

**A Review of Developments in NLRB  
Representation Case Law During 2017  
February 2018**

This paper—summarizing developments in representation case law during 2017—was initially presented at the 2018 Midwinter Meeting of the Development of the Law Under the NLRA Committee, which is part of the American Bar Association’s Section of Labor and Employment Law. The paper’s format utilizes the structure of *An Outline of Law and Procedure in Representation Cases* to indicate recent noteworthy developments in this area. The *Outline* is an NLRB manual that is available on the NLRB website (<https://www.nlr.gov/reports-guidance/manuals>).

The *Outline* was most recently updated in September 2017 to include developments through June 2017. The 2017 update constitutes a thorough revision to the text; many sections have been expanded or streamlined, and several chapters have been significantly restructured. As the *Outline* is now an electronic publication, it will likely be updated more frequently and regularly than was sometimes the case in the past, but in the interim this paper will, as in the past, serve as a supplement to the *Outline*.

Virtually all published representation case decisions from 2017 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., supervisor, independent contractor, or joint employer status) are also included. In addition, there are entries for several unpublished representation case decisions that may be of interest to the researcher, although such decisions are, of course, not binding on the Board. Where relevant, the views of dissenting Board members have been noted.

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## Chapter 1 Jurisdiction

### 1-314 – Government Contractors

*Pennsylvania Interscholastic Athletic Association, Inc.*, 365 NLRB No. 107 (2017) (PMc; M diss): See 14-600.

*Temple University Hospital*, 04-RC-162716, Decision on Review and Order 12/12/17 (PMc; M diss): See 1-401.

### 1-401 – State or Political Subdivision

*Pennsylvania Interscholastic Athletic Association, Inc.*, 365 NLRB No. 107 (2017) (PMc; M diss): A Board majority had previously denied review of the contention that the employer—a non-profit corporation whose primary purpose is to promote uniformity of standards in the interscholastic athletic competitions of its member schools—is a “political subdivision” within the meaning of Section 2(2). In his dissent, then-Member Miscimarra reiterated his position that this issue warranted review.

*Advocates for Arts-Based Education Corp. d/b/a Lusher Charter School*, 15-RC-174745, rev. denied 2/1/17 (PMc; M diss), *Voices for International Business and Education, Inc. d/b/a International High School of New Orleans*, 15-RC-175505, rev. denied 2/1/17 (PMc; M diss), and *Better Choice Foundation d/b/a Mary D. Coghill School*, 15-RC-197643, rev. denied 8/22/17 (PMc; M diss): In each of these three cases, the majority denied review of the RD’s assertion of jurisdiction over a Louisiana charter school, finding it was not a political subdivision. See also 1-500.

*Midwest Division-MMC, LLC v. NLRB*, 867 F.3d 1288 (D.C. Cir. 2017) enfg. in relevant part 362 NLRB No. 193 (2015): The court held that the Board reasonably concluded that a Kansas hospital’s Nursing Review Committee—which reports to a state licensing agency—is not a political subdivision.

*Temple University Hospital*, 04-RC-162716, Decision on Review and Order 12/12/17 (PMc; M diss): The majority noted that although the Board has declined to exercise its jurisdiction over Temple University since 1972 (due to its “unique relationship” to the state of Pennsylvania), the Board has never held that Temple University is itself a political subdivision, and even if it could be analogized to one, the Board should still assert jurisdiction based on *Management Training*, 317 NLRB 1355 (1995). See also 1-500.

### 1-402 – Employers Subject to the Railway Labor Act

*ABM Onsite Services – West, Inc. v. NLRB*, 849 F.3d 1137 (D.C. Cir. 2017), denying enf. of 362 NLRB No. 179 (2015): The court held that starting in 2013, the National Mediation Board embarked on a clear and unexplained departure from prior precedent concerning the test for whether an employer is subject to carrier control (and thus subject to RLA

jurisdiction), but never disavowed prior precedent or explained the new approach. As this particular case would have met the old “carrier control” test, the court stated that either the Board itself or the NMB had to provide a reasoned justification for deviating from the older precedent (the Board has since referred this case to the NMB for an advisory opinion on jurisdiction, along with several other cases involving application of the “carrier control” test).

*Allied Aviation Services Co. of New Jersey v. NLRB*, 854 F.3d 55 (D.C. Cir. 2017), cert. denied 138 S.Ct. 458 (2017), enfg. 362 NLRB No. 173 (2015): The court agreed that the employer was subject to NLRA jurisdiction and distinguished *ABM Onsite*, as here the lack of evidence of carrier control would not even meet the carrier control test under older NMB precedent.

*Aircraft Service International, Inc.*, 365 NLRB No. 94 (2017) (PMc; M diss in part): The majority denied review of the regional director’s finding that the employer’s baggage handling operation at the Orlando International Airport is not covered by the RLA, given that (1) the employer admittedly failed to present sufficient evidence to satisfy any of the factors under the relevant “carrier control” test, and (2) previous NMB decisions finding nationwide units of baggage handlers and other employees at this employer did not warrant a different result, as such decisions did not address the threshold determination of jurisdiction. On the latter count, Chairman Miscimarra dissented and would have granted review, either to provide a reasoned explanation of the interaction between NMB jurisdiction and unit determination precedent, or to refer the matter to NMB for such an explanation.

### **1-403 – Religious Schools**

*Saint Xavier University*, 365 NLRB No. 54 (2017) (PMc, M diss): With respect to a petitioned-for unit of housekeepers at this religious university, the majority adhered to extant precedent (e.g., *Hanna Boys Center*, 284 NLRB 1080 (1987)) holding that the Board will assert jurisdiction over the nonteaching employees of religious institutions or nonprofit religious organizations unless their actual duties and responsibilities require them to perform a specific role in fulfilling the religious mission of the institution. In so doing, the Board declined to extend the test for faculty and religious colleges and universities articulated in *Pacific Lutheran University*, 361 NLRB No. 157 (2014). Then-Acting Chairman Miscimarra would have applied the D.C. Circuit’s test (see *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002)) and would have found that the Board is precluded from asserting jurisdiction here.

In three unpublished decisions on review, the Board applied the holdings in *Seattle University*, 364 NLRB No. 84 (2016), and *Saint Xavier University*, 364 NLRB No. 85 (2016), to exclude faculty teaching in theology or religious studies departments from petitioned-for faculty units (in all three, then-Acting Chairman Miscimarra contended that this distinction violates *Catholic Bishop*, that the Board should apply the *Great Falls* test, and that even under *Pacific Lutheran* there were substantial issues warranting review):

- *Loyola University Chicago*, 13-RC-164168, Decision on Review and Order 3/16/17 (PMc, M diss) (excluding faculty in Department of Theology from unit of non-tenure track faculty)
- *Duquesne University of the Holy Spirit*, 06-RC-080933, Decision on Review and Order 4/10/17 (PMc; M diss) (excluding faculty in Department of Theology from unit of part-time adjunct faculty)
- *Manhattan College*, 02-RC-023543, Decision on Review and Order 4/20/17 (PMc; M diss) (excluding faculty in Department of Religious Studies from unit of part-time adjunct faculty)

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

*Pennsylvania Interscholastic Athletic Association, Inc.*, 365 NLRB No. 107 (2017) (PMc; M diss): Dissenting, Chairman Miscimarra suggested that the Board should decline jurisdiction over state interscholastic sports governing bodies as a class pursuant to 14(c)(1). See also 1-401.

*Advocates for Arts-Based Education Corp. d/b/a Lusher Charter School*, 15-RC-174745, rev. denied 2/1/17 (PMc; M diss), *Voices for International Business and Education, Inc. d/b/a International High School of New Orleans*, 15-RC-175505, rev. denied 2/1/17 (PMc; M diss), and *Better Choice Foundation d/b/a Mary D. Coghill School*, 15-RC-197643, rev. denied 8/22/17 (PMc; M diss): In all three cases, then-Member/Chairman Miscimarra reiterated his position, previously expressed (and rejected by a majority) in published charter school decisions, that the Board should decline to assert jurisdiction over charter schools generally. See also 1-401.

