

**A Review of Developments in NLRB  
Representation Case Law During 2019  
June 2020**

This paper—summarizing developments in representation case law during 2019—was initially presented at the 2019 Midwinter Meetings of the Development of the Law and Practice and Procedure Under the NLRA committees, where are 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 during 2017 and 2018 (following the same format as this paper) are also available on the NLRB website.

Virtually all published representation case decisions (Board and court) from 2019 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 involved issues relevant to representation case law (e.g., supervisory status, joint employer, jurisdictional issues) are also included. The Board’s 2019 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 In addition, there are entries for several unpublished NLRB representation case decisions that may be of interest to the researcher, although such decisions are, of course, not binding on the Board. Where relevant, the views of dissenting Board members have been noted.

This supplement is limited to developments in 2019 and does not include developments thus far in 2020.

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## **Chapter 1 Jurisdiction**

### **1-401 – State or Political Subdivision**

*KIPP Academy Charter School*, 02-RD-191760, order 2/4/19 (RKE; Mc dissenting): The Board 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.

*Temple University Hospital, Inc. v. NLRB*, 929 F.3d 729 (D.C. Cir. 2019): See 3-940.

### **1-402 - Employers Subject to the Railway Labor Act:**

*PrimeFlight Aviation Services, Inc.*, 367 NLRB No. 81 and 367 NLRB No. 83 (2019) (RE; Mc dissenting): The Board deferred to the advisory opinions 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 in both cases. Member McFerran, dissenting, would have referred both matters to the NMB again so that the NMB could provide a sufficient explanation for why, in *ABM Onsite Services-West, Inc.*, 367 NLRB No. 35 (2018), it had reverted to the six-factor carrier control test applied in these cases.

### **1-500 – Jurisdiction Declined for Policy Considerations**

*KIPP Academy Charter School*, 02-RD-191760, order 2/4/19 (RKE; Mc diss): See 1-401.

## **Chapter 2 Regional Directors' Decisionmaking Authority in Representation Cases**

### **2-200 – Scope of Authority**

*Radnet Management, Inc.*, 21-RC-226166, rev. denied 6/12/19 (RKE): In a series of unpublished decisions involving 10 elections conducted under this petition, the Board found that the Regional Director had not abused his discretion by ordering the ballots to be impounded after each election so that they could be counted at a central location.

### **2-400 – Finality of Decisions**

*Part-Time Faculty Association at Columbia College*, 367 NLRB No. 119 (2019) (RMcK): In this unfair labor practice case, the Board adopted the judge's decision to grant the charging parties' motion in limine to preclude relitigation of the unit status of certain employees that the Regional Director had determined were properly included in the unit in an unpublished 2016 representation case decision of which the Board denied review. The Board indicated that the Respondent had not properly excepted to the judge's ruling on

the motion but stated that even if the Respondent had done so, the employees at issue were properly included in the unit for the reasons stated by the judge (which included the preclusive effect of the Regional Director's earlier decision).

*PECO Energy Co.*, 04-RC-223713, rev. denied 2/26/19 (RKE): Based on the Petitioner's loss in an election, the Board denied the Employer's request for review as moot, but noted that under these circumstances the Regional Director's Decision and Direction of Election would not have preclusive effect in any future representation proceeding.

*NLRB v. Wolf Creek Nuclear Operating Corp.*, 762 Fed. Appx. 461 (10th Cir. 2019): The court agreed with the Board that a 2000 regional decision had preclusive effect, but that such effect could be overcome by a showing of changed circumstances, and upheld the Board's finding that such a showing had been made by the petitioning union.

### **Chapter 3** **Initial Representation Case Procedures**

*UPS Ground Freight, Inc. v. NLRB*, 921 F.3d 251 (D.C. Cir. 2019): The court rejected an employer's argument that it was prejudiced and deprived of due process by the current pre-election hearing and Statement of Position timeline, as well a contention that the Acting Regional Director abused his discretion by permitting two employees to vote subject to challenge rather than resolving the dispute concerning their inclusion in the bargaining unit.

*Representation-Case Procedures*, 84 Fed. Reg. 69524 (12/18/19) (RKE; Mc dissenting): The Board adopted a series of representation-case procedures significantly modifying those adopted by the Board in 2014. Dissenting, Member McFerran criticized the majority's decision to forego notice-and-comment rulemaking and leveled a number of general and specific criticisms at most of the changes. The changes adopted include:

- Defining "business day" (Sec. 102.1) and converting all time calculations in the representation-case procedures to business days.
- Increasing the time for provision of the voter list from 2 calendar to 5 business days. Secs. 102.62(d), 102.67(l).
- 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 from 2 calendar to 5 business days. Sec. 102.63(a)(2).
- Increasing the time for submission of the initial Statement(s) of Position to 8 business days from the Notice of Hearing, with postponements available upon a showing of good cause. Sec. 102.63(b).
- 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).

- Providing that disputes concerning unit scope, voter eligibility and supervisory status will normally be litigated and resolved by the Regional Director before an election is directed (absent party agreement to defer such disputes). Secs. 102.64(a), 102.66(a) and (c).
- 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).
- Providing that absent waiver, an election will normally not be scheduled before the 20th business day after the date of the direction of election to permit the Board to rule on any request for review which may be filed during that period. If a request for review 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(b), (c).
- Codifying practice of not permitting reply briefs except upon special leave of the Board. Sec. 102.67(f).
- Prohibiting piecemeal requests for review. Sec. 102.67(i)(1).
- Aligning requests for extensions of time with other regulatory provisions. Secs. 102.67(i)(1), (3), (g), 102.71(c).
- Providing that whenever possible, a party shall select a current member of the voting unit as its observer, and if no such individual is available, a party should select a current nonsupervisory employee as its observer. Sec. 102.69(a)(5).
- Preventing issuance of certifications while a request for review is pending (or may yet be timely filed). Sec. 102.69(b), (c)(1)(i), (iii), (2), (h).
- Aligning requirements for requests for review filed pursuant to Sec. 102.71 with those filed pursuant to Sec. 102.67 or 102.69.

*Hearst Magazines Media*, 02-RC-252592, rev. denied 1/22/20 (RKE): The Board specified that the foregoing amendments will be applicable to petitions filed on or after April 16, 2020.

