Oral Argument Not Yet Scheduled

Nos. 11-1218 & 11-1264

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WHITE MOTOR SALES, D/B/A FAIRFIELD TOYOTA AND FAIRFIELD IMPORTS, D/B/A FAIRFIELD TOYOTA

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

AUTOMOTIVE MACHINISTS LODGE NO. 1173

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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Petitioner/Cross-Respondent	)	
v.	)	**Nos. 11-1218, 11-1264**
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	
AUTOMOTIVE MACHINISTS LODGE NO. 1173	)	
Intervenor	)	

THE BOARD'S CERTIFICATE AS TO
PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the National Labor Relations Board ("the Board") respectfully submits the following Certificate as to Parties, Rulings, and Related Cases:

A. Parties and Amici

White Motor Sales, d/b/a Fairfield Toyota, and Fairfield Imports, d/b/a Fairfield Toyota, ("the Company") was the Respondent before the Board and is the Petitioner and Cross-Respondent before the Court. The

Board is the Respondent and Cross-Petitioner before the Court; its General Counsel was a party before the Board. The Automotive Machinists Lodge No. 1173 was the charging party before the Board and is the intervenor before the Court.

B. Rulings Under Review

The case under review is a Decision and Order of the Board issued on June 9, 2011, reported at 356 NLRB No. 174.

C. Related Cases

This case has not previously been before the Court. The Board is not aware of any related cases either pending or about to be presented before this or any other court.

s/ Linda Dreeben
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Dated at Washington, DC
this 25th day of October, 2011

TABLE OF CONTENTS

Headings **Page(s)**

TABLE OF CONTENTS

Headings – Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases **Page(s)**

[*] Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

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* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

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TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

* Authorities upon which we chiefly rely are marked with asterisks.

Statutes: **Page(s)**

Miscellaneous:

GLOSSARY

"A." = Appendix

"the Act" = National Labor Relations Act, 29 U.S.C. § 151 et seq., as amended

"Board" = National Labor Relations Board

"Br." = Company's opening brief

"the Company" = White Motor Sales, d/b/a Fairfield Toyota, and Fairfield Imports d/b/a Fairfield Toyota

"the Union" = Automotive Machinists Lodge No. 1173

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FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before this Court on the petition of White Motor Sales, d/b/a Fairfield Toyota, and Fairfield Imports d/b/a Fairfield Toyota ("the Company") to

review, and on the cross-application of the National Labor Relations Board ("the Board") to enforce, the Board's Order in *White Motor Sales*, 356 NLRB No. 174, 2011 WL 2308712 (June 9, 2011). (A.281-87.)[1]

The Board had jurisdiction over this matter under Section 10(a) of the National Labor Relations Act, as amended ("the Act") (29 U.S.C. §§ 151, 160(a)), which empowers the Board to prevent unfair labor practices. Because the Board's Order is based, in part, on findings made in an underlying representation proceeding involving the Automotive Machinists Lodge No. 1173 ("the Union"), (Board Case No. 20–RC–18287), the record in that proceeding is also before the Court pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp*., 376 U.S. 473, 477-79 (1964). The Court has jurisdiction to review the Board's actions in the representation case solely for the purpose of "enforcing, modifying, or setting aside in whole or in part the [unfair labor practice] order of the Board." 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the

[1] "A." references are to the joint appendix. "Br." refers to the Company's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. The Board's Decision and Order that appears at pages 281-87 of the Appendix includes two corrections later issued by the Board. The version that appears at pages 290-94 does not reflect both corrections.

representation case in a manner consistent with the Court's rulings. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), which provides for the filing of petitions for review and cross-applications for enforcement of final Board orders in this Circuit. The Board's Order is final with respect to all parties. The Company filed its petition for review on June 14, 2011, and the Board filed its cross-application to enforce the Board's Order on July 18, 2011. There is no time limit in the Act for seeking enforcement or review of Board orders.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are contained in the Addendum to this brief.

STATEMENT OF ISSUE

Courts accord the Board an especially wide degree of discretion in addressing questions that arise in the context of representation elections. Did the Board act within this broad discretion when it overruled the Company's election objections and certified the Union, and therefore properly found that the Company violated Section 8(a)(5) and (1) of the Act when it refused to bargain with the Union and furnish the Union with information it had requested?

STATEMENT OF THE CASE

After the Union prevailed in a Board-conducted representation election, and was certified to represent automotive technicians at the Company's facility in Fairfield, California, the Company refused to bargain with the Union and refused to furnish the Union with information it had requested. The Board found that the Company's refusal violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). The Company does not dispute these allegations but instead contends that it had no duty to bargain with the Union. It argues that the Board abused its discretion in the underlying representation case by overruling several of its election objections and by doing so without conducting an evidentiary hearing, and therefore improperly certified the Union.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Representation Proceeding

On January 26, 2010, the Union filed a petition under Section 9(c) of the Act (29 U.S.C. § 159(c)), seeking to represent a unit of automotive technicians at the Company's Fairfield, California car dealership.[2] Pursuant to a stipulated election

[2] White Motor Sales owned the dealership when the petition was filed but subsequently sold the dealership to Fairfield Imports. In its answer to the General Counsel's second amended complaint, Fairfield Imports admitted it is a successor to White Motor Sales. (A.283 n.2; *compare* A.122 ¶ 7(a)-(d) *with* A.129 ¶ II.)

agreement, on March 11 the Board conducted a secret-ballot election among the designated employees. (A.290; 10-11.) The tally of ballots showed that of approximately 15 eligible voters, 10 voted for the Union and 4 voted against the Union; there were no challenged ballots and no void ballots. (A.17; 12.) The Company filed five objections to the election, arguing in all but one (which the Company withdrew) that Union Organizer Jesse Juarez engaged in conduct on the day of the election that destroyed the laboratory conditions of the election. (A.18; 13-16.)

