

**A Review of Developments in NLRB
Representation Law During 2023
March 2024**

This paper—summarizing developments in representation case law during 2023—was initially presented at the 2024 Midwinter Meetings of the Development of the Law and Practice and Procedure Under the NLRA committees. These committees are 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/guidance/key-reference-materials/manuals-and-guides>).

The *Outline* was most recently updated in September 2017 to include developments through June 2017; supplements covering developments in 2017, 2018, 2019, 2020, 2021, and 2022 (and following a similar format as this paper) are also available on the NLRB website.

Virtually all published representation cases (Board and circuit court) from 2023 are covered here, as are consolidated representation and unfair labor practice cases in which the Board itself passed or commented on the representation issues. I have included several unfair labor practice cases that address issues that frequently also arise in representation cases, and I have also noted several unpublished Board decisions that may be of special interest, although such decisions are not binding and are non-precedential. Rulemaking activities that relate to representation-case matters are also included. Where relevant, I have noted the views of dissenting or concurring Board members.

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

CHAPTER 1: JURISDICTION

1-314 – Government Contractors

Bannum Place of Saginaw, LLC, 372 NLRB No. 97 (2023) (KWP): The Board found it unnecessary to pass on the judge’s determination that the respondents were not a joint employer with the Federal Bureau of Prisons, noting that, under *Management Training Corp.*, 317 NLRB 1355 (1995), such a finding was irrelevant to the respondents’ status as a statutory employer under the Act. See also Section 14-500.

1-403 – Religious Schools

Loma Linda—Inland Empire Consortium for Healthcare Education v. NLRB, No. 23-0688 (CKK), 2023 WL 2894348 (D.D.C. Apr. 11, 2023), *motion for injunction pending appeal and to expedite appeal denied* 1:23-cv-00688-CKK, 2023 WL 7294839 (D.C. Cir. May 25, 2023): See Section 3-910.

1-503 – Religious Organizations

Loma Linda—Inland Empire Consortium for Healthcare Education v. NLRB, No. 23-0688 (CKK), 2023 WL 2894348 (D.D.C. Apr. 11, 2023), *motion for injunction pending appeal and to expedite appeal denied* 1:23-cv-00688-CKK, 2023 WL 7294839 (D.C. Cir. May 25, 2023): See Section 3-910.

CHAPTER 3: INITIAL REPRESENTATION CASE PROCEDURES

AFL-CIO v. NLRB, 57 F.4th 1023 (D.C. Cir. 2023), affirming in part, 466 F. Supp. 3d 68 (D.D.C. 2020) and 471 F. Supp. 3d 228 (D.D.C. 2020): The court passed on the lawfulness of certain provisions of the Board’s 2019 Final Rule amending 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). The litigation on remand was dismissed as moot on January 5, 2024.
- Judge Rao, dissenting, would have upheld the 2019 Final Rule in its entirety.
- The court's mandate issued on March 13, 2023.

Representation Case Procedures, 88 Fed. Reg. 14908 (Mar. 10, 2023) (McWP; K diss.): The Board (without notice and comment) removed references in the regulations to the four provisions set aside and vacated in *AFL-CIO v. NLRB* and reverted the language of the regulations to that which existed prior to the 2019 Final Rule. Member Kaplan stated that he would have asked the Solicitor General to file a petition for certiorari with respect to the test for determining whether rulemaking is procedural (and therefore exempt from notice and comment requirement under the Administrative Procedure Act), and in the absence of that he would have re-promulgated the three provisions the D.C. Circuit found required notice and comment; regarding automatic impoundment, he stated his agreement with Judge Rao's interpretation (which would have upheld the provision), but recognized that repromulgating that provision is not an option. The revisions were effective on publication. Consistent with this Final Rule, the Board's rules now explicitly provide that:

- The employer must provide the voter list within 2 business days after the approval of an election agreement or direction of election (Section 102.62(d) and Section 102.67(l)).
- For manual elections, any party may be represented by observers of its own selection, subject to such limitations as the Regional Director may prescribe (Section 102.69(a)(5)).
- Regional Directors will issue certifications notwithstanding the pendency of a request for review (Section 102.69(b), (c)).
- In addition, the rules no longer provide for automatic impoundment if a request for review is filed within 10 business days of a decision and direction of election. Following issuance of this Final Rule, the Board granted three motions to open and count ballots previously impounded due to pending request for review (or grant of review); in granting the motions, the Board cited *AFL-CIO v. NLRB* and this Final Rule (and in all three Member Kaplan reiterated his dissent from the Final Rule and agreement with Judge Rao's dissent regarding the impoundment provision). See *STG Cartage, LLC dba XPO Logistics*, 21-RC-289115, motion granted 3/10/23 (McKP); *The Atlanta Opera*, 10-RC-

276292, motion granted 3/10/23 (McKWP); *President and Trustees of Bates College*, 01-RC-284384, motion granted 3/17/23 (McKP).

