Nos. 18-1329, 19-1017

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROCKWELL MINING, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITED MINE WORKERS OF AMERICA

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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National Labor Relations Board

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ROCKWELL MINING, LLC	)	
	)	
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	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	09-CA-216001
	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board ("the Board") certify the following:

A. ***Parties and Amici***: Rockwell Mining, LLC was the respondent before the Board, and is the Petitioner/Cross-Respondent in this Court proceeding. The Board's General Counsel was a party before the Board. United Mineworkers of America was the charging party before the Board, and has intervened in support of the Board.

B. ***Rulings Under Review***: The ruling under review is a Decision and Order of the Board, *Rockwell Mining LLC*, 367 NLRB No. 46 (December 11, 2018). The Decision and Order relies on findings made by the Board and Board officials in unpublished decisions in an earlier representation (election) proceeding, Board Case No. 09-RC-202389, including a Hearing Officer's Reports (September

7, 2017 and December 21, 2017), a Regional Director's Supplemental Decision and Certification of Representative (February 16, 2018), and a Board order denying review of the Regional Director's Decision (June 21, 2018).

C. ***Related Cases***: This case has not previously been before this Court. The Board is not aware of any related cases pending or about to be presented to this Court or any other court.

/s/ David Habenstreit
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Dated at Washington, DC
this 26th day of June, 2019

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GLOSSARY

A.	The parties' deferred Joint Appendix
Act	The National Labor Relations Act (29 U.S.C §§ 151 *et seq.*)
Board	The National Labor Relations Board
Br.	The opening brief of Rockwell to this Court
Rockwell	Rockwell Mining, LLC
Union	United Mineworkers of America

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Rockwell Mining, LLC ("Rockwell") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, a Board Decision and Order issued against

Rockwell on December 11, 2018, and reported at 367 NLRB No. 46. (A. 1-7.)[1] In its Decision and Order, the Board found that Rockwell violated Section 8(a)(5) and (1) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 158(a)(5) and (1), by refusing to recognize, bargain with, and provide requested information to United Mineworkers of America ("the Union") as the duly certified collective-bargaining representative of an appropriate unit of production and maintenance employees at Rockwell's Glancy Surface Mine in Wharton, West Virginia. (A. 5.)

The Board had subject-matter jurisdiction over the proceedings below pursuant to Section 10(a) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 160(a), which empowers the Board to prevent unfair labor practices. This Court has jurisdiction over this appeal because the Board's Order is final under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). Venue is proper under Section 10(f), which provides that petitions for review may be filed in this Court. Rockwell's petition for review and the Board's cross-application for enforcement were timely, as the Act places no time limit on those filings. The Union has intervened on behalf of the Board.

As the Board's unfair labor practice Order is based, in part, on findings made in an underlying representation (election) proceeding, the record in that proceeding

[1] "A." refers to the Deferred Joint Appendix and "Br." refers to Rockwell's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

(Board Case No. 09-RC-202389) is also before the Court. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). The Court has jurisdiction to review the Board's actions in the representation proceeding solely for the purpose of "enforcing, modifying or setting aside in whole or in part the [unfair-labor-practice] order of the Board." 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act, 29 U.S.C. § 159(c), to resume processing the representation case in a manner consistent with the ruling of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

ISSUE PRESENTED

Whether the Board acted within its wide discretion in overruling Rockwell's election objection and certifying the Union, and therefore properly found that Rockwell violated Section 8(a)(5) and (1) of the Act by refusing to bargain with and provide information to the Union.

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are contained in the attached Addendum.

STATEMENT OF THE CASE

The Board seeks enforcement of its Order finding that Rockwell violated Section 8(a)(5) and (1) of the Act by refusing to recognize, bargain with, and provide information to the Union as the collective-bargaining representative of a unit of production and maintenance employees at Rockwell's mine. Rockwell does

not dispute its refusals, but claims the Board abused its discretion in finding that Rockwell failed to meet its burden of showing that objectionable conduct occurred and that such conduct prevented a fair election. Though Rockwell filed three objections before the Board alleging conduct that it claims warranted setting aside the election, it pursues only one objection on appeal. Specifically, it claims that, before the Union filed a petition for an election among certain Rockwell employees, employee Jerry Hager, while serving as a union agent for the limited purpose of soliciting union-authorization cards, made a statement that interfered with employee free choice in the election. The Board's findings in the representation proceedings and unfair-labor-practice proceedings are summarized below.

I. THE REPRESENTATION PROCEEDING

A. Rockwell's Operations; the Union Starts an Organizing Campaign

Rockwell operates, among other facilities, the Glancy Surface Mine located in Wharton, West Virginia. (A. 31; A. 131.) Rockwell employs approximately 55 employees at that mine, about 32 of whom work on the day (or first) shift, and about 23 of whom work on the night (or second) shift. (A. 30.) In early summer of 2016, the Union started organizing Rockwell's employees, culminating in the Union filing

a petition on July 14 to represent Rockwell's production and maintenance employees at the mine. (A. 31; A. 165-66.)

B. Prior to the Union Filing the Election Petition, Employee Jerry Hager Holds a Meeting with Employees

In early July, prior to the Union filing the petition, pro-union employee Jerry Hager invited his coworkers on the second shift to attend a meeting that occurred between 3:00 a.m. and 3:30 a.m., promptly after their shift ended. (A. 10, 19, 35 & n.7; A. 54-55, 96, 132.) After the end of their shift, as employees were riding on the "man bus," which regularly transports them from the mine to the employee parking lot, Hager announced there would be a meeting for employees; anyone who wanted to attend could do so. Attendance at the meeting was voluntary. (A. 35; A. 87, 112.) The meeting occurred outdoors a couple of miles from the worksite, and employees drove their cars from the employee parking lot to the meeting. Anywhere from 13-24 employees attended this meeting, which lasted about 15 minutes. (A. 35; A. 87, 122, 132.)

During the meeting, Hager had blank union-authorization cards, which he asked employees to sign.[2] (A. 36.) While soliciting employees to sign cards, Hager told them that it was up to them whether to sign a card. (A. 20 & n.3; A. 96, 136,

[2] The Regional Director found, and Rockwell does not dispute, that Hager was an agent of the Union for the limited purpose of card solicitation and that he was not a union agent beyond the period in which he solicited cards. (A. 10-11 & n.4, A. 33.)

144.) He also said that "if they did not sign, they would not be protected or covered by the Union if something bad happened." (A. 11, 20 & n.3; A 55, 84, 96, 109, 117, 120.) Approximately 16 employees signed cards during the meeting. (A. 35-36.)

C. The Union Holds a Meeting with Employees to Answer Any Questions They May Have About the Union or the Election

On July 12, the Union held a meeting, led by union representative Brian Lacy, for employees to ask any questions they may have had about the Union or the election process. It was attended by about 20 employees. During that meeting, Lacy explained, for example, that Rockwell would not have access to union cards signed by employees and would not learn the identities of card signers. The Union offered this clarification because some employees apparently had heard that Rockwell would have access to signed cards. Union representatives repeated this clarification during home visits with employees. (A. 15; A. 104, 134, 142, 146, 149, 157.) In addition, less than a week before the election, Rockwell met with employees to ensure them it would not retaliate against union supporters. (A. 15.)

