

**A Review of Developments in NLRB
Representation Case Law During 2021
May 2022**

This paper—summarizing developments in representation case law during 2021—was initially presented at the 2021 Midwinter Meetings of the Development of the Law and Practice and Procedure Under the NLRA committees. These committees are a part of the American Bar Association’s Section of Labor and Employment Law. The paper’s format uses the chapter structure of *An Outline of Law and Procedure in Representation Cases* to track and categorize these developments. The *Outline* is published by the NLRB’s Office of the General Counsel and is available on the NLRB website (<https://www.nlr.gov/how-we-work/national-labor-relations-act/agency-manuals>).

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

Virtually all published representation case (Board and circuit court) from 2021 are covered here, as are consolidated representation and unfair labor practice cases in which the Board itself passed or commented on the representation issues. Several unfair labor practice cases that involve issues relevant to representation case law (e.g., jurisdiction and joint employer) are also included. Rulemaking activities that relate to representation-case matters are covered as well. In addition, there are entries for several unpublished NLRB representation case decisions that may be of interest to the researcher, although such decisions are not binding and non-precedential. Where relevant, the views of dissenting or concurring Board members have been noted.

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

Chapter 1: Jurisdiction

1-100 – Jurisdiction Generally

Temple University Hospital, Inc., 370 NLRB No. 106 (McER): See Section 3-940.

1-206 – Territories and

1-501 – Foreign Flag Ships, Foreign Nationals, and Related Situations

Amentum Services, Inc., 28-RC-249393, decision on review and order 5/21/21 (KER): The Board dismissed a petition seeking an election among certain of the Employer's employees who worked at Kandahar Airfield in Afghanistan, finding that Board and Supreme Court precedent mandated a finding that the Board's jurisdiction did not extend to these employees.

Chapter 3: Initial Representation Case Procedures

As of February 15, 2022, certain provisions of the Board's 2019 amendments to its representation-case rules (see 84 Fed. Reg. 69524 (Dec. 18, 2019)) remain enjoined due to *AFL-CIO v. NLRB*, 466 F. Supp. 3d 68 (D.D.C. 2020). Cross-appeals of the District Court order remain pending before the D.C. Circuit, which heard oral argument on May 14, 2021.

At this time the Board's Notice of Proposed Rulemaking that would eliminate the requirement that employers provide available personal email addresses and home and cellular telephone numbers of all eligible voters to the Regional Director and other parties during an election campaign also remains pending. See 85 Fed. Reg. 45553 (July 29, 2020).

Use of Videoconference Technology To Conduct Unfair Labor Practice and Representation Case Proceedings, 86 Fed. Reg. 61090 (Nov. 5, 2021): The Board issued an advance notice of proposed rulemaking seeking public input on the use of videoconference technology to conduct, in whole or in part, all aspects and phases of unfair labor practice and representation case hearings and on potential amendments to its procedural rules regarding the use of videoconference technology. Comments were due on January 4, 2022.

3-700 – Election Agreements

Dynamic Concepts, Inc., 05-RC-282516, rev. and stay granted 11/18/21 (WP, K diss.): The Board granted review of the Regional Director's direction of a rerun election where the Petitioner filed objections and the Employer stipulated to a rerun election (but the Petitioner itself would not stipulate to the rerun). Member Kaplan would have denied review.

3-810 – Statement of Position

IKEA Distribution Services, Inc., 370 NLRB No. 109 (2021) (KR; Mc conc.): The Board affirmed the Regional Director's finding that the Employer was precluded from litigating whether the petitioned-for unit of maintenance employees must include 404 additional hourly

employees under step two of *Boeing* due to its failure to timely serve its statement of position on the petitioner. The Board stated, however, that a regional director is not free to disregard *Boeing* step two simply due to preclusion where the record as a whole indicates the inclusion of additional employees is required to make the unit appropriate. Even so, the Board found that in this case the Regional Director conducted the inquiry contemplated by Section 102.66(b) of the Board's rules and regulations and that her findings, and the record as a whole, supported her determination that the petitioned-for unit of maintenance employees was an appropriate unit. Chairman McFerran would have found that no *Boeing* step two analysis was required where the employer is precluded from raising the issue.

Austin Maintenance & Construction, Inc., 28-RC-266671, rev. granted and remanded 5/28/21 (McKE): The Board found that although the Regional Director properly precluded the Employer from litigating the issue of unit appropriateness because it had failed to properly file and serve its Statement of Position, the Regional Director was still obligated to find the unit appropriate based on some record evidence, and because none was presented remand was required so that an adequate factual basis may be developed to support to Regional Director's unit determination.

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

Cazanove Opici Wine Group d/b/a Opici Family Distributing of New York, 371 NLRB No. 30 (2021) (McKR): The Board rejected the Employer's unsubstantiated claims that the Regional Director had made "intentionally false" statements, "manufactured" her conclusion without record evidence, or based her determination "upon 'something' other than weighing the record facts and applicable law."

3-940 – Relitigation

Browning-Ferris Industries of California, Inc. d/b/a Newby Island Recyclery, 370 NLRB No. 86 (KR; Mc diss.): The Board denied the Charging Party's motion for reconsideration of the Board's earlier decision (369 NLRB No. 139 (2020)) affirming the Acting Regional Director's conclusion that BFI Newby Island Recyclery was not a joint employer with Leadpoint Business Services (and which also found that it would be manifestly unjust to retroactively apply the joint-employer standard introduced at 362 NLRB 1599 (2015)). Chairman McFerran would have granted the motion, citing the need to properly comply with the D.C. Circuit's earlier remand (see 911 F.3d 1195 (D.C. Cir. 2018)).

Temple University Hospital, Inc., 370 NLRB No. 106 (McER): On remand from the D.C. Circuit (see 929 F.3d 729 (D.C. Cir. 2019)), the Board did not foreclose the possibility that there may be Board proceedings in which the doctrine of judicial estoppel may be appropriately applied, but found that it is not available in a proceeding seeking to divest the Board of jurisdiction. The Board therefore reaffirmed its finding in the underlying test-of-certification case (see 366 NLRB No. 88 (2018)).

