

**A Review of Developments in NLRB
Representation Case Law During 2022
February 2023**

This paper—summarizing developments in representation case law during 2022 (along with a few key developments in early 2023)—was initially presented at the 2023 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 uses the chapter structure of *An Outline of Law and Procedure in Representation Cases* to track and categorize these developments. 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 covering developments in 2017, 2018, 2019, 2020, and 2021 (and following a similar format as this paper) are also available on the NLRB website.

Virtually all published representation case decisions (Board and circuit court) from 2022 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. Rulemaking activities that relate to representation-case matters are covered as well. I have also noted several key developments thus far in 2023, with particular reference to the D.C. Circuit’s January 17 decision in *AFL v. CIO*, which upheld and struck down certain provisions of the Board’s 2019 representation case rule. In addition, there are entries for several unpublished NLRB representation case decisions that may be of interest to the researcher, although such decisions are, of course, not binding and non-precedential. Where relevant, I have noted the views of dissenting or concurring Board members.

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CHAPTER 1: JURISDICTION

1-100 – Jurisdiction Generally

Temple University Hospital, Inc. v. NLRB, 39 F.4th 743 (D.C. Cir. 2022): The court stated that the fact that the Board may at times decline to exercise its jurisdiction is not inconsistent with its choice to find that judicial estoppel is unavailable in proceedings where the Board’s jurisdiction is at issue.

1-314 – Government Contractors

Bannum Place of Saginaw, LLC v. NLRB, 41 F.4th 518 (6th Cir. 2022): See Section 1-401.

1-401 – State or Political Subdivision

Bannum Place of Saginaw, LLC v. NLRB, 41 F.4th 518 (6th Cir. 2022): The court rejected the employer’s contention that the Board lacked statutory jurisdiction because the employer was a joint employer with a government agency, noting that Section 2(2) of the Act does not indicate that such joint employers are exempt from the Board’s jurisdiction (and that the Board has long held that whether a private employer and an exempt entity is irrelevant for determining the Board’s jurisdiction over the private employer).

Temple University Hospital, Inc. v. NLRB, 39 F.4th 743 (D.C. Cir. 2022): The court found that there was no basis to set aside the Board’s conclusion that, under the *Hawkins County* test, the employer was not a political subdivision.

1-500 – Jurisdiction Declined for Policy Considerations

Temple University Hospital, Inc. v. NLRB, 39 F.4th 743 (D.C. Cir. 2022): The court rejected the employer’s argument that the Board should have declined to exercise its jurisdiction, as the choice not to do so is “essentially unreviewable”; the court also concluded that the Board’s decision to assert jurisdiction was not substantially prejudicial to the employer.

CHAPTER 2: REGIONAL DIRECTORS’ DECISIONMAKING AUTHORITY IN REPRESENTATION CASES

2-400 – Finality of Decisions

Bannum Place of Saginaw, LLC v. NLRB, 41 F.4th 518 (6th Cir. 2022): See Section 3-911.

NBC Universal Media, LLC, 371 NLRB No. 72 (2022) (McP; R diss.): The Board rejected the contention that the record should be reopened to accept evidence concerning how the classification at issue had changed since decisions issued in 2011 and 2018, noting that the evidence the employer sought to introduce did not exist at the time of the earlier hearings and that the employer had failed to identify any specific evidence that would change the result of the

proceeding, but instead broadly asserted changes without providing relevant details. See also Section 11-200.

CHAPTER 3: INITIAL REPRESENTATION CASE PROCEDURES

On January 17, 2023, the D.C. Circuit issued its decision in *AFL-CIO v. NLRB*, Case No. 20-5223, 2023 U.S. App. LEXIS 990, affirming in part, 466 F. Supp. 3d 68 (D.D.C. 2020) and 471 F. Supp. 3d 228 (D.D.C. 2020), which passed on the lawfulness of certain provisions of the Board's 2019 amendments to its representation-case rules (see 84 Fed. Reg. 69524 (Dec. 18, 2019)).

- The D.C. Circuit held that district courts have jurisdiction over litigation regarding rules that are exclusively concerned with representation elections, as is the case here.
- The D.C. Circuit disagreed with the District Court that two provisions had been unlawfully promulgated without notice and comment; the D.C. Circuit instead upheld these provisions as falling within the procedural exemption:
 - The provision (Section 102.64(a)) giving parties the right to litigate most voter eligibility and inclusion issues prior to the election.
 - The provision (Section 102.67(b)) stating that in directed elections, a Regional Director will normally not schedule an election before the 20th business day after the date of the direction of election.
- The D.C. Circuit agreed with the District Court that three other provisions were unlawfully promulgated without notice and comment:
 - The provision (Sections 102.62(d) and 102.67(l)) giving employers 5 business days (rather than 2 business days) to furnish the required voter list following the issuance of a direction of election.
 - The provision (Section 102.69(a)(5)) limiting a party's selection of observers to individuals who are current members of the voting unit whenever possible.
 - The provision (Section 102.69(b) and (c)) instructing that Regional Directors will not issue certifications following elections if a request for review is pending or before the time has passed during which a request for review could be filed.
- In addition, the D.C. Circuit struck down an additional provision (which the District Court had upheld) finding that it was contrary to text of the Act:
 - The provision (Section 102.67(c) and (h)) requiring automatic impoundment of the ballots if a request for review of a decision and direction of election is filed within 10 business days of the issuance of the decision and direction of election and has not been ruled on (or has been granted) prior to the ballot count.
- The court also agreed with the District Court that the Final Rule, as a whole, was not arbitrary and capricious.
- The court remanded the case for further consideration of certain arguments raised by the AFL-CIO that the District Court had not addressed (whether certain specific provisions were arbitrary and capricious and/or contrary to the Act).
- Judge Rao, dissenting, would have upheld the 2019 Final Rule in its entirety.

As of February 10, 2023, the Board's Notice of Proposed Rulemaking that would eliminate the requirement that employers provide available personal email addresses and home and cellular

telephone numbers of all eligible voters to the Regional Director and other parties during an election campaign also remains pending. See 85 Fed. Reg. 45553 (July 29, 2020).

As of February 10, 2023, the Board's Advance Notice of Proposed Rulemaking seeking public input on the use of videoconference technology to conduct, in whole or in part, all aspects and phases of unfair labor practices and representation case hearings and on potential amendments to its procedural rules regarding the use of videoconference technology remains pending; comments were due on January 4, 2022. See 86 Fed. Reg. 61090 (Nov. 5, 2021).

