This document was authored by John Higgins, the Agency's former Deputy General Counsel, and is intended to supplement the Outline of Law and Procedure in Representation Cases, which was most recently updated through 2011. It follows the format of the Outline and sets forth developments in Board law during the year 2012. We have added a Table of Contents to facilitate finding the covered material.

In future years, we hope to update this supplement until a new edition of the Outline is published.

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Chapter 1: Jurisdiction

1-401 – State or Political Subdivision

Chicago Mathematics and Science Academy Charter School, Inc., 359 NLRB No. 41 (2012). In this case, the Board majority held that a charter school is not a political subdivision of the state. The Board also rejected the contention that it should decline jurisdiction for policy reasons, viz., because of a "special relationship between charter schools and the state."

Chapter 2: Regional Director's Decisionmaking Authority in Representation Cases

2-200 – Scope of Authority

Warren Unilube, Inc. v. NLRB, 690 F3d 969 (8th Cir. 2012)

See Section 10-800 infra.

2-600 – Exhaustion of Administrative Remedies (New Section)

NLRB v. Contemporary Cars, Inc., 667 F3d 1364 (11th Cir. 2012). In this bargaining unit case, the court rejected the employer's due process argument because it had failed to present the issue to the Board. The employer's argument was that it was futile to raise the *New Process Steel* issue (two-Member Board). The Court found that the employer failed to establish that there were "extraordinary circumstances" that excused its failure to present this issue to the Board.

Chapter 6: Qualification of Representative

6-370 – Joint Petitioners

Musical Arts Association v. NLRB, 466 Fed Appx 7 (DC Cir. 2012). Court affirmed Board holding that two or more unions may serve as the joint collective bargaining representatives for a single unit of employees.

Chapter 7: Existence of a Representation Question

7-400 – Effect of Delay and Turnover

Independence Residences, Inc., 358 NLRB No. 42 (2012). In this bargaining order case, the Board ordered the employer to bargain with the union based on the union's certification notwithstanding that the election had been conducted seven years before and the certification was delayed because of litigation involving a New York statute.

Chapter 9: Contract Bar

9-1000 – Special Statutory Provisions as to Prehire Agreements

Allied Mechanical Services, Inc. v. NLRB, 668 F3d 758 (DC Cir. (2012). Court affirmed Board finding that the employer and the union converted their Section 8(f) relationship into a Section 9(a) relationship where the union offered to establish its majority status and the "employer never took the union up on its offer."

NLRB v. American Firestop Solutions, Inc., 673 F3d 766 (8th Cir. 2012). Court affirmed Board finding that the employer and union had a Section 9(a) relationship based on the contract recognition clause which stated that the union represented a majority. Court cited *Staunton Fuel d/b/a Central Illinois Construction*, 335 NLRB 717 (2001) and *Nova Plumbing Inc. v. NLRB*, 330 F3d 531 (DC Cir. 2003).

Chapter 10: Prior Determinations and Other Bars to an Election

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

Bentonite Performance Materials v. NLRB, 456 Fed Appx 2 (DC Cir. 2012). In a withdrawal of recognition case the employer solicited signatures on the union decertification petition. In these circumstances, the Court rejected the employer's contention that the Board should have applied the *Master Slack* "causal relationship test" 271 NLRB 78 (1984). Instead, the Court affirmed the Board's application of *Hearst Corp*., 281 NLRB 764 (1986), in which the Board found no requirement for a showing of causation where the underlying unfair labor practice itself involved solicitation of the decertification petition. The Court noted that the employer did not "directly challenge *Hearst*."

Warren Unilube, Inc. v. NLRB, 690 F3d 969 (8th Cir. 2012). Court found that Regional Director's decision to block an election based on unfair labor practice charges was within the Director's sound discretion. The Court noted that the charges, although ultimately dismissed, were not baseless or frivolous.

Wellington Industries, Inc., 359 NLRB No. 18 (2012). The Board majority rejected an employer request for review of the Regional Director's decision to block the processing of a petition in the face of unremedied unfair labor practice charges. The dissenting Member would have granted review and reconsidered the Board's general blocking charge policy.