Chapter 5: Showing of Interest

5-630 – Employer Petitions

D.O. Productions, LLC, 370 NLRB No. 139 (2021) (KER): See Section 7-200.

Chapter 7: Existence of a Representation Question

7-200 – Rules Affecting Employer Petitions

D.O. Productions, LLC, 370 NLRB No. 139 (2021) (KER): The Board affirmed the Acting Regional Director’s determination that the Employer-Petitioner failed to provide sufficient objective considerations in support of its RM petition, holding that a disaffection petition signed by a minority of unit employees, standing alone, does not establish a good-faith reasonable uncertainty regarding a union’s continuing majority status.

Chapter 9: Contract Bar

Mountaire Farms, Inc., 370 NLRB No. 110 (2021) (McKE; R diss. on other grounds): Following an earlier notice and invitation to file briefs as to whether the Board should rescind, retain or retain with modifications the contract-bar doctrine, the Board decided not to modify the doctrine at this time. Member Emanuel would have made two changes (detailed below).

9-300 – Duration of Contract

Mountaire Farms, Inc., 370 NLRB No. 110 (2021) (McKE; R diss. on other grounds): Following an earlier notice and invitation to file briefs as to whether the Board should rescind, retain or retain with modifications the contract-bar doctrine, the Board decided not to modify the doctrine at this time. Chairman McFerran stated that the Board may wish to address the question of the optimal length of the contract bar period in a future proceeding. Member Emanuel stated he would reduce the duration of the contract bar period from 3 years to 2 years.

9-540 – The “Insulated Period” and

9-550 – The Period for Filing

Mountaire Farms, Inc., 370 NLRB No. 110 (2021) (McKE; R diss. on other grounds): The Board commented that arguments that employees may not always be able to readily ascertain the date on which the “window period” opens “have considerable force,” but stated that a sufficiently compelling case had not been made for any particular proposed modification. Chairman McFerran did not join these observations. Member Emanuel stated that he would increase the window period from 30 to 60 days.

9-700 – Unlawful Union-Security and Checkoff Provisions

Mountaire Farms, Inc., 370 NLRB No. 110 (2021) (McKE; R diss. in part): The Board reversed the Regional Director and dismissed the petition, finding that the union-security clause in question was capable of a lawful interpretation and was therefore not “clearly unlawful on its face.” The Board stated that the clause was, at most, ambiguous and thus did not remove the contract’s bar quality. Member Ring would have affirmed the Regional Director’s conclusion that the clause was unlawful on its face and therefore could not serve as a bar to the petition.

Chapter 10: Prior Determinations and Other Bars to an Election

10-300 – Settlement Agreement as a Bar

D.O. Productions, LLC, 370 NLRB No. 139 (2021) (KER): In affirming the Acting Regional Director’s determination that the Employer-Petitioner failed to provide sufficient objective considerations in support of its RM petition, the Board did not rely on the Acting Regional Director’s alternative finding that the disaffection petition at issue was found to be tainted in a settled ULP case, given that the admissions clause in the settlement stated there was no evidence of supervisory taint in the collection of the signatures or that an earlier ULP allegation tainted the petition. The Board therefore found it unnecessary to pass on the Acting Regional Director’s additional statements concerning *Truserv* or the timing of a showing of interest, as well as the Employer-Petitioner’s argument that the petition could not be dismissed absent a *Saint Gobain* hearing.

Geodis Logistics, LLC, 371 NLRB No. 1 (2021) (KR; Mc diss.): The Board granted the Employer’s request for review of the Regional Director’s refusal to reinstate two decertification petitions as it raised substantial issues warranting review with respect to whether the remedial period associated with the settlement of the ULPs was complete under *Truserv*. Chairman McFerran would have denied review, arguing that the Employer had no statutory standing to seek reinstatement of a decertification petition and that, even if it did, the Employer’s contentions all related to the Regional Director’s processing of the ULP matters and such contentions were not properly before the Board in this representation proceeding.

10-700 – Contracting Unit and Cessation of Operations

American Bottling Co. v. NLRB, 992 F.3d 1129 (D.C. Cir. 2021): The court found that substantial evidence supported the Board’s determination that the Employer’s anticipated elimination of the petitioned-for classification was neither certain nor imminent given that the process of implementing this change had been repeatedly derailed over the previous 18 months and the target date at the time of the election was an aspirational target rather than set in stone. The court observed that the Employer’s repeated false starts distinguished this situation from precedent on which the Employer sought to rely (and noted that although the position was in fact eliminated shortly after the election, that was not relevant to whether elimination was definite and certain on the date the Regional Director directed the election).

NP Lake Mead LLC d/b/a Fiesta Henderson Casino Hotel, 28-RC-245493, rev. denied 2/12/21 (McKR): The Board observed that the Petitioner in this case had prevailed in the election before the Employer laid off all of its employees with no reasonable expectation of recall in the foreseeable future due to the Covid-19 pandemic, and because the Regional Director had overruled all objections no new election would be held. The Board therefore declined to extend its pre-election cessation-of-operations precedent to a post-election situation. The Board noted that these circumstances distinguished the case from *Texas Station Gambling Hall*, 370 NLRB No. 11 (2020).

10-800 – Blocking Charges

As of February 15, 2022, a challenge to the Board’s Election Protection Rule (see 85 Fed. Reg. 18366 (April 1, 2020)) remains pending in *AFL-CIO v. NLRB*, 1:20-cv-01909-BAH (D.D.C.), with briefing currently stayed.

D.O. Productions, LLC, 370 NLRB No. 139 (2021) (KER): In affirming the Acting Regional Director’s determination that the Employer-Petitioner failed to provide sufficient objective considerations in support of its RM petition, the Board also rejected the argument that the administrative dismissal of the RM petition was inconsistent with Section 103.20 of its rules and regulations, as the dismissal was not based on any pending or settled ULP charge.

Rieth-Riley Construction Co., 370 NLRB No. 85 (2021) (KER; Mc diss.): The Board granted the Employer’s and the Petitioner’s requests for review of the Regional Director’s decision and order (which dismissed these two decertification petitions), stating that it raised substantial issues especially with respect to whether the Regional Director’s decision to dismiss the petition was consistent with Section 103.20 of the Board’s Rules and Regulations. Chairman McFerran would have denied review, arguing that the Election Protection Rule did not apply to the petitions at issue and that, even if it did, there was no clear conflict between the Regional Director’s dismissal and the Rule as it now exists.