*Temple University Hospital*, 04-RC-162716, Decision on Review and Order 12/12/17 (PMc; M diss): The majority declined to exercise its discretion to decline jurisdiction based on the employer's asserted close ties to Temple University (an employer over whom the Board discretionarily declined jurisdiction in 1972 due to its "unique relationship" to the state of Pennsylvania) or the longstanding bargaining relationships that heretofore operated under the Pennsylvania Public Employee Relations Act. Chairman Miscimarra would have exercised the Board's discretion to decline jurisdiction on both bases. See also 1-401.

## **Chapter 2**

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

#### **2-200 – Scope of Authority**

*Supreme Airport Shuttle LLC*, 365 NLRB No. 27 (2017) (MPMc): The Board concluded that a regional director has the authority (subject to the Board's review) to rule on an employer's motion to disqualify petitioner's counsel based on a conflict of interest under state ethics rules and Sec. 102.177(a) of the Board's Rules and Regulations. (The Regional Director subsequently denied the employer's motion and Board (MPMc) denied review on 4/17/17 in case 05-RC-187864.)

*The Trustees of Columbia University in the City of New York*, 365 NLRB No. 136 (2017) (PMc; M diss): Despite the parties' earlier agreement that employees would be required to present identification before voting, the Board found that the RD's decision—based on potential prejudice to voters unaware of this previously-unannounced requirement—not to impose such a requirement was reasonable and within the RD's discretion. See also 24-410.

## **2-400 – Finality of Decisions**

*Wolf Creek Nuclear Operating Corp.*, 365 NLRB No. 55 (2017) (MMc; P diss): The majority granted review of the regional director's finding that certain employees were *not* managerial and remanded, holding that an earlier representation decision (from 2000) involving the same parties and the same issue (whether the employees at issue were managerial) of which no party had requested review could potentially have preclusive effect under the doctrine of res judicata. The majority did not state that this doctrine precluded the petition, only that the regional director first had to fully consider whether changed circumstances warranted declining to give preclusive effect to the 2000 decision (which had found the employees at issue *were* managerial). Member Pearce would have found that the employer had not established res judicata as an affirmative defense. (On remand, the regional director concluded that the 2000 decision should not be given preclusive effect due to changed circumstances and again found that the petitioned-for employees were not managerial; the Board denied review of this finding on 10/27/17 in case 14-RC-168543 (MPMc)).

*Audio Visual Services Group, Inc. d/b/a PSAV Presentation Services*, 365 NLRB No. 84 (MPMc): The Board rejected a contention that a regional director's decision and issuance of certification were not final as these decisions provided the right to request for review.

*Cargill, Inc. v. NLRB*, 851 F.3d 841 (8th Cir. 2017), enfg. 363 NLRB No. 110 (2016): The court held that the filing of a new petition (which did not specifically exclude shipping and packaging leads) following the dismissal of an earlier petition (which did specifically exclude shipping and packaging employees) did not constitute improper litigation or run afoul of the Board's rules.

*NLRB v. Lakepointe Senior Care and Rehab Center, L.L.C.*, 680 Fed. Appx. 400 (6th Cir. 2017), denying enf. to 363 NLRB No. 114 (2016): The court rejected a contention that the Board's rule prohibiting relitigation in a "subsequent unfair labor practice proceeding" meant that a 2005 determination that charge nurses were supervisors barred the union from arguing they were employees in a subsequent representation proceeding.

## **2-500 – Board Review**

*Yale University*, 365 NLRB No. 40 (2017) (PMc, M diss): The majority denied a request for expedited consideration and to stay elections in 9 units comprising graduate students in nine University departments (the request for review of the direction of election in the 9

units remains pending at this writing). Dissenting, Acting Chairman Miscimarra would have granted the requested relief, citing the complexity of the legal questions involved and the likelihood that it would take substantial time to resolve them. He also stated his belief that all parties should be given the benefit of the Board's resolution of election-related issues before voting takes place.

*Duke University*, 10-RC-187957, order 2/23/17 (MPMc): The Board granted the employer's request for expedited consideration and also partly granted its request for additional extraordinary relief. The Region had not permitted the employer to litigate the use of a "look-back" eligibility formula; the Board stated that, given that it had not yet passed on the appropriate eligibility formula for graduate student employees, the employer should have been permitted to litigate the issue. The Board therefore directed that voters enfranchised solely by use of the "look-back" period were to vote subject to challenge and their ballots would be impounded pending post-election litigation of the formula (if such ballots proved dispositive).

*Audio Visual Services Group, Inc. d/b/a PSAV Presentation Services*, 365 NLRB No. 84 (MPMc): The Board reiterated that an employer is not relieved of its obligation to bargain with a certified representative pending Board consideration of a request for review. The Board also rejected a contention that the region's decision to hold the instant unfair labor practice in abeyance pending a Board ruling on the request for review did not indicate the certification was "conditional." Chairman Miscimarra noted that the employer had not challenged application of the Election Rule in the underlying proceeding and thus did not reach or pass on any questions regarding the consequences of the Rule's application.

*Republic Silver State Disposal, Inc.*, 365 NLRB No. 145 (2017) (MPMc): The majority found that the RD acted appropriately in issuing a certification when he did, stating that Section 3(b) of the Act authorizes, and Section 102.69 of the Board's rules requires, that RDs issue certifications even though a party may file a request for review of that (or any other) RD action. Chairman Miscimarra stated his belief that it was objectionable and ill-advised for a certification to issue before the Board has had the opportunity to address election-related issues.

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

*European Imports, Inc.*, 365 NLRB No. 41 (2017) PMc; M diss): The majority denied a request to reschedule an election. Then-Acting Chairman Miscimarra contended that this case illustrated shortcomings in the Election Rule, particularly given that (1) due to the election date a substantial number of unit employees received only three days' notice of the election, and (2) the employer was precluded from creating a record in support of its due process arguments.

*UPS Ground Freight, Inc.*, 365 NLRB No. 113 (2017) (PMc; M diss): The majority stated that certain procedural rulings by the hearing officer and acting regional director were well within their discretion, were not demonstrably unfair, and that there was no showing they

had prejudiced the employer. Chairman Miscimarra would have granted review on these rulings, arguing that they illustrated shortcomings in the Election Rule and warranted evaluation of the provisions underlying the regional rulings.

*Request for Information*, 82 Fed. Reg. 58783 (12/14/17): A full-Board majority (MKE; PMc diss) invited the public to submit information regarding three questions: 1) Should the 2014 Election Rule be retained without change? 2) Should the 2014 Election Rule be retained with modifications? If so, what should be modified? 3) Should the 2014 Election Rule be rescinded? If so, should the Board revert to the Representation Election Regulations that were in effect prior to the 2014 Election Rule's adoption, or should the Board make changes to the prior Representation Election Regulations? If the Board should make changes to the prior Representation Election Regulations, what should be changed? The majority stated that it was not engaging in rulemaking, but merely requesting information on these questions. Responses to these questions are due on or before 3/19/18.

### **3-810 – Statement of Position**

*Williams-Sonoma Direct, Inc.*, 365 NLRB No. 13 (2017) (PMc, M conc): The Board agreed that the Regional Director correctly precluded the employer from litigating the appropriateness of the petitioned-for unit based on the employer's failure to timely serve its statement of position on the petitioner. Then-Member Miscimarra reiterated his disagreement with the Board's Election Rule.

### **3-850 – Conduct of Hearing**

*NLRB v. Tito Contractors, Inc.*, 847 F.3d 724 (D.C. Cir. 2017), denying enf. of 362 NLRB No. 119 (2015): In this case, the petitioner sought a presumptively-appropriate employer-wide unit, which the employer contended was nevertheless inappropriate. The hearing officer permitted the employer to make an offer of proof on the issue, but then rejected the offer and found the petitioned-for unit appropriate. The court upheld the offer-of-proof procedure. See also Chapter 13 for the court's assessment of the appropriateness of the employer-wide unit.

*Duke University*, 10-RC-187957, rev. denied 1/4/17 (PMc, M conc): Without reaching the issue of the sufficiency of the employer's offer of proof (which the petitioner had contested), the majority commented that an offer of proof should demonstrate with specificity how the evidence described therein is distinguishable from the facts in controlling precedent to justify being received. Then-Member Miscimarra criticized the Election Rule's treatment of the offer of proof as a substitute for record evidence.