The Regional Director directed an investigation into the objections, during which the Company submitted declarations from several company representatives. (A.19.) Based upon this investigation, the Regional Director issued a report and recommendation finding that the objections did not raise any substantial and material issues of fact that would warrant a hearing. (A.17-30.) He concluded "that the election comprised an untarnished measure of employee sentiment and that an uncoerced majority of unit employees voted in favor of representation by the Union." (A.29.) As a result, he recommended that the Board overrule the objections and certify the Union as the employees' bargaining representative. (A.29.)

The Company filed exceptions to the Regional Director's decision with respect to several objections as well as an exception asserting that the Regional

Director erred by overruling the Company's objections without conducting a hearing. (A.31-73.) On October 6, 2010, the Board (Chairman Liebman and Members Becker and Hayes) issued a Decision and Certification of Representative adopting the Regional Director's findings and recommendations and certifying the Union as the employees' bargaining representative. (A.91-92.)

B. The Unfair Labor Practice Proceeding

Within days after it prevailed in the election, the Union requested that White Motor Sales meet and bargain with it as the exclusive collective-bargaining representative of the bargaining unit. (A.282; 245.) On June 3, 2010, the Union requested certain information regarding the unit's terms and conditions of employment. (A.282; 246-48.) White Motor Sales refused both requests. (A.282; 249.) The Union requested that Fairfield Imports meet and bargain with the Union after it assumed operation of the car dealership in June 2010, and on October 12, 2010, asked Fairfield Imports to furnish the same information it had requested from White Motor Sales; Fairfield Imports also refused both requests. (A.282-83; 250-62.)

After the Board certified the election results, the Union filed a charge with the Board alleging that White Motor Sales and Fairfield Imports refused to meet and bargain in good faith and refused to provide information requested by the Union regarding the unit's terms and conditions of employment. (A.281; 263-64.)

The Board's Acting General Counsel issued a complaint, which was amended twice, alleging that the Company's post-certification refusal to bargain with the Union or to provide information relevant to bargaining violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) & (1)). (A.281; 119-27.) In its answer, the Company admitted that it refused to bargain or to provide information requested by the Union. (A.281; *compare* Acting General Counsel's Second Amended Complaint (A.122-25 ¶¶ 8-11) *with* Company's Answer (A.129 ¶ I.)) The Acting General Counsel then moved for summary judgment, and the Board issued an order transferring the proceeding to itself and a notice to show cause why the motion for summary judgment should not be granted. (A.281; 131-274.) The Company filed a response stating it did not oppose the motion for summary judgment. (A.281; 277-80.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On June 9, 2011, the Board (Chairman Liebman and Members Becker and Hayes) issued a Decision and Order granting the Acting General Counsel's motion for summary judgment. The Board found that all of the issues raised by the Company were, or could have been, litigated in the prior representation proceeding, and that the Company did not offer to adduce any newly discovered evidence or allege any special circumstances that would require reexamination of the Board's decision in the representation proceeding. (A.281) Accordingly, the

Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union and refusing to provide information the Union requested. (A.283)

The Board ordered both White Motor Sales and Fairfield Imports to cease and desist from engaging in the unfair labor practices found, and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights. (A.283-84.) Affirmatively, the Board's Order requires White Motor Sales to furnish the Union with the information it had requested on June 3, to mail a remedial notice to the Union and each unit employee employed after March 12, 2010, and to distribute that notice electronically if the Company customarily communicates with its employees by such means. (A.283-84.) The Board's Order requires Fairfield Imports to furnish the Union with the information it had requested on October 12, to bargain with the Union upon request, and to post a remedial notice at its facility in Fairfield, California, and distribute the notice electronically if it customarily communicates with its employees by such means. (A.284.)

SUMMARY OF ARGUMENT

The Company argues that on the morning of the election, Union Representative Jesse Juarez made intemperate remarks during two visits to the shop where the technicians worked, which destroyed the laboratory conditions

surrounding the election that the Board ideally seeks to maintain. The Board, exercising its broad discretion over representation elections, reasonably overruled the Company's objections.

The Company first maintains that Juarez's comments violated the Board's rule from *Peerless Plywood Co.*, 107 NLRB 427 (1953), which prohibits union or employer representatives from making election speeches to massed assemblies of employees on company time within 24 hours of an election. But the Board reasonably found that Juarez's "brief and disjointed messages" did not rise to the level of a prohibited election speech. Second, the Company suggests that Juarez sent a message to employees about the lengths the Union would go to punish employees who voted against the Union. The Board rejected this suggestion, finding it was "an untenable leap" to conclude that Juarez's admittedly uncivil comments would engender a sense of foreboding and fear among the employees. And third, the Company argues that Juarez's conduct left employees with the impression that the Company was powerless to protect its rights in a confrontation with the Union, which is objectionable under the Board's decision in *Phillips Chrysler Plymouth, Inc*., 304 NLRB 16 (1991) ("*Phillips Chrysler*"). But, as found by the Board, this assertion is belied by the fact that during his first visit to the shop Juarez left when a company representative instructed him to do so, and, later, when Juarez returned to the shop escorted by company representatives, those

representatives stood idly by without asking Juarez to leave when he resumed his commentary. Finally, the Company argues that the Board erred by not considering the cumulative impact of Juarez's conduct, but the Company waived this argument by failing to raise it in exceptions to the Board.

