

24-2818

**In the United States Court of Appeals
For the Second Circuit**

NATIONAL LABOR RELATIONS BOARD,
Petitioner

V.

NEXSTAR MEDIA GROUP, INC.,
Respondent, and

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES &
TECHNICIANS – COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,
Intervenor.

On Petition for Enforcement and Cross-Petition for Review of an Order From the
National Labor Relations Board

NLRB Case No.: 03-CA-332930

RESPONDENT’S REPLY BRIEF

Dean Kpere-Daibo
CONSTANGY, BROOKS, SMITH & PROPHETE, LLP
680 Craig Road, Suite 400
St. Louis, Missouri 63141
dkdaibo@constangy.com - Tel. (314) 338-3740
Counsel for Respondent

TABLE OF CONTENTS

Table of Authorities ii

Preliminary Statement..... 1

Summary of the Argument..... 2

Argument..... 3

I. The Board Argues it Can Ignore the Courts 3

II. Board Procedures Prevent Employers from Meeting Their Burdens 5

Conclusion 9

Certificate of Service 10

Certificate of Compliance 11

TABLE OF AUTHORITIES

Cases

| | |
|---|------|
| <i>Bourne v. NLRB</i> , 332 F.2d 47 (2d Cir. 1964) | 7 |
| <i>Decator v. Paulding</i> , 14 Pet. 497 (1840)..... | 4 |
| <i>Loper Bright Enter. v. Raimondo</i> , 603 U.S. 369 (2024)..... | 4 |
| <i>Manhattan Ctr. Studios, Inc. v. NLRB</i> , 452 F.3d 813 (D.C. Cir. 2006)..... | 3 |
| <i>Marbury v. Madison</i> , 1 Cranch 137 (1803) | 4 |
| <i>Medo Photo Supply Corp. v. NLRB</i> , 321 U.S. 678 (1944)..... | 5 |
| <i>Multimedia KSDK, Inc. v. NLRB</i> , 303 F.3d 896 (8th Cir. 2002) (en banc) | 3 |
| <i>NLRB v. Black Bull Carting, Inc.</i> , 29 F.3d 44 (2d Cir. 1994) | 5 |
| <i>NLRB v. Blue Sch.</i> , No. 23-6305, 2024 WL 4746378 (2d Cir. Nov. 12, 2024)..... | 6, 7 |
| <i>NLRB v. Bristol Spring Mfg. Co.</i> , 579 F.2d 704 (2d Cir. 1978) | 6 |
| <i>NLRB v. Firedoor Corp.</i> , 291 F.2d 328 (2d Cir.), cert. denied 368 U.S. 921 (1961) | 7 |

NLRB v. Milco, Inc.,
388 F.2d 133 (2d Cir. 1968) 7

NLRB v. Springfield Hosp.,
899 F.2d 1305 (2d Cir. 1990) 5

N.J. v. Bessent,
149 F.4th 127 (2d Cir. 2025) 4

Sec. and Exch. Comm’n v. Jarkesy,
603 U.S. 109 (2024)..... 7

Serv. Emp. Int’l Union Loc.
32BJ v. NLRB, 647 F.3d 435 (2d Cir. 2011) 3

Title Guarantee Co. v. NLRB,
534 F.2d 484 (2d Cir. 1976) 6

Board Decisions

Republic Elec., Inc.,
266 NLRB 852 (NLRB 1983) 5

Statutes

29 *U.S.C.* § 161 6

Regulations

29 *C.F.R.* § 102.31 6

29 *C.F.R.* § 102.66 7

Other Authorities

The Federalist No. 78 (A. Hamilton) 4

PRELIMINARY STATEMENT

The grounds for this appeal are simple: Nexstar seeks only the opportunity for a fair and open hearing on issues arising from the underlying election. The Board’s opposition makes clear that it does not want Nexstar asking questions about its personnel conduct, elections, or the ability of Regional Directors to summarily decide which evidence can and cannot be tested at a hearing.