D. The Union Wins the Election and the Board Certifies It as the Unit Employees' Representative

On July 20, after the Union had filed its July 14 election petition, Rockwell and the Union entered a stipulated election agreement (A. 167-69) setting August 3 as the date for the Board conducted secret-ballot election among the employees in the proposed bargaining unit. The Board held the election and the tally of ballots

showed 27 votes for the Union, 25 votes against representation, and one non-determinative challenged ballot.[3] (A. 9; A. 170.) Rockwell filed an objection to the election, alleging that prior to filing the election petition, the Union, through employee and alleged in-house organizer Jerry Hager, offered employees a benefit (union representation) conditioned on employees' signing cards, and threatened discrimination in the form of not representing employees who did not sign cards (referred to as Objection 1).[4]

The Board's Regional Director for Region 9 ordered a hearing on the objection, during which Rockwell and the Union presented witnesses and introduced exhibits. (A. 9.) At the end of the hearing, the Hearing Officer issued a report recommending that the objection be overruled. (A. 29-46.) Rockwell filed exceptions to the Hearing Officer's report. On October 20, 2017, the Regional Director issued an order that remanded the objection to the Hearing Officer,

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[3] The Union challenged two ballots. The Regional Director disposed of one challenged ballot because Rockwell and the Union agreed that the ballot was cast by an employee who was ineligible to vote. The remaining challenged ballot was not counted because it would not affect the outcome of the election. (A. 9 n.2.)

[4] In its opening brief, Rockwell does not make (and has therefore waived) any argument that the Board erred in overruling Rockwell's other two election objections. *See Dunkin' Donuts Mid-Atlantic Distrib. Ctr., Inc. v. NLRB*, 363 F.3d 437, 441 (D.C. Cir. 2004) ("argument portion of an appellant's opening brief 'must contain' the 'appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies'") (quoting Fed.R.App.P. 28(a)(9)(A)). Therefore, we have omitted evidence regarding those objections from the statement of facts unless they provide context for discussing the facts regarding Objection 1.

requesting that he resolve the conflicting testimony as to what Hager told employees when soliciting authorization cards, make factual findings as to what Hager said, and apply relevant case law to those factual findings. (A. 9-10.) On December 21, 2017, the Hearing Officer issued a Supplemental Hearing Officer's Report, making the required findings and analysis, and again recommending overruling the objection. (A. 19-23.) Specifically, after making credibility determinations to resolve the conflicting testimony, the Hearing Officer found that Hager, while soliciting authorization cards at the employee meeting prior to the petition being filed, told employees that "if they did not sign, they would not be protected or covered by the Union if something bad happened." (A. 20-21.) On February 16, 2018, the Regional Director issued a decision that adopted the Hearing Officer's rulings, findings and recommendations, and certified the Union as the employees' collective-bargaining representative. (A. 9-18.)

Rockwell requested Board review of the Regional Director's decision certifying the Union. On June 21, 2018, the Board (Members Pearce, Kaplan, and Emanuel) denied Rockwell's request for review, finding that the request "raises no substantial issues warranting review." (A. 8.)

II. THE UNFAIR LABOR PRACTICE PROCEEDING

A. Procedural History

On about February 28, 2018, the newly certified Union requested by letter, fax, and email that Rockwell recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the certified unit, and provide the Union with information relevant to its bargaining duties. (A. 5 & n.3.) Rockwell failed to comply with either request. (A. 1, 5 & n.3.) Acting on a charge filed by the Union, the Board's General Counsel issued a complaint alleging that Rockwell's refusal to bargain or provide information violated Section 8(a)(5) and (1) of the Act. (A. 1; A. 171-75.) Rockwell admitted its refusal to bargain with or provide information to the Union, but contested the validity of the Union's certification based on its objections to the election in the underlying representation proceeding. (A. 1; A. 159-64.)

The General Counsel then moved for summary judgment, and the Board issued a notice to show cause why the motion should not be granted. Rockwell did not file a response. (A. 1.)

B. The Board's Conclusions and Order

On December 11, 2018, the Board (Chairman Ring and Members Kaplan and Emanuel) issued its Decision and Order, granting the General Counsel's motion and finding that Rockwell's refusal to bargain and provide information violated Section

8(a)(5) and (1). (A. 1-6.) The Board concluded that all representation issues raised by Rockwell in the unfair-labor-practice proceeding were, or could have been, litigated in the underlying representation proceeding, and that Rockwell neither offered any newly discovered or previously unavailable evidence, nor alleged the existence of any special circumstances that would require the Board to reexamine its decision to certify the Union. (A. 1.) In finding that Rockwell unlawfully failed to provide information, the Board explained that the Union had requested information regarding unit employees that was presumptively relevant. (A. 4.) Before the Board, and now on appeal, Rockwell does not dispute that finding. Rather, Rockwell's only defense to providing that information is its challenge to the Union's certification.

The Board's Order requires Rockwell to cease and desist from refusing to bargain with or provide information to the Union, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act, 29 U.S.C. § 157. (A. 6.) Affirmatively, the Board's Order directs Rockwell, on request, to bargain with the Union, provide the Union with requested information with certain exceptions,[5] and post a remedial notice. (A. 2-3.)

[5] The Board ordered Rockwell to provide the information requested in the Union's February 28, 2019 letter except for the information requested in certain enumerated paragraphs pertaining to nonunit employees, which the Board remanded to the

SUMMARY OF ARGUMENT

The Board reasonably found that Rockwell violated Section 8(a)(5) and (1) of the Act by refusing to bargain with or provide information to the Union, which the Board certified as the collective-bargaining representative of Rockwell's production and maintenance employees in the underlying representation proceeding. Before this Court, Rockwell challenges the Board's decision to overrule Rockwell's election objection. That objection was based solely on a single statement that employee and limited union agent Hager made, during a meeting before the Union filed the election petition and three to four weeks before the election, that employees did not have to sign cards, but if they did not sign, "they would not be protected or covered by the Union if something bad happened."

The Board did not abuse its discretion in overruling the objection and certifying the Union. Pursuant to the Board's long-standing policy, set forth in *Ideal Electric & Manufacturing Co.*, it generally will only set aside an election based on misconduct that occurred during the "critical period" between the filing of the election petition and the election. 134 NLRB 1275 (1961). Accordingly, as Hager's statement was indisputably made pre-petition, the Board found that it did not warrant setting aside the election. Moreover, the Board found that Hager's

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Regional Director for further appropriate action consistent with the Board's Decision and Order. (A. 4.)

statement was unlike the more severe conduct in cases where the Board has departed from *Ideal Electric*. In such cases, the Board found pre-petition conduct objectionable if it was egregious or so clearly prescribed that it would likely have a significant impact on the election. Unlike the threats of job loss and promises of benefits and other egregious conduct in those cases, Hager's statement was too vague and ambiguous to be either a promise or a threat and was, at most, benign election propaganda. Rockwell presents no evidence or caselaw that compels the contrary conclusion.

Rockwell fails to show the Board abused its discretion by refusing to expand the critical period under *Ideal Electric* to include Hager's pre-petition statement. The Court need not be detained by Rockwell's complaints about the purportedly "abbreviated" critical period, because the parties' stipulated election agreement established that time period. Moreover, Rockwell cites no authority requiring the Board to depart from *Ideal Electric*, and its arguments ignore the wide discretion the Board has in determining the proper guidelines for conducting and assessing the validity of representation elections.

Rockwell also argues that Hager's statement should be assessed as though it was made by an agent or party during the critical period. But the Regional Director did exactly that, finding, in the alternative, that Hager's statement would also be unobjectionable under the standard applicable to conduct by a party or party's agent

during the critical period. Rockwell fails to undermine that well-supported finding. Thus, even if Hager's statement had been deemed to have taken place within the critical period, it still would not have merited setting aside the election.