### **3-940 – Relitigation**

*Cargill, Inc. v. NLRB*, 851 F.3d 841 (8th Cir. 2017), enfg. 363 NLRB No. 110 (2016): See 2-400.

*NLRB v. Lakepointe Senior Care and Rehab Center, L.L.C.*, 680 Fed. Appx. 400 (6th Cir. 2017), denying enf. to 363 NLRB No. 114 (2016): See 2-400.

## **Chapter 5** **Showing of Interest**

*UPS Ground Freight, Inc.*, 365 NLRB No. 113 (2017) (PMc; M diss): The Board stated that the acting regional director properly resolved an allegation that a putative supervisor's conduct tainted the showing of interest by administrative investigation. Chairman Miscimarra agreed on this count.

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

### **7-110 – Prerequisite for Finding a Question Concerning Representation**

*Bellagio, LLC v. NLRB*, 863 F.3d 839 (D.C. Cir. 2017), denying enf. of 364 NLRB No. 2 (2016) and 364 NLRB No. 1 (2016): The court rejected a contention that petitions that did not answer Box 7 (whether and when a petitioner requested recognition and if the employer declined or did not respond) had to be dismissed, as the Board's rules do not require dismissal, this deficiency was cured at the hearing, the employers conceded they suffered no prejudice, and the Board and at least one other circuit have held this deficiency may be cured at the hearing.

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

*ADT, LLC*, 365 NLRB No. 77 (2017) (PMc; M diss): The employer in this case reorganized its operation as part of a merger with another company, as a result of which technicians who historically had been represented by the union now work alongside unrepresented technicians inherited due to the merger. The majority dismissed the employer's RM petition for an election in the combined group of technicians, finding that there had been no demand for recognition in this combined group, and that there was no reasonable good faith uncertainty regarding the union's majority status as the basis of the petition was solely the employer's own reorganization of its operations. Chairman Miscimarra dissented on both counts.

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

### **10-120 – Comity to State Elections**

*Temple University Hospital*, 04-RC-162716, Decision on Review and Order 12/12/17 (PMc; M diss): Upon asserting jurisdiction over this employer, the majority accorded comity to a



unit of professional and technical employees previously certified by the Pennsylvania Labor Relations Board, finding that (1) the state certification met the Board's standard for extending comity, (2) the unit was not a non-conforming unit under the Board's Health Care Rule, and (3) even if it were non-conforming it was an "existing non-conforming unit[]" within the meaning of the Rule. The majority also rejected an argument that if the Board asserted jurisdiction over the unit, its prior state certification would have been void when issued and therefore comity cannot be extended. Chairman Miscimarra found it unnecessary to reach this issue based on his dissenting views on other issues in the case. See also 15-161.

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

*NLRB v. Lily Transportation Corp.*, 853 F.3d 31 (1st Cir. 2017), enfg. 363 NLRB No. 15 (2015): The court held that the successor bar doctrine, as reinstated in *UGL-UNICCO*, does not unlawfully burden employees' Section 7 rights. The court also rejected an argument that it should not defer to the reinstatement of the successor bar doctrine in *UGL-UNICCO*, stating that the Board had explained its reasoning, and marshaled new factual support, for its reinstatement.

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

*CPL (Linwood) LLC d/b/a Linwood Care Center*, 365 NLRB No. 8 (2017) (PMMc): The Board clarified that although a *Saint Gobain* hearing may be required when a regional director dismisses a petition based on charges raising an issue of a causal relationship between the ULPs and an incumbent union's subsequent loss of majority support, such a hearing is not required when a petition (such as the instant RM petition) is dismissed based on charges challenging the circumstances surrounding the petition and directly affect the petition.

*CPL (Linwood) LLC d/b/a Linwood Care Center*, 365 NLRB No. 24 (2017) (MPMc): On a similar note, the Board clarified that a *Saint Gobain* hearing is not required as a matter of law when a regional director determines to hold a petition in abeyance due to blocking charges. The Board also found that the charges at issue warranted continuing to hold the instant decertification petition in abeyance. Then-Acting Chairman Miscimarra noted that he favored reconsideration of the blocking charge doctrine.

## **Chapter 12**

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

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

*Williams-Sonoma Direct, Inc.*, 365 NLRB No. 13 (2017) (PMc; M conc): The Board denied review of the RD's finding that the petitioned-for unit of merchandise processors in 10 departments was inappropriate. Relying on *Bergdorf Goodman*, 361 NLRB No. 11 (2014), the RD found that the evidence was insufficient to permit a determination that the

petitioned-for employees formed a readily identifiable group separate from the rest of the employer's workforce. In denying review, the majority stated that it was affirming the dismissal of the petition, but emphasized that it did not adopt the RD's decision as its own.

*Cargill, Inc. v. NLRB*, 851 F.3d 841 (8th Cir. 2017), enfg. 363 NLRB No. 110 (2016): The court upheld the Board's application of *Specialty Healthcare* to find that a unit of packing/shipping/receiving employees was appropriate and did not have to include all of the employees at the plant at issue.

*Cristal USA, Inc.*, 365 NLRB No. 74 (2017) (PMc; M diss): A majority denied review of the RD's direction of election (based on an application of *Specialty Healthcare*) in a unit limited to warehouse employees at one facility, excluding production employees at that and a nearby facility. Chairman Miscimarra would have granted review and noted his disagreement with *Specialty Healthcare*.

*Cristal USA, Inc.*, 365 NLRB No. 82 (2017) (PMc; M diss): The majority denied review of the RD's direction of election (based on an application of *Specialty Healthcare*) in a unit limited to production employees in one facility, excluding the production and warehouse employees at another nearby facility. Chairman Miscimarra would have granted review and noted his disagreement with *Specialty Healthcare*.

*UPS Ground Freight, Inc.*, 365 NLRB No. 113 (2017) (PMc; M diss): In finding that the employer had not rebutted the presumptive appropriateness of the petitioned-for single-facility unit, the Board did reach the question of whether *Specialty Healthcare* applied. Chairman Miscimarra agreed on this count.

*Rhino Northwest, LLC v. NLRB*, 867 F.3d 95 (D.C. Cir. 2017), enfg. 363 NLRB No. 72 (2015): The court upheld the *Specialty Healthcare* framework, joining the 7 other circuits that had already done so. The court also held that substantial evidence supported the Board's determination that the petitioned-for riggers did not share an overwhelming community of interest with the employer's other employees.

*Allied Services of Dexter, LLC d/b/a Republic Services of Dexter*, 14-RC-192027, rev. denied 9/11/17 (MPMc): In an unpublished decision, the Board clarified that the fact that a petitioner agrees to vote petitioned-for employees subject to challenge based on the employer's contention they should not be included in the unit does not, when their ballots prove dispositive, require the petitioner to establish that those employees share an overwhelming community of interest with those employees all parties agree should be in the unit. Chairman Miscimarra agreed that the petitioned-for unit (operations employees excluding maintenance employees) was appropriate, but reiterated his disagreement with *Specialty Healthcare*.

*K & N Engineering*, 365 NLRB No. 141 (2017) (MPMc): In this case, the parties stipulated that 30 "production employee" classifications (including janitors) were eligible to vote, but also agreed to vote certain maintenance employees (whom the employer contended

should be included in the unit) subject to challenge. The RD determined that the maintenance employees need not be included in the unit because they did not share an overwhelming community of interest with the petitioned-for employees. The Board reversed, finding that the RD had improperly skipped the initial inquiry of the *Specialty Healthcare* framework, and that under that inquiry the petitioned-for unit was not appropriate. The Board went on to find that the maintenance employees shared a sufficient community of interest with the petitioned-for employees to be included in the unit. Chairman Miscimarra agreed, but reiterated his disagreement with *Specialty Healthcare*.

*Republic Silver State Disposal, Inc.*, 365 NLRB No. 145 (2017) (MPMc): The Board noted that neither *Specialty Healthcare* nor *Odwalla, Inc.*, 357 NLRB 1608 (2011), purported the change the Board's longstanding standard for determining whether a self-determination election is appropriate. See also 21-500.