In addition to its arguments over laboratory conditions, the Company argues that it presented a prima facie case of objectionable conduct and thus was entitled to an evidentiary hearing on its objections. But the Regional Director acted within his broad discretion by finding, based on declarations of company representatives that he assumed as true, that the Company failed to raise any substantial and material issue of fact that would warrant a hearing.

Because the Board did not abuse its discretion in overruling the Company's election objections, it properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union and to furnish the Union with information it had requested.

ARGUMENT

THE BOARD DID NOT ABUSE ITS DISCRETION BY OVERRULING THE COMPANY'S OBJECTIONS, AND THEREFORE PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION AND REFUSING TO PROVIDE INFORMATION THAT THE UNION REQUESTED

Section 7 of the Act gives employees the right to choose a representative and to have that representative bargain with the employer on their behalf. 29 U.S.C.

§ 157. Employers have the corresponding duty to bargain with their employees' chosen representatives, and a refusal to bargain violates this duty under Section 8(a)(5) and (1) of the Act. 29 U.S.C. § 158(a)(5) and (1).[3]

The Company admits (Br. 4) that it refused to bargain with the Union, but maintains that it had no legal obligation to do so because the Board erred by overruling its election objections in the underlying representation proceeding without holding an evidentiary hearing, and therefore improperly certified the Union. Accordingly, if the Board did not abuse its discretion in overruling those election objections, the Company's actions violated Section 8(a)(5) and (1) of the Act, and the Board is entitled to enforcement of its order. *See Pearson Educ., Inc. v. NLRB*, 373 F.3d 127, 130 (D.C. Cir. 2004); *C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 882 (D.C. Cir. 1988) (per curiam).

A. This Court Gives Considerable Deference to the Board's Rulings on Election Objections

In enacting Section 9 of the Act, "Congress . . . entrusted the Board with a wide degree of discretion in establishing the procedures and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); *accord Kwik Care Ltd. v.*

[3] A violation of Section 8(a)(5) of the Act produces a "derivative" violation of Section 8(a)(1). *See Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004).

NLRB, 82 F.3d 1122, 1126 (D.C. Cir. 1996). Thus, on questions that arise in the context of representation elections, the Court "accord[s] the Board an especially 'wide degree of discretion.'" *Antelope Valley Bus Co. v. NLRB*, 275 F.3d 1089, 1095 (D.C. Cir. 2002) (quoting *A.J. Tower*, 329 U.S. at 330). The Court will only overturn the Board's order to bargain upon finding that the Board abused that wide discretion. *Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 473 (D.C. Cir. 1996). This occurs "in only the rarest of circumstances." *North of Market Senior Servs., Inc. v. NLRB*, 204 F.3d 1163, 1166 (D.C. Cir. 2000).

A party seeking to overturn a Board-administered election thus shoulders a "heavy burden." *Kwik Care Ltd.*, 82 F.3d at 1126. The objecting party must show not only that election misconduct occurred, but that the conduct "interfered with the employees' exercise of free choice to such an extent that [it] materially affected the results of the election." *C.J. Krehbiel Co.*, 844 F.2d at 882. These determinations are "fact-intensive" and thus are "especially suited for Board review." *Family Serv. Agency San Francisco v. NLRB*, 163 F.3d 1369, 1377 (D.C. Cir. 1999).

This Court's "review of the Board's factual conclusions is 'highly deferential.'" *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 834 (D.C. Cir. 1998) (quoting *LCF, Inc. v. NLRB*, 129 F.3d 1276, 1281 (D.C. Cir. 1997)). Under the Act, the Board's findings of fact are conclusive if supported by substantial

evidence considered on the record as a whole. 29 U.S.C. § 160(e). Hence, "[i]f there is substantial evidence to support the Board's conclusions, [this Court] will uphold the Board's conclusions even if [this Court] would have reached a different result had [it] considered the question de novo." *Perdue Farms*, 144 F.3d at 834 (citation and quotation marks omitted).

B. The Board Did Not Abuse Its Discretion in Overruling the Company's Election Objections

In *General Shoe Corp.*, 77 NLRB 124, 127 (1948), the Board proclaimed that "[i]n election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." In evaluating whether laboratory conditions have been achieved, this Court has recognized that "union elections are often not conducted under ideal conditions, that there will be minor (and sometimes major, but realistically harmless) infractions by both sides, and that the Board must be given some latitude in its effort to balance the right of the employees to an untrammeled choice, and the right of the parties to wage a free and vigorous campaign." *NLRB v. Mar Salle, Inc.*, 425 F.2d 566, 571 (D.C. Cir. 1970) (quotation marks omitted); *see also Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1562 (D.C. Cir. 1984) ("although the 'laboratory conditions' standard represents a noble ideal, it must be applied flexibly, for in its extreme form it is a standard that 'no seasoned observer

considers realistic'") (internal citation omitted); *Morganton Full Fashioned Hosiery Co.*, 107 NLRB 1534 (1954) ("we are not unmindful of the fact that the 'laboratory' for election purposes is usually an industrial plant where vigorous campaigning and discussion normally take place, and where isolated deviations from the above-mentioned standard will sometimes arise").

