COMMENT

Procedures for Resolving Objections to NLRB Elections*

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Circuit courts have increasingly rejected aspects of the procedure used by the NLRB in resolving objections to elections of employee representatives. This Comment examines the disagreements between the courts and the NLRB, compares the efficiency of the different approaches, and suggests a comprehensive framework for resolving objections.

INTRODUCTION

One of the primary functions of the National Labor Relations Board (NLRB or the Board) is to determine whether employees desire to be represented by a union.¹ Certification of a union as the employees’ collective bargaining representative gives meaning to their statutory right of self-organization.²

"Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees."³ The favored method of ascertaining employees' preferences, and that mandated by statute in most situations, is an election.⁴ The Board takes great pains to protect the electoral process from coercion and unfair campaign tactics. Its absence from the site, however, requires that it rely on the parties to inform it of any improprieties. As a result, the

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Board permits the parties to file objections to the election. The regional director decides the merits of the objections, based on either an administrative investigation or a hearing. Board review of the regional director's decision is available.

Federal circuit courts recently began to examine and reject various aspects of the Board's procedure for resolving objections. The courts initially focused on the record for review, but their field of view rapidly broadened. The courts have demanded that the Board provide the objecting party with greater procedural rights: more evidentiary hearings, access to adverse evidence, and consideration of hearsay evidence. The Board has, until now, generally resisted the courts' efforts to expand the objections procedure. The Board prizes quick resolution of objections, and more procedural requirements impair that goal. Further, the courts' efforts may lead to disclosure of employee preferences, directly conflicting with the ideal of secret ballot elections.

This Comment will examine the three procedural areas at the heart of the dispute between the Board and the courts. The first, and probably most significant in terms of the Board's priorities, is the determination of the types of issues which require an evidentiary hearing and the types which may be resolved through an administrative investigation. The second dispute concerns the form of evidence admissible during the investigation (specifically, whether hearsay may be used to show objectionable conduct). The third dispute, the one that initially focused attention on the Board's objection procedure, concerns whether the Board must consider, and later provide to the courts, all the affidavits of witnesses relied on by the regional director. Following the description of the disputes, the Comment will examine whether the courts have authority to impose a different objections procedure on the

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6. 29 C.F.R. § 102.69(c)(1), (d) (1983).
7. 29 C.F.R. § 102.69(c)(2) (1983).
8. Prestolite Wire Div. v. NLRB, 592 F.2d 302, 306 (6th Cir. 1979). The circuit courts review decisions on objections usually through technical refusals to bargain. After a union is certified, the employer refuses to bargain, faces summary judgment in an unfair labor practice case, and petitions a circuit court for review of the unfair labor practice finding. AFL v. NLRB, 308 U.S. 401 (1940). The representation proceeding is reviewed with the unfair labor practice case.
9. See Kitchen Fresh, Inc. v. NLRB, 716 F.2d 351, 357-58 (6th Cir. 1983).
11. See infra text accompanying notes 14-90; Vitek Electronics, Inc. v. NLRB, 653 F.2d 785 (3d Cir. 1981).
12. See infra text accompanying notes 95-130; EDS-IDAB, Inc. v. NLRB, 666 F.2d 971 (5th Cir. 1982).
13. See infra text accompanying notes 131-57; NLRB v. Belcor, Inc. 652 F.2d 856 (9th Cir. 1981); Prestolite Wire Div. v. NLRB, 592 F.2d 302.
RESOLVING NLRB ELECTION OBJECTIONS

Board and whether changes are constitutionally required. Finally, the Comment will compare the efficiency of the different approaches and attempt to develop a comprehensive framework for resolving objections.

A cautionary note is required; some of the statements made in this paper are generalizations. The foremost examples are references to the behavior of "the courts." As can be expected, the federal appellate courts do not all act in the same manner or for the same reasons, either within a circuit or between circuits. The paper attempts only to discern the trends of the Board and the courts and not to engage in either a circuit-by-circuit or panel-by-panel analysis. The general trends present ample substance for comparison and discussion.

I
CONFLICTS BETWEEN THE COURTS AND THE BOARD

A. Type of Issue Necessary for a Hearing

The Board vests the decision of whether to provide a hearing on objections in the regional director. Prior to September 15, 1981, the Board's regulations provided for hearings when it "appears to the regional director that substantial and material factual issues exist which, in the exercise of his reasonable discretion, he determines may be more appropriately resolved after a hearing."\(^4\) Although the regulations technically "authorize[d] [regional directors] . . . to make credibility resolutions without hearings,"\(^5\) the Board discouraged them from doing so.\(^6\)

Attempting to answer criticism by the appellate courts,\(^7\) the Board recently removed all discretion from the regional directors. The rules now state: "Such hearing shall be conducted with respect to those objections or challenges which the Regional Director concludes raise substantial and material factual issues."\(^8\) Thus, the regulation codifies the

\(^{14}\) 29 C.F.R. §102.69(d) (1980).

\(^{15}\) Zimmerman & Dunn, Relations Between the NLRB and the Courts of Appeals: A Tale of Acrimony and Accommodation, 8 Employee Rel. L.J. 4, 6 (1981).

\(^{16}\) In Newport News Shipbuilding & Dry Dock Co., 239 N.L.R.B. 82 (1978), remanded, 594 F.2d 8 (4th Cir. 1979), the board criticized a regional director for making "improper credibility resolutions." The regional director had stated that "no credible evidence was presented," and that other statements were "uncorroborated"; the Board held that "statements of this kind are permissible from a trier of fact, whose responsibility is to resolve conflicting testimony and to weigh the evidence, but they are improper in the context of the determination of whether 'substantial and material factual issues' have been raised by the objectors." 239 N.L.R.B. at 84. The proper procedure was to "assume the truth of the factual assertion of the objecting party relating to specific individuals." Id.


\(^{18}\) 29 C.F.R. § 102.69(d) (1983).
Board's case law prohibiting regional directors from resolving credibility issues without a hearing. The term "substantial and material factual issues" provokes the greatest disagreements between the Board and the courts. A definition of "factual issues" has long eluded the scholars; the Board and the courts have fared no better. Moreover, their lack of agreement causes further differences in their approaches to the objections process.

All objection cases have two factual elements: what occurred and whether the occurrence affected the results. The first element examines the conduct specified as objectional; for example, what was said, who said it, and who heard it. A "substantial and material factual issue" about this element occurs when the evidence pertaining to the specified conduct conflicts. For convenience, this element will be referred to as "conduct facts."

The second factual issue concerns "effect facts": whether a voter switched her vote because of the conduct facts. The Board can determine effect either subjectively, using employees' testimony about their own states of mind, or objectively, determining the reasonable tendency of the conduct to affect the voters. The objective approach requires settled conduct facts, but it does not require that all the conduct facts lead to the same effect. For example, an employer may present evidence that a union agent told employees he would beat them up if they voted against the union. The union, to rebut, may present evidence that the agent and the employees were intoxicated at the time. No evidence contradicts either the making of the statement or the fact of drunkenness. The cumulative effect, however, remains in doubt: the employees may have voted for the union out of fear or may have recognized the statement as meaningless drunken bravado. As will be shown, these situations, where some settled conduct facts indicate one effect and others tend to show a different effect, cause the greatest disagreements between the Board and the courts.

20. 29 C.F.R. § 102.69(f) (1983); Summa Corp., 265 N.L.R.B. No. 46, slip op. at 4 (November 9, 1982).
22. See Eliason Corp. v. NLRB, 688 F.2d 22 (6th Cir. 1982).
23. A third, nonfactual, element of objection cases is the application of law to policy. All effective campaign techniques influence the voter; the Board must determine whether the technique itself is impermissible. Thus, the Board and the Act have proscribed certain campaign
The Board considers conduct fact disputes as the type of factual issues suitable for hearing. In *Erie Coke & Chemical Co.*,24 the investigative affidavits contained inconsistent statements regarding the circumstances of an alleged threat. The Board reversed the Regional Director and remanded for an evidentiary hearing. Similarly, in *Eurasian Automobile Products*,25 the Board ordered a hearing when the regional director failed to consider an affidavit with evidence of a potentially objectionable statement. Although the opinion does not specify, the regional director apparently overruled the objection based on evidence that the alleged statement had not been made. Thus, the fact of what had been said was in dispute.

On the other hand, the Board does not regard hearings as appropriate for issues of effect facts. Employee testimony about effect necessarily reveals preferences and runs counter to the Board's long-standing emphasis on secret ballots.26 Consequently, the Board has refused to examine whether conduct actually coerced or intimidated voters.27 The Board uses an objective approach: it decides whether the conduct was “likely to coerce prospective voters”28 or “reasonably tend[ed] to interfere with the free and uncoerced choice by the employees.”29 Effect is therefore determined as “a matter calling for the exercise of . . . administrative expertise.”30

In *Modine Manufacturing Co.*,31 the Board provided a rare discussion of its approach to hearings on objections. Prior to the Board's recent *Midland National Life Insurance Co.* decision, a campaign misrepresentation provided a basis for setting aside an election if it was “a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election.”32 The employer in *Modine* objected to the union’s alleged misrepresentations about the circumstances in which a valid strike vote could be held. The Board overruled the ob-

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jection without a hearing, which the employer contended was improper. Answering the employer's contentions, the Board noted that the materiality of the misrepresentation and the tendency to influence voter choice are not subjects "susceptible to development through an evidentiary hearing."\(^\text{34}\) "It would be . . . troublesome and difficult to know how one would develop in a hearing whether the statement had a significant impact on the voters' minds."\(^\text{35}\) Instead, the Board relied on the "expertise [it] develop[s] in observing through [its] own eyes and through the eyes of regional personnel directly involved in the conduct of some 9,000 elections a year"\(^\text{36}\) to evaluate the "many intangibles going into such a judgment."\(^\text{37}\) The Board indicated that hearings about effect were not prudent expenditures of its time and money and delayed the resolution of representation proceedings.\(^\text{38}\)

The Board's practice changes the character of effect facts. Although facts about the actual impact are available, for well-established policy reasons, the Board chooses to decide effect by drawing inferences from the conduct facts. Thus, effect becomes more a prediction of fact than actual fact.

Through technical refusals to bargain,\(^\text{39}\) the federal circuit courts also review decisions on objections. Because Board regulations provide the only authority for postelection hearings, the courts use the same "substantial and material factual issues" standard to analyze the need for hearing.\(^\text{40}\) Similarly, the courts require, as the Board does, that the objecting party bear the burden of showing that the election was unfair\(^\text{41}\) and that it present "specific evidence of specific events from or about specific people,"\(^\text{42}\) not assertions that are conclusionary or vague.\(^\text{43}\)

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\(^{34}\) Modine Mfg. Co., 203 N.L.R.B. at 531.
\(^{35}\) Id.
\(^{36}\) Id.
\(^{37}\) Id.
\(^{38}\) "At least we must carefully weigh in the balance whether considerations of protecting the integrity of our elections are, under all the circumstances, sufficiently significant to warrant a further expenditure of public funds, a further investment of the time of our personnel, and, as here, a delay in the commencement of collective bargaining on behalf of the employees by the agent they have selected." Id. at 529-30.
\(^{39}\) See supra note 8.
\(^{40}\) See, e.g., NLRB v. Winburn Tile Mgf. Co., 663 F.2d 44, 46 (8th Cir. 1981); Anchor Inns, Inc. v. NLRB, 644 F.2d 292, 296 (3d Cir 1981); NLRB v. Claxton Mfg. Co., 613 F.2d 1364, 1365, modified, 618 F.2d 396 (5th Cir. 1980).
\(^{43}\) Anchor Inns, Inc. v. NLRB, 644 F.2d at 296; NLRB v. Claxton Mfg. Co., 613 F.2d at 1366.
In contrast to the Board, the circuit courts consider effect fact issues appropriate for hearings. In *NLRB v. Bristol Spring Manufacturing Co.*, the employer alleged that the union made improper payments to employees. The Board overruled the objections without a hearing. The Second Circuit initially noted that "cash payments can, under some circumstances, improperly influence an election." The court conceded that "[t]he nature and timing of the Union payments are both material to the resolution of this proceeding, and undisputed," but found a dispute with regard to the effect of the payments. It held that the dispute about effect necessitated a hearing: "whether and to what extent the payments affected the outcome of the election is a 'substantial and material factual issue' which requires a hearing for its determination."