Finley Hospital, 33 RD 899 (October 12, 2012). In this unpublished decision, a divided Board panel affirmed the decision of the Regional Director to block an election based on unfair labor practices that had occurred more than a year and a half before. The RD had held a prior election during the pendency of these same charges when the union filed a Request to Proceed. No request was filed in this case.

Chapter 11: Amendment, Clarification, and Deauthorization Petitions, Final Offer Elections and Wage-Hour Certifications

11-200 – Clarification of Certification (UC)

Entergy Mississippi, Inc., 358 NLRB No. 99 (2012). A party acts at its peril in removing a position from a bargaining unit during the pendency of a unit clarification petition.

11-210 - Timing of UC Petition

Dixie Electric Membership, 358 NLRB No. 120 (2012). Board affirmed ALJ ruling that a UC petition filed somewhere between 121 and 143 days of contract execution was not filed "shortly after the contract is executed." Accordingly the petition was not timely filed.

11-300 – Deauthorization Petition (UD)

First Student, Inc., 359 NLRB No. 27 (2012). A Board majority denied review of a Regional Director's dismissal of a UD petition where the RD found that the employees had become part of a merged national unit and the petition sought only an election at a single location.

Chapter 12: Appropriate Unit: General Principles

12-210 – Community of Interest

NLRB v. Contemporary Cars, Inc., 667 F3d 1364 (11th Cir. 2012). In this bargaining unit case, the Court affirmed the Board's finding of an appropriate unit of automobile service technicians based on both craft and traditional community of interest grounds. In doing so, the Court rejected the employer's contention that the integration of its operations warranted a broader unit of all fixed operations department employees.

12-220 – History of Collective Bargaining

ADT Security Services, Inc., 689 F3d 628 (6th Cir. 2012). Court affirmed a Board decision that a bargaining unit at an organized plant remained appropriate after that plant was closed and its employees were assigned to an unorganized plant. Court found that a "long and well established bargaining history" weighed strongly in favor of the historic unit. The Court found that a change in intermediate supervisors is not a "compelling circumstances that would overcome the twenty-nine year bargaining history. . . ."

12-300 – Extent of Organization

San Miguel Hospital Corp. v. NLRB, 697 F3d 1181 (DC Cir. 2012). See Section 15-174 infra.

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

14-500 – Single Employer

NLRB v. San Luis Trucking, 479 Fed Appx 743 (9th Cir. 2012). Court affirmed Board finding that three companies (a grocery store chain, a U.S. trucking company and a Mexican trucking company) were a single employer.

Massey Energy Company, 358 NLRB No. 159 (2012). In a divided opinion the Board found single employer status based on common ownership, interrelated operations, common management ("to a limited extent") and centralized control of labor relations. The dissent argued that the General Counsel had not litigated the single employer issue.

14-600 – Joint Employer

Aim Royal Insulation and Jacobson Staffing, 358 NLRB No. 91 (2012). The Board found a joint employer relationship between a construction industry employer and a staffing company that was under contract to recruit and provide temporary employees to the construction company.

Chapter 15: Specific Units and Industries

15-130 – Construction Industry

Grace Industries, 358 NLRB No. 62 (2012). In a petition for a unit of paving employees, the Board found that a unit of those who perform "primary asphalt paving" and a unit of employees performing paving regardless of the material used are equally appropriate units. Accordingly, the Board ordered a *Globe-Armour* self determination election. See Sec. 21-100.

15-171 – Acute Care Hospitals

San Miguel Hospital Corp. v. NLRB, 697 F3d 1181 (DC Cir. 2012).

See Sec. 15-174 infra.

15-174 – Application of the Health Care Rule

San Miguel Hospital Corp. v. NLRB, 697 F3d 1181 (DC Cir. 2012). The Court rejected the employers contention that the Board's Health Care Rules violate Section 9(c)(5) of the Act because they give controlling weight to the extent of the unions organization in making unit determinations. The Court found "zero merit" to this argument. The Court noted that there was little evidence to support this contention but that even if the Board did consider extent of organization as a factor, it would only be impermissible if it were the "controlling factor."