Representation Case Procedures, 88 Fed. Reg. 14913 (Mar. 10, 2023) (McWP; K diss.): The Board (without notice and comment) stayed the two provisions of the 2019 Final Rule—previously enjoined by the District Court but upheld by the Court of Appeals in *AFL-CIO v. NLRB*—until September 10, 2023. The provisions in question allowed parties to litigate disputes over unit scope and voter eligibility prior to the election (Section 102.64(a)) and instructed Regional Directors not to schedule elections before the 20th business day after the date of the direction of election (Section 102.67(b)). The Board stated that staying these provisions would accommodate the pending legal challenges to them before the District Court (see above), and further stated that a stay is necessary and appropriate because the Board is currently considering whether to revise or repeal the 2019 Final Rule, including potential revisions to those two provisions. Member Kaplan would have permitted the provisions at issue to take effect. The stay was effective on publication. The Board subsequently extended the stay of these provisions to December 26, 2023, the date on which the rule rescinding these provisions (see below) became effective. See 88 Fed. Reg. 58075 (Aug. 25, 2023) (McWP; K diss.).

Representation-Case Procedures, 88 Fed. Reg. 58076 (Aug. 25, 2023) (McWP; K diss.): The Board (without notice and comment) rescinded the 2019 amendments to representation-case procedures that were not already rescinded in the prior final rule (88 Fed. Reg. 14908). The revisions' effective date was December 26, 2023. Member Kaplan would have kept the 2019 rules in place. Consistent with this final rule, the Board's rules now provide:

- The pre-election hearing will generally be scheduled to open 8 calendar days from service of the Notice of Hearing (rather than the 14 business days provided in the 2019 rule). Sec. 102.63(a)(1).
- Regional Directors have discretion to postpone a pre-election hearing for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances (rather than permitting unlimited postponement upon request of a party showing good cause). Sec. 102.63(a)(1).
- The nonpetitioning party's statement of position will be due to be filed by noon the business day before the opening of the pre-election hearing, which will normally be 7 calendar days after service of the Notice of Hearing (rather than 8 business days after service of the notice of hearing). Sec. 102.63(b).
- Regional Directors have discretion to postpone the due date for filing the statement of position for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances (rather than permitting unlimited postponement upon request of a party showing good cause). Sec. 102.63(b).
- The petitioner will orally respond to the Statement of Position at the start of the pre-election hearing (rather than having to file a written statement of position 3 business days in advance of the hearing). Sec. 102.66(b).
- An Employer has 2 business days after service of the Notice of Hearing to post the Notice of Petition for Election (rather than 5 business days). Sec. 102.63(a)(2).
- The purpose of the preelection hearing is to determine whether a question of representation exists, and disputes concerning individuals' eligibility to vote or inclusion

in an appropriate unit ordinarily do not need to be litigated or resolved prior to the election (rather than the 2019 provision stating that eligibility and inclusion are “normally” litigated). Sec. 102.64(a).

- Parties may file post-hearing briefs only with the special permission of the regional director (for pre-election hearings) or hearing officer (for post-election hearings) within the time and addressing the subjects permitted by the regional director or hearing officer (rather than being entitled to file post-hearing briefs up to 5 business days after the close of the hearing). Sec. 102.66(h), 102.69(c)(1)(iii).
- Regional directors ordinarily should specify election details in the decision and direction of election (as opposed to the 2019 rule’s emphasis on discretion to convey the details later). Sec. 102.67(b).
- Regional directors shall schedule elections for the earliest date practicable after issuance of a decision and direction of election (eliminating the 2019 rule’s additional instruction that the election shall not be scheduled before the 20th business day after the decision and direction of election). Sec. 102.67(b).

3-500 – Dismissal or Withdrawal of Petition

Danone North America, PBC, 372 NLRB No. 103 (2023) (KW; P diss.): See Section 3-890.

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

Danone North America, PBC, 372 NLRB No. 103 (2023) (KW; P diss.): The Board granted requests for review of the Regional Director’s dismissal of two petitions and remanded for the Regional Director to provide a fuller explanation as to why the petitions should be dismissed under the contract-bar doctrine and to address the Petitioner’s arguments as to why the contract bar doctrine should not apply. The Board stated that it was not passing on the substance of the Petitioner’s arguments. Member Prouty would have denied review, as in his view the Regional Director had adequately explained the reasons for his dismissals and Section 102.71(a) of the Board’s Rules and Regulations did not require anything further of the Regional Director.