The Fourth Circuit recently remanded for an evidentiary hearing a case presenting a classic effect issue. In *ARA Services, Inc. v. NLRB*, the regional director concluded that a threat by union advocates did not interfere with the election. Without any indication of conflicting evidence regarding the making of the threat, the court rejected the regional director's decision on the effect issue. "We disagree with the regional director's conclusion that the threats did not create an atmosphere in which free choice was impossible. Indeed, we fail to see how the remarks could not have done so. . . ." The court did not stand on its decision about effect, however, but remanded for a hearing concerning the effect of the threat. "We think the facts asserted by petitioner and the reasonable inferences to be drawn therefrom plainly establish *ex facie* pre-election misconduct which may or may not have clouded the validity of the election and the correctness of certifying the Union as the bargaining agent."

The Sixth Circuit has also rejected the Board's position. The employer in *Eliason Corp. v. NLRB* alleged that a union supporter threatened other employees and then acted as the union observer during the election. The regional director, after her investigation, found that the threats did occur. She concluded, however, that the threats

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44. The courts also direct hearings about conduct facts; but since the Board does as well, not many conduct fact issues reach the courts without hearings. The court held that the employer's affidavits must show not only the alleged threat, but the impact of the threat. *Id.* Thus, the Board succeeded, but on a different rationale than would suggest.

45. 579 F.2d 704 (2d Cir. 1978).
46. *Id.* at 706.
47. *Id.* at 707.
48. *Id.*
49. 712 F.2d 936 (4th Cir. 1983).
50. *Id.* at 937.
51. *Id.* at 938.
52. 688 F.2d 22 (6th Cir. 1982).
“would not likely have an intimidating effect on the voters”\textsuperscript{53} because the union supporter had been drunk and because the threats were unrelated to the campaign. Although the court recognized that the conduct facts were undisputed, it remanded for a hearing:

We conclude that, in light of undisputed facts in the case, Eliason’s contentions and exceptions raise sufficient material questions to warrant a hearing on the central question of whether the union supporter’s activities intimidated workers from voting against the union. We find that the threat on one worker’s life, the threat against Mexican-American employees as a group, the small size of the bargaining unit, and the large percentage of abstentions raise a substantial question of intimidation.\textsuperscript{4}

In \textit{Pinetree Transportation Co. v. NLRB},\textsuperscript{55} the Ninth Circuit ordered the Board to hold a hearing and examine each employee regarding the effect of a Notice of Election posted 102 inches high. The regional director had recommended that the union’s objection to the posting of the notice at that height be sustained, after concluding that the notice would be unreadable at that height or would, at least, discourage employees from reading it. The Board concurred. After the union won the second election, the employer refused to bargain to obtain appellate review of the first objections decisions. The court rejected the regional director’s “personal off-premises examination of a notice posted at that height,”\textsuperscript{56} but also rejected the employer’s inference that the employees were informed: “Whether this inference is the correct one could only be tested by examining each employee. Whether the employees were or were not aware of the posted information is the kind of issue that ordinarily cannot be resolved by an ex parte investigation.”\textsuperscript{57} Consequently, the court remanded for a hearing.

In \textit{Methodist Home v. NLRB},\textsuperscript{58} the Fourth Circuit demonstrated the confusion that results from mixing older precedent using the

\begin{itemize}
  \item \textsuperscript{53} \textit{Id.} at 23.
  \item \textsuperscript{54} \textit{Id.} (emphasis added). \textit{See also NLRB v. Monark Boat Co.}, 713 F.2d 355, 359 (8th Cir. 1983) ("A hearing, however, is necessary to determine whether the work force as a whole, or a significant portion of it, was intimidated. It is also necessary to decide whether those threatened were engaging in bravura when denying their fear or whether the threats were innocuous and did not spawn any fear.")
  \item \textsuperscript{55} 686 F.2d 740 (9th Cir. 1982).
  \item \textsuperscript{56} \textit{Id.} at 746-47.
  \item \textsuperscript{57} \textit{Id.} at 746. The courts’ inclination to direct hearings on effect issues does not always work against the Board. The Eleventh Circuit required one employer to provide effect facts—as opposed to conduct facts—as part of its prima facie case. “The company’s affidavits failed to set out a prima facie showing to the extent they failed to demonstrate that fear affected the voters (step 2), and that but for the year, the election results might have been different (step 3).” \textit{Daylight Grocery Co. v. NLRB}, 678 F.2d 905, 909 n.5 (11th Cir. 1982). The court held that the employer’s affidavits must show not only the alleged threat, but the impact of the threat: \textit{Id.} Thus, the Board succeeded, but on a different rationale that it would suggest.
  \item \textsuperscript{58} 596 F.2d 1173 (4th Cir. 1979).
\end{itemize}
Board's approach and more recent holdings of the courts. The employer alleged, and the regional director found, that a pro-union employee threatened another employee with a knife. The regional director overruled the objection, however, on four grounds: that the incident was a joke, that the incident was unrelated to the election, that the employee was not an agent of the union, and that, in any event, the incident did not create fear or apprehension that might have influenced the result. Only the last was relevant; if the employer could not surmount the Board conclusions of "no effect," the specific ones were moot.

Initially, the court seemed to adopt the Board's approach of drawing inferences about effect from undisputed conduct facts. It quoted a Fifth Circuit opinion rejecting attempts to probe employees' minds about effect:

[D]etecting the subjective reaction of employees to electioneering requires an expedition into the thought processes of the electorate, a journey that administrators and courts are ill-equipped to make. To eliminate this invitation to speculate, the Board should not attempt to plumb the subconscious. Rather, the assay should seek to find whether the questioned action by an election candidate had a tendency to influence the outcome of the election, then the election should be invalidated.

The court rejected the regional director's fourth inference and drew one of its own. "It was misconduct of a serious nature which could be reasonably assumed to influence an election. ..." The court, however, then ignored its own inference. Rather than directly reversing the Board, it held that a determination of whether the incident "could have" affected the election required an evidentiary hearing. In view of the court's earlier rejection of expeditions into the thought process of the electorate, the purpose of the hearing is unclear. Not surprisingly, the court did not suggest the kind of testimony to be presented at the hearing.

Even in the context of misrepresentations, where the Board has fully explained its approach, the circuit courts ignore the Board's con-

59. Id. at 1179.
60. Id. at 1184 n.10 (quoting NLRB v. Gulf State Canners, Inc., 585 F.2d 757, 759 (5th Cir. 1978)).
61. Id. at 1184. The court noted an employee's testimony that the incident provoked a "cold feeling...over the floor" and that everything became very quiet. Id.
62. Id. at 1184.
63. The court may have been seeking a hearing on the external manifestations of the state of mind—the cold and quiet feeling. It did not indicate, however, that any conflicting evidence existed about the feeling on the floor which would prevent using it to infer effect. In any event, testimony about the "general feeling" opens the door to rebuttal evidence of specific effect and interpretations of the cold and quiet atmosphere.
64. See supra text accompanying notes 31-41.
tention that the materiality and the effect of the misrepresentation are not factual issues appropriate for hearings.\(^{65}\) In *Vitek Electronics, Inc. v. NLRB*,\(^ {66}\) the regional director overruled the employer's objections that union literature contained misrepresentations. In his report, the regional director reviewed the facts submitted by the employer and those gathered during the investigation. He concluded that the statements in the literature were either "arguably true" or not substantial departures from the truth.\(^ {67}\) None of the investigative evidence contradicted the facts submitted by the employer.

In its brief to the Third Circuit, the employer did not seek a hearing on the misrepresentations.\(^ {68}\) Rather, Vitek contested the regional director's decision on the merits; it argued that it did not have adequate time to reply and that the misrepresentations were substantial. The employer did not question any of the conduct facts on which the regional director relied.\(^ {69}\)

The court's opinion made clear that it disagreed with the regional director's inference about effect:

> Finally, the statements, insofar as they were (arguably) untrue, were hardly "insubstantial" departures from the truth. . . . The realities of the marketplace render it indisputable that a 61 cent per hour misrepresentation of the wages obtained by the Union for workers in other bargaining units would have been a distortion of sufficient magnitude to exert an impermissible influence on the election results.\(^ {70}\)

Again, the court ignored its own conclusion about effect. Even though the employer had not requested an evidentiary hearing, the court held that effect was a matter to be determined at such a hearing:

> As a result, we do not believe that [the regional director (RD)] could properly determine on the basis of his investigation that, as a factual matter, the audience to which it was addressed would adopt an interpretation other than Vitek's. . . . [W]e conclude that the RD should

\(^{65}\) Although the appropriateness of hearings about misrepresentation may become less significant after *Midland Nat'l Life Ins.*, 263 N.L.R.B. No. 24, the discussion in the text illustrates the courts' approach to directing hearings. Moreover, the courts' receptivity to *Midland* is still undetermined, and, of course, the Board may once again reinstate the *Hollywood Ceramics* doctrine.\(^ {67}\)

\(^{66}\) 653 F.2d 785 (3d Cir. 1981).

\(^{67}\) Report on Objections, Vitek Electronics, Inc., 22-RC-7833, 16, 17, 20 (September 7, 1979). With regard to a statement that the employer had provided "tidbits" such as games and drinks to defeat the union, the Regional Director concluded that each employee was "fully capable of evaluating for himself Petitioner's statement." *Id* at 18.

\(^{68}\) Brief for Vitek Electronics at 20-32, Vitek Electronics, Inc. v. NLRB, 653 F.2d at 785. The employer did contend that the Board should have directed a hearing on its allegations that the union threatened intimidated employees.

\(^{69}\) The employer did contend that the regional director "all but ignored certain evidence presented by the employer." Brief for Vitek Electronics at 27, 30. It appears that the employer's argument went to the weight accorded its evidence and not to the accuracy of any of the regional director's investigative evidence.

\(^{70}\) 653 F.2d at 791.
not have reached his decision without first affording Vitek a hearing in which to challenge the RD's assumption that the handbill would be interpreted by its intended audience consistently with the truth of the underlying facts.\textsuperscript{71}

The Eighth Circuit reached a similar result in \textit{Bauer Welding & Metal v. NLRB}.\textsuperscript{72} In the course of an election, the union had categorically stated that "an employer \textit{cannot} reduce wages or take away benefits such as insurance" and had enclosed a letter from former Board chairman McCulloch stating a similar proposition; McCulloch, however, conditioned his proposition on the establishment of majority status by the union.\textsuperscript{73} The Board concluded that the employer effectively rebutted the union's misrepresentation and overruled the employer's objection. Although the court agreed that Chairman McCulloch's letter was an accurate statement of the law, it found that "it is questionable, however, whether [the employer] could ever effectively or credibly rebut a misstatement buttressed by a document such as Chairman McCulloch's letter."\textsuperscript{74} As a result, the court ordered a hearing on the issue of effect.\textsuperscript{75} Nowhere did the court indicate the existence of any dispute about the conduct facts of either the union's statement or the employer's response.