Chapter 16: Craft and Traditional Department Units

NLRB v. Contemporary Cars, Inc., 667 F3d 1364 (11th Cir. 2012). See Section 12-210 supra.

Chapter 17: Statutory Exclusions

17-500 – Supervisors

G4S Regulated Security Solutions, 358 NLRB No. 160 (2012). A divided Board concluded that two discharged guards were not supervisors as they did not have any of the statutory indicia of supervision. The Board majority noted particularly that the evidence was insufficient to establish that these guard "lieutenants" had the authority to discipline, assign work or to responsibly direct employees. The majority also rejected a contention that secondary indicia supported a supervisory finding noting that "without sufficient proof of Sec. 2(11) primary indicia, secondary indicia does not establish supervisory authority."

Rochelle Waste Disposal v. NLRB, 673 F3d 587 (7th Cir. 2012). Court affirmed Board finding that individual was an employee and not a supervisor even though his title was "landfill supervisor." There was no evidence the individual enjoyed any of the indicia of a supervisor or that he had ever been accountable for actions of employees.

Flex-n-Gate Texas, 358 NLRB No. 76 (2012) and *Station Casinos d/b/a Place Station Hotel and Casino*, 358 NLRB No. 153 (2012). In these two cases decided in 2012, the Board found insufficient evidence to support a finding that employees were supervisors.

17-502 – Assignment/Responsible Direction/Independent Judgment

Alternate Concepts, Inc., 358 NLRB No. 38 (2012). Board found that the employer, a light rail transit system failed to establish that its line controllers (persons responsible for ensuring that trains operate on schedule) and its crew dispatches (persons responsible for the timely and safe dispatch of trains) are supervisors. Board found that they did not have authority to assign or responsibly direct employees.

Brusco Tug and Barge, 359 NLRB No. 43 (2012). In a 2-1 decision, the Board held that the employer's tugboat mates were not supervisors. In an extensive opinion, the majority found that the employer did not meet its burden of establishing that the mates have assignment authority or responsibility direct employees. The majority noted that its holding was limited to the mates in this case. Both the majority and dissenting opinions relied upon the Board's *Oakwood Healthcare* decision 348 NLRB 686 (2006).

Ambassador Services, 358 NLRB No. 130 (2012). The Board sustained the finding of an ALJ that the employer did not establish that an individual was a supervisor. The ALJ noted that while employees may have perceived the individual to be a supervisor, there was no evidence that he had any supervisory indicia. The ALJ characterized him as a "straw boss."

17-507 – Secondary Indicia

G4S Regulated Security Solutions, 358 NLRB No. 160 (2012). See Sec. 17-500 supra.

17-511 – Health Care Supervisory Issues

Barstow Community Hospital, 474 Fed Appx 497 (9th Cir. 2012). Court agreed with Board that the employer did not establish that a nurse who served as "Acting Clinical Coordinator" on an ad hoc basis has supervisory authority.

735 Putman Pike Operations d/b/a Greenville Skilled Nursing v. NLRB, 474 Fed Appx 782 (DC Cir. 2012). Court affirmed Board's finding that the employer did not establish that registered nurses were supervisors. Accordingly, unit of registered nurses was held to be appropriate.

Frenchtown Acquisition Co. d/b/a Fountain Vew of Monroe v. NLRB, 683 F3d 298 (6th Cir. 2012). Court affirmed Board finding that a unit of charge nurses was appropriate rejecting the employer's contention that the nurses were supervisors. In a detailed opinion the Court rejected the employer's contentions that the nurses had sufficient disciplinary, hiring and/or assignment authority to establish supervisory status.

Lakeland Health Care Associates v. NLRB, 696 F3d 1332 (11th Cir. 2012). In an extensive opinion, a divided panel reversed the Board's finding that licensed practical nurses are employees. The panel majority found that these LPNs had authority to discipline, to responsibly direct and to assign work to CNAs. The dissenting judge disagreed, finding that the majority reweighed the evidence and "improperly substituted in own views of the facts for those of the Board."