3-910 – Judicial Review—Generally

Loma Linda—Inland Empire Consortium for Healthcare Education v. NLRB, No. 23-0688 (CKK), 2023 WL 2894348 (D.D.C. Apr. 11, 2023): The court held that binding appellate precedent instructs that a district court lacks jurisdiction over any challenge to an NLRB proceeding where a litigant may subsequently receive relief on appeal, concluded that the *Leedom v. Kyne*, 358 U.S. 184 (1958), exception was not available here, noted that constitutional claims do not permit a party to bypass administrative review channeled exclusively to the courts of appeal, and therefore dismissed the action. The Employer argued that it was “patently” obvious that the NLRB lacks jurisdiction over it as a religious teaching institution. A divided D.C. Circuit subsequently denied the Employer’s emergency motion for injunction pending appeal. 1:23-cv-00688-CKK, 2023 WL 7294839 (D.C. Cir. May 25, 2023). The majority emphasized that the facts of this case were novel, complex, and distinct from precedent holding that the Board lacks statutory jurisdiction over teaching faculty that offer instruction within a religious school, and therefore the Employer had not demonstrated they type of clear and

mandatory constitutional prohibition needed to establish district court jurisdiction. Judge Rao would have granted the injunction pending appeal. The D.C. Circuit dismissed the case based on the parties' stipulation on September 8, 2023.

3-940 – Relitigation

UPS Supply Chain Solutions, Inc., 372 NLRB No. 121 (2023) (McKW): In this refusal-to-bargain case, the Board rejected the argument that the facts of this case (which involved alleged union electioneering) triggered the “extreme circumstances” exception to the rule against relitigation set forth in *Sub-Zero Freezer Co.*, 271 NLRB 47 (1984) (which involved threats to employees and property damage).

CHAPTER 4: TYPES OF PETITIONS

4-300 – Employer Petition (RM)

Cemex Construction Materials Pacific, LLC, 372 NLRB No. 130 (2023) (McWP; K diss.): The Board adopted a standard under which an employer violates Section 8(a)(5) and (1) by refusing to recognize, upon request, a union that has been designated as Section 9(a) representative by the majority of employees in an appropriate unit unless the employer promptly files an RM petition to test the union's majority status or the appropriateness of the unit, assuming that the union has not already filed a petition (the Board specified that this framework does not limit an individual or labor organization's ability to file a petition pursuant to Section 9(c)(1)(A)). The Board stated that it will normally interpret “promptly” to require an employer to file its RM petition within 2 weeks of the union's demand. The Board further held that if the employer commits an unfair labor practice that requires setting aside the election, the petition (whether filed by employer or union) will be dismissed, and the employer will be subject to a remedial bargaining order (rather than the Board conducting a rerun election). Member Kaplan would have adhered to prior precedent that the majority's approach overruled. The Board denied a motion for reconsideration at 372 NLRB No. 157 (2023) (McWP; K diss.). The General Counsel subsequently issued a guidance memorandum touching on the representation-case aspects of *Cemex*. See GC 24-01, *Guidance in Response to Inquiries about the Board's Decision in Cemex Constructional Materials Pacific, LLC* (Nov. 2, 2023).

CHAPTER 7: EXISTENCE OF A REPRESENTATION QUESTION

7-220 – RM Petitions/Incumbent Unions

Cemex Construction Materials Pacific, LLC, 372 NLRB No. 130 (2023) (McWP; K diss.): See Section 4-300.

CHAPTER 9: CONTRACT BAR

Danone North America, PBC, 372 NLRB No. 103 (2023) (KW; P diss.): See Section 3-890.

9-1000 – Special Statutory Provisions as to Prehire Agreements

As of February 12, 2024, 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.), but is currently stayed.

As of February 12, 2024, the Board’s Notice of Proposed Rulemaking that would rescind Section 103.22 and restore case-law including *Staunton Fuel* and *Casale Industries* in representation proceedings remains pending. See 87 Fed. Reg. 66890 (Nov. 4. 2022) (McWP; KR diss.). The initial comment period closed on February 2, 2023; reply comments were due on March 1, 2023.

CHAPTER 10: PRIOR DETERMINATIONS AND OTHER BARS TO AN ELECTION

10-500 – Recognition and Successor Bar

As of February 12, 2024, 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.), but is currently stayed.

As of February 12, 2024, the Board’s Notice of Proposed Rulemaking 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), remains pending. See 87 Fed. Reg. 66890 (Nov. 4. 2022) (McWP; KR diss.). The initial comment period closed on February 2, 2023; reply comments were due on March 1, 2023.

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

As of February 12, 2024, 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.), but is currently stayed.

As of February 12, 2024, the Board’s Notice of Proposed Rulemaking that would rescind the amendments to the blocking charge policy made by the 2020 Election Protection Rule (codified at Section 103.20), remains pending. See 87 Fed. Reg. 66890 (Nov. 4. 2022) (McWP; KR diss.). The initial comment period closed on February 2, 2023; reply comments were due on March 1, 2023.

Hood River Distillers, Inc., 372 NLRB No. 126 (2023) (McWP): The Board noted that the administrative law judge had previously severed and remanded a consolidated RD petition, and following that remand the Regional Director had dismissed the petition based on his finding of a causal relationship between employee disaffection and the Respondent’s unfair labor practices

(discussed in the instant decision); the Board further noted that on November 2, 2022, it had denied the Respondent’s request for review of the Regional Director’s dismissal.

