In the

United States Court of Appeals

For the Seventh Circuit

No. 22-1122

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

and

THEATRICAL STAGE EMPLOYEES UNION, LOCAL NO. 2, I.A.T.S.E.

Intervening Petitioner,

v.

JAM PRODUCTIONS, LTD., EVENT PRODUCTIONS, INC., STANDING ROOM ONLY, INC., and VICTORIA OPERATING CO.,

Respondents.

Application for Enforcement of an
Order of the National Labor Relations Board.
No. NLRB-1, No. 13-CA-284761

ARGUED NOVEMBER 1, 2022 — DECIDED APRIL 27, 2023

Before ROVNER, BRENNAN, and SCUDDER, *Circuit Judges*.

BRENNAN, *Circuit Judge*. Over six years ago, employees of Jam Productions, Ltd., voted to certify the Theatrical Stage Employees Union, Local No. 2, as their bargaining representative. Jam filed an objection to the election results, which the National Labor Relations Board overruled. In a prior opinion, this court granted Jam's petition for review and instructed the Board to hold an evidentiary hearing on the objection. *Jam Prods., Ltd. v. NLRB*, 893 F.3d 1037 (7th Cir. 2018). The Board did so, and then overruled Jam's objection again. Now back before this court, the Board once more seeks enforcement of its order compelling Jam to bargain with Local 2. We discern no reversible error in the Board's decision to overrule Jam's objection and certify the election, so we grant its application for enforcement.

I

A

Jam Productions, Ltd.,[1] produces and hosts live events at venues in and around Chicago. This case centers on stagehands at the Riviera Theatre, one of Jam's locations. Jam's labor needs at the Riviera vary according to its show schedule, so it utilizes an "on-call" list to obtain stagehands. Leading up to a performance date, Jam contacts stagehands on its call list and secures the necessary personnel for loading and unloading gear, setting up stage equipment, and operating electronics, among other tasks. During the relevant period, the Riviera Theatre call list contained approximately 55 non-union

[1] Jam Productions, Ltd., Event Productions, Inc., Standing Room Only, Inc., and Victoria Operating Co., operate as a single employer. We refer to them collectively as "Jam Productions" or "Jam."

stagehands, and Chris Shaw operated as its crew chief. We refer to that group as the "Shaw Crew."

The Theatrical Stage Employees Union, Local No. 2, is affiliated with the International Alliance of Theatrical Stage Employees and represents stagehands, including in the Chicagoland area. Local 2 also operates a non-exclusive[2] hiring hall that connects stagehands with event-related job opportunities. Jobs from the hiring hall routinely pay higher wages than other non-union work, making such referrals valued opportunities in the industry. Because the operation of Local 2's hiring hall is integral to this case, we describe it in detail.

As indicated, the Local 2 hiring hall helps staff stagehands to event venues in and around Chicago. The hiring hall is non-exclusive, and it had over one thousand registered participants at the time. Those participants fall into three general categories: Local 2 union members, non-union participants, and union members of other locals. Interested non-union stagehands can register with the hiring hall in a variety of ways. Some join through formal apprenticeship programs, while others enroll as part of organization drives. Plus, nothing prevents an individual from walking into a Local 2 office and requesting registration. To manage its participants and allocate work, Local 2 utilizes software known as "CallSteward," which provides two main functions. First, CallSteward inventories hiring-hall participants. Once an individual is

[2] The parties and the Board agree that the Local 2 hiring hall is non-exclusive. As the Board correctly explains, this means Local 2's venue contracts do not give it "exclusive control over who will be hired for stagehand work." *See Alyeska Pipeline Serv. Co.*, 261 NLRB 125, 126–27 (1982); *NLRB v. Teamsters "General" Local Union No. 200*, 723 F.3d 778, 784–85 (7th Cir. 2013). Instead, the venues can hire elsewhere whenever they see fit.

approved to start receiving referrals, a Local 2 staff member will add that person's name into CallSteward. A typical participant profile includes contact information, work experience, and special skills, if any.

Second, CallSteward allows Local 2 management to make and track referrals to employers. When a venue requires stagehands, it will contact Local 2 and provide details about its event and labor needs. A Local 2 manager will then add the event to CallSteward and start referring participants to the job. As Local 2 staff selects stagehands, the CallSteward system sends the stagehands a message indicating that they have been selected for a referral and providing information about the job. At that point, the stagehand can either accept or decline the referral. Accepted referrals populate in the CallSteward system, which allows Local 2 management to ensure that venues have sufficient stagehands for their events.

The CallSteward system has several notable features. For instance, once a participant is registered into the system, his or her information cannot be permanently deleted. At most, a participant may be labeled "inactive" or "unavailable" if he has not responded to referrals in a long time. This inevitably means that some registered hiring-hall participants have moved away, died, or found different work. CallSteward's participant cataloguing system thus makes it difficult to ascertain precisely how many stagehands are actively seeking work at any given time. Additionally, the system does not show when a profile is created, but it does show when a participant is referred. And though CallSteward helps facilitate the process, the selection of which jobs go to which stagehands is not automated—a Local 2 staff member must manually assign referrals. During the relevant time, that

responsibility fell on two Local 2 employees: Thomas Herrmann and occasionally Craig Carlson. Those men wielded significant power because the number of hiring-hall participants looking for work perpetually outnumbered available jobs. Indeed, the Board recognized "that the number of participants (more than 1,000) exceeded the number of jobs to be filled (hundreds), even on the busiest days." So, Herrmann and Carlson controlled which participants received the limited number of referrals each day.

When making allocations, Herrmann and Carlson always retained personal discretion, taking into consideration a number of factors. One important factor was employer preference. Contracting venues would frequently request specific hiring-hall personnel for their events and, in those cases, Local 2 staff would try to honor their requests. Relatedly, employers sometimes asked for stagehands with unique skills, such as lighting or rigging ability. When possible, the hiring hall would provide stagehands who could render the needed services. Herrmann and Carlson would also try to preference Local 2 members over non-members or affiliate local members. In addition they also considered pragmatic aspects, like amount of work required, stagehand availability, general experience levels, and the preference for an experienced stagehand to be on each job site as a leader. General fairness also played a role. Still, Local 2 staff followed no strict protocol (such as worker seniority) when making referrals. Instead, they retained complete discretion over which stagehands received which jobs, and no stagehand was guaranteed to receive any particular hiring-hall referral.

But at least one factor bearing on referrals fell outside Herrmann and Carlson's control: the weather. Given the

nature of stagehand work in Chicago, there are routinely more large-scale events, and thus more stagehand job opportunities, available during the warmer spring, summer, and fall months than in the winter. And not every year is the same as the last. The record shows that the months surrounding the representation election in the spring of 2016 were extraordinarily busy for the hiring hall.

With this context, we briefly survey the lengthy dispute between Jam and Local 2. This case traces back to September 2015 when Jam collectively fired Chris Shaw and the entire Shaw Crew just as they were on the brink of unionizing, replacing them with a new list of on-call workers. The day following the discharge, Local 2 filed a representation petition[3] and, shortly thereafter, submitted an unfair labor practice charge against Jam as well. The Board's Regional Director ordered the representation petition held in abeyance pending resolution of the unfair labor practices charge. In the meantime, Jam and Local 2 agreed to provisional rules for a future representation election. Specifically, the parties deemed 21 members of the Shaw Crew eligible to (eventually) vote, creating a subset we refer to as the "Shaw voters." The parties continued to litigate the unfair labor practices complaint[4] through the winter of 2016. Many of the fired Shaw Crew members were able to find work during this time through referrals from the Local 2 hiring hall.

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[3] The petition also sought to represent stagehands at the Vic Theatre and Park West Theatre, both Jam venues.