The positions the Board takes in its briefing have substantial implications. This includes the Board’s insistence that the only precedent it needs to consider is “its own.” Accepting this argument amounts to the forfeiture of the Judiciary’s constitutional obligation to check and balance the Executive and Legislature by carrying out its duty to “say what the law is.”

The Board also contends that Nexstar failed to meet its burdens during administrative proceedings. This argument ignores the reality that Nexstar’s ability to meet its burdens is controlled by the Board’s self-imposed prohibitions on pre-hearing disclosure and by the National Labor Relations Act’s limitations on employers’ ability to question their employees.

The arguments submitted here on reply, like arguments presented in Nexstar’s opening brief, make clear that the Board impeded Nexstar’s ability to make its case during administrative proceedings. This goes beyond the Board’s legitimate—and

limited—authority to impose case management policies and procedures and merits reversal of the Board Order appealed.

SUMMARY OF THE ARGUMENT

Nexstar is mindful that the purpose of reply is not to simply reiterate arguments made in opening briefs. To that end, the arguments presented to reply are limited to addressing the Board’s opposition papers.

First, Nexstar addresses the Board’s contention that it was not under an obligation to consider *Multimedia KSDK, Inc. v. NLRB*, 303 F.3d 896 (8th Cir. 2002) (en banc). The Board’s argument is that the United States Court of Appeals' decision is not binding because it is not the Board’s “own” precedent. This position is inconsistent with the Judiciary’s constitutional role of “saying what the law is.”

Second, Nexstar addresses the Board’s contentions that it “failed to meet its burden” during administrative proceedings. In making this argument, the Board ignores that it places extreme limitations on employers’ ability to gather and present evidence. The Board cannot use its rules and procedures as a means to create a self-fulfilling prophecy.

ARGUMENT

I. The Board Argues that it Can Ignore the Courts

In its briefing, the Board contends that it is under no obligation to follow the precedent established by *Multimedia KSDK, Inc. v. NLRB*, 303 F.3d 896 (8th Cir. 2002) (en banc). Specifically, the Board argues that “*Multimedia* neither bound the Board nor involved a legal issue presented in this case” and that it “was not obligated to address it. (Br. 17).

The Board argues that *Multimedia* is not precedential because it is a decision “of a nonbinding court.” (Br. 18). This argument relies on *Manhattan Ctr. Studios, Inc. v. NLRB*, 452 F.3d 813, 816 (D.C. Cir. 2006) and its holding that “[t]he Board cannot ignore its own relevant precedent but must explain why it is not controlling.” The Board also relies on *Serv. Emp. Int’l Union, Loc. 32BJ v. NLRB*, 647 F.3d 435, 442 (2d Cir. 2011) and its holding that the courts “examine whether an agency decision accurately reflects its own case law.”

From these authorities, the Board concludes that it is only bound by its own precedents. What the Board is arguing for is an unconstitutional echo chamber in which it alone determines what the law is, without oversight. The Supreme Court has made clear that agencies may no longer refuse to accept judicial oversight.

Article III of the Constitution establishes that the Federal Judiciary, and *only* the Federal Judiciary, is empowered to interpret the laws. *Loper Bright Enter. v. Raimondo*, 603 U.S. 369, 385 (2024) (*citing* The Federalist No. 78, at 525 (A. Hamilton) (“interpretation of the laws” is the “proper and peculiar province of the courts”). This is why the Judiciary exercises its judgment independent from the influence of the political branches—the Executive and the Legislature. *Id.*

Under this clear constitutional standard, “[i]t is emphatically the province and the duty of the judicial department to say what the law is.” *Id.* (*quoting* *Marbury v. Madison*, 1 Cranch 137, 177 (1803)). Where, as here, the meaning of a statute is at issue, the Judiciary alone has the authority to “interpret the act of Congress, in order to ascertain the rights of the parties.” *Id.* (*quoting* *Decatur v. Paulding*, 14 Pet. 497, 515 (1840)). This Court, of course, follows the law and honors its obligation to “use every tool at [its] disposal to determine the best reading of the statute and resolve the ambiguity.” *N.J. v. Bessent*, 149 F.4th 127, 136 (2d Cir. 2025) (*quoting* *Loper*, 603 U.S. at 400).