ARGUMENT

THE BOARD ACTED WITHIN ITS WIDE DISCRETION IN OVERRULING ROCKWELL'S ELECTION OBJECTION AND CERTIFYING THE UNION, AND, THEREFORE, PROPERLY FOUND THAT ROCKWELL VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH AND PROVIDE INFORMATION TO THE UNION

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of [its] employees . . . ." 29 U.S.C. § 158(a)(5).[6] Here, Rockwell has admittedly refused to bargain with (or provide information to) the Union in order to challenge the Board's certification of the Union following its election victory. (A. 1.) There is no dispute that if the Board properly certified the Union as the employees' collective-bargaining representative, Rockwell violated Section 8(a)(5) and (1) of the Act by refusing to bargain with or provide information to the Union, and the Board is entitled to enforcement of its Order. *See C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 880-82 (D.C. Cir. 1988). Accordingly, the issue before the Court is whether the Board abused its wide discretion in overruling Rockwell's election objection and certifying the Union. *See NLRB v. A.J. Tower Co.*, 329 U.S. 324, 329-30, 335 (1946); *accord Amalgamated Clothing Workers v. NLRB*, 424 F.2d 818, 827 (D.C. Cir. 1970).

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[6] An employer's failure to meet its Section 8(a)(5) bargaining obligation constitutes a derivative violation of Section 8(a)(1), which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the[ir statutory] rights . . . ." 29 U.S.C. § 158(a)(1); *see Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

Because Rockwell failed to produce sufficient evidence to support its claim that Hager engaged in objectionable conduct that interfered with the employees' free choice, the Board did not abuse its discretion in overruling Rockwell's objection.

A. The Board Has Broad Discretion in Conducting Representation Proceedings, and the Party Seeking To Overturn a Board-Approved Election Bears a Heavy Burden

"Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *A.J. Tower Co.*, 329 U.S. at 329-30, 335; *accord C.J. Krehbiel Co.*, 844 F.2d at 882. Accordingly, the scope of appellate review of the Board's decision to certify a union is "extremely limited." *Amalgamated Clothing & Textile Workers v. NLRB*, 736 F.2d 1559, 1562, 1564 (D.C. Cir. 1984). The Board's order is entitled to enforcement unless the Board abused that wide discretion in overruling the objections to the election. *See Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 473 (D.C. Cir. 1996).

There is a "strong presumption" that an election conducted in accordance with those safeguards "reflect[s] the true desires of the employees." *Deffenbaugh Indus., Inc. v. NLRB*, 122 F.3d 582, 586 (8th Cir. 1997); *accord NLRB v. Coca-Cola Bottling Co. Consol.*, 132 F.3d 1001, 1003 (4th Cir. 1997) ("the outcome of a Board-certified election [is] presumptively valid"). Therefore, the results of such an election "'should not be lightly set aside.'" *NLRB v. Mar Salle, Inc.*, 425 F.2d 566,

570 (D.C. Cir. 1970) (citations omitted); *accord 800 River Rd. Operating Co. v. NLRB*, 846 F.3d 378, 385-86 (D.C. Cir. 2017) (court will overturn a Board decision to certify a union "in only the rarest of circumstances") (internal quotation marks and citation omitted). Thus, "there is a heavy burden on [the employer] in showing that the election was improper." *Amalgamated Clothing Workers*, 424 F.2d at 827. To meet that burden, the objecting party must demonstrate not only that improprieties occurred, but that they "interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election." *Id.* (citation omitted). *Accord Cambridge Tool & Mfg. Co., Inc.*, 316 NLRB 716, 716 (1995). The test is "an objective one." *Id.*; *see Cedars-Sinai Med. Ctr.*, 342 NLRB 596, 597 (2004). *Accord AOTOP, LLC v. NLRB*, 331 F.3d 100, 104 (D.C. Cir. 2003) ("Subjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct.") (internal quotation marks and citation omitted).

The determination of whether an objecting party has carried its burden of proving objectionable conduct is "fact-intensive" and thus "especially suited for Board review." *Family Serv. Agency S.F. v. NLRB*, 163 F.3d 1369, 1377 (D.C. Cir. 1999). The Board's factual findings are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e). "Because substantial evidence means such relevant evidence as a reasonable mind might accept as

adequate to support a conclusion," this Court has said that it "will reverse for lack of substantial evidence only when the record is so compelling that no reasonable factfinder could fail to find to the contrary." *Highlands Hosp. Corp. v. NLRB*, 508 F.3d 28, 31 (D.C. Cir. 2007) (internal quotation marks and citations omitted). A hearing officer is "uniquely well-placed to draw conclusions about credibility when testimony [is] in conflict," and such "credibility determinations may not be overturned absent the most extraordinary circumstances such as utter disregard for sworn testimony or the acceptance of testimony which is on its fac[e] incredible." *Amalgamated Clothing & Textile Workers*, 736 F.2d at 1563 (internal quotation marks and citation omitted). *Accord E.N. Bisso & Son, Inc. v. NLRB*, 84 F.3d 1443, 1445 (D.C. Cir. 1996).

Although election proceedings should be conducted in "'laboratory . . . conditions as nearly ideal as possible,'" the Court has recognized that this "noble ideal . . . must be applied flexibly." *Amalgamated Clothing & Textile Workers*, 736 F.2d at 1562 (quoting *Gen. Shoe Corp.*, 77 NLRB 124, 127 (1948)). Moreover, "[i]t is for the Board in the first instance to make the delicate policy judgments involved in determining when laboratory conditions have sufficiently deteriorated to require a rerun election." *Amalgamated Clothing & Textile Workers*, 736 F.2d at 1562; *accord Serv. Corp. Int'l v. NLRB*, 495 F.3d 681, 684-85 (D.C. Cir. 2007).

B. The Board Did Not Abuse Its Discretion in Finding that Employee Hager's Statements While Soliciting Union Cards Did Not Warrant Setting Aside the Election

Rockwell contests the Board's decision to overrule its objection, which alleged that Hager's single, pre-petition statement while soliciting employees to sign cards—namely, that if they did not sign, the Union would not "protect or cover" them if something "bad happened"—coerced employees into voting for the Union during an election held three to four weeks later. As shown below, the Board, relying on two alternative rationales, reasonably found that Hager's statement did not require setting aside the election. First, that statement indisputably occurred outside the "critical period"—the period beginning with the filing of an election petition and ending with the election. Under the Board's long-standing, judicially approved rule, such conduct generally will not serve as the basis for setting aside an election, absent narrow exceptions that do not apply here. Second, the Board alternatively found, applying the standard for misconduct by union agents during the critical period, that Hager's statement would not support setting aside the election even if it had occurred during the critical period. Rockwell fails to undermine either of these sound determinations, which are supported by substantial evidence, reasonable (and unchallenged) credibility determinations, and settled precedent.