Wendt Corp., 03-RD-276476, rev. granted and remanded 6/25/21 (McER): The Board stated that the blocking charge policy is not relevant where, as here, the Board has issued its final disposition of ULP charges (see 369 NLRB No. 135 (2020)), and that the Regional Director therefore should not have scheduled an election in the face of the ULPs without first determining the impact of the violations found on the petition. Member Emanuel would have found that the blocking charge policy continued to apply because the Board’s ULP decision was pending before the circuit court, and the court’s decision would constitute final disposition of the charges.

Troy Grove Quarry, 25-RD-269960, rev. denied 9/28/21 (McKR): The Board found that the Regional Director should not have placed a hearing on challenges and objections in abeyance based on pending unfair labor practice charges because the current blocking charge policy requires processing up to the point at which the certification would otherwise issue. Chairman McFerran stated her disagreement with the current blocking charge policy but agreed that it applied and warranted granting review.

Chapter 11: Amendment Clarification, and Deauthorization Petitions

11-200 – Unit Clarification (UC) Generally

Northwestern Corp. d/b/a Northwestern Energy, 371 NLRB No. 12 (2021) (KER): Applying *Premcor*, the Board reversed the Regional Director’s clarification of the existing unit to include those working in the newly-created controller position. The Board found, contrary to the Regional Director, that the controllers did not perform the “same basic functions” as employees in the OMS dispatcher bargaining unit position. The Board emphasized that the controllers spent most of their time performing or preparing to perform duties not performed by OMS dispatchers, and also observed that the Employer had taken concrete steps towards giving controllers additional decisionmaking authority not shared by OMS dispatchers.

Chapter 12: Appropriate Unit: General Principles

12-100 – Introduction

Austin Maintenance & Construction, Inc., 28-RC-266671, rev. granted and remanded 5/28/21 (McKE): See Section 3-810.

12-120 – Craft Units

PCC Structurals, Inc. v. NLRB, 839 Fed. Appx. 571 (D.C. Cir. 2021): The court upheld the Board majority’s finding that a petitioned-for unit of welders was an appropriate unit under craft-unit analysis, commenting that the Employer’s challenges to the Regional Director’s findings did not discuss ample evidence supporting those findings. The court also rejected the Employer’s argument that it was deprived of due process because the Regional Director did not provide notice that he was considering the craft-unit test, given that it has considerable overlap with the community-of-interest test and, absent any colorable defense under the craft-unit test, the Employer could not show that any lack of notice was prejudicial. See also Section 12-200.

Nissan North America, Inc., 371 NLRB No. 43 (2021) (McWP; KR diss.): The Board granted review, finding the Petitioner had raised substantial issues warranting review with respect to the Acting Regional Director’s finding that the petitioned-for unit of Tool and Die Maintenance Technicians does not constitute a separate craft unit, and that even if it did constitute a separate craft unit, the unit would be inappropriate for collective bargaining. Members Kaplan and Ring would have denied review, finding the craft-unit cases relied on by the Petitioner were distinguishable.

12-200 – General Principles

Alaska Communications Systems Holdings, Inc. v. NLRB, 6 F.4th 1291 (D.C. Cir. 2021): The court rejected the Employer’s argument that the Board acted unlawfully in modifying a petitioned-for voting group to include two employees not originally sought by the Petitioner, observing that nothing in the Board’s rules constrains its authority to identify an appropriate unit

not presented by the parties and the Act itself calls for the Board, not the parties, to determine the appropriate unit in each case. The court also noted that extensive evidence about the two employees in question was presented at the hearing, including by the Employer (who had raised their inclusion in the first place), and that the Board had therefore provided an appropriate hearing upon due notice. The court also rejected the Employer's contention that the inclusion of the two employees denied it due process.

PCC Structural, Inc. v. NLRB, 839 Fed. Appx. 571 (D.C. Cir. 2021): The court upheld the Board majority's finding that a petitioned-for unit of welders was an appropriate unit under the community-of-interest analysis, observing that in seeking court review the Employer had discussed only three of the eight relevant factors, leaving unchallenged much of the evidence that supported the Regional Director's appropriate-unit finding (including distinct wages, skills, training, and job duties that distinguish the welders from other employees).

St. James Medical Group v. NLRB, 843 Fed. Appx. 334 (D.C. Cir. 2021): The court rejected the Employer's argument that, under the *PCC Structural/Boeing* framework, the Regional Director had inadequately analyzed whether the petitioned-for registered nurses' interests were sufficiently distinct from those of excluded advanced-practice practitioners, noting that the Regional Director had discussed distinguishing features between the two groups, including specialized training, different terms and conditions of employment, and separate supervision.

IKEA Distribution Services, Inc., 370 NLRB No. 109 (2021) (KR; Mc conc.): See Section 3-810.

AT&T Mobility Services, LLC, 371 NLRB No. 14 (2021) (McKR), and *Cazanove Opici Wine Group d/b/a Opici Family Distributing of New York*, 371 NLRB No. 30 (2021) (McKR): The Board explained that the *PCC Structural* framework applies when a non-petitioning party contends that the petitioned-for unit is inappropriate unless it includes additional employee classifications, but not where, as in these cases, a party contends that the petitioned-for unit is inappropriate without the inclusion of employees at additional locations. Chairman McFerran joined her colleagues in finding *PCC Structural* was inapplicable here but adhered to her dissent in that case.

Davidson Hotel Co., 371 NLRB No. 44 (2021) (McKP): See Section 15-170.

Blue School, 02-RC-278139, rev. denied 10/19/21 (McKR): The Board noted that *PCC Structural* does not apply in cases where the petitioner seeks a presumptively appropriate unit.

Los Angeles Daily News Publishing Co., 21-RC-273230, rev. denied 12/22/21 (RWP): The Board stated that the three-step analysis set forth in *Boeing* applies only when a non-petitioning party asserts that the petitioned-for unit is inappropriate unless the unit includes certain additional employee classifications; it does not apply where a party contends that a petitioned-for unit is inappropriate unless it excludes certain petitioned-for classifications.

