

**A Review of Developments in NLRB
Representation Case Law during 2015
February 2016**

This paper is not in traditional Midwinter Meeting paper format and it does not advocate any particular position. Instead, it updates the reader on representation case law decisions in 2015.

The format utilizes the structure of the Outline of Law and Procedure in Representation Cases to indicate the new case law. The Outline is an NLRB Manual that is available for purchase from the Superintendent of Documents and is also available on the NLRB website: www.nlr.gov.

The Outline was most recently updated through 2011. This paper is a cumulative supplement to this updated text and the Board will include it on its website in order to give researchers a current text. As a cumulative supplement, it includes 2012-2014 cases as well as cases decided in 2015. The 2015 cases are marked with an asterisk.

As you all know, 2015 was also the year in which the Board implemented its new election rules. For your convenience, we have included information on these rules as an Appendix to this paper. This information was copied from the Board's website and is a Comparison of Current/New Procedures.

This year's paper is a collaborative effort between John Higgins and Terry Schoone-Jongen. John needs no introduction; Terry is an acting supervisory attorney in the Office of Representation Appeals at the NLRB and a current Development Fund Fellow of the Section.

John E. Higgins, Jr.
Columbus School of Law
Catholic University
Washington, DC 20064
higgins@cua.edu

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

Chapter 1 Jurisdiction

1-100 – Jurisdiction Generally

**Northwestern University*, 362 NLRB No. 167 (2015). The Board, citing *NLRB v. Denver Building Trades Council*, 341 U.S. 675 (1954), declined to assert jurisdiction over this case, finding that the purposes of the Act would not be effectuated by its assertion of jurisdiction. See also Sections 1-500 and 20-400.

1-200 - The Jurisdictional Standards

Six Star Janitorial, 359 NLRB No. 146 (2013). The annual dollar volume standards used for jurisdictional purposes “do not literally require evidentiary data respecting any certain 12 month period of operations.”

1-201 – Nonretail

Newman Livestock-11, Inc., 361 NLRB No. 32 (2014). The Board found that the employer came within its jurisdiction because of sales totaling \$55,793 thus exceeding the indirect outflow standard.

1-202 – Retail

**NLRB v. Le Fort Enterprises, Inc.*, 791 F.3d 207 (1st Cir. 2015). The Court found that the Board did not disregard its discretionary jurisdictional standards by classifying the respondent—who provides home cleaning services to residential customers—as a retail enterprise.

1-213 - Indian Tribes

Little River Band of Ottawa Indians Tribal Government, 359 NLRB No. 84 (2013), affirmed 361 NLRB No. 45 (2014), enfd. 788 F.3d 537 (6th Cir. 2015). The Board reaffirmed its holding in *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004), affd. 475 F.3d 1306 (DC Cir. 2007) and found it has jurisdiction over a casino resort operated by the tribe. Accord:
Soaring Eagle Casino and Resort, an Enterprise of the Saginaw Chippewa Indian Tribe of Michigan, 359 NLRB No. 92 (2013),

affirmed in 361 NLRB No. 73 (2014), enfd. 791 F.3d 648 (6th Cir. 2015).

**Winstar World Casino*, 362 NLRB No. 109 (2015). In *Chickasaw Nation operating Winstar World Casino*, 359 NLRB No. 163 (2013), the Board asserted jurisdiction over this employer pursuant to *San Manuel*, but 359 NLRB No. 163 was subsequently vacated in light of *Noel Canning*. The Board therefore considered the case de novo in this decision. The Board again applied *San Manuel*, but found that application of the Act would abrogate treaty rights contained in an 1830 treaty. The Board therefore declined to assert jurisdiction.

1-401 – State or Political Subdivision

Chicago Mathematics and Science Academy Charter School, Inc., 359 NLRB No. 41 (2012). In this case, the Board majority held that a charter school is not a political subdivision of the state. The Board also rejected the contention that it should decline jurisdiction for policy reasons, viz., because of a “special relationship” between charter schools and the state (recess appointment case).

Pilsen Wellness Center, 359 NLRB No. 72 (2013), The Board found a private nonprofit corporation that provides educational support services to public charter schools is not a political subdivision of the State of Illinois.

The Pennsylvania Cyber Charter School, 6 RC 120811 (Apr. 9, 2014). In this case, the Board denied review of a Regional Director’s decision asserting jurisdiction over a charter school. In doing so, the Board majority relied on its decision in *Chicago Mathematics*, a recess appointee decision. This case issued before the Supreme Court *Noel Canning* decision.

The Board has now granted review in *Hyde Leadership Charter School-Brooklyn*, 29 RM 126444 (August 6, 2014) apparently to consider the charter school issue with a full Board.

*The Board has also granted review in *The Pennsylvania Virtual Charter School*, 04 RC 143831 (March 25, 2015), a case in which the Regional Director applied *Chicago Mathematics* to find that the employer was not a political subdivision.

1-403 – Religious Schools

Pacific Lutheran University, 361 NLRB No. 157 (2014). In this case the employer contended that the Board did not have jurisdiction to process a case involving its faculty because it is a religious school under *Catholic Bishop* and because its faculty are managerial under *Yeshiva University*.

With respect to the religious contention, the Board majority adopted a new test, viz, the University must show that it holds itself out as providing a religious educational environment and if it does, that it holds out the petitioned-for faculty as performing a specific role in maintaining the environment. Here the Board majority found that the University met the first test but not the second.

With respect to the *Yeshiva* test, the Board majority announced that in considering the issue, it would look to the role of the faculty with respect to academic programs, enrollment policies, finances, academic policies and personal policies and decisions. Of these five factors greater weight will be given to the first three than the last two.

See also 1-503, 15-271, 17-510, and 19-200.

**Saint Xavier University*, 13 RC 092296 (November 3, 2015). In granting review, the Board invited the parties to address whether the Board should adhere to its current precedent regarding secular, non-teaching employees of religiously affiliated organizations, extend *Pacific Lutheran* to the non-teaching employees at issue in this case, or take a different approach.

1-500 – Jurisdiction Declined for Policy Considerations

**Northwestern University*, 362 NLRB No. 167 (2015). In declining to assert jurisdiction over this case (involving a petitioned-for unit of Northwestern's college football players who receive a grant-in-aid scholarship), the Board stated that (1) asserting jurisdiction over only one team in professional league (or an association resembling a professional league) would not promote stability in labor relations, and in practice past Board cases involving professional sports involve league-wide bargaining units; (2) the structure of FBS-college football suggested that asserting jurisdiction would not promote stability in labor relations, given that only 17 of 125 FBS schools are potentially subject to the Board's jurisdiction; and (3) recent

changes in the circumstances of scholarship football players, although the Board also commented that future changes could outweigh the considerations motivating it to decline jurisdiction in this case. See also Sections 1-100 and 20-400.

1-503 – Religious Organizations

See 1-403.

1-607 – Relitigation of Jurisdiction

**Casino Pauma*, 363 NLRB No. 60 (2015). The Board stated that the doctrine of issue preclusion (rather than *res judicata*) foreclosed the respondent from arguing that the Board lacks jurisdiction.

Chapter 2

Regional Director's Decisionmaking Authority in Representation Cases

2-200 – Scope of Authority

Warren Unilube, Inc. v. NLRB, 690 F3d 969 (8th Cir. 2012)
See Section 10-800 infra.

2-400 - Finality of Decisions

Brusco Tug & Barge, Inc., 359 NLRB No. 122 (2013), The Board rejected an employer attempt to show a change in duties of the unit employees in a test of certification Section 8(a)(5) cases. The Board noted that the change occurred before the Board Decision on Review. In these circumstances the employer should have filed a request to reopen the record. The Board set this decision aside but retained the case on its docket after *Noel Canning*, 19 CA 96559 (June 27, 2014); subsequently, the Board incorporated 359 NLRB No. 122 by reference at 362 NLRB No. 28 (2015).

2-500 – Transfer and Review

**American Indian Community Housing Organization*, 18 RD 154756 (August 11, 2015); *Pennsylvania Interscholastic Athletics Association*, 06 RC 152861 (August 26, 2015); *The Cement League*, 02 RC 154016 (August 11, 2015); *Danbury Hospital of the Western Connecticut Health Network*, 01 RC

153086 (December 9, 2015). All four cases involved requests to stay an election or impound the ballots; the Board denied the requests in all cases. In *Danbury*, the Board emphasized that under the new rules (Sec. 102.67(j)), impoundment is no longer virtually automatic but is instead an extraordinary form of relief.

2-600 – Exhaustion of Administrative Remedies (New Section)

NLRB v. Contemporary Cars, Inc., 667 F3d 1364 (11th Cir. 2012). In this bargaining unit case, the court rejected the employer’s due process argument because it had failed to present the issue to the Board. The employer’s argument was that it was futile to raise the *New Process Steel* issue (two Member Board). The Court found that the employer failed to establish that there were “extraordinary circumstances” that excused its failure to present this issue to the Board.

Chapter 3 Initial Representation Case Procedures

3-700 - Consent Election Agreements

Bluefield Regional Medical Center, 359 NLRB No. 137 (2013). The Board stated that in Consent Election Agreement cases, “all rulings and determination made by the Regional Director will be final with the same force and effect in that case as if issued by the Board.” The Board considered the case anew at 361 NLRB No. 154 (2014) and made the same point.

The Board also made the same point in *Affinity Medical Center*, 08-RC-087639 (Jan. 11, 2013), an unpublished decision, when it said:

The Board has long refused to review the merits of a regional director’s determination under a consent election agreement absent a showing of fraud, misconduct, or such gross mistakes as to imply bad faith or that the regional director’s rulings were arbitrary or capricious. See, e.g., *The Pierre Apartments*, 217 NLRB 445, 446 (1975); *Vanella Buick Opel*, 196 NLRB 215 (1972) and cases cited.

Rehabcare Group, 21 RC 116808 (May 23, 2014). The Board majority denied an employer special permission to appeal from a decision of the Regional Director withdrawing approval of an election agreement. The Regional

Director did so when she found that the unit had only 10 employees where before the Region had been advised there were “20 or so” employees. The Regional Director relied on, and the Board affirmed, that the number of potential challenges could be extensive. See CHM Sec. 11095.

Tekweld Solutions, Inc., 361 NLRB No. 18 (2014). The Board majority found that the Regional Director did not abuse his discretion by adhering to the Election Agreement which provided for an eligibility date of March 8, 2013, even though the election originally scheduled for April 16, was postponed until November 19, 2013. The Employer argued that the ballots of 23 employees who had been hired after the stipulated election date should have been counted, but the Board sustained these challenges. See also 23-530.

Chapter 5

Showing of Interest

5-640 – Showing of Interest for Intervention

**Prospect Airport Services, Inc.*, 04 RC 085852 (March 16, 2015). The Board noted that, when a labor organization seeks to intervene after the close of the representation hearing, the Board’s policy is to permit intervention if that labor organization did not have notice of the hearing and can establish that as of the time of the hearing, they had such a representative interest in employees affected by the investigation as to have been entitled to notice of the hearing. See *United Boat Service Corp.*, 55 NLRB 671 (1944). The labor organization in this case (which did not receive notice of the hearing until almost two and a half years after the close of the hearing) proffered a showing of interest consisting entirely of cards signed after the hearing. Nevertheless, based on the unique circumstance of this case—including the unusually long delay in scheduling the election (occasioned by the Board’s referral of the case to the NMB for an advisory opinion on jurisdiction) and the labor organization’s substantial showing of interest—the Board permitted the labor organization to intervene.

Chapter 6 Qualification of Representative

6-370 – Joint Petitioners

Musical Arts Association v. NLRB, 466 Fed Appx 7 (DC Cir. 2012). Court affirmed Board holding that two or more unions may serve as the joint collective bargaining representatives for a single unit of employees.