[4] After investigating Jam's charge, the Regional Director issued a complaint alleging the firings violated the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*

On March 28, 2016, Jam and Local 2 settled the unfair labor practices complaint, with the Regional Director approving the settlement over Local 2's objection. In short, Jam promised to put the Shaw Crew back on its call list and agreed to provide the fired crewmembers stipulated backpay. Yet the settlement did not entirely restore the pre-termination status quo for the Shaw Crew. As noted, Jam constructed a new call list shortly after terminating the Shaw Crew stagehands. Post-settlement, those replacement stagehands did not simply disappear. Instead, the Shaw Crew had to share job opportunities with the alternative group of workers. This resulted in Shaw Crew members receiving significantly fewer Riviera Theatre job offers than before they were fired. Given their increased availability, many Shaw Crew members continued to obtain referrals through the hiring hall into spring 2016. So, by the time of the election, every Shaw Crew member who was eligible to vote and able to work had accepted Local 2 hiring-hall referrals.

Here, we pause to identify several pertinent time periods leading up to the election. The first is known as the "critical period," and it spans from the filing of the election petition (September 17, 2015) to election day (May 16, 2016). In labor law, the critical period is typically the window of time in which the Board looks for objectionable election conduct. *See Ideal Elec. & Mfg. Co.*, 134 NLRB 1275, 1278 (1961); *NLRB v. Wis-Pak Foods, Inc.*, 125 F.3d 518, 521 (7th Cir. 1997). However, Local 2's unfair labor practice charge against Jam—and the ensuing complaint—created an "abeyance period" from mid-September 2015 to late March 2016, disrupting the ordinary operation of the critical period. As a consequence, the parties and the Board identify a third, narrower window they call the "focal period." The focal period covers the six weeks

immediately preceding the election, running from April 1, 2016, to May 16, 2016. We continue this convention, referring when appropriate to the critical period, abeyance period, and focal period.

The election was held on May 16, 2016. Local 2 prevailed on election day, but Jam promptly objected to the outcome. Per Jam, Local 2 improperly influenced the election by providing "economic benefits to employees to induce them to support the Union." Namely, Jam accused Local 2 of preferentially providing Shaw voters with lucrative job referrals in the weeks and months leading up to the election.[5] The Regional Director overruled Jam's objection without a hearing, and the Board denied review. Seeking federal court involvement, Jam refused to bargain. *See NLRB v. City Wide Insulation of Madison, Inc.*, 370 F.3d 654, 657 n.1 (7th Cir. 2004) (explaining that certification orders are not independently appealable to federal courts, but an employer can obtain judicial review "by refusing to bargain and then asserting its objections to the election as a defense to the ensuing charge of an unfair labor practice"); *see also* 29 U.S.C. § 160(f). The Board's general counsel filed an unfair labor practice complaint, which the Board resolved on summary judgment against Jam. Jam then filed a petition for review in this court, and the Board filed a cross-application for enforcement. *Jam Productions*, 893 F.3d at 1042.

[5] As noted, other voters participated in the representation election, but we focus exclusively on the Shaw voters. The Shaw voters are sufficiently numerous on their own to have a material impact on the election, and Jam's objection pertains only to them.

B

This court resolved Jam's initial appeal by declining to enforce the Board's certification order and remanding for additional factfinding. *Id.* at 1045–47. Our main concern was the Board's decision not to hold an evidentiary hearing on Jam's objection. We acknowledged that "[t]he Regional Director is obligated to hold a hearing only when the objecting party raises 'substantial and material factual issues' sufficient to support a prima facie showing of objectionable conduct." *Id.* at 1044 (quoting *Clearwater Transp., Inc. v. NLRB*, 133 F.3d 1004, 1011 (7th Cir. 1998)). But we concluded that Jam had made the requisite showing. *Id.* We explained, "The financial benefit of the higher-paying jobs immediately preceding the election could plausibly be seen as an economic inducement to secure votes in favor of Local No. 2." *Id.* at 1045. And determining whether Local 2 had improperly provided jobs to voters could only be accomplished by granting Jam subpoena power and an evidentiary hearing: "[W]hether the jobs were in fact offered to the Shaw crew 'according to pre-existing standards and practice' is precisely the question Jam sought to answer with its objection." *Id.* Finally, we recognized, "If the jobs were in fact, as Jam maintains, previously unavailable to those [Shaw crew] employees, the offer of the premium-pay jobs could certainly be seen as an unearned benefit to induce union support." *Id.* at 1046. On that basis, we returned the case to the Board.

On remand, the Board reopened the case and allowed Jam to subpoena hiring hall records from Local 2. The Board then held a three-day hearing during which a hearing officer listened to witness testimony and considered several statistical summaries extrapolated from Local 2's hiring hall data.

Because this data forms the foundation of Jam's arguments on appeal, we highlight the main points of the voluminous evidentiary hearing record and include noteworthy charts when helpful. For ease of reference, we also assign numbers to the data sets.

Data Set One. Recall that Shaw voters are the voter-eligible subset of the Shaw Crew. The first data set traces the number of hiring-hall referrals given to Shaw voters over time. Before the critical period, only one Shaw voter received referrals. From the critical period to the start of the focal period, 17 of 20[6] Shaw voters received 107 referrals—an average of 6.3 referrals per voter. Between the start of the focal period and the election, all 20 Shaw voters received referrals. The voters received 213 total referrals during that time—an average of 10.65 per voter.[7] Therefore, the data indicates a general trend of more referrals as the election approached. More voters received referrals, and the per-voter rate of referral increased.

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[6] Though 21 Shaw Crew members were eligible to vote, one member was not fit to work at the time.

[7] The parties differ slightly on how many referrals Shaw voters received during the focal period. Jam identifies 213 referrals that, across 20 Shaw voters, results in a per person average of 10.65 during the focal period. The Board identifies Jam voters as receiving 215 referrals during the focal period. Yet, in its appellate brief, the Board continues to utilize the 10.65 per person rate, a number consistent with 213 referrals divided by 20 stagehands. We note this distinction for purposes of clarity, but it does not impact our analysis. Moreover, the record appears to support both counts depending on which chart is consulted.

Data Set One			
Period	**Voters**	**Referrals**	**Referrals Per Voter**
Pre-Critical Period (Pre-September 17, 2015)	1/20	2	2.0
Start of Critical Period (September 17, 2015) to Start of Focal Period (March 31, 2016)	17/20	107	6.3
Start of Focal Period (April 1, 2016) to Election Day (May 16, 2016)	20/20	213	10.65

Data Set Two. A second data set compares focal period referrals for 14 Shaw voters who received their first referral between September 2015 and May 2016 to 111 other, non-Local 2 stagehands who also started receiving referrals in the same period. But while this data set captures participants with a variety of first-referral dates, it includes referral numbers only for the focal period. As such, it cannot be used to examine change in referral patterns over time between the Shaw voters and the other non-Local 2 participants. It does show that during the focal period, the 14 relevant Shaw voters received 129 referrals—an average of 9.21 per voter. In the same period, the 111 non-Local 2 stagehands received 294 referrals—an average of 2.65 per person. We need not delve into detail, but at

times the parties and the Board slice this data set into even more pieces.

Data Set Two		
	Shaw Voters with First Referral Sept. 2015 - May 2016	**Other Non-Local 2 Participants with First Referral Sept. 2015 - May 2016**
Number of Stagehands	14[8]	111[9]
Focal Period Referrals	129	294
Focal Period Referral Per Person	9.21	2.65

Data Set Three. A third data set compares Shaw voters to all other registered non-union hiring-hall participants during

[8] The Board equivocates on the number of Shaw voters who received their first referral between September 2015 and May 2016, suggesting it is 14 or 15. This distinction is not material to our analysis.