1. Hager's statement was not objectionable pre-petition conduct

a. The Board's finding that Hager's conduct was unobjectionable properly relies on the Hearing Officer's credibility-based findings and adheres to precedent

The Board generally will only set aside an election based on misconduct that has occurred within the "critical period" running from the date the election petition was filed (here, July 14) to the date of the election (here, August 3, the date the parties agreed to in their stipulated election agreement, A. 167-69). *The Ideal Elec. & Mfg. Co.*, 134 NLRB 1275, 1278 (1961). In other words, the petition is "the cutoff time in considering alleged objectionable conduct in contested cases." *Id.* The *Ideal Electric* rule is aimed at excluding consideration of conduct too remote from the election process to reasonably have had any effect on the process. Accordingly, as this Court has observed, the rule is "a convenient device to limit the post-election inquiry to the period near the election when improper acts are most likely to affect the employees' freedom of choice." *Amalgamated Clothing & Textile Workers*, 736 F.2d at 1567. Consistent with the Board's wide discretion in developing fair procedures for conducting and determining the validity of representation elections, the courts defer to the Board's reasonable application of its *Ideal Electric* rule. *See id.* at 1562-64, 1567. *See also NLRB v. R. Dalkin & Company*, 477 F.2d 492, 494 (9th Cir. 1973) (noting court generally pays "great deference" to Board's application of its *Ideal Electric* policy, "even though [the

court] might not believe that the lapse of time was of sufficient length to render that conduct innocuous").[7]

The Board and the courts have recognized departures from the critical-period rule only in "extremely unusual circumstances." *Amalgamated Clothing & Textile Workers*, 736 F.2d at 1567. For example, in *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270, 274, 277 (1973), the Supreme Court found that a union's offer to waive initiation fees only if employees signed union-authorization cards was grounds for setting aside an election. *Accord Gibson's Discount Center*, 214 NLRB 221, 222 (1974) (holding that rationale of *Savair* covers such offers of waiver made pre-petition). Likewise, the Board has held that a union's pre-petition offer of work, or threat to take away work, based on whether employees sign union authorization cards, may be objectionable if employees would reasonably believe the union could carry out its threat or promise. *See Royal Pkg. Corp.*, 284 NLRB 317, 317-18 (1987); *Lyon's Restaurants*, 234 NLRB 178, 178-79 (1978). Importantly, in each of those cases, the Board has sought to limit its holding to the facts of that case. Thus, the Board emphasized in *Lyon's*, 234 NLRB at 179 n.6, that it was addressing "a most unusual situation" and "speaking only of threats in the context" of the

[7] Rockwell is wrong in claiming that such deference "is not appropriate" here because the Board's decision relies on its interpretation of Supreme Court precedent. (Br. 20.) This argument misreads the Board's decision, which is premised on its application of the well-established *Ideal Electric* rule to the facts of this case.

particular facts of that case. Likewise, it explained in *Royal*, 284 NLRB at 317-18 n.6, that its holding was limited to that case's "unique circumstances;" and reiterated in *Gibson's*, 214 NLRB at 222 n.3, that it did not "intend[] a broad departure from the *Ideal Electric* rule."

The courts have endorsed *Ideal Electric* and have agreed that for conduct to be found objectionable, it typically must occur within the critical period. *Amalgamated Clothing & Textile Workers*, 736 F.2d at 1567; *R. Dalkin & Co.*, 477 F.2d at 494. Also in agreement with the Board, courts have determined that any exception to that policy should be sparsely applied. *See id. See also NLRB v. L&J Equip. Co.*, 745 F.2d 224, 237 (3d Cir. 1984) (agreeing with Board's practice of departing from *Ideal Electric* in cases with "particularly egregious" pre-petition conduct, such as assault and arson, that is likely to materially impact the election). *Amalgamated Clothing*, for example, illustrates the principle that exceptions to the *Ideal Electric* rule are narrowly proscribed and applied in limited circumstances. Thus, in *Amalgamated Clothing*, the court reasoned that multiple anonymous pre-petition threats to anti-union employees, including one that there were "5 sticks of dynamite for [the recipient's] house" and another that "something bad is liable to happen to your truck" unless the recipient employee signed a union card, were insufficiently egregious to warrant an exception to *Ideal Electric*. 736 F.2d at 1567. *Accord Jacmar Foodservice Distr. v. NLRB*, D.C. Cir. Nos. 17-1150 & 17-1167,

2018 WL 3040515 (May 29, 2018) (per curiam) (threats by pro-union employees to persuade supervisor to fire another employee if he did not sign a card did not fall within "narrow exceptions" to *Ideal Electric* rule). Accordingly, the Board, with court approval, will depart from *Ideal Electric* only where the union statement or inducement in the gathering of signed authorization cards rises to the level of egregious or "clearly prescribed activity likely to have a significant impact on the election." *Royal Pkg. Corp.*, 284 NLRB at 317.

Applying the foregoing principles, the Board reasonably found that Hager's statement, which indisputably occurred pre-petition and therefore outside the critical period, did not meet the rigorous and exceptional standard for setting aside an election based on pre-petition conduct. (A. 11-14.) In making this determination, the Board properly relied on the Hearing Officer's finding that Hager told employees, before the filing of the petition, that if they did not sign cards, "they would not be protected or covered by the Union if something bad happened." (A. 11-12; A. 20.) This finding was based on the Hearing Officer's observations of the witnesses' demeanor and on mutually corroborated testimony. While Rockwell makes other claims regarding what Hager stated (Br. 12, 13, 26, 31), it has not shown the "extraordinary circumstances" necessary to overcome the Hearing Officer's credibility determinations (*see* pp. 16-17).

Examining this credited statement, the Regional Director correctly determined that Hager's assertion was "at best, ambiguous" and "open to various interpretations." (A. 13.) As the Regional Director elaborated, Hager's remark "could mean that if employees did not sign a card and the [Union] became the employees' representative, then the [Union] would choose not to represent those who failed to sign." (A. 13.) An equally reasonable interpretation, however, could be, as the Regional Director also found, "that if employees did not sign authorization cards the natural consequence would be the [Union] will not become the employees' bargaining representative and hence unable to represent or 'cover' employees if something bad happens." (A. 13.) Given this lack of clarity, the Regional Director acted rationally in finding that the statement did "not amount to a threat or a promise reasonably tending to interfere with employees' freedom of choice," but was instead lawful "pre-petition propaganda capable of being evaluated by employees." (A. 13, A. 22.)

The Regional Director explained why Hager's vague and ambiguous statement was nothing like the specific and unequivocal pre-petition offers of benefits that warranted setting aside an election in *Savair Manufacturing Co.*, 414 U.S. at 274, 277; *Gibson's Discount Ctr.*, 214 NLRB at 221-22; and *Royal Packaging, Corp.*, 284 NLRB at 317-18. In *Savair*, for example, the Supreme Court held that a union agent's pre-petition conduct of expressly promising employees that

"those who signed [union-recognition] slips would not be required to pay an initiation fee, while those who did not would have to pay" invalidated the election results. 414 U.S. at 274, 277. *Accord Gibson's*, 214 NLRB at 221-22 (applying *Savair* where union explicitly told employees, during a pre-petition meeting, that "initiation fees would be waived if employees signed authorization cards"). *Royal Packaging*, like *Savair* and *Gibson's*, also involved a union expressly offering employees tangible benefits in return for their overt union support. Specifically, the Board in *Royal Packaging* found that a pre-petition offer from a union agent whose husband was a supervisor and union supporter, to obtain the reinstatement of an employee's daughter if the employee and daughter signed union cards, was objectionable because the employees reasonably believed the union could bring about the reinstatement. 284 NLRB at 317-18. As the Board put it, those facts clearly showed that the union agent "promised an economic benefit"—one that the employees reasonably believed the union agent could bring about—only if the employees signed union cards. Given those "unique circumstances," the Board in *Royal* found that the union agent's conduct was "clearly prescribed activity likely to have a significant impact on the election," as is required to justify setting aside an election based on pre-petition activity. *Id.* at 317-18 & n.6 (limiting case to unique circumstances and distinguishing promises about employee job tenure that employees would not reasonably believe union could fulfill).