American Steel Construction, Inc., 371 NLRB No. 41 (2021) (McWP; KR diss.): The Board granted review of the Regional Director's determination that a petitioned-for unit of field ironworkers was inappropriate because, under *PCC Structural* and *Boeing*, the petitioned-for

employees did not share a community of interest that was “sufficiently distinct” from the interests of other excluded employees. The Board invited briefing on whether it should adhere to the *PCC Structural/Boeing* standard or, if not, what standard should replace it (including whether the Board should return to *Specialty Healthcare* either in its entirety or with modifications). Briefing concluded on February 7, 2022. Members Kaplan and Ring stated their disagreement with revisiting precedent based on their belief that *PCC Structural* and *Boeing* closely reflected traditional analysis in this area and brought it into sharper focus.

Chapter 13: Multilocation Employers

AT&T Mobility Services, LLC, 371 NLRB No. 14 (2021) (McKR): The Board agreed with the Regional Director that the single-facility presumption of appropriateness applied to the petitioned-for unit of two classifications at the Employer’s facility and that the Employer had not rebutted that presumption, as most of the relevant factors supported the single-facility unit. The Board noted that even if the Employer had established that four “hubs” housed at the facility in question were separate business units, that evidence would not render the single-facility presumption inapplicable. The Board additionally found that even if the single-facility presumption did not apply, the unit was still appropriate under the multifacility community-of-interest test based on factors including employee interchange, functional integration, and geographic proximity.

Cazanove Opici Wine Group d/b/a Opici Family Distributing of New York, 371 NLRB No. 30 (2021) (McKR): Applying the Board’s multifacility community-of-interest test, the Board found that the petitioned-for unit of outside sales representatives based in Metro New York (excluding sales representatives based in Upstate New York) was an appropriate unit. In so finding, the Board emphasized that the factors of centralized management and supervision, geographic proximity, the petitioned-for employees’ distinct terms and conditions of employment, employee interchange, and functional integration all favored the petitioned-for unit.

Starbucks Corp., 03-RC-282115 et al., rev. denied 12/7/21 (KWP): The Board emphasized that the central issue in this case was whether the Employer had met its “heavy burden” to overcome the presumption that the petitioned-for single-store units were appropriate; the mere fact that the petitioned-for employees may share some community of interest with excluded employees did not serve to rebut the presumption.

Chapter 14: Multiemployer, Single Employer, and Joint Employer Units

14-600 – Joint Employer

As of February 15, 2022, a challenge to the Board’s joint employer rule (see 85 Fed. Reg. 11184 (Feb. 26, 2020)) remains pending in *SEIU v. NLRB*, 21-CV-02243 (D.D.C.).

Browning-Ferris Industries of California, Inc. d/b/a Newby Island Recyclery, 370 NLRB No. 86 (KR; Mc diss.): See Section 3-940.

Chapter 15: Specific Units and Industries

15-160 – Health Care Institutions

St. James Medical Group v. NLRB, 843 Fed. Appx. 334 (D.C. Cir. 2021): The court rejected the Employer’s argument that the Regional Director had erroneously applied industry-specific, non-acute care precedent in finding that the petitioned-for unit of registered nurses was appropriate, observing that the Regional Director had cited *Park Manor Care Center* and various other decisions finding registered nurses units appropriate where the nurses constituted “a sizable homogenous grouping of professionals, whose specialized training and licensure requirements clearly prevent other professions from performing their work.”

15-170 – Hotels and Motels

Davidson Hotel Co., 371 NLRB No. 44 (2021) (McKP): On remand from the D.C. Circuit, the Board reaffirmed its earlier finding that, under *PCC Structurals*, the petitioned-for units of housekeeping and food-and-beverage employees were appropriate. In doing so, the Board explained that the Regional Director’s conclusion that the separate units were appropriate was consistent with his earlier finding that a combined unit of housekeeping and food-and-beverage employees was not appropriate. The Board also distinguished two hotel industry cases in which the Board had rejected separate units of hotel employees and instead mandated wall-to-wall units.

15-220 – Newspaper Units

Los Angeles Daily News Publishing Co., 21-RC-273230, rev. denied 12/22/21 (RWP): The Board agreed with the Regional Director that the petitioned-for unit of editorial department employees was appropriate, particularly in light of established Board precedent in the newspaper industry holding that units of editorial department employees are appropriate.

15-260 – Universities and Colleges

Elon University, 370 NLRB No. 91 (2021) (KER; Mc conc.): See Section 19-200.

Jurisdiction-Nonemployee Status of University and College Students Working in Connection With Their Studies, 86 Fed. Reg. 14297 (March 15, 2021): See Section 20-400.

Chapter 16: Craft and Traditional Departmental Units

16-200 – Initial Establishment of Craft or Departmental Unit

PCC Structurals, Inc. v. NLRB, 839 Fed. Appx. 571 (D.C. Cir. 2021): See Section 12-120.

Chapter 17: Statutory Exclusions

17-400 – Independent Contractors

The Atlanta Opera, Inc., 371 NLRB No. 45 (2021) (McWP; KR diss.): The Board granted review, finding that the Employer had raised substantial issues regarding the Acting Regional Director’s finding that the petitioned-for makeup artists, wig artists, and hairstylists were employees and not independent contractors. The Board invited briefing on whether the Board should adhere to the independent-contractor standard in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), and if not, what standard should replace it (including whether the Board should return to *FedEx Home Delivery*, 361 NLRB 610 (2014), either in its entirety or with modifications). Amicus briefs were due on February 10 and responsive briefs from the parties were due on February 25. Members Kaplan and Ring would have limited review to evaluating whether the Acting Regional Director correctly applied *SuperShuttle*.

17-500 – Supervisors

Atlantic City Electric Co. v. NLRB, 5 F.4th 298 (3d Cir. 2021): The court refused to consider two arguments regarding the burden in supervisory status cases insofar that the Employer failed to sufficiently raise them before the Board. The Employer contended that the principle that a party fails to meet its burden when the evidence is in conflict or otherwise inconclusive improperly imposes a summary-judgment standard and that the Board’s use of the words “clear” and “unclear” to describe aspects of the record improperly imposed a clear-and-convincing standard.