[9] We were unable to replicate the 111 "other participant" figure in our examination of the record. By our count, there were 145 hiring-hall participants who began receiving referrals between September 2015 and May 2016. Removing the 14 Shaw voters from that count leaves 131 other participants, who collectively received 294 referrals. Even if the greater number is correct, our conclusions remain the same.

the focal period. For that stretch, 827 non-union participants received 4,386 total referrals—an average of 5.3 per person. The twenty Shaw voters received 213 referrals during that time—10.65 per person. That said, the record indicates that only 314 of the 827 non-union participants received referrals during the focal period. Thus, the per person rate for non-union participants who actually *received* referrals during the focal period is 13.97.

Data Set Three			
	Shaw Voters	***Registered* Non-Union Stagehands**	***Referred* Non-Union Stagehands**
Number of Stagehands	20	827	314
Focal Period Referrals	213	4386	4386
Focal Period Referrals Per Person	10.65	5.3	13.97

Data Set Four. A fourth data set compares referrals given to Shaw voters against those given to non-voter Shaw Crew members. While other data sets lack referral data outside the focal period, this set better demonstrates change over time.

From the start of the critical period to the start of the focal period, Shaw voters received 5.35 referrals per person. During the same period, non-voter Shaw Crew members received 0.95 referrals per person. Within the focal period, Shaw Crew voters received 10.65 referrals per person, while the non-voters received 3.3. Thus, while Shaw Crew non-voters routinely received fewer total referrals, their per person rate of referral also increased as the election approached.

Data Set Four			
Group	**Critical Period to Focal Period Referral Rate**	**Focal Period Referral Rate**	**Referral Rate % Change**
Shaw Crew Voters	5.3	10.65	200.94%
Shaw Crew Non-Voters	0.95	3.3	347.37%

Post-Election Data & Grouping Data. The record touches on two additional areas of importance: referral patterns post-election; and referral grouping patterns. Starting with post-election data, in the first six weeks following the election, Shaw voters saw a 28 percent decrease in referrals compared to the focal period. But in the next six-week period, Shaw voters received 35 percent more referrals than during the preelection focal period. Said another way, referrals to Shaw voters dipped after the election but picked up again later. As to irregular grouping, Jam identified several occasions in which Shaw voters were assigned to work the same events together in a way that could not be plausibly attributed to completely

random assignment. Jam also emphasizes that Justin Huffman, a Shaw voter and Local 2's observer during the election, received the most referrals of any Shaw voter in the critical and focal periods.

Other Evidence. Aside from statistics, the Hearing Officer heard testimony from several witnesses, including Local 2 call steward Thomas Herrmann and Local 2 business manager Craig Carlson—the men responsible for assigning referrals during the critical and focal time periods. We expand on their testimony when relevant below, but those men denied unfairly preferring the Shaw voters when assigning job referrals. After considering the data sets and other evidence, the Hearing Officer recommended overruling Jam's objection, and the Regional Director agreed. The Board granted Jam's request for review.

After considering the evidentiary record, the Board largely concurred with the Regional Director and overruled Jam's objection. In reaching its decision, the Board detailed how cases featuring hiring-hall referrals—like Jam's—should be analyzed to determine objectionable conduct. The Board started with the rules generally applicable to the preelection context, recognizing that while "[a] union cannot make, or promise to make, a gift of tangible economic value as an inducement to win support in a representation election," "[n]ot every grant during an election campaign requires a 'per se finding' of objectionable conduct." What matters is "whether the donor's conduct would reasonably have a 'tendency to influence' the outcome of the election."

To answer that question, the Board explained it has often employed the approach from its *B&D Plastics, Inc.*, 302 NLRB 245, 245 (1991), decision. There, the Board examined a set of

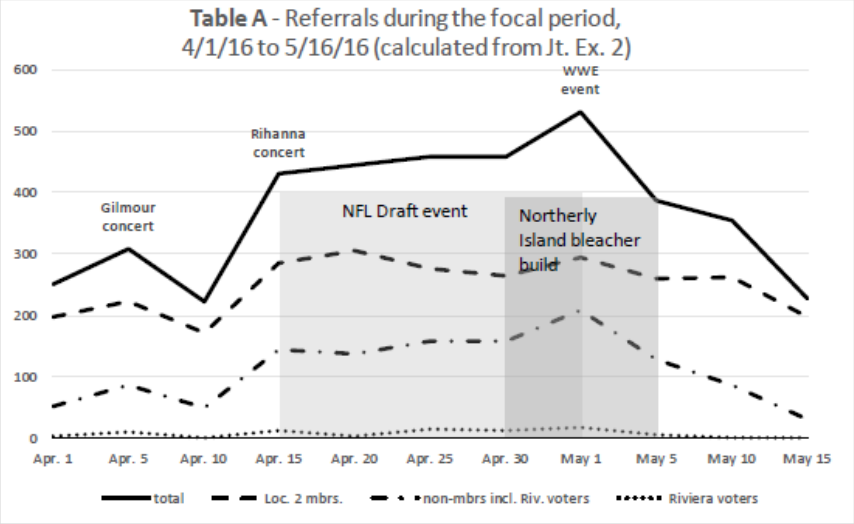
factors to evaluate whether the benefit granted had the tendency to influence the election's outcome. *Id.* Those factors included the size of the benefit in relation to the reason for granting it, the number of employees who received it, and "how employees reasonably would view the purpose of the benefit." *Id.* Then, to determine whether the grant of benefits was objectionable, the Board drew a rebuttable inference that the grant of benefits during the critical period was coercive. That inference can be overcome through "an explanation, other than the pending election, for the timing of the grant or announcement of such benefits." *Id.*

Here, the Board examined the approach from *B&D Plastics* and reasoned that circumstances involving employment- or hiring-hall-related benefits introduce additional complexity. Those types of benefits "raise a different set of analytical concerns," from other types of benefits, as they "do not involve mere 'incidents' or benefits of union membership but, instead, implicate employees' access to *employment* and related benefits." Employment-related benefits have also, according to the Board, received different analytical treatment. The Board observed that "in hiring-hall cases, [it] has not expressly considered whether a union's promise or grant *during the critical period* may raise an inference of coercive timing, or whether any such inference could be rebutted." Nor has it always "weigh[ed] the other *B&D Plastics* factors." Instead, it has often "focused on whether the employees in question would have been entitled to the benefit under the union's normal practices."

Against that backdrop, the Board employed portions of the *B&D Plastics* framework alongside inquiry into normal union practices. Namely, the Board articulated a "reconciled"

approach for cases involving employment- and hiring hall-related benefits: "Where an objecting party alleges a union granted access to a hiring-hall benefit during the critical period, it has the burden of proving not just that the union did so but also that the benefit was one to which the employees were not otherwise entitled." If the objecting party meets that burden, the Board will draw an inference that the benefits granted are coercive. It is then on the responding party to demonstrate that the benefits were conferred for reasons unrelated to the pending election.

Given all this, the Board scrutinized the facts of Jam's case and overruled its objection for two main reasons. First, the Board determined that the referrals were conferred in the regular operation of the hiring hall and, as such, did not constitute an objectionable benefit. So, Jam failed to raise an inference of coercion at the outset. Second, the Board held that—even if the hiring-hall referrals qualified as an objectionable benefit raising an inference of coercion—Local 2 provided persuasive, non-election-related reasons for the increased number of referrals. The Board concluded that any increases in referrals were attributable to the collective firing of the Shaw Crew and the busy spring 2016 season. Part of the Board's decision relied on "Table A," which it created using native hiring-hall referral data. We reprint that graphic below:



In addition to overruling Jam's objection, the Board also certified Local 2 as the employees' bargaining representative for the Riviera Theatre and the two smaller venues.

