

**A Review of Developments in NLRB
Representation Case Law During 2020
February 2021**

This paper—summarizing developments in representation case law during 2020—was initially presented at the 2020 Midwinter Meetings of the Development of the Law and Practice and Procedure Under the NLRA committees. These committees are a part of the American Bar Association’s Section of Labor and Employment Law. The paper’s format utilizes the structure of *An Outline of Law and Procedure in Representation Cases* to track and categorize recent noteworthy developments in this area. The *Outline* is published by the NLRB’s Office of the General Counsel and is available on the NLRB website (<https://www.nlr.gov/how-we-work/national-labor-relations-act/agency-manuals>).

The *Outline* was most recently updated in September 2017 to include developments through June 2017. Supplements to the *Outline* covering developments in 2017, 2018, and 2019 (following the same format as this paper) are also available on the NLRB website.

Virtually all published representation case decisions (Board and court) from 2020 are covered here, as are consolidated representation and unfair labor practice cases in which the Board itself passed or commented on the representation issues. Several unfair labor practice cases that involve issues relevant to representation case law (e.g., jurisdiction, supervisory status, joint employer) are also included. The Board’s 2020 rulemaking activities that relate to representation case matters are covered as well. In addition, there are entries for several unpublished NLRB representation case decisions that may be of interest to the researcher, although such decisions are, of course, non-precedential and thus not binding on the Board. Where relevant, the views of dissenting (or concurring) Board members have been noted. General Counsel memos providing representation-case guidance that issued in 2020 are noted as well, though these too are not binding on the Board.

This supplement is limited to developments in 2020 and, with one or two exceptions, does not include developments thus far in 2021

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Chapter 1 Jurisdiction

1-401 – State or Political Subdivision

KIPP Academy Charter School, 369 NLRB No. 48 (2020) (RKE): See 1-500.

1-402 – Employers Subject to the Railway Labor Act

Oxford Electronics, Inc., 369 NLRB No. 6 (2020) (RKE): In this unfair labor practice case, the Board deferred to the advisory opinion of the National Mediation Board, which had concluded that the employer and its employees were subject to the Railway Labor Act. In doing so, the Board agreed that substantial evidence supported the NMB’s conclusions that three of the six traditional “carrier control” factors established that respondents were controlled by carriers, and that this finding was consistent with prior NMB precedent.

American Sales & Management Organization, LLC v. NLRB, 799 Fed. Appx. 1 (D.C. Cir. 2020): The court enforced the Board’s order in this unfair labor practice case, finding that the employer had waived a challenge to the Board’s non-referral of the jurisdictional question to the NMB and that the Board’s decision concluding that the employer was subject to the NLRA was supported by substantial evidence and not otherwise arbitrary.

G2 Secure Staff, LLC, 29-UD-232699, decision and order 2/21/20 (RKE): The Board deferred to the advisory opinion of the NMB, which had concluded that the employer and its employees were subject to the Railway Labor Act, finding that substantial evidence supported NMB’s finding that four carrier control factors demonstrate the employer was subject to carrier control.

1-403 – Religious Schools

Duquesne University of the Holy Spirit v. NLRB, 947 F.3d 824 (D.C. Cir. 2020): A panel majority held that the Board’s test for asserting jurisdiction over religious schools and their faculty set forth in *Pacific Lutheran* ran afoul of the court’s decisions in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002), and *Carroll College v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009), which, the majority held, continued to govern the Board’s jurisdictional reach in this area. Under those decisions, the majority held that Board had no jurisdiction over this employer and vacated the Board’s decision and order finding jurisdiction under *Pacific Lutheran*. Dissenting, Judge Pillard emphasized that the dispute in this case was over adjunct faculty, not full faculty, and that the Board’s “holding out” test as articulated in *Pacific Lutheran* was a modest requirement more consistent with the competing concerns than a blanket conclusion that all adjuncts at such institutions serve a religious function. The court subsequently denied rehearing en banc at 975 F.3d 13 (D.C. Cir. 2020); Judge Pillard concurred in the denial but reiterated his view that the majority had wrongly decided the case.

Bethany College, 369 NLRB No. 98 (2020) (RKE): In this unfair labor practice case, the Board overruled, in relevant part, *Pacific Lutheran University*, 361 NLRB 1404 (2014), and adopted the jurisdictional test set forth in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002).

Thus, in determining whether to assert jurisdiction over the faculty of an educational institution claiming exemption under *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Board will now inquire only whether the institution (a) holds itself out to the public as a religious institution, (b) is nonprofit, and (c) is religiously affiliated. Applying that test, the Board concluded that the Respondent was exempt and dismissed the underlying complaint.

1-500 – Jurisdiction Declined for Policy Considerations

KIPP Academy Charter School, 369 NLRB No. 48 (2020) (RKE): having previously granted review and invited amicus briefs on the question of whether the Board should exercise its discretion to decline jurisdiction over charter schools as a class or category of employer under Section 14(c)(1) of the Act, the Board determined it would not exercise such discretion at this time.

Baxter Academy, 01-RC-239165, rev. denied 3/30/20 (RKE): Citing *KIPP Academy*, the Board denied the Employer’s request for review of the Acting Regional Director’s decision and direction of election at this Maine charter school.

Chapter 2

Regional Directors’ Decisionmaking Authority in Representation Cases

2-300 – Other Specific Powers Under the Delegation

AM/NS Calvert, LLC, 15-RM-246203, rev. granted 6/30/20 (RKE): See 23-530.

2-500 – Board Review

See 3-890.

Chapter 3

Initial Representation Case Procedures

Representation-Case Procedures, 84 FR 69524 (Dec. 18, 2019) (RKE; Mc dissenting): The Board adopted a series of representation-case procedures significantly modifying those adopted by the Board in 2014. The amendments’ effective date was originally April 16, 2020, but was subsequently extended to May 31, 2020. See 85 FR 17500 (Mar. 30, 2020).¹ The changes now effective include:

- Defining “business day” (Sec. 102.1) and converting all time calculations in representation-case procedures to business days.

¹ GC Memo 20-07 (June 1, 2020) provides further guidance on these changes; the Board’s *Casehandling Manual (Part Two) Representation Proceedings* has also been revised to reflect these changes (see OM Memo 20-16 (September 17, 2020)).

- Setting a default schedule of 14 business days from the Notice of Hearing to the conduct of the hearing, with postponements available upon a showing of good cause. Sec. 102.63(a)(1).
- Increasing the time for the posting of the Notice of Petition for Election to 5 business days. Sec. 102.63(a)(2).
- Requiring the petitioner to submit a written Statement of Position (responding to the issues raised in the initial Statement(s) of Position) 3 business days before the hearing. Sec. 102.63(b).
- Permitting post-hearing briefs as a matter of right for both pre- and post-election hearings. Secs. 102.66(h), 102.69(c)(1)(iii).
- If a request is filed within 10 business days of a decision and direction of election and has not been ruled on when the election is conducted, ballots that could be affected by the Board’s ruling on the request for review will be automatically impounded. Sec. 102.67(c).
- Codifying practice of not permitting reply briefs except upon special leave of the Board, prohibiting piecemeal requests for review, aligning requests for extensions of time with other regulatory provisions, and aligning requirements for requests for review filed under Sec. 102.67, 102.69, and 102.71. Sec. 102.67(f), (i)(1), (3), (g); 102.71(c).