Were this Court to accept the Board’s argument, it would mean that the Board has free reign to set its own precedents and follow only those precedents. This would leave the Board free to ignore the reasoned judgment of this Court, or its sister courts such as the United States Court of Appeals for the Eighth Circuit. The Board’s

argument, therefore, fails because, functioning as a part of the Executive Branch, it cannot reasonably expect that it is not subject to the Judiciary's oversight.

II. Board Procedures Prevent Employers from Meeting Their Burdens

In its papers, the Board contends that Nexstar has failed to meet its burden during Board proceedings to support its objections as to the challenged voter list and the substantial pecuniary or other benefits offered by NABET during the critical period. (Br. 28, 237-38, 40-43). This is an argument premised on the Board's efforts to hide behind its own procedural rules, which prevent open and fair litigation of election integrity issues.

A party seeking to overturn an election must carry a "heavy burden." *NLRB v. Black Bull Carting, Inc.*, 29 F.3d 44, 46 (2d Cir. 1994). In meeting this heavy burden, the acts of the party seeking to overturn an election must be beyond reproach. *NLRB v. Springfield Hosp.*, 899 F.2d 1305, 1312 (2d Cir. 1990) (applying the unclean hands doctrine). Employers must therefore act within the limitations imposed by the National Labor Relations Act ("NLRA") to proffer evidence of improper election activity. *Id.* (citing *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 687 (1944) (employers cannot act improperly to "disestablish [a] union"); see further *Republic Elec., Inc.*, 266 NLRB 852, 853 (NLRB 1983) ("a party to an election is ordinarily estopped from profiting from its own misconduct").

To obtain a hearing on election irregularities, employers must present *prima facie* evidence demonstrating the existence of “substantial and material factual issues,” which, if resolved in the employer’s favor, would require setting aside an election. *NLRB v. Bristol Spring Mfg. Co.*, 579 F.2d 704, 706-707 (2d Cir. 1978). Even where an employer presents “legitimate questions” as to the conduct of an election, this heavy burden still heavily favors the Board’s purported discretion. *NLRB v. Blue Sch.*, No. 23-6305, 2024 WL 4746378, at *2 (2d Cir. Nov. 12, 2024).

Despite this high standard, employers are allowed only a limited tool set to present a case to overturn an election.

The Board enjoys broad subpoena powers and investigatory authority. *See* 29 U.S.C. § 161(1) (allowing the Board and its personnel “access to, for the purpose of examination, and the right to copy any evidence of any persons being investigated or proceeded against” through subpoena power); *see further* 29 C.F.R. § 102.31(a). Employers (and unions) have no right to investigate facts through discovery before a hearing. *Title Guarantee Co. v. NLRB*, 534 F.2d 484, 487 (2d Cir. 1976). This limitation stems from rules the Board made for itself and likely deprives employers of the procedural protections that arise from a fair, open exchange of information before a hearing. *Id.*; *see Sec. and Exch. Comm’n v. Jarkesy*, 603 U.S. 109, 143-144

(2024) (Gorsuch, J., concurring) (a lack of discovery “stacked the odds” against a party before an administrative agency).