Not all circuit courts diverge from the Board's approach. The First Circuit, in at least one case, adopted the \textit{Modine} rationale. In \textit{Melrose-Wakefield Hospital Assoc., Inc. v. NLRB},\textsuperscript{76} the court pointed out that the employer could "point to no substantial dispute about what occurred."\textsuperscript{77} The employer only "dispute[d] the legal conclusions to be drawn from the fact of the occurrences and the estimation of the impact on the election." The court concluded that "[s]uch disagreement standing alone does not mandate a hearing."\textsuperscript{78}

Issues of agency present a slightly different situation. Objectors frequently allege that employees are agents of the other party, because

\textsuperscript{71.} \textit{Id.} at 793. In dissent, Judge Higginbotham ignored the procedural issue raised \textit{sua sponte} by the majority. He concluded that the Board's decision on the merits was reasonable. \textit{Id.} at 798 (Higginbotham, J., dissenting). The majority, he argued, failed "to differentiate or appreciate the limited role of appellate review in National Labor Relations Board cases," and their decision "steps over the boundary lines for appellate review and invades the role which Congress gave exclusively to the Board." \textit{Id.} at 796.

\textsuperscript{72.} 676 F.2d 314 (8th Cir. 1982).

\textsuperscript{73.} \textit{Id.} at 319. McCulloch's letter stated that "as a general proposition, an employer cannot reduce wages or take away benefits . . . because the union has established its majority status."

\textsuperscript{74.} \textit{Id.} at 320-21.

\textsuperscript{75.} The court ordered a hearing because "we think the issue is relatively close," and because they had ordered a hearing on other issues. \textit{Id.} at 321.

\textsuperscript{76.} 615 F.2d 563 (1st Cir. 1980).

\textsuperscript{77.} \textit{Id.} at 571.

\textsuperscript{78.} \textit{Id.} The First Circuit has also denied enforcement based on a need for either further investigation or hearing. \textit{NLRB v. Granite State Minerals, Inc.}, 674 F.2d 101, 104 (1st Cir. 1982).
parties are held to a stricter standard of conduct than employees.\textsuperscript{79} The conduct facts for agency issues are the circumstances of the employee's relationship with the principal. The analogous issue to effect facts is the question of agency, but the analogy is imperfect. Agency is a legal description of a relationship; it can never be determined as pure fact, as effect can. Consequently, agency issues are less amenable to testimony than pure effect facts.

The same split, however, occurs between the Board and the courts. Consistent with its approach to effect facts, the Board determines agency issues without hearings if the conduct facts concerning the ties to the party are undisputed. Some courts take the opposite view and require hearings for issues of agency.

In \textit{ATR Wire & Cable Co. v. NLRB,}\textsuperscript{80} the employer submitted fifteen affidavits asserting that pro-union employees threatened other employees and that cars had been vandalized. To prove agency, however, the employer showed only that the threatened were part of a union contact group. Relying on an affidavit from a union organizer which described the relationship between the contact group and the union, the Board found that the members of the contact group were not agents.\textsuperscript{81}

The Sixth Circuit reversed and remanded for a hearing.\textsuperscript{82} The court held that the agency of the contact group employees was a substantial issue, "and its resolution should not have been based on [the union organizer's] affidavit."\textsuperscript{83} Essentially, the employer placed agency in issue merely by presenting one undisputed fact—membership in the contact group. Since the facts in the organizer's affidavit were also undisputed, the issue for hearing was the inference to be drawn from the undisputed conduct facts.

In dissent, Judge Edwards followed the Board's approach. He noted that the employer had not contradicted the investigatory conduct facts but had only questioned the Board's inferences and interpreta-

\textsuperscript{79} See \textit{Salem No. 1, Inc.}, 262 N.L.R.B. 1282, 1282 n.2 (1982); \textit{Central Photocolor Co., Inc.}, 195 N.L.R.B. 839, 839 (1972); \textit{It is unclear whether the stricter standard for agents stems from an assumption that the conduct of parties and their agents affects the vote more than that of employees, or from an assumption that the Board can more effectively sanction the conduct of parties than that of employees. See \textit{NLRB v. ARA Servs., Inc.}, 717 F.2d 57, 66 (3d Cir. 1983).}

\textsuperscript{80} 671 F.2d 188 (6th Cir. 1982).

\textsuperscript{81} \textit{Id.} at 190.

\textsuperscript{82} \textit{Id.} The court also concluded that the Board abused its discretion by not reviewing the affidavits on which the regional director relied. \textit{See infra} text accompanying notes 124-45.

\textsuperscript{83} 671 F.2d at 190. Understandably, the court may have been swayed by the equities before them: fifteen affidavits detailing threats and vandalism had been overcome by an innocuous affidavit describing the contact group. The court, however, had the alternative of disagreeing with the Board's decision about effect notwithstanding the lack of agency and refusing to enforce the decision, rather than remanding it. For a case law lacking these equity considerations, see \textit{NLRB v. West Coast Liquidaturs, Inc.}, No. 83-7121 (9th Cir. Feb. 1984).
tion. He concluded that a hearing was not warranted.

The Ninth Circuit viewed agency from a different perspective but reached the same result in *May Department Stores Co. v. NLRB.* The employer alleged various threats by union adherents. The regional director, after noting that the union trained these employees to answer questions, "concluded, apparently as a matter of law, that the members of the In Plant Organizing Committee were not union agents even in performing misconduct with an apparent intention to serve the union." The court, in remanding the case to the Board, pointed out that some conduct facts tended to negate a finding of agency but determined that the regional director had failed to consider, in a hearing, the adherents' apparent authority—their status in the eyes of the other employees. Thus, the Court wanted the NLRB to probe employee minds to determine the effect of the conduct facts of agency on the other employees.

In summary, the courts interpret "substantial and material factual issues" more broadly than the Board. The Board grants hearings only for issues of conduct fact and otherwise determines effect from undisputed conduct facts. The courts require hearings for issues of both conduct fact and effect fact, as well as for agency, a mixed question of law and fact. Since effect facts determine every objections case, the courts could conceivably remand every objections case decided without a hearing, as long as the employer presented some evidence of imper-

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84. *Id.* at 191 (Edwards, J., dissenting).
85. 707 F.2d 430 (9th Cir. 1983).
86. *Id.* at 433.
87. *Id.* at 434.
88. *Id.*
89. An analogous dispute between the Board and the courts exists in the area of remedial bargaining orders. The Board orders an employer to bargain, without an election, if it determines that the employer's conduct prevents the holding of a fair election. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). As with objection cases, the Board predicts the effect of the employer's conduct through its expertise rather than determining the actual effect through employee testimony. The courts of appeals have split, both within and among the circuits, about how complete the Board's discussion of its conclusion must be. The Board prefers to credit its expertise for the determination, while some of the courts demand "specific, detailed responses upholding its conclusions that an election will not adequately reflect employee preferences and that traditional remedies (e.g., cease and desist orders) are unlikely to erase any hint of coercion occasioned by the employer's unfair labor practices." *NLRB v. Maida'sville Coal Co., Inc.*, 693 F.2d 1119, 1122 (4th Cir. 1982). As with objection proceedings, therefore, the Board and the courts approach the exercise of discretion and the use of expertise to determine effect in very different ways.

For a sample of the arguments about bargaining orders, see the majority and dissenting opinions in *NLRB v. Maida'sville Coal Co., Inc.*, 693 F.2d 1119; *NLRB v. Century Moving & Storage*, 683 F.2d 1087 (7th Cir. 1982); *NLRB v. Pace Oldsmobile, Inc.*, 681 F.2d 99 (2d Cir. 1982); *NLRB v. Eastern Steel Co.*, 671 F.2d 104 (3d Cir. 1982); *NLRB v. Permanent Label Corp.*, 657 F.2d 512 (3d Cir. 1981) (en banc); *NLRB v. Appletree Chevrolet, Inc.*, 608 F.2d 988 (4th Cir. 1979), *on subsequent review*, 671 F.2d 838 (4th Cir. 1982). Compare *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 813-14 (1978) (for decisions of a judgmental nature, "complete factual support . . . is not possible or required").
missible conduct.  

B. Role of the Investigation

The first casualty of the courts’ different standard is the administrative investigation. The Board’s regulations authorize regional directors to act either “on the basis of an administrative investigating or upon the record of a hearing before a hearing officer.” The courts, however, eliminate the need for investigations.

Under the Board’s procedure, the objecting party must submit evidence in support of its objections. The objecting party presents a prima facie case by providing conduct facts that tend to influence the election impermissibly. If the regional director concludes that, even if true, the conduct facts would not warrant setting aside the election, the objections can be overruled immediately. If the conduct facts warrant a new election, the regional director investigates. The investigation may uncover evidence that casts doubt on the truth of the objector’s conduct facts; if so, the director orders a hearing. If the investigation produces other relevant conduct facts which do not undermine the objecting party’s facts, no dispute requiring hearing exists. Accordingly, the regional director decides the objections accepting the conduct facts in both the objecting party’s submission and the investigative affidavits.

The courts’ approach places little value on investigative evidence. Once the objecting party presents a prima facie case, it has shown that an impermissible effect may have occurred. Consequently, unless the opposing party fails to contest the objections, the effect of the conduct is a live issue which, under the courts’ rationale, requires a hearing. Thus, the sole use of the investigation is to assure that the election victor holds an opposite view of the effect of the conduct. The investigative evidence cannot be used to resolve the effect issue raised by the objecting party:

We turn then to consider the effect of an investigation made by the regional director when the objector has met his burden of coming forward and thereby has established a right to a hearing. Once the right to a hearing is established, the investigation is not a substitute for it. The hearing may not be denied on the basis of new information obtained ex parte by the regional director.

90. ATR Wire & Cable Co. v. NLRB, 671 F.2d at 191 (Edwards, J., dissenting). Cases in which the Board found that the alleged conduct was not an impermissible way of influencing votes would not be remanded if the court agreed. If the court disagreed, however, it would have to remand for a hearing about the effect in order to be consistent.

91. 29 C.F.R. § 102.69(d) (1983).
92. 29 C.F.R. § 102.69(a) (1983).
93. See Summa Corp., 265 N.L.R.B. No. 46, slip op. at 4 & n.4.
94. NLRB v. Claxton Mfg. Co., 613 F.2d at 1366 (footnote omitted). See also NLRB v.
C. Form of the Evidence

The Board and the courts also disagree over whether hearsay evidence can necessitate a hearing. The Board will not permit an objecting party to establish a prima facie case using hearsay. In *National Duct Corp.* the employer submitted a hearsay affidavit to prove a threat by the union. The employee-affiant stated that another employee said that the chairman of the employee organizing committee threatened him. The Board refused to consider the hearsay, because the employer made no attempt to ascertain the identity of the threatened employee and did not show why it could not reasonably obtain nonhearsay evidence. The employer therefore had failed to meet its burden of producing evidence, and the Board overruled the objections without a hearing.

Rather than simply reject the hearsay evidence, the Board will often use it as a starting point for the investigation. If the regional director cannot obtain nonhearsay evidence about the alleged conduct, the objecting party is placed in the same position as the employer in *National Duct*; and the Board will overrule the objection. Yet if the Board interviews the declarant and obtains evidence conflicting with the hearsay affidavit, it will ignore the hearsay and rule solely on the nonhearsay testimony. Thus, not only does hearsay fail to present a prima facie case, but also factual conflicts between hearsay and nonhearsay do not warrant evidentiary hearings.

Courts, in contrast, grant hearings in both situations. For example, in *EDS-IDAB, Inc. v. NLRB,* the employer submitted affidavits stating that an employee told the affiants that he had been threatened by a pro-union employee. After the regional director unsuccessfully attempted to interview the threatened employee, he overruled the objections without a hearing. In its brief to the Fifth Circuit, the Board argued that the employer had not submitted any competent evidence of the threat.