AFL-CIO v. NLRB, 466 F. Supp. 3d 68 (D.D.C. 2020): The judge found five aspects of the 2019 representation-case amendments were unlawfully promulgated without notice and comment.² As a result, these five amendments are not currently in effect; rather, the prior versions of these rules remain in force:

- Section 102.64(a): Disputes concerning individuals’ eligibility to vote in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted (instead of parties having right to litigate most eligibility and inclusion issues before election).
- Section 102.67(b): The Regional Director still schedules the election for “earliest date practicable” (instead of normally not doing so before the 20th business day after the date of the direction of election).
- Section 102.62(d) and 102.67(l): Employers are still required to furnish the voter list to the Regional Director and other parties within 2 business days of the issuance of a direction of election/approval of election agreement (instead of 5 business days).
- Section 102.69(a)(5): A party may be represented by observers of its own selection subject to such limitations as the Regional Director may prescribe (instead of limiting selection to individuals who are current members of voting unit whenever possible).
- Section 102.69(b)(c): Regional Directors retain the authority to issue certifications notwithstanding the pendency or possible filing of a request for review (as opposed to prohibiting certifications from issuing if a request for review is pending or before the time has passed during which a request for review could be filed).

Representation-Case Procedures: Voter List Contact Information; Absentee Ballots for Employees on Military Leave, 85 FR 45553 (July 29, 2020): The Board proposed amending its Rules and Regulations to eliminate the requirement that employers provide available personal

² Following AFL-CIO’s motion for reconsideration, the judge found that the other provisions were sufficiently reasoned and did not violate the NLRA. See 471 F. Supp. 3d. 228 (D.D.C. 2020).

email addresses and home and cellular telephone numbers of all eligible voters to the Regional Director and other parties during an election campaign. The Board stated its belief, subject to comments, that this amendment would advance important employee privacy interests the current rules do not sufficiently protect. The reply comment period closed on October 27, 2020.

3-200 – Submission of Showing of Interest

Valley Health System, LLC, 369 NLRB No. 16 (2020) (RKE): In this unfair labor practice case, the Respondents withdrew recognition, relying in part on email submissions which the Respondents contended complied with GC Memo 15-08, which provides guidance to Regional Offices on accepting submissions of electronic signatures to support a showing of interest for an election. The Board found that electronic submissions complying with GC Memo 15-08 can demonstrate good-faith uncertainty as to whether a union enjoys majority support and can therefore support the filing of an RM petition. But given that the Respondents had withdrawn recognition, the question was whether they had objective evidence of actual loss of majority support, which they did not; furthermore, the Board noted that the email submissions did not in fact comply with GC Memo 15-08.

3-700 – Election Agreements

In three cases, the Board denied requests for review of Regional Directors' revocation of stipulated election agreements (providing for manual elections) due to changed circumstances occasioned by the COVID-19 pandemic:

- *NorthShore University HealthSystem*, 13-RC-257168, rev. denied 4/23/20 (RKE).
- *Johnson Controls, Inc.*, 16-RC-256972, rev. denied 5/8/20 (RKE).
- *Balfour Beatty Communities, LLC*, 28-RC-256955, rev. denied 5/27/20 (RKE).

AM/NS Calvert, LLC, 15-RM-246203, rev. granted 6/30/20 (RKE): The Board reiterated that although a Regional Director can revoke a stipulated election agreement due to concerns related to COVID-19, the Regional Director does not have the authority to modify an election agreement by, as in this case, changing the election method from manual to mail-ballot.

Housing Works, Inc., 29-RC-256430, decision and order remanding 10/15/20 (RKE): The Board found that the Employer had made an affirmative showing of unusual circumstances (its operational changes occasioned by the COVID-19 pandemic) and that the Regional Director should have therefore permitted it to withdraw from the stipulated election agreement.

3-850 – Conduct of Hearing

Morrison Healthcare, 369 NLRB No. 76 (2020) (RKE): The Board granted the Employer's request for review of the Regional Director's notice of a telephonic representation hearing and, upon review, clarified that a remote hearing may be held in representation cases when compelling circumstances—such as the COVID-19 pandemic—exist, but unless the parties agree otherwise, a remote hearing must be conducted by videoconference where there is witness testimony; where there is no witness testimony, the hearing may be conducted telephonically. The Board subsequently granted review and remanded two cases for proceedings consistent with

Morrison. See *Sea World Parks & Entertainment*, 12-RC-257917, rev. granted and remanded 5/11/20 (RKE); *BASF Corp.*, 07-RC-259428, rev. granted and remanded 5/14/20 (RKE). The Board also denied review in a case where the scheduled audio-only preelection hearing did not include witness testimony. See *Touchpoint Support Services, LLC*, 07-RC-258867, rev. denied 5/18/20 (RKE).

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

Crozer-Chester Medical Center, 04-RC-257107, rev. denied 4/23/20 (RKE): The Board denied review of a request to stay an election based on the health-care employer’s obligation to maintain operations during the COVID-19 pandemic.

In a series of cases raising issues of case-processing in the context of COVID-19, the Board granted requests to stay proceedings including:

- Telephonic/Skype audio hearings: *Morrison Healthcare*, 12-RC-257857, stay granted 4/30/20 (RKE); *BASF Corp.*, 07-RC-259428, stay granted 5/4/20 (RKE).
- Elections/mailling of ballots: *NP Texas LLC*, 28-RC-261253, stay granted 7/13/20 (RKE); *Housing Works, Inc.*, 29-RC-256430, stay granted 7/29/20 (RKE); *Aspirus Keweenaw*, 370 NLRB No. 13 (2020) (RKE; Mc dissenting); *Perdue Foods, LLC*, 370 NLRB No. 20 (2020) (RKE; Mc dissenting); *ClarkWestern Dietrich Building Systems, LLC*, 01-RC-264014, rev. granted and stayed 9/16/20 (RKE; Mc dissenting); *Airgas USA, LLC*, 16-RC-262896, rev. granted in part and stayed 9/24/20 (KE; Mc dissenting); *Ecolab Production LLC*, 16-RC-264667, rev. granted and stayed 10/1/20 (KE; Mc dissenting); *JDRC Managed Services, LLC*, 25-RC-265109, rev. granted and stayed 10/13/20 (RKE).

In another series of unpublished cases, the Board noted that a request for review (or part thereof) was not a self-contained document or otherwise did not comply with Section 102.67(e):

- *Audio Visual Services Group, LLC*, 05-RC-232347, rev. denied 2/26/20 (RKE).
- *St. Louis Symphony Orchestra*, 14-RC-236036, rev. denied 3/13/20 (RKE).
- *BluePearl Vet, LLC*, 19-UC-239832, rev. denied 4/10/20 (RKE).
- *Western Wall Systems, LLC*, 28-RC-247464, rev. denied 4/16/20 (RKE).
- *DFWS Inc.*, 32-RC-248845, rev. denied 5/27/20 (RKE).
- *Walt Disney Parks and Resorts U.S.*, rev. denied 7/9/20 (RKE).
- *Allied Power Services, LLC*, 13-RC-262563, rev. denied 10/15/20 (REMc).