Over time, the Board has established various tests to determine when the preelection conduct of employers and unions alike transgresses the bounds of what is permissible and deprives voters of their exercise of free choice. For instance, as will be discussed in further detail below, in *Peerless Plywood Co.*, 107 NLRB 427 (1953), the Board explained that an election may be set aside if an employer or union makes an election speech to massed assemblies of employees within 24 hours of an election. Likewise, in *Phillips Chrysler*, 304 NLRB 16 (1991), the Board prohibited union conduct that creates the impression that an employer is powerless to protect its own legal rights.

As we now show, although the Company argues that the conduct of Union Representative Jesse Juarez destroyed the laboratory conditions of the election involving the Company's automotive technicians, the Board did not abuse its discretion in overruling those objections and certifying the Union. Indeed, as the Regional Director concluded in his Report and Recommendation to the Board (A.29), "the election comprised an untarnished measure of employee sentiment and

that an uncoerced majority of unit employees voted in favor of representation by the union."

1. Underlying Facts

The parties agreed to hold the election among the approximately 15 automotive technicians at the Company's facility on March 11, 2010, from 10:00 a.m. to 10:30 a.m. (A.17; 10-11.) The facility consists of two buildings, the Truck Center where the polling took place, and a larger service building that contained several offices as well as the parts department and "the shop" where the technicians work in a number service stalls approximately ten feet apart from one another. (A.20.)

At approximately 8:45 a.m. on the morning of the election, Parts Manager Perry Sperling observed Union Representatives Juarez and Rick Rodgers standing in the service stall of technician Darnell Moore, who was to serve as the Union's election observer. (A.19-20 & n.5.) Juarez and Rodgers were speaking with Moore as well as technicians Tim Stacey, Frank Bartolomucci, and Oscar Larin. (A.20; 58-59, 66.) Sperling could not hear what was being discussed. (A.20.)

Sperling immediately went to the Truck Center and reported what he saw to Service Manager Anthony Mattice and to Patrick O'Mara, a labor consultant for the Company. (A.19-20; 58, 66.) Mattice and O'Mara rushed to the shop to investigate. (A.20; 58, 66.) Once at the shop, O'Mara asked Juarez to leave the

work area, and Juarez, in turn, asked O'Mara to leave. (A.21; 59, 67.) O'Mara stated that the Union was not allowed to meet with the employees on the Company's premises on the day of the election, and Juarez responded by approaching O'Mara and asking "[w]ho are you to tell me to leave." (A.21; 59, 67.)

Mattice then spoke up and ordered Juarez to leave. (A.21; 59, 67.) Juarez and Rodgers immediately complied with this directive and O'Mara and Mattice escorted them to a nearby door. (A.21; 59, 67.) On his way out, Juarez stated in the direction of O'Mara and Mattice "I don't have to listen to you," but nonetheless complied and left the shop. (A.21; 59-60, 67.)

Once out of the shop, Juarez and Rodgers turned left, thereby stationing themselves almost immediately adjacent to the door and near the Company's Service Writers' office. At some point Juarez yelled insults about the Company, including that O'Mara was a "piece of shit," that he (Juarez) would file charges with the Board and OSHA, and that the Company spent money on attorneys and consultants rather than taking care of employees. He also accused the Company and O'Mara of lying to employees, and claimed that co-owner Scott Thomason was a known pedophile. (A.22; 60, 68.) O'Mara later asserted that "these comments were made in locations so that employees in the shop could have heard them and certainly any customers in the service drive area would have heard them,

not to mention Service Writers who were in the immediate area." (A.22; 60.) Mattice reported that Juarez made these comments in the service drive area, which is outside the shop. (A.22; 68.) The Regional Director assumed that employees heard this outburst. (A.22 n.9.)

The parties then held a pre-election conference in the Truck Center, after which Juarez asked if he could inspect the Board Notice of Election that the Company was required to post in the shop. The Company consented and accompanied Juarez to the shop. (A.22-23; 61, 68-69.) After the group reentered the shop, Juarez loudly proclaimed that the shop was "filthy" and a "pigsty," that "this is why we [the Union] are here," that it was "no wonder the guys are unhappy," and asked "why can't you spend money to clean this up." (A.23; 61, 69.) Juarez then accused Company President Rahim Hassanally of being responsible for the horrible conditions, reiterated that the shop was filthy, and again stated that it was "no wonder the employees were unhappy and wanted my help." (A.23; 61, 69.) Again, the Regional Director assumed that some or all of the employees overheard these comments. (A.28.) In response, Hassanally admonished Juarez for having bad manners and an unprofessional attitude. (A.23; 61, 69.) At no point did any company representative ask Juarez to leave. Even after Juarez, along with the other Union and company representatives, left the unit employees in the shop and proceeded to the polling area, Juarez continued his rant

by repeating his intention to contact OSHA and his contention that Thomason was a pedophile. (A.23; 62, 69-70.)