Thus, compared to the repeated and explicit offers of tangible and achievable benefits in return for overt union support in *Savair*, *Gibsons*, and *Royal Packaging*, Hager's single, ambiguous, pre-petition remark—lacking any clarity as to what, if anything, was promised—was not clearly prescribed activity likely to impact the election. As the Regional Director aptly concluded, "such an ambiguous statement does not amount to a threat or a promise reasonably tending to interfere with employees' freedom of choice, and, moreover, it is certainly not so clearly prescribed as to require that [the Board] deviate from the *Ideal Electric* general rule that only post-petition conduct can be used to set-aside an election." (A. 13.)

The Regional Director also explained (A. 13) why, contrary to Rockwell (Br. 23), Hager's statement is unlike the explicit threat addressed in *Lyon's*, 234 NLRB at 178-79. There, a union shop steward threatened two employees, pre-petition, that if "they did not join [the union], they did not work." *Id.* The Board found that, due to the particular circumstances of the prior bargaining history between the employer and a sister union, employees would reasonably believe the union could carry out this threat. *Id.* In holding that such blatant pre-petition misconduct warranted setting aside the election, the Board emphasized how the union's threatening statement, that employees had to join the union or they would not work, was false and explicitly "related to the serious topic of the employees' job security;" was clearly the catalyst that propelled the two employees to sign union cards; and may

have given a false impression of union support during the election campaign. *Id.* As the Regional Director reasonably found here, "the nature of Hager's equivocal statement," in contrast, did not expressly "implicate [the serious topic of] employees' job security," much less falsely threaten that they would not work if they did not sign union cards. (A. 14.) Rather, as shown, Hager's statement was at worst ambiguous, and at best an innocuous and truthful statement that absent employees' support, a natural consequence would be that the Union would not be able to represent them.

Importantly, Rockwell's reliance on the foregoing cases is also misplaced because the Board, in each one, explicitly cautioned that its decisions do not support the kind of wholesale departure from the *Ideal Electric* rule that would sweep in statements like Hager's. Rockwell claims (Br. 23), for example, that this precedent "applies more broadly" to a union's pre-petition statements that confer a benefit or threaten to withhold one. As shown, however, Hager's statement here included no such threat or promise. Rockwell ignores, moreover, that the Board will depart from *Ideal Electric* in only the most unusual circumstances, and that this case does not present such a moment. In accordance with this careful and judicially approved approach, *see* cases cited at pp. 19-21, the Board reasonably concluded here that Hager's statement was not objectionable because it "was made outside of the critical period, and does not constitute clearly prescribed activity likely to have a significant

impact on the election." (A. 14.) Thus, given the Regional's Director's careful application of settled law, Rockwell cannot show (Br. 23) that his "decision was arbitrary, capricious and not in accordance with [Board] law."

b. Rockwell's challenges to the Board's application of *Ideal Electric* lack merit, rely on inapposite precedent, and mischaracterize Hager's statement

Rockwell faults the Board for its assertedly "formulaic" application of the critical period in this case, but in doing so, Rockwell undermines its own argument by relying on factually distinguishable precedent involving unique circumstances that did not warrant strict application of the *Ideal Electric* rule (Br. 29). For example, in *R. Dakin & Co.*, the union filed three identical petitions within a period of three months, withdrew the first two, and the third culminated in an election. 477 F.2d 492, 493-94 (9th Cir. 1973). The Board, applying *Ideal Electric*, declined to consider any allegedly objectionable conduct preceding the filing of the third petition, even though the Board found that alleged misconduct raised substantial and material issues of fact regarding the validity of the election. *Id.* The Board reasoned that the union had not filed the third petition in a bad-faith attempt to "clean the slate" of any misconduct preceding that petition. *Id.* at 494. The court found, in those particular circumstances, that the Board erred by "mechanically" applying *Ideal Electric* in an arbitrary manner. *Id.* at 494. The court reiterated, however, that absent these unusual circumstances, it "would pay great deference" to

a Board created cut-off date from *Ideal Electric* for the consideration of objectionable election conduct. *Id.* The instant case presents no such unusual circumstances warranting an outcome similar to *R. Dakin*.

Unable to make winning arguments that Hager's actual statement was objectionable under settled law, Rockwell changes tactics and attempts to challenge the Board's findings about what Hager said and how that statement was ambiguous. Those attempts are to no avail. Rockwell gains little ground in claiming (Br. 25-26), for example, that Hager, in soliciting cards, pressured employees to sign immediately and suggested that unionization was a "forgone conclusion." The Hearing Officer did not find that such statements were made, and thus did not discuss whether they were objectionable conduct. *See* A. 36-37. In any event, given the absence of other coercive circumstances, merely encouraging employees to make a prompt decision does not negate their choice. Indeed, Hager began by reminding them they did not have to sign. (A. 20 n.3; A. 96, 136, 144.) And telling employees the Union may already have enough signed cards to support having an election does not change the fact that the Union still needs to win the election. Thus, such a statement does not present "unionization as a foregone conclusion." (Br. 26, 33.)

Rockwell offers another false narrative inconsistent with the credited testimony in claiming (Br. 27) that Hager's pre-petition statement was objectionable

because he was "promising a union lawyer" in exchange for signing cards. The Hearing Officer found that Hager told employees that if they did not sign cards, "they would not be protected or covered by the Union if something bad happened." (A. 11-12; A. 20.) That statement contains no reference to a union attorney, much less a promise of one. Rockwell points to testimony by employees that they thought Hager was referring to an attorney, or were concerned about being able to afford one. (Br. 13-14, 26-27.) That, however, does not change the Board's credibility based findings as to what Hager said. As the Regional Director noted, "to the extent that testimony, even by witnesses whom were credited by the hearing officer, diverged from the aforementioned statement, that divergent testimony was implicitly discredited." (A. 11-12.) Nor, in any event, does Rockwell show that Hager's vague reference to being "protected or covered by the Union" must be viewed as a promise of *legal* representation by a union attorney. As the Board explained, Hager could just as easily be referring to the Union's statutory duty to fully and fairly represent the employees should they choose union representation. (A. 13, 22, 38.)

Incongruously, Rockwell, in its attempt to show Hager's *pre-petition* conduct was objectionable, relies on cases involving *post-petition* conduct, i.e., conduct that occurred within the critical period. *See, e.g., Cedars-Sinai Med. Ctr.*, 342 NLRB 596, 597 (2004) (Br. 20, addressing post-petition conduct); *Freund Baking Co. v. NLRB*, 165 F.3d 928, 931 (D.C. Cir. 1999) (Br. 24, same); *Nestle Ice Cream v.*

NLRB, 46 F.3d 578, 583 (6th Cir. 1995) (Br. 24-25, same). However, those post-petition cases are simply inapplicable because Hager's allegedly objectionable statement was indisputably made before the petition was filed, and therefore subject to a different standard—a signification distinction that Rockwell blatantly ignores. In any event, the cases are also factually distinguishable as they address conduct far more egregious than Hager's single, ambiguous, and relatively innocuous statement.

For example, in *Freund Baking*, the union provided free legal services to voters by sponsoring an employee lawsuit seeking overtime pay from the employer, which was filed just a week before the election. 165 F.3d at 931-32. The Court found this overt conduct was objectionable because the union actively publicized the lawsuit, the day before the election, by distributing a flyer to employees telling them the lawsuit would get "all wages owed to you," and urging them, on the same page, to "VOTE UNION YES!" In the Court's view, this publicity greatly increased the likelihood that the union's objectionable conduct would interfere with employee choice in the next day's election. *Id.* at 931-32. Hager's pre-petition statement, in contrast, had no such likely impact because it was made weeks before the election, was neither publicized nor repeated by Hager or the Union, provided nothing of value in the pre-election period, and was at worst ambiguous, and at best an accurate observation that absent employee support, the Union would be unable to represent them if something bad happens.