*PCC Structurals, Inc.*, 365 NLRB No. 160 (2017) (MKE; PMc diss): The majority overruled *Specialty Healthcare*, stated it was reinstating the traditional community of interest standard (and noted that the Board will also continue to apply existing principles regarding presumptively appropriate units), and remanded the case to the region to assess the petitioned-for unit (of rework welders and rework specialists) under the standard articulated. The majority further stated that its decision was not based on a position that *Specialty Healthcare* was statutorily prohibited. The dissent criticized the majority's denial of briefing on the issue and disagreed with the majority's reasoning for overruling *Specialty Healthcare*. In addition, the dissent contended that the majority approach was inconsistent with the Act and will result in administrative quagmire.

## **12-220 – History of Collective Bargaining**

Although not a representation issue as such, in two cases decided in 2017 the Board reiterated that the determination as to whether a unit is appropriate in the successorship context differs from the determination in an initial representation case, insofar as the preexisting unit is presumptively appropriate:

- *AM Property Holding Corp.*, 365 NLRB No. 162 (2017) (PMc, M diss)
- *Always East Transportation, Inc.*, 365 NLRB No. 71 (2017) (PMc; M diss)

## **12-410 – Residual Units in the Health Care Industry**

*Rush University Medical Center v. NLRB*, 708 Fed. Appx. 692 (D.C. Cir. 2017): The court noted that it had previously held that *St. Vincent Charity Medical Center*, 357 NLRB 854 (2011), was fully consistent with the Board's Health Care Rule (see 833 F.3d 202 (D.C. Cir. 2016)), and further noted that the Board does not apply the Health Care Rule to apply to self-determination elections. The court accordingly held that because the Board has permissibly held that the Health Care Rule is concerned only with disruptions caused by unit proliferation, the Board need not (as the employer contended) elaborately explain why some other disruption does not implicate the Rule.

## **Chapter 13**

### **Multilocation Employers**

*NLRB v. Tito Contractors, Inc.*, 847 F.3d 724 (D.C. Cir. 2017), denying enf. of 362 NLRB No. 119 (2015): The petitioner in this case sought an employer-wide unit; the employer contended that it was not appropriate (due to differences within its operations), and submitted an offer of proof in support of its contention. The ARD found that the unit was presumptively appropriate and that the evidence described in the offer of proof did not overcome this presumption; the Board denied review. Although the court upheld the offer-of-proof procedure, it remanded the case, holding that the Board had not adequately considered “ample” evidence described in the offer of proof “manifesting” that the employees lacked a community of interest. (Following remand, the Board remanded the case to the regional director for further analysis in light of the court’s opinion, including reopening of the record. The RD subsequently found the unit appropriate; at this writing, the employer’s request for review of that subsequent finding is pending with the Board.)

*UPS Ground Freight, Inc.*, 365 NLRB No. 113 (2017) (PMc; M diss): The Board noted that the employer had not rebutted the presumptive appropriateness of a single-facility unit of road drivers. Chairman Miscimarra agreed on this count.

## **Chapter 14**

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

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

*Midland Electrical Contracting Corp.*, 365 NLRB No. 87 (2017) (PMc; M diss): In this ULP case, the majority found that an employer’s attempted withdrawal from multiemployer bargaining was ineffective, given that the employer had failed to withdraw before the bargaining association commenced negotiations on the current collective-bargaining agreement, as well as the fact that the withdrawal did not take place within the timeframe set forth in the association’s membership application. Chairman Miscimarra would have found that the withdrawal was timely.

#### **14-500 – Single Employer**

*Alcoa, Inc. v. NLRB*, 849 F.3d 250 (5th Cir. 2017), enfg. 363 NLRB No. 39 (2015): The court held that substantial evidence supported the Board’s finding of single-employer status. No party disputed that the two entities shared common ownership, nor was there any dispute the entities did *not* share common day-to-day management. The court upheld the Board’s findings that the remaining factors—interrelation of operations and centralized control of labor relations—supported a single-employer finding.

#### **14-600 – Joint Employer**

*The Wang Theatre, Inc. d/b/a Citi Performing Arts Center*, 365 NLRB No. 33 (2017) (PMc, M conc): In this case (in which the Board denied a motion for reconsideration of its entry of summary judgment in a refusal to bargain case—see 364 NLRB No. 146 (2016)), then-Acting Chairman Miscimarra concurred in the denial, but opined that there were substantial questions including whether the local musicians at issue were also jointly employed by other entities.

*Healthbridge Management, LLC*, 365 NLRB No. 37 (2017) (PMc, M diss in part): In this ULP case, the majority found that the respondents were joint employers under pre-*Browning-Ferris* precedent (and thus did not pass on whether that case was retroactively applicable here). Then-Acting Chairman Miscimarra disagreed.

*Pennsylvania Interscholastic Athletic Association*, 365 NLRB No. 107 (2017) (PMc; M diss): In his dissent, Chairman Miscimarra suggested that the lacrosse officials at issue were jointly employed by the employer and its member schools (many of which are public), thus raising questions about the Board’s jurisdiction over the officials. The majority noted that no party made this argument or developed the record on the issue, and that in any event such joint employment would not foreclose the Board’s jurisdiction under *Management Training*.

*NLRB v. CNN America, Inc.*, 865 F.3d 740 (D.C. Cir. 2017), denying enf. of 361 NLRB No. 47 (2014): The court vacated the Board’s finding—made before *Browning-Ferris*—that CNN and another entity were joint employers and remanded, holding that the Board had not adequately discussed then-extant precedent in this area.

*Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (2017) (MKE; PMc diss): The majority overruled *Browning-Ferris* and reinstated precedent requiring “direct and immediate” control that is more than “limited and routine.” Applying that precedent, the majority found that the entities at issue constitute a joint employer. The dissent contended that the case could have been decided without reaching the joint employer issue at all (because the entities area single employer, the new standard concededly made no difference to the ultimate finding of joint employer status, and no party had asked the Board to reconsider *Browning-Ferris*), criticized the failure to invite briefing, and disputed the bases of the majority’s criticisms of *Browning-Ferris*.

## **Chapter 15**

### **Specific Units and Industries**

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

*Temple University Hospital*, 04-RC-162716, Decision on Review and Order 12/12/17 (PMc; M diss): See 10-120.

*Mercy Catholic Medical Center*, 365 NLRB No. 165 (MPK): The Board denied review in a case involving challenges concerning the placement of various classifications in a unit of nonprofessional employees. Member Kaplan would have granted review with respect to

the Regional Director's finding that Operation Room Technicians are technical employees who should be excluded from the nonprofessional unit.

*Pomona Valley Hospital Medical Center*, 21-RC-166499, rev. granted in part 12/15/17 (MK; P diss in part): The petition in this case sought a unit of service/nonprofessional and technical employees. The majority granted the employer's request for review with respect to the RD's exclusion of Information Technology Clericals, the Telecommunications Technician, Worker's Compensation Claims Specialist, Education Coordinator, Charge Revenue Representatives, System Coordinator Laboratory, and Nursing Staff Coordinators. The majority also granted the petitioner's request for review with respect to the inclusion of Specialists HIM Data Integrity, Application Specialist, and Application Specialist, Perioperative. Member Pearce would have granted the Employer's request for review only with respect to the Nursing Staff Coordinators, but agreed in all other respects.

**15-162 – Other Hospitals  
and**

**15-163 – Nursing Homes & Other Nonacute Facilities**

*PCC Structural, Inc.*, 365 NLRB No. 160 (2017) (MKE; PMc diss): The majority reinstated the “pragmatic” or “empirical” community-of-interest test articulated in *Park Manor Care Center*, 305 NLRB 872 (1991), which applies to unit determinations in nonacute healthcare facilities. In doing so, the majority relied on former Member Hayes's dissent in *Specialty Healthcare*. The dissent criticized the majority for deciding an issue that was not obviously presented in the case (which involved a unit of welders—see 12-210).

**15-270 – Warehouse Units**

*Cristal USA, Inc.*, 365 NLRB No. 74 (2017) (PMc; M diss): See 12-210.

**Chapter 17  
Statutory Exclusions**

**17-400 – Independent Contractors**

*The Wang Theatre, Inc. d/b/a Citi Performing Arts Center*, 365 NLRB No. 33 (2017) (PMc, M conc): In this case (in which the Board denied a motion for reconsideration of its entry of summary judgment in a refusal to bargain case—see 364 NLRB No. 146 (2016)), then-Acting Chairman Miscimarra concurred in the denial, but opined that there were substantial questions including whether the local musicians at issue were independent contractors.