3-800 – Notice of Hearing and Preelection Hearings

Amazon.com Services, LLC, 29-RC-288020, rev. denied 7/5/22 (McP; R diss.): The Board emphasized that the appointment of a representative for a regional director is a well-established practice codified in Section 11424 of the Board's Casehandling Manual and can be applied to proceedings where (as here) the regional director overseeing a proceeding that was transferred from another region appoints a representative for the regional director from the originating region. The Board noted that the Regional Director for Region 28's description of the representatives' role diverged in some respects from Section 11424 and stated that it expected the representatives here to adhere to Section 11424. The Board also noted that Section 102.1(h)'s definition of "party" is sufficiently broad to include the Regional Director in whose region a proceeding originated. Finally, the Board stated that any allegations of prejudice in the appointment or conduct of the representatives were more appropriately raised at the conclusion of the hearing. Member Ring would have granted review given that the Regional Director's order contradicted the guidance in Section 11424.

3-911 – Review By Employers

Bannum Place of Saginaw, LLC v. NLRB, 41 F.4th 518 (6th Cir. 2022): The court agreed with the Board that, under the rule against relitigation (Section 102.67(g) of the Board's Rules and Regulations), the employer's joint-employer argument was not properly before the court because the employer had failed to request review of the Regional Director's decision on this issue (instead waiting three years before raising it again in a related unfair labor practice proceeding).

3-940 – Relitigation

Temple University Hospital, Inc. v. NLRB, 39 F.4th 743 (D.C. Cir. 2022): The court held that the Board did not abuse its discretion in determining that judicial estoppel is unavailable in cases in which the Board's jurisdiction is at issue.

CHAPTER 4: TYPES OF PETITIONS

4-200 – Decertification Petition (RD)

Geodis Logistics, 371 NLRB No. 102 (2022) (McW; R conc.): The Board held that in order for a previously-dismissed decertification petition to be reinstated and processed following the parties'

settlement and resolution of the unfair labor practice charge on which the regional director relied in dismissing the petition, the request must come from the employee petitioner, not the employer. See also Section 10-300.

4-500 – Petition for Clarification (UC)

NBC Universal Media, LLC, 371 NLRB No. 72 (2022) (McP; R diss.): The Board rejected the employer’s claim that the petitions at issue were facially deficient, insofar as they met the minimum requirements of the Board’s Rules and Regulations; further, although the petitioners sought to have the Board consider two possible units into which the content producers might be placed, the Board processes unit clarification petitions that analogously seek for the Board itself, and not the party filing the petition, to determine the appropriate unit placement of disputed employees. See also Section 11-200.

CHAPTER 6: QUALIFICATION OF REPRESENTATIVE

6-200 – Statutory Limitation as to “Guards”

Securitas Security Services USA, Inc., 372 NLRB No. 2 (2022) (McRW): The Board found that the Regional Director erred by dismissing a petition seeking to decertify an incumbent mixed guard-nonguard union. The Board observed that although Section 9(b)(3) of the Act prohibits the Board from certifying such a union as the representative of a unit of guards, it does not address decertification proceedings to remove an incumbent mixed guard-nonguard union. The Board also found that although *University of Chicago*, 272 NLRB 873 (1984), prevents a mixed guard-nonguard union from participating in a Board election as a petitioner or intervenor, that case does not prevent an incumbent mixed guard-nonguard union from appearing on the ballot in a decertification election. The Board also noted that holding that employees cannot secure an election to decertify a mixed guard-nonguard union would be at odds with the purpose of Section 9(b)(3), as well as with employees’ Section 9(c) right to seek to decertify their representative. The Board specified that in a situation where a unit of guards votes to retain their mixed guard-nonguard representative, a regional director should issue an order stating that a majority of employees have voted against decertification but specifying that under Section 9(b)(3) the results of the election cannot be certified. Member Wilcox indicated she was open to reconsidering *University of Chicago*.

CHAPTER 7: EXISTENCE OF A REPRESENTATION QUESTION

7-131 – Grievances and Arbitration

Penske Truck Leasing Co., 371 NLRB No. 113 (2022) (McR; P diss.): See Section 11-200.

7-310 – Who May File a Decertification Petition

Geodis Logistics, 371 NLRB No. 102 (2022) (McW; R conc.): See Section 4-200.

CHAPTER 9: CONTRACT BAR

9-300 – Duration of Contract and

9-310 – Fixed Term Contracts

Indiana Michigan Power Co., 371 NLRB No. 114 (2022) (McR; P diss.): The Board agreed with the Regional Director that the duration clause in the operative extension agreement failed to provide clear notice of the effective expiration date of the agreement and that it therefore could not serve as a bar. The Board stated that the dissent provided one reasonable interpretation of the relevant language, but that the Regional Director's contrary interpretation was also reasonable, and that accordingly the Board could not say that the language was unambiguous; unlike the dissent, the majority declined to read the extension agreement in conjunction with the master and local agreements. Member Prouty would have found that, reading the extension agreement in conjunction with the master and local agreements, there was only one reasonable interpretation, and that it required dismissal of the petition.

Paragon Systems/Patronus Systems, 371 NLRB No. 152 (2022) (McW; K diss.): The Board denied review of the Regional Director's dismissal of the petition, noting that although there were conflicting termination dates in the operative collective-bargaining agreement, under either date the instant petition was untimely, and that the dismissal was therefore consistent with *Suffolk Banana Co.*, 328 NLRB 1086 (1999). Member Kaplan would have found *Suffolk Banana* distinguishable, and also commented that it was inconsistent with the principle that a contract will not serve as a bar where there is an ambiguous expiration date.

9-610 – Agreements not to Represent Certain Employees

NBC Universal Media, LLC, 371 NLRB No. 72 (2022) (McP; R diss.): The Board agreed with the Regional Director that a local union did not have the authority, under the relevant bylaws or master agreement, to waive the parent union's right to represent certain classifications of employees in the absence of a Board election. See also Section 11-200.

9-1000 – Special Statutory Provisions as to Prehire Agreements

Enright Seeding, Inc., 371 NLRB No. 127 (2022) (WP; R diss.): In this unfair labor practice case, the Board reaffirmed *Staunton Fuel & Material*, 335 NLRB 717 (2001), inasmuch as it followed prior precedent in holding that the existence of a Section 9(a) bargaining relationship may in some circumstances be evidenced with contract language alone (and in which the Board set forth the requirements such language must fulfill in order to be legally sufficient in that regard). The Board noted that although the 2020 Election Protection Rule overruled *Staunton Fuel* (and the related *Casale Industries*, 311 NLRB 951 (1993)) in the context of representation cases, it did not affect the application of those cases in unfair labor practice proceedings. Dissenting, Member Ring stated that he would overrule *Staunton Fuel* in the context of unfair labor practice cases for the reasons stated in the Election Protection Rule (and, accordingly,

require a showing of positive evidence of majority employee support in order to establish a majority-based 9(a) bargaining relationship).

As of February 10, 2023, a challenge to the Board's Election Protection Rule (see 85 Fed. Reg. 18366 (April 1, 2020)) remains pending in *AFL-CIO v. NLRB*, 1:20-cv-01909-BAH (D.D.C.), with briefing currently stayed.

Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationship, 87 Fed. Reg. 66890 (Nov. 4, 2022) (McWP; KR diss.): The Board proposed a rule that would rescind Section 103.22 and restore case-law including *Staunton Fuel* and *Casale Industries* in representation proceedings. Members Kaplan and Ring dissented. The initial comment period closed on February 2, 2023; reply comments were due on February 16, 2023.