### **3-810 – Statement of Position**

*Manor Care of Yeadon Pa, LLC d/b/a Manorcare Health Services-Yeadon*, 368 NLRB No. 28 (2019) (RK; Mc dissenting on other grounds): The Board noted that the Acting Regional Director had found that, by failing to identify on its Statement of Position the classifications it sought to include in the petitioned-for unit, the employer waived its right to argue that the only appropriate unit is one that includes additional classifications; the Board further noted that the employer had failed to challenge that finding in its request for review.

### **3-830 – Hearing Officer's Responsibilities and 3-850 – Conduct of Hearing**

*University of Chicago v. NLRB*, 944 F.3d 694 (7th Cir. 2019): See 20-400.

### **3-890 – Regional Director's or Board Decision and Request for Review**

*Manor Care of Yeadon Pa, LLC d/b/a Manorcare Health Services-Yeadon*, 368 NLRB No. 28 (2019) (RK; Mc dissenting on other grounds): The Board found that on several counts,

the employer's request for review was deficient because it was not a self-contained document enabling the Board to rule on its contents without recourse to the record.

*The Wang Theatre Inc. d/b/a Citi Performing Arts Center*, 368 NLRB No. 107 (2019) (RMcK): The Board found that the employer had never properly raised its joint-employer argument to the Acting Regional Director or the Board. See 14-600.

### **3-940 – Relitigation**

*Part-Time Faculty Association at Columbia College*, 367 NLRB No. 119 (2019) (RMcK): See 2-400.

*PECO Energy Co.*, 04-RC-223713, rev. denied 2/26/19 (RKE): See 2-400.

*Davidson Hotel Co.*, 368 NLRB No. 110 (McKE): See 12-210.

*ASV, Inc. a/k/a Terex*, 368 NLRB No. 138 (2019) (McKE): See 12-210.

*E. W. Howell Co., LLC*, 367 NLRB No. 69 (2019) (RMcE): See 12-231.

*Cristal USA, Inc.*, 368 NLRB No. 137 and No. 141 (2019) (RK; Mc dissenting): See 12-210.

*Temple University Hospital, Inc. v. NLRB*, 929 F.3d 729 (D.C. Cir. 2019): The court opined that the question of whether a nonjudicial tribunal (such as the Board) may invoke judicial estoppel was apparently an issue of first impression, but held that the Board had in any case misapplied the doctrine in refusing to apply it to preclude the petitioner from arguing the employer was subject to the Board's jurisdiction. The court accordingly remanded the case to the Board to determine whether judicial estoppel is available in Board proceedings and, if so, to adequately explain whether the employer made a sufficient showing of unfair advantage or unfair detriment given the petitioner's prior position that the employer was subject to a state labor board's jurisdiction.

## **Chapter 7 Existence of a Representation Question**

### **7-220 – RM Petitions/Incumbent Unions**

*Johnson Controls, Inc.*, 368 NLRB No. 20 (2019) (RKE; Mc dissenting): The Board modified its anticipatory withdrawal doctrine to provide that if an employer lawfully withdraws recognition (based on proof of an incumbent's actual loss of majority support), the union may attempt to reestablish its majority status by filing a petition for a Board election within 45 days from the date the employer gives notice of anticipatory withdrawal. Member McFerran, dissenting, argued that the majority's new standard unduly undermined the continuing presumption of majority support.

*ADT, LLC*, 368 NLRB No. 118 (2019) (RKE): In 2014, the employer consolidated a larger group of unrepresented employees with a smaller group of represented employees and filed an RM petition seeking an election in the consolidated unit, which the Board dismissed, finding that union had not demanded recognition of the nonunit employees and the employer had not demonstrated a reasonable good-faith uncertainty regarding the union's majority status in the historic unit. *ADT, LLC*, 365 NLRB No. 77 (2017). The Board did not, however, pass on whether the historic unit remained appropriate. Following the Board's decision, the employer withdrew recognition, and in this unfair labor practice case, the Board concluded that the withdrawal was lawful because the historic unit had lost its separate identity by virtue of the consolidation.

### **7-230 – Accretions**

*ADT, LLC*, 368 NLRB No. 118 (2019) (RKE): See 7-220.

*Walt Disney Parks and Resorts U.S. d/b/a Walt Disney World Co.*, 367 NLRB No. 80 (2019) (McKE): See 12-500.

*Recology Hay Road*, 367 NLRB No. 32 (2019) (RKE): See 12-500.

*Schuylkill Medical Center South Jackson Street d/b/a Lehigh Valley Hospital-Schuylkill South Jackson Street*, 367 NLRB No. 100 (RMcK): See 12-500.

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

In three unpublished orders denying review, Chairman Ring and Members Kaplan and Emanuel stated they would consider revising the Board's merger doctrine in a future appropriate proceeding:

- *First Student*, 03-RD-243112, rev. denied 9/30/19 (RMcK)
- *First Student, Inc.*, 01-RD-238462, rev. denied 9/30/19 (RMcK)
- *USF Holland LLC*, 18-RD-239688, rev. denied 11/7/19 (McKE)

## **Chapter 9 Contract Bar**

### **9-120 – Signatures of the Parties**

*Inwood Material Terminal LLC*, 29-RD-206581, decision on review and order 1/30/19 (RKE): The Board previously granted review with regard to whether the parties' emails were sufficient to constitute a signed agreement that would establish a contract bar. In this unpublished decision, the Board affirmed the Regional Director's finding that there was no contract-bar here. In doing so, the Board agreed with the Regional Director's statement that an exchange of emails can constitute a signed agreement, but stated it would consider, in a future appropriate proceeding, implementing a requirement that a single, signed document must be present to establish a contract bar.

## **9-1000 – Special Statutory Provisions as to Prehire Agreements**

*Raymond Interior Systems*, 367 NLRB No. 124 (2019) (RKE): On remand from the D.C. Circuit, the Board found that the parties' Confidential Settlement Agreement created a lawful collective-bargaining agreement under Section 8(f) of the Act, but that the agreement was vitiated by unfair labor practices when the employer coerced employees into signing authorization cards and unlawfully granted 9(a) recognition to the incumbent union.

*Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships*, 84 Fed. Reg. 39930 (8/12/19) (RKE; Mc dissenting): The Board proposed a rule under which extrinsic evidence would be required to establish a 9(a) relationship in the construction industry and the existence of a contract bar to an election, and that contract language alone would not suffice. This proposal would overrule *Staunton Fuel & Material, Inc.*, 335 NLRB 717 (2001). Dissenting, Member McFerran questioned the majority's decision to address this area via rulemaking, and in any event contended that *Staunton* should not be overruled.