3-940 – Relitigation

NLRB v. RadNet Management, Inc., 818 Fed. Appx. 663 (9th Cir. 2020): The court stated that it was not arbitrary and capricious for the Board to decline to reconsider an employer’s election objections in subsequent unfair labor practice proceedings after having rejected them in the representation proceeding. The court commented that there was nothing inherently inconsistent in the Board having a regulation generally prohibiting such relitigation while also reserving some discretion not to apply the relitigation bar in special circumstances.

Rhino Northwest, LLC, 369 NLRB No. 25 (2020) (RKE): In this unfair labor practice case, the Board rejected the Respondent’s argument that the community of interest test in *PCC*

Structurals, Inc., 365 NLRB No. 160 (2017), warranted finding the unit at issue inappropriate, thus abnegating its obligation to bargain. In doing so, the Board noted that it had previously rejected the Respondent's test of certification (see 363 NLRB No. 72 (2015)), and the bargaining order had been enforced (see 867 F.3d 95 (D.C. Cir. 2017)).

Green Jobworks LLC, 369 NLRB No. 20 (2020) (RKE): see 12-210.

Alaska Communications Systems Holdings, Inc., 369 NLRB No. 17 (2020) (RKE): The Board rejected the Respondent's claim that the issuance of *Boeing Co.*, 368 NLRB No. 67 (2019), represented special circumstances warranting de novo reexamination of the underlying unit determination.

SCL Health, St. James Medical Group, Rock Mountain Clinic, 369 NLRB No. 29 (2020) (RKE): The Board rejected the Respondent's argument that *Boeing Co.*, 368 NLRB No. 67 (2019), which issued after the unit was certified, supported its contention that the unit was inappropriate, given that the issuance of *Boeing* did not create any new issues.

Browning-Ferris Industries of California, 369 NLRB No. 139 (2020) (RKE): The Board found that it would be a manifest injustice to apply what was the then-new joint employer standard retroactively in this case, and under the prior joint-employer standard no joint-employer relationship had been shown. The Board therefore dismissed the technical 8(a)(5) charge and amended the certification to remove Respondent employer. The Board denied a motion for reconsideration at 370 NLRB No. 86 (2021) (KR; Mc dissenting).

Chapter 5 **Showing of Interest**

5-600 – Quantitative Sufficiency

HMH Residential Care, Inc., 22-RD-243803, rev. granted 4/6/20 (KE; R recused): The Board reversed the Regional Director's dismissal of a decertification petition supported by an insufficient showing of interest, finding that the Regional Director had improperly required the instant Petitioner to secure the authorization of a prior petitioner (who had filed a decertification petition in the same unit just two weeks before the instant petition) to use that earlier petitioner's showing of interest. The Board observed that decertification petitioners do not possess an individual interest in the proceedings, but merely stand in the shoes of the employees wishing to decertify the union, and the Regional Director therefore should have focused on the wishes of the unit employees.

5-630 – Employer Petitions

Valley Health System, LLC, 369 NLRB No. 16 (2020) (RKE): See 3-200.

ASARCO, LLC, 28-RM-255301, rev. denied 7/6/20 (RKE): See 7-220.

Chapter 7

Existence of a Representation Question

7-220 – RM Petitions/Incumbent Unions

Valley Health System, LLC, 369 NLRB No. 16 (2020) (RKE): See 3-200.

ASARCO, LLC, 28-RM-255301, rev. denied 7/6/20 (RKE): The Board indicated a willingness to consider whether and under what circumstances a decline in union membership may be relied on to establish a good-faith reasonable uncertainty in support of a RM petition.

7-320 – The Unit in Which the Decertification Election is Held

NBC Universal Media LLC, 369 NLRB No. 134 (2020) (RKE): Although not a decertification case, in the unit clarification context the Board has now held that, in order to demonstrate that a merger of units has occurred, the alleging party must show an “unequivocal manifestation of an intent” to merge the units.

Chapter 9

Contract Bar

Mountaire Farms, Inc., 05-RD-256888, rev. granted 6/23/20, Notice and Invitation to File Briefs 7/7/20 (RKE): The Board granted review of the Regional Director’s Decision and Direction of Election (which had determined that a contract was not a bar to an election due to an unlawful clause), finding merit to the Petitioner’s contention that it was appropriate for the Board to undertake a general review of the contract bar doctrine. The Board subsequently invited briefing on whether it should rescind the doctrine, retain it, or retain it with modifications. On the last count, the Board invited parties to address the formal requirements for according bar quality to a contract, the circumstances in which an allegedly unlawful clause will prevent a contract from serving as a bar, the duration of the bar period, and how changed circumstances during the term of a contract may affect its bar quality.

9-1000 – Special Statutory Provisions as to Prehire Agreements

Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships, 85 FR 18366 (Apr. 1, 2020): This Final Rule modified the Board’s policy in this area by providing that, in order to prove the establishment of a Section 9(a) relationship in the construction industry and the existence of a contract bar to an election, extrinsic evidence is required to demonstrate that recognition was based on a contemporaneous showing of majority employee support. The Final Rule included clarifications of the original proposal. The Final Rule took effect on May 31, 2020 (see 85 FR 20156 (Apr. 10, 2020)); the relevant provisions are set forth in Section 103.22 of the Board’s Rules and Regulations.³

³ GC Memo 20-11 (July 30, 2020) provides further guidance on these changes.

Chapter 10

Prior Determinations and Other Bars to an Election

10-500 – Recognition Bar and Successor Bar

Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships, 85 FR 18366 (Apr. 1, 2020): This Final Rule modified the Board’s recognition-bar policy. Per the Board’s original proposal, the Final Rule reestablishes a notice requirement and 45-day open period for filing an election petition following an employer’s voluntary recognition of a labor organization as the employees’ majority-supported exclusive collective-bargaining representative under Section 9(a). The Final Rule contained a number of clarifications of and changes to the original proposal. The Final Rule took effect on May 31, 2020 (see 85 FR 20156 (Apr. 10, 2020)); the recognition-bar provisions are set forth in Section 103.21 of the Board’s Rules and Regulations.⁴

10-700 – Contracting Units and Cessation of Operations

NP Texas LLC, 370 NLRB No. 11 (RKE): See 23-115.

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

Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships, 85 FR 18366 (Apr. 1, 2020): This Final Rule modified the Board’s blocking charge policy. The Board originally proposed a rule that would institute a vote-and-impound procedure, but the Final Rule instead requires impoundment only for certain types of blocking charges alleging violations of Section 8(a)(1), 8(a)(2), and 8(b)(1)(A). The Final Rule otherwise provides that ballots will be opened and counted, but for all types of charges no certification will issue until final disposition of the charge and its effect, if any, on the election process. The Final Rule took effect on May 31, 2020 (see 85 FR 20156 (Apr. 10, 2020)); the blocking-charge provisions are set forth in Section 103.20 of the Board’s Rules and Regulations.⁵

Arakelian Enterprises, Inc., 31-RD-223309, rev. denied 9/22/20 (KEMc): The Board stated that the changes to the blocking charge policy described above do not apply to petitions filed before the effective date.