Following the Board's decision, Jam again refused to bargain so that it could access judicial review. *See NLRB v. AmeriCold Logistics, Inc.*, 214 F.3d 935, 937 (7th Cir. 2000) ("Refusing to bargain is the only way for an employer to get judicial review of an NLRB decision upholding an election and certifying a union.") (citation omitted). The Board's general counsel filed an unfair labor practices complaint alleging Jam's refusal to bargain violated § 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (5), and moved for summary judgment. The Board granted that motion on January 11, 2022, ruling that Jam's refusal constituted an unfair labor practice. The Board then docketed this application for enforcement on January 25, 2022, and Local 2 filed a supporting brief as intervenor. Jurisdiction over the petition for enforcement is proper under 29 U.S.C. § 160(e). We now review the Board's determinations.

II

The National Labor Relations Act forbids a union from "both blatantly giving something of value to an employee in exchange for his vote as well as offering a benefit in a way that 'tacitly obliges the employee' to vote for the union." *Jam Productions*, 893 F.3d at 1044 (quoting *Freund Baking Co. v. NLRB*, 165 F.3d 928, 931 (D.C. Cir. 1999)). Therefore, "[i]n considering whether a particular incentive taints the fairness of the election, we ask whether what is offered is 'sufficiently valuable and desirable in the eyes of the person to whom they are offered, to have the potential to influence that person's vote[.]'" *Id.* (quoting *NLRB v. River City Elevator Co.*, 289 F.3d 1029, 1033 (7th Cir. 2002)). That said, Congress has entrusted the National Labor Relations Board with "wide discretion to ensure the fair and free choice of bargaining representatives." *NLRB v. Savair Mfg., Co.*, 414 U.S. 270, 276–77 (1973) (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969)). So, when a party objects to a union representation election, the Board bears initial responsibility for investigating and determining whether the complained of conduct substantially impaired the exercise of free choice such that a new election must be held. *River City Elevator*, 289 F.3d at 1032; *see also Jam Productions*, 893 F.3d at 1044.

Our subsequent review of a Board's decision to certify an election is deferential. "We presume the validity of a Board-supervised election and will affirm the Board's certification of a union if that decision is supported by substantial evidence." *AmeriCold Logistics*, 214 F.3d at 937 (citation omitted); 29 U.S.C. § 160(e) ("The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."). The

substantial evidence standard is not arduous. "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support the conclusion of the Board.'" *NLRB v. Mickey's Linen & Towel Supply, Inc.*, 460 F.3d 840, 842 (7th Cir. 2006) (quoting *SCA Tissue N. Am. LLC v. NLRB*, 371 F.3d 983, 988 (7th Cir. 2004)). And the "burden is on the objecting party to prove that the election is invalid." *NLRB v. WFMT*, 997 F.2d 269, 274 (7th Cir. 1993) (citing *NLRB v. Serv. Am. Corp.*, 841 F.2d 191, 195 (7th Cir. 1988)).

"We 'do not reweigh the evidence,' and the 'presence of contrary evidence does not compel us to reverse the Board's order.'" *ADT, LLC v. NLRB*, 54 F.4th 981, 987 (7th Cir. 2022) (quoting *Contemp. Cars, Inc. v. NLRB*, 814 F.3d 859, 868–69 (7th Cir. 2016)). "Our only task is to evaluate 'whether there is evidence in the record supporting the Board's outcome that would satisfy a reasonable fact finder.'" *Mondelez Glob. LLC v. NLRB*, 5 F.4th 759, 769 (7th Cir. 2021) (quoting *NLRB v. KSM Indus., Inc.*, 682 F.3d 537, 544 (7th Cir. 2012)). This means that a party objecting to the results of a Board supervised election faces "a formidable burden … to prove that it was not valid." *River City Elevator*, 289 F.3d at 1032 (citing *Service American Corp.*, 841 F.2d at 195); *see also NLRB v. Erie Brush & Mfg. Corp.*, 406 F.3d 795, 801 (7th Cir. 2005) ("Our review of the Board's decision to certify a collective bargaining agent following an election is extremely limited.") (citation omitted).

Judicial scrutiny of the Board's treatment of substantive labor law is similarly deferential. *ADT*, 54 F.4th at 987. "Congress intended to confer upon the Board broad authority to develop national labor policy and so we will uphold the Board's legal conclusions so long as they have a reasonable basis in the law." *Erie Brush*, 406 F.3d at 801 (citation omitted);

see also City Wide Insulation, 370 F.3d at 657 ("Our function is to decide whether the Board's … legal conclusions have a reasonable basis in law.") (citation omitted). Put another way, we accept the Board's legal conclusions "unless they are irrational or inconsistent with the [Act]." *Loparex LLC v. NLRB*, 591 F.3d 540, 545 (7th Cir. 2009) (alteration in original) (quoting *Ryder Truck Rental v. NLRB*, 401 F.3d 815, 825 (7th Cir. 2005)). Indeed, the Supreme Court has "refused enforcement of Board orders where they had 'no reasonable basis in law,' either because the proper legal standard was not applied or because the Board applied the correct standard but failed to give the plain language of the standard its ordinary meaning." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979) (citation omitted). With that deferential standard in mind, we turn to the Board's decision.

A

First, we consider the Board's approach to reviewing hiring-hall referrals granted in the critical period. Our analysis proceeds in two steps. We survey how the Board and this court have addressed the promise or grant of benefits within the critical period. Then, relying on that precedent, we determine whether the Board reasonably applied the law through its articulated legal framework.

As previously stated, the Board decision identified an approach applicable to employment- and hiring-hall-related benefits conferred during the critical period. The Board explained: "Where an objecting party alleges a union granted access to a hiring hall benefit during the critical period, it has the burden of proving not just that the union did so but also that the benefit was one to which the employees were not otherwise entitled." As the Board wrote:

> [O]bjecting parties can meet this burden in multiple ways, including by showing that the eligible voters received favorable treatment, that the grant of benefits deviated from the status quo or the union's normal practice, or that the eligible voters were treated differently than others with access to the referral system, among others.

If the objecting party makes that showing, the Board will draw an inference that the benefits granted were coercive. The responding party can then rebut the inference by explaining the reason for the timing, which must not be election-related.

On appeal, Jam takes issue with this framework and urges us to find it unreasonable. Jam offers two arguments. To begin, Jam contends that the Board's approach imposes "*sua sponte* an unprecedented two-part burden on Jam." Jam must demonstrate the union provided employees a benefit *and* that the benefit was one to which the employees were "not otherwise entitled" to receive. But Jam's rejection of the Board's rule goes further. Per Jam, any union grant of benefits during the critical period should automatically give rise to an inference of objectionable conduct: "[T]he Board improperly departed from well-established precedent … that granting a benefit during the critical period is, itself, sufficient to create an inference of objectionable conduct." Under Jam's interpretation, any benefit conferred during the critical period would give rise to an adverse inference. It would not matter whether that benefit was one to which the employee was already entitled.

We begin with the Board's statement that a party objecting to employment- or hiring hall-related benefits must demonstrate both the delivery (or promise) of such benefits *and* that

the employees were "not otherwise entitled" to the benefits. Both this court and the Board have used a variety of approaches when evaluating whether a grant of benefits during the critical period is objectionable. A tour of some of those approaches is instructive.

1. The Board's analysis in *B&D Plastics* demonstrates one prominent approach. 302 NLRB at 245; *see also Gulf State Canners*, 242 NLRB 1326, 1327 (1979) (identifying the factors recited in *B&D Plastics*). In *B&D Plastics* the Board used a set of factors to determine whether a benefit would tend to unlawfully influence an election. 302 NLRB at 245. Specifically, the Board analyzed "(1) the size of the benefit conferred in relation to the stated purpose for granting it; (2) the number of employees receiving it; (3) how employees reasonably would view the purpose of the benefit; and (4) the timing of the benefit." *Id.* On the timing element, the Board explained it infers that benefits granted during the critical period are coercive. *Id.* That inference is rebuttable, however, if the party responds with an explanation unrelated to the election. *Id.*

To determine when a grant of a preelection benefit is potentially objectionable, several Board decisions deploy the *B&D Plastics* factors and draw an adverse inference about benefits conferred in the critical period. *See, e.g.*, *Star, Inc.*, 337 NLRB 962, 962–63 (2002); *Va. Concrete Corp.*, 338 NLRB 1182, 1182, 1184 (2003); *Cmty. Options NY, Inc.*, 359 NLRB 1534, 1535–36 (2013); *BFI Waste Sys.*, 334 NLRB 934, 935 n.3, 935–36 (2001).