## **Chapter 10 Prior Determinations and Other Bars to an Election**

### **10-200 – The 1-Year Certification Rule**

*Volkswagen Group of America Chattanooga Operations*, 367 NLRB No. 138 (2019) (RK; Mc dissenting): The Board dismissed the petition under the Board's 1-year certification bar, observing that, where an employer pursues judicial review, the one-year bar period does not begin until the parties' first bargaining session. The Board found that no exception to the certification bar applied here because the union was not defunct at the time of the petition and did not disclaim interest in representing the certified unit until after the petition was filed. Member McFerran, dissenting, would have found that an exception to the certification bar applied because the union had disclaimed interest in representing the certified unit, and because the union was seeking to represent what the employer had all along argued was the only appropriate unit.

*Pinnacle Foods Group, LLC*, 368 NLRB No. 97 (2019) (RKE; Mc dissenting): See 10-300.

### **10-221 – The Mar-Jac Exception**

*Pinnacle Foods Group, LLC*, 368 NLRB No. 97 (2019) (RKE; Mc dissenting): See 10-300.

### **10-300 – Settlement Agreement as a Bar**

*Pinnacle Foods Group, LLC*, 368 NLRB No. 97 (2019) (RKE; Mc dissenting): Applying *Truserv Corp.*, 349 NLRB 227 (2007), the Board found that the decertification petition was not precluded by a settlement agreement that extended the certification year because the

petition was filed before the settlement agreement went into effect and before the extended certification year commenced. The Board further explained that the remedial period contemplated in *Truserv* does not include the extension of the certification year provided for in a settlement agreement where the petitioner has not consented to that agreement. Member McFerran, dissenting, would have found that the petition was precluded under the certification year bar.

#### **10-500 – Recognition Bar and Successor Bar**

*Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships*, 84 Fed. Reg. 39930 (8/12/19) (RKE; Mc dissenting): The Board proposed a rule that would overrule *Lamons Gasket Co.*, 357 NLRB 739 (2011), and reestablish the *Dana* notice requirement and 45-day open period for filing an election petition following voluntary recognition. See *Dana Corp.*, 351 NLRB 434 (2007). Member McFerran argued that there was no good reason for the majority to revisit this issue or resurrect *Dana*.

*American Water MSG*, 14-RD-245062 and 14-RM 246212, rev. granted 10/22/19 (RKE): The Board granted review of the Acting Regional Director's dismissal of the petitions, finding that it raised substantial issues warranting review of the successor bar doctrine as articulated in *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011). The union subsequently disclaimed interest.

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

*Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships*, 84 Fed. Reg. 39930 (8/12/19) (RKE; Mc dissenting): The Board proposed a rule that would replace the current blocking charge policy with a vote-and-impound procedure, stating its view that this approach would better protect employee free choice. Member McFerran, dissenting, contended that this proposal would result in an unacceptable number of elections being conducted under coercive conditions.

### **Chapter 11**

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

#### **11-200 – Unit Clarification (UC) Generally**

*Walt Disney Parks and Resorts U.S. d/b/a Walt Disney World Co.*, 367 NLRB No. 80 (2019) (McKE): See 12-500.

*Recology Hay Road*, 367 NLRB No. 32 (2019) (RKE): See 12-500.



*Schuylkill Medical Center South Jackson Street d/b/a Lehigh Valley Hospital-Schuylkill South Jackson Street*, 367 NLRB No. 100 (RMcK): See 12-500.

## **Chapter 12**

### **Appropriate Unit: General Principles**

#### **12-120 – Craft Units**

*PCC Structural, Inc.*, 368 NLRB No. 122 (2019) (McKE): See 12-210.

#### **12-210 – Community of Interest**

*PCC Structural, Inc.*, 368 NLRB No. 122 (2019) (McKE): The employer refused to bargain, contending that the welders unit ultimately found appropriate in the underlying representation case is not an appropriate unit for bargaining. See also 16-110.

*The Boeing Co.*, 368 NLRB No. 67 (RKE; Mc dissenting): The Board clarified the unit determination test that it established in *PCC Structural, Inc.*, 365 NLRB No. 160 (2017), outlining a three-step process to determine whether a petitioned-for unit is “sufficiently distinct” from excluded employees another party contends must be included in the unit. First, the proposed unit must share an internal community of interest; second, the interests of those within the proposed unit and the shared and distinct interests of those excluded from that unit must be comparatively analyzed and weighed, such that excluded employees must be included in the unit unless they have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members; and third, consideration must be given to the Board’s decisions on appropriate units in the particular industry involved. The Board determined that the petitioned-for Flight Readiness Technicians and Flight Readiness Technician Inspectors did not share an internal community of interest with each other and, moreover, that they did not have meaningfully distinct interests that outweighed their similarities with nonunit employees. Member McFerran, dissenting, asserted that the majority’s test was inconsistent with both the Board’s traditional unit determination jurisprudence and with the Act, and would have found the unit appropriate based on the Board’s traditional application of its community-of-interest factors. The petitioning union has since filed a *Leedom v. Kyne* suit contending that the Board exceeded its statutory authority in *Boeing*. See *International Association of Machinists v. Ring*, 2019 WL 6122823 (D.S.C).

*Davidson Hotel Co.*, 368 NLRB No. 110 (McKE): The Board rejected the employer’s contention that *Boeing* required a fresh analysis of the previously-litigated unit-appropriateness issues, including whether the petitioned-for units (1) food and beverage and (2) housekeeping employees were appropriate, or whether they had to be combined in a single unit.

*ASV, Inc. a/k/a Terex*, 368 NLRB No. 138 (2019) (McKE): The Board denied the Respondent’s Request for Reconsideration in light of the Board’s decision in *PCC Structural*, 365

NLRB No. 160 (2017), which overruled *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), because the Regional Director concluded that the petitioned-for unit of undercarriage employees was an inappropriate, “fractured” unit under pre-*Specialty Healthcare* jurisprudence and had to include all assembly department employees. The employer’s assertion that a different analysis would have occurred under *PCC Structural*s was accordingly misplaced, and further consideration of the issue under *PCC Structural*s would serve no useful purpose.

*Cristal USA, Inc.*, 368 NLRB No. 137 and No. 141 (2019) (RK; Mc dissenting): In both cases, the Board concluded that although the unit determination (reached under *Specialty Healthcare*) was reached before *PCC Structural*s issued, retroactive application of *PCC Structural*s to these cases would not work a manifest injustice, and remanded the representation cases for further appropriate action, including analyzing the propriety of the units under *PCC Structural*s. Dissenting, Member McFerran would not have applied *PCC Structural*s retroactively under these circumstances.