CHAPTER 10: PRIOR DETERMINATIONS AND OTHER BARS TO AN ELECTION

10-120 – Comity to State Elections

Temple University Hospital, Inc. v. NLRB, 39 F.4th 743 (D.C. Cir. 2022): The court rejected the employer's argument that the Board should not have extended comity to the state labor relations board's previous certification of the bargaining unit in question. See also Section 15-136.

10-221 – The Mar-Jac Exception

J.G. Kern Enterprises, 371 NLRB No. 91 (2022) (McW; R diss.): In this unfair labor practice case, the Board found that the employer's unlawful conduct warranted an extension of the certification year (and that its withdrawal of recognition and refusal to bargain was therefore also unlawful). Dissenting, Member Ring argued that, properly viewed, this case did not involve extension of the certification year.

10-300 – Settlement Agreement as a Bar

Geodis Logistics, 371 NLRB No. 102 (2022) (McW; R conc.): In response to the employer's request for review of the Regional Director's refusal to reinstate a decertification following a settlement agreement, the Board held that an employer cannot secure reinstatement of a previously-dismissed decertification petition. Member Ring, concurring, criticized the delay in processing the petition in this case. Shortly after the Board's decision issued, the decertification petitioner moved to reinstate the petition, and the Regional Director denied that request, citing the fact that she had revoked the underlying settlement agreement; the Board denied a request for review of that latest action (see *Geodis Logistics, LLC*, 15-RD-217294, rev. denied 12/14/22 (McRW)), and in doing so explained that regional directors may revoke their previous approval of a settlement agreement; the question of whether the settlement was properly revoked is not, however, properly litigable in a representation case.

10-500 – Recognition and Successor Bar

Hospital Menonita de Guayama, Inc., 371 NLRB No. 108 (2022) (McW; R diss.): In this unfair labor practice case, the Board reaffirmed the successor bar doctrine as articulated by *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011). Dissenting, Member Ring explained why he would overrule *UGL-UNICCO* and instead find that incumbent unions in successorship situations enjoy a rebuttable presumption of majority status only.

American Medical Response, 371 NLRB No. 153 (2022) (McW; K diss.): The Board denied review of the Regional Director’s dismissal of a petition pursuant to the successor bar doctrine notwithstanding the Union’s delay in requesting bargaining, noting that the relevant inquiry was whether the Union’s conduct exhibited “inexcusable procrastination or other manifestations of bad faith,” and that the Union’s delay here did not rise to bad faith on these facts. Member Kaplan would have granted review and directed an election based on the Union’s delay in requesting bargaining.

As of February 10, 2023, a challenge to the Board’s Election Protection Rule (see 85 Fed. Reg. 18366 (April 1, 2020)) remains pending in *AFL-CIO v. NLRB*, 1:20-cv-01909-BAH (D.D.C.), with briefing currently stayed.

Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationship, 87 Fed. Reg. 66890 (Nov. 4, 2022) (McWP; KR diss.): The Board proposed a rule that would rescind current Section 103.21 and replace it with a new rule that codifies the traditional voluntary-recognition bar as refined in *Lamons Gasket Co.*, 357 NLRB 739 (2011). Members Kaplan and Ring dissented. The initial comment period closed on February 2, 2023; reply comments were due on February 16, 2023.

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

Rieth-Riley Construction Co., 371 NLRB No. 109 (2022) (McWP; KR diss.): The Board unanimously held that Regional Directors retain the discretion to issue a “merit-determination dismissal” (i.e., to dismiss a representation petition, subject to reinstatement, when the Regional Director has found merit to an unfair labor practice charge that would irrevocably taint the petition and any related election) under the 2020 Election Protection Rule. A majority affirmed the Regional Director’s dismissal of the petition in question here based on her finding of a causal nexus between the unfair labor practices and employee disaffection, as well as the fact that the complaint sought an affirmative bargaining order. Dissenting, Members Kaplan and Ring would have required a hearing on the causal-nexus determination, and also would have found that the delay in processing the petitions in this case was too extensive to permit dismissal based on the complaint seeking an affirmative bargaining order. The Board subsequently denied review of merit-determination dismissals in *Station Casinos LLC d/b/a Palms Casino Resort*, 28-RD-273582, rev. denied 8/2/22 (McW; R conc.); *Hood River Distillers, Inc.*, 19-RD-271944, rev. denied 11/2/22 (McKP); and *Station Casinos LLC d/b/a NP Red Rock*, 28-RD-292426, rev. denied 11/7/22 (McW; K diss.).

Saint Alphonsus Medica Center – Ontario, Inc., 371 NLRB No. 130 (2022) (McWP): The Board denied review of the Regional Director’s blocking determination, in which he declined to impound the ballots under Section 103.20(c), as none of the unfair labor practice violations alleged by the Petitioner concerned the circumstances surrounding the election petition (which was filed by the Petitioner in response to the Employer’s anticipatory withdrawal of recognition pursuant to *Johnson Controls*, 368 NLRB No. 20 (2019)). The Board clarified that in this case, the Regional Director’s approval of the Petitioner’s request to block meant only that any appropriate certification would not issue until final disposition of the unfair labor practice charges and a determination of their effect on the petition. Chairman McFerran noted her dissent from the 2019 Notice of Proposed Rulemaking that led to the Election Protection Rule, and Members Wilcox and Prouty noted that they did not participate in the promulgation of the Election Protection Rule.

Wendt Corp., 371 NLRB No. 159 (2022) (McP; R diss.): The Board reversed the Acting Regional Director’s finding that, under *Master Slack*, 271 NLRB 78 (1984), the Employer’s unfair labor practices (as found by the Board in a parallel proceeding—see 369 NLRB No. 135 (2020), enfd. in part, review granted in part and remanded, 26 F.4th 1002 (D.C. Cir. 2022)) lacked a causal nexus with the instant decertification petition; the Board therefore dismissed the petition. Dissenting, Member Ring would have affirmed the Acting Regional Director’s decision.

As of February 10, 2023, a challenge to the Board’s Election Protection Rule (see 85 Fed. Reg. 18366 (April 1, 2020)) remains pending in *AFL-CIO v. NLRB*, 1:20-cv-01909-BAH (D.D.C.), with briefing currently stayed.

Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationship, 87 Fed. Reg. 66890 (Nov. 4, 2022) (McWP; KR diss.): The Board proposed a rule that would rescind the amendments to the blocking charge policy made by the 2020 Election Protection Rule (codified at Section 103.20), stating that it was inclined to believe, subject to comments, that the Board’s historical blocking charge policy better protects employee free choice. Members Kaplan and Ring dissented. The initial comment period closed on February 2, 2023; reply comments were due on February 16, 2023.