Chapter 7 Existence of a Representation Question

7-110 – Prerequisite for Finding a Question Concerning Representation

**Aria*, 363 NLRB No. 24 (2015). In this case, the Petitioner did not indicate on the petition form whether it had requested recognition (and whether the Employer had declined to recognize it); at the hearing, the Petitioner made such a request, and the Employer declined to recognize it. The Board found that under *Advance Pattern Co.*, 80 NLRB 29 (1948), the events at the hearing were sufficient to establish the existence of a question concerning representation. The Board indicated that nothing in its new rules had altered its longstanding practice in this area. Accord:

MGM Grand, 28 RC 154099 (October 22, 2015).

Bellagio Las Vegas, 28 RC 154081 (November 18, 2015).

The Mirage, 28 RC 154083 (November 18, 2015).

7-131 – Grievances and Arbitration.

Appollo Systems, Inc., 360 NLRB No. 80 (2014). The Board dismissed a unit clarification petition for a Section 8(f) unit. The Board found it unnecessary to pass on whether it should clarify a Section 8(f) unit finding instead that the dispute was a contractual one that could be resolved through the parties' contractual grievance arbitration procedure.

7-220 – RM Petitions/Incumbent Union

**ADT, LLC*, 16 RM 123509 (April 22, 2015). The Board has granted review of the Regional Director's direction of election in the petitioned-for unit. The Union has been the representative of some of the Employer's installation technicians in the Dallas/Fort Worth area, but after acquiring another

company and restructuring its operations, the Employer asserted that the Union's continued majority status was no longer clear. The Union contended that there was an insufficient basis for questioning its majority status, and that the petitioned-for unit was inappropriate because it included service technicians hired through and since the Employer's acquisition of the other company (and to whom the Employer has not applied the existing agreement) who lack a sufficient community of interest with the existing covered employees. The Regional Director directed the election after concluding that all the service technicians share a community of interest.

7-230 – Accretions

Beacon Sales Company, 01-RC-098033 (Apr. 8, 2013). In this unpublished order, the Board commented: "In denying review, we agree with the Regional Director's statement that *WLVI, Inc.*, 349 NLRB 683 (2007), is inapposite. *WLVI* dealt with a unit clarification petition involving the placement of a new classification in a unit defined by the work performed, and it was therefore necessary to analyze the employees the union sought to add to the unit under the framework set forth in *The Sun*, 329 NLRB 854 (1999). Neither *WLVI* nor *The Sun* applies to cases, such as this, where the parties only dispute whether an employee performs sufficient unit work to be eligible to vote as a dual-function employee".

See Section 12-500, *infra*.

7-240 – Changes in Affiliation

In three 2014 cases, a respondent argued that the affiliation of CNA/NNOC with NUHW resulted in a lack of continuity of representative. In two of these cases, an ALJ found that changes to CNA/NNOC's finances were not sufficiently dramatic to alter its identity. *Fallbrook Hospital*, 360 NLRB No. 73 (2014), *enfd.* 785 F.3d 729 (D.C. Cir. 2015); *Barstow Community Hospital*, 361 NLRB No. 34 (2014). In *Bluefield Regional Medical Center*, 361 NLRB No. 154 (2014), the Board did not specifically pass on the affiliation issue, but cited both *Fallbrook Hospital* and *Barstow Community Hospital* as prior cases in which the Board had rejected the assertion that the affiliation caused a discontinuity of representation.

7-400 – Effect of Delay and Turnover

Independence Residences, Inc., 358 NLRB No. 42 (2012). In this bargaining order case, the Board ordered the employer to bargain with the union based on the union's certification notwithstanding that the election had been conducted seven years before and the certification was delayed because of litigation involving a New York statute.

Chapter 9 Contract Bar

9-580 – The “Premature Extension” Doctrine

**Ameriguard Security Services*, 362 NLRB No. 160 (2015). The Board found that the exception to the premature extension doctrine set forth in *Michigan Bell Telephone Co.*, 182 NLRB 632 (1970), did not apply and accordingly reinstated the petition. Unlike *Michigan Bell*, the Employer had not combined employees who had not been covered by a common collective-bargaining agreement into a new department and then entered into a new agreement covering the new department. Instead, the Employer entered into a new agreement covering a group of guards who had all previously been covered by a collective-bargaining agreement.

9-1000 – Special Statutory Provisions as to Prehire Agreements

Allied Mechanical Services, Inc. v. NLRB, 668 F3d 758 (DC Cir. 2012). Court affirmed Board finding that the employer and the union converted their Section 8(f) relationship into a Section 9(a) relationship where the union offered to establish its majority status and the “employer never took the union up on its offer.”

NLRB v. American Firestop Solutions, Inc., 673 F3d 766 (8th Cir. 2012). Court affirmed Board finding that the employer and union had a Section 9(a) relationship based on the contract recognition clause which stated that the union represented a majority. Court cited *Staunton Fuel d/b/a Central Illinois Construction*, 335 NLRB 717 (2001) and *Nova Plumbing Inc. v. NLRB*, 330 F3d 531 (DC Cir. 2003).

Appollo Systems, Inc. 360 NLRB No. 80 (2014). See Sec. 7-131 above.

**King's Fire Protection*, 362 NLRB No. 129 (2015). In this unfair labor practice case, a Board majority, relying on the language of a 2005 assent and interim

agreement, found that the parties had a 9(a), rather than 8(f), relationship. The dissenting Member would have found that record evidence contradicted the language of the agreement.

**MSR Industrial Services, LLC*, 363 NLRB No. 1 (2015). In this unfair labor practice case, the Board found—based on language in the complaint and the Board’s presumption that construction industry relationships are governed by Section 8(f)—that the parties had an 8(f), rather than 9(a), relationship

Chapter 10

Prior Determinations and Other Bars to an Election

10-200 – The 1-Year Certification Rule

Latino Express, Inc., 360 NLRB No. 112 (2014). In this Section 8a(5) withdrawal of recognition case, the Board affirmed the discussion of the ALJ concerning the reasons for the one year certification rule. As set forth in *Chelsea Industries*, 331 NLRB 1648 (2000), these reasons are:

- (1) to give the union ample time to bargain without “the pressures to produce hothouse results...,” and
- (2) to deter an employer from violating its duty to bargain. See *Latino Express* sl. op. p. 14.

10-300 – Settlement Agreement As a Bar

**Bradken, Inc.*, 19 RD 112390 (Oct. 20, 2014). Board panel majority granted union Request for Review of Direction of Election. The dissenting Member would have denied review because he found that the Regional Director had correctly applied precedent in reinstating the decertification petition under *TruServ*, 349 NLRB 227 (2007). The petition was subsequently withdrawn, so the case is no longer pending before the Board.

10-500 - Lawful Recognition as a Bar/Reasonable Period of Time

FJC Security Services Inc., 360 NLRB No. 115 (2014). The Board found no successor bar because at the time the petition was filed a reasonable period for bargaining had elapsed.

**Americold Logistics, LLC*, 362 NLRB No. 58 (2015). The Board had previously granted review and asked the parties to brief (1) whether the Regional Director correctly found under *Lamons Gasket Co.*, 357 NLRB No. 72 (2011), that there is no recognition bar because the petition was filed more than one year after the Employer recognized the Union, and (2) if the Regional Director erred, whether a reasonable time for bargaining had elapsed at the time the petition was filed. In this decision, the Board majority first clarified that, under *Lamons Gasket*, a reasonable period of time is a minimum of 6 months and a maximum of 1 year, measured from the date of the first bargaining meeting between the union and the employer. Under that standard, the petition was filed less than a year after the parties' first bargaining meeting, and the Regional Director thus erred by finding that he was required to process the petition. The Board then concluded, applying the *Lee Lumber* multifactor test, that a reasonable period of time had not elapsed when the petition was filed, and that it was therefore barred. Among other things, the dissenting Member would have found that the reasonable period ran from the date of voluntary recognition (or at least could not exceed one year from the date of recognition).

**Jamestown Fabricated Steel and Supply, Inc.*, 362 NLRB No. 161 (2015). In this unfair labor practice case, the Board agreed with the ALJ's application of the successor bar doctrine to find that the respondent unlawfully refused to recognize and bargain with the union.

10-600 – Expanding Unit

Benjamin H. Realty Corp., 361 NLRB No. 103 (2014). Board denied review of a Regional Director's conclusion that replacement of unlicensed superintendents did not constitute a fluctuating workforce, particularly where the size of the workforce would remain the same.

10-700 – Contracting Units and Cessation of Operation

Benjamin H. Realty Corp., 361 NLRB No. 103 (2014). See 10-600 above.

**Retro Environmental, Inc./Green Jobworks, LLC*, 05 RC 153468 (November 5, 2015). A panel majority granted review of the Regional Director's dismissal of the petition. Pursuant to *Davey McKee Corp.*, 308 NLRB 839 (1992), the Regional Director found that the assertedly-joint operation involving the petitioned-for employees would soon cease.

10-800 – Blocking Charges (CHM sec. 11730)

Bentonite Performance Materials v. NLRB, 456 Fed Appx 2 (DC Cir. 2012). In a withdrawal of recognition case the employer solicited signatures on the union decertification petition. In these circumstances, the Court rejected the employer’s contention that the Board should have applied the *Master Slack* “causal relationship test” 271 NLRB 78 (1984). Instead, the Court affirmed the Board’s application of *Hearst Corp.*, 281 NLRB 764 (1986), in which the Board found no requirement for a showing of causation where the underlying unfair labor practice itself involved solicitation of the decertification petition. The Court noted that the employer did not “directly challenge *Hearst*.”

Warren Unilube, Inc. v. NLRB, 690 F3d 969 (8th Cir. 2012). Court found that Regional Director’s decision to block an election based on unfair labor practice charges was within the Director’s sound discretion. The Court noted that the charges, although ultimately dismissed, were not baseless or frivolous.

Wellington Industries, Inc., 359 NLRB No. 18 (2012). The Board majority rejected an employer request for review of the Regional Director’s decision to block the processing of a petition in the face of unremedied unfair labor practice charges. The dissenting Member would have granted review and reconsidered the Board’s general blocking charge policy.

Finley Hospital, 33 RD 899 (October 12, 2012). In this unpublished decision, a divided Board panel affirmed the decision of the Regional Director to block an election based on unfair labor practices that had occurred more than a year and a half before. The RD had held a prior election during the pendency of these same charges when the union filed a Request to Proceed. No request was filed in this case.

10-1000 – Reasonable Period of Time

**Americold Logistics, LLC*, 362 NLRB No. 58 (2015). See Section 10-500 above.

**Lift Truck Sales and Services, Inc.*, 14 RD 153982 (December 2, 2015). The Board granted review of the Regional Director’s direction of election. The Regional Director found that in analyzing whether a reasonable period of

time for bargaining elapsed, the *Lee Lumber* factors did not apply to this case because the Board had not adjudicated the Employer's allegedly unlawful conduct (the Employer had entered a settlement agreement and agreed to bargain with the Union). The Regional Director instead applied *Poole Foundry & Machine Co.*, 95 NLRB 34 (1952), and found that a reasonable period had elapsed.

Chapter 11

Amendment, Clarification, and Deauthorization Petitions, Final Offer Elections and Wage-Hour Certifications

11-200 – Clarification of Certification (UC)

Entergy Mississippi, Inc., 358 NLRB No. 99 (2012). A party acts of its peril in removing a position from a bargaining unit during the pendency of a unit clarification petition. The Board reiterated this point at 361 NLRB No. 89 (2015), *affd.* and *revd.* in part __ F.3d __ (5th Cir. 2015).