### **12-231 – Size of Unit**

*E. W. Howell Co., LLC*, 367 NLRB No. 69 (2019) (RMcE): In this test-of-certification case, the Board refused to entertain the employer’s argument that it had no bargaining obligation because only a single vote had been cast in the underlying representation election. The Board noted that in the representation case, the employer had entered into a stipulated election agreement and submitted a list identifying two eligible voters and had not asserted that it had no employees or only a stable one-person unit.

### **12-500 – Accretions to Existing Units**

*Walt Disney Parks and Resorts U.S. d/b/a Walt Disney World Co.*, 367 NLRB No. 80 (2019) (McKE): Applying *Premcor, Inc.*, 333 NLRB 1365 (2001), the Board reversed the Regional Director and found that the new classification of Ride Service Associates did not belong in the unit because they did not perform the same basic work functions historically performed by unit employees (specifically Bus Drivers and Parking Hosts/Hostesses). The Board further determined that the Ride Service Associates could not be accreted into the unit because they had a separate group identity from the bargaining unit employees and did not share an overwhelming community of interest with the unit employees.

*Recology Hay Road*, 367 NLRB No. 32 (2019) (RKE): The Board reversed the Regional Director’s finding that the employer’s Material Receiving Coordinators were an accretion to the existing unit, concluding that they had at least some separate group identity and did not share an overwhelming community of interest with the existing unit employees. With respect to separate group identity, the Board emphasized that the Material Receiving Coordinator position performed a new review function that unit employees had not previously performed.

*Schuylkill Medical Center South Jackson Street d/b/a Lehigh Valley Hospital-Schuylkill South Jackson Street*, 367 NLRB No. 100 (RMcK): The Board reversed the Regional Director’s decision clarifying a unit that historically comprised the employer’s South Jackson site to include unrepresented employees working at the employer’s East Norwegian Street site. The Regional Director had reached this determination by applying *Gitano Distribution Center*, 308 NLRB 1172 (1992), in light of the partial integration of the two facilities. The Board held that the Regional Director had erred in applying *Gitano*, and instead applied the Board’s traditional accretion analysis, finding that the unrepresented and represented employees did not share an overwhelming community of interest, particularly emphasizing the “critical factors” of common day-to-day supervision and interchange. The Board also found that policy concerns counseled against an accretion finding, given that most unrepresented employees worked at the East Norwegian site and constituted a majority of the employees working at that site.

#### **12-600 – Relocations, Spinoffs, and Accretions**

*Schuylkill Medical Center South Jackson Street d/b/a Lehigh Valley Hospital-Schuylkill South Jackson Street*, 367 NLRB No. 100 (RMcK): See 12-500.

### **Chapter 13 Multilocation Employers**

*UPS Ground Freight, Inc. v. NLRB*, 921 F.3d 251 (D.C. Cir. 2019): The court upheld the Board’s finding that a unit limited to one distribution center was appropriate, citing the single-facility presumption.

*Tito Contractors, Inc.*, 05-RC-117169, rev. denied 9/26/19 (McKE): In this unpublished case, the Board reaffirmed the applicability of the presumption that a petitioned-for employer-wide unit is presumptively appropriate under the Act, and agreed with the Acting Regional Director that the employer had not met its burden of demonstrating that the unit was nevertheless inappropriate.

### **Chapter 14 Multiemployer, Single Employer, and Joint Employer Units**

#### **14-400 – Employer Withdrawal From Multiemployer Bargaining**

*NLRB v. Midland Electrical Contracting Corp.*, 774 Fed. Appx. 58 (3d Cir. 2019): The court held that substantial evidence supported the Board’s determination that the employer was bound by a multiemployer collective-bargaining agreement because it had failed to timely withdraw from the multiemployer bargaining association that negotiated the agreement.

#### **14-500 – Single Employer**

*NLRB v. Westrum*, 753 Fed. Appx. 421 (8th Cir. 2019): The court enforced the Board’s finding that the employers were alter egos and a single employer; in doing so, the court held that the only properly preserved argument was a 10(b) defense, which the court rejected. The employers have since filed a petition for certiorari.

#### **14-600 – Joint Employer**

*Seven Seas Union Square, LLC*, 368 NLRB No. 92 (2019) (RMcE): Applying the test established in *BFI Newby Island Recyclery*, 362 NLRB 1599 (2015), the Board agreed with the judge that Key Food is a joint employer with each of the individual-store Respondents. The judge had applied the since-vacated *Hy-Brand* (under which he had reached the same result).

*The Wang Theatre Inc. d/b/a Citi Performing Arts Center*, 368 NLRB No. 107 (2019) (RMcK): In this case, the Board had originally denied review of the Acting Regional Director’s finding that the employer was an employer of the petitioned-for musicians, notwithstanding that other entities also controlled many of the musicians’ terms and conditions of employment. The employer tested cert, contending before the First Circuit that the Board had erred by inquiring into joint-employer status. Following the subsequent issuance of *Hy-Brand*, the General Counsel requested remand. On remand, the Board found that no joint employer issue was before it. On the one hand, the Board found that no joint-employer argument was properly raised to the Acting Regional Director or the Board because the employer had only cited joint-employer cases by way of analogy and had in fact admitted it was not raising a joint-employer argument. On the other hand, the Board found that even if a joint-employer argument had been raised, under well-established precedent (including *Chelmsford Food Discounters*, 143 NLRB 780, 781 (1963)), the existence of potential joint employers is not relevant where, as here, the record establishes that the lone petitioned-for employer is *an* employer of the petitioned-for employees.

*Stericycle of Puerto Rico, Inc.*, 12-RC-238280, rev. denied 10/31/19 (RKE): Citing *Chelmsford*, the Board reiterated that if the requisite employer-employee relationship exists, if a petitioner seeks the employees of an employer, there is no need to inquire into other potential joint employers, and here the employer—by entering a stipulated election agreement naming it as an employer of the employees in question—admitted it was at least *an* employer of the petitioned-for employees. The Board disavowed reliance on the Regional Director’s citation to *Miller & Anderson*, 364 NLRB No. 39 (2016), noting it did not apply to the instance circumstances, but also stated it would be open to reconsidering that decision in a future appropriate case.