2. The Board acted within its broad discretion by finding that Juarez's brief outbursts did not amount to an election speech prohibited by the Board's *Peerless Plywood* rule

The Board acted well within its discretion in rejecting the Company's argument, advanced at Br. 18-24, that Juarez's remarks on the morning of the election constituted objectionable election speech. In *Peerless Plywood Co.*, 107 NLRB 427, 429 (1953), the Board declared "that employers and unions alike will be prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election." This type of speech, the Board reasoned, "tends to create a mass psychology which overrides arguments made through other campaign media and gives an unfair advantage to the party, whether employer or union, who in this manner obtains the last most telling word." *Id*. As the Board explained in *Montgomery Ward & Co.*, 124 NLRB 343, 344 (1959), this prohibition is not limited to "formal [election] speech in the usual sense" but includes question-and-answer sessions, the purpose of which in that case was to make certain that employees "fully understood the policies and practices of the Company with respect to wages, commissions, and other benefits so as to enable them to evaluate

these benefits against prospective benefits to be obtained from union representation."

By contrast, the Board has explained that *Peerless Plywood* does not prohibit minor conversations between employees and either a union agent or supervisor within 24 hours of an election. *See Bus. Aviation, Inc.*, 202 NLRB 1025, 1027 (1973) (finding brief, election-day conversation, during which union agent solicited authorization cards from some employees and discussed the benefits that would follow if they voted for the union, "was not the kind of election speech to a captive massed audience envisioned by the Board" as objectionable); *Associated Milk Producers, Inc.*, 237 NLRB 879, 880 (1978) (finding manager's conversation with three employees not objectionable where he informed them that it was election day and stated that he did not feel that they needed a union and hoped that they would vote "no" in the election").[4]

Here, the Board reasonably found (A.27-28) that the Union did not violate *Peerless Plywood* when Juarez and Rodgers were speaking with Moore, who was to serve as the Union's election observer, in the presence of several other

[4] The Company attempts (Br. 19-20) to undercut the Board's decision in *Business Aviation* by arguing that it is inconsistent with *Honeywell, Inc.*, 162 NLRB 323, 325 (1966). In *Honeywell*, the Board found that the *Peerless Plywood* rule bars all campaign speeches, even when only a small percentage of the voting-eligible employees were subjected to the captive-audience speech. It did not, as the Company suggests, find that any communication or conversation with employees constitutes an objectionable campaign speech.

technicians who had gathered near Moore's stall. Because the Company did not overhear what was said, the Board found (A.27-28) that there was no evidence supporting the argument that Juarez and Moore were campaigning among the employees. The Company does not challenge this finding in its brief.

The Board then reasonably found (A.28) that the statements Juarez made when he was escorted out of the shop, and those made when he returned a short time later, were also not objectionable. The Board assumed (A.29) that the employees who were present constituted a "massed assembly," yet found (A.28-29) that Juarez's "brief and disjointed messages" were not full-fledged campaign speeches like those found objectionable in *Peerless Plywood* and *Montgomery Ward*, but were instead akin to the "spontaneous, off-the-cuff remarks" that the Board has distinguished from election speeches. *See Midway Hosp. Med. Ctr., Inc.*, 330 NLRB 1420, 1420 (2000) (finding a Union agent's "prolonged, 30-minute tirade against the Employer after being directed to leave the Employer's cafeteria," made within minutes before an election was scheduled to resume, did not constitute an election speech); *Mediplex of Conn., Inc.*, 319 NLRB 281, 298 (1995) (finding union agent did not make an election speech when he yelled, in the presence of prospective voters on election day, that he would see them at a victory party). Unlike in *Montgomery Ward*, where an employer representative engaged in a question-and-answer session to discuss the employer's policies and practices,

here Juarez, at most, suggested that the employees wanted the union because the shop was a "pigsty."[5] Certainly more is required than this to set aside an election. Accordingly, the Board acted within its discretion in finding that Juarez's outbursts did not constitute objectionable conduct that would tend to interfere with employee free choice. *See C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 882 (D.C. Cir. 1988) (per curiam).

3. The Board acted within its broad discretion by rejecting the Company's argument that Juarez's conduct created among employees a sense of fear about how the Union might deal with those with whom it disagrees

The Board also acted within its discretion by rejecting the Company's vague assertion, advanced at Br. 24-27, that Juarez's conduct destroyed laboratory conditions by creating a sense of fear about how the Union would treat employees who voted against the Union. (A.26, 54.) Although the Board acknowledged (A.26) that Juarez's comments were "uncivil" and possibly even "slanderous," it reasonably found that they did not amount to punishment that would warrant setting aside the election. This is consistent with the principle that insulting language alone does not destroy laboratory conditions. *See Bridgeport Fittings,*

[5] The Company also complains (Br. 22-23) that the Regional Director "grafted" onto the *Peerless Plywood* rule the requirement that, to be objectionable, a campaign speech must be sustained. But since the Regional Director also found (A.28) that Juarez's ramblings "did not constitute a campaign speech," the Regional Director's finding that the ramblings were not sustained is not of independent significance in this case.