Appollo Systems, Inc., 360 NLRB No. 80 (2014). See Sec. 7-131 above.

**NV Energy, Inc.*, 362 NLRB No. 5 (2015). The Board found that employees at a recently-acquired power plant were not an accretion of an existing unit of employees performing similar work at certain of the Employer's other power plants because the record did not establish common day-to-day supervision or interchange between the two groups. Despite the absence of these factors, the Regional Director had found an accretion based on the Board's preference for systemwide units in the public utility industry. The Board, however, held that where accretion analysis and the systemwide preference are in tension, the systemwide preference is not dispositive, but is only one more factor in the accretion analysis, and one that cannot dictate a different result where the two "critical" factors are lacking.

**Pepsi Beverage Co.*, 362 NLRB No. 25 (2015). The Board declined to find that four delivery and install employees assigned to pick up their loads at its Grand Rapids parking lot were an accretion to the existing unit of Grand Rapids-based field service employees. The Board found that the two groups worked in different operations, that the delivery and install employees have been historically excluded from the Grand Rapids collective-bargaining agreement, and that the evidence did not show that the delivery and install employees have little or no separate identity from, or that they share an

overwhelming community of interest with, the Grand Rapids field service technicians.

**Airway Cleaners, LLC*, 362 NLRB No. 87 (2015). The Board found that the Regional Director erred in using accretion analysis to determine whether certain new employees were included in the existing unit, because that analysis is inappropriate where, as here, new employees are hired into a specific classification expressly encompassed in the established bargaining unit.

11-210 – Timing of UC Petition

Dixie Electric Membership, 358 NLRB No. 120 (2012), affirmed 361 NLRB No. 107. Board affirmed ALJ ruling that a UC petition filed somewhere between 121 and 143 days of contract execution was not filed “shortly after the contract is executed.” Accordingly the petition was not timely filed.

11-220 – Accretion vs. Question Concerning Representation

AT Wall Co., 361 NLRB No. 62 (2014). The Board found that the new classifications at issue did not perform the same basic functions as those in the existing unit because the new classifications produced different products using different processes under different conditions. The Board therefore declined to apply *Premcor, Inc.*, 338 NLRB 1365 (2001) to find that the new classifications were part of the existing unit, but instead applied the traditional accretion standard. See Sec. 12-500 infra.

11-300 – Deauthorization Petition (UD)

First Student, Inc., 359 NLRB No. 27 (2012). A Board majority denied review of a Regional Director’s dismissal of a UD petition where the RD found that the employees had become part of a merged national unit and the petition sought only an election at a single location.

Chapter 12

Appropriate Unit: General Principles

12-210 – Community of Interest

Kindred Nursing Centers East, LLC v. NLRB, 727 F3d 552 (6th Cir. 2013). In this decision, the Sixth Circuit affirmed the Board's decision in *Specialty Healthcare*, 357 NLRB No. 83 (2011), where the Board held that an employer who challenges an excluded classification from an otherwise appropriate unit, must demonstrate “an overwhelming community of interest with those in the petitioned for unit.”

In two cases decided in 2013, the Board applied *Specialty* and found that efforts to add employees to otherwise appropriate units were not supported by overwhelming evidence. These cases are:

Fraser Engineering Company, 359 NLRB No. 80 (2013) (Employer sought to add employees of wholly owned subsidiary)

Guide Dogs for the Blind Inc., 359 NLRB No. 151 (2013) (Employer sought to add “dog handlers” to unit of canine welfare technicians and instructors.)

The Fourth Circuit found it unnecessary to reach the *Specialty Healthcare* issue when it affirmed the Board's unit decision in:

NLRB v. Enterprise Leasing and Huntington Ingalls v. NLRB, 722 F3d 609 (4th Cir. 2013). These two cases were consolidated for the *Noel Canning* issue. The Huntington case presented the *Specialty* issue and the Court affirmed the Board decision on the basis the Board's alternate finding that the unit was consistent with its traditional technical employee community of interest analysis citing *TRW Carr* 266 NLRB 326.

As part of its reconsideration of *Noel Canning* cases, the Board reaffirmed *Enterprise* at 361 NLRB No. 63 and *Huntington* at 361 NLRB No. 64. The Fourth Circuit enforced these decisions in *Huntington Ingalls Inc. v. NLRB*, __ Fed. Appx. __ (4th Cir. 2015).

A.S.V., Inc. a/k/a Terex, 360 NLRB No. 138 (2014). Board affirmed decision of Regional Director that a unit of undercarriage employees at a track and skid loading manufacturer was a “fractured” unit and not a unit appropriate for

collective bargaining. The employer sought a larger unit and the Regional Director ordered an election in a larger unit.

Macy's Inc., 361 NLRB No. 4 (2014). Board majority affirmed finding of Regional Director that a unit of cosmetic and fragrance department employees are a readily identifiable as a group and share a community of interest, and that other selling department employees do not share an overwhelming community of interest with them.

Bergdorf Goodman, 361 NLRB No. 11 (2014). Full Board found that a unit of women's shoe sales associates spread over two departments was readily identifiable as a group but did not share a community of interest because the unit sought did not conform to any of the employer's administrative or operational lines, did not share common supervision, did not have significant contact or interchange, and did not share specialized skills or training. The Board therefore did not consider whether the petitioned-for employees shared an overwhelming community of interest with other selling employees.

NLRB v. Contemporary Cars, Inc., 667 F3d 1364 (11th Cir. 2012). In this bargaining unit case, the Court affirmed the Board's finding of an appropriate unit of automobile service technicians based on both craft and traditional community of interest grounds. In doing so, the Court rejected the employer's contention that the integration of its operations warranted a broader unit of all fixed operations department employees.

**DPI Secuprint*, 362 NLRB No. 172 (2015). Board majority found that a petitioned-for unit consisting of pre-press, digital press, digital bindery, offset bindery, and shipping and receiving employees was readily identifiable as a group and shared a community of interest. The Board further found that the petitioned-for employees did not share an overwhelming community of interest with the excluded offset press employees. The Board also found that printing industry precedent concerning the "traditional lithographic unit" did not require the inclusion of the offset press employees.

**NLRB v. Onyx Management Group LLC*, 614 Fed. Appx. 40 (2d Cir. 2015). The Court found that the Board did not act arbitrarily in finding that the petitioned-for unit of five "inside maintenance workers" and four "outside groundsmen" shared a sufficient community of interest.

**Future Environmental Inc.*, 13 RC 124781 (March 23, 2015). Board denied review of the Regional Director’s finding that petitioned-for unit was “fractured.”

**Americold Logistics*, 04 RC 134233 (June 16, 2015). Board denied review of the Regional Director’s finding that petitioned-for checkers did not share overwhelming community of interest with (currently-represented) warehouse persons.

**Oregon Shakespeare Festival Association*, 19 RC 150979 (August 20, 2015). Board applied *Specialty Healthcare* to find that petitioned-for unit of costume run crew employees was an appropriate unit. Member Miscimarra agreed with the majority based on past precedent concerning stagehand units.

12-220 – History of Collective Bargaining

PCMC/Pacific Crane Maintenance, 359 NLRB No. 136 (2013), incorporated at 362 NLRB No. 120 (2015). Board gave “significant weight” to 40 year history of collective bargaining rejecting an ALJ finding that a historical unit did not survive a transfer of unit work. The Board set this decision aside but retained the case on its docket after *Noel Canning*. 32 CA 21925 (June 27, 2014).

ADT Security Services, Inc., 689 F.3d 628 (6th Cir. 2012). Court affirmed a Board decision that a bargaining unit at an organized plant remained appropriate after that plant was closed and its employees were assigned to an unorganized plant. Court found that a “long and well established bargaining history” weighed strongly in favor of the historic unit. The Court found that a change in intermediate supervisors is not a “compelling circumstances that would overcome the twenty-nine year bargaining history. . . .”

**Dodge of Naperville, Inc. v. NLRB*, 796 F.3d 31 (D.C. Cir. 2015). Court stated that historical bargaining unit remains appropriate absent a showing of compelling circumstances. See also 12-500, *infra*.

12-231 – Size of Unit

Seedorff Masonry, Inc., 360 NLRB No. 107 (2014). Board found that employer failed to carry its burden that the bargaining unit was a stable one person unit.

12-300 – Extent of Organization

San Miguel Hospital Corp. v. NLRB, 697 F3d 1181 (DC Cir. 2012). See Section 15-174 infra.

12-410 – Residual Units in the Health Care Industry

Rush University Medical Center, 13 RC 132042 (Aug. 27, 2014). In this unpublished Order, the Board denied review of a Regional Director Decision and Direction of Election. At footnote 1 thereof, however, Members Miscimarra and Johnson indicated that they would have granted review for the sole purpose of permitting the Board to review *St. Vincent Charity Center*, 357 NLRB No. 79 (2011). Member Johnson reiterated this view in *Rush University Medical Center*, 13 RC 143495 (March 24, 2015).

See also Sec. 21-500.

12-420 – One Person Residual Units (new topic)

Klochko Equipment Rental, 361 NLRB No. 49 fn. 1 (2014). The Board is reluctant to leave a single employee out of a unit where that would result in that employee being unable to exercise Section 7 rights to representation.

12-500 – Accretions to Existing Units

AT Wall Co., 361 NLRB No. 62 (2014). The Board declined to clarify the existing unit to include new classifications because the new classifications did not share an overwhelming community of interest with the existing unit. In this regard, the Board noted that although some factors favored accretion, others—including the two critical factors of interchange and common day-to-day supervision—weighed against it.

**NV Energy, Inc.*, 362 NLRB No. 5 (2015). See Section 11-200, above.

**Pepsi Beverage Co.*, 362 NLRB No. 25 (2015). See Sec. 11-200, above.

**Airway Cleaners, LLC*, 362 NLRB No. 87 (2015). See Sec. 11-200, above.

**Dodge of Naperville, Inc. v. NLRB*, 796 F.3d 31 (D.C. Cir. 2015). The Court stated that accretion analysis does not apply where larger unit (to which employees at issue are claimed to be an accretion) is not organized and has no representative.

See Section 7-230, above.

12-580 – Bargaining History

**Pepsi Beverage Co.*, 362 NLRB No. 25 (2015). See Sec. 1-200, above.

Chapter 13 Multilocation Employers

Bread of Life, LLC d/b/a Panera Bread, 361 NLRB No. 142 (2014). Considering the representation issue de novo following *Noel Canning*, the Board found that the petitioned-for unit, which consisted of bakers at the employer's I-94 Corridor locations, possessed a distinct community of interest. Although there were factors supporting the employer's preferred unit (which included bakers from locations in two other districts), other factors showed the I-94 corridor bakers were sufficiently distinct to constitute an appropriate unit.

**Exemplar, Inc.*, 20 RC 149999 (June 8, 2015). Board granted review of decision directing election in single-facility unit instead of petitioned-for two location unit.

Chapter 14 Multiemployer, Single Employer, and Joint Employer Units

14-500 – Single Employer

Grane Health Care v. NLRB, 712 F3d 145 (3rd Cir. 2013). Third Circuit enforced Board order that the employer and a newly acquired facility are a single employer and that the employer was required to bargain with the union at that facility.

NLRB v. San Luis Trucking, 479 Fed Appx 743 (9th Cir. 2012). Court affirmed Board finding that three companies (a grocery store chain, a U.S. trucking company and a Mexican trucking company) were a single employer.

Massey Energy Company, 358 NLRB No. 159 (2012). In a divided opinion the Board found single employer status based on common ownership, interrelated operations, common management (“to a limited extent”) and centralized control of labor relations. The dissent argued that the General Counsel had not litigated the single employer issue.