Chapter 21: Self-Determination Elections

21-100 – Several Units Equally Appropriate

Grace Industries, 358 NLRB No. 62 (2012). The Board found two units of paving employees to be appropriate and thus ordered a self-determination election in order to ascertain the wishes of the employees being sought.

Chapter 22: Representation Case Procedures Affecting the Election

22-111 – Challenges

Hard Rock Holdings v. NLRB, 672 F3d 1117 (DC Cir. 2012). The failure of the union to challenge the inclusion of a name on the *Excelsior* list did not deprive it of the right to challenge the vote at the election.

22-118 – Hearing on Objections

NLRB v. New Country Audi, 448 Fed Appx 155 (2nd Cir. 2012). Employer did not present evidence of substantial and material factual issues sufficient to warrant a hearing on its objections.

Chapter 23: Voting Eligibility

23-111 – Newly Hired or Transferred Employees

NLRB v. Regency Grande Nursing and Rehabilitation Center, 462 Fed Appx 183 (3rd Cir. 2012). Court found that employer unlawfully "packed" the unit just prior to election where record showed that many of the "new hires" submitted incomplete employment information, worked fewer hours and did not appear on work schedules.

23-112 – Voluntary Quits

Road Works, Inc. 358 NLRB No. 60 (2012). Board reversed hearing officer finding that employee intended to quit before the election.

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

Hard Rock Holdings v. NLRB, 672 F3d 1117 (DC Cir. 2012). Court affirmed Board's finding that the stipulated election agreement was ambiguous and that there was no extrinsic evidence to clarify the ambiguity. Accordingly, the Court agreed with application of the community of interest test to resolve the unit issue.

Chapter 24: Interference with Elections

24-110 – Objections Period

NLRB v. New Country Audi, 448 Fed Appx 155 (2nd Cir. 2012). Court rejected employer contention that conduct occurring prior to the filing of the petition should be considered objectionable. Court noted that while it would find an exception to the general rule where the conduct would "have had a significant impact on voting post-petition," it did not find such conduct here.

Brentwood at Hobart v. NLRB, 675 F3d 999 (6th Cir. 2012). Court affirmed the action of the Board and its hearing officer in not considering the employer's contention, first raised at hearing, that a union election flyer was objectionable. The employer had filed an objection to another flyer and the court ruled that the Board did not abuse its discretion in excluding consideration of the second flyer.

Permanente Medical Group and Kaiser Foundation Hospitals, 358 NLRB No. 88 (2012). Board found that certain alleged objectionable conduct was "remote in time, predating the critical period by several months and did not directly affect the . . . unit."

Ashland Facility Operations v. NLRB, 2012 WL 6217607 (4th Cir. 2012). See Section 24-323 infra.

24-314 – Dissemination

Trump Plaza Associates v. NLRB, 679 F3d 822 (DC Cir. 2012). Court remanded case to Board disagreeing with Board's view that a "mock card check" was not disseminated broadly. Court found that Board had not given sufficient attention to fact that matter was covered on local television and in the local newspapers.

24-320 – Types of Interference Under the *General Shoe* Doctrine

Radiant Energy a/k/a Etiwanda, 357 NLRB No. 172 (2011). Board majority set aside election involving both promise of some benefits, withholding of other benefits and the removal of an employee of a contractor at the employer's facility because the employee engaged in union activity.

Kingspan Benchmark, 359 NLRB No. 19 (2012). Board set aside election where the election results were close (20 for and 22 against the union) and the employer granted an employee a wage increase, implemented a shift differential and interrogated an employee.

24-322 – Misrepresentation

Permanente Medical Group and Kaiser Foundation Hospitals, 358 NLRB No. 88 (2012). Board rejected contention that statements that employees would lose

membership in one of two rival unions and consequently would lose the benefits of membership were objectionable. Rather, the Board found them to be, at best, "mere misrepresentations."