Inc. v. NLRB, 877 F.2d 180 (2d Cir.1989) ("rude" or "impolite talk," without more, does not justify setting aside election); *Firestone Textiles Co.*, 244 NLRB 168, 171 (1979) (derogatory comments had no impact on employees' votes).

In its attempt to refute the Board's findings, the Company attempts a sleight-of-hand by recasting its argument (Br. 25-26) and suggesting, without any supporting evidence, that Juarez's conduct was physically threatening. In their declarations, both O'Mara and Mattice stated (A.61, 69) that when Juarez returned to the shop, he did so "to humiliate and belittle the President of the Company in the presence of the Company's employees." Neither stated that Juarez made physical threats. Nevertheless, in its brief, the Company states (A.25) that Juarez had "lost all control" and suggests that it was a "frightening situation." Moreover, the Company claims that it did not attempt to end Juarez's diatribe during his second visit to the shop so as not to "escalat[e] the incident into a physical brawl." But neither O'Mara nor Mattice offered any such explanation in their declarations, and indeed this fictional justification for its inaction is belied by the fact that a short time earlier, when O'Mara instructed Juarez to leave the shop, Juarez did so immediately.

4. The Board acted within its broad discretion by finding that Juarez's conduct did not create the impression that the Company was powerless to protect its legal rights

The Board acted within its discretion in rejecting (A.24) the Company's argument, advanced at Br. 27-30, that Juarez's conduct destroyed laboratory conditions by creating the impression that the Company was powerless to protect its property rights, which constitutes objectionable conduct under the Board's decision in *Phillips Chrysler*, 304 NLRB 16 (1991). The Board reasonably found that when company representatives asked Juarez to leave the shop, he left, and that when he returned and resumed his diatribe, the Company stood idly by and let him rant. In neither instance can the Company assert that it appeared powerless.

In *Phillips Chrysler*, 304 NLRB at 16, the Board set aside an election based on the conduct of two union representatives, who on the day of an election "repeatedly and belligerently refused to heed requests of the Employer's president to leave" the employer's shop area and likewise remained after the police were summoned. The Board found that this "direct challenge to the Employer's assertion of its property rights . . . undoubtedly conveyed to employees . . . that the Employer was powerless to protect its own legal rights in a confrontation with the Union." *Id*. In analyzing such objections, the Board seeks to determine whether the objectionable conduct demonstrates either an employer's powerlessness to stop the union or instead that the conduct would have reasonably been perceived by the

employees merely as embarrassing union conduct. *See Reliable Trucking, Inc.*, 349 NLRB 812, 823 (2007) (citing *Chrill Care, Inc.*, 340 NLRB 1016, 1017 (2003)).

The Board found (A.25) that Juarez's conduct "reasonably would have been perceived by employees as establishing the Employer's authority, rather than showing it as lacking in that regard." After all, although Juarez during his first appearance in the shop stated that he "didn't have to listen" to the company representatives, he left "very grudgingly" when told to do so by Service Manager Mattice, leading the Board to explain that his actions in leaving spoke louder than his words and served to establish the Company's authority. (A.25.) *See Chrill Care, Inc.*, 340 NLRB 1016, 1017 (2003) (explaining that, where union organizer briefly disrupted a meeting at a restaurant between management and employees but was ultimately persuaded to leave, it did not show the employer's powerlessness but rather was more likely to convince employees that the employer remained in complete control);[6] *Station Operators, Inc.*, 307 NLRB 263, 263 (1992) (union representatives who confronted employer officials at an employee meeting several

[6] In its attempt to distinguish *Chrill Care*, the Company incorrectly asserts (Br. 29) that there was no evidence in that case that eligible voters witnessed the misconduct at issue. In fact, there were two incidents reviewed, one of which plainly occurred in front of eligible voters as established by the fact that following the disruption an employer representative asked the assembled employees "is that the kind of person you want representing you?" 340 NLRB at 1017.

weeks before an election, but left the premises when asked to do so, did not "directly challenge the Employer's property rights in a manner that would tend to interfere with employees' free and uncoerced choice in the election"). And as pointed out here by the Board (A.25), it rejected similar arguments involving behavior far more aggressive than that attributed to Juarez. In *Reliable Trucking, Inc.*, 349 NLRB at 824-25, for instance, the Board overruled an objection where seven or eight union agents barged into a hotel room where an employer was holding a meeting for employees concerning a mail-ballot election that was to begin the following day. The agents disrupted the meeting, exchanged profanities with employees and employer representatives, and only left after police were summoned.

Moreover, the Board explained (A.25 & n.11) that, although Juarez made intemperate remarks when he reentered the shop escorted by company representatives, those representatives did not ask Juarez to end his diatribe or to leave the shop, and thus the Company cannot now claim that it was perceived as powerless to protect its property interests. This is consistent with the Board's decision in *Edward J. Bartolo Corp.*, 313 NLRB 382, 383 (1993), where the Board explained that, because the employer did not ask the offending union representative to leave its property and thus did not assert any property rights in the

first place, it could not maintain that it was powerless to protect its property rights: "[t]here was never any battle, on this particular front, for the Employer to lose."