Taft Coal Sales & Associates, Inc. v. NLRB, 586 Fed. Appx. 525 (11th Cir. 2014) (enforcing 360 NLRB No. 19 (2014)). In the underlying Board decision, the ALJ found single employer status based on common ownership, common management, and centralized control of labor relations. The Eleventh Circuit found that substantial evidence supported these findings.

**Lederach Electric, Inc.*, 362 NLRB No. 14 (2015). In this compliance proceeding, the Board found that two companies constituted a single employer based on the companies’ interrelation of operations, common management, and common ownership and financial control, notwithstanding the companies’ different business purposes and lack of evidence concerning centralized control of labor relations.

**Rogan Brothers Sanitation, Inc.*, 362 NLRB No. 61 (2015). In this unfair labor practice case, the Board adopted the judge’s finding that two companies constituted single employer due to common ownership and financial control, interrelation of operations, common control of labor relations, and common management.

14-600 – Joint Employer

Aim Royal Insulation and Jacobson Staffing, 358 NLRB No. 91 (2012). The Board found a joint employer relationship between a construction industry employer and a staffing company that was under contract to recruit and provide temporary employees to the construction company.

CNN America, Inc., 361 NLRB No. 47 (2014). The Board found a joint employer relationship between CNN and a former contractor that operated electrical equipment because CNN meaningfully affected hiring, hours, supervision, direction, assignment of work, compensation, and additional factors

supported finding joint employer status. The Board declined to reconsider its decision at 362 NLRB No. 38 (2015).

**Browning-Ferris Industries of California d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015). After previously granting review and inviting briefs on questions relating to the Board's joint employer standard, the Board majority restated its joint-employer standard and reaffirmed that two companies are joint employers if they are both common law employers and if they share or codetermine matters governing the essential terms and conditions of employment. On this latter count, the inquiry is whether the putative joint employer possesses sufficient control over the employees' terms and conditions of employment to permit meaningful bargaining. The Board further held that it will no longer require that a joint employer exercise, as well as possess, control and will no longer require that control be exercised directly and immediately. The Board therefore overruled *TLI, Inc.*, 271 NLRB 798 (1984), *Laerco Transportation*, 269 NLRB 324 (1984), *AM Property Holding Corp.*, 350 NLRB 998 (2007), and *Airborne Express*, 338 NLRB 597 (2002), and other decisions to the extent they are inconsistent. Applied here, the Board found a joint employer relationship, with particular reference to BFI's control over hiring, work processes, and task assignments, and its role in determining wages.

14-600 – Alter Ego

**Newark Electric Corp.*, 362 NLRB No. 44 (2015). In this unfair labor practice case, the Board adopted the judge's conclusion that two companies were alter egos, but found it unnecessary to pass on the judge's finding that the two companies had substantially identical business purposes.

**Deer Creek Electric, Inc.*, 362 NLRB No. 171 (2015). Board, adopting judge, found one respondent was not alter ego of the second because although they shared common management, they lacked common ownership, customers, and equipment, and evidence did not show first was formed to evade the second's responsibilities under the Act. The Board did not pass on General Counsel's suggestion that common service providers and employees may be considered as separate factors in alter ego analysis (but stated that even if they were considered as separate factors, they did not support finding alter ego status here).

Chapter 15

Specific Units and Industries

15-130 – Construction Industry

Grace Industries, 358 NLRB No. 62 (2012). In a petition for a unit of paving employees, the Board found that a unit of those who perform “primary asphalt paving” and a unit of employees performing paving regardless of the material used are equally appropriate units. Accordingly, the Board ordered a *Globe-Armour* self determination election. See Sec. 21-100.

15-141 – The Koester Rule

*In eight different Fedex Freight cases in 2014 and five more in 2015, the Board rejected an employer contention that dockworkers be included in a unit of truck drivers. In each of these unpublished cases, the Board noted that the percentage of time that drivers spend on dock work was well below the 30-40% figure in Home Depot USA, Inc. 331 NLRB 1289, 1291 (2000). See unpublished decisions in Case Nos. 04-RC-134614; 04-RC-136233; 04-RC-133959; 22-RC-135473; 22-RC-134873; 10-RC-136185; 05-RC-136673; 09-RC-136994; 09-RC-140912; 06-RC-140779; 06-RC-141025; 32-RC-144041; 13-RC-147997.

15-171 – Acute Care Hospitals

San Miguel Hospital Corp. v. NLRB, 697 F3d 1181 (DC Cir. 2012).
See Sec. 15-174 infra.

15-174 – Application of the Health Care Rule

San Miguel Hospital Corp. v. NLRB, 697 F3d 1181 (DC Cir. 2012). The Court rejected the employers contention that the Board’s Health Care Rules violate Section 9(c)(5) of the Act because they give controlling weight to the extent of the unions organization in making unit determinations. The Court found “zero merit” to this argument. The Court noted that there was little evidence to support this contention but that even if the Board did consider extent of organization as a factor, it would only be impermissible if it were the “controlling factor.”

15-231 – Printing Industry

**DPI Secuprint*, 362 NLRB No. 172 (2015). See Sec. 12-210, above.

15-240 – Public Utilities

**NV Energy, Inc.*, 362 NLRB No. 5 (2015). The Board held that in the context of accretion analysis, the Board’s preference for systemwide units in the public utility industry is not dispositive, and cannot dictate a different result where the two “critical” accretion factors (common day-to-day supervision and interchange) are lacking. See Section 11-200, above.

15-250 – Retail Store Operations

See Sec. 12-210.

15-271 – Faculty

**The New School*, 02 RC 143009 (October 21, 2015), and *Columbia University*, 02 RC 143012 (December 23, 2015). In both cases, a petitioner requested that the Board reconsider *Brown University*, 342 NLRB 483 (2004), and the Board granted review. In *Columbia University*, the Board issued a notice and invitation to file amicus briefs on January 13, 2016. The Board has invited briefing on (1) whether to modify or overrule *Brown*; (2) if so, what standard should be used to determine whether graduate student assistants engaged in research are statutory employees; (3) if, assuming all are found to be statutory employees, a unit composed of graduate student assistants, terminal masters degree students, and undergraduate students would be appropriate; and (4) what standard the Board should use to determine whether the foregoing types of students are temporary employees (again, assuming they are found to be statutory employees).

See also Sec. 1-403.

Chapter 16

Craft and Traditional Department Units

NLRB v. Contemporary Cars, Inc., 667 F3d 1364 (11th Cir. 2012). See Section 12-210 supra.

**Electric Boat Corp.*, 01-RC-124746 (April 30, 2015). The Board previously granted review (on August 14, 2014) of this case, in which the Regional Director found that the petitioned for unit constituted a craft unit entitled to severance under *Mallinckrodt Chemical Works*, 162 NLRB 387 (1967). In its unpublished decision on review, the Board agreed with the Regional Director that, in light of the unusual circumstances of this case, the relevant factors warranted permitting the petitioned-for employees to determine whether they wish to be represented by the Petitioner or the Intervenor. The Board particularly noted that neither granting nor denying the petition would preserve the historically stable bargaining structure under which the petitioned-for employees were represented by both the Intervenor and the Petitioner as an affiliate of the Intervenor, and that the question concerning representation arose only because of the Intervenor’s termination of that affiliation.

Chapter 17

Statutory Exclusions

17-400 – Independent Contractors

Fedex Home Delivery, 361 NLRB No. 55 (2014). A Board majority found home delivery drivers are employees and not independent contractors. In doing so, the Board reviewed the traditional test for independent contractors including entrepreneurial opportunity and concluded that it “represents one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor is in fact rendering services as part of an independent business.” *sl. op.* p.11. The Board declined to reconsider this decision at 362 NLRB No. 29 (2015).

**Porter Drywall, Inc.*, 362 NLRB No. 6 (2015). The Board found that the Employer had shown that crew leaders are independent contractors and that the drywall installers they hire are employees of the crew leaders, not the Employer. The Board found that most of the relevant factors—with the exceptions of method of payment, whether the work is part of the regular business of the employer, and whether the principal is or is not in the business—favored independent contractor status.

**Sisters’ Camelot*, 363 NLRB No. 13 (2015). The Board found that evidence failed to show that the Employer’s canvassers are independent contractors. The Board found that most of the relevant factors—with the exceptions of

length of employment and whether or not the parties believe they are creating an independent contractor relationship—favored employee status.

17-500 – Supervisors

The Board granted review in three supervisory status cases in 2014:

- (1) *Cook Inlet Tug and Barge*, 19 RC 106498 (January 23, 2014), whether captains are supervisors. The Board issued its decision in 2015 at 362 NLRB No. 111. See Sec. 17-502, *infra*.
- (2) *G4S Government Solutions*, 10 RC 126849 (July 7, 2014), whether lieutenants are supervisors. This case remains pending before the Board.
- (3) *Pac Tell Group, Inc. d/b/a U.S. Fibers*, 10 RC 101166 (March 13, 2014), whether putative supervisors engaged in objectionable conduct. On September 22, 2014, Board affirmed the RD’s finding that the Employer had not established that the putative supervisors were statutory supervisors for the reasons stated in the RD’s decision.

Vance v. Ball State University, 133 S. Ct. 2434 (2013). In a Title VII case, the Supreme Court majority adopted a different definition of “supervisor” for Title VII purposes than that set out in Section 2(11) of the NLRA. For Title VII purpose a supervisor is one to whom an employer gives the power to make “tangible employment actions.”

G4S Regulated Security Solutions, 358 NLRB No. 160 (2012). A divided Board concluded that two discharged guards were not supervisors as they did not have any of the statutory indicia of supervision. The Board majority noted particularly that the evidence was insufficient to establish that these guard “lieutenants” had the authority to discipline, assign work or to responsibly direct employees. The majority also rejected a contention that secondary indicia supported a supervisory finding noting that “without sufficient proof of Sec. 2(11) primary indicia, secondary indicia does not establish supervisory authority.” The Board set this decision aside but retained the case on its docket after *Noel Canning*, 12 CA 26644 (July 15, 2014), and incorporated the decision by reference at 362 NLRB No. 134.

Rochelle Waste Disposal v. NLRB, 673 F3d 587 (7th Cir. 2012). Court affirmed Board finding that individual was an employee and not a supervisor even though his title was “landfill supervisor.” There was no evidence the

individual enjoyed any of the indicia of a supervisor or that he had ever been accountable for actions of employees.

Flex-n-Gate Texas, 358 NLRB No. 76 (2012) and *Station Casinos d/b/a Place Station Hotel and Casino*, 358 NLRB No. 153 (2012). In these two cases decided in 2012, the Board found insufficient evidence to support a finding that employees were supervisors.

Benjamin H. Realty Corp., 361 NLRB No. 103 (2014). The burden of establishing supervisory status rests with the party asserting that position even where the parties had previously stipulated that the individual was a supervisor and now no longer agrees. See fn 3.

17-501 - Supervisory Authority as Defined in Section 2 (11)

GGNSC Springfield, LLC v. NLRB, 721 F.3d 403 (6th 2013), the Sixth Circuit refused to enforce a Board bargaining order for a unit of registered nurses. The Court found that the nurses had authority to discipline, viz., issue warning memoranda. The Court however, rejected the employee contention that the authority of the RNs to send employees home for flagrant misconduct establishes supervisory authority.

**NLRB v. NSTAR Electric Co.*, 798 F.3d 1 (1st Cir. 2015). The Court agreed with the Board that the employer had not established that Transmission System Supervisors and Senior Transmission Outage Coordinators are statutory supervisors based on their authority to assign, responsibly to direct, or hire, or effectively recommend hiring. The Court held that the company had not shown that *Oakwood Healthcare* or *Entergy Mississippi* unreasonably interpreted the Act's definition of supervisor, and that under these cases the company had not shown that the employees at issue possessed any supervisory authority.