Rockwell likewise misses the mark in relying (Br. 24-26) on *Nestle Ice Cream v. NLRB*, 46 F.3d 578, 583 (6th Cir. 1995), where the court found that a union improperly sought to influence voters by staging an employee rally the day before the election, publicized by its flyers, during which its president announced a union-sponsored lawsuit seeking employee back-wages from the employer, and presented an $18,000 check to a union member from another employer. Nor, as shown, did Hager even suggest that employees would receive job referrals (*see King Electric v. NLRB*, 440 F.3d 471, 472, 475-76 (D.C. Cir. 2006)) or other job opportunities in exchange for signing cards. *See NLRB v. River City Elevator Co.*, 289 F.3d 1029, 1033 (7th Cir. 2002) (union improperly offered employees mechanic's cards before election, which provide additional job opportunities).

In short, Rockwell offers nothing that warrants disturbing the Board's well-supported findings. In light of the Board's credibility based findings as to what Hager actually said, Rockwell cannot show (Br. 20-25) that Hager's ambiguous statement clearly falls within *Savair* and progeny. Indeed, Rockwell's view would stand that law on its head by setting aside an election based on a single, vague statement that contained no threat or promise of benefits, and was therefore unlikely to impact the results of the election. So doing would allow the proverbial exception to swallow the rule, and broadly expand an exception that the Board has justifiably

limited. It is therefore unsurprising that Rockwell cites no case construing *Savair* and progeny as covering the different circumstances presented here.

c. Rockwell's complaints about a purportedly abbreviated critical period do not warrant a different outcome

Rockwell, displeased by the Board's application (Br. 29) of the *Ideal Electric* rule, claims that if the Board had not implemented its revised election rules in 2015, purportedly resulting in less time between the filing of a petition and an election and thus a shorter critical period, then Hager's conduct would have occurred during the critical period.[8] Rockwell further speculates that if Hager's conduct occurred within the critical period, it would have been found objectionable. As discussed below, the former argument ignores that Rockwell agreed to the election date and, therefore, the length of the critical period, and lacks any precedential support. The latter argument makes an unnecessary and flawed argument because the Board did in fact make an alternative finding that Hager's conduct, even if viewed as occurring during the critical period, did not warrant setting aside the election.[9]

Although Rockwell bemoans the impact of the Board's 2015 election rules on the critical period, its complaint is a red herring. The parties, fully aware that the

[8] Notably, Rockwell cites (Br. 28) to the entire 20-plus section election rule (29 C.F.R. §§ 102.60-102.82) without specifying which provision therein is supposedly responsible for an abbreviated critical period.

[9] Rockwell does not make any facial challenge to the Board's *Ideal Electric* policy or to the validity of its election rules. Thus, the validity of that policy and the

petition had been filed on July 14, agreed in their stipulated election agreement to hold the election on August 3. (A. 167-69.) *See* 29 CFR § 102.62(b). Thus, the length of the critical period was set by the parties' agreement. And contrary to Rockwell's unsupported claims (Br. 27-29), the election rule does not mandate that the election occur within a specified number of days after the filing of the petition. Rather, the relevant provision of the election rule, 29 CFR § 102.67(b), simply provides that the Regional Director will hold the election as soon as "practicable." Notably, this provision codified, rather than changed, long-term practice. *See* Representation—Case Procedures, 79 Fed. Reg. 74,310 (Dec. 15, 2014) (point number 17). In any event, Rockwell is, in effect, unpersuasively claiming that the "abbreviated" critical period established by its own agreement is unreasonable.

Moreover, as the Regional Director observed (A. 13), there is no authority requiring the Board to extend the *Ideal Electric* time frame to before the filing date of the petition. Rockwell's request that the Board do so excessively focuses on the number of days from petition to election, which has always varied, and in doing so, fails to grapple with the full purpose of the critical-period policy. Pursuant to *Ideal*

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election rules are not before the Court, and Rockwell has waived any such challenges. *See* cases cited at p. 7 n.4. Notably, the Board's election rules have been upheld by the two courts that have considered the issue. *Associated Builders & Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215, 223-27 (5th Cir. 2016); *Chamber of Commerce of U.S. v. NLRB*, 118 F. Supp. 3d 171, 189-220 (D.D.C. 2015).

Electric, the filing of the petition is the cut-off date in assessing objectionable conduct because that is "when the Board's processes have been invoked and a prompt election may be anticipated." 134 NLRB at 1278. Accordingly, it is "conduct [occurring] thereafter which tends to prevent a free election" and which "should appropriately be considered." *Id.* Put differently, the critical-period rule recognizes that election campaigns typically are not in full swing until after the petition is filed. Thus, as this Court has observed, the Board's application of that rule falls within its wide discretion over representation-election procedures, because it is "a convenient device to limit the inquiry to the period near the election when improper acts are most likely to affect employees' freedom of choice." *Amalgamated Clothing & Textile Workers*, 736 F.2d at 1567.

Nor is there any merit to Rockwell's claim (Br. 29) that the Board's continued adherence to *Ideal Electric* in the face of an "abbreviated" critical period (here, about three to four weeks) means the Board "ignores" as too remote in time most organizing activity that could interfere with employee free choice in an election. To the contrary, as shown, the Board will depart from *Ideal Electric* and set aside an election when a party engages in "clearly prescribed *pre-petition* activity likely to have a significant impact on the election," and the election rules do not change the Board's ability to do so. A. 8 n.1 (emphasis added). *Accord L & J Equip Co.*, 745 F.2d at 236-37 (Board only required to depart from *Ideal Electric* where pre-petition

conduct is egregious and its effect is likely to last through the election); *Amalgamated*, 736 F.2d at 1567 (same). Thus, Rockwell's quarrel appears to be with the "clearly prescribed" standard itself, but it fails to even claim that this judicially approved standard is insufficient to protect employee freedom of choice, much less show the Board's choice of standard is an abuse of discretion.

Rockwell gains no ground (Br. 28) by pointing to a drop in the length of the average critical period since the implementation of the current election rules. Even putting aside that the Board was not obligated to lengthen the critical period set by the parties' stipulated election agreement, a longer critical period would not encompass statements like Hager's, which were made to solicit signed union-authorization cards. Such statements tend, given their purpose, to be made prior to the filing of the petition, and thus occur outside the critical period regardless of its length. This is so because, in election cases, the purpose of securing signed cards is to demonstrate sufficient employee support for the filing of the election petition. *See Gibson's Discount Ctr.*, 214 NLRB at 221-22 ("Since a union must have authorization cards from at least 30 percent of the employees in the bargaining unit prior to the filing of the petition[], most solicitations to sign authorization cards occur prior to the filing of the petition."); 29 C.F.R. § 102.61(a)(7) & (f) (discussing requirement that petition be supported by evidence of substantial employee support, which may include employee signatures); NLRB Casehandling Manual, Part Two:

Representation Proceedings (2017), § 11023.1 (to justify further election proceedings, petitioner must usually demonstrate support by at least 30% of employees in the unit it seeks to represent), *available at* https://www.nlrb.gov/reports-guidance/manuals). The new election rules do not change that reality.

Finally, Rockwell's bottom-line point (Br. 28-30) is that, but for the "abbreviated" critical period here, Hager's statement would have been evaluated under the standard applicable to party conduct occurring during the critical period. But as discussed below, the Regional Director did exactly that, applying, in the alternative, the test for evaluating allegedly objectionable conduct by a party or agent that occurs during the critical period.