Phoenix New Times, LLC, 370 NLRB No. 84 (2021) (KER): The Board denied review of the Regional Director’s finding that a Food Editor was not a supervisor, noting that the Employer had relied heavily on a single case but had not presented evidence of supervisory authority comparable to the facts of that case.

17-521 – Assign

Atlantic City Electric Co. v. NLRB, 5 F.4th 298 (3d Cir. 2021): The court found that substantial evidence supported the Board’s determination that the Employer had not established that its system operators could assign employees to places or to times. Regarding places, the court commented that although system operators prioritized resources, which determined the need for work at a given location, they did not assign individual employees to places (field supervisors did that); the court rejected the Employer’s argument that the downstream effects the system operators’ decisions had on where employees ended up required a finding they assigned field employees to places (nor was such a result required by *Entergy Mississippi*, 367 NLRB No. 109 (2019)). Regarding times, the court noted that the evidence did not establish that system operators scheduled shifts, assigned overtime, or could require employees to stay to finish the work.

17-522 – Responsibly Direct

Transdev Services, Inc. v. NLRB, 991 F.3d 889 (8th Cir. 2021): The court upheld the Board’s finding that the Employer had not established that the petitioned-for road supervisors possessed the authority to responsibly direct employees, observing that the Employer had failed to argue or explain how road supervisors were held accountable for the performance of their subordinates, as opposed to the road supervisors’ own performance.

Atlantic City Electric Co. v. NLRB, 5 F.4th 298 (3d Cir. 2021): The court found that substantial evidence supported the Board’s determination that the Employer had not established that its system operators could responsibly direct employees. More specifically, the court upheld the Board’s finding that there was no evidence the system operators were held accountable for the performance of their subordinates or suffered adverse consequences if their subordinates performed poorly. The court further found that even if certain evidence showed that system operators responsibly directed employees’ performance, the Board properly concluded that the evidence did not establish the system operators used independent judgment in doing so.

17-523 – Discipline, Discharge, and Suspension

Transdev Services, Inc. v. NLRB, 991 F.3d 889 (8th Cir. 2021): The court upheld the Board’s finding that the Employer had not established that the petitioned-for road supervisors possessed the authority to discipline. The court found that substantial evidence supported the Board’s determination that road supervisors’ issuance of counseling or warnings was not part of a progressive disciplinary policy and thus was not discipline; the court also agreed with the Board that the authority to remove bus operators from service did not establish the authority to discipline under the circumstances of this case. The court also upheld the Board’s determination that road supervisors did not effectively recommend discipline insofar as their reports did not recommend discipline and the evidence suggested that any recommendations were independently investigated by superiors; the court also agreed that road supervisors’ role as accident investigators did not result in discipline recommendations, and their determinations were not final and appeared to lack independent judgment.

17-526 – Reward/Evaluate

Transdev Services, Inc. v. NLRB, 991 F.3d 889 (8th Cir. 2021): The court upheld the Board’s finding that the Employer had not established that the petitioned-for road supervisors possessed the authority to reward, finding that substantial evidence supported the Board’s conclusion that the Employer had not shown that the authority to reward was anything more than isolated, infrequent, or sporadic, or that the road supervisors exercised independent judgment in “rewarding.” The court commented that the Board reasonably concluded that one-time distribution of gift cards under the circumstances described here was insufficient to establish the authority to reward.

17-530 – Secondary Indicia

Transdev Services, Inc. v. NLRB, 991 F.3d 889 (8th Cir. 2021): Addressing the argument that if the petitioned-for road supervisors were not statutory supervisors, the ratio of supervisors to non-supervisors would fail the “test of common sense,” the court commented that this position mistakenly assumed that the lay definition of “supervisor” is the same as the Act’s, and that finding that road supervisors were not statutory supervisors merely meant that they may vote in a Board election, not that they cannot monitor the performance of other employees, report their findings, issue orders to other employees, or that the Employer cannot discipline other employees for failing to obey such orders.

Chapter 18: Statutory Limitations

18-200 – Plant Guards

RadNet Management, Inc. v. NLRB, 992 F.3d 1114 (D.C. Cir. 2021): The court rejected the Employer’s contention that its MRI Technologists were statutory guards by virtue of their duties enforcing rules related to the safe operation of dangerous equipment. The court reasoned that their primary duties were unrelated to safety and security, any guard-like duties were merely incidental, and they lacked many common indicia of guard status.

Portland Museum of Art, 370 NLRB No. 113 (2021) (KER): The Board reversed the Regional Director’s finding that the petitioned-for Gallery Ambassadors are not guards within the meaning of Section 9(b)(3). In finding that the Gallery Ambassadors are guards, the Board found that they had been assigned guard responsibilities (including maintaining security of artworks and safety of the visitors and employees, monitoring visitors and other employees, enforcing rules to protect exhibits, responding to incidents reported by Security Associates, and manning stations where they monitored other employees and enforced rules such as bag checks against them). The Board stated that these responsibilities were neither minor nor incidental to their overall responsibilities.

Chapter 19: Categories Governed by Board Policy

19-200 – Managerial Employees

Phoenix New Times, LLC, 370 NLRB No. 84 (2021) (KER): The Board denied review of the Regional Director’s finding that a Food Editor was not a managerial employee, noting the absence of record evidence that the Food Editor had the authority to determine the Employer’s editorial positions or otherwise control its editorial content.

Elon University, 370 NLRB No. 91 (2021) (KER; Mc conc.): In finding that the Employer had not established that the petitioned-for nontenure-track faculty members were managerial employees, the Board modified the *Pacific Lutheran* test by discarding the “subgroup majority status rule” (under which a petitioned-for faculty subgroup would be found non-managerial

simply because the members of that subgroup did not constitute a majority of the members on committees exercising actual control or effective recommendation over certain areas of consideration, even if the committees were exclusively composed of faculty members) and instead adopted the D.C. Circuit’s formulation considering (1) whether a faculty body exercises effective control over the *Pacific Lutheran* areas of consideration and (2) if so, whether the subgroup at issue is included in that managerial faculty body. Applying the modified standard here, the Board concluded that the Employer had not established that the petitioned-for faculty members are structurally included in the Employer’s faculty bodies (given that the evidence identified only one petitioned-for faculty member who had served on any of the Employer’s governance committees). Chairman McFerran concurred with the result and wrote separately to point out that the new framework permits and requires the Board to be sensitive to the actual situation of contingent faculty members.