24-323 – Racial Appeals

Ashland Facility Operations v. NLRB, 2012 WL 6217607 (4th Cir. 2012). The Court affirmed the Board's finding that statements made by a representative of the NAACP were not racially inflammatory (viz – the nurses were "targeted because of their skin color, publically and illegally strip-searched and harassed" and the employees were treated like "chattel enslaved captives"). The Court found that the remarks were "made in the context of an effort to raise workplace grievances."

The Court also held that the representative of the NAACP was not an agent of the Union and that his remarks should be treated under third party conduct standards. Finally, the Court concluded that the Sewall doctrine does not apply to appeals made by third parties unless the appeal is such as to make "a rational, uncoerced expression of free choice impossible." The Court also found that the incidents objected to took place outside the critical period.

24-324 – The *Excelsior* Rule

(a) Submission of the List

Hard Rock Holdings v. NLRB, 672 F3d 1117 (DC Cir. 2012). See Sec. 22-111 supra.

24-325 – The *Peerless* Rule

White Motor Sales d/b/a Fairfield Toyota v. NLRB, 2012 WL 1912631 (DC Cir. 2012). Court affirmed the Board's finding that union did not violate *Peerless Plywood* when its representative went to plant prior to election to speak with employees. The representative refused to leave when requested by employer. Court found no violation of 24 hour rule because union did not summon employees to a meeting.

24-326 b –Third Party Conduct

Trump Plaza Associates v. NLRB, 679 F3d 822 (DC Cir. 2012). Court found that a public official's involvement in an election campaign did not interfere with employee free choice or give the impression that the Board favored the union. *Columbia Tanning*, 238 NLRB 899 was distinguished by the Court.

NLRB v. Downtown Bid Services Corp., 682 F3d 109 (DC Cir. 2012). Court affirmed Board finding that a prounion employee was not acting as an agent of the union under either actual or apparent authority when, while soliciting union authorization cards, he told employees they would be fired if they did not support

the union. Court relied on fact that union had clearly designated an organizer as its representative and this employee was not that person.

Ashland Facility Operations v. NLRB, 2012 WL 6217607 (4th Cir. 2012).

See Sec. 24-323 supra.

24-328 – Prounion Supervisory Conduct

Veritas Health Services v. NLRB, 671 F3d 1267 (DC Cir. 2012). Court affirmed Board finding that prounion conduct of supervisory charge nurses in signing cards in front of employees and in attending union meetings did not amount to employer supervisory interference. Court also noted that even if the conduct tended to interfere with employee free choice, it was mitigated by the actions of the charge nurses in subsequently campaigning against the union.

24-410 – Board Agent Conduct

Hard Rock Holdings v. NLRB, 672 F3d 1117 (DC Cir. 2012). It was not objectionable conduct for the Board agent to decide not to give observers a badge when he discovered that he had only one in his election kit. The Court held that there was no evidence that the absence of badges affected the election.

24-424 – Observers

NLRB v. New Country Audi, 448 Fed Appx 155 (2nd Cir. 2012). Court rejected employer contention that statement of an employee concerning the whereabouts of a co-worker established that the union had "kept a running tally during the voting on him . . . employees case their ballots."

NLRB v. Regency Grande Nursing and Rehabilitation Center, 462 Fed Appx 183 (3rd Cir. 2012). Court rejected employer contention that observer kept list of those voting. Rather, the Court affirmed the Board's finding that the list was a list of employees the union intended to challenge.

See also Sec. 24-410.

24-426 – Secrecy of the Ballot

Physicians & Surgeons Ambulance Service v. NLRB, 477 Fed Appx 743 (DC Cir. 2012). Court affirmed the Board holding that the use of a table top voting booth did not fail to guarantee the voters privacy.

24-429 – Ballot Count

Ruan Transport v. NLRB, 674 F3d 672 (7th Cir. 2012). In a two union election, an employee had marked both unions' boxes on the ballot. One box had a heavy

mark while the other had signs of erasure. The Court affirmed the Board's finding that the ballot viewed overall showed the clear intent of the voter.