Starbucks Corp., 372 NLRB No. 156 (2023) (McP; K diss.): The Board observed that the Regional Director engaged in a merit-determination dismissal, which the Board held remained available under Board law in *Rieth-Riley Construction Co.*, 371 NLRB No. 109 (2022). In agreeing with the Regional Director that dismissal was warranted here, the Board observed that the Regional Director was not obligated to make a “causal nexus” finding before dismissing because the refusal-to-bargain allegations in the complaint, if proven, would result in an affirmative bargaining order and/or extension of the certification year, and that those outcomes would not depend on the existence of a causal nexus between the unfair labor practices and the petition. Member Kaplan, dissenting, acknowledged that dismissal may be warranted absent a causal nexus finding where an affirmative bargaining order is the appropriate remedy, but would have found dismissal was not warranted based on the lengthy delay in the processing of the charges here.

CHAPTER 11: AMENDMENT, CLARIFICATION, AND DEAUTHORIZATION PETITIONS

11-200 – Unit Clarification (UC) Generally

MV Transportation, Inc., 373 NLRB No. 8 (2023) (McP; K diss. on other grounds): The Board clarified that when a unit clarification petition seeks to resolve the unit placement of a classification that voted subject to challenge, but whose placement was unnecessary to resolve prior to the issuance of the certification of representative, the applicable standard is the same standard that would have been applied had the issue been litigated prior to the underlying election. See also Section 12-210.

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

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.

MV Transportation, Inc., 373 NLRB No. 8 (2023) (McP; K diss.): The Board reversed the Regional Director and concluded that the disputed maintenance supervisors shared a community of interest with the employees the parties had agreed to include in the unit, noting that there was no dispute that functional integration and contract favored finding a shared community of interest; contrary to the Regional Director, the Board concluded that departmental organization and supervision also favored finding a shared community of interest, insofar as the maintenance supervisors were in the same department and shared supervision with some (albeit a minority) of included employees. Although the Board found that the remaining factors did not favor finding a shared community of interest, it nevertheless concluded that, on balance, the relevant factors supported including the maintenance supervisors in the unit. Member Kaplan would have denied review based on his view that the Regional Director had correctly excluded the maintenance supervisors. See also Section 11-200.

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

14-500 – Single Employer

Bannum Place of Saginaw, LLC, 372 NLRB No. 97 (2023) (KWP): In adopting the judge’s single-employer finding, the Board rejected the employer’s argument that it did not share sufficient interrelation of operations with its subsidiary because the subsidiary had its own manager; the Board cited precedent involving single-employer findings on similar facts. See also Section 1-314.

14-600 – Joint Employer

As of February 12, 2024, a challenge to the Board’s 2020 joint employer rule (see 85 Fed. Reg. 11184 (Feb. 26, 2020)) remains pending in *SEIU v. NLRB*, 21-CV-02243 (D.D.C.), but is currently stayed.

Bannum Place of Saginaw, LLC, 372 NLRB No. 97 (2023) (KWP): See Section 1-314.

Cognizant Technology Solutions U.S. Corporation, 372 NLRB No. 108 (2023) (McWP): In denying the requests for review, the Board agreed with the Regional Director that, under Section 103.40, the Petitioner had established that Google was a joint employer of the petitioned-for employees, given that Google possessed and exercised such substantial direct and immediate control over the employees’ supervision, benefits, and hours of work as to warrant finding that Google meaningfully affects matters relating to the employment relationship with those employees. The Board provided additional analysis of each these essential terms and conditions.

The Board did not rely on the Regional Director’s finding that Google exercised direct and immediate control over direction within the meaning of Section 103.40(a) and (c)(8), but also observed that the Board does not require a showing of authority over any specific number or combination of essential terms and conditions as a prerequisite to a joint-employer finding. Although the Board found it unnecessary to determine Google’s possession or exercise of indirect control over essential terms and conditions, the Board noted that this is also probative of its status as a joint employer. The Board reiterated that a joint employer is required to bargain with respect to such terms and conditions of employment which it possesses the authority to control.

Standard for Determining Joint Employer Status, 88 Fed. Reg. 73946 (Oct. 27, 2023) (McPW; K diss.): The Board issued a Final Rule rescinding and replacing the 2020 joint employer rule. The new Final Rule emphasizes that joint employer status may be established by indirect and/or reserved control, and also reconfigures and adds to the list of “essential terms and conditions” of employment. The Rule’s effective date was originally December 26, 2023, but was subsequently delayed to February 26, 2024, in order to facilitate the resolution of legal challenges that have been filed with respect to the rule. See 88 Fed. Reg. 81344 (Nov. 22, 2023) (citing *Service Employees International Union v. NLRB*, No. 23-1309 (D.C. Cir.), and *Chamber of Commerce of the United States of America, et al. v. NLRB*, No. 6:23-cv-00553 (E.D. Tex.)). Oral argument in the latter case is scheduled for February 13, 2024.