2. The *B&D Plastics* framework is often applied with variations. For instance, some Board decisions borrow the *B&D Plastics* factors, but do not consider any inferences from

timing. *See, e.g.*, *Broward Cnty. Health Corp.*, 320 NLRB 212, 212–13 (1995); *Sequel of N.M. LLC*, 361 NLRB 1124, 1124–25 (2014).

3. Still other Board decisions take the inverse approach, inferring that the grant of benefits during the critical period is coercive and thus objectionable, without analyzing any other factors. *Mercy Hospital Mercy Southwest Hospital*, 338 NLRB 545 (2002), is one such case. There, an employer announced a wage increase during the preelection critical period. *Id.* at 545. Explaining that "[t]he standard for determining whether the timing of benefit announcement during the critical period is unlawful is essentially the same as the standard for determining whether the grant of benefit itself violates the Act," the Board inferred coercive conduct from the announcement. *Id.* But the Board did not explicitly evaluate the announced wage increase using the *B&D Plastics* factors. Instead, the Board focused its analysis on whether the employer had provided an explanation, other than the pending election, for the timing of the benefits announcement. *Id.* Finding that the employer failed to justify the timing of the wage increase, the Board set aside the election. *Id.* at 546.

Additional Board decisions utilize the same approach. *See, e.g.*, *SBM Mgmt. Servs.*, 362 NLRB 1207, 1207 (2015) (providing no multifactor analysis but holding that an employer grant of bonuses during the critical period raised an inference of coercion, which the employer failed to rebut); *United Airlines Servs. Corp.*, 290 NLRB 954, 954–55 (1988) (ordering a hearing for an objection and explaining that "[i]n determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits granted during the critical

period are coercive, but it has allowed the employer to rebut the inference") (citation omitted).

4. Further Board decisions—many of which deal with employment- or hiring hall-related benefits—set aside factors and inferences entirely, and instead ask whether a party conferred a benefit to which the employees were not otherwise entitled to receive. For instance, in *Mailing Services, Inc.*, 293 NLRB 565, 565 (1989), a union announced and provided free medical screenings to voting employees just days prior to the representation election. *Id.* Reviewing that conduct, the Board explained that unions, like employers, are "barred in the critical period prior to the election from conferring on potential voters a financial benefit *to which they would otherwise not be entitled*." *Id.* (emphasis added) (citing *McCarty Processors, Inc.*, 286 NLRB 703, 703 (1987)). And, because the union there "made no contention that the employees who received the screenings were entitled to receive them independent of the election campaign," *id.*, the Board sustained the employer's objection and set aside the election. *Id.* at 566.

The Board used a similar approach in *IBEW Local 103 (Drew Electric)*, 312 NLRB 591 (1993). There, a union operated a hiring hall through which referrals were made for construction and residential contracts. Construction contract referrals were more lucrative, but they required the job seeker to hold an "A" card from the union. *Id.* By contrast, residential contracts entailed lower wages but could be obtained with either an "A" or an "R" card. *Id.* Predictably, the "A" cards required "superior qualifications and work experience" compared to "R" cards. *Id.* at 592. Leading up to a representation election, the union promised all bargaining unit employees that they would immediately receive "A" cards if the union prevailed.

Id. Considering the valuable positions that an "A" card would unlock, that promise implicated a significant benefit. While the employer objected, the Board sided with the union, finding it reasonable to infer that the employees already had the "necessary skills to qualify for 'A' cards." *Id.* at 592. So, the union was not promising the voters anything that they were not already qualified for and entitled to have. *Id.* at 593.

The Board reached a different result in *Alyeska Pipeline*, 261 NLRB at 127, while employing a similar approach. There, the Board set aside an election because the union promised voters undeserved—and indeed unlawful—special treatment. *Id.* The union in *Alyeska Pipeline* ran an "exclusive" hiring hall, which legally constrained its discretion when handing out work. *Id.* Nonetheless, the union promised voters that membership would provide a "definite advantage" in hiring-hall referrals. *Id.* at 126. The Board found that communication objectionable because it promised, in essence, a hiring-hall perk that the employees were not entitled to receive; the union had "clearly promised to give members an unlawful advantage." *Id.* at 127. The "not otherwise entitled to" rubric appears in a collection of other Board decisions. *See Topside Constr., Inc.*, 329 NLRB 886, 886, 898–99 (1999); *Go Ahead N. Am. LLC*, 357 NLRB 77, 77–78 (2011); *McCarty Processors*, 286 NLRB at 703.

Board decisions aside, this court has at times reviewed election-related benefits by asking whether employees received a benefit outside their employment status quo—that is, a benefit to which they were not otherwise entitled. In *NLRB v. Chicago Tribune Co.*, a union provided credential cards to certain employees during the critical preelection period. 943 F.2d 791, 793, 796–97 (7th Cir. 1991). The Board determined that the union's grant of credential cards did not improperly

influence the election, and we agreed. *Id.* at 796–97. In so deciding, this court explained that a party challenging an election "must show that the unlawful acts occurred and 'that those acts interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election.'" *Id.* at 794 (quoting *Service American Corp.*, 841 F.2d at 195). But the union there gave the credential cards according to a routine schedule separate and apart from the election. *Id.* at 797. Thus, "because there was no change in the status quo with regard to employee benefits," the credential cards did not interfere with the election. *Id.*

We relied on a comparable approach in *River City Elevator* but reached the opposite conclusion. 289 F.3d at 1033. There, a union made a pre-election promise that all employees would receive mechanics cards, even though they had not uniformly completed the requisite training. *Id.* Examining the impact of those cards on the election, we first identified the controlling inquiry: "[A]re the articles sufficiently valuable and desirable in the eyes of the person to whom they are offered, to have the potential to influence that person's vote?" *Id.* at 1033 (quoting *Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578, 583 (6th Cir. 1995)). We concluded that the promised cards were. *Id.* at 1033–34. By offering employees a benefit that they were not qualified or entitled to receive, the union promised to gift "access to more lucrative jobs at a far lesser cost." *Id.* at 1033.

As is apparent from previous decisions, no single approach controls. Jam overstates the uniformity of Board precedent and circuit cases when it argues that "[t]he Board and the courts consistently have applied" the principle that "granting a benefit during the critical period is, itself,

sufficient to create an inference of objectionable conduct." Rather, over time the Board and this court have approached the question of objectionable preelection benefits in different ways.

B

With that, we determine whether the Board's articulated framework is reasonable. It helps at this juncture to restate the considerations at play.

When examining elections, one question the Board asks is whether a party has engaged in objectionable conduct—conduct that has a "tendency to influence" the outcome of the election. *Gulf State Canners*, 242 NLRB at 1326; *B&D Plastics*, 302 NLRB at 245. One form of objectionable conduct is when a union coerces employees by conferring benefits pre-election. *See Savair*, 414 U.S. at 278–80; *see also Warner Press, Inc. v. NLRB*, 525 F.2d 190, 196 (7th Cir. 1975); *Jam Prods.*, 893 F.3d at 1044. But not every pre-election grant of benefits is necessarily coercive. *See, e.g.*, *Virginia Concrete*, 338 NLRB at 1184–85; *Sequel of New Mexico*, 361 NLRB at 1125–26. So, the Board's inquiry here, as we see it, is to identify when a conferral of pre-election benefits is coercive and thus objectionable. On that point, the Board's decision states, "Where an objecting party alleges a union granted access to a hiring-hall benefit during the critical period, it has the burden of proving not just that the union did so but also that the benefit was one to which the employees were not otherwise entitled." If that burden is met, the Board then will draw a rebuttable inference that the benefits granted are coercive.