*The Standard for Determining Joint-Employer Status*, 83 Fed. Reg. 46681 (Sept. 14, 2018) (RKE; Mc dissenting): The Board proposed a new rule defining its joint employer inquiry, which would require a showing that the putative joint employers share or codetermine the employees’ essential terms and conditions of employment, and that a

putative joint employer must possess and actually exercise substantial direct and immediate control over essential terms and conditions in a manner that is not limited and routine.

#### **14-700 – Alter Ego**

*Nico Asphalt Paving, Inc.*, 368 NLRB No. 111 (2019): The Board adopted the judge’s findings that the respondents were alter egos.

*Collective Concrete, Inc. v. NLRB*, 786 Fed. Appx. 266 (D.C. Cir. 2019): The court enforced the Board’s order (*RDM Concrete & Masonry, LLC*, 366 NLRB No. 34 (2018)) finding alter ego and single employer status due to shared ownership, management, operations, business purpose, and interrelated finances. In doing so, the court held that it lacked jurisdiction to consider the challenge to the alter-ego finding because the employer had not properly excepted to the judge’s finding in the underlying Board proceeding.

*NLRB v. Westrum*, 753 Fed. Appx. 421 (8th Cir. 2019): See 14-500.

### **Chapter 15 Specific Units and Industries**

#### **15-161 – Acute Care Hospitals**

*Pomona Valley Hospital Medical Center*, 21-RC-166499, decision on review 1/11/19 (RMcK): The Board sorted through whether certain classifications were properly included in a petitioned-for unit of nonprofessional and technical employees at this acute care hospital. The case is of interest for its consideration of whether the classifications at issue are more akin to (nonprofessional) hospital clericals, business office clericals, or skilled maintenance employees. Member Kaplan and Chairman Ring stated that existing precedent regarding the placement of IT Clericals warrants review in a future appropriate case in light of changes in the nature of IT functions over the past 40 years.

#### **15-162 – Other Hospitals**

*Manor Care of Yeadon Pa, LLC d/b/a Manorcare Health Services-Yeadon*, 368 NLRB No. 28 (2019) (RK; Mc dissenting in part): The Board granted review and remanded the case to the Regional Director for analysis pursuant to the Board’s decision in *PCC Structural, Inc.*, 365 NLRB No. 160 (2017), in which the Board reinstated the standard established in *Park Manor Care Center*, 305 NLRB 872 (1991), for determining bargaining units in nonacute care health facilities. Member McFerran, dissenting, asserted that the purported reinstatement of *Park Manor* was perfunctory and unaccompanied by any rationale, and that the Board accordingly should have taken this opportunity to issue a notice and invitation to file briefs addressing the possible reinstatement of *Park Manor*.

### **15-170 – Hotels and Motels**

*Davidson Hotel Co.*, 368 NLRB No. 110 (McKE): See 12-210.

### **15-260 – Universities and Colleges**

*University of Southern California v. NLRB*, 918 F.3d 126 (D.C. Cir. 2019): In this case involving the alleged managerial status of the employer’s full and-part time non-tenure track faculty, the court commented that the Board’s decision in *Pacific Lutheran* was an admirable effort to “tame a thicket” of case law dealing with the possible managerial status of university faculty, but took issue with *Pacific Lutheran*’s “subgroup majority status” rule, holding that it misunderstood the Supreme Court’s decision in *Yeshiva* because it “ignore[d] the possibility that faculty subgroups, despite holding different status within the university, may share common interests and therefore effectively participate together as a body on some or all of the issues relevant to managerial status.” The court held that the question the Board must ask is not whether a particular faculty subgroup can force policies through based on crude headcounts, but whether the subgroup is structurally included within collegial faculty body to which university has delegated managerial authority. The court otherwise rejected most of the employer’s criticisms of the *Pacific Lutheran* standard. (Following remand, the petitioner disclaimed interest in the unit.)

### **15-270 – Warehouse Units**

*Cristal USA, Inc.*, 368 NLRB No. 141 (2019) (RK; Mc dissenting): See 12-210.

## **Chapter 16 Craft and Traditional Departmental Units**

### **16-110 – The Mallinckrodt Criteria**

*PCC Structurals, Inc.*, 368 NLRB No. 122 (2019) (McKE): The Board noted, in this test-of-certification case, that the employer had confused the question of what constitutes a craft unit with the separate question of whether such a unit may be severed from a historical bargaining unit, and that because the latter question was not before the Board, the employer’s assertion that the Board had sub silentio overruled *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966), in the underlying representation case was without merit.

## Chapter 17 Statutory Exclusions

### 17-400 – Independent Contractors

*SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019) (RKE; Mc dissenting): The Board overruled *FedEx Home Delivery*, 361 NLRB 610 (2014), finding that the independent contractor test elucidated in *FedEx* impermissibly diminished the significance of entrepreneurial opportunity in the Board's analysis and revived an “economic dependency” standard that Congress explicitly rejected with the Taft-Hartley amendments of 1947. Applying the Board’s common-law agency test, as well as Board precedent relating to taxicab drivers, the Board concluded, in agreement with the Regional Director, that the petitioned-for shuttle drivers were independent contractors. Member McFerran, dissenting, would have found that the shuttle drivers are employees even under pre-*FedEx* precedent, and expressed concern that the Board was elevating entrepreneurial opportunity into a “super-factor” in a manner inconsistent with both Board precedent and the common-law agency test.

*Velox Express, Inc.*, 368 NLRB No. 61 (2019) (RKE; Mc concurring in relevant part): Applying *SuperShuttle DFW*, the Board found that the employer had failed to establish that its drivers are independent contractors. Member McFerran concurred in the majority’s finding that the drivers were not independent contractors.

*Pennsylvania Interscholastic Athletic Association, Inc. v. NLRB*, 926 F.3d 837 (D.C. Cir. 2019): The court, applying a “middle course” between de novo and substantial-evidence review, reversed the Board’s finding (under *FedEx*) that the petitioned-for high-school lacrosse officials were employees, not independent contractors. In particular, the court held that the Board had failed to adequately account for the few times on which the employer actually paid the officials, and the short duration of the officials’ employment.

### 17-500 – Supervisors

*Entergy Mississippi, Inc.*, 367 NLRB No. 109 (2019) (RKE): On remand from the Fifth Circuit, the Board—applying *Oakwood Healthcare*—concluded that the petitioned-for electrical dispatchers were statutory supervisors because they exercised independent judgment in assigning employees to places by prioritizing outages, determining how many employees should be sent to address outages, and deciding to reassign, hold over, or summon on-call employees in response to outages.