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

The Atlanta Opera, Inc., 372 NLRB No. 95 (2023) (McWP; K diss. in part): The Board overruled *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), and reinstated the standard for determining independent-contractor status set forth in *FedEx Home Delivery*, 361 NLRB 610 (2014). In doing so, the Board rejected *SuperShuttle DFW*'s characterization of entrepreneurial opportunity for gain or loss as the “animating principle” of the independent-contractor test and instead held that evidence of entrepreneurial opportunity is considered when assessing whether a putative independent contract is, in fact, rendering services as part of an independent business. The Board also emphasized that it will give weight only to actual (not merely theoretical) entrepreneurial opportunity, and that it will evaluate the constraints imposed by a company on the individual's ability to pursue this opportunity. Applying the reinstated standard, the Board concluded that the Employer had not established that the petitioned-for makeup artists, wig artists, and hairstylists were independent contractors. Dissenting in part, Member Kaplan would have adhered to *SuperShuttle DFW*, but agreed with the majority that the Employer had not established that the petitioned-for employees were independent contractors under *SuperShuttle DFW*.

17-500 – Supervisors

International Organization of Masters v. NLRB, 61 F.4th 169 (D.C. Cir. 2023): The court observed that neither the Board nor any reviewing court has ever found that an employer's unannounced belief about the supervisory status of employees determines the Board's jurisdiction, and further noted that nothing in the Act instructs the Board to consider parties' beliefs as part of its jurisdictional analysis. The court held that the Board's dismissal of the complaint in this case based on its finding that the employer believed that all employees in the unit were statutory supervisors (a position the employer had not itself advanced) was therefore arbitrary and capricious and remanded for reconsideration.

Tracy Auto, L.P. d/b/a Tracy Toyota, 372 NLRB No. 101 (2023) (McW; K conc. in part and diss. in part): The Board noted that two putative supervisors in question did not merely have the same title (“foreman”), but also held the same positions as two other individuals, and accordingly the other two individuals' evidence of supervisory authority was relevant to the two putative supervisors in question. Even so, the Board agreed with the judge that the employer had not proven supervisory status. See also Sections 17-522 and 17-523.

17-511 – Independent Judgment

NLRB v. Aakash, Inc., 58 F.4th 1099 (9th Cir. 2023): The court found that the employer had failed to present sufficient evidence to prove that the RNs assign work using independent judgment, as the record suggested that RNs simply paired nursing assistants to groups of patients using a schedule created by higher management.

17-521 – Assign

NLRB v. Aakash, Inc., 58 F.4th 1099 (9th Cir. 2023): See Section 17-511.

Acumen Capital Partners, LLC, 372 NLRB No. 129 (2023) (McKW): In this unfair labor practice case, the Board affirmed the ALJ’s finding that an individual possessed the authority to assign work and overtime using independent judgment. Member Wilcox found it unnecessary to rely on the finding that the individual had the authority to assign overtime.

17-522 – Responsibly Direct

NLRB v. Aakash, Inc., 58 F.4th 1099 (9th Cir. 2023): The court found that RNs did not responsibly direct other employees using independent judgment because the Board had reasonably concluded that RNs could not direct the work of nursing aides and were not held accountable for nursing aides’ work.

Tracy Auto, L.P. d/b/a Tracy Toyota, 372 NLRB No. 101 (2023) (McKW): The Board rejected the employer’s claim that its demotion of a putative supervisor for inefficiency established that foremen have the authority to responsibly direct other employees; the Board found that the demotion instead merely showed that foremen were accountable for their own performance or lack thereof, not the performance of others. See also Sections 17-500 and 17-523.

17-523 – Discipline, Discharge, and Suspension

NLRB v. Aakash, Inc., 58 F.4th 1099 (9th Cir. 2023): The court agreed with the Board that the RNs did not discipline employees. The employer relied on a single instance of a RN notifying a superior that an employee was sleeping on the job, but the RN had specifically requested an investigation and review by management personnel; the fact that the RN had also chastised the sleeping employee did not, without more, demonstrate the independent authority to discipline.

Tracy Auto, L.P. d/b/a Tracy Toyota, 372 NLRB No. 101 (2023) (McKW): The Board found that the evidence regarding putative supervisors’ role in written warnings did not establish the authority to discipline as there was no evidence that the employer used a progressive disciplinary system or that the warnings otherwise affected job status. See also Sections 17-500 and 17-522.