The court held that the Board could not refuse to consider the employer's hearsay affidavits. According to the court, an employer, be-

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95. 265 N.L.R.B. No. 50 (November 17, 1982).
96. *Id.* slip op. at 4. The testimony of the threatened employee would not have been hearsay; the threat is the fact in issue and the testimony is not offered to prove the truth of the threat.
98. 666 F.2d 971 (5th Cir. 1982).
100. Brief of the NLRB, at 11, EDS-IDAB, Inc. v. NLRB, 666 F.2d 971 (5th Cir. 1982).
101. 666 F.2d at 974-75.
cause it must rely on the voluntary cooperation of witnesses, has
difficulty obtaining affidavits from employees. In this case, the court
pointed out, even the regional director could not obtain the witness’
cooperation; the Board placed too difficult a burden on the employer.
Using the hearsay evidence, the Fifth Circuit ordered a hearing.102

*Anchor Inns, Inc. v. NLRB*103 presented the second situation: a
conflict between hearsay evidence and nonhearsay evidence. A super-
visor-affiant stated that one employee told him that a pro-union em-
ployee had said that if the employees did not vote for the union, they
would lose their jobs within thirty days. During the investigation, the
pro-union employee testified that he had said if the union won, the
employees would have to join within thirty days or lose their jobs. The
Board relied solely on the pro-union employee’s version to overrule the
objections.104

The court, however, refused to let the Board credit the nonhearsay
evidence over the hearsay evidence: “When material factual issues are
raised in an affidavit alleging specific instances of unlawful conduct by
a party to an election, the allegations giving rise to those issues may not
be disregarded, simply because of their hearsay nature, in favor of evi-
dence gathered during an ex parte administrative investigation.”105
Like the *EDS-IDAB* court, the *Anchor Inns* court noted that employees
need not give information to the objecting party and that hearsay evi-
dence may be all that is available: “As evidenced by the facts of this
case, there are a variety of circumstances that would render the produc-
tion of firsthand accounts of unlawful activity extremely difficult, if not
impossible.”106 The court concluded that the factual conflict between
the hearsay evidence and the nonhearsay evidence required a hearing.

Generally, the courts and the Board have limited their disagree-
ment to the proper role of hearsay in creating factual issues. The Third
Circuit, however, added another dimension to the dispute. In *Season-
All Industries, Inc. v. NLRB*,107 the employer’s objections alleged that
an employee acting as a union agent had improperly electioneered at
an election site.108 The affidavits submitted to the Board by the em-
ployer contained no evidence of agency, a necessary element of the ob-

102. *Id. at 976. See also NLRB v. Nixon Gear, Inc., 649 F.2d 906, 913-914 (2d Cir. 1981),
where the court refused to enforce a Board decision that the hearsay evidence submitted did not
warrant a hearing.
104. *Id. at 298.*
105. *Id.*
106. *Id. at 297.*
108. The Board has ruled that any campaigning or other discussions with voters by a party at
the election site is *per se* objectionable. Michem, Inc., 170 N.L.R.B. 362 (1968).
The regional director's investigation revealed that the employee held no position with the union and was not designated by the union to act as its agent. Therefore, the director concluded that the employee was not an agent and overruled the objection.

The court, in an opinion by Judge Garth, found that the "conflicting evidence" regarding the employee's status necessitated a hearing. The court conceded that the employer's affidavits "did not specifically assert that [the employee] was a union agent," but held that the assertions in the objections themselves "were more than sufficient under the standard . . . to 'prima facie warrant setting aside the election.'" Since courts consider agency to be a factual issue suitable for hearing, the court remanded for a hearing.

Judge Adams dissented. He argued that the employer offered only conclusory allegations of agency and criticized the majority on two grounds. First, he contended that "requiring a hearing in the absence of a factual predicate" created unnecessary delay. Second, he noted that the agency must have discretion to fashion its own rules, and the Board's rule requires a hearing only when facts are in conflict. The majority's rule, he asserted, abrogated the Board's rule and "in its stead . . . substitute[d] a court-crafted rule that there must be a hearing even when the allegations are vague and unsupported."

The Third Circuit initially abided by the Season-All approach in NLRB v. ARA Services, Inc. The ARA Services employer presented an affidavit in which an employee referred to two other employees as "union spokesmen," but gave no other evidence of agency. The regional director, relying on investigative evidence that the two employees were not identified as union partisans during the campaign and that they did not take any action on behalf of the union, concluded that they were not agents.

Judge Garth again wrote for the court. He found two characterizations that provided sufficient evidence of agency to warrant a hearing. First, the employee's reference to the two as "union spokesmen" was "at least sufficient to raise a substantial factual issue" about their status. "His statement could hardly be characterized as 'conclusory or vague.'" Second, the employer had called the two "officers and
agents” in its papers and had thereby raised the issue. As a result, the court remanded for a hearing.

Judge Adams, who dissented in Season-All, concurred in the result, but only because he felt bound by Season-All.\textsuperscript{119} He noted, however, that he failed “to see how such conclusory, unsubstantiated statements properly can be considered proffers of ‘evidence’ at all.”\textsuperscript{120}

Judge Gibbons, on the other hand, completely rejected the Season-All doctrine.\textsuperscript{121} He argued that even when faced with conflicting evidence of agency status, the regional director may decide the issue based on an investigation.\textsuperscript{122} He concluded that the two characterizations did not provide evidence in support of agency status. Gibbons ended with criticism of Judge Garth: “If this record requires an evidentiary hearing, then 29 C.F.R. § 102.69(d) has been distorted so as to require an evidentiary hearing for every objection to the conduct of an election. That, obviously, is where the author of the opinion announcing the judgment of the court wants to take us.”\textsuperscript{123} The disagreement in the circuit, manifested by Adams’ concurrence and Gibbons’ dissent, led to a reconsideration \textit{en banc}.

In the subsequent \textit{en banc} opinion, Judge Gibbons gathered the support of five other judges and wrote the opinion for the court.\textsuperscript{124} His opinion reviews, at length, the procedure for objections and judicial review and draws on the analysis in his initial dissenting opinion. Although he decided the case under NLRB rules in effect at the time the objections were filed, specifically the rule which left the decision whether to hold a hearing to the discretion of the regional director,\textsuperscript{125} he noted that the decision would be the same under the new regulations.\textsuperscript{126} Judge Gibbons again concluded that the designation of employees as pro-union in the affidavits did not create an issue as to agency status:

Even if the Board’s rules had adopted the “no genuine issue of material fact” standard of Rule 56(c), it is questionable whether ARA, by furnishing the statements of Woodruff and Smith, raised such an issue as to agency status. But certainly it was not an abuse of discretion for the regional director to conclude that no “substantial and material factual issue” as to that status was raised.\textsuperscript{127}

\textsuperscript{119. Id. at 447-48 (Adams, J., concurring).} \textsuperscript{120. Id. at 447 (Adams, J., concurring).} \textsuperscript{121. Although Judge Gibbons attempted to distinguish Season-All, realistically, his opinion contradicts Season-All.} \textsuperscript{122. Id. at 451 (Gibbons, J., dissenting).} \textsuperscript{123. Id. at 453 (Gibbons, J., dissenting).} \textsuperscript{124. 717 F.2d 57 (3d Cir. 1983).} \textsuperscript{125. Id. at 63-64. See supra text accompanying notes 14-16.} \textsuperscript{126. Id. at 64 n.3.} \textsuperscript{127. Id. at 67.}
Judge Gibbons attempted to distinguish *Season-All* by noting that the regional director in that case failed to comment on the evidence regarding agency status. He recognized some inconsistency, however, and stated that "[a]nything in the *Season-All* opinion which suggests that it announces a different standard of review than we have applied in this in banc case must in the future be disregarded." It appears, therefore, that Judge Gibbons has brought the Third Circuit in line with the others.

**D. Proper Record for Review**

Upon the filing of exceptions by a party, the Board reviews the regional director's decision on objections. The review has two elements. The Board first determines whether the regional director improperly resolved any factual issues without a hearing. If not, the Board evaluates the regional director's decision on the merits using the facts as stated in the director's report. The excepting party bears the burden of showing an improper resolution of a factual issue without a hearing or an erroneous decision on the merits.

When exceptions are filed, the regional director transmits the record to the Board. The Board's old regulations, before September 15, 1981, defined the record as:

The notice of hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, exceptions, documentary evidence, together with the objections to the conduct of the election or conduct affecting the results of the election, . . . any briefs or other legal memoranda submitted by the parties, the decision of the regional director, if any, and the record previously made [in the pre-election unit determination proceedings].

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128. Id. at 68.

129. Id.

130. Judge Garth, in dissent, claimed that Judge Gibbons "has first given a virtually unreviewable status to the determinations of the Regional Director and the Board, and second, in approving this two-level discretionary review, has failed to provide any standard by which the unbridled discretion granted to the Regional Director and the Board, may be measured and thus reviewed." Id. at 74 (Garth, J., dissenting). Garth again argued that the designation by the affiant of the employees as "union spokesmen" provided sufficient evidence for an evidentiary hearing: "Woodruff specifically identified the 'union spokesmen' involved and the threats they used. He referred to the three different occasions and named employees who were present. His statement could hardly be characterized as 'conclusory or vague.'" Id. at 80. Judge Garth also criticized the regional director for failing to assume the truth of the objecting party's allegations. Id. at 81.


132. Id. at 74 (Garth, J., dissenting).

133. Id.

134. 29 C.F.R. § 102.69(g)(2) (1982).

135. 29 C.F.R. § 102.69(g) (1980). These regulations did not provide separate definitions of
The Board's new regulations are more precise; they specifically exclude witness affidavits:

In a proceeding pursuant to this section in which no hearing is held, the record shall consist of the objections . . . any report on objections or on challenged ballots and any exceptions to such a report, any regional director's decision on objections or challenged ballots and any request for review of such a decision, any documentary evidence, excluding statements of witnesses, relied on by the regional director in his decision or report, any briefs or other legal memoranda submitted by the parties, and any other motions, rulings or orders of the regional director.136

To show factual issues warranting a hearing, the excepting party may "support its submission to the Board by appending thereto copies of documentary evidence, including copies of any affidavits, it has timely submitted to the regional director and which were not included in the report or decision."137 The party's submissions become a part of the record.138 The Board compares the facts stated in the regional director's report to those in the affidavits to discern any factual issue.

The Board refuses to include all witness affidavits in the record for three reasons. First, for the limited decision of whether factual issues exist, the excepting party can show issues through a comparison of its affidavits and the regional director's statement of facts.139 Second, the affidavits must be held confidential to encourage witness cooperation with the Board.140 Third, the Board hopes to avoid "assum[ing] the objecting party's burden and conduct[ing] a 'fishing expedition' into the investigatory file for evidence which the objecting party has failed to identify."141

Unlike the Board, the courts focus on the second element—the review of the regional director's holding on the merits. The courts reject the notion that the Board can fairly review the decision without the underlying evidence relied on by the regional director: "The Regional Director, in making his report, relied upon evidence which was unavailable to petitioner and which has not been made available either to the Board or to us. . . . The potential for mischief in such a procedure

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137. 29 C.F.R. § 102.69(g)(3) (1983). Witness affidavits are confidential; thus, the parties do not have access to the affidavits taken by the Board personnel during their investigation or to the affidavits submitted to the regional director by the other party. See NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 239-41 (1978).
139. Summa Corp., 265 N.L.R.B. No. 46, slip op. at 3-5.
140. Id., slip op. at 3; 46 Fed. Reg. 45,922 (Supplementary Information) (September 15, 1981).
141. Summa Corp., 265 N.L.R.B. No. 46, slip op. at 5.
must be altogether apparent." The courts are also concerned about their ability to review the Board's order. As a result, where the Board has not reviewed all the evidence, the courts will ignore the factual findings and "construe the 'well pleaded factual assertions . . . most favorably to [the excepting party]." Some courts found that the Board's old regulation provided authority for including the witness affidavits in the record: "any reasonable interpretation of 'documentary evidence' includes all portions of affidavits or other documents that are relevant to the evidentiary basis of the regional director's decision and recommendation." The Fifth Circuit found constitutional support: "[T]o exclude such documents from the record would raise serious due process problems." As also pointed out by the Fifth Circuit, 28 U.S.C. § 2112(b) may require that at least the courts possess the affidavits. The courts reject the Board's argument for confidentiality on the ground that the contents have been used in the regional director's decision, thereby negating their confidentiality. However, they would permit the regional director to excise the affiant's name and other irrelevant information. The Board's recent amendments to its regulations remove the courts' primary justification; the regulations can no longer be construed to include the affidavits in the record. In the future, therefore, the courts may have to confront directly the requirements of constitutional due process.