Chapter 20: Effect of Status or Tenure on Unit Placement and Eligibility to Vote

20-200 – Temporary Employees

Phoenix New Times, LLC, 370 NLRB No. 84 (2021) (KER): The Board reversed the Regional Director and found that petitioned-for Fellows were temporary employees who could not be appropriately included in the unit, noting there was no dispute that Fellows had a finite tenure with a readily ascertainable end date, and the 6-month terms of their apprenticeships with the Employer were not comparable to precedent relied on by the Regional Director in finding the Fellows were not temporary employees. The Board further noted that the Fellows did not fall within any exceptions to the Board’s general policy of excluding temporary employees from units of permanent employees.

Curaleaf Massachusetts, Inc., 370 NLRB No. 100 (2021) (McKR): The Board agreed with the Acting Regional Director that six challenged transferees were ineligible temporary employees. The Board noted that although it applies a “date certain” test in evaluating temporary-employee status, that test does not require a party to prove that the employee’s tenure was certain to expire on an exact calendar date, but only that the prospect of termination was sufficiently finite on the eligibility date to dispel reasonable contemplation of continued employment beyond the term for which the employee was hired. The Board emphasized that here, the six transferees were present at the facility to cover staffing shortages due to Covid-19, and as of the eligibility date all parties were aware that their time at the facility would be finite and limited to the staffing shortages, even though no one knew the precise date on which the shortages would end. The Board further noted it was relying on postelection evidence only to the extent it corroborated evidence that existed on the eligibility date.

20-400 – Student Workers

Jurisdiction-Nonemployee Status of University and College Students Working in Connection With Their Studies, 86 Fed. Reg. 14297 (March 15, 2021): The Board withdrew its earlier Notice of Proposed Rulemaking (see 84 Fed. Reg. 49691 and 84 Fed. Reg. 55265) which would have established that students who perform any services for compensation (including, but not limited

to, teaching or research) at a private college or university in connection with their studies are not “employees” within the meaning of the Act. The Board stated that in light of competing agency priorities, it had determined to focus its time and resources on the adjudication of cases currently in progress.

Chapter 21: Self-Determination Elections

21-500 – Inclusion of Unrepresented Groups

Alaska Communications Systems Holdings, Inc. v. NLRB, 6 F.4th 1291 (D.C. Cir. 2021): The court held that the Board’s conclusion that the petitioned-for voting group shared a community of interest with the preexisting unit was supported by substantial evidence, noting that adding the voting group would result in a unit tracking the Employer’s departmental structure, that the voting group and the unit shared some supervision, had significant overlap in job duties, exhibited some functional integration, and were subject to centralized control of management and supervision. The court agreed with the Board that the remaining factors were neutral, save geographic proximity, and although that factor weighed against a community of interest this was tempered by the specific facts of the case.

Chapter 22: Representation Case Procedures Affecting the Election

RadNet Management, Inc. v. NLRB, 992 F.3d 1114 (D.C. Cir. 2021): The court rejected the Employer’s argument that the elections in this case were defective because they were conducted pursuant to the Board’s 2014 revised election rules.

As of February 15, 2022, certain provisions of the Board’s 2019 amendments to its representation-case rules (see 84 Fed. Reg. 69524 (Dec. 18, 2019)) remain enjoined due to *AFL-CIO v. NLRB*, 466 F. Supp. 3d 68 (D.D.C. 2020). Cross-appeals of the District Court order remain pending before the D.C. Circuit, which heard oral argument on May 14, 2021.

Use of Videoconference Technology To Conduct Unfair Labor Practice and Representation Case Proceedings, 86 Fed. Reg. 61090 (Nov. 5, 2021): See Chapter 3.

22-110 – Mail Ballots

Rush University Medical Center, 370 NLRB No. 115 (2021) (McKR): The Board clarified two aspects of the framework for Covid-19-driven mail-ballot determinations set forth in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020). First, with respect to factor 5 (current Covid-19 outbreak at the facility), the Board stated that the factor was not satisfied by evidence that Covid-19 is present at a facility; instead, regional directors should determine whether the Covid-19 cases at the facility would reasonably be expected to affect the conduct of a manual election, including (1) whether the number and location of Covid-19 cases (or the likelihood they will result in unit employees being exposed to Covid-19) indicates that a manual election would pose a threat to health or safety, or (2) whether current cases among unit employees would result in their

disenfranchisement by a manual election. Second, regarding factor 6 (“other similarly compelling circumstances”) the Board concluded that the mere CDC determination that new variants exist does not, at present, meet factor 6. Chairman McFerran rearticulated her belief that a default preference for mail ballots for the duration of the pandemic is warranted.

Comprehensive Health Services, LLC, 371 NLRB No. 2 (2021) (McER): The Board denied review of the Regional Director’s direction of a mail ballot election, relying solely on the Regional Director’s finding that a mail ballot election was warranted under *Aspirus* Factor 4 (the employer fails or refuses to commit to abide by GC Memo 20-10) because the proposed room for a manual election would not have provided adequate space to ensure adequate social distancing and safe traffic flow. Chairman McFerran noted her separate opinion in *Aspirus*. Member Emanuel stated that in light of the evolving nature of the pandemic he would have revisited the guidelines set forth in *Aspirus*.

Hitachi Rail Honolulu JV, 20-RC-268153, rev. denied 4/8/21 (McKR): The Board denied review of the Regional Director’s mail-ballot determination, but in doing so found that the Regional Director misapplied *Aspirus* factor 2 by relying on an upward trend in the positivity rate, even though it never reached 5% during the period at issue, and also erroneously focused only on an increase in confirmed cases for the latter half of the period involved.