CHAPTER 18: STATUTORY LIMITATIONS

18-230 – Guards Unions

Universal Protection Service, LLC d/b/a Allied Universal Security Services, 373 NLRB No. 3 (2023) (McKW): The Board reversed the Regional Director’s dismissal of the Petitioner’s petition seeking to represent a unit of guards, which was based on his finding that the Petitioner also represents employees who are not guards within the meaning of Section 9(b)(3). The Board emphasized that, under *Burns Security Services*, 278 NLRB 565 (1986), the noncertifiability of a guard union must be shown by definitive evidence, and specified that the burden of establishing

noncertifiability therefore rests with the party asserting it. The Board stated that, because the Employer had asserted that the Petitioner could not be certified to represent the petitioned-for guards because it also represented nonguard Traffic Control Aides, it was the Employer's burden to show, by definitive evidence, that the Traffic Control Aides were not guards; the Board concluded that the Employer had not met that burden, citing record evidence that the Traffic Control Aides have some guard-like duties and responsibilities as well as the potential for divided loyalty based on the Aides' obligations during a strike. Citing *Rapid Armored Corp.*, 323 NLRB 709 (1997), Member Kaplan stated his view that the Regional Director should not have allowed the Employer to litigate the Traffic Control Aides' duties.

CHAPTER 22: REPRESENTATION CASE PROCEDURES AFFECTING THE ELECTION

AFL-CIO v. NLRB, 57 F.4th 1023 (D.C. Cir. 2023), affirming in part, 466 F. Supp. 3d 68 (D.D.C. 2020) and 471 F. Supp. 3d 228 (D.D.C. 2020): The court 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 Board subsequently issued two Final Rules amending its representation-case rules in the wake of the D.C. Circuit's decision. See Chapter 3 for details.

22-110 – Mail Ballots

GC 20-10, *Suggested Manual Election Protocols* (May 16, 2023): The General Counsel updated prior guidance regarding suggested manual election protocols for use during the COVID-19 pandemic.

22-121 – Rerun Elections

Starbucks Corp., 14-RC-289926, rev. denied 12/15/23 (McPW): The Board declined to address the Petitioner's argument that the Regional Director should not have directed a rerun election—because an ALJ had recommended an affirmative bargaining order with respect to the petitioned-for unit in a ULP proceeding, and also because a bargaining order is appropriate under *Cemex*, 372 NLRB No. 130 (2023)—because the ALJ's findings and the propriety of the bargaining order were still being litigated and had not been consolidated with the present representation case. Given that the Regional Director had correctly sustained certain objections and directed a rerun, the Board stated that it need not and would not reach the Employer's other arguments for voiding the election. In response to the Employer's argument that, had it been able to present its full case, the proper remedy would be to bar the Petitioner from representing the unit for a year, the Board stated that this remedy had no basis in Board precedent and ran directly counter to Section 7 of the Act; the proper remedy for objectionable conduct is a rerun election, which the Regional Director had directed. Finally, in response to the Employer's contention that the Regional Director erred by directing that the second election be conducted by mail ballot, the Board observed that it typically uses the method of election agreed upon by the parties in a prior stipulated election agreement in any rerun election, and the decision to order a second mail ballot election here was consistent with that practice.

22-122 – The Certification

SEIU Healthcare Michigan (Maple-Drake Real Estate, LLC d/b/a Notting Hill of West Bloomfield), 372 NLRB No. 43 (2023) (McWP): In this consolidated case, which involved a decertification election in which the incumbent union prevailed, the judge had recommended that the employer’s objections be overruled and no exceptions were filed. The judge had further recommended that the decertification petition be dismissed, but the Board instead issued a certification of representative, noting that Section 9(c) of the Act provides that, following a representation election, the Board “shall certify the results thereof,” and that because the union had received a majority of the votes cast it was entitled to a certification of representative.

United Scrap Metal PA, LLC, 372 NLRB No. 49 (2023) (KWP): The Board noted that under Section 102.69 of the Board’s Rules and Regulations, the Board itself has the authority to issue a certification, and because the union had prevailed in the election, the Board so certified. See also Sections 24-312 and 24-320.

CHAPTER 23: VOTING ELIGIBILITY

23-100 – Eligibility in General

23-110 – The General Rule

Gimme Coffee, Inc., 372 NLRB No. 75 (2023) (McWP): The Board reiterated that the party challenging an employee’s eligibility to vote bears the burden of proof. See also Section 23-115.

American Federation for Children, Inc., 372 NLRB No. 137 (2023) (McWP; K diss. on other grounds): In this unfair labor practice case, the Board found that, consistent with well-established precedent, an applicant for employment was a statutory employee; the Board further noted that her immigration status was irrelevant to her status as a statutory employee because it did not prevent her from applying for work.