*Pennsylvania Interscholastic Athletic Association*, 365 NLRB No. 107 (2017) (PMc; M diss): The majority found that the employer had not established that high school lacrosse officials are independent contractors, placing particular emphasis on PIAA's control over

them, the integral nature of their work to PIAA's regular business, PIAA's supervision of them, the method of payment, and the fact that they did not render services as part of an independent business. The majority also rejected the employer's reliance on a case involving college basketball referees that predated the more recent lead cases in this area (*FedEx Home Delivery*, 361 NLRB No. 55 (2014), and *Roadway Package System*, 326 NLRB 842 (1998)). Chairman Miscimarra would have found that PIAA had established the officials' independent contractor status.

*Minnesota Timberwolves Basketball, LP*, 365 NLRB No. 124 (2017) (PMc; M diss): The majority reversed the regional director and found that the employer had not established that crewmembers responsible for operation of the center-hung board at NBA and WNBA games are independent contractors, finding that the relevant *FedEx* factors either favored employee status or were inconclusive. Chairman Miscimarra would have found that the employer had established the crewmembers' independent contractor status.

*Fedex Home Delivery v. NLRB*, 849 F.3d 1123 (D.C. Cir. 2017), denying enf. of 361 NLRB No. 55 (2014) and 362 NLRB No. 29 (2015): Citing an earlier opinion (563 F.3d 492 (D.C. Cir. 2009)) in which the court found single-route FedEx drivers are independent contractors, and characterizing the current factual record as "materially indistinguishable," the court invoked the law of the circuit doctrine and denied enforcement of the Board's finding that the single-route drivers at issue here were statutory employees, not independent contractors.

At this writing, the 11/1/10 grant of review in *Supershuttle DFW, Inc.*, 16-RC-010963, remains pending. The grant concerns the ARD's finding that the petitioned-for franchisee drivers are independent contractors.

### **17-510 – Supervisory "Authority" as Defined in Section 2(11)**

*Hobson Bearing International, Inc.*, 365 NLRB No. 73 (2017) (MPMc): In affirming an ALJ finding that the respondent had failed to show supervisory status, the Board observed that the *Oakwood* "accountability" requirement applies only to responsible direction, not to other supervisory indicia. Chairman Miscimarra also noted that the ALJ's finding was consistent with his proposed approach to supervisory status.

*Benjamin H. Realty Corp. v. NLRB*, 2017 WL 963149 (D.C. Cir. 2/3/17), enfg. 362 NLRB No. 181 (2015): The court, in an unpublished decision, held that the Board properly placed the burden of establishing supervisory status on the employer, as the party asserting supervisory status (and that the employer failed to show the burden should have been modified under these specific circumstances).

### **17-511 – Independent Judgment**

*UPS Ground Freight, Inc.*, 365 NLRB No. 113 (2017) (PMc; M diss): The majority found that, even assuming a dispatcher "assigned" employees within the meaning of *Oakwood*

*Healthcare*, 348 NLRB 686 (2006), the evidence did not show he did so using independent judgment. Chairman Miscimarra did not pass on this issue.

*SR-73 & Lakeside Avenue Operations, LLC d/b/a Powerback Rehabilitation, 113 South Route 73*, 365 NLRB No. 119 (PMc; M diss): The majority found that the employer had not shown that care managers exercised independent judgment in assigning employees, given that the evidence was either conclusory or lacking in specificity, and the one specific example involved one obvious and self-evident choice. Chairman Miscimarra would have found independent judgment and assignment were established.

*NLRB v. Sub-Acute Rehabilitation Center at Kearny, LLC*, 675 Fed. Appx. 173 (3d Cir. 2017), enfg. 363 NLRB No. 61 (2015): The court held that substantial evidence supported the Board's finding that even if LPNs who serve as floor nurses made assignments or adjusted grievances, they did not do so using independent judgment.

*NLRB v. Missouri Red Quarries, Inc.*, 853 F.3d 920 (8th Cir. 2017), enfg. 363 NLRB No. 102 (2016): See 17-524.

*Brusco Tug & Barge, Inc. v. NLRB*, 696 Fed. Appx. 519 (D.C. Cir. 2017), enfg. 359 NLRB 486 (2012), incorporated by reference at 362 NLRB No. 28 (2015): The court held that substantial evidence supported the Board's finding that any assignments made by mates involved obvious or self-evident choices that did not require independent judgment.

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

*NLRB v. Lakepointe Senior Care and Rehab Center, L.L.C.*, 680 Fed. Appx. 400 (6th Cir. 2017): See 17-523.

*NLRB v. Missouri Red Quarries, Inc.*, 853 F.3d 920 (8th Cir. 2017), enfg. 363 NLRB No. 102 (2016): See 17-524.

*NLRB v. New Vista Nursing and Rehabilitation*, 870 F.3d 113 (3d Cir. 2017), denying enf. of 357 NLRB 714 (2011): See 17-523.

### **17-521 - Assign**

*UPS Ground Freight, Inc.*, 365 NLRB No. 113 (2017) (PMc; M diss): The majority found that the evidence did not show that a dispatcher assigned employees, or exercised independent judgment in doing so, with the meaning of *Oakwood*. Chairman Miscimarra did not pass on this issue. See also 17-511.

*SR-73 & Lakeside Avenue Operations, LLC d/b/a Powerback Rehabilitation, 113 South Route 73*, 365 NLRB No. 119 (PMc; M diss): See 17-511.

*NLRB v. Sub-Acute Rehabilitation Center at Kearny, LLC*, 675 Fed. Appx. 173 (3d Cir. 2017), enfg. 363 NLRB No. 61 (2015): See 17-511.



*Brusco Tug & Barge, Inc. v. NLRB*, 696 Fed. Appx. 519 (D.C. Cir. 2017), enfg. 359 NLRB 486 (2012), incorporated by reference at 362 NLRB No. 28 (2015): See 17-511.

### **17-522 – Responsibly Direct**

*Hobson Bearing International, Inc.*, 365 NLRB No. 73 (2017) (MPMc): See 17-500.

*SR-73 & Lakeside Avenue Operations, LLC d/b/a Powerback Rehabilitation, 113 South Route 73*, 365 NLRB No. 119 (PMc; M diss): The majority found that even assuming the care managers directed employees using independent judgment, accountability was not established as the relevant testimony was generalized and conclusory. Chairman Miscimarra would have found that the evidence established this indicium.

*NLRB v. Sub-Acute Rehabilitation Center at Kearny, LLC*, 675 Fed. Appx. 173 (3d Cir. 2017), enfg. 363 NLRB No. 61 (2015): The court held that substantial evidence supported the Board's finding that the employer had not established that LPNs serving as floor nurses faced even a prospect of adverse consequences when directing other employees.

*Brusco Tug & Barge, Inc. v. NLRB*, 696 Fed. Appx. 519 (D.C. Cir. 2017), enfg. 359 NLRB 486 (2012), incorporated by reference at 362 NLRB No. 28 (2015): The court held that substantial evidence supported the Board's finding that mates do not responsibly direct because the evidence did not meet the accountability requirement. The court also stated that the Board had adequately distinguished pre-*Oakwood* cases concerning the supervisory status of mates (or equivalent positions).

*Allied Aviation Services Co. of New Jersey v. NLRB*, 854 F.3d 55 (D.C. Cir. 2017), cert. denied 138 S.Ct. 458 (2017), enfg. 362 NLRB No. 173 (2015): The court held that substantial evidence supported the Board's finding that certain employees did not responsibly direct because the evidence did not establish accountability under *Oakwood*.

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

*Deep Distributors of Greater NY*, 365 NLRB No. 95 (2017) (MPMc): The majority stated that the record supported the ALJ's finding that an individual was a supervisor, particularly given un rebutted testimony the individual disciplined one employee and terminated two others. Chairman Miscimarra would have relied only on the authority to discipline and discharge (the majority also agreed, without further elaboration, with the ALJ's findings that the individual had the authority to assign and direct employees).

*NLRB v. Sub-Acute Rehabilitation Center at Kearny, LLC*, 675 Fed. Appx. 173 (3d Cir. 2017), enfg. 363 NLRB No. 61 (2015): The court held that substantial evidence supported the Board's finding that the employer had not established that LPNs serving as floor nurses disciplined other employees.