142. Prestolite Wire Div. v. NLRB, 592 F.2d at 306 ("It is apparent to us that any fair consideration of the 73 objections filed by Prestolite would be impossible without review of the underlying documentation."). Accord NLRB v. Klingler Elec. Corp., 656 F.2d 76 (5th Cir. 1981). Compare Reichert Furniture Co. v. NLRB, 649 F.2d 397, 398 (6th Cir. 1981) (failure of regional director to transmit the affidavits excused where employer's objections did not present substantial challenge to election).

143. Kitchen Fresh, Inc. v. NLRB, 716 F.2d 351, 356 (6th Cir. 1983); NLRB v. Klingler Elec. Corp., 656 F.2d at 84-85; Prestolite Wire Div. v. NLRB, 592 F.2d at 306.


146. NLRB v. Klingler Elec. Corp., 656 F.2d at 84. See also cases cited therein.

147. Id. 28 U.S.C. §2112(b) (1976) requires that the record in proceedings to review or enforce orders of administrative agencies include the evidence, or specified portions of it, before the agency.

148. NLRB v. Klingler Elec. Corp. 656 F.2d at 82-83.

149. Id. at 82, 83 n.8.

150. See supra text accompanying notes 135-36.

151. See Zimmerman & Dunn, supra note 15, at 8. In NLRB v. West Coast Liquidaturs, Inc., No. 83-7121 (9th Cir Feb. 9, 1984), the court concluded that application of the Board's new regulation is unreasonable when the employer has no access to the investigated affidavits, and refused to enforce the Board's order on that basis. Under this rationale, the regulation would always be "unreasonable." The court cited no authority for refusing to abide by the Board's regulation.
The courts may be altering the review process in another way. Although the Board’s regulations limit the record on review to evidence submitted to the regional director, some courts might allow a proffer of new evidence to the Board. In *NLRB v. Tennessee Packers, Inc.*, the employer asserted that the Board had erroneously denied a hearing on the union’s objections. While discussing the procedure for obtaining a hearing, the court stated:

The exceptions must state the specific findings that are controverted and must show what evidence will be presented to support a contrary finding or conclusion. . . . To request a hearing a party must, in its exceptions, define its disagreements and make an offer of proof to support its findings contrary to those of the Regional Director. . . . [I]t was incumbent upon [the employer] to state what evidence it would produce to establish that the conclusions were incorrect.

The court found that no issues existed and enforced the Board’s order. The opinion does not refer to any new evidence not submitted to the regional director, but taken literally, it encourages new proffers. The court does not mention the Board’s limiting regulation.

Several courts have recently cited the above language from *Tennessee Packers*. The courts are apparently concerned that because the investigation is confidential, the objecting party has no opportunity to respond to the investigative evidence before the regional director issues a decision. So far, however, no court has specifically held that proffers of new evidence are permitted.

### Suggested Resolution of the Disputes

Congress recognized that representation proceedings require swift resolution and tried to streamline the process. The disputes between

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152. 29 C.F.R. § 102.69(g)(3) (1982).
154. *Id.* at 178.
155. 29 C.F.R. § 102.69(g) (1967).
157. *See* *Prestolite Wire Div. v. NLRB*, 592 F.2d at 306 (“[T]he Director’s report and recommendation referred . . . to affidavits and other evidence which were not made available to Prestolite and which neither it nor the Board has yet seen.”).
158. *See* *AFL v. NLRB*, 308 U.S. 401, 409-10 (1940); *NLRB v. Sun Drug Co.*, 359 F.2d 408, 414 (3d Cir. 1966). The need for speedy representation proceedings was originally founded on the need for early elections, so that union support did not dissipate. *See* *Boire v. Greyhound Corp.*, 376 U.S. 473, 478-79 (1964); *H.R. Rep. No. 972, 74th Cong., 1st Sess. 5; S. Rep. No. 573, 74th Cong., 1st Sess. 14 (“Section 9(d) makes it absolutely clear that there shall be no right to court review anterior to the holding of an election.”). The desire for expeditious processing has been expanded to postelection proceedings so that the commencement of collective bargaining on behalf of the employees by the agent they have selected or the signalling of the end of a union campaign where the majority have decided not to select a union as their representative will not be
the Board and the courts serve only to frustrate that intent. The courts' tendency to grant more hearings causes delay by requiring the Board to decide objections twice—once before and once after the remand. Moreover, the courts' broader standard encourages losing parties to file more objections and pursue them longer. Conversely, by refusing to adopt the courts' approach, the Board encourages parties to seek judicial review more often. The courts and the Board must resolve their differences to eliminate this wasteful and detrimental procedure.

The threshold question is whether the courts possess the authority to interpret the regulations differently than the Board. The Supreme Court has severely limited judicial review of agency procedural regulations. In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, the Court stressed the deference the courts must give:

> Absent constitutional constraints or extremely compelling circumstances the "administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"¹⁵⁹

Although the *Vermont Yankee* holding concerned rulemaking procedures, the Court indicated that the agencies' procedural discretion applies to all functions:

> Even apart from the Administrative Procedure Act this Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments."¹⁶⁰

The Court's rationale, that agencies can better design procedural rules because of their familiarity with the regulated constituency and the necessary tasks,¹⁶¹ has merit for all types of agency procedures.

Agency interpretations of procedural regulations should receive the same deference. An agency's interpretation of its own regulation operates as a modification of the regulation and, like the regulation, is based on the agency's familiarity with the industry and its tasks. Furthermore, "[a]n administrator is in a special position to determine his own intent or his agency's own intent."¹⁶² The agency could achieve the same effect through use of its authority to amend the regulations.

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¹⁶¹. Id. at 525.

Two sources of judicial authority to interpret the regulation differently than the Board emerge. The first, mentioned in *Vermont Yankee*, is the presence of any constitutional requirements. The second, review for abuse of discretion, is strictly limited. The lack of post-election procedures in the National Labor Relations Act\(^{163}\) gives the Board “a wide discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.”\(^{164}\) The courts may ensure, however, that the Board has exercised its discretion within the policies of the Act and that the regulations are not “without justification in law or in reason.”\(^{165}\)

### A. Constitutional Considerations

The Board and the courts do agree on one result: the Board regulations satisfy all constitutional requirements. In determining constitutionality, however, the Board and the courts examine the regulations pursuant to their own interpretations. Without analysis, the Board has held that “[i]t is clear that this qualified right to a hearing is consistent with all statutory and constitutional requirements.”\(^{166}\) Further, the Board Manual simply instructs regional directors: “Since there is no statutory requirement for a hearing on objections or challenges, the primary concern of a regional director is to afford the parties the constitutional standard of due process.”\(^{167}\)

The courts hold that the regulations, as they interpret them, provide the minimum due process required.\(^{168}\) Because they held that due process required a hearing on substantial and material factual issues,\(^{169}\) they construed the Board’s old regulations to eliminate the discretion

167. NLRB REPRESENTATION CASE MANUAL § 11396.2.
168. See, e.g., NLRB v. Bata Shoe Co., 377 F.2d at 825. Before the Board established the right to a hearing on “substantial and material factual issues,” the Fifth Circuit held that the regional director could not constitutionally decide “strongly contested issues of voting eligibility” without a hearing: “We find no logical justification either in the Act, the Board rules and regulations, or the consent election agreement for thus extending the discretionary powers of the Board or Regional Director so as to impair and infringe upon a party’s constitutional rights.” NLRB v. Sidran, 181 F.2d 671, 673 (5th Cir. 1950). See also NLRB v. Joclin Mfg. Co., 314 F.2d 627, 631 (2d Cir. 1963).
169. NLRB v. Claxton Mfg. Co., 613 F.2d at 1365; NLRB v. Smith Indus., Inc., 403 F.2d 889, 892 (5th Cir. 1968) (“This administrative standard is also the constitutional standard under due process clause.”).
provided to the regional director.\textsuperscript{170} In the absence of factual issues, however, neither the regulations nor the constitution requires a hearing: "If there is nothing to hear, then a hearing is a senseless and useless formality."\textsuperscript{171}

The Third Circuit has reached a different conclusion regarding the constitutional need for hearings on objections. In \textit{ARA Services}, Judge Gibbons held that the Board’s regulations provide significantly more process than the Constitution requires:

What sort of factual investigation is required by due process depends upon a number of variables . . . . Certainly the inquisitorial model of procedure selected by Congress for certification matters in section 159(c) of the Act satisfies due process even though the hearing officer, under 29 C.F.R. §102.64(a) merely reports, without resolving credibility issues or making recommendations. \textit{A fortiori} investigations of election irregularities, which are entirely creatures of Board regulation, do not require evidentiary hearings satisfying Rule 56(c) standards. The governmental policy being implemented is employee free choice of bargaining representative, not employer freedom from collective bargaining. \textit{Board supervision and Board investigation} with no provision for a hearing on employer complaints would be perfectly consistent with due process for employers. There are instances in which due process requires that an agency afford an adversarial mode of procedure and an evidentiary hearing, in preference to an ex parte inquisitorial process. Determining the basic fairness of an election, however, is not such an instance.\textsuperscript{172}

Judge Gibbons’ provocative remarks, and the lack of thorough analysis by the Board and the courts, demonstrate a need for more complete consideration of the constitutional requirements placed on the Board.

The due process clause is activated only by a deprivation of a life, liberty, or property interest (i.e., a fundamental right).\textsuperscript{173} Certification of a union, the final result of a representation proceeding, constitutes official recognition of the employees’ preference to be represented. A certification only announces an existing fact; it does not deprive any party of a protected liberty or property interest.