**Entergy Mississippi, Inc. v. NLRB*, __ F.3d __ (5th Cir. 2015). The Court first held that *Oakwood Healthcare's* interpretations of "assign," "responsibly to direct," and "independent judgment" were reasonable and entitled to deference. The Court then held that because the Board's decision that the Employer had not shown that electrical dispatchers were supervisors relied on *Oakwood*, it had a reasonable legal basis, despite pre-*Oakwood* precedent finding that such dispatchers were supervisors. The court also held that under *Oakwood*, substantial evidence supported the Board's finding that the

electrical dispatchers do not “responsibly direct” employees and do not “assign” employees to a time or significant overall duties, but held that the Board had ignored evidence that showed how dispatchers arguably used independent judgment when assigning employees to location. The Court accordingly remanded the case on that narrow issue.

17-502 – Assignment/Responsible Direction/Independent Judgment

See 17-501 above.

Alternate Concepts, Inc., 358 NLRB No. 38 (2012). Board found that the employer, a light rail transit system failed to establish that its line controllers (persons responsible for ensuring that trains operate on schedule) and its crew dispatches (persons responsible for the timely and safe dispatch of trains) are supervisors. Board found that they did not have authority to assign or responsibly direct employees.

Brusco Tug and Barge, 359 NLRB No. 43 (2012). In a 3-1 decision, the Board held that the employer’s tugboat mates were not supervisors. In an extensive opinion, the majority found that the employer did not meet its burden of establishing that the mates have assignment authority or responsibility direct employees. The majority noted that its holding was limited to the mates in this case. Both the majority and dissenting opinions relied upon the Board’s *Oakwood Healthcare* decision 348 NLRB 686 (2006). This decision was incorporated by reference at 362 NLRB No. 28 (2015).

Ambassador Services, 358 NLRB No. 130 (2012). The Board sustained the finding of an ALJ that the employer did not establish that an individual was a supervisor. The ALJ noted that while employees may have perceived the individual to be a supervisor, there was no evidence that he had any supervisory indicia. The ALJ characterized him as a “straw boss.” Reconsidered and affirmed 361 NLRB No. 106 (2014); enfd. ___ Fed. Appx. ___ (11th Cir. 2015).

See also *Community Education Centers, Inc.*, 360 NLRB No. 17 (2014).

CNN America, Inc., 361 NLRB No. 47 (2014). The Board found that “shift supervisors” did not exercise independent judgment in making assignments.

Modesto Radiology Imaging, 361 NLRB No. 84 (2014). In this case the Board found that team leaders at a radiology imaging facility do not use independent judgment in dealing with employees.

**Cook Inlet Tug & Barge, Inc.*, 362 NLRB No. 111 (2015). The Board majority found that the evidence did not establish that the Employer’s tugboat captains assign or responsibly direct crew using independent judgment. With respect to direction, the Board found that the Employer had not shown that captains are “accountable” within the meaning of *Oakwood*.

**Buchanan Marine, L.P.*, 363 NLRB No. 58 (2015). The Board majority found that the Employer had not established that its tugboat captains possess the authority responsibly to direct other employees. As in *Brusco* and *Cook Inlet*, supra, the Board stated that pre-*Oakwood* cases involving boat captains are of limited precedential value.

**NLRB v. NSTAR Electric Co.*, 798 F.3d 1 (1st Cir. 2015). See Sec. 17-501 above.

**NLRB v. Onyx Management Group LLC*, 614 Fed. Appx. 40 (2d Cir. 2015). The Court found that substantial evidence supported the Board’s finding that the employer had not shown that an employee possessed the authority to assign.

**Entergy Mississippi, Inc. v. NLRB*, ___ F.3d ___ (5th Cir, 2015). See Sec. 17-501 above.

17-503 – Power Effectively to Recommend

Republican Company, 361 NLRB No. 15 (2014). The Board found that Assistant Classified Manager and Electrical Manager at a newspaper do not effectively recommend hiring and thus are not supervisors.

Lucky Cab Company, 360 NLRB No. 43 (2014), enfd. 621 Fed. Appx. 9 (2015). Board found that “road supervisors” at taxi company were not supervisors. Their duties were reportorial and not effective recommendations. Nor did those reports provide a basis for future disciplinary action.

Gestamp South Carolina, LLC v. NLRB, 769 F.3d 254 (4th Cir. 2014). Substantial evidence supported the Board’s determination that an individual was a supervisor because two employees reported to him, were required to inform him if they needed time off, and he prepared their biannual evaluations.

Although another individual retained final authority over leave and evaluations, he never disagreed with the putative supervisor's recommendations.

At this time, two cases are pending on review before the Board that raise issues concerning the authority to discipline and effectively recommend discipline:

**Veolia Transportation Services, Inc.*, 28-RC-071479 (March 19, 2012): whether road supervisors (who observe bus drivers) are supervisors.

**Veolia Transportation*, 05-RC-137335 (April 21, 2015): whether road supervisors (who observe van drivers) are supervisors.

17-504 – Limited, Occasional, or Sporadic Exercise of Supervisory Power

Republican Company, 361 NLRB No. 15 (2014). Even if the employer maintained a progressive disciplinary system, an individual's involvement in two minor instances was too sporadic to establish supervisory status.

17-507 – Secondary Indicia

G4S Regulated Security Solutions, 358 NLRB No. 160 (2012), incorporated by reference at 362 NLRB No. 134. See Sec. 17-500 supra.

17-508 - Ostensible v. Apparent Authority

In four cases decided in 2013, the Board found ostensible or apparent authority to act for an employer or a union. These cases are:

Woodmans Food Market, 359 NLRB No. 114 (2013) (employee circulating decertification petition had apparent authority to act for the employer)

Bellagio LLC, 359 NLRB No. 128 (2013) (employees could reasonably believe that third party was acting as an agent of the union when he threatened employees)

Sanitation Salvage Corp., 359 NLRB No. 130 (2013) (employee had apparent authority to speak for employer when he threatened employees)

A.W. Farrell & Son, 359 NLRB No. 154 (2013) (employer designation of individual as its bargaining representative clothed him with opponent authority to bind the employer to an agreement). The Board set this decision aside but retained the case on its docket after *Noel Canning*. 28 CA 023502 (June 27, 2014). It reaffirmed the decision at 361 NLRB No. 162.

International Union (SPFPA), 360 NLRB No. 57 (2014). Union Steward held to be union's agent when he handled grievances, represented employees in disciplinary meetings and resolved disputes without union president's approval.

Pratt (Corrugated Logistics), LLC, 360 NLRB No. 48 (2014). Labor Relations consultant who was held out by the employer as a conduit for transmitting information to and from management held to be agent of employer.

Labriola Baking Co., 361 NLRB No. 41 (2014). Employer is responsible for the translation of the employer's remarks where employer designated individual to translate.

Corona Regional Medical Center, 21 RC 094258 (June 17, 2014). Doctors at medical center were held not to be acting with apparent authority from the employee when they engaged in prounion activity.

17-510 – Supervisory Issues affecting Educational Institutions

See Sec. 1-403.

17-511 – Health Care Supervisory Issues

Belgrove Post Acute Care Center, 361 NLRB No. 118 (2014). In this case the Board reaffirmed the finding of the "recess Board" that LPNs were not supervisors because they lacked independent judgment to make assignments to CNAs.

See 17-501 above.

Barstow Community Hospital, 474 Fed Appx 497 (9th Cir. 2012). Court agreed with Board that the employer did not establish that a nurse who served as "Acting Clinical Coordinator" on an ad hoc basis has supervisory authority.

735 Putman Pike Operations d/b/a Greenville Skilled Nursing v. NLRB, 474 Fed Appx 782 (DC Cir. 2012). Court affirmed Board's finding that the employer did not establish that registered nurses were supervisors. Accordingly, unit of registered nurses was held to be appropriate.

Frenchtown Acquisition Co. d/b/a Fountain View of Monroe v. NLRB, 683 F3d 298 (6th Cir. 2012). Court affirmed Board finding that a unit of charge nurses was appropriate rejecting the employer's contention that the nurses were supervisors. In a detailed opinion the Court rejected the employer's contentions that the nurses had sufficient disciplinary, hiring and/or assignment authority to establish supervisory status.

Lakeland Health Care Associates v. NLRB, 696 F3d 1332 (11th Cir. 2012). In an extensive opinion, a divided panel reversed the Board's finding that licensed practical nurses are employees. The panel majority found that these LPNs had authority to discipline, to responsibly direct and to assign work to CNAs. The dissenting judge disagreed, finding that the majority reweighed the evidence and "improperly substituted its own views of the facts for those of the Board."

Trinity Continuing Care Services d/b/a Sanctuary at Mcauley, 359 NLRB No. 162 (2013). The Board agreed with the Regional Director that the Employer failed to adduce sufficient evidence to prove that, based on their role in issuing verbal and written corrective action notices, unit manager had the authority to discipline or to effectively recommend it.

Chapter 18 **Statutory Limitations**

18-100 – Professional Employees

**Oberthur Technologies of America Corp.*, 362 NLRB No. 198 (2015). The Board adopted the judge's finding that two employees who held engineering degrees and whose work was predominantly intellectual and varied and required independent judgment were professional employees.

18-230 - Guards Unions

FJC Security Services, Case No. 22 RC 115634 (May 20, 2014). In this unpublished Order the Board denied review of Review Request from an

SEIU Local that it reverse the findings of the Regional Director that it could not participate in an election for a unit of guards. In denying review, the panel noted that “while it raises a significant question of statutory interpretation concerning Section 9(b)(3), we decline to address the issue at this time.”

Sands Casino Resort Bethlehem, 361 NLRB No. 102 (2014). In this technical Section 8(a)(5) case, the Board entered a bargaining order reaffirming its certification of the union over the objections of the employer. The Board found that the union was not shown to be a non-guard union or that it “lacked the freedom and independence” to formulate its own policies and decide its own course of action.

Chapter 19

Categories covered by the Board Policy

19-200 - Managerial Employees

Connecticut Light & Power Company, 01-RC-112451 (Dec. 5, 2013). In an unpublished decision the Board agreed with its Regional Director that the authority of “Circuit Owners” to commit up to \$10,000 of Employer funds did not establish managerial status because that authority was “exercised within the confines of the Employer’s policy....”

Republican Company, 361 NLRB No. 15 (2014). Board found that a newspaper Editorial Page Editor was a managerial employee based on his role in formulating, determining and effectuating editorial policies.

**NLRB v. NSTAR Electric Co.*, 798 F.3d 1 (1st Cir. 2015). The Court found that substantial evidence supported the Board’s finding that the employer had not established that Transmission System Supervisors and Senior Transmission Outage Coordinators were managerial employees.

See also Section 1-403.

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

20-100 – Part-Time Employees

**Circo Bar*, 362 NLRB No. 75 (2015). Based on the record, it was impossible to tell whether the disputed employee had averaged sufficient hours to be eligible to vote as a regular part-time employee under the *Davison-Paxon* formula. The Board overruled the challenge to the employee's ballot, however, because it is the challenging party's burden to show that the challenged employee is ineligible.

20-200 – Temporary Employees

**Miller & Anderson, Inc.*, 05 RC 079249 (May 18, 2015). The Regional Director dismissed this case under *Oakwood Care Center*, 343 NLRB 659 (2004). After granting review, the Board invited parties to address how (if at all) Section 7 rights of employees in alternative working arrangements (temporary, part-time, other contingent) have been affected by *Oakwood Care Center*, whether the Board should adhere to *Oakwood Care Center*, and if not, whether the Board should return to *M.B. Sturgis*, 331 NLRB 1298 (2000) (or what other principles should govern such cases).