*Atlantic City Electric Co.*, 04-RC-221319, decision on review 11/18/19 (McK; E dissenting): The Board affirmed the Acting Regional Director’s finding that the employer had not established that the petitioned-for system operators were statutory supervisors by virtue of their alleged authority to assign employees to places or responsible direct employees using independent judgment. The Board explicitly distinguished *Entergy Mississippi*, explaining that unlike in that case, the relevant evidence in this case was at best

conflicting. Dissenting, Member Emanuel would have found that the system operators assign work using independent judgment.

*The Arc of South Norfolk*, 368 NLRB No. 32 (2019) (RKE): The Board reversed the Regional Director and found that the employer's Program Coordinators are statutory supervisors because they have the authority to assign employees to significant overall duties by assigning "caseloads" (e.g., clients) to case managers. The Board further found that the Program Coordinators exercise independent judgment in doing so because, in making their assignments, they consider who has the best "fit" or "chemistry" with a particular client and which case manager will be able to form the best relationship with the client's parents or guardians.

*Sysco Grand Rapids, LLC*, 367 NLRB No. 111 (RMcK): The judge concluded that an individual was a statutory supervisor based on the exercise of independent judgment in assigning, approving, and changing drivers' schedules, as well as his authority to hire and terminate temporary drivers as necessary.

*UPS Ground Freight, Inc. v. NLRB*, 921 F.3d 251 (D.C. Cir. 2019): The court held that the Board properly concluded that the employer had not demonstrated the putative supervisor had the authority to assign work (because he had no authority to require subordinates to accept assignments), to effectively recommend hiring (because he only administered road tests to new hires and reported the results to management), to responsibly direct employees (because there was no evidence he was held accountable under *Oakwood*), or to adjust grievances (because at most he only brought minor grievances to the attention of upper management).

*Coral Harbor Rehabilitation & Nursing Center v. NLRB*, 945 F.3d 763 (3d Cir. 2019): The court found that substantial evidence supported the Board's conclusion that the employer had not established that its LPNs were statutory supervisors by virtue of their alleged authority to discipline CNAs. The court emphasized the Board's finding that LPNs did not exercise independent judgment because all discipline and disciplinary recommendations had to be cleared with managers and the LPNs did not know what level of discipline was appropriate in any given case. The court also held that the Board's determination was consistent with *NLRB v. New Vista Nursing & Rehabilitation*, 870 F.3d 113 (3d Cir. 2017), as the LPNs in this case had no discretion to take different disciplinary actions, they did not "initiate a progressive disciplinary process," and their involvement in discipline did not increase the severity of the consequences of a future rule violation.

In three unpublished orders, the Board took a similar approach as it had employed in the underlying decision in *Coral Harbor* (366 NLRB No. 75 (2018)), finding that supervisory status had not been established and that Third Circuit precedent was not to the contrary (while also stating that such precedent "warrant[s] careful consideration, and we would be open to reconsidering extant Board law on this topic in a future appropriate case"):

- *Bloomsburg Care and Rehabilitation Center*, 06-RC-241173, rev. denied 12/3/19 (RKE)



- *AECOM*, 22-RC-238880, rev. denied 12/11/19 (RKE)
- *Mountain View Health Care and Rehabilitation Center, LLC*, 04-RC-242288, rev. denied 12/11/19 (RKE)

### **17-511 – Independent Judgment**

*Entergy Mississippi, Inc.*, 367 NLRB No. 109 (2019) (RKE): See 17-500.

*Atlantic City Electric Co.*, 04-RC-221319, decision on review 11/18/19 (McK; E dissenting): See 17-500.

*The Arc of South Norfolk*, 368 NLRB No. 32 (2019) (RKE): See 17-500.

*Sysco Grand Rapids, LLC*, 367 NLRB No. 111 (RMcK): See 17-500.

*Coral Harbor Rehabilitation & Nursing Center v. NLRB*, 945 F.3d 763 (3d Cir. 2019): See 17-500.

### **17-513 – Power Effectively to Recommend**

*UPS Ground Freight, Inc. v. NLRB*, 921 F.3d 251 (D.C. Cir. 2019): See 17-500.

*Coral Harbor Rehabilitation & Nursing Center v. NLRB*, 945 F.3d 763 (3d Cir. 2019): See 17-500.

### **17-521 – Assign**

*Entergy Mississippi, Inc.*, 367 NLRB No. 109 (2019) (RKE): See 17-500.

*Atlantic City Electric Co.*, 04-RC-221319, decision on review 11/18/19 (McK; E dissenting): See 17-500.

*The Arc of South Norfolk*, 368 NLRB No. 32 (2019) (RKE): See 17-500.

*Sysco Grand Rapids, LLC*, 367 NLRB No. 111 (RMcK): See 17-500.

*UPS Ground Freight, Inc. v. NLRB*, 921 F.3d 251 (D.C. Cir. 2019): See 17-500.

### **17-522 – Responsibly Direct**

*Atlantic City Electric Co.*, 04-RC-221319, decision on review 11/18/19 (McK; E dissenting): See 17-500.

*UPS Ground Freight, Inc. v. NLRB*, 921 F.3d 251 (D.C. Cir. 2019): See 17-500.

### **17-523 – Discipline, Discharge, and Suspension**

*Sysco Grand Rapids, LLC*, 367 NLRB No. 111 (RMcK): See 17-500.

*Coral Harbor Rehabilitation & Nursing Center v. NLRB*, 945 F.3d 763 (3d Cir. 2019): See 17-500.

**17-524 – Hire**

*Sysco Grand Rapids, LLC*, 367 NLRB No. 111 (RMcK): See 17-500.

*UPS Ground Freight, Inc. v. NLRB*, 921 F.3d 251 (D.C. Cir. 2019): See 17-500.

**17-525 – Adjust Grievances**

*UPS Ground Freight, Inc. v. NLRB*, 921 F.3d 251 (D.C. Cir. 2019): See 17-500.

**17-600 – Individuals Employed By Employers Subject to the Railway Labor Act**  
See 1-402.

**Chapter 19**  
**Categories Governed by Board Policy**

**19-200 – Managerial Employees**

*NLRB v. Wolf Creek Nuclear Operating Corp.*, 762 Fed. Appx. 461 (10th Cir. 2019): The court upheld the Board’s finding that the employer had not established that its buyers were managerial employees because they operated within the confines of detailed policies and did not exercise the type of discretion indicative of managerial status.