Whether to be represented by a union is solely the choice of the employees; the employer has no cognizable interest in whether they choose a representative or in whom they choose. Employer-employee relationships are contractual. The employer may not contract with the employees in any way it chooses. Just as any party to a potential contract can designate a representative for the negotiations, employees can

\textsuperscript{170} \textit{See supra} note 42.
\textsuperscript{171} \textit{NLRB v. Air Control Prods.}, 335 F.2d 245, 249 (5th Cir. 1964).
\textsuperscript{172} \textit{NLRB v. ARA Servs., Inc.}, 717 F.2d at 67 (3rd Cir. 1983) (emphasis added).
\textsuperscript{173} \textit{Mathews v. Eldridge}, 424 U.S. 319, 332 (1976); \textit{U.S. Const. amend. V}. 
designate unions as their representative.\textsuperscript{174} The lack of an employer interest allows Congress to prohibit employer interference with employee choice without impinging on any constitutional right.\textsuperscript{175}

The Supreme Court has recognized that governmental action threatening the loss of indirect benefits does not provide a procedural due process claim to one indirectly affected. In \textit{O'Bannon v. Town Court Nursing Center}, the Court held that patients in a nursing home are not deprived of any interest in life, liberty, or property by a governmental decision to decertify the nursing home of its eligibility for reimbursement under Medicare or Medicaid.\textsuperscript{176} The Court pointed to “[t]he simple distinction between government action that indirectly affects a citizen’s legal rights, or imposes a direct restraint on his liberty, and action that is directed against a third party and affects the citizen only indirectly or incidentally.”\textsuperscript{177} Having long “recognized the principle that the due process provision of the Fifth Amendment does not apply to the indirect adverse effects of governmental action,”\textsuperscript{178} the Court concluded that “the fact that the decertification of a home may lead to severe hardship for some of its elderly residents does not turn the decertification into a governmental decision to impose that harm.”\textsuperscript{179}

An employer in a certification proceeding is in a position analogous to that of the patients in \textit{O'Bannon}. The employer may be affected by the certification, but the action is one solely to determine employee choice. The employer’s interest is incidental. The Seventh Circuit has aptly shown the insufficiency of the employer’s interest:

The employer’s interest and his great concern about whom the employees shall have as their representative for bargaining purposes are early demonstrated as very unsubstantial. Suppose the stockholders of the respondent company or any corporation were holding a stockholders’ meeting for the purpose of electing the bargaining representative of the stockholders, namely, the directors; and suppose fraud, forgery and sharp dealing of many kinds were used in the procurement and handling of the stockholders’ proxies in such an election. Would the em-

\textsuperscript{174} NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33, 44 (1937).
\textsuperscript{176} 447 U.S. 773, 787-89 (1980).
\textsuperscript{177} Id. at 788.
\textsuperscript{178} Id. at 789.
\textsuperscript{179} Id. Justice Blackmun, in his concurring opinion, argued that “the indirect character of a harm at least normally has to do with whether state action has ‘deprived’ a person of a protected interest, not with whether a protected interest exists.” Id. at 793 n.3. Under either the majority’s or Blackmun’s analysis, the result is the same: the third party is not entitled to due process. \textit{See also} Dialysis Centers, Ltd. v. Schweiker, 657 F.2d 135, 139 (7th Cir. 1981) (plaintiff was not deprived of due process by a refusal of its request to intervene in the licensing proceeding of a potential competitor).
employer be likely to tolerate the protest of its employees, who were not stockholders, that the election was crooked or invalid? In what forum in this land of ample legal machinery could the employees be heard to challenge the election of the stockholders’ representative for collective bargaining? This reverse statement of the case shows how ephemeral and unsubstantial the employer's objection is.\(^{180}\)

Certification does, however, impose obligations on the employer.\(^{181}\) Of primary importance, it requires the employer to bargain with the chosen representative,\(^{182}\) a duty the Board enforces through unfair labor practice findings and remedial orders. Still, neither the obligation to bargain nor its enforcement through unfair labor practice proceedings deprives the employer of any fundamental right. The duty to bargain imposes no obligation on the employer to enter into any agreement. The Supreme Court has stressed the limited nature of the duty:

The [National Labor Relations] Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer “from refusing to make a collective contract and hiring individuals on whatever terms” the employer “may by unilateral action determine.” The Act expressly provides in § 9(a) that any individual employee or a group of employees shall have the right at any time to present grievances to their employer. The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel. . . . The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them.\(^{183}\)


\(^{181}\) The Court has recognized that certification affects the employer. See, e.g., AFL v. NLRB, 308 U.S. 401, 408 (1940) (“[W]e attribute little importance to the fact that the certification does not itself command action. Administrative determinations which are not commands may for all practical purposes determine rights as effectively as the judgment of a court. . . .”). See also Brotherhood of Ry. & S.S. Clerks v. Association for the Benefit of Noncontract Employees, 380 U.S. 650, 667 (1965) (certification “might impose some additional burdens on the carrier.”).


\(^{183}\) The Supreme Court employed the language of “fundamental rights” in its initial analysis of due process issues posed by the NLRA. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. at 33, 43-47. See also Texas & New Orleans R.R. v. Brotherhood Ry. & S.S. Clerks, 281 U.S. at 570-71. The NLRA’s requirement that the employer bargain with representatives of a majority of the employees of any appropriate unit was expressly held not to be an unconstitutional interference with the employer’s freedom of contract under a similar logic. Precision Casting Co. v. Boland, 13 F. Supp. 877 (W.D.N.Y. 1936), aff’d, 85 F.2d 15 (2d. Cir. 1936). To elucidate the freedom of contract concepts explored here, the language of “fundamental rights” is again employed. If con-
Thus, the bargaining obligation deprives an employer of only the ability to ignore its employees' representative, which is not an abridgement of a fundamental right sufficient to trigger procedural due process protections.  

The duty to bargain has another element: an employer cannot unilaterally alter working conditions without first discussing the change with the union. After certification, the employer does not have the same freedom of action. This deprivation does not reach a constitutional level, however. First, it is only a temporary restriction. Second, the employer controls the means to regain the ability—all it must do is bargain. Third, the employer's ability to make unilateral changes in the first place stems from the peculiar nature of the employment situation; other contractual situations preclude unilateral changes of terms. The Act simply removes the adhesive nature of the employment contract relationship. The ability to demand contracts of adhesion cannot be termed a fundamental right. Properly viewed as a contractual matter, therefore, the temporary abrogation of the employer's ability to make unilateral changes does not amount to a substantial deprivation of any fundamental right.

One commentator has suggested that employers have a constitutional interest in "maintaining the integrity of the elections process and protecting [their] employees from the subversion of their Section 7 rights through unlawful union practices." Neither of these interests, however, describes fundamental employer rights. The employer's interest in "maintaining the integrity of the elections process" is no more than a generalized interest in efficient government—an interest that normally cannot even provide standing to challenge agency action. It is unlikely, therefore, that an interest in the elections process constitutes a fundamental right.
tutes a fundamental constitutional interest. The purported interest in protecting employees is self-serving paternalism; it attempts to bootstrap employer constitutional rights from the statutory rights of employees. The employer can have no constitutional interest in assuring the accuracy of a decision from which it is specifically excluded. Further, the employees have statutory procedures available to insure their section 7 rights; they need not depend on the employer for protection. In any event, an erroneous certification decision may not violate any employee rights. The dissenting majority can control the bargaining strategy, remove the union's authority to contract for a union security clause, and decertify the union after a year. Thus, the effect of the erroneous certification can be minimized; an employee majority cannot be compelled to participate or contribute to the union. If the employees' rights are not violated, an employer cannot claim a derivative constitutional deprivation.

An examination of the procedures of the Railway Labor Act also reveals that certification does not affect the constitutional rights of employers. The National Mediation Board (NMB) accepts employer participation in representation proceedings, but does not give employers party status. Moreover, the NMB has no formal procedure for

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188. Virginian Ry. Co. v. System Fed'n No. 40, 300 U.S. 515, 558 (1937). See also Texas & New Orleans R.R. Co. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548, 571 (1930) ("As the carriers subject to the Act have no constitutional right to interfere with the freedom of the employees in making their selections, they cannot complain of the statute on constitutional grounds.").

In Bell & Howell Co. v. NLRB, 598 F.2d 136 (D.C. Cir.), cert. denied, 442 U.S. 942 (1979), the Court granted standing to an employer to contest a certification based on allegations that the union discriminated against women. The Court recognized that the standing was essentially derived from the employees' rights, 598 F.2d at 143, but concluded that without standing, the certification may be insulated from review and its own enforcement might run afoul of the Supreme Court's prohibition of government enforcement of discriminatory behavior in Shelley v. Kramer, 334 U.S. 1 (1948). The standing granted in Bell & Howell is distinguishable from an employer's challenge to a certification based on objections. The employer in Bell & Howell was not challenging the Board's determination regarding majority preference, which is essentially an investigatory function. Revocation or denial of certification based on alleged discrimination, in contrast, is more in the realm of punishment. In addition, neither the Board nor the courts need be concerned about a Shelley v. Kramer problem in objections cases. In any event, the fact that an employer may possess standing to bring the claim in no way indicates that a fundamental right of the employer is endangered.


191. Moreover, the employer can file unfair labor practice charges at any time to protect its employees from "unlawful union practices."


postelection objections, and the Railway Labor Act does not prescribe any unfair labor practices. The Supreme Court, however, has upheld the NMB's summary representation proceedings against constitutional challenge. If the NMB can constitutionally withhold hearings in their certification decisions, and even all formal objection procedures, the NLRB can do likewise.

Where no fundamental right is at stake, constitutional due process is not required. Accordingly, an objecting party possesses no constitutional right to a hearing. As the Third Circuit held, the Board could eliminate all hearings on objections to representation elections and remain within the confines of due process. The courts' attempt to reinterpret the Board's regulations, therefore, is not justified by the Constitution.

B. Policy Considerations

The courts still may reject the Board's approach if the regulations, or the interpretations of these regulations, are "without justification in law or in reason." The lack of statutory standards and the procedural nature of the regulations require that the courts review the regulations with great deference. Although such deference is appropriate, the policies underlying the approaches of the Board and courts should be examined to determine the most efficient procedures.

1. Definition of Factual Issues

The key dispute between the Board and the courts is whether hear-

195. Eischen, supra note 193, at 32.
197. Although only employer rights have been examined in the text, an objecting union also is not deprived of any right by not being certified. Since employees can pay dues irrespective of certification, the union denied certification loses only the chance to obtain dues from all employees pursuant to a union security clause. Because a union security clause must be accepted by the employer before becoming effective, 29 U.S.C. § 158(a)(3) (1976), and can be removed by the employees, 29 U.S.C. § 159(e)(2) (1976), the possibility of harm is too speculative to warrant constitutional recognition.
198. NLRB v. ARA Servs., Inc. 717 F.2d at 67.
200. Not only does the National Labor Relations Act fail to provide any authority for post-election hearings, but also the Administrative Procedure Act expressly excludes certifications from its provisions for hearings. 5 U.S.C. § 554(a)(6) (1976).
201. To some extent, this review overlaps the second part of the due process analysis. If certification abridged a fundamental right, the following factors would have to be balanced to determine the constitutional requirements: (1) the private interest; (2) the risk of an erroneous deprivation and the probable value of other procedural safeguards; and (3) the Government's interest, including the fiscal and administrative burdens imposed by the new safeguards. Mathews v. Eldridge, 424 U.S. at 335. The same factors of accuracy and cost will be examined as policy considerations.
ings should be held about the effect of allegedly coercive conduct on the election. The answer depends on the proper standard for identifying objectionable conduct: whether the Board should discover the actual effect of the alleged conduct or use its experience to predict the probable effect of the conduct. The latter appears to be the better view.

Determinations of actual effect require testimony about voting preferences; employees must divulge whether they changed their vote after the conduct at issue. The objective approach, on the other hand, requires only that employees testify about what they saw or heard. The Board then decides, using its expertise, whether such conduct was likely to have affected the election.

The necessity for secret ballots requires the predictive approach used by the Board. Disclosing voting choices goes against the strong national policy and statutory command for secret ballots. Moreover, examination of voter changes of preference months after the election can amplify the divisiveness and unrest normally present during objection proceedings; employees cannot give non-partisan testimony. Most importantly, employees become more susceptible to coercion if they know their votes will be revealed. Employees may either succumb at the ballot box, since the coercing party will later find out the employee's choice, or may simply testify that they voted in accordance with the coercion, although they did not. Thus, both the election results and the subsequent objections proceedings become less trustworthy.

The courts' approach also imposes a great burden on the Board. Whether through investigation or hearing, the Board would have to interview all employees or, at least, the number of employees constituting the margin of victory. Such an obligation wastes the Board's resources and delays the processing of representation proceedings even further.