20-400 – Student Workers

Beth Israel Medical Center, 02 RC 121992 (June 11, 2014). Panel majority denied review of Regional Director finding that interns and residents were statutory employees, Member Miscimarra dissenting.

**Northwestern University*, 362 NLRB No. 167 (2015). After granting review and inviting briefs on whether grant-in-aid scholarship football players are employees within the meaning of Section 2(3), the Board declined to assert jurisdiction over this case based on policy considerations. The Board accordingly did not address whether grant-in-aid scholarship football players (or other types of scholarship athletes) are statutory employees. See also Sections 1-100 and 1-500.

**The New School*, 02 RC 143009 (October 21, 2015), and *Columbia University*, 02 RC 143012 (December 23, 2015). See Sec. 15-271, above.

Chapter 21 Self-Determination Elections

21-100 – Several Units Equally Appropriate

Grace Industries, 358 NLRB No. 62 (2012). The Board found two units of paving employees to be appropriate and thus ordered a self-determination election in order to ascertain the wishes of the employees being sought.

21-500 – Inclusion of Unrepresented Groups

**Rush University Medical Center*, 13 RC 132042 (Aug. 27, 2014). In this unpublished order, Members Miscimarra and Johnson advised that they would review the question presented in *St. Vincent Charity Medical Center*, 357 NLRB No. 79 (2011), a two member decision, holding that “modified acute care hospital bargaining units need not conform to the Board’s rule regarding acute care hospital bargaining units when an *Armour-Globe* self determination election may add unrepresented employees to an existing non-conforming unit that pre-dated the Board’s rule.” The two members noted that there is no majority at present to reconsider this decision. Member Johnson reiterated this view in *Rush University Medical Center*, 13 RC 143495 (March 24, 2015). See also Section 12-410.

Chapter 22 Representation Case Procedures Affecting the Election

22-110 - Mail Ballots

In six unpublished decisions, the Board granted Employer Special Requests to Appeal Regional Director Decisions ordering mail ballot elections. Thereafter in each case the Board denied the appeal on the merits. In each case the Regional Director found that the votes were “scattered” under *San Diego Gas & Electric*, 325 NLRB 1143 (1998).

The cases are:

EKO Painting Inc., 20 RC 082348 (April 24, 2013) (The employer was a contractor with various sites around Oahu. Employees travelled directly to these sites from their homes and there were a number of non-current eligible employees.)

United Maintenance Company, 13-RC-106926 (Sept. 12, 2013) (Miscimarra dissenting) (Employer operates three shifts at O'Hare Airport and on any given day, a large number do not work any shift.)

Republic Services of Pinconning, 7 RC 122650 (Sept. 9, 2014). In this unpublished decision, Member Johnson stated that he believes employees on military duty who cannot be at the polls should be given mail ballots. See also Section 24-427.

Allied Waste Services of Sacramento, 20 RC 133841 (Sept. 23, 2014) (Johnson dissenting) (Employees scattered due to staggered work schedules.)

**Covanta Honolulu Resource Recovery Venture*, 20 RC 140392 (January 20, 2015) (Miscimarra dissenting) (Employees scattered due to work schedules).

**New York & Co.*, 01 RM 142091 (February 4, 2015) (Union challenged mail ballot election; Board rejected argument that mail ballot would prevent Union from challenging voter eligibility).

**Classic Valet Parking, Inc.*, 363 NLRB No. 23 (2015). In this mail ballot election, the Board unanimously denied review of the direction of a mail ballot election. A Board majority also found that the Regional Director's decision to exclude 10 ballots not received until after the tally was consistent with established Board precedent and policy. Member Miscimarra would have granted review based on the failure to count the 10 ballots, as they were mailed prior to the deadline.

22-111 – Challenges

Hard Rock Holdings v. NLRB, 672 F3d 1117 (DC Cir. 2012). The failure of the union to challenge the inclusion of a name of the Excelsior list did not deprive it of the right to challenge the vote at the election.

New Century Transportation, 04 RC 115860 (Nov. 12, 2014). In this unpublished decision a Board majority found that the conduct of the Board agent did not warrant setting aside the election. The agent failed to enter pertinent information on the challenge envelope at the time and later filled it in at the office.

Europa Auto Imports d/b/a Mercedes Benz of San Diego v. NLRB, 576 Fed Appx 1 (DC Cir. 2014) enforcing 357 NLRB No. 114. Employer filed objections to election based on voting by two employees. Court held that challenges to voting must be made prior to the actual casting of ballots.

22-113 – Tally of Ballots

Tekweld Solutions, 29 RC 099621 (November 3, 2014). In this unpublished Order, the Board considered objections to a revised Tally of Ballots. It held that objections to a revised Tally should serve as a basis for an investigation only of the circumstances leading up to and surrounding the revised count not those involving the election itself. See Section 11392.2(c) of the Casehandling Manual. See also Sec. 24-110.

22-115 – Resolution of Challenges

Unifirst Corporation, 361 NLRB No. 1 (2014). The proper procedure for processing a post-election challenge/objection case is to resolve the status of the challenged ballots before determining whether the election should be set aside. See also *PSQ Inc.*, 4 RC 112179 (July 1, 2014), an unpublished decision.

**Circo Bar*, 362 NLRB No. 75 (2015). See Sec. 20-100, above.

**Y-Tech Services, Inc.*, 362 NLRB No. 7 (2015). See Sec. 24-425, *infra*.

22-118 – Hearing on Objections

NLRB v. New Country Audi, 448 Fed Appx 155 (2nd Cir. 2012). Employer did not present evidence of substantial and material factual issues sufficient to warrant a hearing on its objections.

Volkswagen Group of North America, 10 RM 121704 (Apr. 16, 2014). In the “unique circumstances of this case” the Board permitted seven employees and a corporation to participate in a hearing on the union’s objections for the limited purposes of (1) offering evidence in opposition to the objections, (2) cross-examining witnesses and (3) filing briefs.

22-118(a) - Hearing on Objections – Subpoenas

800 River Road Operating Company d/b/a Woodwest Health Care Center, 359 NLRB No. 48, affirmed in 361 NLRB No. 117 (2014). On the second day of a hearing on objections, the hearing officer refused to permit the employer to present testimony from eight subpoenaed witnesses. He also refused to issue six additional subpoenas. On the first two days of hearing the employer presented 10 witnesses, none of whom had firsthand knowledge that supported the employer’s objections. The hearing officer refused to allow the additional testimony because the employer could not make an offer of proof that the testimony would support the objections.

The Board found that the hearing officer erred in not issuing the requested subpoenas but concluded that the error was harmless as it was reasonable to conclude that the hearing officer would, as with the other witnesses have precluded testimony from them in these circumstances. The Board certified the union.

Thereafter, the Employer filed a motion to reopen the record to present newly discovered evidence, evidence discovered when it re-interviewed witnesses after the Board certification of the Union. In an unpublished order dated May 31, 2013, the Board denied the motion as not meeting the standards of Section 102.65 (e)(1) of the Boards Rules.

22-120 – Rerun Elections

Heartland Human Services v. NLRB, 746 F3d 802 (7th Cir. 2014), enforcing 359 NLRB No. 76 (2013). In this unfair labor practice case, the employer withdrew recognition from the union before the Board resolved the determinative challenge. The Court enforced the Board’s bargaining order finding that the employer “jumped the gun” by refusing to recognize the union before the new-election ordered by the Board was conducted and its results certified.

Chapter 23 Voting Eligibility

23-111 – Newly Hired or Transferred Employees

NLRB v. Regency Grande Nursing and Rehabilitation Center 462 Fed Appx 183 (3rd Cir. 2012). Court found that employer unlawfully “packed” the unit just prior to election where record showed that many of the “new hires” submitted incomplete employment information, worked fewer hours and did not appear on work schedules.

Tekweld Solutions, Inc., 361 NLRB No. 18 (2014). See Section 3-700.

23-112 – Voluntary Quits

Road Works, Inc., 358 NLRB No. 60 (2012). Board reversed hearing officer finding that employee intended to quit before the election.

23-500 – Eligibility Lists and Stipulations

Tekweld Solutions, Inc., 361 NLRB No. 18 (2014). See Section 3-700.

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

Hard Rock Holdings v. NLRB, 672 F3d 1117 (DC Cir. 2012). Court affirmed Board’s finding that the stipulated election agreement was ambiguous and that there was no extrinsic evidence to clarify the ambiguity. Accordingly, the Court agreed with application of the community of interest test to resolve the unit issue.

Tekweld Solutions, Inc., 361 NLRB No. 18 (2014). See Section 3-700.

**Oberthur Technologies of America Corp.*, 362 NLRB No. 198 (2015). The Respondent contended that the stipulated unit unambiguously included two individuals found to be professional employees, and that therefore the election should be set aside and a new election directed to conform to *Sonotone*. The Board, however, found that the judge properly sustained the challenges to these ballots, and that the challenges would have to be sustained in any event because either (1) the stipulated unit excluded these individuals, or (2) even if it included them, the challenges would be properly sustained because Section 9(b)(1) prohibits the type of election to which the parties would have stipulated (a conventional election with no self-determination vote for professional employees).

Chapter 24 Interference with Elections

24-110 – Objections Period

NLRB v. New Country Audi, 448 Fed Appx 155 (2nd Cir. 2012). Court rejected employer contention that conduct occurring prior to the filing of the petition should be considered objectionable. Court noted that while it would find an exception to the general rule where the conduct would “have had a significant impact on voting post-petition,” it did not find such conduct here.

Brentwood at Hobart, 675 F3d 999 (6th Cir. 2012). Court affirmed the action of the Board and its hearing officer in not considering the employer’s contention, first raised at hearing, that a union election flyer was objectionable. The employer had filed an objection to another flyer and the court ruled that the Board did not abuse its discretion in excluding consideration of the second flyer.

Permanente Medical Group and Kaiser Foundation Hospitals, 358 NLRB No. 88 (2012). Board found that certain alleged objectionable conduct was “remote in time, predating the critical period by several months and did not directly affect the . . . unit.”

Ashland Facility Operations v. NLRB, 701 F.3d 983 (4th Cir. 2012). See Section 24-323 *infra*.

Durham School Services, 360 NLRB No. 86 (2014). A change in payroll procedures during the critical period is objectionable where it is made in response to an employee request made well before the organizing campaign.

Tekweld Solutions, 29 RC 099621 (Nov. 3, 2014). See Section 22-113.

Flamingo Las Vegas Operating Co, LLC, 360 NLRB No. 41 (2014). The Board declined the union’s request to overrule *Ideal Electric*, 134 NLRB 1275 (1961), and allow specific reliance on prepetition conduct as grounds for objecting to an election.

**Oberthur Technologies of America Corp.*, 362 NLRB No. 198 (2015). The Board stated that a party’s failure to file objections or in any other way raise its concerns at the appropriate time, limits the issues that party preserves for

Board consideration. The Respondent in this case accordingly could not have its exceptions to the judge's decision treated as if they were objections, as they were filed long after the objections deadline and had no explanation for failing to timely raise the issue. See also Sec. 23-530.

**Pulau Corp.*, 363 NLRB No. 8 (2015). In requesting review of the Regional Director's overruling of its objections to the Board's new rules, the Employer argued that the election schedule gave it inadequate time to communicate with employees concerning the election. The Employer had not presented these facts or this argument to the Regional Director, so the Employer's challenge to the election date was not properly before the Board.

24-140 – Scope of Investigation of Objections

Labriola Baking Co., 361 NLRB No. 41 (2014). The Board may consider conduct that does not exactly coincide with the precise wording of objections where they are sufficiently related to the filed objections.