⁴ GC Memo 20-11 (July 30, 2020) provides further guidance on these changes.

⁵ GC Memo 20-11 (July 30, 2020) provides further guidance on these changes.

Chapter 11

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

11-200 – Unit Clarification (UC) Generally

NBC Universal Media LLC, 369 NLRB No. 134 (2020) (RKE): In considering whether separately-certified or recognized bargaining units had merged to form a single unit such that the Petitioner represented a single nationwide unit (which it could clarify to include the newly-created classification of content producer), the Board held that in order to demonstrate that a merger of units has occurred, the alleging party must show an “unequivocal manifestation of an intent” to merge the units. The Board overruled precedent to the contrary, applied the standard retroactively, and found that the evidence did not establish the requisite unequivocal intent to merge the separate units into a single nationwide unit.

Teamsters Local 743, 13-UC-239758, rev. granted and remanded 3/12/20 (RKE): The Board granted review of the Regional Director’s dismissal of the petition, finding that although, as stated in his dismissal, the Attorney classification was historically excluded from the unit, there was no dispute on that count and accordingly the finding did not resolve whether the petitioned-for Attorney-Senior Representative classification—which the parties appeared to agree was a distinct classification—has been historically excluded or whether the petition should be dismissed on some other basis. Noting certain other apparent factual issues, the Board remanded the case for a hearing.

AMR of Maricopa, LLC, 28-UC-223664, rev. granted and remanded 7/10/20 (RKE): The Board affirmed the Regional Director’s dismissal of a RM petition given that none of the three unions that represented the three existing bargaining units had presented a demand for recognition in the unit sought in the RM petition, but found that the Regional Director’s dismissal of the UC petition under accretion principles was misplaced because there was no question of accretion; rather, the Employers contended that the three existing units had been rendered inappropriate by organizational changes and sought to reconfigure them into two units. The Board found that, consistent with *Rock-Tenn Co.*, 274 NLRB 772 (1985), there had been recent and substantial organizational changes and remanded to the Regional Director to apply the Board’s traditional community of interest test to determine whether those changes rendered the three existing units inappropriate.

Chapter 12

Appropriate Unit: General Principles

12-210 – Community of Interest

Dillon Companies, Inc. v. NLRB, 809 Fed. Appx. 1 (D.C. Cir. 2020): The court rejected the employer’s argument that the Board’s direction of a self-determination election to determine whether a voting group of deli employees wished to join an existing unit of meat department employees departed from *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017), and *Boeing Co.*,

368 NLRB No. 67 (2019), noting that these decisions do not address self-determination elections, but instead the different question of whether the smallest appropriate unit must include employees excluded from the petitioned-for unit. See also 21-500.

Green Jobworks LLC, 369 NLRB No. 20 (2020) (RKE): The Board concluded that although the unit determination (applying *Specialty Healthcare*) was reached before *PCC Structural*s issued, retroactive application of *PCC Structural*s would not work a manifest injustice here, and therefore remanded the representation case for further appropriate action, including analyzing the appropriateness of the unit under *PCC Structural*s.

Rhino Northwest, LLC, 369 NLRB No. 25 (2020) (RKE): See 3-940.

Audio Visual Services Group, LLC, 05-RC-232347, rev. denied 2/26/20 (RKE): The Board noted that following the filing of the request for review of the Acting Regional Director's determination that the petitioned-for unit of riggers was appropriate, the Board had issued *The Boeing Co.*, 365 NLRB No. 160 (2017). The Board found that although the Acting Regional Director had not expressly applied the three-step *Boeing* framework, the record demonstrated that the riggers had a strong internal community of interest (step 1), that the Acting Regional Director had considered whether the riggers had a sufficiently distinct community of interest (step 2), and that there were no industry-specific guidelines to consider (step 3).

Macy's West Stores, Inc., 32-RC-246415, rev. denied 5/27/20 (RKE): In denying review, the Board clarified that where no party asserts that the smallest appropriate unit must include employees excluded from the petitioned-for unit, it is not necessary to consider whether the petitioned-for employees possess a sufficiently distinct community of interest (*Boeing* step 2).

Chapter 13 Multilocation Employers

FreshPoint Southern California, Inc., 28-RC-252613, rev. granted and remanded 6/18/20 (RKE): See 21-500.

Chapter 14 Multiemployer, Single Employer, and Joint Employer Units

14-600 – Joint Employer

Joint Employer Status Under the National Labor Relations Act, 85 FR 11184 (Feb. 26, 2020): The Board issued this Final Rule under which an entity may be considered a joint employer of a separate employer's employees only if the two share or codetermine the employees' essential terms and conditions of employment, which are exclusively defined as wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction. The Final Rule took effect April 27, 2020.

Browning-Ferris Industries of California, 369 NLRB No. 139 (2020) (RKE): See 3-940.

Chapter 15 **Specific Units and Industries**

15-170 – Hotels and Motels

Davidson Hotel Co., LLC v. NLRB, 977 F.3d 1289 (D.C. Cir. 2020): The court held that in certifying a unit of housekeeping employees and a separate unit of food and beverage employees at this hotel, the Board had failed to distinguish contrary precedents (namely *Ramada Beverly Hills*, 278 NLRB 691 (1986), and *Atlanta Hilton & Towers*, 273 NLRB 87 (1984)), as well as an earlier decision by the Regional Director. The court emphasized that the Board could reach a different conclusion than the Regional Director’s earlier decision, that it was not requiring the Board to distinguish every case cited by a party, or that there was a specific way the Board had to explain its prior decisions—but faced with contrary precedent directly on point, the Board must distinguish it.

15-260 – Universities and Colleges

Elon University, 10-RC-231745, rev. granted 4/13/20 (RKE): See 19-200.

Chapter 17 **Statutory Exclusions**

17-400 – Independent Contractors & 17-410 – Trucking Industry

Intermodal Bridge Transport, 369 NLRB No. 37 (2020) (RKE): Applying *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), which had issued after the judge’s decision in this unfair labor practice case, the Board agreed with the judge that the Respondent had not established that its drivers are independent contractors.

Nolan Enterprises, Inc., 370 NLRB No. 2 (2020) (RKE): Applying *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), the Board agreed with the judge that the Respondent had not established that the Charging Party dancer was an independent contractor. In particular, the Board emphasized that the judge had properly assessed the common-law factors through the prism of entrepreneurial opportunity.

17-500 – Supervisors

17-511 – Independent Judgment

International Brotherhood of Electrical Workers v. NLRB, 973 F.3d 451 (5th Cir. 2020): The court held that substantial evidence supported the Board’s conclusion that electricity dispatchers exercised independent judgment in assigning field employees to places. The court rejected the

union's contentions that the Board had ignored contrary evidence, that the Board had erroneously focused on the dispatchers' prioritization of outages, and that the Board had erred in failing to address the fact that dispatchers did not assess the skills of field employees in making assignment decisions. See also 17-521.

DH Long Point Management LLC, 369 NLRB No. 18 (2020) (RKE): In this unfair labor practice case, the Board agreed with the judge that the Respondent had not demonstrated that a putative supervisor exercised independent judgment in assignment and/or direction.