*NLRB v. Lakepointe Senior Care and Rehab Center, L.L.C.*, 680 Fed. Appx. 400 (6th Cir. 2017), denying enf. to 363 NLRB No. 114 (2016): The court held (contrary to the Board) that charge nurses are supervisors because they chose whether to write up aides for misconduct, and when writing an aide up the charge nurses described the rule violation and submitted the form so that managers would discipline the aide. The court also held that the managers gave substantial weight to these recommendations without conducting independent investigations.

*NLRB v. New Vista Nursing and Rehabilitation*, 870 F.3d 113 (3d Cir. 2017), denying enf. of 357 NLRB 714 (2011): The court remanded the case with instructions that the Board apply earlier Third Circuit cases concerning the supervisory status of LPNs alleged to effectively recommend discipline (see *NLRB v. Attleboro Associates*, 176 F.3d 154 (3d Cir. 1999)).

*Allied Aviation Services Co. of New Jersey v. NLRB*, 854 F.3d 55 (D.C. Cir. 2017), cert. denied 138 S.Ct. 458 (2017), enfg. 362 NLRB No. 173 (2015): The court held that substantial evidence supported the Board's finding that certain employees did not exercise disciplinary authority, given that forms they filed were merely "reportorial."

#### **17-524 – Hire**

*UPS Ground Freight, Inc.*, 365 NLRB No. 113 (2017) (PMc; M diss): The majority found that the evidence did not show that a dispatcher possessed the authority to hire or effectively recommend hiring. Chairman Miscimarra did not pass on this issue.

*NLRB v. Missouri Red Quarries, Inc.*, 853 F.3d 920 (8th Cir. 2017), enfg. 363 NLRB No. 102 (2016): The court agreed with the Board's finding that an individual was a supervisor and ineligible to vote as he had effectively recommended the hiring of two individuals, and in doing so exercised independent judgment by assessing the recommendees' "experience, ability, attitude, and character references, among other factors."

#### **17-525 – Adjust Grievances**

*NLRB v. Sub-Acute Rehabilitation Center at Kearny, LLC*, 675 Fed. Appx. 173 (3d Cir. 2017), enfg. 363 NLRB No. 61 (2015): See 17-511.

## **Chapter 18 Statutory Limitations**

#### **18-100 – Professional Employees**

*Oberthur Technologies of America Corp. v. NLRB*, 865 F.3d 719 (D.C. Cir., 2017), enfg. 362 NLRB No. 198 (2015): The court agreed with the Board's sustaining of challenges on the grounds that 2 employees were professional employees ineligible to vote in an election involving a unit of non-professional employees.

## **18-220 – Guards Defined**

*Bellagio, LLC v. NLRB*, 863 F.3d 839 (D.C. Cir. 2017), denying enf. of 364 NLRB No. 2 (2016) and 364 NLRB No. 1 (2016): Interpreting the text of Section 9(b)(3), the court concluded that surveillance technicians in two Las Vegas casinos (who maintain camera coverage, maintain alarm systems, control access to sensitive areas and have access to all areas, and help spy on employees suspected of misconduct) are statutory guards, and the Board erred in finding to the contrary. The court emphasized that the Board had not accounted for (1) evidence that employees who actually monitored cameras could not do so without the surveillance technicians, (2) the fact that the employers were “ultramodern luxury casinos,” (3) the ability of the surveillance technicians to control what employees monitoring cameras can see, and (4) the fact that the surveillance technicians help enforce rules against coworkers and are essential to “special operations” involving video surveillance.

## **Chapter 20**

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

## **20-400 – Student Workers**

In three unpublished cases, the Board denied review of arguments contending that petitioned-for graduate students are distinguishable from those held to be statutory employees in *Columbia University*, 364 NLRB No. 90 (2016). In each case, Chairman Miscimarra dissented, and in one (*The New School*) specifically stated his belief that the employer had raised substantial issues warranting review with respect to whether the petitioned-for graduate students were distinguishable from those in *Columbia*.

- *University of Chicago*, 13-RC-198365, rev. denied 6/1/17 (PMc; M diss)
- *Loyola University Chicago*, 13-RC-189548, rev. denied 7/6/17 (PMc; M diss)
- *The New School*, 02-RC-143009, rev. denied 7/6/17 (PMc; M diss)

## **Chapter 21**

### **Self-Determination Elections**

## **21-500 – Inclusion of Unrepresented Groups**

*Public Service Company of Colorado*, 365 NLRB No. 104 (2017) (MPMc): The Board previously granted review on whether the ARD properly directed a self-determination election to determine whether plant planners and plant planner/schedulers wished to join the existing unit (which included a wide variety of classifications); in this decision the Board agreed that a self-determination election was appropriate, but in finding the petitioned-for group shared a sufficient community of interest with the existing unit to warrant inclusion, the Board declined to rely on the ARD’s use of the appropriate voting

group in the community-of-interest analysis, or on the diversity of the existing unit in place of a showing of an actual shared community of interest.

*Republic Silver State Disposal, Inc.*, 365 NLRB No. 145 (2017) (MPMc): The Board held that directing a self-determination election in a voting group broader than what the petitioner originally sought does not require a showing that the employees the RD added to the voting group share an “overwhelming community of interest” with the petitioned-for voting group, nor must it be shown that the petitioned-for voting group was “fractured.” The Board also rejected the contention that a self-determination election is not appropriate when the unrepresented employees also constitute a separate appropriate unit.

*Cytec Process Materials (CA), Inc./Source One Staffing, LLC*, 21-RC-185937, decision and order remanding 4/4/17 (MPMc): The parties stipulated to a self-determination election in this case, but the Notice of Election did not specify that this was the case. The RD ultimately issued a certification of results adding the voting group to the existing unit, but the Board found that in order to effectuate the parties’ stipulation, and to ensure the vote accurately reflected the voting employees’ desires (there was no evidence that the employees were in fact aware that the election was a self-determination election), the election had to be set aside and a second election directed.

*Rush University Medical Center v. NLRB*, 708 Fed. Appx. 692 (D.C. Cir. 2017): See 12-410.

## **Chapter 22**

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

#### **22-112 – Challenges**

*Anheuser-Busch, LLC*, 365 NLRB No. 70 (2017) (MPMc): The Board agreed with RD’s conclusion (set forth in the decision and direction of election) that an employee was not a confidential employee, and overruled the employer’s objection that it was wrongly prevented from challenging the employee’s ballot at the election. On this latter count, the employer’s objection was based on a contention (the employee’s alleged confidential status) that had been fully litigated at the preelection hearing, the RD had found that this employee was specifically included in the unit, and Section 11338.7 of the Casehandling Manual (Part Two) states that persons specifically included by a decision and direction of election should be permitted to vote without challenge (absent changed circumstances, which were not demonstrated here).

*Neises Construction Corp.*, 365 NLRB No. 129 (2017) (MPMc): Having resolved certain dispositive challenges, and having found that both objectionable conduct (see 24-301), and several unfair labor practices warranted setting aside the election, the Board agreed with an ALJ’s recommendation to set aside the election if the revised tally of ballots showed that the union did not prevail.

*Allied Services of Dexter, LLC d/b/a Republic Services of Dexter*, 14-RC-192027, rev. denied 9/11/17 (MPMc): See 12-210.

*NLRB v. Spectrum Juvenile Justice Services* (6th Cir. 11/27/17) (link available at <https://www.nlr.gov/case/07-CA-180451>), enfg. 364 NLRB No. 149 (2016): In this election held at two locations, Board agents divided the list into two lists, one covering each facility, but in doing so inadvertently omitted 35 eligible voters, whose ballots the agents then challenged before the parties agreed all were in fact eligible. The court agreed with the Board that this circumstance did not disrupt laboratory conditions, given that the employer's argument that the 35 employees blamed it for the omissions and thus voted for the union was entirely speculative.

*Capay, Inc. v. NLRB*, \_\_ Fed. Appx. \_\_, 2017 WL 5035327 (9th Cir. 2017), enfg. 363 NLRB No. 142 (2016): In an unpublished decision, the court held that it had no jurisdiction over an objection concerning the inclusion of 4 employees in the bargaining unit, given that the Board had not passed on this objection because the union would have prevailed regardless of how they voted and had indicated the employer could seek to resolve this issue in future unit clarification proceedings.