2. Hager's statement was also unobjectionable under the test for party conduct occurring during the critical period

Although the Regional Director found that Hager's statement was pre-petition conduct that did not significantly impact the election, he also made an alternative finding that the conduct was not objectionable under the standard applied for overturning an election based on union-agent or party misconduct during the critical period. Specifically, the Regional Director found that Hager's single, ambiguous statement, made before the petition was filed and a few weeks before the election, and not repeated during the critical period, was not so severe as to likely cause fear among employees, and did not persist in the minds of employees. Substantial evidence supports that finding, and Rockwell's arguments to the contrary lack merit.

In evaluating whether conduct by a party or party's agent during the critical period would reasonably tend to interfere with employees' free and uncoerced choice during the election, the Board considers a number of factors. Those factors include: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among employees in the voting unit; (3) the number of employees in the unit who were subjected to the alleged misconduct; (4) the temporal proximity of the misconduct to the date of the election; (5) the degree to which the misconduct persists in the minds of the voting-unit employees; (6) the

extent of dissemination of the misconduct among voting-unit employees; (7) the effect of any misconduct by the objecting party (here, Rockwell) to cancel out the effects of the alleged misconduct; (8) the closeness of the vote; and (9) the degree to which the misconduct can be attributed to the party against whom the objections were filed. *Taylor Wharton Div.*, 336 NLRB 157, 158 (2001). Under this multi-factor test, it is not dispositive that some factors favor finding objectionable conduct if all the factors, viewed as a whole, support the opposite conclusion. *Id.* In applying this test, consistent with the principle that Board-conducted elections will not be lightly set aside (*see* pp. 15-17), the Board does not assume "extreme fragility in voters," or that the "slightest imperfection" will invalidate an election. *Pacific Coast Sightseeing Tours & Charters*, 365 NLRB No. 131, slip op. at 11, 2017 WL 4161683 (2017).

As the Regional Director explained, several of the *Taylor Wharton* factors support finding that Hager's statement would not tend to interfere with employees' free and uncoerced choice during the election. (A. 14, 38-39.) It was not, for example, a reoccurring statement. It happened once, in early July, prior to the petition being filed, and about three to four weeks before the election was held on August 3. Thus, the number of incidents (factor 1) and the statement's temporal proximity to the election (factor 4) weigh in favor of finding the statement non-objectionable. *See Avis Rent-A-Car Sys.*, 280 NLRB 580, 581-82 (1986) (isolated

and relatively mild incidents committed weeks before election did not invalidate election). *Accord FJC Security Servs, Inc.*, 360 NLRB 32, 37 (2013) ("one instance of allegedly objectionable conduct" occurring six weeks before election insufficient). *Cf. Taylor Wharton*, 336 NLRB at 158 (finding objectionable conduct where, no later than 3 days before the election, the employer repeated threatening statements that were likely to persists in employees' minds, and engaged in other misconduct).

Further, the Regional Director gave "significant weight" to factors 2 and 5, pursuant to which he found that Hager's ambiguous, one-time statement was not so severe to as cause fear among voting employees, and its effect would not persist in their minds. (A. 13-14.) As shown, Hager told employees that they did not have to sign cards, but if they did not, the Union would not "protect" or "cover" them if "something bad" happened. The statement's ambiguous nature (as described above, *see* pp. 22-23) made it unlikely to cause fear or have an impact that would not dissipate over the ensuing weeks. The statement could be taken, for example, as observing that a natural consequence of employees not supporting the Union is that it would not become their representative and would therefore be unable to "cover" them if something bad happened. *See generally FJC Security Servs, Inc.*, 360 NLRB at 37 (absence of threat of reprisal or promise of benefits weighs against finding of objectionable conduct that would warrant setting aside the

election). *Accord AOTOP, LLC v. NLRB*, 331 F.3d 100, 105 (D.C. Cir. 2003) (Board not required to view ambiguous or "seemingly innocuous conduct" as objectionable threat). In addition, as the Hearing Officer explained, to the extent that "something bad" could be construed as a vague prediction of employer retaliation, the Union held a meeting after Hager's statement and before the election to clarify that Rockwell would not learn who had signed cards and thus could not retaliate on that basis. (A. 38-39.) Further, less than a week before the election, Rockwell met with employees to ensure them that it would not retaliate against union supporters. (A. 15.)

The Regional Director explained that while some of the remaining factors favor finding objectionable conduct, they do not outweigh the opposing factors just discussed. (A. 13-14, 38-39.) Hager spoke during a meeting attended by about 20 employees, about 16 employees of whom signed cards. As those numbers indicate that roughly a third of the voting unit attended the meeting, the Regional Director found that the number of employees who heard the statement (factor 3) weighed in favor of finding the statement objectionable. On the other hand, contrary to Rockwell's assertions (Br. 31-32), there was little evidence the statement was disseminated to other unit employees who were not at the meeting (factor 6), which weighed against finding objectionable conduct. *See Flamingo Las Vegas*

Op. Co., LLC, 360 NLRB 243, 246-47 (2014) (objecting party bears burden of showing that critical-period threats were disseminated to other employees).

There was also no evidence that Rockwell engaged in any misconduct that would offset Hager's alleged misconduct (factor 7), which weighs in favor of a finding of objectionable conduct. Further, the closeness of the vote (factor 8), and the degree to which Hager's statement was attributable to the Union (factor 9)—both weighed in favor of finding objectionable conduct. However, those factors, viewed in context with the other factors as a whole, do not require setting aside the election where the conduct at issue here—a one-time, ambiguous statement made weeks before the election—was unlikely to provoke fear among, or have a lasting impact on, employees on election day. Accordingly, while Board law holds that the closeness of the vote is a relevant consideration, it is not dispositive, and the Board will still assess the impact of Hager's statement on employee free choice. *See FJC Security Servs., Inc.*, 360 NLRB at 37. *Cf. MEK Arden, LLC*, 365 NLRB No. 109, slip op. at 25, 2017 WL 3229289 (2017) (concluding misconduct tended to interfere with employees' freedom of choice given close election, that misconduct was repeated and several employees were subjected to it, and that some misconduct occurred a week before the election), *enforced on other grounds* 755 F. App'x 12 (D.C. Cir. 2018) (enforcing Board's unfair-labor practice order; order of second election based on misconduct was not before the Court).

In response, Rockwell fails to show, as it must, that the credited evidence compels a finding of objectionable conduct. Rockwell claims that certain *Taylor Wharton* factors—the dissemination of Hager's statement, the Union's purported failure to correct that statement, the proximity of the statement to the election, the closeness of the election, and the statement's tendency to provoke fear and have a lasting impact—require a finding of objectionable conduct. The Regional Director, however, carefully addressed each of those considerations in finding no objectionable conduct, and Rockwell fails to show that the Regional Director's balancing of the *Taylor Wharton* factors as a whole is contrary to precedent or unsupported by substantial record evidence.

For example, Rockwell claims (Br. 30-31) that Hager's statement was "widely disseminated" after the statement was made during a meeting attended by over a third of the unit. The "widely disseminated" claim simply ignores the Hearing Officer's finding that there was little or no evidence the statement was disseminated to employees who were not at the meeting. (A. 39.) As to the claim regarding how many employees heard the statement, Rockwell fails to explain how the Regional Director committed reversible error in finding that factor was offset by others supporting a finding of unobjectionable conduct.

There is also no record support for Rockwell's misleading claim that the Union's failure to "correct Hager's misstatements was serious." (Br. 31).