Horseshoe Bossier City Hotel & Casino, 369 NLRB No. 80 (2020) (RKE): The Board adopted the judge's finding, in this unfair labor practice case, that the Respondent had not established the supervisory status of its dual-rate dealers, including his conclusion that, because the dual-rate dealers relied upon highly-detailed rules, policies, and procedures they did not exercise independent judgment in directing dealers on game play issues.

STP Nuclear Operating Co. v. NLRB, 975 F.3d 507 (5th Cir. 2020): See 17-521 and -522.

HNY Ferry, LLC, 02-RC-230811, rev. denied 1/21/20 (RKE): In denying review of the Regional Director's decision that boat captains are not supervisors, the Board relied on a lack of evidence showing that the captains used independent judgment with respect to any Section 2(11) function. The Board also found that the case was distinguishable from earlier boat captain/mate supervisory cases that the employer was urging the Board to overrule, and that this case did not present an appropriate vehicle to revisit those precedents.

Oracle Elevator Holdco, Inc., 25-RC-248645, rev. granted 9/30/20 (RK; E dissenting): The Board granted review and reversed the Regional Director's finding that an individual was a statutory supervisor; the Board found that the evidence did not establish the putative supervisor could assign, evaluate, adjust grievances, or effectively recommend assignment and hiring using independent judgment. Member Emanuel would have found the evidence established the putative supervisor's authority to assign and/or effectively recommend assignment of work.

17-513 – Power Effectively to Recommend

Bluepearl Vet, LLC, 19-UC-239832, rev. denied 4/10/20 (RKE): See 17-523.

Oracle Elevator Holdco, Inc., 25-RC-248645, rev. granted 9/30/20 (RK; E dissenting): See 17-511.

17-521 – Assign

International Brotherhood of Electrical Workers v. NLRB, 973 F.3d 451 (5th Cir. 2020): In the latest iteration of this long-running dispute, the Board had held that because electricity dispatchers' decisions during outages resulted in sending particular field employees to particular places, the dispatchers "undisputedly" assigned employees to places within the meaning of *Oakwood Healthcare*. On review, the court agreed with the union that the Board had failed to meaningfully engage with the scope of assignment powers under *Oakwood* given the allegedly

temporary nature of these assignments or the dispatchers' inability to require certain conduct. But the court also excused the Board's cursory treatment of the issue because the union had failed to adequately raise this argument in its most recent brief to the Board and that it was accordingly barred by Section 10(e).

DH Long Point Management LLC, 369 NLRB No. 18 (2020) (RKE): See 17-511.

STP Nuclear Operating Co. v. NLRB, 975 F.3d 507 (5th Cir. 2020): The court reversed the Board and found that the employer's maintenance supervisors assign work using independent judgment. The court focused on evidence that maintenance supervisors have significant input in the creation of work schedules, temporarily reassign employees between crews without managerial oversight, delegate tasks to crews based on assessment of crew members' skills and certifications, and assign limited amounts of overtime.

Oracle Elevator Holdco, Inc., 25-RC-248645, rev. granted 9/30/20 (RK; E dissenting): See 17-511.

17-522 – Responsibly Direct

DH Long Point Management LLC, 369 NLRB No. 18 (2020) (RKE): See 17-511.

Horseshoe Bossier City Hotel & Casino, 369 NLRB No. 80 (2020) (RKE): See 17-511.

STP Nuclear Operating Co. v. NLRB, 975 F.3d 507 (5th Cir. 2020): The court reversed the Board and found that the employer's unit supervisors at a nuclear power plant responsibly direct work, relying on federal regulations stating unit supervisors are equipped to direct the activities of operators; testimony that unit supervisors use judgment, experience, and training to determine the order of tasks and who will perform them and to respond to situations that arise at the facility; evidence that unit supervisors take corrective action in response to employee mistakes; and evidence that they face adverse consequences for the actions of their subordinates. The court held that the existence of procedures the unit supervisors followed did not remove the need for them to use independent judgment in these areas.

17-523 – Discipline, Discharge, and Suspension

Bluepearl Vet, LLC, 19-UC-239832, rev. denied 4/10/20 (RKE): in denying review of Regional Director's finding that certain classifications were not statutory supervisors, Board stated that it would be open to reconsidering extant Board law on effective recommendation of discipline in a future appropriate case.

17-524 – Hire

Oracle Elevator Holdco, Inc., 25-RC-248645, rev. granted 9/30/20 (RK; E dissenting on other grounds): See 17-511.

17-525 – Adjust Grievances

Oracle Elevator Holdco, Inc., 25-RC-248645, rev. granted 9/30/20 (RK; E dissenting on other grounds): See 17-511.

17-526 – Reward/Evaluate

Oracle Elevator Holdco, Inc., 25-RC-248645, rev. granted 9/30/20 (RK; E dissenting on other grounds): See 17-511.

Chapter 18 Statutory Limitations

18-200 – Plant Guards

International Union of Operating Engineers Local 501 v. NLRB, 949 F.3d 477 (9th Cir. 2020): The court agreed with the Board that the employer’s slot technicians are not guards within the meaning of Sec. 9(b)(3) of the Act and granted the Board’s cross-application for enforcement. In doing so, the court distinguished the D.C. Circuit’s finding that casino surveillance technicians were guards in *Bellagio, LLC v. NLRB*, 863 F.3d 839 (D.C. Cir. 2017), and commented that finding the slot technicians were guards “would characterize virtually all employees working on the casino floor as guards.”

NLRB v. RadNet Management, Inc., 818 Fed. Appx. 663 (9th Cir. 2020): See 22-112.

Chapter 19 Categories Governed by Board Policy

19-200 – Managerial Employees

Elon University, 10-RC-231745, rev. granted 4/13/20 (RKE): The Board granted review as the Acting Regional Director’s Decision and Direction of Election in a unit of nontenure-track faculty raised a substantial issue with respect to the continued application of the Board’s “majority status rule” as articulated in *Pacific Lutheran University*, 361 NLRB 1404 (2014). The Board (KER; Mc concurring) ultimately decided to modify *Pacific Lutheran* and adopt the alternative framework set forth in *University of Southern California v. NLRB*, 918 F.3d 126 (D.C. Cir. 2019), under which the determination of managerial status of a subgroup of faculty members, based on their participation in a collegial faculty body, involves asking (1) whether a faculty body exercises effective control over relevant areas of decision-making, and (2) whether, based on the faculty’s structure and operations, the petitioning subgroup is included in that managerial faculty body. See 370 NLRB No. 91 (2021).

Horseshoe Bossier City Hotel & Casino, 369 NLRB No. 80 (2020) (RKE): Although the judge in this unfair labor practice case had not addressed the Respondent’s contention that its dual-rate dealers are managerial, the Board rejected it, finding the Respondent had not shown as much, particularly given that the dual-rate dealers did not control the Respondent’s labor costs (and their monitoring of cash flow based on federal regulations is not indicative of managerial status).