#### **22-119 – Hearing on Objections**

*800 River Road Operating Co v. NLRB*, 846 F.3d 378 (D.C. Cir. 2017), enfg. 362 NLRB No. 114 (2015): The court agreed with the Board that a hearing officer acted reasonably when, after hearing testimony from 10 employer witnesses who (contrary the representations in the employer's offer of proof alleging prounion supervisory conduct) provided no direct (or non-hearsay) testimony of objectionable conduct, he refused to permit testimony from more witnesses without firsthand knowledge of the alleged conduct. The court also held that although the hearing officer improperly denied the employer's request to subpoena 6 additional witnesses, the employer could not show that this error was not harmless. On both counts, the court emphasized that the employer had voluntarily decided to walk out of the hearing, which prevented it from demonstrating reversible error. The court also dismissed a contention that the hearing officer abused his discretion by refusing to allow the employer to treat a witness as hostile.

#### **22-122 – The Certification**

*Audio Visual Services Group, Inc. d/b/a PSAV Presentation Services*, 365 NLRB No. 84 (MPMc): See 2-500.

*Republic Silver State Disposal, Inc.*, 365 NLRB No. 145 (2017) (MPMc): See 2-500.

### **Chapter 23 Voting Eligibility**

#### **23-300 – Alleged Discriminatees**

*Neises Construction Corp.*, 365 NLRB No. 129 (2017) (MPMc): The Board agreed with the ALJ's overruling of a challenge to the ballot of an employee who was employed on the eligibility date and would have continued working for the employer but for its discrimination (as found by the ALJ and affirmed by the Board) against him.

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

*K & N Engineering*, 365 NLRB No. 141 (2017) (MPMc): Where the parties had specifically stipulated to the inclusion of janitors in a unit of production employees, the Board rejected the employer's subsequent argument that they should be excluded (and the petitioner's suggestion that they should be excluded if the petitioned-for unit was found inappropriate), holding that excluding the janitors would be contrary to the parties' stipulation.

*Cytec Process Materials (CA), Inc./Source One Staffing, LLC*, 21-RC-185937, decision and order remanding 4/4/17 (MPMc): The parties having unambiguously stipulated to a self-determination election, the Board rejected the employer's contention that this express language was mistaken and that it had not intended to agree to such an election. See also 21-500.

*Neises Construction Corp.*, 365 NLRB No. 129 (2017) (MPMc): The Board affirmed an ALJ's recommendation to sustain challenges to 5 ballots, given that the stipulated election agreement unambiguously excluded them (and thus found it unnecessary to pass on the ALJ's community-of-interest analysis, as well as the employer's contention that these employees were dual-function employees).

*CVS Albany, LLC v. NLRB*, \_\_ Fed. Appx. \_\_ (D.C. Cir. 2017), enfg. 364 NLRB No. 122 (2016): The court upheld the Board's determination (based on the "principle against superfluity") that 3 challenged voters were "floaters" excluded by the stipulated election agreement, noting that the employer offered no reason to adopt a different reading of the agreement and that the employer had not identified any genuine inconsistency in Board cases it claimed conflicted with the Board's decision.

## **Chapter 24 Interference with Elections**

### **24-130 – Duty to Provide Evidence of Objections**

*Jacmar Food Service Distribution*, 365 NLRB No. 35 (2017) (PMc, M diss in part): The majority denied review of the RD's decision to overrule objections without a hearing, stating that the employer's offer of proof in support of its objections was insufficient to sustain its position. Then-Acting Chairman Miscimarra would have remanded for a hearing on two of the employer's objections. See also 24-301, 24-320, and 24-410.

*NLRB v. Spectrum Juvenile Justice Services* (6th Cir. 11/27/17) (link available at <https://www.nlr.gov/case/07-CA-180451>), enfg. 364 NLRB No. 149 (2016): The court rejected the employer’s argument that the Board should have had to disprove the theory behind the employer’s objection. See 22-112.

*Capay, Inc. v. NLRB*, \_\_ Fed. Appx. \_\_, 2017 WL 5035327 (9th Cir. 2017), enfg. 363 NLRB No. 142 (2016): In an unpublished decision, the court held that no hearing was required on various objections, as they did not raise substantial and material factual issues. See also 24-301, 24-306, 24-310, and 24-442.

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

*Neises Construction Corp.*, 365 NLRB No. 129 (2017) (MPMc): The Board agreed with the ALJ that the employer’s unfair labor practices warranted setting the election aside (if a revised tally of ballots showed the union had lost). Chairman Miscimarra agreed but stated he was expressing no view on the soundness of the “virtually impossible” standard, though he acknowledged it as extant law.

*MEK Arden, LLC d/b/a Arden Post Acute Rehab*, 365 NLRB No. 109 (2017) (MPMc): Here too, in a case setting an election aside due to certain objections (involving interrogation and surveillance) and various ULPs, Chairman Miscimarra expressed no view on the soundness of the “virtually impossible” standard, while acknowledging it as extant law.

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

*Deep Distributors of Greater NY*, 365 NLRB No. 95 (2017) (MPMc): The Board stated that a confrontation between the union president and two of the employer’s agents—which involved an exchange of words and brief physical contact when the union president attempted to exit the election area to verify that the employer’s video surveillance cameras were shut down before voting began—would not tend to affect the election results, particularly in the absence of evidence any employee other than the union’s observer was aware of it before voting.

*NLRB v. Spectrum Juvenile Justice Services* (6th Cir. 11/27/17) (link available at <https://www.nlr.gov/case/07-CA-180451>), enfg. 364 NLRB No. 149 (2016): See 22-112.

#### **24-243 – Narrowness of the Election Results**

*Deep Distributors of Greater NY*, 365 NLRB No. 95 (2017) (MPMc): The Board declined to rely on the ALJ’s finding that “nine votes to five is not a close vote.”

#### **24-244 – Dissemination**

*Keystone Automotive Industries, Inc.*, 365 NLRB No. 60 (2017) (PMc, M diss in relevant part): See 24-301.

*Deep Distributors of Greater NY*, 365 NLRB No. 95 (2017) (MPMc): See 24-242.

#### **24-301 - Threats**

*Jacmar Food Service Distribution*, 365 NLRB No. 35 (2017) (PMc, M diss in part): The majority noted that with respect to the employer's objection concerning an alleged threat made by one employee to coerce another employee to sign an authorization card, the employer had proffered no evidence indicating the employee who made the threat was a union agent or in a position to carry out the threat and thus no hearing was warranted. Then-Acting Chairman Miscimarra would have remanded for a hearing.

*Keystone Automotive Industries, Inc.*, 365 NLRB No. 60 (2017) (PMc, M diss in relevant part): The Board adopted the findings that certain statements to employees constituted objectionable threats that were sufficiently disseminated to warrant setting the election aside.

*Neises Construction Corp.*, 365 NLRB No. 129 (2017) (MPMc): The Board agreed with the judge that an employer flyer stating that "bargaining starts for scratch" constituted objectionable conduct.

*Capay, Inc. v. NLRB*, \_\_ Fed. Appx. \_\_, 2017 WL 5035327 (9th Cir. 2017), enfg. 363 NLRB No. 142 (2016): In an unpublished decision, the court held that no hearing was required on an objection alleging threats by union representatives that the employer would fire or check the immigration status of employees who voted for the union, as only vague allegations supported this objection and did not allege how the employer could have determined who to retaliate against.

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

*Keystone Automotive Industries, Inc.*, 365 NLRB No. 60 (2017) (PMc, M diss in relevant part): The majority found, in agreement with the hearing officer, that employer statements to employees—which informed them that employees at another facility had recently voted against union representation, that pursuant to a wage survey the employees at the other facility had received a 12.45 percent wage increase after voting against representation, that the employer was beginning a similar wage survey for the employee at issue, that due to the instant survey "a reasonable man" could expect a 12.45 percent wage increase, and that if the union won the election, a pay raise could take "a whole lot longer"—constituted an implied promise of an expeditious wage increase should the employees vote against the union. Then-Acting Chairman Miscimarra dissented and would have found that the statements merely informed employees about historical facts.