Testimony from employees about the actual effect, if truthful, reveals more accurately whether the election reflects employee free will. Yet the accompanying costs—infringements upon the secrecy of the ballot, reductions in the likelihood of truthful testimony, and increases in the Board's workload—outweigh the increase in accuracy. The Board possesses the requisite experience and expertise, acquired through forty-five years of weighing the factors relevant to effect, to evaluate accurately the probabilities that such conduct affected the election. Moreover, even to those skeptical about the Board's expertise, the objective standard should be preferable to requiring disclo-

203. See, e.g., Vitek Electronics, Inc. v. NLRB, 653 F.2d at 792 n.8. It should be noted that those who make the initial determinations of effect, the Board's regional personnel, generally pos-
sure of employee preferences. The courts permit the Board to
determine the tendency to coerce in the unfair labor practice context; 204
no reason exists why the Board cannot similarly use its expertise to
decide the effect of objectionable conduct in representation elections.
Thus, the Board correctly relies on its experience and expertise to de-
terminate the probable effect of the conduct. 205

Use of the objective method to decide effect facts creates differ-
ences in the method of resolving conduct fact and effect fact issues. For
conduct facts, each witness may tell a different story. As a result, “is-
issues of witness credibility and witness veracity . . . are critical to the
decision making process.” 206 The Supreme Court has recognized that
evidentiary hearings provide the best method for resolving credibility
disputes. 207 Accordingly, the Board and the courts properly direct
hearings for conduct fact issues.

Determining the probability of effect, however, eliminates the use-
fulness of hearings about effect facts. Since actual effect is irrelevant,
the decision-maker has no need for employee testimony concerning the
effect of the conduct on them. Given undisputed conduct facts, the
Board possesses all the information necessary to decide the probable
effects; its judgment is “essentially an experienced prediction based on
a host of variables.” 208 Since the conduct facts are undisputed, holding
a hearing simply to allow the parties to cross-examine witnesses about

204. See, e.g., Henry I. Siegel Co. v. NLRB, 417 F.2d 1206, 1214 (6th Cir.), cert. denied, 398

205. The Supreme Court has permitted agencies to determine facts of a judgmental nature
based on the agency’s expertise, rather than through factual inquiry on the record. In FCC v.
National Citizens Comm. for Broadcasting, the Court refused to set aside an FCC order for not
disclosing the extent to which divestiture of a broadcast-newspaper combination would threaten
the policies of the statute. Rather the Court found that the decision was of a judgmental nature,
and “complete factual support . . . is not possible or required.” 436 U.S. 775, 813-14 (1978).


207. Id. at 344. See also Califano v. Yamasaki, 442 U.S. 682, 697 (1979), where the Court
noted that credibility decisions were important in Social Security overpayment situations, and that
“written submissions are a particularly inappropriate way to distinguish a genuine hard luck story
from a fabricated tall tale.”

208. Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 16 (1979). In Greenholtz, inmates
challenged parole procedures. The Court rejected the suggestion that hearings should be provided
for every parole-release decision because the decision was essentially an educated prediction. See
also K. Davis, Administrative Law Treatise § 13:12 (Supp. 1982) (“If the question is some-
what factual but is mixed with ‘purely subjective appraisals,’ then trial procedure is unneces-
sary.”).

For misrepresentations, the Board has noted some of the many “intangibles going into such a
judgment.” It may consider the degree of the sophistication of the voters, the character of the
work force, and the reputation and relative strength of the employer or union. “All of these
factors, whether they be labeled ‘common sense’ or ‘expertise,’ help mold our conclusions in such
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conduct facts wastes time and money.\textsuperscript{209} The example used above is illustrative here.\textsuperscript{210} The employer presented evidence that a union agent threatened employees. The union countered with evidence that the agent was drunk and argued that the drunken threat had no effect on the election. Neither party attempted to rebut the evidence of the threat or of drunkenness. What benefit would a hearing provide? Cross-examination about the threat is wasteful; no one denies the agent made it. Similarly, the drunkenness of the agent is undisputed. The only issue remaining is the effect on the employees who heard the threat. Effect is an issue of fact, but inasmuch as the standard is the probable effect of the threat on employees, the Board can decide the case on the basis of the evidence it gathered during the investigation.

The same result applies to determinations of agency. Once the Board has all the facts about the employees’ relationship with the union, if the facts are undisputed, the Board can decide the issue. Moreover, employees can testify competently only about the conduct facts of agency; unlike effect issues, the conclusions of agency involve legal concepts suitable for the Board or courts. Consequently, the courts’ tendency to require hearings about agency issues when the conduct facts are undisputed wastes time and money and does not increase the accuracy of the decisions.

Perhaps the circuit courts did not intend to require employee testimony about their votes. Instead, the courts may have intended to provide hearings any time the objecting party presented a \textit{prima facie} case of objectionable conduct—in other words, conduct facts that indicated an impermissible effect—through still intending that the Board determine the effect objectively. Thus, a \textit{prima facie} showing would entitle the party to a hearing on all the facts. If so, the courts have placed an

\textsuperscript{209} Limiting hearings to credibility issues has support from labor law practitioners. The Chairman’s Task Force on the NLRB recommended a new standard for hearings on objections: “If the investigation discloses that there are disputed issues of material fact \textit{which turn on credibility}, the investigation will cease and the parties will be notified that the hearing will take place.” Chairman’s Task Force on the NLRB, Interim Report and Recommendations 20 (1976) (emphasis added). The Board rejected the proposal on other grounds. Memorandum from Chairman Fanning to Task Force 4 (May 25, 1977).

\textsuperscript{210} Some courts have compared the decision of whether to grant a hearing to a summary judgment decision. \textit{See}, \textit{e.g.}, NLRB v. Monark Boat Co., 713 F.2d 355, 358 (8th Cir. 1983). The Board’s method of deciding, however, is not closely analogous to a summary judgment decision. To grant a summary judgment, a court must find that no factual issues exist. \textit{See} \textit{Fed. R. Civ. P. 56(c).} In the objections situation, there is clearly a factual issue regarding effect; the question is how to resolve the issue—through hearing or investigation. \textit{See} NLRB v. ARA Servs., Inc., 717 F.2d at 67 (rejecting employer’s contention that standard for objections hearings is the same as summary judgment standard).
unnecessary burden on the Board. If each of the conduct facts is undisputed, then a hearing on these facts duplicates the investigative process without reducing the risk of errors. Granting hearings for all prima facie cases would delay an already overburdened process.211

Another possible explanation of the courts' recent trend is that courts are using procedural issues to hide their disagreement with the Board's conclusions about effect issues. Language in two opinions suggests this possibility. In Methodist Home v. NLRB,212 the regional director concluded that a threat had been a joke and therefore had no effect on the election. The court plainly disagreed with this finding:

One would have to have an almost bizarre turn of mind to regard such action as a joke. . . . The incident itself cannot be said to carry the imprint of a joke. The person who was the victim showed unmissakenly that she did not regard it as a joke. . . . Only [the threatener]—and the Regional Director—would characterize the incident as a joke.213

The court, however, remanded for determination of the issue in a hearing. Similarly, in Vitek Electronics, Inc. v. NLRB,214 the Third Circuit antagonistically rejected the regional director's interpretation of union literature: "Even the Board's reputed expertise in labor matters cannot prompt us to accept the [regional director]'s conclusory determination that Vitek's workers would be likely to interpret the phrase 'to keep pace with' in such a way as to render the Union's hand-bill congruent with the truth."215

The courts may disguise disagreements on the merits as procedural holdings because of the different standards of review. Both the Vitek Electronics court and the Methodist Home court state that the procedural issue, whether factual issues for hearing exist, is a "question of law and ultimately a question for the courts."216 Review of the merits, in contrast, requires deference to the Board under either the substantial evidence or abuse of discretion standard.217 Thus, the courts find it eas-

211. See ATR Wire & Cable Co. v. NLRB, 671 F.2d 188, 191 (6th Cir. 1982) (Edwards, J., dissenting) ("The current delay in Board and court processing of union certification disputes (currently two years and nine months in this case) is already completely inconsistent with the purposes of the National Labor Relations Act. For the courts routinely to return all election disputes for hearings will create a strong tendency to take labor/management industrial conflicts out of the National Labor Relations Board and judicial processes and return them to the streets.").
212. 596 F.2d 1173 (4th Cir. 1979).
213. Id. at 1180-81.
215. Id. at 792 (footnote omitted).
216. Id. at 791; Methodist Home v. NLRB, 596 F.2d at 1179. See also NLRB v. Bata Shoe Co., 377 F.2d at 826.
217. See discussion in Mosey Mfg. Co. v. NLRB, 701 F.2d 610, 614-15 (7th Cir. 1983); NLRB v. ARA Servs., Inc., 717 F.2d at 68 ("Considering that the law respecting electioneering atmosphere is Boardmade law, and that the regular directors and the Board have far more expertise in
ier to justify the procedural rationale.

Such an approach is intellectually dishonest. The courts can overturn on the merits if it is warranted; they can disagree with the Board's conclusions about effect. Certainly a holding that requires a "bizarre turn of mind" is infirm under any standard and should be reversed. Hiding behind the "substantial and material factual issues" approach creates confusion and distorts the entire objections process.

2. Role of the Investigation

The courts' approach may also stem from a reluctance to use investigative evidence regarding conduct facts not seen by the objecting party; they require hearings to prevent the Board from using investigative evidence to contradict an objecting party's prima facie showing. If this is the reason for hearings, the courts' distrust is unwarranted. An affidavit made under oath and in confidence to a Board agent in a relaxed setting can be as reliable as testimony given in a hearing. Some witnesses may feel more comfortable lying to a single Board agent; but for others, the presence of employer or union officials at a hearing may be intimidating and cause false testimony. In any event, by directing hearings for credibility questions, the Board provides a safeguard against intentional fabrications to its investigators. Since the Board asks only about conduct facts, any lies will be about conduct facts. In a thorough investigation, other testimony should contradict false statements, and the Board will direct a hearing. Thus, where there is no dispute, the Board can properly rely on investigative evidence to overrule or sustain objections.

The accuracy of the Board's reliance on investigative evidence assumes one important procedure. After independently gathering evidence or receiving evidence from the election victor, the objecting party must have the opportunity to respond to any new conduct facts raised. Often the investigation will uncover evidence of additional conduct not covered by the objector's initial presentation; in the example above, evidence of drunkenness may only come up once the union submits its defense. The objecting party should be given the chance to dispute the added facts. Otherwise, the Board would be blindly accepting the testimony of some witnesses but not those of the objecting party. The Board need not disclose the investigative affidavits nor its evidence on judging the effect of threats on employee free choice than we do, we cannot say that these rulings were an abuse of discretion.

218. See supra text accompanying notes 213-14.

219. See Bauer Welding & Metal Fabricators, Inc. v. NLRB, 676 F.2d 314, 316 (8th Cir. 1982) (At hearing, "the testimony of witnesses may be subject to the 'cleansing rigors of cross-examination.' "); NLRB v. Winburn Tile Mfg. Co., 663 F.2d at 47.
conduct facts covered by the objector's initial submission, as long as it confronts the objecting party with the additional allegations.

3. Form of the Evidence

The crucial dispute regarding the types of acceptable evidence concerns the weight to be accorded hearsay evidence. First, however, the Third Circuit's *Season-All* doctrine will be examined.

Judge Garth, in both *Season-All* and the first decision in *ARA Services*, insisted that assertions without supporting sworn testimony presented sufficient evidence of a factual issue to warrant a hearing. Contrary to Judge Garth's protestations, the assertions in both cases were conclusions; they simply called employees union agents. A finding of agency, however, requires underlying facts concerning the relationship between the employer and union. Neither employer presented any evidence about the relationship.

Requiring hearings for such conclusory assertions wastes the Board's resources. The risk of error does not decrease. If supporting evidence cannot be submitted prior to hearing, it probably could not be submitted at hearing. The cost to the Board, on the other hand, is tremendous. Every objection states conclusions; the Board would be required to hold a hearing in every case. The Board's procedure weeds out frivolous, unsupportable objections and eliminates a stalling device.