CHAPTER 11: AMENDMENT, CLARIFICATION, AND DEAUTHORIZATION PETITIONS

11-200 – Unit Clarification (UC) Generally

NBC Universal Media, LLC, 371 NLRB No. 72 (2022) (McP; R diss.): The Board agreed with the Regional Director that, under *Premcor, Inc.*, 333 NLRB 1365 (2001), the content producers at issue were properly viewed as “remaining” in the unit covered by the relevant article of a master agreement; the Board rejected several arguments regarding the scope of the unit at issue, finding that although there was no nationwide merged unit covering all classifications, there was a nationwide unit of technical positions, and that the content producers performed functions substantially similar to employees in that unit. The Board acknowledged that the content

producers also had some overlap with classifications in other units, but stated that *Premcor* does not allow for an employer to avoid its bargaining obligation by creating a new hybrid classification that performs functions historically performed by unit employees simply because some of those functions were performed by employees in multiple classifications across more than one unit. The Board also noted that a unit clarification petition is not an appropriate vehicle for designating a new collective-bargaining representative for an existing unit of employees. Dissenting, Member Ring would have granted review, finding there were substantial issues regarding the scope of the issue and the fact that the content producers performed work historically performed by employees in multiple units. See also Sections 4-500 and 9-610.

Penske Truck Leasing Co., 371 NLRB No. 113 (2022) (McR; P diss.): The Board stated that the issue in this case was one of accretion, and that the Regional Director had properly applied the Board’s “restrictive” accretion policy to concluded that the petitioned-for employees could not be accreted to the existing unit. The Board rejected the union’s argument that the Regional Director should have deferred this matter to the parties’ arbitration procedure, noting that accretion is a statutory question for the Board alone to decide; the Board also stated that whether the Union could add the employees to unit through some other, lawful mechanism was not before it. Dissenting, Member Prouty would have granted review and deferred the dispute to arbitration.

Innovative Transport & Logistics Solutions LLC, 15-UC-281061, rev. granted and remanded 3/8/22 (McKR): The Board stated that the Regional Director had apparently dismissed the petition based on a finding that the Petitioner sought to add positions that were historically excluded from the unit. The Petitioner, however, alleged changes in the Employer’s operation following the execution of the current bargaining agreement which, if true, could be a basis for finding the petitioned-for positions were not historically excluded; moreover, because the Petitioner was alleging recent and substantial changes to these petitions, unit clarification could still be appropriate even if the positions had been historically excluded. The Board therefore reinstated the petition and remanded for a hearing.

11-210 – Timing of UC Petition

CVS Pharmacy, 372 NLRB No. 1 (2022) (McW; R diss.): The Board vacated and set aside an earlier order based on then-Member Emanuel’s participation, and then readjudicated the case, incorporated the earlier order by reference, and entered the re-adjudicated order *nunc pro tunc*. Member Ring would not have vacated the earlier order. In the earlier order, the Board had reinstated a dismissed petition based on application of *Goddard Riverside Community Center*, 351 NLRB 1234 (2007), and *Washington Post Co.*, 254 NLRB 168 (1981), which hold that a UC petition seeking to exclude a classification based on supervisory status may be processed even though the disputed classification has been historically included (unless the parties have stipulated to the inclusion in a representation case proceeding).

11-300 – Deauthorization Petition (UD)

Burrtec Kern, LLC, 31-UD-303553, rev. denied 12/23/22 (McKW): The Board noted that the rules governing UD petitions incorporate by reference rules governing other types of election petitions and that Section 102.67(c) in turn allows a party to file a request for review of “any

action” by a Regional Director delegated to them under Section 3(b) of the Act, which includes directing elections under Section 9(c) and (e). A request for review in a UD case is therefore governed by the procedural requirements of Section 102.67(e).

CHAPTER 12: APPROPRIATE UNIT: GENERAL PRINCIPLES

12-120 – Craft Units

Nissan North America, Inc., 372 NLRB No. 48 (2023) (McWP): On review, the Board found that the petitioned-for unit of tool and die maintenance technicians was an appropriate craft unit under the multifactor craft status test set forth in *Burns & Roe Services Corp.*, 313 NLRB 1307 (1994), and that this finding was also amply supported by Board precedent concerning tool-and-die craft units. The Board explained that if craft status is demonstrated under *Burns & Roe*, there is no additional inquiry into whether the craft employees are “sufficiently distinct” from, or share an “overwhelming community of interest” with, other employees. The Board also clarified that the presence of a formal training or apprenticeship program is not a prerequisite for finding craft status. See also Sections 16-100 and 16-200.

12-210 – Community of Interest

WideOpenWest Illinois, LLC, 371 NLRB No. 107 (2022) (McRP): Applying *Boeing Co.*, 368 NLRB No. 67 (2019), the Board reversed the Acting Regional Director and found that the petitioned-for unit of Field Service Technicians, Field Service Technician Locators, System Technicians, and Warehouse Operations Specialists was an appropriate unit without the inclusion of additional classifications. The Board found that the petitioned-for employees shared an internal community of interest, and that on balance that community of interest was sufficiently distinct from the interests of the employees the employer sought to include in the unit. The Board also observed that although there are no special industry guidelines or rules for the cable industry, the facts of this case were similar to cable industry cases where the Board approved similar units.

Blizzard Entertainment, Inc., 03-RC-299607, rev. denied 11/30/22 (McKP): Applying *The Boeing Co.*, 368 NLRB No. 67 (2019), the Board agreed with the Regional Director that the petitioned-for unit of quality assurance employees share a community of interest (based on shared department, common supervision, contact, same function and skills, and shared terms and conditions of employment including wage rate), and that although the petitioned-for employees shared some interests with other employees working on the *Diablo* videogame franchise the petitioned-for employees were nevertheless “sufficiently distinct” from the other employees.

American Steel Construction, 372 NLRB No. 23 (2022) (McWP; KR diss.): The Board overruled *PCC Structurals* and *Boeing* and reinstated *Specialty Healthcare*. Pursuant to *Specialty Healthcare*, when a party contends that a petitioned-for unit is inappropriate without the inclusion of additional classifications, the petitioned-for unit will be found appropriate if it is (1) readily identifiable as a group, (2) the petitioned-for employees share a community of interest, and (3) the petitioned-for employees are sufficiently distinct from the employees the other party

contends must be included. Under the sufficiently distinct inquiry, the party contending that additional employees must be added bears the burden of establishing that the additional employees share an “overwhelming community of interest” with the petitioned-for employees. The Board further emphasized that the “overwhelming community of interest” standard applies only when a party contends that the petitioned-for employees are not sufficiently distinct from excluded employees. Members Kaplan and Ring dissented. See also Chapter 13 and Section 15-136.

Nissan North America, Inc., 372 NLRB No. 48 (2023) (McWP): The Board clarified that the “sufficiently distinct”/“overwhelming community of interest” inquiry does not apply if the petitioned-for employees constitute a craft unit. See also Sections 12-120, 16-100, and 16-200.