#### **24-306 – Assembly of Employees at a Focal Point of Authority and Home Visitations**



*Keystone Automotive Industries, Inc.*, 365 NLRB No. 60 (2017) (PMc, M diss in relevant part): The Board declined an invitation to overrule *Frito Lay, Inc.*, 341 NLRB 515 (2004) (finding employer's use of "ride-alongs" not objectionable under the circumstances).

*Capay, Inc. v. NLRB*, \_\_ Fed. Appx. \_\_, 2017 WL 5035327 (9th Cir. 2017), enfg. 363 NLRB No. 142 (2016): In an unpublished decision, the court held that no hearing was required on an objection alleging coercive home visits and phone calls as it was only supported by legally insufficient subjective impressions by employees.

#### **24-309 – The Voter List (Excelsior Rule)**

*RHCG Safety Corp.*, 365 NLRB No. 88 (2017) (PMc; M diss): The majority agreed with the ALJ's finding that the election should be set aside due to the employer's insufficient compliance with voter list requirements. On that count, 90% of addresses were inaccurate, the names of at least 15 eligible voters were omitted, and the employer provided no phone numbers. Regarding phone numbers, the majority noted that the Board's rules require "available" phone numbers but do not limit "available" to those numbers kept in a computer database. The majority stated that each of the three deficiencies identified was sufficient reason to set the election aside. The majority also rejected contentions that the list's shortcomings did not impede the union's ability to communicate with voters, that the election should not be set aside due to large voter turnout, or that the list's shortcomings should be excused as "inadvertent" or "unintentional." Finally, the majority rejected the dissent's criticisms of the time afforded for production of the list. Chairman Miscimarra agreed that the large number of incorrect home addresses warranted setting the election aside, but reiterated his disagreement with the Election Rule's expanded voter list requirements and disagreed that phone number were "available" to the employer under the circumstances of this case.

#### **24-310 – The Peerless Rule**

*Capay, Inc. v. NLRB*, \_\_ Fed. Appx. \_\_, 2017 WL 5035327 (9th Cir. 2017), enfg. 363 NLRB No. 142 (2016): In an unpublished decision, the court noted that an objection alleging home visits, telephone calls, and electioneering within 24 hours of election did not implicate the *Peerless* rule as no captive audience speeches by the union on company time were alleged.

#### **24-320 – Third-Party Conduct**

*Cargill, Inc. v. NLRB*, 851 F.3d 841 (8th Cir. 2017), enfg. 363 NLRB No. 110 (2016): The court held that substantial evidence supported the Board's finding that the conduct of some employees (who engaged in loud, boisterous conversation and shouted profanities while waiting to vote, briefly changed "Yes we can" in Spanish, and booed a coworker known to have voted against the union) did not establish the "general atmosphere of fear and reprisal" necessary to set an election aside based on third-party conduct.

*Jacmar Food Service Distribution*, 365 NLRB No. 35 (2017) (PMc, M diss in part): The majority noted that neither an alleged threat—whereby one employee threatened to tell another’s supervisor he was a bad worker unless the second employee signed an authorization card—nor a third employee’s claim that he signed an authorization card “in order to be part of the group” would meet the test for objectionable third-party conduct and thus no hearing was warranted. Then-Acting Chairman Miscimarra would have remanded for a hearing.

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

*UPS Ground Freight, Inc.*, 365 NLRB No. 113 (2017) (PMc; M diss): The Board found that even if the dispatcher at issue were a supervisor, his alleged prounion conduct (which involved a union organizer calling the dispatcher’s cell phone and the dispatcher making a prounion statement to a nonunit employee) was not objectionable under *Harborside Healthcare*, 343 NLRB 906 (2004). Chairman Miscimarra agreed on this count.

#### **24-410 – Board Agent Conduct**

*Jacmar Food Service Distribution*, 365 NLRB No. 35 (2017) (PMc, M diss in part): The majority found that no hearing was warranted on an objection alleging Board agent misconduct, as (1) it is customary for a Board agent to have spare ballots; (2) having observers check off names as employees vote is accepted standard procedure; (3) when a blank ballot was allegedly discovered folded together with a marked ballot at the tally, the Board agent properly preserved the blank ballot, and in any event that employee’s vote would not have affected the results of election; and (4) a contention the agent “seemed” to favor “yes” votes when explaining how to vote did not demonstrate her instructions affected the integrity of the voting process. Then-Acting Chairman Miscimarra would have remanded for a hearing, due to his concerns that there may nevertheless have been irregularities at the election that the acting regional director had not adequately addressed.

*Cargill, Inc. v. NLRB*, 851 F.3d 841 (8th Cir. 2017), enfg. 363 NLRB No. 110 (2016): The court agreed with the Board’s finding that a Board agent’s failure to investigate and halt certain employee behavior (see Sec. 24-320) did not cast sufficient doubt on the fairness and validity of the election such that it should be set aside.

*The Trustees of Columbia University in the City of New York*, 365 NLRB No. 136 (2017) (PMc; M diss): The majority agreed with the hearing officer’s assessment that the Region’s handling of voter identification requirements—although not optimal—did not warrant setting aside the election. Although there was no voter identification requirement, during the election the employer observers were in some instances permitted to request (though not require) identification, but in others were not so permitted; the majority held that this irregularity did not raise a reasonable doubt as to the fairness and validity of the election, given that this inconsistency affected at most four ballots in an election decided by a 979-vote margin. Chairman Miscimarra dissented, noting that these inconsistent voter identification procedures were either inconsistent with the parties’ agreement or the RD’s

directives, and that as a result the Board could not determine whether eligible voters may have been turned away (and if so, how many) or whether ineligible voters may have been permitted to vote (and if so, how many). Chairman Miscimarra also expressed concern that these inconsistencies undermined the role played by election observers.

#### **24-424 - Observers**

*The Trustees of Columbia University in the City of New York*, 365 NLRB No. 136 (2017) (PMc; M diss): See 24-410.

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

*Hanson Cold Storage Co. of Indiana v. NLRB*, 860 F.3d 911 (7th Cir. 2017), denying enf. of 364 NLRB No. 121 (2016): The court rejected the Board’s reading of a voter’s irregular marks on a determinative ballot as demonstrating the intent to vote “yes.” The ballot in question involved an “X” in the “Yes” box, but the court held this did not show a clear intent to vote yes given that scribbling covered much of the “X” and both the “X” itself and the scribbling was not “almost entirely contained within” the “Yes” box.

#### **24-442 – The Milchem Rule**

*Capay, Inc. v. NLRB*, \_\_ Fed. Appx. \_\_, 2017 WL 5035327 (9th Cir. 2017), enfg. 363 NLRB No. 142 (2016): In an unpublished decision, the court held that no hearing was required on an objection alleging improper electioneering, as the allegations established only that the union was involved in electioneering and did not speak to other relevant factors necessary to determine whether it was objectionable.

#### **24-446 – Agents Stationed Near the Polls**

*Baker DC, LLC*, 05-RC-135621, decision on review 11/2/17 (PMc; M diss): The majority rejected an argument that the mere presence of union agents in the lobby of an office building where the employer’s headquarters were located, without proof of electioneering or other improper conduct, warranted overturning the election; in so finding, the majority distinguished *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 931 (D.C. Cir. 2001). Chairman Miscimarra would have remanded for a hearing on this objection.

*The Trustees of Columbia University in the City of New York*, 365 NLRB No. 136 (2017) (PMc; M diss): Chairman Miscimarra noted, with respect to an overruled objection the majority did not specifically address when denying review, that the placement of the petitioner’s agents during the election was not objectionable as the voters did not have to pass directly by the agents in order to vote. See also 24-410.

*University of Chicago*, 13-RC-198365, rev. granted in part and remanded for hearing 12/15/17 (ME; P diss): The majority remanded for a hearing on an objection alleging that petitioner agents were stationed in areas voters would be forced to pass in order to vote. Member Pearce would have denied review on the grounds that the assertions in the

employer's offer of proof did not describe objectionable conduct, either under Board precedent or *Nathan Katz*.

**24-500 – The Lufkin Rule**

*Keystone Automotive Industries, Inc.*, 365 NLRB No. 60 (2017) (PMc, M diss in relevant part):  
The Board granted the union's request for inclusion of *Lufkin* language in the notice of rerun election, noting that such inclusion is standard when requested.