We examine that language in parts, beginning with the Board's guidelines for inference drawing. Jam says that under

the Board's framework, a union granting voters hiring-hall benefits during the critical period is insufficient to create an inference of objectionable conduct. Jam takes issue with that approach, but we identify no reversible error. As precedent confirms, neither we nor the Board necessarily infer coercion when evaluating whether a grant of benefits during the critical period is objectionable. For example, this court in *Chicago Tribune Co.* determined that a grant of apprentice cards during the critical period was not objectionable. 943 F.2d at 797. In reaching that conclusion, we simply examined the record and agreed that the employer had not "presented evidence that the Union issued apprentice cards outside of the 'normal course of business' in order to influence the vote in the election." *Id.* (quoting *St. Francis Fed'n of Nurses & Health Pros. v. NLRB*, 729 F.2d 844, 850 (D.C. Cir. 1984)). The Board has likewise declined to always find a grant of benefits objectionable simply because a party provided voters something of value during the critical period. *See, e.g.*, *Topside Construction*, 329 NLRB at 898; *Drew Electric*, 312 NLRB at 591. As such, the Board can reasonably require Jam to show something more than voters receiving a critical period hiring-hall benefit before inferring coercion.

Next, we examine exactly what the Board required Jam to show before it would infer coercion. As a prerequisite to inference drawing, the Board required Jam to demonstrate not only that Local 2 granted voters access to hiring- hall referrals, but also that "the benefit was one to which the employees were *not otherwise entitled*." (emphasis added). This requirement is reasonable. The Board has previously used identical or similar language to determine if a grant or promise of benefits during the critical period is objectionable, and we see nothing unreasonable about deploying that construction here.

See, e.g., *Mailing Services*, 293 NLRB at 565; *Drew Electric*, 312 NLRB at 592; *Topside Construction*, 329 NLRB at 898; *Go Ahead North America*, 357 NLRB at 78; *McCarty Processors*, 286 NLRB at 703.

This and other circuit courts have used a comparable analysis when ascertaining whether a grant of benefits is objectionable. *See, e.g.*, *Chi. Tribune Co.*, 943 F.2d at 797 ("[B]ecause there was *no change in the status quo* with regard to employee benefits, the Union's issuance of the apprenticeship cards did not interfere with the election.") (emphasis added); *King Elec., Inc. v. NLRB*, 440 F.3d 471, 475 (D.C. Cir. 2006) ("As we have indicated, a union's grant to employees of a benefit to which they are *not otherwise entitled*, during an election campaign, is still objectionable … .") (emphasis added). The "not otherwise entitled to" distinction makes sense. If voters are already entitled to receive a benefit well in advance of an election, such a benefit could not potentially influence a vote.

To be clear, in our prior decision in this case, we wrote "the Board has held that a union is forbidden from providing voters anything of 'tangible economic benefit' during the critical period before the election." *Jam Productions*, 893 F.3d at 1044. Jam references that statement for the proposition that the grant of *any* tangible economic benefit during the critical period at least raises an inference of coercion. In contrast, the Board understands that statement to mean that a union is barred from providing voters "any benefit that reasonably can be seen as an economic inducement to vote for a union." The quote above, read out of context, could be misinterpreted. So, we take this opportunity to reiterate that, when examining whether benefits improperly influenced a representation election, the guiding question is whether "what is offered is

'sufficiently valuable and desirable in the eyes of the person to whom they are offered, to have the potential to influence that person's vote[.]'" *Id.* at 1044 (quoting *River City Elevator*, 289 F.3d at 1033).

Under that standard, we discern no unreasonable application of law in the Board's decision. General access to hiring-hall referrals is not a benefit offered in the critical period if it was available to voters on the same, routine terms all along. As such, not every hiring-hall benefit will "taint[] the fairness of the election," and the Board need not automatically draw an inference of coercion just because a voter received hiring-hall referrals during the critical period. *Id.* Our prior decision recognized this when it explained Local 2's referrals might amount to improper inducement "[i]f the jobs were in fact … *previously unavailable* to those employees." *Id.* at 1046 (emphasis added); *see also id.* at 1045 (explaining that denial of an evidentiary hearing confined Jam's ability "to demonstrate that the referrals were in fact an aberration from Local No. 2's *ordinary* referral operating system") (emphasis added).[10] As is apparent from that language, our prior opinion did not hold

[10] Another case Jam cites, *Freund Baking*, 165 F.3d at 931–32, also must be considered in context. There, the D.C. Circuit stated, "the Board has held that a union may not give voters anything of 'tangible economic benefit' during the critical period before an election." *Id.* (citing *Mailing Services*, 293 NLRB at 565–66). That statement is broad, but the decision to which *Freund* cites for that proposition undermines the rule's scope. As support for the above-quoted text, *Freund* cites to *Mailing Services*, where the Board held that unions are "barred in the critical period … from conferring on potential voters a financial benefit *to which they would otherwise not be entitled*." 293 NLRB at 565 (emphasis added). Given that context, the rule of *Freund* is not so broad that a union provision of *any* benefit is coercive or demands an inference of coercion.

that any critical period referrals would amount to objectionable conduct or an adverse inference.

At bottom, the Board reasonably interpreted and applied the applicable law in this area. Examining the facts of Jam's objection, the Board correctly surmised that it had "not previously articulated how cases addressing employment- and hiring hall-related benefits during a pre-election critical period interact with [the] *B&D Plastics* framework for assessing other types of grants or promises." The Board took the opportunity to do so in this case, and considering our deferential standard of review, we hold that the Board used a reasonable framework.

III

We now turn to the Board's factual findings, which we will uphold if they are supported by substantial evidence. *AmeriCold Logistics*, 214 F.3d at 937; 29 U.S.C. § 160(e). First, the Board held that Jam "failed to prove the union provided referrals to the [Shaw] voters to which they were not otherwise entitled" and, as consequence, found it unnecessary to draw an inference of coercion.[11] Second, the Board went one step further and determined that "even if the increase in job referrals during the critical period were construed as a grant of benefits," the union's explanation for the referrals rebutted

[11] We acknowledge there is room for disagreement on whether the question of Shaw voters receiving benefits to which they were not otherwise entitled is a factual or legal one. Either way, our holding remains the same. To the extent this determination is legal, it is reasonable. And if the determination is factual, substantial evidence supports it.

"any inference of coercive, election-related timing or purpose."

A

Before considering each of these findings, we first address whether participants are "entitled" to hiring-hall work. According to Jam, the discretionary nature of the hiring hall means that Shaw voters could not have received referrals they were otherwise entitled to have. Local 2's discretion in allocating referrals, says Jam, means hiring-hall participants are never "entitled" to receive referrals: "[T]he evidence showed that Local 2's referral process was wholly discretionary and that no participants in the hiring hall, including the Shaw voters, were entitled to receive any particular referral." For Jam, "entitlement" requires discernible pre-existing referral practices, which it contends the union "did not and could not identify," thus imposing an unrealistic evidentiary burden on Jam. Jam contends it is unreasonable to ask employers to prove deviation from a status quo when that status quo involves discretion. In response, the Board asserts "the Union made referrals based on a variety of legitimate factors" and highlights the Shaw voter's entitlement to referrals as a general matter.