CHAPTER 13: MULTILLOCATION EMPLOYERS

Starbucks Corp., 371 NLRB No. 71 (2022) (RWP): The Board denied review of the Regional Director’s finding that the Employer had failed to rebut the presumptive appropriateness of the petitioned-for single-store unit. The Board specifically noted that the employer’s evidence of interchange did not establish regular or frequent interchange between the petitioned-for employees and those based in other stores in the same district, and also observed that the employer’s conclusory and generalized evidence that its local store managers had limited autonomy was at odds with the petitioner’s specific testimony that they did have autonomy certain personnel matters in the day-to-day operation of the individual stores. The Board also rejected the employer’s contention that Board precedent was ill-equipped to take the employer’s modern-day technology into account.

American Steel Construction, 372 NLRB No. 23 (2022) (McWP; KR diss.): The Board noted that the question of whether a petitioned-for unit must contain additional classifications is substantively different than whether a petitioned-for unit must contain employees at additional locations; accordingly, the Board’s reinstatement of *Specialty Healthcare* did not alter the Board’s extant law with respect to whether additional locations must be included. See also Sections 12-210 and 15-136.

CHAPTER 14: MULTIEmployer, SINGLE EMPLOYER, AND JOINT EMPLOYER UNITS

14-600 – Joint Employer

As of February 10, 2023, a challenge to the Board’s joint employer rule (see 85 Fed. Reg. 11184 (Feb. 26, 2020)) remains pending in *SEIU v. NLRB*, 21-CV-02243 (D.D.C.).

Sanitary Truck Drivers & Helpers Local 350, Int’l Bhd. of Teamsters v. NLRB, 45 F.4th 38 (D.C. Cir. 2022): Following an earlier remand to the Board to rearticulate the indirect-control element of the joint-employer test set forth in *Browning-Ferris*, 362 NLRB 1599 (2015), to meaningfully apply and explain the second part of that test, and to consider whether retroactive application of

that test was proper—see *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018)—the Board instead held that it was manifestly unjust to apply the test to these parties. See 369 NLRB No. 139 (2020). In this decision, the court held that the Board made multiple errors in its retroactivity analysis, including failing to establish that the 2015 decision was a clear departure from longstanding and settled law.

Standard for Determining Joint-Employer Status, 87 Fed. Reg. 54641 (Sept. 7, 2022) (McWP; KR diss.): The Board proposed a rule that would rescind and replace the 2020 joint employer rule (see Section 103.40). Initial comments were due by December 7; responses to initial comments were due by December 21. Members Kaplan and Ring dissented from the Notice of Proposed Rulemaking.

Colart Americas, Inc., 372 NLRB No. 9 (2022) (McKW): In this unfair labor practice case, the Board found that the judge had properly applied the standard set forth in *Browning-Ferris*, 362 NLRB 1599 (2015), to find joint-employer status, noting that the Board’s subsequent 2020 joint-employer rule applied only prospectively, that the D.C. Circuit had largely affirmed *Browning-Ferris* at 911 F.3d 1195, and there was no need to comprehensively address the issues raised in the court’s remand insofar as the user employer exercised direct control over essential terms and conditions of employment of the employees of the supplier employer.

CHAPTER 15: SPECIFIC UNITS AND INDUSTRIES

15-136 – Health Care Institutions

Temple University Hospital, Inc. v. NLRB, 39 F.4th 743 (D.C. Cir. 2022): The court noted that although the professional-technical unit in question was not one of the 8 units specified in the Board’s Health Care Rule, it had originally been certified in 1975 and therefore was an “existing non-conforming unit” that also remains appropriate under the Health Care Rule.

American Steel Construction, 372 NLRB No. 23 (McWP; KR diss.): The Board stated that it viewed the purported reinstatement of the *Park Manor Care Center* (“pragmatic or empirical community of interests”) standard in *PCC Structurals* as dicta that is not binding on the Board, given that *PCC Structurals* did not involve a unit at a nonacute healthcare facility.

15-260 – Universities and College

President and Trustees of Bates College, 01-RC-284384, rev. granted 3/18/22 (KR; Mc diss.): The Board stated that the request for review raised substantial issues with respect to whether the longstanding principle that a petitioned-for wall-to-wall unit is presumptively appropriate should be applied to units in higher education that include both faculty and staff, and whether the petitioned-for unit here is appropriately considered a wall-to-wall unit as contemplated by, e.g., *Kalamazoo Paper Box*, 136 NLRB 134 (1962). Chairman McFerran would have denied review in all respects.

CHAPTER 16: CRAFT AND TRADITIONAL DEPARTMENTAL UNITS

16-100 – Severance

Nissan North America, Inc., 372 NLRB No. 48 (2023) (McWP): The Board discussed how craft-severance cases can be instructive in assessing whether a petitioned-for unit constitutes a craft unit in an initial organizing setting. See also Sections 12-120 and 16-200.

16-200 – Initial Establishment of Craft or Departmental Unit

Nissan North America, Inc., 372 NLRB No. 48 (2023) (McWP): On review, the Board found that the petitioned-for unit of tool and die maintenance technicians was an appropriate craft unit under the multifactor craft status test set forth in *Burns & Roe Services Corp.*, 313 NLRB 1307 (1994), and that this finding was also amply supported by Board precedent concerning tool-and-die craft units. The Board explained that if craft status is demonstrated under *Burns & Roe*, there is no additional inquiry into whether the craft employees are “sufficiently distinct” from, or share an “overwhelming community of interest” with, other employees. The Board also clarified that the presence of a formal training or apprenticeship program is not a prerequisite for finding craft status. See also Sections 16-100 and 12-120.

CHAPTER 17: STATUTORY EXCLUSIONS

17-400 – Independent Contractors

As of February 10, 2023, *The Atlanta Opera, Inc.*—in which the Board granted review and invited briefing on the standard to be applied in determining independent contractor status, see 371 NLRB No. 45 (2021) (McWP; KR diss.)—remains pending.

STG Cartage, LLC d/b/a XPO Logistics, 21-RC-289115, rev. granted 7/13/22 (McKR): With respect to the issue of whether the petitioned-for drivers are independent contractors, the Board took administrative notice of the briefs filed in response to the Notice and Invitation to File Briefs in *The Atlanta Opera*, 371 NLRB No. 45 (2021). Members Kaplan and Ring noted that no party to this case had asked the Board to revisit *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), and noted that they had dissented from the solicitation of briefs in *The Atlanta Opera* and adhered to the views stated there.

17-500 – Supervisors

17-512 – In the Interest of the Employer

Pain Relief Centers, P.A., 371 NLRB No. 70 (2021) (RWP): In this unfair labor practice case, the Board noted that the employer’s invocation of state law was insufficient to carry its burden of establishing an individual’s supervisory status, particularly as the state law in question did not answer the key question of whether the supervisory authority in question was exercised “in the interest of the employer.” See also Section 17-522.