Nelson Tree Service, Inc., 361 NLRB No. 161 (2014). The Board remanded the case to the Regional Director to consider evidence of possible additional objectionable conduct he had uncovered during the investigation of an unfair labor practice charge. Because the Regional Director had independently discovered this evidence, he had no discretion to ignore it and the petitioner was not required to show that the evidence was newly discovered and previously unavailable.

24-300 - Pre-election Campaign Interference

Enterprise Leasing and Huntington Ingalls v. NLRB, 722 F.3d 609 (4th Ct. 2013). Employee's subjective feeling that he was threatened by the union is irrelevant. "This is so because the test for coercion is an objective one."

24-310 - Interference Which May also Violate Unfair Labor Practice Provisions

Garda CL Great Lakes, Inc., 359 NLRB No. 148 (2013) (grant of benefits found to be a Section 8(a)(1) violation and objectionable).

Olympic Supply d/b/a Onsite News, 359 NLRB No. 99 fn 3 (2013) (threats of stricter enforcement of work rules for supporting union is a violation Section 8(a)(1) and is objectionable).

Durham School Services, 360 NLRB No. 85 (2014). In a 3-2 decision, the majority found that the employer's "social networking policy" to be objectionable. Here the policy required contacts with parents and school officials to be "appropriate." Two members found it unnecessary to reach the "social networking" issues.

Intertape Polymer Corp., 360 NLRB No. 114 (2014), enfd. in part and remanded 801 F.3d 224 (4th Cir. 2015). Board set aside an election due to confiscation of union literature and surveillance of leafleting that occurred during critical period. The Court held that substantial evidence supported the Board's findings with respect to the confiscation of literature, but not with respect to surveillance. At the conclusion of its opinion, the Court noted that because it eliminated one of the bases for setting aside the election, "the Board will also find it necessary to reconsider its decision to direct a second election."

Purple Communications, 361 NLRB No. 43 (2014). Board found handbook rule prohibiting disruptions on its property to be objectionable.

Seton Medical Center/Seton Coastsides, 360 NLRB No. 49 (2014). Election set aside where employer routinely condoned work time solicitation by non-employee representatives of one union while denying the same opportunities to non-employee representatives of the other union.

24-311 – De Minimis or Isolated Conduct

Flamingo Las Vegas Operating Co., LLC, 360 NLRB No. 41 (2014). Although two objections corresponded to ULPs found in an earlier case (threat to be less lenient if employees selected union and threat to discharge employee for supporting union), these threats affected fewer employees than the 18-vote margin and there was no evidence of dissemination.

Lucky Cab Co., 360 NLRB No. 43 (2014), enfd. 621 Fed. Appx. 9 (2015). Board noted that an election may not be set aside for de minimis conduct, but that exception has not been applied to 8(a)(3) violations during the critical period.

24-313 - Narrowness of Election Results

Flamingo Las Vegas Operating Co., LLC, 360 NLRB No. 41 (2014). See 24-311 above.

Newark Portfolio JV, LLC, 22 RC 081108 (Feb. 27, 2013). In this unpublished decision the Board commented at fn 3:

“Given the two-vote margin in the election, we do not rely on the hearing officers reliance on the facts that the remark was heard by, at most, one employee and was not disseminated to other eligible votes.”

24-314 - Dissemination

See 24-311 and 24-313 above.

Trump Plaza Associates v. NLRB, 679 F3d 822 (DC Cir. 2012). Court remanded case to Board disagreeing with Board’s view that a “mock card check” was not disseminated broadly. Court found that Board had not given sufficient attention to fact that matter was covered on local television and in the local newspapers.

24-320 – Types of Interference Under the *General Shoe Doctrine*

Reliant Energy a/k/a Etiwanda, 357 NLRB No. 172 (2011). Board majority set aside election involving both promise of some benefits, withholding of other benefits and the removal of an employee of a contractor at the employer’s facility because the employee engaged in union activity.

Kingspan Benchmark, 359 NLRB No. 19 (2012). Board set aside election where the election results were close (20 for and 22 against the union) and the employer granted an employee a wage increase, implemented a shift differential and interrogated an employee.

Bellagio, LLC, 359 NLRB No. 128 (2013). Statements made by employee with apparent authority to speak for union found objectionable. Statements were "if this vote goes through you're toast" and "the vote is going through . . . you better not."

Unifirst Corporation, 361 NLRB No. 1 (2014). Employer statements about 401(k) and profit-sharing plan available to its unrepresented employees went beyond historical fact and constituted an objectionable promise of benefit in exchange for vote to decertify union.

Labriola Baking Co., 361 NLRB No. 41 (2014). Election set aside where the employer stated its belief that a strike would be inevitable, and that it would hire replacement workers if that happened. In the Spanish translation, the phrase used was “legal workers,” and in this context employees would understand the statement as a threat to use immigration status to take action against them.

Purple Communications, 361 NLRB No. 43 (2014). Board set aside elections where, among other things, employer promised benefits, made statements about costs of antiunion campaign (and how that money could have been used for other things including bonuses), and stated it could only make improvements at facilities that did not have elections pending.

NTN Bower Corp., 10 RD 105644 (Nov. 15, 2014). Board set aside election due to plant manager’s statement that carried implied promise of higher pay if employees voted to decertify. The statement at issue compared the compensation at the plant at issue and at one of the employer’s nonunion plants; although such comparisons may be lawful, the Board found that here, the presentation of the comparison—through word choice, emphasis, and surrounding circumstances—conveyed the message that wages would be raised if the employees decertified.

**SBM Management Services*, 362 NLRB No. 144 (2015). Board set election aside where Respondent distributed bonuses to 11 employees (in unit of 35) during critical period and Respondent failed to provide explanation rebutting inference that distribution of bonuses during the critical period is coercive.

**Student Transportation of America, Inc.*, 362 NLRB No. 156 (2015). Board set election aside where Vice President stated that, if Petitioner won, the Employer could walk away from its contract with the school district (the petitioned-for employees were school bus drivers and mechanics). The Board found that the statement was an indirect threat of job loss that lacked an objective basis and did not predict demonstrably probable consequences beyond the Employer’s control.

**Bio-Medical Applications of Jersey City, Inc.*, 22 RD 114233 (April 29, 2015).

The Board set the election aside based on the incumbent union's demanding the discharge of the petitioning employee.

**Baker DC, LLC*, 05 RC 135621 (December 28, 2015). The Board granted the Employer's requests for review of the Regional Director's overruling of the Employer's objection alleging that the Union and/or its agents or supporters improperly engaged in surveillance or created the impression of surveillance.

24-322 – Misrepresentation

Enterprise Leasing cited at 24-300 above where the Court rejected an employer contention that union conduct in using a photo of an employee without the employees authorization was objectionable. The Court found this conduct did not meet the misrepresentation standard of *Midland National*, 263 NLRB 127 (1982).

Permanente Medical Group and Kaiser Foundation Hospitals, 358 NLRB No. 88 (2012). Board rejected contention that statements that employees would lose membership in one of two rival unions and consequently would lose the benefits of membership were not objectionable. Rather, the Board found them to be, at best, "mere misrepresentations."

Durham School Services, 360 NLRB No. 108 (2014). Board found that distribution of campaign flyer containing pictures of voters and misrepresentations of their intent to vote for union was not a material or factual misrepresentation under *Midland National*, 263 NLRB 127 (1982).

24-323 – Racial Appeals

Ashland Facility Operations v. NLRB, 701 F.3d 938 (4th Cir. 2012). The Court affirmed the Board's finding that statements made by a representative of the NAACP were not racially inflammatory (viz – the nurses were "targeted because of their skin color, publicly and illegally strip-searched and... harassed" and the employees were treated like "chattel enslaved captives"). The Court found that the remarks were "made in the context of an effort to raise workplace grievances."

The Court also held that the representative of the NAACP was not an agent of the Union and that his remarks should be treated under third party conduct standards. Finally, the Court concluded that the *Sewell* doctrine does not apply to appeals made by third parties unless the appeal is such as to make “a rational, uncoerced expression of free choice impossible.” The Court also found that the incidents objected to took place outside the critical period.

**GD Copper (USA) Inc.*, 362 NLRB No. 99 (2015). The Board found that employee statements about slavery and Jim Crow in reference to the Employer’s attendance policy, as well as comments about “slave food” and “the master’s table,” did not warrant setting aside the election, even if they were attributable to the Union.

24-324 – The Excelsior Rule

(a) Submission of the List

Hard Rock Holdings v. NLRB, 672 F3d 1117 (DC Cir. 2012). See Sec. 22-111 supra.

Kaiser Foundation Health Plan, 32-RC-5775 (Mar. 22, 2013). In an unpublished decision the Board rejected an union request that the employer provide the Excelsior list in an electronic format- the format in which the employer had provided a list for the preparation of mail ballot envelopes. The Regional Director rejected the union request because the employer had provided the electronic list on the assurance it would not be given to other parties and had complied with the Excelsior requirement by providing the list in the traditional format.

(b) Erroneous or Incomplete Lists

Tractor Co. d/b/a CCS Trucking, 359 NLRB No. 67 (2013), the Board rejected a hearing officers recommendation that the election be set aside because of an incomplete Excelsior list. The Board found the percentage of voters omitted “is relatively small (15.4 percent), there is no showing of bad faith on the part of the employer and perhaps most importantly, the number of voters omitted from the list does not constitute a determinative number.”

**Atlas Roll-Off Corp.*, 29 RC 114120 (January 20, 2015). Election set aside due to 32% omission rate and fact that the number of voters omitted from the list was determinative.

24-325 – The Peerless Rule

White Motor Sales d/b/a Fairfield Toyota v. NLRB, 486 Fed. Appx 130, 2012 WL 1912631 (DC Cir. 2012). Court affirmed the Board’s finding that union did not violate Peerless Plywood when its representative went to plant prior to election to speak with employees. The representative refused to leave when requested by employer. Court found no violation of 24 hour rule because union did not summon employees to a meeting.

24-326(b) – Third Party Conduct

GEO Corrections Holdings, 12-RC-097792 (Dec. 3, 2013). In an unpublished decision, the Board applied the “party” standard rather than the “third party” standard in connection with alleged objectionable conduct by the unions observer.

Trump Plaza Associates v. NLRB, 679 F3d 822 (DC Cir. 2012). Court found that a public official’s involvement in an election campaign did not interfere with employee free choice or give the impression that the Board favored the union. *Columbia Tanning*, 238 NLRB 899 was distinguished by the Court.

NLRB v. Downtown Bid Services Corp., 682 F3d 109 (DC Cir. 2012). Court affirmed Board finding that a prounion employee was not acting as an agent of the union under either actual or apparent authority when, while soliciting union authorization cards, he told employees they would be fired if they did not support the union. Court relied on fact that union had clearly designated an organizer as its representative and this employee was not that person.

Ashland Facility Operations v. NLRB, 701 F.3d 938 (4th Cir. 2012).

See Sec. 24-323 supra.

Pac Tell Group, Inc. d/b/a U.S. Fibers, Case No. 10 RC 101188 (Sept. 22, 2014).

In this unpublished decision the panel found that comments from two employees that employees might lose their jobs if they did not support the union would be considered not objectionable under the third party conduct standard.

ManorCare of Kingston, 360 NLRB No. 93 (2014). Comments made by fellow employees are considered under the third party standard and were made here in a “joking and casual manner.” Thus they did not create a general atmosphere with fear and reprisal.