This was far different from the situation in *North of Market Senior Services, Inc. v. NLRB*, 204 F.3d 1163, 1169 (D.C. Cir. 2000), on which the Company (Br. 15-18) relies. This Court remanded *North of Market Senior Services* to the Board to hold a hearing upon finding that the employer raised "significant issues regarding the Union's improper invasion of its property and the resulting impression that the employer was helpless to control the situation." There, union representatives, purporting to act on behalf of Board agents, walked throughout the employer's medical facility for 30 minutes—including barging into examination rooms where patients were in various states of undress—while openly defying instructions from an employer representative who stated in a declaration that she was "powerless to stop this rampage through [the employer's] facility or to counter what the union agents were doing or saying." *Id*. at 1165-66. By contrast, here Juarez was not acting under the proclaimed authority of the Board, and Company representatives never asserted that they were unable to stop or counter what Juarez was saying.

5. The Company waived its argument that the Regional Director erred by failing to consider the cumulative impact of Juarez's conduct, an argument which in any event lacks merit

The Company attempts (Br. 17-18) to impermissibly revive its first objection to the election in which it argued that the Regional Director erred by failing to consider the cumulative impact of Juarez's misconduct. The Regional Director recommended (A.24) that the Board overrule this objection, which he described as "mere boilerplate, an unsupported catch-all allegation," the breadth of which was encompassed by the Company's other objections. The Company expressly abandoned this objection in its exceptions to the Board (A.42), stating only the following: "While ignoring the Report's 'boilerplate' and lack of evidence findings, we nevertheless do not take Exceptions to this Recommendation as it is not determinative." Accordingly, the Company waived this argument and this Court lacks jurisdiction to consider it now. 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, . . .[absent] extraordinary circumstances."); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *Dean Transp., Inc. v. NLRB*, 551 F.3d 1055, 1063 (D.C. Cir. 2009).

In any event, the Company's argument lacks merit. It has been widely recognized that, although the Board "consider[s] the overall conduct of an election campaign, . . . such an approach may not be used to turn a number of insubstantial

objections to an election into a serious challenge." *Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1569 (D.C. Cir. 1984) (quoting *NLRB v. Van Gorp Corp.*, 615 F.2d 759, 765 (8th Cir. 1980)); *see also NLRB v. Brown-Ferris Indus. of Louisville, Inc.*, 803 F.2d 345, 349-50 (7th Cir. 1986) ("[t]he challenging party must at the very least demonstrate conduct that is legally actionable in its component parts or 'offer the Board detailed evidence of the pattern the activity formed and its influence on the election.'") (quoting *Melrose-Wakefield Hosp. Ass'n v. NLRB*, 615 F.2d 563, 570 (1st Cir. 1980)). Moreover, this Court has explained that it "will not independently assess the 'totality of the circumstances' to overturn the Board's considered decisions." *Amalgamated Clothing & Textile Workers Union*, 736 F.2d at 1570; *see also Pace Univ. v. NLRB*, 253 F. App'x 41, 42 (D.C. Cir. 2007).

D. The Company Failed To Carry Its Burden of Establishing Conduct Requiring the Board To Conduct an Evidentiary Hearing

Finally, there is no merit to the Company's claim (Br. 15) that the Board abused its discretion by declining to order the Regional Director to hold an evidentiary hearing in response to the Company's election objections. It is well settled that the Act does not mandate post-election hearings. *See Int'l Union of Elec., Radio & Mach. Workers v. NLRB*, 135 U.S. 355, 360 (1969); *accord Amalgamated Clothing Workers of America v. NLRB*, 424 F.2d 818, 828 (D.C. Cir.

1970). Such hearings are granted only when a party challenging an election raises a "substantial and material issue[] of fact sufficient to support a prima facie showing of objectionable conduct." *AOTOP, LLC v. NLRB*, 331 F.3d 100, 103 (D.C. Cir. 2003) (quoting *Swing Staging, Inc. v. NLRB*, 994 F.2d 859, 862 (D.C. Cir. 1993) and citing 29 C.F.R. § 102.69(d)). This policy "is designed to resolve expeditiously questions preliminary to the establishment of the bargaining relationship and to preclude the opportunity for protracted delay of certification of the results of representation elections." *Amalgamated Clothing Workers of America*, 424 F.2d at 828 (quoting *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 32 (5th Cir. 1969)); *Int'l Union of Elec., Radio & Mach. Workers v. NLRB*, 418 F.2d 1191, 1196-97 (D.C. Cir. 1969).

The objecting party must "clearly demonstrate that factual issues exist which can only be resolved by an evidentiary hearing." *Int'l Union of Elec., Radio & Mach. Workers*, 418 F.2d at 1197 (quoting *NLRB v. Tennessee Packers, Inc.*, 379 F.2d 172, 178 (6th Cir. 1967)). It bears the burden of producing this specific evidence, and not merely "[n]ebulous and declaratory assertions," because "it is not up to the Board staff to seek out [such] evidence." *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1182 (D.C. Cir. 2000) (quoting *Amalgamated Clothing Workers of America*, 424 F.2d at 828); *see also North of Market Senior Servs., Inc. v. NLRB*, 204 F.3d 1163, 1167 (D.C.Cir.2000) (evidence "must point to specific

events and specific people"). Accordingly, no evidentiary hearing is required where the Regional Director "assumed the facts alleged in the objections to be true but found, as a matter of law, that those facts did not justify setting aside the election." *Micro Pac. Dev., Inc. v. NLRB*, 178 F.3d 1325, 1326 n.14 (D.C. Cir. 1999).