Chapter 20

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

20-100 – Part-Time Employees

NLRB v. Wang Theatre, Inc., 981 F.3d 108 (1st Cir. 2020): In this case, the Regional Director had directed an election in a unit of local musicians the employer occasionally sourced to producers mounting productions at the employer’s theatre. Per the court, it was uncontested that, if the *Davison-Paxon* test was applied for eligibility purposes, there were no employees in the proposed unit, but the Regional Director had applied the more expansive *Juilliard* formula, under which there were eligible voters. The court concluded, however, that the use of the *Juilliard* formula was contrary to a number of Board precedents which confined use of the formula to factual circumstances not present here and which the Board had not distinguished or addressed. The court therefore found it was error not to apply the *Davison-Paxon* test, and because there were no eligible voters under that test the court vacated the Board’s underlying orders, without remand.

20-400 – Student Workers

Jurisdiction-Nonemployee Status of University and College Students Working in Connection With Their Studies, 84 Fed Reg 49691 (9/23/19) (RKE; Mc dissenting): The Board proposed a rule establishing that students who perform any services for compensation at a private college or university in connection with their studies are not “employees” within the meaning of Section 2(3) of the Act. The reply comment period closed on December 31, 2019.

Chapter 21

Self-Determination Elections

21-500 – Inclusion of Unrepresented Groups

Dillon Companies, Inc. v. NLRB, 809 Fed. Appx. 1 (D.C. Cir. 2020): The court found that substantial evidence supported the Board’s conclusion that the petitioned-for voting group of deli employees constituted an “identifiable, distinct” segment and shared a community of interest with employees in the existing unit of meat department employees, and that a self-determination election was therefore appropriate. The court also rejected the employer’s argument that the Board’s decision departed from *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017), and *Boeing Co.*, 368 NLRB No. 67 (2019).

FreshPoint Southern California, Inc., 28-RC-252613, rev. granted and remanded 6/18/20 (RKE): The Board granted review and remanded the case to the Regional Director for further analysis addressing the propriety of the self-determination election he had directed to determine whether drivers at the Employer's Las Vegas facility wished to be added to an existing unit of drivers at 7 Southern California facilities. The Board directed the Regional Director to determine if the resulting unit would include all of the employer's facilities and how that would bear on the appropriateness of a self-determination election (including whether it would result in a presumptively appropriate employer-wide unit), and also to revisit his prior application of the Board's multi-facility community-of-interest test and make specific findings on the relevant factors.

Chapter 22

Representation Case Procedures Affecting the Election

Representation-Case Procedures, 84 FR 69524 (Dec. 18, 2019) (RKE; Mc dissenting): see Chapter 3. Changes to post-election procedures that have taken effect include provision that parties may file post-hearing briefs with the hearing officer after post-election hearings.

22-103 – The Question and Choices on the Ballot

NLRB v. RadNet Management, Inc., 818 Fed. Appx. 663 (9th Cir. 2020): The court held that the employer had waived its objection that voters were not told of a purported affiliation between the petitioning union and another union because the employer had stipulated to the ballots' form in advance of the elections.

22-110 – Mail Ballots

AM/NS Calvert, LLC, 15-RM-246203, rev. granted 6/30/20 (RKE): See 23-530.

In several cases (involving mail-ballot determinations made prior to the eruption of the COVID-19 pandemic), the Board stated that it was open to addressing the criteria for mail balloting in a future appropriate proceeding (an openness the Board has continued to articulate in COVID-19-related mail-ballot cases):

- *EIHAB Human Services, Inc.*, 29-RC-245133, rev. denied 4/15/20 (RKE).
- *Western Wall Systems, LLC*, 28-RC-247464, rev. denied 4/16/20 (RKE).

Atlas Pacific Engineering Co., 27-RC-258742, rev. denied 5/8/20 (RKE): The Board denied review of a mail-ballot determination the Regional Director had ordered due to the extraordinary circumstances occasioned by the COVID-19 pandemic. In doing so, the Board noted extraordinary government directives limiting travel and business, as well as the fact the regional office had been placed on mandatory telework. The Board denied review and offered similar comment in a series of cases decided between May and October:

- *Touchpoint Support Services, LLC*, 07-RC-258867, rev. denied 5/18/20 (RKE).
- *Johnson Controls, Inc.*, 16-RC-256982, rev. denied 5/18/20 (RKE).
- *Roseland Community Hospital*, 13-RC-256995, rev. denied 5/26/20 (RKE).

- *Seminole Electric Cooperative, Inc.*, 12-RC-256815, rev. denied 5/28/20 (RKE).
- *2101 LLC*, 19-RC-258144, rev. denied 5/28/20 (RKE).
- *Twinbrook Health & Rehabilitation Center*, 06-RC-257382, rev. denied 6/5/20 (RKE).
- *Vistar Transportation, LLC*, 09-RC-260125, rev. denied 6/12/20 (RKE).
- *TDS Metrocom, LLC*, 18-RC-260318, rev. denied 6/23/20 (RKE).
- *Roseland Community Hospital*, 13-RC-259788, rev. denied 6/25/20 (RKE).
- *Brink's Global Services USA, Inc.*, 29-RC-260969, rev. denied 7/14/20 (RKE).
- *SunSteel, LLC*, 19-RC-261730, rev. denied 8/4/20 (RKE).
- *Pace Southeast Michigan*, 07-RC-257046, rev. denied 8/7/20 (RKE).
- *Antioch Tire, Inc.*, 13-RC-263043, rev. denied 8/19/20 (RKE).
- *Daylight Transport, LLC*, 31-RC-262633, rev. denied 8/19/20 (RKE).
- *Rising Ground*, 02-RC-264192, rev. denied 9/8/20 (RKE).
- *Sea World of Florida*, 12-RC-257917, rev. denied 9/22/20 (RKE).
- *Savage Services Corp.*, 21-RD-264617, rev. denied 10/1/20 (KEMc).
- *Jersey Shore University Medical Center*, 22-RC-263932, rev. denied 10/1/20 (KeMc).
- *Quickway Transportation, Inc.*, 09-RC-257491, rev denied 10/26/20 (REMc).

Starting with *Aspirus Keweenaw*, 370 NLRB No. 13 (2020) (RKE; Mc dissenting), the Board granted review of mail ballot determinations in a series of cases (and stayed an election in most of them, see 3-890):

- *Perdue Foods, LLC*, 370 NLRB No. 20 (2020) (RKE; Mc dissenting)
- *ClarkWestern Dietrich Building Systems, LLC*, 01-RC-264014, rev. granted 9/16/20 (RKE; Mc dissenting)
- *Airgas USA, LLC*, 16-RC-262896, rev. granted in part 9/24/20 (KE; Mc dissenting)
- *Ecolab Production LLC*, 16-RC-264667, rev. granted 10/1/20 (KE; Mc dissenting)
- *CR&R Inc.*, 21-RC-262569, rev. granted 10/9/20 (RE; Mc dissenting)
- *JDRC Managed Services, LLC*, 25-RC-265109, rev. granted 10/13/20 (RKE)

Aspirus Keweenaw, 370 NLRB No. 45 (2020) (RKE; Mc concurring): The majority reiterated the Board's longstanding preference for elections to be conducted manually but also set forth six situations that will normally suggest the propriety of using mail ballots under the extraordinary circumstances presented by the COVID-19 pandemic: (1) the Agency office tasked with conducting the election is operating under "mandatory telework" status; (2) either the 14-day trend in the number of new confirmed cases of Covid-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher; (3) the proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size; (4) the employer fails or refuses to commit to abide by the protocols set forth in GC Memo 20-10; (5) there is a current Covid-19 outbreak at the facility or the employer refuses to disclose and certify its current status; and (6) other similarly compelling considerations. The Board remanded the case to the Regional Director in order to apply the new framework in the first instance.⁶ Concurring, then-Member McFerran stated that the Board should stop treating mail-

⁶ The Board similarly remanded *Ecolab Production, LLC*, 16-RC-264667, order 11/18/20 (RKEMc); *Perdue Foods*, 19-RC-263822, order 11/18/20 (RKEMc); and *Airgas USA, LLC*, 16-RC-262896, order 11/24/20 (RKMMc). In

ballot elections as deviations that must be justified on a case-by-case basis but should (a) at least until the pandemic is over, adopt a default presumption that mail-ballot elections are appropriate, and (b) consider expanding and normalizing other ways to conduct representation elections on a permanent basis, including mail, telephone, and electronic voting.