An employer's dependence on the voluntary cooperation of employees for evidence does not justify the *Season-All* rule. First, the Board does not bar employers from questioning employees; it is well settled that with appropriate procedural safeguards, an employer may interview employees in preparation for litigation. Second, the more widespread the awareness of the objectionable conduct, the greater the likelihood that it affected the election results. Consequently, the employer's chances of obtaining employee cooperation increase with its chances on the merits; the inability to get employee testimony may be harmless. More importantly, the front-line supervisors may know about the conduct, and the employer may require supervisors to testify. As a result, the employer should be able to obtain some testimony, at least hearsay, regarding the incident. In any event, where the employer can demonstrate complete inability to obtain evidence, the Board's regional offices may accept a proffer of evidence and contract the wit-

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220. 654 F.2d 932 (3d Cir. 1981); See supra text accompanying notes 108-300. As noted, the *Season-All* doctrine may already have been reversed in the *en banc* proceeding, 717 F.2d 57, 77 n.11 (Garth, J., dissenting).

221. *Season-All Indus.*, Inc. v. NLRB, 654 F.2d at 939.

222. W.W. *Grainger*, Inc., v. NLRB, 677 F.2d 557, 559 (7th Cir. 1982).
nesses themselves. Accordingly, the Board's insistence on evidence of conduct facts, rather than mere conclusions, is justified.

The employer, however, does not have full and free access to evidence. For this reason, evidentiary conflicts created by hearsay warrant hearings. Consideration of hearsay increases the accuracy of objection determinations; otherwise, valid objections may be overruled because of one particular employee's refusal to cooperate with the employer. The Board's function in representation proceedings extends beyond simply adjudicating a dispute between the employer and union; its role is to assure the accuracy of elections. Ignoring hearsay and strictly adhering to burden of proof requirements transform the Board into an adjudicator, and it no longer acts as the overseeing administrator of elections.

Thus, when hearsay conflicts with nonhearsay, the Board should provide a hearing. In addition, when hearsay provides the only evidence of an incident and there is no denial, the Board should also direct a hearing. Setting aside the election based solely on hearsay might give it too much credence; providing a hearing enables the Board and the parties to obtain nonhearsay evidence through the use of subpoenas.

Accepting hearsay would not burden the Board greatly. The objecting party must still support its objections, and, as discussed below, the Board can limit the kinds of hearsay considered. Inasmuch as Board proceedings, and representation proceedings in particular, are not restricted by the technical rules of evidence, allowing hearsay comports with Board policy.

The Board may choose to limit the circumstances allowing consideration of hearsay. For example, the Board might accept only one level of hearsay. Similarly, the Board could refuse to consider statements attributed solely to "rumors" or those not attributed at all.

Limiting hearsay by levels, however, requires the drawing of arbitrary lines. A better approach would discard hearsay if the Board obtains the testimony of all the participants in the incident. If all agree on what was said or what occurred, the Board could disregard a conflicting version based on hearsay. A hearing would not increase accuracy; if all agree, then the incident likely occurred in the manner related. If the participants disagree, then a factual conflict exists regardless of the hearsay. This limit also encourages the Board to investigate the allegation fully.

The Board has already recognized one limit on accepting hearsay. In *National Duct Corp.*, the Board did not consider hearsay evidence of a threat because the employer did not show why it could not obtain direct testimony or at least identify the alleged threatener.225 Thus, the Board appears to be willing to consider hearsay in some situations. Although the Third Circuit rejected this limit in *Anchor Inns*,226 the limit provides a fair solution. The employer must attempt to obtain firsthand testimony, but, when impossible, it can rely on hearsay evidence. The burden is appropriately placed on the party seeking to have the election set aside, but the Act's restrictions on employer activity are not used to the employer's prejudice. Before generally relying on this limitation, however, the Board should publicize it or promulgate an appropriate regulation so that the parties recognize their obligation.

4. **Record on Review**

The Board's regulations exclude witness affidavits from the record transmitted from the regional director to the Board. To demonstrate that the regional director improperly resolved factual conflicts without a hearing, the parties may submit their witness affidavits.227 This procedure suffices for the parties to bring any factual issues to the Board's attention; the Board can compare the witness affidavits to the facts in the regional director's report.

Regional directors, however, consider and rule on any evidence of objectionable conduct found during their investigations, even if the conduct was not alleged by the objecting party.228 These affidavits taken by the regional offices are never transmitted to the Board, since neither party has access. Thus, the Board cannot determine whether the regional director improperly resolved any factual conflicts about unalleged conduct.

The Board's record on review also precludes effective review of the merits of the regional director's decision, even for conduct alleged by the parties. Appellate review, essentially the Board's function in this situation, traditionally includes review of factual determination, albeit with deference to the lower forum.229 The Board, however, grants absolute deference; it accepts the facts as stated by the regional director.230 Even though the parties have the opportunity to show conflicts, the Board may not know of some evidence that may be crucial. For instance, the Board would not be aware of conduct facts gathered inde-
pendently by the region but either inadvertently or purposely excluded from the regional director's report. In addition, the record limits the Board to the regional director's paraphrasing of the investigative affidavits; the Board might interpret the statements differently if seen in context.231

The accuracy and protection given to elections by including affidavits in the record outweigh the additional burden on the Board. The burden consists of the time and money spent reproducing the affidavits and the time spent by the Board and its staff reviewing them. The time spent, however, insures full review for all objection decisions based on investigatory evidence. At a minimum, full review enhances the Board's integrity and reputation for accuracy and fairness.

In addition to requiring the affidavits for full review, the courts insist on inclusion of the affidavits in the record so that the parties may see the evidence against them.232 The Board argues that the affidavits need to be kept confidential.233 The Supreme Court has recognized the importance of protecting the identity of witnesses; the courts must accommodate this interest.234

The Fifth Circuit provided one solution: it allowed the regional director to excise the affiant's name and other nonrelevant portions before the affidavits become part of the record.235 The witness' identity should not be more discernable from the excised affidavit than from the regional director's discussion of its contents. To prevent abuses in excision,236 the Board and the courts could receive the unexcised affidavits.

Alternatively, providing the full affidavits to the Board and nothing to the parties may suffice. Confidentiality is maintained, and the Board can engage in full review of the regional director's decision. The parties would each know the facts against them because they are included in the regional director's report. If the Board finds that the regional director neglected material facts in the investigative affidavits, it can advise the parties and remand the case to the regional director or discern whether the error was harmless. This procedure should meet all constitutional standards. If the regional director can constitution-

231. Effective review may be further hampered by the Board's internal procedures. Rarely will the regional director personally review the investigative affidavits; Board agents and their supervisors perform that function. Consequently, the factual determinations are made by those who do not receive the public awareness of responsibility. Although time and budget constraints require this delegation of responsibility, it magnifies the need for an additional level of review of the investigative affidavits.
232. Prestolite Wire Div. v. NLRB, 592 F.2d at 306.
233. Summa Corp., 265 N.L.R.B. No. 46, slip op. at 3.
236. See id. at 83 n.8.
ally decide objections using confidential affidavits, the Board should be able to do the same.

Confidentiality may not warrant as much protection at the appellate court level. Technically, the court reviews unfair labor practice decisions, and the Board normally discloses the affidavits of those witnesses who testify at unfair labor practice hearings.\textsuperscript{237} Moreover, court review occurs years after the election. The passage of time should decrease the disincentives from testifying recognized by the Court in \textit{Robbins}.\textsuperscript{238} Thus, disclosure at the court level may not have the adverse effects predicted by the Board. In any event, the option of submitting excised affidavits remains available.

Some circuit court cases indicate that the courts wish to allow the objecting party to submit new evidence to the Board on review.\textsuperscript{239} Such a practice is inefficient. Providing the objecting party with an opportunity to respond to the investigative evidence before the regional director issues a decision eliminates the need for new evidence.\textsuperscript{240} The regional director's factual findings would not surprise the objecting party, and the Board would avoid performing the initial review of evidence. Most importantly, it assures that both parties had equal opportunities to present their best case and to persuade the regional director that conduct facts are in issue.

\section{5. \textit{Summary}}

The procedures for objections outlined in this paper should satisfy all constitutional requirements and provide an expeditious method of resolving objections fairly. Because many variations in procedure have been discussed, a summary of those suggested follows.

After receiving the objections and the objecting party's supporting evidence, the regional office considers whether the evidence presented, if true, warrants setting aside the election. If not, the regional director immediately dismisses the objections. If a \textit{prima facie} case has been presented, the region solicits witnesses from the other party and seeks out, on its own, any other relevant witnesses. The investigator then returns to the objecting party, describes any new evidence of additional conduct, and provides an opportunity to present rebutting evidence.

Once the region has collected all the evidence, the regional director determines whether any conduct facts are in dispute. Hearsay, to a limited extent, can create a factual issue. If the director finds such an

\footnotesize{\textsuperscript{237} The affidavits are disclosed upon motion of the respondent. 29 C.F.R. § 102 118(b)(1) and (2) (1983).}
\textsuperscript{238} See supra note 137.
\textsuperscript{239} See supra text accompanying notes 141-56.
\textsuperscript{240} See supra text accompanying notes 211-15.}
issue, a hearing is quickly provided. If the investigatory file contains only undisputed conduct facts, even if they support opposite conclusions, the regional director decides the merits of the objections; he draws conclusions about the effect of the election from an objective analysis of the conduct facts.

Upon the filing of exceptions, the regional director transmits the entire investigative file, including affidavits, to the Board. The parties do not receive copies of the affidavits or, at most, receive the affidavits with identifying portions excised. The Board decides, first, whether the regional director correctly concluded that no conduct fact dispute exists, and, second, whether the regional director correctly decided the merits, both factually and legally. Appellate courts, in subsequent technical section 8(a)(5) proceedings, review the Board’s two determinations with appropriate deference.

CONCLUSION

Judge Henry Friendly has remarked that:

In the mass justice area the Supreme Court has yielded too readily to the notions that the adversary system is the only appropriate model and that there is only one acceptable solution to any problem, and consequently has been too prone to indulge in constitutional codification. There is need for experimentation, particularly for the use of the investigative model . . .

In the context of objections to union representation elections, the appellate courts are similarly guilty. Their refusal to accept the Board’s approach demonstrates an unwillingness to rely on investigative evidence; they also have yielded too readily to the notion that a complete hearing is vastly preferred. The nature of the certification decision, the Board’s role as the protector of free elections, and the Board’s expertise in the area strongly recommend against routinely providing adversary hearings. Investigations provide a faster, more efficient, and less polarizing manner of determining the fairness of an election. For the most part, the Board has fairly balanced the interests of employees, the public interest, and the risk of inaccurate decisions. In this situation, therefore, the courts should heed the words of the Supreme Court in Vermont Yankee: agencies are not only expert in their particular substantive area but also in devising effective procedures to fulfill their purpose.

For its part, the Board cannot simply institute procedures and refuse to budge in the face of contrary policy reasons. The Board’s defensive reactions to criticism, such as amending its regulations to assure that they could not be interpreted to include affidavits in the record, are
not helpful; in that particular example, the Board has only forced the constitutional question. The investigative process is not fully developed and, as Judge Friendly noted, must grow with experimentation. The Board must welcome constructive criticism and disagreement, for such discussion provides new ideas and new procedures.

Most importantly, the Board and the courts must be more explicit. Both hide behind the magic phrase "substantial and material factual issues"; neither recognizes nor confronts the other's interpretation of the term. The differences must be brought into the open for discussion and analysis. Only then will the board and the courts be able to resolve their disputes and permit the certification process to function efficiently.