Here, the Regional Director reasonably found, as adopted by the Board, that the Company failed to raise any substantial or material issues of fact, and thus no hearing was warranted. (A.19.) He did not, as the Company suggests (Br. 7, 11, 15, 23), resolve any factual disputes or rely on any credibility determinations that would require a hearing. Although he recounted the factual assertions set forth in both the declarations submitted by the Company and the affidavits provided to the Board by Juarez and several employees, he properly assumed the truth of the Company's witnesses in deciding that the Company failed to make a prima facie showing of objectionable conduct. Most notably, although there was some question of whether or not the employees overheard Juarez's ramblings when he left the shop the first time, the Regional Director assumed that they did. (A.6 n.9.) Likewise, he assumed that the employees constituted a "massed assembly" for the purpose of evaluating whether Juarez's comments, which he made when he returned to the shop, ran afoul of *Peerless Plywood*. (A.29.)

Although the Company maintains that "many of" the Regional Director's fact findings were based on credibility determinations, it offers no valid examples supporting this claim. It quibbles (Br. 11) with the Regional Director's assertion that company representatives "briefly glimpsed" Juarez and Rodgers standing in Moore's stall on the morning of the election. But regardless, the company representatives did not hear what was said during that exchange and in its brief it does not assert that this discussion, as opposed to Juarez's rants that followed, was objectionable. The Company also asserts (Br. 12) that the Regional Director "relie[d] on" employees' Board affidavits stating they did not hear what Juarez said when he was escorted out of the shop. But as discussed, although the Regional Director acknowledged that some witnesses stated that "Juarez's eruptions [were] out of earshot from employees," because the company witnesses claimed that the employees overheard Juarez's statements, he assumed that they did. (A.6 n.9.) In short, the Company can point to no instance in which the Regional Director either resolved any factual disputes against the Company's factual assertions or made any credibility determinations. Instead, it merely questions the inferences and conclusions drawn from the evidence. But a party does not raise a "substantial and material factual issue" necessitating a hearing merely by disagreeing with a Regional Director's reasoning and legal conclusions. *See Int'l Union of Elec., Radio & Mach. Workers*, 418 F.2d at 1197 (quoting

Tennessee Packers, Inc., 379 F.2d at 178). Thus it is apparent that the Board did not abuse its discretion in deciding not to order the Regional Director to hold an evidentiary hearing.

* * *

Having reasonably overruled the Company's election objections, the Board properly certified the Union as the exclusive representative of the automotive technicians. The Company, therefore, violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by, admittedly, refusing to bargain with the Union and refusing to furnish the Union with information it had requested.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

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October 2011

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WHITE MOTOR SALES, D/B/A FAIRFIELD TOYOTA AND FAIRFIELD IMPORTS, D/B/A FAIRFIELD TOYOTA	)	
Petitioner/Cross-Respondent	)	Nos. 11-1218, 11-1264
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	Board Case No. 20-CA-35310
AUTOMOTIVE MACHINISTS LODGE NO. 1173	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 7,319 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

s/ Linda Dreeben
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Dated at Washington, DC
this 25th day of October 2011

ADDENDUM

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WHITE MOTOR SALES, d/b/a FAIRFIELD TOYOTA and FAIRFIELD IMPORTS, d/b/a FAIRFIELD TOYOTA	)	
Petitioner/Cross-Respondent	)	
v.	)	Nos. 11-1218, 11-1264
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	
AUTOMOTIVE MACHINISTS LODGE NO. 1173	)	
Intervenor	)	

STATUTORY ADDENDUM

The following provisions of the National Labor Relations Act ("the Act"), 29 U.S.C. §§ 151, et. seq., are excerpted below pursuant to FRAP 28(f) and Circuit Rule 28(a)(5):

Section 7 of the Act (29 U.S.C. § 157): Rights of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8 of the Act (29 U.S.C. § 158): Unfair Labor Practices.

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer-

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 9 of the Act (29 U.S.C. § 159): Representatives and Elections.

(c) Hearings on questions affecting commerce; rules and regulations

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board— (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) subsection (a) of this section; or (B) by an employer, alleging that one or more

individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) subsection (a) of this section; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

(d) Petition for enforcement or review; transcript

Whenever an order of the Board made pursuant to section 10(c) section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f) subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Section 10 of the Act (29 U.S.C. § 160): Prevention of Unfair Labor Practices.

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. . . .

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it

deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. 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. . . .

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. . . .

29 C.F.R. § 102.69: Election procedure; tally of ballots; objections; certification by the regional director; report on challenged ballots; report on objections; exceptions; action of the Board; hearing.

(d) In issuing a report on objections or challenged ballots, or both, following proceedings under [29 C.F.R.] §§ 102.62(b) or 102.67, or in issuing a decision on objections or challenged ballots, or both, following proceedings under [29 C.F.R.] § 102.67, the regional director may act on the basis of an administrative investigation or upon the record of a hearing before a hearing officer. Such hearing shall be conducted with respect to those objections or challenges which the regional director concludes raise substantial and material factual issues.

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NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	Board Case No. 20-CA-35310
AUTOMOTIVE MACHINISTS LODGE NO. 1173	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system; all parties or their counsel are registered users.

s/ Linda Dreeben

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Dated at Washington, DC
this 25th day of October, 2011