*University of Southern California v. NLRB*, 918 F.3d 126 (D.C. Cir. 2019): See 15-260.

**19-400 - Office Clerical and Plant Clerical Employees**

*Centerpoint Energy Houston Electric, LLC*, 368 NLRB No. 109 (2019) (RMcK): The Board affirmed the Regional Director’s conclusion that the employer’s service area assistants may be appropriately included in the existing production and maintenance unit via self-determination election because they are plant clerical employees. Chairman Ring and Member Kaplan noted that Board law in this area is inconsistent and that they would reconsider the “plant clerical” analysis, and its value in determining whether bargaining units are appropriate, in a future case.

## **Chapter 20**

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

#### **20-200 – Temporary Employees**

*American Municipal Power, Inc. v. NLRB*, 917 F.3d 904 (6th Cir. 2019): The court rejected the employer’s argument that the unit description should have expressly excluded permanent operators from other facilities who might possibly in the future be temporarily assigned to the facility at issue, noting that rulings premised on contingent events create contingent law, and that it was reasonable for the Regional Director to avoid drawing lines based on unseen future events. The court also noted that the employer could invoke the unit clarification process should such employees exist in the future and should the union refuse to bargain over their placement.

#### **20-400 - Student Workers**

*Amnesty International of the USA, Inc.*, 368 NLRB No. 112 (2019) (RK; Mc concurring in result): In this unfair labor practice case, the Board agreed with the judge that the respondent’s unpaid interns (many of whom were apparently also students) were not employees within the meaning of Section 2(3) of the Act because they received no economic compensation. Member McFerran, concurring, expressed no opinion on whether the interns were employees under the Act, but characterized the majority’s analysis as “cursory” and “unpersuasive.”

*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 proposed rule would overrule *Columbia University*, 364 NLRB No. 90 (2016), and would be largely consistent with *Brown University*, 342 NLRB 483 (2004). Dissenting, Member McFerran stated there was no good basis in law, in policy, or in fact to remove such students from the protections of the Act.

*University of Chicago v. NLRB*, 944 F.3d 694 (7th Cir. 2019): The court held that the Board had not abused its discretion in refusing to permit the employer to introduce evidence proffered at the pre-election hearing that, even if true, would not have affected the outcome of this case under *Columbia University*. The court noted that the employer had not directly challenged the reasoning of *Columbia University* or asked the court to evaluate it, and so that issue was beyond the limits of the court’s review.

## **Chapter 21 Self-Determination Elections**

*Centerpoint Energy Houston Electric, LLC*, 368 NLRB No. 109 (2019) (RMcK): See 19-400.

## **Chapter 22 Representation Case Procedures Affecting the Election**

*Representation-Case Procedures*, 84 Fed. Reg. 69524 (12/18/19) (RKE; Mc dissenting): see Chapter 3. Changes to post-election procedures include provision of post-hearing briefs, guidance on the parties' selection of observers, and disallowing the issuance of certifications while requests for review are pending (or may yet be filed).

### **22-110 – Mail Ballots**

*UPS Ground Freight, Inc. v. NLRB*, 921 F.3d 251 (D.C. Cir. 2019): The court held that the Acting Regional Director properly directed a mail-ballot election because he reasonably determined that employees traveled long distances and that traffic and weather conditions might hinder them from returning to the employer's facility in time to vote in a manual election. The court also observed that the mail-ballot election did not impermissibly restrict the employer's right to campaign, and opined that it was difficult to imagine any prejudice had arose from the choice of a mail-ballot election given that 94% of the voters had cast ballots and had overwhelmingly favored unionization.

### **22-113 – The Count**

*Radnet Management, Inc.*, 21-RC-226166, rev. denied 6/12/19 (RKE): See 2-200.

### **22-122 – The Certification**

*Didlake, Inc.*, 367 NLRB No. 125 (2019) (RK; Mc dissenting): Chairman Ring and Member Kaplan stated that the practice of permitting regional directors to issue certifications notwithstanding the pendency of requests for review warranted reconsideration in a future rulemaking.

## **Chapter 23 Voting Eligibility**

### **23-100 – Eligibility in General**

*Amnesty International of the USA, Inc.*, 368 NLRB No. 112 (2019) (RK; Mc concurring in result): See 20-400.

### **23-113 – Discharged Employees**

*Johnston Fire Services, LLC*, 367 NLRB No. 49 (2019) (McKE): In this consolidated case, the Board adopted the judge’s conclusion that two challenged voters had been lawfully discharged, sustained the challenges to the ballots of these two employees, and certified the results of the election because the union had not receive the majority of votes cast.

*Advanced Masonry Associates, LLC v. NLRB*, 781 Fed. Appx. 946 (11th Cir. 2019): The court held that substantial evidence supported the Board’s finding that the employer had discharged two employees because of their union activity, and because they were otherwise eligible voters their votes should be tallied.

## **Chapter 24 Interference With Elections**

### **24-110 – Objections Period**

*Rockwell Mining, LLC v. NLRB*, 786 Fed. Appx. 268 (D.C. Cir. 2019): The court agreed with the Board that a comment made before the petition was filed was not the type of “clearly proscribed activity likely to have a significant impact on the election” that warrants an exception to the *Ideal Electric* rule. The court also declined to reconsider the *Ideal Electric* rule.

*Schwarz Partners Packaging, LLC d/b/a MaxPak*, 368 NLRB No. 8 (2019) (McKE): See 24-301.

### **24-301 – Threats**

*Valmet, Inc.*, 367 NLRB No. 84 (2019) (RKE): In this consolidated case, the Board adopted the judge’s conclusions that the Respondent violated Section 8(a)(1) and engaged in objectionable conduct during the organizing campaign by threatening to withhold employees’ regularly-scheduled progressive wage increases; threatening employees with a loss of severance benefits; by its agent’s threat that the employer would eliminate a position if employees selected union representation; and by threatening employees that unionization would be futile. A majority also concluded that a manager’s threat of unspecified reprisal if an employee selection the union was unlawful and objectionable (Member Emanuel, dissenting, would have found the statement was too vague to constitute a threat).

*Schwarz Partners Packaging, LLC d/b/a MaxPak*, 368 NLRB No. 8 (2019) (McKE): The Board engaged in de novo review of this case pursuant to *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). The Board found that the employer engaged in objectionable conduct when one of its managers threatened the employees with stricter discipline if they selected the Union as their exclusive bargaining representative. The Board also rejected the employer’s contention that the statement was made outside the critical period.