While employers can attempt to discuss the facts of a union organization campaign or an election with their employees, doing so carries the risk of committing an unfair labor practice. *NLRB v. Milco, Inc.*, 388 F.2d 133, 137-138 (2d Cir. 1968) (questions “directed at the individual’s own position and sympathies...may not be dismissed as idle inquiries concerning the overall election prospects”). Any inquiry to an employee that goes beyond generalities and into specific facts or issues carries this risk. *See Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964) (generalized inquiries such as “[h]ow is the union is doing?” are permissible, but specific inquiries such as “[w]ho has joined?” are not); *see further NLRB v. Firedoor Corp.*, 291 F.2d 328, 331 (2d Cir.), *cert. denied* 368 U.S. 921 (1961) (employers may permissibly ask if employees to belong to a union to “check the union’s claim to represent a majority,” but cannot ask “whether named fellow workers belong”).

Employers are thus limited to making an offer of proof. 29 *C.F.R.* § 102.66(c). An offer of proof “shall take the form of a written statement...identifying each witness the party would call to testify concerning the issue and summarizing each witness’s testimony.” *Id.*; *see Blue Sch.*, 2024 WL 4746378, at *4 (to meet the

“threshold requirements for a hearing,” an offer of proof must indicate who will testify and summarize their anticipated testimony).

Here, Nexstar submitted an offer of proof that complied with the Board’s standard and did not violate the NLRA’s prohibition on coercive interrogation or offend the Board’s self-made ban on pre-hearing disclosures. [App. 40-49]. The offer of proof identified five (5) witnesses who could offer first-hand testimony. [*Id.*]. This included: (a) Mr. Miller’s instruction that voter lists be kept face down so observers could not track who had and had not voted and his contradictory offer to allow the parties to photograph a list of names of challenged voters; (b) Mr. Miller’s distribution of such photographs between voting sessions; (c) the Union’s dissemination a promise to lower dues for supporters; and (d) an open Union supporter’s admission that lowered dues were intended to save employees money and that this benefit was within the Union’s power to confer. [*Id.*].

The Board contends this offer of proof failed to meet Nexstar’s burden. This, as outlined above, ignores the severe limitations the Board imposes on employers and their ability to find a “smoking gun” of wrongdoing the Board apparently expects. This is inconsistent with basic notions of fairness and due process and merits at least a remand to the Board with an instruction to conduct a hearing after a reasonable opportunity to develop a factual record.

CERTIFICATE OF SERVICE

I certify that, on February 18, 2026, I electronically filed the foregoing *Respondent's Reply Brief* via ECF and thus served counsel of record to all parties electronically. True and correct copies of the same have been via email on the following:

Ruth E. Burdick, Deputy Associate General Counsel
Jared Odessky, Attorney
Usha Dheenan, Attorney
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570
Email: Ruth.Burdick@nlrb.gov
Jared.Odessky@nlrb.gov
Usha.Dheenan@nlrb.gov

Kate M. Swarengen, Esq.
Melissa S. Woods, Esq.
Cohen, Weiss & Simon
903 3rd Avenue, 12th Floor
New York, New York 10022
Email: kswarengen@cwsny.com
mwoods@cwsny.com

Judiann Chartier, Esq., General Counsel
NABET-CWA, AFL-CIO
501 Third Street NW, Suite 1000
Washington, D.C. 20001
Email: jchartier@cwa-union.org

/s/ Dean Kpere-Daibo
Dean Kpere-Daibo
Counsel for Respondent/Cross-Petitioner

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this document complies with the typeface, type-style, and length requirements established by Local Rule 32.1 and *Fed. R. App. P.* 32(a) because it contains is under fifteen (15) pages and contains 1,778 words, excluding those exempted by *Fed. R. App. P.* 32(f), which are proportionally-spaced, 14-point Times New Roman font, and the word-processing software used was Microsoft Word for Office 365.

CONSTANGY, BROOKS, SMITH & PROPHETE, LLP
Counsel for Respondent/Cross-Petitioner
Nexstar Media, Inc.,

By: /s/ **Dean Kpere-Daibo**

Dean Kpere-Daibo
680 Craig Road, Suite 400
St. Louis, Missouri 63141
dkdaibo@constangy.com
Tel. (314) 338-3740

Dated: February 18, 2026