23-115 – Laid-Off Employees

Gimme Coffee, Inc., 372 NLRB No. 75 (2023) (McWP): Applying *Apex Paper Box Co.*, 302 NLRB 67 (1991), the Board reversed the Regional Director and found that the nine challenged employees at issue—who had been temporarily laid-off due to the COVID-19 pandemic—possessed a reasonable expectancy of recall in the near future as of the eligibility date and therefore were eligible to vote in the decertification election. The Board found that the circumstances of the layoffs, as well as the Employer’s past experience with layoffs, favored finding a reasonable expectancy of recall, particularly in view of the fact that the employees possessed recall rights and the trend towards gradual reopening of the Employer’s stores in the months leading up to the election. The Board also found that the Employer had a plan to reopen one of its locations in the near future and communicated that plan to the employees. With respect to an HVAC issue that was impeding the reopening of the store in question, the Board remarked that the challenged employees did not need to be advised of a specific plan to address the issue in order to have a reasonable expectancy of recall (and that adopting such an approach

would improperly shift the applicable burden). The Board therefore concluded that the Employer had not met its burden of demonstrating the ineligibility of these employees.

Kava Holdings, LLC v. NLRB, 85 F.4th 479 (9th Cir. 2023): In this unfair labor practice case, the court rejected the employer’s claim that employees who were laid off due to a temporary shutdown for renovations lost their reasonable expectation of rehire when their contractual right to recall expired, observing that employees do not need a contractual or other legal right to reemployment in order to have a “reasonable” expectation. The court also distinguished cases involving indefinite shutdowns.

CHAPTER 24: INTERFERENCE WITH ELECTIONS

24-130 – Duty to Provide Evidence of Objections

Longmont United Hospital v. NLRB, 70 F.4th 573 (D.C. Cir., June 13, 2023), motion for rehearing en banc denied 9/11/23: The court agreed with the Board that the Employer’s offer of proof did not include evidence that could reasonably be interpreted as an offer by the Union to collect and mail ballots, and that accordingly the Employer was not entitled to a hearing on that objection. See also Section 24-427.

Oakrheem, Inc. d/b/a Haywood Convalescent Hospital, 2023 WL 8621974 (9th Cir. Dec. 13, 2023) (unpublished): The court held that the Board acted within its discretion by overruling the Employer’s election objection—which alleged prounion supervisory conduct—without a hearing, insofar as the Employer’s supporting offer of proof was limited to vague and conclusory allegations regarding the putative supervisor’s supervisory status, did not identify specific evidence to support the Employer’s allegations, did not identify any employees who were actually coerced or intimidated by the conduct at issue, and could not have established that the conduct had a material impact on the election.

24-220 – Party vs. Third-Party Conduct

United Scrap Metal PA, LLC, 372 NLRB No. 49 (2023) (KWP): See Section 24-320.

24-231 – Interference Which may also Violate the Unfair Labor Practice Provisions

CVS Pharmacy, 372 NLRB No. 91 (2023) (McWP): In this consolidated case, the Board affirmed the judge’s finding that the Respondent violated Section 8(a)(1) of the Act and engaged in objectionable conduct by announcing and granting a wage increase during the organizing campaign.

24-243 – Narrowness of the Election Results

CVS Pharmacy, 372 NLRB No. 91 (2023) (McWP): See Section 24-440.

24-244 – Dissemination

United Scrap Metal PA, LLC, 372 NLRB No. 49 (2023) (KWP): See Section 24-320.

24-301 – Threats

Coway, USA, Inc., 372 NLRB No. 145 (2023) (McP; K diss.): The Board found that the Regional Director did not abuse her discretion by overruling, without a hearing, an objection alleging that the Union’s president’s alleged statement (that, if employees voted against representation, he would “hire lawyers and file a lawsuit” and that the Union would eventually prevail) was a threat or message of futility. The Board found that this was a permissible forecast of the Union’s legal options (and to the extent it misrepresented the extent to which the “lawsuit” might be successful, the Board does not probe into the truth or falsity of campaign statements), employees would not reasonably believe this was an implicit threat to force recognition by the Employer (as the Union would not control the outcome of any legal proceeding), and was distinguishable from situations where employers threaten employees with bargaining futility. Member Kaplan would have granted review based on his view that this was an objectionable message of futility and commented that objectionableness of such a message should not turn on whether it is made by a union or employer. Member Prouty stated his view that the objectionableness of such a message may well turn on whether it is attributable to an employer or a union.

24-302 – Promises and Grants of Benefit

NLRB v. Jam Productions, Ltd., 66 F.4th 654 (7th Cir. 2023): The court enforced the Board’s decision to overrule an objection alleging that the Petitioner union had, through operation of its hiring hall, impermissibly granted benefits to eligible voters during the critical period. The court found that it was reasonable for the Board to require that, in order to draw an inference that a hiring-hall benefit was coercive, the Employer must show not only that the union granted access to such a benefit during the critical period, but also that the benefit was one to which the employees were not otherwise entitled. The court further concluded that the Board’s factual findings—that the Employer had not shown that the union had provided referrals to which the voters were not otherwise entitled, and that in any event the union had provided an explanation for the referrals that rebutted any inference of coercion—were supported by substantial evidence. The court also found that substantial evidence supported the Board’s conclusion that the Employer had not established that the union gave voters preferential treatment by waiving drug-testing requirements for them. (The court denied rehearing on June 15, 2023.)