*Sysco Grand Rapids, LLC*, 367 NLRB No. 111 (2019) (RMcK): In this consolidated case, the Board adopted the judge's findings that various statements by the employer constituted unlawful and objectionable threats.

*Didlake, Inc.*, 367 NLRB No. 125 (2019) (RK; Mc dissenting): See 24-307.

*Grill Concepts Services, Inc. d/b/a The Daily Grill*, 31-RC-209589, decision on review 6/28/19 (RKE): On review, the Board concluded that the union's otherwise-lawful home visits did not involve objectionable threats or coercive conduct. See 24-427.

#### **24-302 – Promises and Grants of Benefit**

*Sysco Grand Rapids, LLC*, 367 NLRB No. 111 (2019) (RMcK): In this consolidated case, the Board adopted the judge's findings that statements by the employer were unlawful and objectionable promises of benefit.

#### **24-303 – Gifts, Parties, Raffles and Contests**

*Valmet, Inc.*, 367 NLRB No. 84 (2019) (RKE): In this consolidated case, the Board found that the employer's pre-election raffle was an unlawful and objectionable promise of benefit because the cash prizes were substantial and unnecessary to achieve the employer's campaign-related purpose, all employees had the opportunity to compete for the prizes, employees would reasonably view the raffle as intended to influence their votes, and it was conducted close to the election.

#### **24-307 – Misrepresentation**

*Didlake, Inc.*, 367 NLRB No. 125 (2019) (RK; Mc dissenting): The Board, reversing the Regional Director, found that the employer did not engage in objectionable conduct by misstating the law when they characterized union membership and the payment of dues as a "condition of employment" if the Union won the election. The Board noted that mere misrepresentations of law with respect to compulsive membership and/or union dues are not objectionable, and that the employer's statements did not exceed a misrepresentation to become a threat of job loss. Member McFerran, dissenting, would have found that the employer's statements crossed the line into the realm of objectionable threats.

*St. Luke's Hospital*, 368 NLRB No. 49 (2019) (RMcK): The Board denied the employer's request for review of the Acting Regional Director's decision to overrule an objection that alleged that a flyer purporting to display signatures of employees who were supporting the union warranted setting the election aside. Chairman Ring and Member Kaplan noted that they would be open to reconsidering *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), in a future appropriate case.

### **24-329 – Third Party Conduct**

*DS Services of America, Inc.*, 19-RC-243327, req. and rev. denied 7/26/19 (RMcK): Although it denied the employer's request for a stay of all proceedings (and denied review of the Regional Director's denial of an earlier motion to stay all proceedings), the Board noted that the order did not preclude the employer from raising issues related to the impact, if any, of an Oregon state law (Or. Rev. Stat. §659.785) effectively prohibiting captive-audience meetings in post-election proceedings. Chairman Ring and Member Kaplan also expressed willingness to reexamine *Independence Residences*, 355 NLRB 724 (2010), in an appropriate proceeding.

### **24-330 – Prounion Supervisory Conduct**

*Domino's Pizza LLC*, 368 NLRB No. 142 (2019) (KE; Mc dissenting): Applying *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004), the Board granted review, reversed the Regional Director's decision, and set aside the election, finding that a supervisor engaged in objectionable prounion conduct by making express threats of job loss (i.e., telling three employees that employees would lose their jobs if the petitioner lost the election and told a fourth employee that they would not have jobs if the petitioner won) and that this conduct affected a sufficient number of employees to materially affect the election's outcome (and was not sufficiently mitigated by the employer's campaign or partial disavowals). Member McFerran, dissenting, would have found that even assuming that the employer's supervisor engaged in objectionable prounion conduct, the majority should not have set aside the election, because it unfairly permits the Employer to take advantage of supervisory misconduct that it condoned.

*Rockwell Mining, LLC v. NLRB*, 786 Fed. Appx. 268 (D.C. Cir. 2019): The court agreed with the Board that a supervisor's statement, made before the petition was filed, that unless employees signed authorization cards they would not be protected if something bad happened to them, did not warrant setting aside the election.

### **24-410 – Board Agent Conduct**

*Concrete Express of NY, LLC*, 368 NLRB No. 135 (2019) (RE; Mc dissenting): The Board remanded the case to the Regional Director for a hearing on the Employer's objections alleging that the Board agent failed to secure a potentially determinative challenged ballot in accordance with the Board's Case Handling Manual, and then, while in possession of the unsealed challenged ballot, accepted a ride from the polling location with union officials, finding that these allegations raised a substantial issue regarding the integrity of the election. Member McFerran would have found the alleged harm was speculative and of the employer's own making.

*National Hot Rod Association (NHRA)*, 368 NLRB No. 26 (2019) (RKE): See 24-427.

## **24-427 - Mail Ballots**

*Grill Concepts Services, Inc. d/b/a The Daily Grill*, 31-RC-209589, decision on review 6/28/19 (RKE): On review, the Board concluded that the union’s otherwise-lawful home visits did not involve objectionable threats or coercive conduct, given that the union representatives had not collected any mail ballots, there was inadequate evidence to establish that any solicitation of mail ballots took place, and the record did not establish that the Petitioner’s representatives sought to physically assist voters in filling out ballots, sought to have them record votes in the union representatives’ presence, or engaged in any other conduct that could reasonably be viewed as coercive or imperiling the integrity of the mail ballots.

*National Hot Rod Association (NHRA)*, 368 NLRB No. 26 (2019) (RKE): The Board affirmed the judge’s decision to overrule the objections to the election, agreeing that the respondent presented insufficient evidence to support its claim that the Region’s handling of the mail ballot election deprived eligible employees of an adequate opportunity to vote. The Board noted, however, that the facts of this case—namely, the difficulties encountered by a few employees in timely receiving mail ballots—illustrate one reason why manual elections are, and should be, preferred.

*UPS Ground Freight, Inc. v. NLRB*, 921 F.3d 251 (D.C. Cir. 2019): See 22-110.

## **24-445 – Checking Off Names of Voters/Listkeeping**

*Station GVR Acquisition. LLC v. NLRB*, 784 Fed. Appx. 795 (D.C. Cir 2019): The court upheld the Board’s finding that the petitioner had not engaged in objectionable listkeeping when, at its request, certain prounion “committee leaders” asked small groups of fellow employees whether they had voted, orally relayed this information to the petitioner, and the petitioner recorded it electronically. The court also found that substantial evidence supported the Board’s conclusion that no employee actually knew about the petitioner’s electronic list.