17-513 – Power Effectively to Recommend

Pain Relief Centers, P.A., 371 NLRB No. 70 (2021) (RWP): In this unfair labor practice case, the Board found that the evidence did not establish the putative supervisor had effectively recommended discipline or assignment; for discipline, there was no evidence that the individual had made any recommendation or that it was followed without independent investigation by higher management; for assignment, the individual denied having any role in creating the employer’s plan for medical care during the pandemic, and vague testimony that the individual “worked together” to make a plan was not sufficient to establish an effective recommendation.

17-521 – Assign

Pain Relief Centers, P.A., 371 NLRB No. 70 (2021) (RWP): See Section 17-513.

NCRNC, LLC d/b/a Northeast Center for Rehabilitation and Brain Injury, 372 NLRB No. 35 (2022) (McP; R diss.): The Board agreed with the judge that the individual in question made assignments, but that they were routine in nature and therefore did not involve independent judgment. Member Ring would have found that the assignments involved independent judgment.

Metro Man IV, LLC d/b/a Fountain Bleu Health and Rehabilitation Center, Inc., 372 NLRB No. 37 (2022) (WP; K diss. on other grounds): The Board affirmed the judge’s finding that LPNs’ assignment of work to CNAs was routine and did not involve independent judgment.

17-522 – Responsibly Direct

Pain Relief Centers, P.A., 371 NLRB No. 70 (2021) (RWP): In this unfair labor practice case, the Board noted that the “accountability” required to establish responsible direction “does double duty” by both giving meaning to the term “responsibly” and by ensuring the authority exercised is in the interest of the employer; the Board went on to find that the evidence did not establish that the individual in question met the accountability requirement. See also Section 17-512.

Metro Man IV, LLC d/b/a Fountain Bleu Health and Rehabilitation Center, Inc., 372 NLRB No. 37 (2022) (WP; K diss. on other grounds): The Board affirmed the judge’s finding that the respondent had not shown that LPNs were held accountable for the shortcomings of CNAs.

17-523 – Discipline, Discharge, and Suspension

Pain Relief Centers, P.A., 371 NLRB No. 70 (2021) (RWP): See Section 17-513.

Metro Man IV, LLC d/b/a Fountain Bleu Health and Rehabilitation Center, Inc., 372 NLRB No. 37 (2022) (WP; K diss. on other grounds): The Board affirmed the judge’s finding that LPNs’ role in discipline was reportorial and that they could not independently issue discipline.

17-530 – Secondary Indicia

Metro Man IV, LLC d/b/a Fountain Bleu Health and Rehabilitation Center, Inc., 372 NLRB No. 37 (2022) (WP; K diss. on other grounds): The Board affirmed the judge’s conclusion that the respondent had not established that its LPNs possessed any of the statutory indicia of supervisory status, and that the judge therefore did not err by declining to consider secondary indicia.

CHAPTER 18: STATUTORY LIMITATIONS

18-230 – Guard Unions

Securitas Security Services USA, Inc., 372 NLRB No. 2 (2022) (McRW): See Section 6-200.

CHAPTER 19: CATEGORIES GOVERNED BY BOARD POLICY

19-510 – Technical Employees—Health Care

Temple University Hospital, Inc. v. NLRB, 39 F.4th 743 (D.C. Cir. 2022): See Section 15-126.

19-600 – Quality Control Employees

Blizzard Entertainment, Inc., 03-RC-299607, rev. denied 11/30/22 (McKP): See Section 12-210.

CHAPTER 20: EFFECT OF STATUS OR TENURE ON UNIT PLACEMENT AND ELIGIBILITY TO VOTE

20-300 – Seasonal Employees

Pier 55, Inc. d/b/a Little Island, 371 NLRB No. 80 (2022) (McW; R diss.): The Board denied review of the Regional Director’s finding that the stage technicians in question were eligible to vote as seasonal employees with a reasonable expectation of future employment with the employer, noting (1) the narrow labor pool from which the employer hired applicants, (2) the employer’s regular and frequent use of stage technicians during the one season it had been in operation (and the Regional Director’s determination that the employer had no concrete plans to change its operations), and (3) evidence of a recall policy and preference. Member Ring would have granted review as to whether the required reasonable expectation of reemployment was present here.

20-630 – Clients (Rehabilitation)

Sinai Hosp. of Baltimore, Inc. v. NLRB, 33 F.4th 715 (4th Cir. 2022): The court concluded that substantial evidence supported the Board’s determination that certain disabled janitorial workers were “employees” within the meaning of the Act because the employer had failed to establish

that the relationship with these individuals was “primarily rehabilitative.” Concurring, Judge Niemeyer would strongly presume that where (as here) individuals were hired under a Javits-Wagner-O’Day Act program, those individuals are not “employees” under the NLRA, but observed that the employer had not argued for such a categorical presumption.

CHAPTER 22: REPRESENTATION CASE PROCEDURES AFFECTING THE ELECTION

On January 17, 2023, the D.C. Circuit issued its decision in *AFL-CIO v. NLRB*, Case No. 20-5223, 2023 U.S. App. LEXIS 990, affirming in part, 466 F. Supp. 3d 68 (D.D.C. 2020) and 471 F. Supp. 3d 228 (D.D.C. 2020), which passed on the lawfulness of certain provisions of the Board’s 2019 amendments to its representation-case rules (see 84 Fed. Reg. 69524 (Dec. 18, 2019)). See Chapter 3 for details.

As of February 10, 2023, the Board’s Advance Notice of Proposed Rulemaking seeking public input on the use of videoconference technology to conduct, in whole or in part, all aspects and phases of unfair labor practices and representation case hearings and on potential amendments to its procedural rules regarding the use of videoconference technology remains pending; comments were due on January 4, 2022. See 86 Fed. Reg. 61090 (Nov. 5, 2021).

22-110 – Mail Ballots

KMS Commercial Painting, LLC, 371 NLRB No. 69 (2022) (McP; R conc.): See Section 23-112.

NRT Bus, Inc., 371 NLRB No. 136 (2022) (WP; R diss.): See Section 23-112.

Starbucks Corp., 371 NLRB No. 154 (2022) (McWP; KR diss.): The Board revised one of the factors set forth in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020), that guide regional directors’ consideration of whether to direct a mail-ballot election based on the Covid-19 pandemic. Specifically, the Board updated Factor 2, holding that going forward, a Regional Director will not abuse their discretion by directing a mail-ballot election where the CDC’s Covid-19 Community Level is “high” for the county in question. Dissenting, Members Kaplan and Ring agreed that it was time to revisit *Aspirus Keweenaw*, but would not have done so without the benefit of public input and expert advice.