CVS Pharmacy, 372 NLRB No. 91 (2023) (McWP): See Section 24-231.

24-307 – Misrepresentation

Coway, USA, Inc., 372 NLRB No. 145 (2023) (McP; K diss.): See Section 24-301.

24-312 - Videotaping

United Scrap Metal PA, LLC, 372 NLRB No. 49 (2023) (KWP): The Board agreed with the judge's determination to overrule an objection regarding alleged photographing of employees by the union, given the judge's credibility resolution (which credited testimony that no photography took place), but did not rely on certain aspects of the credibility resolution. See also Sections 22-112 and 24-320.

24-313 – Miscellaneous Party Conduct

Starbucks Corp., 372 NLRB No. 159 (2023) (McKW): In affirming the judge's findings and conclusions in this unfair labor practice case, the Board observed that the complaint alleged that, among other things, the Respondent had violated Section 8(a)(1) by requiring employees to listen to the Respondent's unsolicited views on union activity during a mandatory meeting. But the judge had made a credibility-based determination that the Respondent had not required an employee to listen to arguments against unionization and there was no basis for reversing that credibility determination. Chairman McFerran and Member Wilcox observed that in dismissing the allegations, the Board was not passing on the legal theory advanced by the General Counsel or on any other legal theory under which the conduct alleged might be found to violate the Act. Member Kaplan emphasized that because the General Counsel did not allege that any unlawful statements were made during the alleged captive audience meeting, there was no basis for finding a violation under longstanding precedent (see *Babcock & Wilcox Co.*, 77 NLRB 577 (1948)) regardless of whether the judge correctly found that the interaction in question did not amount to a captive audience meeting.

24-320 – Third-Party Conduct

United Scrap Metal PA, LLC, 372 NLRB No. 49 (2023) (KWP): In this consolidated case, the Board agreed with judge that an alleged employee threat made on the eve of the election was not "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible" under *Westwood Horizons Hotel*, 270 NLRB 802 (1984), but noted that the first factor in the test for assessing a third-party threat is not "the cumulative effect of the threat" (as the judge stated) but "the nature of threat itself." Member Kaplan commented that the alleged threat (in which a pro-union employee told another employee "You don't know me, I have people. I can send you back to your country [expletive] in pieces") raised serious concerns about the election's validity, but because the respondent had not established with any clarity who actually heard the threat or how widely it was disseminated, the respondent had not shown that this threat tainted the election. See also Sections 22-112 and 24-312.

24-410 – Board Agent Conduct

Jones Lang LaSalle Americas, Inc., 372 NLRB No. 139 (2023) (McKP): In denying review of the Regional Director's decision to overrule the employer's objections, Member Kaplan agreed that the Employer had not shown that the manner in which the election was conducted raised a reasonable doubt as to the fairness and validity of the election. But he also commented that the Board agent took an unnecessary risk by leaving the unsealed ballot box in the custody of

election observers when he briefly left the polling place to determine if voters were nearby, and encouraged Regions to provide procedural guidance to ensure that Board agents retain possession of the unused ballots and the ballot box at all times.

24-424 – Observers

CVS Pharmacy, 372 NLRB No. 91 (2023) (McWP): See Section 24-440.

24-427 – Mail Ballots

Longmont United Hospital v. NLRB, 70 F.4th 573 (D.C. Cir., June 13, 2023), motion for rehearing en banc denied 9/11/23: The court rejected the Employer’s argument that the Board had abused its discretion by counting a ballot cast by a voter whom the Employer asserted had not “signed” her ballot envelope. The court concluded that substantial evidence supported the Board’s finding that the voter did not print her name on the ballot envelope, as the voter had credibly testified that the marking on the envelope was her signature and the marking’s cursive lettering contrasted with samples of the voter’s printed name. The court also observed that no precedent supported the employer’s claim that the marking on the ballot had to match other signature samples from the voter—particularly where, as here, there was no dispute as to the voter’s identity. See also Section 24-130.

24-440 – Electioneering

CVS Pharmacy, 372 NLRB No. 91 (2023) (McWP): The Board affirmed the judge’s recommendation to sustain an objection alleging that the Respondent’s observer told a voter “remember, you’re going to be a pharmacist soon” when he was waiting in line to vote, concluding that this constituted objectionable electioneering under *Boston Insulated Wire*, 259 NLRB 1118 (1982). The Board noted that the interaction violated the Board agent’s explicit instruction that observers should not speak to voters; that the Union lost the election by a one-vote margin; and that because pharmacists were excluded from the unit, the remark would reasonably be understood as a reminder that the voter would not benefit from representation and should instead vote based on his future interests.

24-442 – The Milchem Rule

CVS Pharmacy, 372 NLRB No. 91 (2023) (McWP): The Board noted that a conversation between an observer and a voter was not “prolonged” within the meaning of *Milchem*, 170 NLRB 362 (1968), but found that it did constitute objectionable electioneering. See Section 24-440.