In its decision, the Board rejected Jam's premise that the hiring hall lacks discernible operating procedures. Specifically, the Board examined the evidentiary record—including witness testimony on how the hiring hall functions—and concluded the Shaw voter referrals "were consistent with Local 2's usual practices." Implicit in that conclusion is the existence of meaningful "usual practices." The Board also rejected Jam's position that lack of entitlement to specific jobs means hiring-hall referrals are benefits which the Shaw voters were

not "otherwise entitled" to receive. On that point, the Board reasoned that even if the Shaw voters were not entitled to any particular *job*, they were still "'entitled' to referrals as a general matter, in that they were eligible to receive referrals once they had enrolled in the system, which any stagehand (Local 2 member or otherwise) could do." Put another way, the Board determined that the Shaw voters were entitled to normal participation in the hiring hall. The Board defends this analysis on appeal, contending "the Board reasonably found that Jam failed to show the [Shaw] voters received a new benefit" and arguing "the Union acted consistently with its longstanding, customary practice" of making referrals based on "considerations that included availability, experience, and skills."

Substantial evidence supports the Board's findings that the hiring hall has an ordinary manner of operating, and that Shaw voters were entitled to participate in that operation, even if they were not "entitled" to particular jobs. First up is whether the Board could conclude "usual practices" governed the Shaw referrals. Though the record suggests that Union personnel retained significant discretion in granting referrals, the system was not devoid of common practices.[12] As explained above, Herrmann considered union membership, employer preferences, special skills, availability, and the like. When asked, he agreed that those "criteria" "guided [him] when [he was] … making work assignments." Herrmann also

[12] In its decision, the Board remarked that Herrmann and Carlson's discretion in handing out referrals "is not legally significant." We understand that to be a comment on the different legal rules applicable to exclusive and non-exclusive hiring halls. We do not interpret the comment as the Board ignoring the role discretion plays in this analysis.

testified that he did not know which Shaw Crew members were eligible to vote, and explained that he did not "abandon" his identified "criteria" for making referrals as the Jam election approached. He further denied that "anyone else at Local 2 ever instruct[ed] [him] to make sure to refer JAM employees to jobs in the weeks before the election." For his part, Carlson testified that he made no promises to Jam stagehands as to how much work they would get in return for supporting the union, and denied ever instructing Local 2 personnel to grant Jam employees preferential treatment in hiring-hall referrals.

The Board credited Herrmann and Carlson's testimony, explaining they "testified that the referrals made during the focal period (and indeed during the entire critical period) followed Local 2's usual practice." "[N]o direct evidence" contradicted that testimony, and the Board was entitled to believe it. The record therefore contains substantial evidence that the Shaw referrals were made per "usual practices." The existence of a cognizable status quo also deflates Jam's arguments that the Board saddled it with an unrealistic evidentiary burden.[13]

We turn next to the Board's conclusion that Shaw voters are "otherwise entitled" to participate in the hiring hall even if they are not entitled to particular jobs. Herrmann testified

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[13] Jam also implies that the Board required direct evidence of favoritism, but we do not read the decision as going that far. Instead, the Board pointed out that witnesses testified to no special treatment, and it noted there was "no direct evidence to the contrary." We do not interpret that to mean direct evidence is always necessary, even if Jam's indirect evidence of special treatment did not persuade the Board here. In fact, the Board "acknowledge[d] that a proven statistical disparity could arguably demonstrate favorable treatment or a grant of benefits."

that participation in the Local 2 hiring hall is open and accessible. In fact, the hiring hall allowed a wide variety of individuals (both union and non-union) to register, including people who walk into the union office from off the street. And, as Herrmann explained, any registered individual is eligible to start receiving referrals under the hall's normal operation. This is shown by the fact that some Shaw voters had obtained Local 2 referrals years before the representation election. Amidst that backdrop, Jam identifies no reason why the Shaw voters were not entitled to participate in the hiring hall's ordinary operation. Were there a special participation requirement that Local 2 relaxed because of the impending election, our conclusions might change. But on this record, substantial evidence supports the Board's conclusion that Shaw voters were otherwise entitled to basic hiring hall participation.[14] What matters here is not, as Jam contends, a distinction between entitlement versus eligibility. Instead, the point is that no evidence shows Local 2 afforded the Shaw voters special treatment merely by allowing them to participate. Substantial evidence supports the Shaw voters' "'entitle[ment]' to referrals as a general matter."

The Board's reasoning here is not unprecedented, either. In *Topside Construction*, the Board affirmed a decision holding that individuals were generally "entitled" to hiring hall participation under that hall's ordinary operating terms. 329 NLRB at 898. The employer there accused the union of

[14] As we explained above, the Board's requirement that Jam show voters received hiring-hall benefits to which they were not otherwise entitled is a reasonable one. So, Jam's failure to demonstrate that here means Local 2 was not obligated to entirely suspend referrals to the Shaw voters during the preelection critical period.

bypassing its standard job referral practices to benefit voters and induce their support for the union. *Id.* The Board disagreed, finding no evidence that the union "made promises to obtain for the employees work or priority in employment which they were not otherwise entitled to receive from the Union simply as employment applicants to the hiring hall." *Id.* Similarly, even though the employer "introduced evidence that various of its former employees received referrals through the union hiring hall," the Board determined that there was insufficient evidence to establish the union "favored [those] individuals over others of like standing under the hiring hall practices." *Id.* at 898–99. Thus, *Topside Construction* reasonably supports the Board's holding that voters are generally entitled to participate in the Local 2 hiring hall under its ordinary rules. Absent a finding of "improprieties in the operation of [the union] hiring hall referral process," the referrals were not objectionable. *Id.* at 899. By contrast, hiring-hall referrals may support a finding of union improprieties when the hall provides voters with special treatment they were not entitled to before.

The D.C. Circuit's decision in *King Electric*, 440 F.3d at 472, does not alter this analysis. There, a union filed an election petition and told voters during the campaign they were eligible for hiring-hall referrals, even though the hall was not generally open to the public. *Id.* As the union explained it, King Electric employees could take referrals "regardless of whether the union won or lost the election," because "at least 51% of King's employees had signed authorization cards." *Id.* King Electric objected to that promise of benefits as improper. *Id.* at 474. The D.C. Circuit explained "a union's grant to employees of a benefit to which they are *not otherwise entitled*, during an election campaign, is still objectionable … whether or not

conditioned on how employees vote in an election." *Id.* at 475-76 (emphasis added). So, the question became whether the union strictly applied the "51% rule," such that the King Electric employees were "entitled" to referrals via the signed authorization cards, or "whether [the rule] was merely something that was in the union's discretion to offer in appropriate situations—perhaps when necessary in order to encourage pro-union votes." *Id.* at 476. The court held for the employer, reasoning "the hearing officer never made a finding that the union treated the '51% rule' as binding on it and thereby unconditionally available to employees." *Id.*

Jam reads *King Electric* to mean that "where a union retained discretion whether to award … benefits, the recipients were 'not actually *entitled*' to the referrals." Our takeaway is different. As we see it, the animating question in *King Electric* was whether employees were entitled to *access* the hiring hall. *Id.* at 472 ("According to the Board, without the '51% rule,' King employees would not have been eligible for … referrals … ."). If application of the "51% rule" was discretionary, then the union could be seen as giving the employees special, undeserved access. *Id.* at 476. But if the rule was "invariably employed," then perhaps the employees were already entitled to participate. *Id.* Thus, the dispute in *King Electric* sets it apart from this case. Here, the question is not whether Shaw voters were barred from the hiring hall—they were not. The issue is how referrals were made within the hall. On that question, *King Electric* offers no insight. Therefore, we do not disturb the Board's conclusion that Shaw voters were "entitled" to referrals as a general matter.