3067 Orange Ave., LLC d/b/a Anaheim Crest Nursing Center, 21-RC-264740, rev. denied 6/13/22 (McKP): The Board noted that the Regional Director’s mail-ballot determination was consistent with *Aspirus* factors 4 and 5 (because the Employer had not shown its proposed voting room setup would comply with GC Memo 20-10 and because there was an outbreak at the facility in the weeks leading up to the decision and direction of election). A majority also found that the heightened risk of Covid-19 transmission from unit employees and outside participants to the vulnerable residents of the facility favored a mail-ballot election pursuant to factor 6 (“other similarly compelling considerations”) in light of the high positivity rate already present at the facility; Member Kaplan disagreed that factor 6 applied, insofar as there was no showing the

positivity rate met factor 2 and the existence of a vulnerable population at the facility would not, by itself, be sufficient to meet factor 6.

CenTrio Energy South, LLC, 371 NLRB No. 94 (2022) (McP; R diss.): The Board encouraged Regional Directors to carefully consider the realities of mail service in their area when determining the voting period for mail-ballot elections. See also Sections 24-410 and 24-427.

Packers Sanitation Services, Inc., 371 NLRB No. 111 (2022) (McRP): See Section 23-530.

22-111 – Absentee Ballots

As of February 10, 2023, the Board’s Notice of Proposed Rulemaking that would provide absentee ballots for employees who are on military leave remains pending. See 85 Fed. Reg. 45553 (July 29, 2020).

22-112 – Challenges

Needham Excavating, Inc., 371 NLRB No. 146 (2022) (McKR): Because the Board directed a second election, it found it unnecessary to pass on the union’s exception to the judge’s recommendation to sustain a challenge to one ballot. Member Kaplan stated that he would have adopted the judge’s finding (that the employee was not a dual-function employee eligible to vote in the election).

22-119 – Hearing on Objections

Akima Global Services, Inc., 372 NLRB No. 14 (2022) (McP; R conc.): To the extent that the petitioner asked the Board to rescind an order scheduling a hearing on objections, the request was denied as moot because the regional director subsequently postponed the hearing and consolidated the instant representation case with an unfair labor practice charge for hearing before an administrative law judge. Concurring, Member Ring stated that he was deeply troubled by the delays in this case and the part actions by the agency had played in that delay.

22-121 – Rerun Elections

Dynamic Concepts, Inc., 371 NLRB No. 117 (2022) (WP; K diss.): The Board clarified that a Regional Director can set aside an election and proceed to a rerun election based on agreement by the nonobjecting party over the protest of the objecting party, but provided for new Notice language in such a situation, and further emphasized that the Regional Director must schedule the rerun election when free choice is possible. Dissenting, Member Kaplan would not have required the new Notice language and questioned the scheduling language. See also Section 24-500.

Needham Excavating, Inc., 371 NLRB No. 146 (2022) (McKR): See Section 22-112.

CHAPTER 23: VOTING ELIGIBILITY

23-112 – Voluntary Quits

KMS Commercial Painting, LLC, 371 NLRB No. 69 (2022) (McP; R conc.): The Board reaffirmed the longstanding principle that in mail ballot elections, individuals are deemed eligible voters if they are in the unit on both the payroll eligibility cutoff date and on the date they mail in their ballots to the Board’s designated office. See, e.g., *Dredge Operators, Inc.*, 306 NLRB 924 (1992). The Board commented that this well-settled law has effectively provided a bright-line rule for decades in resolving voter eligibility in mail ballot elections and has proven well-suited to the increased use of mail balloting during the Covid-19 pandemic. Concurring, Member Ring commented that he was open to reviewing mail ballot procedures generally, including the principle reaffirmed here, in a future appropriate case.

NRT Bus, Inc., 371 NLRB No. 136 (2022) (WP; R diss.): The Board reaffirmed *KMS Commercial Painting* and *Dredge Operators*. Dissenting, Member Ring would have granted review to reconsider this principle, which he contended had never been explained.

23-115 – Laid-Off Employees

The Atlantic Group, Inc., 371 NLRB No. 119 (2022) (WP; K diss.): In this unfair labor practice case dealing with whether the layoffs in question were consistent with past practice, the Board noted that layoffs due to Covid-19 are significantly different than other layoffs, citing *NP Palace LLC d/b/a Texas Station Gambling Hall and Hotel*, 370 NLRB No. 11 (2020). Dissenting, Member Kaplan noted that *Texas Station* dealt with voting eligibility, not whether layoffs were unlawful.

23-510 – Voting List (Excelsior)

MVM, Inc., 372 NLRB No. 32 (2022) (KR; Mc diss.): See Section 24-309.

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

Packers Sanitation Services, Inc., 371 NLRB No. 111 (2022) (McRP): The Board found that the Regional Director had not abused his discretion by converting the manual election to a mail-ballot election given that the parties had entered into a Stipulated Election Agreement providing that the Regional Director had “full and complete discretion to determine whether it is unsafe, for any reason, to conduct a manual election on the stipulated date” and, upon that showing, had “sole and complete discretion to reschedule the date, time, location, and/or manner of the election, including converting the election to a mail ballot election.” The Board stated that this rescheduling provision was not ambiguous, and the fact that it was possible that a mail-ballot election would not have been warranted had the issue been litigated did not demonstrate that the rescheduling provision was contrary to established Board precedent. The Board accordingly held the parties to this agreed-upon provision.

Window to the World Communications, Inc., 372 NLRB No. 3 (2022) (McKW): After finding that a departure was warranted from the Board’s usual policy against counting late-arriving ballots (see Section 24-427), the Board remanded for further action; in this regard, the Board observed that the stipulation to the rerun election in question provided that ballots had to be received by a certain date, and opening and counting the ballot in question, which arrived after that date, would be contrary to the stipulation. The Board emphasized that the parties were free to nevertheless agree to open and count the late-arriving ballot, thereby obviating the need for a third election. The Board further observed that if the parties could not agree to count the ballot, the third election would, pursuant to the stipulated election agreement, have to be conducted by mail unless the parties agreed to a manual election.

The Ritz-Carlton Hotel Company, L.L.C. d/b/a The Ritz-Carlton, Half Moon Bay, 20-RC-294048, rev. denied 8/3/22 (McWP): The Board agreed with the Regional Director that the Stipulated Election Agreement unambiguously conditioned voter eligibility on satisfying the well-established voter eligibility formula set forth in *Davison-Paxon Co.*, 185 NLRB 21 (1970), observing that the disputed eligibility language in the agreement is boilerplate language reiterating *Davison-Paxon*. The Regional Director therefore did not err by declining to consider extrinsic evidence concerning the supposed intent or understanding of the parties when they entered into the agreement.

CHAPTER 24: INTERFERENCE WITH ELECTIONS

24-220 – Party vs. Third-Party Conduct

Exela Enterprise Solutions, Inc. v. NLRB, 32 F.4th 436 (5th Cir. 2022): See Section 24-310.

24-307 – Misrepresentation

GHG Management LLC d/b/a Windy City Cannabis, 371 NLRB No. 93 (2022) (WP; K diss.): See Section 24-410.