**NLRB v. Le Fort Enterprises, Inc.*, 791 F.3d 207 (1st Cir. 2015). The Court agreed with the Board that comments made by employees to others entering and leaving the polling area (that employees who did not vote for the Union would be dismissed, that undocumented employees would be fired if the Union won, and that the Union needed their votes) were not objectionable under the third party conduct standard. See also Section 24-440.

**GD Copper (USA) Inc.*, 362 NLRB No. 99 (2015). See Section 24-323, above.

24-327 - Offers to Waive Union Initiation Fees

Community Options NY, 359 NLRB No. 165 (2013), Board found an offer to waive dues for the first six month after the effective date of a contract is not objectionable. The Board distinguished *McAllister Towing*, 341 NLRB 394 (2004) and *Go Ahead North America*, 357 NLRB No. 18 (2011).

24-328 – Prounion Supervisory Conduct

SSC Mystic Operating d/b/a Pendleton Health & Rehabilitation, 01-RC-098982 (Dec. 3, 2013). In an unpublished decision, the Board noted the employer's “extensive antiunion campaign in finding that a supervisor’s prounion conduct was ‘effectively mitigated.’” Enfd. 801 F.3d 302 (D.C. Cir. 2015).

Veritas Health Services v. NLRB, 671 F3d 1267 (DC Cir. 2012). Court affirmed Board finding that prounion conduct of supervisory charge nurses in signing

cards in front of employees and in attending union meetings did not amount to employer supervisory interference. Court also noted that even if the conduct tended to interfere with employee free choice, it was mitigated by the actions of the charge nurses in subsequently campaigning against the union.

**Laguna College of Art and Design*, 362 NLRB No. 112 (2015). The Board found that conduct was not objectionable under *Harborside Healthcare*, 343 NLRB 906 (2004), where the individual was a low-level supervisor who engaged in non-coercive election behavior. Although this behavior included inquiring whether 3 employees were interested in signing authorization cards, he had no direct supervisory authority over them and did not furnish authorization cards to them. The Employer's aggressive antiunion campaign also ensured that employees would not attribute the pronoun supervisory conduct to the Employer.

24-410 – Board Agent Conduct (Ballot Box Security)

Hard Rock Holdings v. NLRB, 672 F3d 1117 (DC Cir. 2012). It was not objectionable conduct for the Board agent to decide not to give observers a badge when he discovered that he had only one in his election kit. The Court held that there was no evidence that the absence of badges affected the election.

24-410(a) – Board Agent Conduct

Magnum Transportation, 360 NLRB No. 129 (2014). Board agent did not engage in objectionable conduct when he permitted an employee to cast a second ballot under challenge where the employee notified the agent that he had marked his first ballot incorrectly and put it in the box.

Durham School Services, 360 NLRB No. 108 (2014). It was not objectionable for the Board agent to carry the ballot box to the parking lot in order to permit a disabled employer to cast a ballot.

Securitas Security Services USA, Case No. 20 RC 107222 (Feb. 7, 2014). In the unpublished decision, a panel majority found that a Board agent did not engage in objectionable conduct in the circumstances here. Board agent engaged in conversation with union representatives while those representatives were handing out literature to prospective voters.

Patient Care of Pennsylvania, 360 NLRB No. 76 (2014). Board agent did not err by failing to allow a late arriving voter to vote or to inquire whether the parties would agree to permit the vote.

The Avenue Care and Rehabilitation Center, 361 NLRB No. 151 (2014). Objection alleging election should be set aside because Board agent wore a purple vest—which was allegedly the union’s official color—did not raise material or substantial issues warranting a hearing and was properly overruled.

24-424 – Observers

NLRB v. New Country Audi, 448 Fed Appx 155 (2nd Cir. 2012). Court rejected employer contention that statement of an employee concerning the whereabouts of a co-worker established that the union had “kept a running tally during the voting on him . . . employees case their ballots.”

NLRB v. Regency Grande Nursing and Rehabilitation Center, 462 Fed Appx 183 (3rd Cir. 2012). Court rejected employer contention that observer kept list of those voting. Rather, the Court affirmed the Board’s finding that the list was a list of employees the union intended to challenge.

Purple Communications, 361 NLRB No. 43 (2014). ALJ erred in making his credibility resolutions by considering the fact that a witness had been an observer and that another had delivered the representation petition to the employer.

See also Sec. 24-410

24-425 - Opportunity to Vote and Numbers of Voters

Enterprise Leasing, cited at 24-300 above, court rejected employer contention that the election should be set aside because of an ice/snow storm on the day of the election.

**Y-Tech Services, Inc.*, 362 NLRB No. 7 (2015). The Board adopted the recommendation to set aside the election because five eligible voters (a determinative number) were unable to cast ballots due to their work

assignments. The Board rejected the Employer's contention that four challenged ballots should be resolved before setting the election aside.

24-426 – Secrecy of the Ballot

Physicians & Surgeons Ambulance Service v. NLRB, 477 Fed Appx 743 (DC Cir. 2012). Court affirmed the Board holding that the use of a table top voting booth did not fail to guarantee the voters privacy.

Atlas Roll-Off Corp., 29 RC 114120 (Aug. 6, 2014). Employer representative engaged in objectionable conduct in telling employees to take pictures of their ballots and show them to the employer or they would be fired.

24-429 – Ballot Count

Ruan Transport v. NLRB, 674 F3d 672 (7th Cir. 2012). In a two union election, an employee had marked both unions' boxes on the ballot. One box had a heavy mark while the other had signs of erasure. The Court affirmed the Board's finding that the ballot viewed overall showed the clear intent of the voter.

Ozburn-Hessey Logistics, 361 NLRB No. 100 (2014). In this post *Noel Canning* case the Board explained that because the ballots had already been counted (a ministerial task) it would not require a recount but in an abundance of caution and to avoid further litigation, it would issue a new Certification of Representative.

24-440 - Electioneering and

24-442 - The Milchem Rule

Aaron Medical Transportation, 22 RC 070888 (June 19, 2013). In this unpublished decision, the Board found "that the mere presence of union agents in the parking lot and the sixth floor of the Employers premises, without more, does not constitute objectionable conduct sufficient to overturn the election." The Board distinguished *Nathan Katz Realty*, 251 F.3d 981 (DC Cir. 2001).

**NLRB v. Le Fort Enterprises, Inc.*, 791 F.3d 207 (1st Cir. 2015). See Section 24-326(b).

24-443 – Raffles, Gifts, Contents and Parties

(d) Campaign Parties (new topic).

Sequel of New Mexico d/b/a Bernalillo Academy, 361 NLRB No. 127 (2014).

Campaign parties, absent special circumstances are legitimate campaign devices “*LM Berry*, 266 NLRB 47, 51 (1983)”. The Board will evaluate them as a four part test:

- (1) size of benefit;
- (2) number of employees receiving the benefit;
- (3) how employees would reasonably view the purpose of the benefit;
and
- (4) the timing of the benefit.

In this case the Board found that the party given by the employer was not objectionable.

APPENDIX I **Cases Dealing with New Representation Rules**

**Pulau Corp*, 363 NLRB No. 8 (2015). See Sec. 24-110, above.

**Aria*, 363 NLRB No. 24 (2015). See Sec. 7-110, above. Accord:

**MGM Grand*, 28 RC 154099 (October 22, 2015)

**Bellagio Las Vegas*, 28 RC 154081 (November 18, 2015)

**The Mirage*, 28 RC 154083 (November 18, 2015)

**American Indian Community Housing Organization*, 18 RD 154756 (August 11, 2015); *Pennsylvania Interscholastic Athletics Association*, 06 RC 152861 (August 26, 2015); *The Cement League*, 02 RC 154016 (August 11, 2015); *Danbury Hospital of the Western Connecticut Health Network*, 01 RC 153086 (December 9, 2015). See Sec. 2-500, above.

**American Indian Community Housing Organization*, 18 RD 154756 (December 11, 2015). Board agreed that Acting Regional Director correctly prohibited the parties from litigating the appropriateness of the unit at the hearing, pursuant to Section 102.66(d) of the Board’s Rules and Regulations, because neither party raised the issue in their statements of position.

APPENDIX II

The following table provides a side-by-side comparison of Current and New procedures:

Current procedures	New procedures
Parties cannot electronically file election petitions. Parties and NLRB regional offices do not electronically transmit certain representation case documents.	Election petitions, election notices and voter lists can be transmitted electronically. NLRB regional offices can deliver notices and documents electronically, rather than by mail.
The parties and prospective voters receive limited information.	Parties will receive a more detailed description of the Agency's representation case procedures, as well as a Statement of Position form, when served with the petition. The Statement of Position will help parties identify the issues they may want to raise at the pre-election hearing. A Notice of Petition for Election, which will be served with the Notice of Hearing, will provide employees and the employer with information about the petition and their rights and obligations. The Notice of Election will provide prospective voters with more detailed information about the voting process.

<p>The parties cannot predict when a pre- or post-election hearing will be held because practices vary by Region.</p>	<p>The Regional Director will generally set a pre-election hearing to begin 8 days after a hearing notice is served and a post-election hearing 14 days after the filing of objections.</p>
<p>There is no mechanism for requiring parties to identify issues in dispute.</p>	<p>Non petitioning parties are required to identify any issues they have with the petition, in their Statements of Positions, generally one business day before the pre-election hearing opens. The petitioner will be required to respond to any issue raised by the non petitioning parties in their Statements of Positions at the beginning of the hearing. Litigation inconsistent with these positions will generally not be allowed.</p>
<p>The employer is not required to share a list of prospective voters with the NLRB's regional office or the other parties until after the regional director directs an election or approves an election agreement.</p>	<p>As part of its Statement of Position, the employer must provide a list of prospective voters with their job classifications, shifts and work locations, to the NLRB's regional office and the other parties, generally one business day before the pre-election hearing opens. This will help the parties narrow the issues in dispute at the hearing or enter into an election agreement.</p>

<p>Parties may insist on litigating voter eligibility and inclusion issues that do not have to be resolved in order to determine whether an election should be held.</p>	<p>The purpose of the pre-election hearing is clearly defined and parties will generally litigate only those issues that are necessary to determine whether it is appropriate to conduct an election. Litigation of a small number of eligibility and inclusion issues that do not have to be decided before the election may be deferred to the post-election stage. Those issues will often be mooted by the election results.</p>
<p>Parties may file a brief within 7 days of the closing of the pre-election hearing, with permissive extensions of 14 days or more.</p>	<p>Parties will be provided with an opportunity to argue orally before the close of the hearing and written briefs will be allowed only if the regional director determines they are necessary.</p>
<p>Parties waive their right to challenge the regional director's pre-election decision if they do not file a request for review before the election. This requires parties to appeal issues that may be rendered moot by the election results.</p>	<p>Parties may wait to see whether the election results have made the need to file a request for review of the regional director's pre-election decision unnecessary and they do not waive their right to seek review of that decision if they decide to file their request after the election.</p>

<p>Elections are delayed 25-30 days to allow the Board to consider any request for review of the regional director's decision that may be filed. This is so even though such requests are rarely filed, even more rarely granted and almost never result in a stay of the election.</p>	<p>There will be no automatic stay of an election.</p>
<p>The Board is required to review every aspect of most post-election disputes, regardless of whether any party has objected to it.</p>	<p>The Board is not required to review aspects of post-election regional decisions as to which no party has raised an issue, and may deny review consistent with the discretion it has long exercised in reviewing pre-election rulings.</p>
<p>The voter list provided to non-employer parties to enable them to communicate with voters about the election includes only names and home addresses. The employer must submit the list within 7 days of the approval of an election agreement or the regional director's decision directing an election.</p>	<p>The voter list will also include personal phone numbers and email addresses (if available to the employer). The employer must submit the list within 2 business days of the regional director's approval of an election agreement or decision directing an election.</p>