Following the issuance of *Aspirus Keweenaw*, the Board upheld of a series of mail-ballot determinations, finding that one or more of the *Aspirus Keweenaw* factors had been present at the time of the mail-ballot determination, that the determination was consistent with the concerns articulated in *Aspirus Keweenaw*, that setting aside an election already held would result in wasted resources and delay and would be a disservice to voters who had cast their ballots in good faith, and/or that conditions at the time of the Board's order would support a mail-ballot election were the election set aside and a new determination made now (*Aspirus Keweenaw* factors touched on are indicated):

- *CR&R Inc.*, 21-RC-262469, decision on review and order 11/24/20 (REMc) (factor 2).
- *Union Tank Car Co.*, 12-RC-221465, rev. denied 11/18/20 (RKM) (factor 2).
- *Flex-N-Gate Chicago, LLC*, 13-RC-265966, rev. denied 11/23/20 (REMc) (factor 2).
- *Lazarus Energy Holdings, LLC*, 16-RC-266439, rev. denied 11/24/20 (REMc) (factor 2).
- *Bunge Milling, LLC*, 25-RC-262150, rev. denied 11/25/20 (RKM) (factor 2).
- *The Riverview Nursing Facility, LLC*, 14-RC-265356, rev. denied 11/30/20 (REMc) (factor 2).
- *Hearthside Food Solutions, LLC*, 08-RC-264349, rev. denied 12/1/20 (REMc) (factors 2, 3, and 5).
- *Enel North America, Inc.*, 32-RC-259399, rev. denied 12/3/20 (RKE) (factor 1).

22-111 - Absentee Ballots

Representation-Case Procedures: Voter List Contact Information; Absentee Ballots for Employees on Military Leave, 85 FR 45553 (July 29, 2020): The Board proposed amending its Rules and Regulations providing for absentee ballots for employees who are on military leave. The Board stated its belief, subject to comments, that it should seek to accommodate voters serving the United States in the Armed Forces in light of congressional policies facilitating their participation in federal elections and protecting their employment rights. The Board stated its further belief, subject to comments, that a procedure for providing such voters with absentee ballots can be instituted without impeding the expeditious resolution of representation elections. The reply comment period closed on October 27, 2020.

22-112 – Challenges

NLRB v. RadNet Management, Inc., 818 Fed. Appx. 663 (9th Cir. 2020): The court held that the Employer had waived its objection to the inclusion of statutory guards in the bargaining unit by failing to challenge the purported guards as voters before or during the election.

ClarkWestern, 01-RC-264014, and *JDRC*, 25-RC-265109, the regional directors had already requested remand after the Board had granted review.

22-119 – Hearing on Objections

NLRB v. RadNet Management, Inc., 818 Fed. Appx. 663 (9th Cir. 2020): The court concluded that a hearing office had not erred by refusing to enforce certain employer subpoenas (seeking supposedly-false police reports filed by the union) and then closing the evidentiary record without waiting for responses to the subpoenas, as these were mere fishing expeditions.

Chapter 23 Voting Eligibility

23-113 – Discharged Employees

Kumho Tires, 10-RC-246475, rev. denied 7/17/20 (RKE): In denying review, the Board reaffirmed the principles of *Choc-ola Bottlers, Inc.*, 192 NLRB 1247 (1971).

23-115 – Laid-Off Employees

NP Texas LLC, 370 NLRB No. 11 (2020) (RKE): The Board concluded that because the Employer had, due to the COVID-19 pandemic, indefinitely suspended its operations and laid off all its employees without any indication of when it would resume operations and/or recall the employees (aside from vague and hopeful statements), none of the petitioned-for employees had a reasonable expectation of recall and, accordingly, there were no eligible voters that could vote in any election held in the foreseeable future. The Board therefore dismissed the petition, without prejudice and subject to reinstatement when the Employer resumes normal operations.

23-120 – Economic Strikers, Locked Out Employees, and Replacements

Charter Communications, 02-RD-220036, rev. granted and remanded 3/19/20 (RKE): The Board granted the union's request for review of the Regional Director's overruling of challenges to ballots cast by 581 strike replacement employees and sustaining challenges to the ballots of 651 strikers. The Board noted that the passage of more than 12 months since the start of the strike does not, by itself, show the 581 replacement employees were permanent replacements or that the 651 strikers had been permanently replaced, and that the Regional Director had not addressed the necessary evidence or legal analysis to resolve these issues. The Board also concluded that the Regional Director needed to consider the union's assertion that the employer was operating with 300 fewer employees than were employed at the start of the strike, as well as whether the employer had established that 117 strikers had voluntarily separated from its employ. The Board accordingly remanded for further proceedings.

23-400 – Special Formulas for Specific Industries & 23-460 – Entertainment Industries

NLRB v. Wang Theatre, Inc., 981 F.3d 108 (1st Cir. 2020): See 20-100.

23-510 – Voting List (Excelsior)

Representation-Case Procedures: Voter List Contact Information; Absentee Ballots for Employees on Military Leave, 85 FR 45553 (July 29, 2020): See Chapter 3.

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

NLRB v. RadNet Management, Inc., 818 Fed. Appx. 663 (9th Cir. 2020): See 22-103.

See also 3-700.

Chapter 24 Interference With Elections

24-110 – Objection Period

Dolgencorp, LLC v. NLRB, 950 F.3d 540 (8th Cir. 2020): The court found that substantial evidence supported the Board’s determination that one employee’s threat to slash the tires of another employee was made (if at all) before the critical period and further found that the employer had not preserved its argument that the Board had erroneously applied the *Ideal Electric* principle to this conduct.

Troutbrook Co. v. NLRB, 801 Fed. Appx. 781 (D.C. Cir. 2020): The court upheld the Board’s determination that conduct that occurred prior to a first election fell outside the critical period for the rerun election at issue and rejected the employer’s contention that an exception to the critical period rule applied.

Wayne/Scott Fetzer Co., 25-RD-256161, rev. denied 9/24/20 (RKE): In denying review, Members Kaplan and Emanuel commented that there may be an important issue to be considered in a future case about whether the critical-period policy set forth in *Ideal Electric* adequately protects employees from election interference by coercive threats made immediately prior to the filing of a petition.