Paragon Systems, 21-UD-279539, rev. denied 3/11/22 (McKW): The Board agreed with the Regional Director that the union engaged in objectionable conduct by sending an email directing employees to disregard NLRB mail ballots because this was not campaign propaganda attempting to encourage voters to vote a certain way, but instead a directive from the union that had the objective and foreseeable effect of confusing voters and reducing turnout in this deauthorization election. The Board did not, however, rely on witnesses’ testimony that they were personally confused by the disputed email. The Board also disagreed with the Union’s assertion that this case raised a question as to whether, in a deauthorization election, it is a legitimate campaign tactic for a party to urge voters not to vote at all.

24-309 – The Voter List (Excelsior Rule)

MVM, Inc., 372 NLRB No. 32 (2022) (KR; Mc diss.): The Board reversed the Regional Director and concluded that the employer’s failure to provide home phone numbers of five unit

employees on the voter list did not warrant setting aside the election; the Board concluded that the employer had substantially complied with the voting list requirements because it had only omitted home phone numbers for about 5 percent of eligible employees, the number of omissions would not have been determinative (as the union lost the election by 19 votes), the union was not substantially prejudiced by the omissions because it still had cell phone numbers (and the other required information) for the five voters in question, and the employer's explanation for the omission (mistakenly believing the cell phone and home phone numbers were the same for all voters) was consistent with a finding of substantial compliance as it did not rise to the level of bad faith or gross negligence. Dissenting, Chairman McFerran would have found that the employer's conduct amounted to gross negligence that warranted setting aside the election.

24-310 – The Peerless Rule

Exela Enterprise Solutions, Inc. v. NLRB, 32 F.4th 436 (5th Cir. 2022): The court held that substantial evidence supported the Board's conclusion that a conversation between an alleged union agent and employees within 24 hours of the election did not violate *Peerless Plywood Co.*, 107 NLRB 427 (1953), given that there was no evidence in the record supporting the existence of an agency relationship.

24-410 – Board Agent Conduct

GHG Management LLC d/b/a Windy City Cannabis, 371 NLRB No. 93 (2022) (WP; K diss.): The Board concluded that even assuming that a Board agent misled the parties by giving the incorrect impression that the Region had received all outstanding mail ballots that had previously led the parties (and the Acting Regional Director) to agree to extend the voting period and ballot count, there was no reasonable doubt as to the fairness and validity of the election. In this regard, the Board noted that the voting itself was valid (because there was no indication any employees were aware of the communications and the one outstanding, potentially-dispositive ballot was already in the mail by the time of the communications), and the effect of the alleged misrepresentation was speculative (because even if the employer had sought an extension in the voting period based on the outstanding ballot, the Acting Regional Director was not obligated to grant it). Dissenting, Member Kaplan would have granted review; in his view, when combined with other concerns raised by the objections the issue of the Region's misstatement raised insurmountable concerns about the Region's handling of the election.

CenTrio Energy South, LLC, 371 NLRB No. 94 (2022) (McP; R diss.): The Board found it unnecessary to pass on the Regional Director's reasoning for declining to provide the number of late-arriving ballots to the employer, but stated that the better course of action would be for a regional director to disclose the number of late-arriving ballots to any party requesting that information. See also Sections 22-110 and 24-427.

24-422 – Opening and Closing of the Polls

Refresco Beverages US Inc., 22-RC-276628, decision and order remanding 4/5/22 (McKW): The Board found that the delayed opening of the polls possibly disenfranchised a determinative number of voters and that therefore a new election was required. The Board emphasized that the standard here is an objective one, and that because 32 eligible voters did not vote in an election

decided by 13 votes, the votes of those possibly excluded could have been determinative. The Board further stated that the objective standard does not assess how likely or probable it is that the non-voting eligible voters would have cast votes during the period when the polls were not opened as scheduled, and that evidence of which employees did not vote or why they did not vote was not relevant under the objective standard.

24-427 – Mail Ballots

GHG Management LLC d/b/a Windy City Cannabis, 371 NLRB No. 93 (2022) (WP; K diss.): See Section 24-410.

CenTrio Energy South, LLC, 371 NLRB No. 94 (2022) (McP; R diss.): The Board found that the Regional Director acted consistently with well-established precedent by overruling an objection alleging that the Region refused to count a potentially-dispositive number of ballots that were received after the count and therefore were not counted. See *Classic Valet Parking*, 363 NLRB 249 (2015). Dissenting, Member Ring stated that he would direct the Region to open and count the late-arriving ballots under the exceptional circumstances of this case. See also Sections 22-110 and 24-410.

Window to the World Communications, Inc., 372 NLRB No. 3 (2022) (McKW): The Board concluded that the singular circumstances of this case warranted a departure from the Board's normal approach for dealing with mail ballots that arrive after the count date. The Board stated that a highly unusual combination of circumstances informed this conclusion: (1) this was a rerun election necessary only because the Region had provided the sole voter with a ballot listing the wrong union and employer; (2) the voter promptly placed the second ballot in the mail so the delay in its receipt was not attributable to any action or inaction on his part; (3) the voter was the sole voter in this self-determination election, and if the certification of results were permitted to stand he would, through no fault of his own, have to wait a year before being able to vote again on his inclusion in the existing unit; and (4) the ballot was received by the Region prior to issuance of the certification of results. Member Kaplan would have more broadly found that the bright-line rule against counting late-arriving ballots should not be applied whenever doing so would irrationally interfere with employees' fundamental rights under the Act to choose whether or not to be represented by a union. See also Section 23-530.

24-440 – Electioneering

Exela Enterprise Solutions, Inc. v. NLRB, 32 F.4th 436 (5th Cir. 2022): The court found that the Board reasonably concluded that the presence of two union agents in the parking lot a few minutes before the polls opened did not constitute objectionable electioneering under *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118 (1982), as the agents were not close to the actual polling area and there was no evidence they engaged in any electioneering while the polls were open. See also Sections 24-442 and 24-446.

24-442 – The Milchem Rule

Exela Enterprise Solutions, Inc. v. NLRB, 32 F.4th 436 (5th Cir. 2022): The court found that the Board reasonably concluded that the presence of two union agents in the parking lot a few minutes before polls opened did not violate *Milchem, Inc.*, 170 NLRB 362 (1968), as there was no evidence the agents had conversations (much less prolonged ones) with eligible voters waiting in line to vote. See also Sections 24-440 and 24-446.

24-446 – Agents Stationed Near Polling Place

Exela Enterprise Solutions, Inc. v. NLRB, 32 F.4th 436 (5th Cir. 2022): The court noted that the prolonged and unexplained absence of a union or employer at an election site can be objectionable, in this case the mere presence of representatives far outside the entrance to the polling place, absent evidence of electioneering, was insufficient to warrant setting aside the election. See also Sections 24-440 and 24-442.

24-500 – The Lufkin Rule

Dynamic Concepts, Inc., 371 NLRB No. 117 (2022) (WP; K diss.): The Board provided for new Notice language in situations where a Regional Director has set the election aside and proceeded to a rerun over the protest of the objecting party. Dissenting, Member Kaplan would not have required the new Notice language. See also Section 22-121.