Planned Building Services, Inc., 02-RD-274535, decision and order remanding 8/27/21 (KE; R diss. in part): Consistent with *Rush University*, above, the Board found that the presence of Covid-19 variants was not sufficient to meet *Aspirus* factor 6, nor was the fact that the location of the proposed manual election was not controlled by any party. The Board also found that *Aspirus* factors 4 and 5 were not met simply because the Employer would not commit to providing plexiglass barriers and could not commit to providing certain required certifications (due to its lack of control over the premises in question), insofar as the Petitioner had offered to provide the barriers and no effort had been made (by the Region or anyone else) to contact the entity that controlled the premises to seek its permission to use the proposed location or ascertain whether it was possible to obtain the certifications the Employer could not provide by itself. Member Ring disagreed with the majority’s approach to factors 4 and 5, expressing concern that any delay resulting from that approach would outweigh any likely benefits.

sp0n Inc. d/b/a Citizen, 02-RC-283400, rev. denied 11/9/21 (KWP): Contrary to the Employer’s argument that the Regional Director was required to direct an electronic election, the Board agreed with the Regional Director that he was precluded from doing so at present.

22-111 – Absentee Ballots

As of February 15, 2022, the Board’s Notice of Proposed Rulemaking that would provide absentee ballots for employees who are on military leave remains pending. See 85 Fed. Reg. 45553 (July 29, 2020).

22-112 – Challenges

American Bottling Co. v. NLRB, 992 F.3d 1129 (D.C. Cir. 2021): The court held that the Board correctly overruled the Employer’s objection alleging that the region did not record a challenge to each vote cast by an employee, given that the Regional Director had specifically found that the classification in question was included in the unit.

22-113 – The Count

RadNet Management, Inc. v. NLRB, 992 F.3d 1114 (D.C. Cir. 2021): The court agreed with the Employer that the Board had abused its discretion by postponing the counting of ballots and disclosure of results until the conclusion of voting in all ten of the individual elections at issue, noting that the Board’s rules provide that a tally of ballots will be prepared and immediately made available to the parties upon the conclusion of the election and finding that the Regional Director’s reasoning for departing from that rule was inadequately explained. But the court found that this error was harmless because it did not prejudice either party (for the Employer’s part, it was merely prevented from publicizing Petitioner victories in the earliest-scheduled of the elections).

Chapter 23: Voting Eligibility

23-113 – Discharged Employees

David Saxe Productions, 370 NLRB No. 103 (2021) (KER): Remediating the ALJ’s omission of an explanation for why she directed that the seven challenged ballots cast by unlawfully discharged employees be counted, the Board noted that it has consistently found that such challenges should be overruled.

Chapter 24: Interference With Elections

24-110 – Objections Period

American Bottling Co. v. NLRB, 992 F.3d 1129 (D.C. Cir. 2021): The court noted that the union’s recording of the ballot tabulation took place after the polls had closed and therefore could not have had any bearing on the results of the election.

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

David Saxe Productions, 370 NLRB No. 103 (2021) (KER): The Board found that two ULPs the Employer committed during the critical period—one of which involved creating the impression of surveillance, the other unlawful solicitation of grievances—combined with certain objectionable conduct clearly warranted setting aside the election (in the event the Union failed to obtain a majority after certain challenged ballots were counted).

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

GADecatur SNF LLC v. NLRB, No. 20-1435 (D.C. Cir. Nov. 11, 2021): See Section 24-301.

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

GADecatur SNF LLC v. NLRB, No. 20-1435 (D.C. Cir. Nov. 11, 2021): See Section 24-301.

American Bottling Co. v. NLRB, 992 F.3d 1129 (D.C. Cir. 2021): The court noted that even if all voters in the classification the Employer was prevented from challenging were subtracted from the union’s vote tally, it still would have prevailed in the election.

Professional Transportation, Inc., 370 NLRB No. 132 (2021) (McKER): See Section 24-427.

24-301 – Threats

GADecatur SNF LLC v. NLRB, No. 20-1435 (D.C. Cir. Nov. 11, 2021): The court upheld the Board’s overruling of an objection that concerned a loud argument that took place outside the polling place when the Employer attempted to prevent an eligible voter from accessing its property. The court noted that the dispute was of limited duration, involved only one voter’s eligibility, did not involve unlawful action by the Petitioner, involved potentially disruptive behavior by both parties, and that a small-if-unknown number of unit employees were aware of or affected by the argument. In light of these considerations, although the election was close and the incident took place during the election, the court concluded that the Board reasonably held that the conduct did not reasonably tend to interfere with the voters’ free choice.

David Saxe Productions, 370 NLRB No. 103 (2021) (KER): The Board affirmed the ALJ’s sustaining of an objection alleging that an agent of the Employer urged certain employees to vote against the Union at a mandatory meeting the night before the election and in doing so intimidated voters.

24-302 – Promises and Grants of Benefit

Jam Productions Ltd., 371 NLRB No. 26 (2021) (McKR): On remand from the Seventh Circuit, the Board affirmed the Regional Director’s overruling of the Employer’s objection alleging that the Petitioner, through its hiring hall, gave job referrals to certain voters in order to induce their support in the election. The Board found that because the hiring hall was non-exclusive, voters were already eligible for the referrals irrespective of the election and therefore were not receiving anything for which they were not already eligible. Further, although there was an increase in referrals during the relevant part of the critical period, to the extent that increase raised an inference of coercive timing under *B & D Plastics*, the Petitioner had given alternative explanations (namely that the increase corresponded to its typical busy season) to rebut that inference. The Board further found that the record did not support the Employer’s contention that the Petitioner had waived drug testing for voters insofar as it did not establish that drug testing was an absolute or consistently-enforced prerequisite for enrolling in the hiring hall.

24-307 – Misrepresentation

RadNet Management, Inc. v. NLRB, 992 F.3d 1114 (D.C. Cir. 2021): The court rejected the Employer’s argument that the elections at issue had to be set aside because the Petitioner failed to disclose to employees its alleged affiliation with another union, because even if there was such an affiliation there was no evidence the Petitioner had affirmatively misrepresented its affiliation or that the affiliation was material to the campaign, nor was there any indication the voters were confused as to the identity of their prospective bargaining representative.

24-312 – Videotaping

American Bottling Co. v. NLRB, 992 F.3d 1129 (D.C. Cir. 2021): See Section 24-110.