24-130 – Duty to Provide Evidence of Objections

East Valley Glendora Hospital, LLC v. NLRB, 807 Fed. Appx. 685 (9th Cir. 2020): The Court found that the Board had not abused its discretion in affirming the Regional Director’s denial of a hearing on a series of objections alleging prounion supervisory conduct, concluding that the objections and offer of proof did not sufficiently allege conduct amounting to coercion or interference, or that materially affected the outcome of the election. The court similarly concluded that even assuming the employer had preserved its objection to the union’s use of a statutory supervisor as its observer, its offer of proof was insufficient as it had not identified the supervisor, had not listed facts supporting that individual’s supervisory status, or provided any specificity to the facts underlying the objection. Dissenting, Judge Bumatay would have remanded the objection concerning the observer for hearing.

24-220 – Party vs. Third-Party Conduct

Dolgenercorp, LLC v. NLRB, 950 F.3d 540 (8th Cir. 2020): The court found that substantial evidence supported the Board’s conclusion that the employer failed to establish an agency relationship under a theory of apparent authority. See also 24-320.

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

First American Enterprises, 369 NLRB No. 45 (2020) (RKE): In this consolidated case, the Board adopted the judge’s recommendation to set the election aside based on the Respondent’s unfair labor practices (including a new “resident-centered” conversation policy, threatening statements made when disseminating the policy, and instructing an employee to “work on” getting an employee to vote against the union).

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

NLRB v. RadNet Management, Inc., 818 Fed. Appx. 663 (9th Cir. 2020): The court commented that the Regional Director had reasonably concluded that a single allegation of one prounion employee “cornering” another and urging the other to sign a union petition would not establish the “tendency to interfere” with employees’ freedom of choice.

24-243 – Narrowness of the Election Results & 24-244 – Dissemination

First American Enterprises, 369 NLRB No. 45 (2020) (RKE): In finding the Respondent’s unfair labor practices warranted setting aside the election, the judge noted the closeness of the election and the dissemination of the unlawful conduct.

24-301 – Threats

Dolgenercorp, LLC v. NLRB, 950 F.3d 540 (8th Cir. 2020): See 24-110.

Wayne/Scott Fetzer Co., 25-RD-256161, rev. denied 9/24/20 (RKE): See 24-110.

First American Enterprises, 369 NLRB No. 45 (2020) (RKE): See 24-241.

24-320 – Third-Party Conduct

Dolgenercorp, LLC v. NLRB, 950 F.3d 540 (8th Cir. 2020): Assessing an employee’s conduct (the offer of an unconditional \$100 loan to another employee) under the standard for nonthreatening third-party conduct, the court concluded that the Board had properly determined that the offer did not “substantially impair” the other employee’s free choice in the election. In this regard, the court noted that the loan offer was not conditioned on union support.

24-330 – Prounion Supervisory Conduct

East Valley Glendora Hospital, LLC v. NLRB, 807 Fed. Appx. 685 (9th Cir. 2020): See 24-130.

24-410 – Board Agent Conduct

NLRB v. RadNet Management, Inc., 818 Fed. Appx. 663 (9th Cir. 2020): The court found that the purported failure of the Board agent conducting the election to explain to some voters that votes would not be kept secret in unusual circumstances did not call into question the fairness and validity of the election.

NP Lake Mead LLC, 28-RC-245493, rev. granted and remanded 2/20/20 (RKE): The Board granted review of the Regional Director’s decision to sustain an objection (alleging that a Board agent’s interactions with an individual in the polling place warranted setting the election aside) without a hearing, stating that the conduct had to be analyzed under *Polymers, Inc.*, 174 NLRB 282 (1969), which requires more than speculative harm to overturn an election. The Board therefore found it appropriate to remand the case for a hearing on the objection.

Epsilon System Solutions, Inc., 21-RC-257595, rev. denied 9/1/20 (RKE): The Board stated that although its suspension of elections from March 19 to April 3 may have created uncertainty over whether the election would proceed as scheduled on April 6 (and Regional personnel may have made comments contributing to this uncertainty), this did not prevent parties from preparing for the election or communicating with employees, nor was there any evidence of prejudice, and so the objection had not established a reasonable doubt as to the fairness and validity of the election.

24-424 – Observers

East Valley Glendora Hospital, LLC v. NLRB, 807 Fed. Appx. 685 (9th Cir. 2020): See 24-130.

24-427 – Mail Ballots

Professional Transportation, Inc., 32-RC-259368, rev. granted 12/2/20 (RKEMc): The Board granted the Employer’s request for review because it raised substantial issues with respect to the Board’s policy regarding mail-ballot solicitation as addressed in *Fessler & Bowman, Inc.*, 341 NLRB 932 (2004).

24-429 – Ballot Count and Ballot Interpretation/Void Ballots

Providence Health & Services—Oregon, 369 NLRB No. 78 (2020) (RKE): The Board held that a ballot that includes markings in more than one square or box is void and overruled prior precedent to the contrary. Applying the new rule retroactively, the Board voided a dual-marked ballot that the Regional Director had counted as a “yes” vote and vacated the certification of representative, as the revised tally of ballots resulted in a tie. The Board also directed that the instructions that appear on actual and sample ballots be changed as soon as practicable; the revised instructions stated: “Do not sign or write your name or include other markings that would

reveal your identity. Mark an ‘X’ in the square of your choice only. If you make markings inside, or anywhere around, more than one square, return your ballot to the Board Agent and ask for a new ballot. If you submit a ballot with markings inside, or anywhere around, more than one square, your ballot will not be counted.”

24-440 – Electioneering

NLRB v. RadNet Management, Inc., 818 Fed. Appx. 663 (9th Cir. 2020): The court held that the Board had not erred in declining to vacate an election because the Board agent conducting the election had not established a no-electioneering zone (which is not a requirement) and allegedly had failed to police electioneering (the court further noting that the employer never alleged the Board agent failed to prevent any actual unlawful electioneering).

NP Sunset, LLC, 28-RC-242249, rev. denied 4/13/20 (RKE): See 24-446.

24-445 – Checking Off Names of Voters/Listkeeping

NLRB v. RadNet Management, Inc., 818 Fed. Appx. 663 (9th Cir. 2020): The court found that even accepting the employer’s “implausible contention” that a union observer kept a secret list of voters, the employer had not proffered any evidence any voter was aware of this.

24-446 – Agents Stationed Near Polling Place

NP Sunset, LLC, 28-RC-242249, rev. denied 4/13/20 (RKE): Member Kaplan noted that many of the issues in this case could have been avoided by the designation and enforcement of a no-electioneering zone and stated his belief the issue should be addressed in a future proceeding.

24-500 – The Lufkin Rule

Troutbrook Co. v. NLRB, 801 Fed. Appx. 781 (D.C. Cir. 2020): The court rejected the employer’s objection to the *Lufkin* statement in the Notice of Election for a rerun election, which did not refer to party-conduct objections the employer had filed to the first election (and on which the Regional Director had not passed), observing that the employer was objecting to language it never requested in the first place, that the Board did not have to include even upon request, and that was factually accurate. The court also rejected the employer’s suggestion that the Board, having found one valid reason to order a rerun election, should render a decision on every other objection for the sole purpose of adding a single sentence to a Notice of Election.