Rockwell does not specify a "misstatement" or "misrepresentation" (Br. 12, 27, 33), and its conclusory assertion that the Union's purported failure was "serious" is no substitute for showing that Hager's statement coerced employees in their exercise of free choice and materially affected the results of the election. Moreover, Rockwell grossly mischaracterizes (Br. 14) the purpose of the employee meeting the Union held on July 12 as being "to dispel any of Hager's blatant misrepresentations about the consequences of not signing a card." To the contrary, Hager's cited testimony (Br. 14) stated that the meeting's purpose was to answer questions that he had been unable to answer during the prior meeting and to clear it up if he had "said something wrong." Rockwell, however, cites no evidence showing that any of the approximately 20 employees at the July 12 meeting asked or expressed concerns about Hager's allegedly objectionable statement, which further undermines Rockwell's claim that the statement had a lasting coercive impact.

Nor is it dispositive that Rockwell (Br. 31-32) views the three-to-four week period between Hager's statement and the election as a short time frame, which it defines as "approximately 19-21 days before the election."[10] To support its claim

[10] As the Hearing Officer observed, no witness could specify the date of the meeting during which Hager made this statement, other than that it was before the petition was filed on July 14. (A. 35 n.7.) The record showed the meeting may

that the short time frame warrants overturning the election, Rockwell relies (Br. 32) on distinguishable cases addressing conduct that was markedly more severe than Hager's single, ambiguous remark, and therefore more likely to have a lasting impact so close to the election. *See Cedars-Sinai Med. Ctr.*, 342 NLRB 596, 597-98 (1980) (cited at Br. 32) (repeated "menacing and intimidating" threats made as late as two weeks before election and suggesting union was willing to physically harm its opponents and their families; threats were disseminated to dozens of employees who continued to discuss the threats, which remained fresh in their minds up to the election). Particularly specious is Rockwell's reliance (Br. 32) on *Beaird-Poulan Division*, a case where the court enforced the Board's order certifying the union because the purported misconduct did not warrant setting aside the election. 247 NLRB 1365 (1980), *enforced* 649 F.2d 589 (8th Cir. 1981).

Next, Rockwell claims (Br. 32) that the close election compels a finding of that Hager's statement was objectionable. However, in the *Portola Packaging, Inc.* case, which Rockwell cites (Br. 32), the Board overturned the election results because the objectionable conduct was "pervasive" and committed by "literally every company official," not simply because of the closeness of the election. 361 NLRB 1316, 1350 (2014). Those facts bear no resemblance to this case, where

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have occurred from early July to July 13, meaning about 3 to 4 weeks before the election.

one limited union agent, Hager, made one vague and relatively innocuous statement. Adopting Rockwell's view, that this single ambiguous statement was objectionable, would fundamentally alter the law such that virtually every close election would be overturned. As shown (p. 41), however, Board law holds that while the closeness of the election is a relevant consideration, it is not dispositive. This accords with the fundamental principle (*see* pp. 15-17) that a Board-conducted election will not be lightly set aside.

Rockwell's fleeting attempt to prove that Hager's statement provoked fear or had a lasting impact suffers from several shortcomings: it ignores that the Board applies an objective standard when determining objectionable conduct, cites to inapplicable precedent, and relies on discredited testimony. Thus, ignoring the objective nature of the test, Rockwell points to employee Blackburn's subjective reaction to Hager's statement, namely, that he signed a card because he did not wish to be left "out here by myself, I'd have to fend for myself." (Br. 31, A. 122.) Other than offering Blackburn's subjective (and therefore immaterial) view of Hager's statement, Rockwell offers no other evidence that Hager's conduct persisted in the employees' minds as they voted. *See AOTOP, LLC*, 331 F.3d at 104 (employees' subjective reactions are immaterial to determination whether to set aside election).

Rockwell gains no ground in its comparison (Br. 32) of this case to *Knapp-Sherril Co.*, where "there was nothing vague or ambiguous" about the union's repeated warning to employees, "immediately before the election," that it would protect union members first, and employees "wouldn't have that job" if the union lost the election. 171 NLRB 1547, 1548 (1968). Hager's statement is unlikely to have any effect similar to the explicit job-loss threat at issue in *Knapp-Sherril*.

Moreover, in trying to analogize its cited precedent to Hager's conduct, Rockwell relies on discredited testimony and conjured findings in a failed attempt to show that Hager's statement was "similarly" explicit in warning that if employees did not sign cards, they would not receive "equal" union representation. (Br. 32.) It recites, for example, the testimony of employee Pruett that he trusted Hager and "took what he said as the truth." (Br. 31.) As discussed (pp. 8, 22, 29), the Hearing Officer discredited Pruett, the one employee who testified, contrary to the credited testimony of his coworkers, that Hager used words that plainly referred to such differential representation. (A. 20-21.) Rockwell does not even claim to challenge this credibility determination, much less show that the requisite "most extraordinary circumstances" support overturning it. *See* cases cited at p.17.

In sum, Rockwell has failed to show that the election results should be overturned. Therefore, its failure to recognize, bargain with, and provide requested information to the Union violated the Act.

CONCLUSION

The Board respectfully requests that the Court deny Rockwell's petition for review and enforce the Board's Order in full.

Respectfully submitted,

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June 2019

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROCKWELL MINING, LLC	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 18-1329, 19-1017
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	09-CA-216001
	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 10,725 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

s/ David Habenstreit
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Dated at Washington, DC
this 26th day of June, 2019

STATUTORY ADDENDUM

Except for the following, all pertinent statutes and regulations are contained in the statutory addendum to Rockwell's opening brief to the Court.

Rules and Regulations

29 C.F.R. § 102.61(a)

(a) RC Petitions. A petition for certification, when filed by an employee or group of employees or an individual or labor organization acting in their behalf, shall contain the following:

(1) The name of the employer.

(2) The address of the establishments involved.

(3) The general nature of the employer's business.

(4) A description of the bargaining unit which the petitioner claims to be appropriate.

(5) The names and addresses of any other persons or labor organizations who claim to represent any employees in the alleged appropriate unit, and brief descriptions of the contracts, if any, covering the employees in such unit.

(6) The number of employees in the alleged appropriate unit.

(7) A statement that a substantial number of employees in the described unit wish to be represented by the petitioner. Evidence supporting the statement shall be filed with the petition in accordance with paragraph (f) of this section, but shall not be served on any party.

(8) A statement that the employer declines to recognize the petitioner as the representative within the meaning of Section 9(a) of the Act or that the labor organization is currently recognized but desires certification under the Act.

(9) The name, affiliation, if any, and address of the petitioner, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(10) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(11) Any other relevant facts.

(12) The type, date(s), time(s) and location(s) of the election sought.

29 C.F.R. § 102.61(f)

(f) Provision of original signatures. Evidence filed pursuant to paragraphs (a)(7), (b)(8), or (c)(8) of this section together with a petition that is filed by facsimile or electronically, which includes original signatures that cannot be transmitted in their original form by the method of filing of the petition, may be filed by facsimile or in electronic form provided that the original documents are received by the regional director no later than 2 days after the facsimile or electronic filing.

29 C.F.R. § 102.62(b)

(b) Stipulated election agreements with discretionary Board review. Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of the employees involved may, with the approval of the Regional Director, enter into an agreement providing for the waiver of a hearing and for an election as described in paragraph (a) of this section and further providing that the parties may request Board review of the Regional Director's resolution of post-election disputes. Such agreement, referred to as a stipulated election agreement, shall also include a description of the appropriate bargaining unit, the time and place of holding the election, and the payroll period to be used in determining which employees within the appropriate unit shall be eligible to vote. Such election shall be conducted under the direction and supervision of the Regional Director. The method of conducting such election and the post-election procedure shall be consistent with that followed by the Regional Director in conducting elections pursuant to §§102.69 and 102.70.