B

We turn next to Jam's main contention—that Local 2 singled out Shaw voters for special, undeserved treatment beyond usual hiring hall practices. For support Jam points to a collection of statistical trends. It emphasizes that "the raw number of referrals to the Shaw voters increased sharply at the beginning of the focal period"; "Shaw voters began to receive union referrals immediately after the petition for election was filed"; more Shaw voters began accepting referrals as the election approached; and the rate of referral to Shaw voters rose during the focal period as well. Jam believes these trends "show[] not only that the raw numbers of lucrative referrals to the Shaw voters increased dramatically in the critical and focal periods, but also that the Shaw voters were targeted and favored with disproportionate numbers of referrals." The Board was not persuaded and defends its weighing of the evidence on appeal.

Substantial evidence supports the Board's decision that the Shaw voters were not given special treatment. To start, the evidentiary hearing yielded witness testimony in addition to hiring-hall data. The Board was entitled to credit testimony from union personnel explaining that they did not grant special treatment to Shaw voters. Herrmann testified that he used personal discretion when assigning referrals but consulted a set of general factors. For instance, he would always try to satisfy employer requests, provide specially skilled workers when necessary, and accommodate stagehand schedules. He further testified that he did not let his personal feelings towards hiring hall participants cloud his work and that he did not abandon his usual criteria when the Jam election approached. Carlson, who occasionally assisted with assigning

referrals during the relevant period, likewise testified that the Shaw voters received no special treatment. He said he did not promise voters access to work in exchange for union support nor did he consider a participant's status as a Jam employee when making referrals. He averred he never ordered the Shaw voters to receive priority treatment in the hiring hall. Different factfinders may weigh that testimony differently, but the Board is allowed to credit it.

Jam tries to refute this testimony through statistical evidence, but the data trends are not so incontrovertible that the Board had to accept Jam's version of events. The statistics Jam points to demonstrate that Shaw voters received increased referrals as the election approached and generally suggest that the eligible voters received more referrals than other identified groups during the focal period. True enough, but those trends do not necessarily mean Local 2 was giving Shaw voters special treatment. As the Board points out, the full picture is more complex, with the data suffering from certain weaknesses.

For example, Shaw voters who received their first referrals between September 2015 and May 2016 had a higher referral rate during the focal period than other non-voter stagehands who also received their first referrals at that time. But the record does not identify how many of those other non-voter stagehand "comparators" were still available or looking for work during the focal period. Some of those individuals might have accepted referrals in the fall of 2015 and then moved away or found other work, skewing the referral rate data. The record also contains no information on how many referrals the "comparators" received prior to the focal period, thus failing to show change over time. We highlight these

open questions not to reweigh the evidence, but to illustrate the tangle of factual issues facing the Board and thus the room for reasonable disagreement on which conclusions to draw from the evidence.

Other data sets, many of which the Board emphasizes on appeal, also support its decision. Post-election data demonstrates that referrals to Shaw voters rose sharply over the summer of 2016, when the union would have no incentive to give them special treatment. And referrals to non-voting Shaw Crew members increased "by an even greater percentage during the focal period" compared to the Shaw voters. The Board's Table A[15] is also instructive, as it traces the general referral patterns for different groups across time. Examination of this table suggests that Shaw voters received increased referrals largely in lockstep with busy time periods. Thus, the Board could conclude that the increased referrals had more to do with seasonal needs than the representation election.

Finally, the Board did not have to infer that the union favored Shaw voters from the referral patterns Jam identified. Jam points out that the union maintained a list of eligible Shaw voters and that those voters were referred to jobs as a group with some frequency. According to Jam, these facts in combination require an inference that the union kept the voter list to "target and favor the Shaw voters or otherwise support the existence of such favoritism." But without more, the mere fact of group referral does not demand an inference of favoritism. Jam did not examine witnesses about the grouping

[15] Table A is available in the text of the Board's decision. *Jam Prods., Ltd. v. NLRB*, 371 NLRB No. 26, 13-RC-160240, at 7 (Sept. 30, 2021).

patterns, and the Board did not need to draw the inference Jam invites. The same is true for the fact that Justin Huffman, a Shaw voter and the union's observer during the election, received the most referrals out of the Shaw Crew. For Jam, the "reasonable inference is that Huffman was favored most because he was an active Union supporter." While that may be one possible inference, it is not the only one. Herrmann testified under oath that during the focal period he was not aware Huffman was a main Local 2 contact amongst the Shaw Crew. So, a different, reasonable inference is that Herrmann did not deliberately favor Huffman as a reward for his organizing efforts. We recognize how the data looks, and we understand that different factfinders might weigh the evidence differently and draw different conclusions. But our review is not de novo, and we do not reweigh evidence. *ADT*, 54 F.4th at 97. The Board did not commit reversible error when it credited Herrmann's testimony and declined to draw conclusions favorable to Jam.

Jam urges us to force the Board to make certain inferences. Under our deferential standard of review, we decline to do so. The Board concluded that the union did not give special treatment to Shaw voters, and it relied on substantial evidence in so deciding. The Board carefully examined the statistical evidence and witness testimony, concluding that the union did not engage in election misconduct. We do not disturb that decision.

C

The Board decision took a "belt and suspenders" approach, finding that—even if the hiring-hall referrals during the critical period raised an inference of coercion—the union's explanations rebutted that inference. We thus turn our

attention to Local 2's proffered explanations for why Shaw voters received increased referrals as the election approached. Jam criticizes Local 2's explanations and the Board's treatment of them, arguing the Board held "Local 2 to a non-existent rebuttal burden and accept[ed] Local 2's factually unsupported 'explanation' of its conduct as sufficient, despite substantial evidence to the contrary in the record as a whole."

The union's first explanation for its referral patterns centers around the April 2016 focal period. Per Local 2, the increase in referrals to Shaw voters during the focal period is attributable to the hiring hall being extraordinarily busy at that time. Indeed, the Board argues that the data shows Shaw voters "received limited referrals during the coldest months, followed by a marked increase in the spring." The Board decision credited that explanation, and it relied on substantial evidence in doing so. Witnesses confirm that the spring of 2016 was the busiest time in the hiring hall's history to date. They testified further that the demand for labor fluctuates seasonally, with the need for work starting to rise at "the end of March, beginning of April, until the end of September, beginning of October." The focal period coincided with spring, meaning a general increase in across-the-board referrals could be expected. Table A also strongly suggests that the focal period was exceptionally busy, as it shows referrals increasing to *all groups* at that time. So, even if certain isolated days during the focal period were busier than others, the Board still relied on substantial evidence in analyzing general correlations across the entire focal period.

Local 2's second explanation relates to referrals granted during the abeyance period before the focal period. According to the union, referrals increased during that time because Jam

had just collectively terminated the entire Shaw Crew, and those individuals were looking for work. The increase in referrals to Shaw voters in 2015 indeed took place after Jam terminated the Shaw Crew, so the Board was entitled to believe the union's offered explanation.

One final point: Per Jam, the union also gave Shaw voters preferential treatment by "failing to apply its standard drug-testing requirements to the Shaw voters." On this count, the Board found that Jam failed to present sufficient evidence of a drug test policy and violation thereof. The Board concluded that "the record contains no evidence regarding whether new enrollees were tested during the relevant time period." Further, the rules relevant to the drug testing requirement were not submitted into evidence. Both findings draw support from substantial record evidence. Herrmann and Carlson both testified that they did not know whether the Shaw voters enrolled during the critical period underwent drug testing. The two stagehand witnesses testified that they were not personally drug tested, but they started receiving referrals before the critical period began. Jam presented no other evidence suggesting that Local 2 waived drug testing requirements for the Shaw voters. Thus, the Board relied on substantial evidence in rejecting Jam's drug testing arguments.

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The Board decision reasonably applies substantive labor law, and substantial evidence supports its factual findings. So, we GRANT the Board's application for enforcement of its January 11, 2022, Order in Board Case No. 13-CA-284761.