24-410 – Board Agent Conduct

RadNet Management, Inc. v. NLRB, 992 F.3d 1114 (D.C. Cir. 2021): The court held that the Board properly overruled an objection asserting that the Board agent conducting an election failed to maintain the security of the ballot box because the Employer had not offered any evidence that would support a reasonable inference of ballot box tampering. The court also held that the Board properly overruled an objection asserting that the Board agent failed to post any “Voting Place” signs because Board precedent is clear that such minor deviations from guidelines do not warrant invalidating elections. See also Section 22-113.

American Bottling Co. v. NLRB, 992 F.3d 1129 (D.C. Cir. 2021): See Section 22-112.

24-423 – Notice of Election

David Saxe Productions, 370 NLRB No. 103 (2021) (KER): The Board affirmed the ALJ’s sustaining of an objection alleging that the Employer had failed to distribute the Notice of Election by email, as required by the parties’ stipulated election agreement.

24-424 – Observers

RadNet Management, Inc. v. NLRB, 992 F.3d 1114 (D.C. Cir. 2021): See Section 24-445.

24-425 – Opportunity to Vote and Number of Voters

See Section 24-427.

24-427 – Mail Ballots

National Hot Rod Association v. NLRB, 988 F.3d 506 (D.C. Cir. 2021): The court found that the Board had erred in certifying the Petitioner’s one-vote victory in this mail-ballot election insofar as the Board had caused an irregularity that possibly disenfranchised a determinative number of voters. In this regard, the court deemed the Board responsible for one voter’s inability to vote because it took five days to respond to the voter’s voicemail requesting a duplicate ballot and

two other duplicate ballot kits mailed on the day the voter left his voicemail were returned to the Board in time to be counted.

XPO Logistics Freight, Inc., 370 NLRB No. 99 (2021) (KER): The Board found that the Regional Director had erred in finding that the region had potentially disenfranchised a voter by failing to send him a duplicate ballot kit. The voter in question had returned the ballot in an unsigned yellow envelope which the Region received on the Friday before the Tuesday ballot count, and the Board decided that even had the Region mailed a duplicate ballot kit on that Friday it was implausible to conclude that it could have been returned in time for the count.

Professional Transportation, Inc., 370 NLRB No. 132 (2021) (McKER): Taking up an issue left unresolved in *Fessler & Bowman*, the Board held that a party's solicitation of one or more mail ballots constitutes objectionable conduct because solicitation of ballots casts doubt on the integrity of the election and on the secrecy of employees' ballots and also suggests to voters that the soliciting party is officially involved in running the election. The Board further held that in order to set the election aside, the evidence must show that a determinative number of voters were affected by the solicitation. Applying this standard retroactively, the Board concluded that the Employer had proffered evidence that, if credited at a hearing, would show the Petitioner had made statements that could reasonably be interpreted as soliciting one employee's ballot and perhaps that of a second, but as the Petitioner won the election by 10 votes the solicitation had not affected a dispositive number of voters (and the Employer had not proffered evidence that the solicitation was disseminated or that the Petitioner had engaged in a pattern or practice of solicitation). Member Emanuel would have established a bright-line rule that elections should be set aside whenever a party is shown to have collected or solicited mail ballots, irrespective of the number of incidents or number of voters affected.

Able Rolling Steel Door, Inc., 22-RC-265289, rev. denied 4/15/21 (KER): See Section 24-442.

College Bound Dorchester, Inc., 01-RC-261667, decision on review and order remanding 6/25/21 (McER): The Board found that the Employer's challenge to a ballot raised substantial and material issues as to whether the ballot was cast by an eligible employee that must be resolved at a hearing. The Board commented that the purpose of the requirement that voters in a mail-ballot election sign the outer envelope is so that the ballot can be identified as cast by an eligible employee, and therefore evidence that the signature on the envelope varies significantly from known examples of the employee's signature may, depending on the circumstances, raise substantial and material issues regarding the identity of the person who marked the ballot.

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

XPO Logistics Freight, Inc., 370 NLRB No. 99 (2021) (KER): The Board found that the Regional Director incorrectly concluded that a physically altered ballot should be counted for the Petitioner. The right side of this ballot was missing; the Regional Director had concluded that because the "yes" portion was what remained, the voter had expressed a clear preference for the Petitioner. The Board, however, applied longstanding precedent to find that a ballot torn in half is void. In doing so, the Board commented that the Regional Director necessarily had to resort to speculation as to the possible meaning of the alteration in order to deem the ballot a "yes" vote.

24-442 – The Milchem Rule

RadNet Management, Inc. v. NLRB, 992 F.3d 1114 (D.C. Cir. 2021): The court held that the Board properly overruled an objection alleging that the Board agent permitted a prounion employee to loiter in the polling area and to attempt to engage the Petitioner’s observer in two minutes of conversation about workplace subjects; the court rejected the Employer’s contention that this constituted a *Milchem* violation because this was not a conversation with prospective voters and it was merely a chance, isolated, innocuous comment or inquiry exempt from the *Milchem* rule.

Able Rolling Steel Door, Inc., 22-RC-265289, rev. denied 4/15/21 (KER): The Board noted that the Employer misapplied *Milchem* by arguing that a union agent’s single conversation with an employee during the 3-week mail-ballot period per se warranted a second election, as this allegation did not involve a voter in the polling area waiting to vote.

24-445 – Checking Off Names of Voters/Listkeeping

RadNet Management, Inc. v. NLRB, 992 F.3d 1114 (D.C. Cir. 2021): The court held that the Board properly overruled an objection asserting that the Petitioner’s observer used her cell phone during the election in violation of the Board agent’s instructions and in view of eligible voters— with the apparent implication that the observer was using her cell phone to keep a list of voters— because no evidence was offered of actual or perceived list keeping.

24-446 – Agents Stationed Near Polling Place

GADecatur SNF LLC v. NLRB, No. 20-1435 (D.C. Cir. Nov. 11, 2021): The court upheld the Board’s overruling of an objection that concerned a brief, loud argument that took place outside the polling place, observing that this situation was readily distinguishable from the sustained presence of party agents in *Electric Hose* and related cases.