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Executive Secretary
National Labor Relations Board
Washington, D.C.
By electronic mail only

Re: Stamford Hotel 34-RC-080390
Request for Review of Supplemental Decision¹

May it Please the Board:

Please be advised that the undersigned represents the employer in the above referenced matter.

This letter/memorandum is filed in support of the instant request for review of the Regional Director's ("RD") decision dated August 1, 2012. It is respectfully submitted that, at the least, the RD should have set this matter down for a fact hearing.

When looking at the RD's decision, the need for a hearing is manifest to ascertain the facts, and the failure to order one denied the Employer due process. A fact hearing

¹ In filing this request, the employer does not waive, and specifically asserts, that President Obama unconstitutionally appointed 3 board members by recess appointment on January 4th since the Senate was then actually in session.

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could explore to what extent the anti union employee's being beaten up for having the temerity to state that she would vote "no" in the election, was disseminated to the other employees. The RD notes, for instance, that in one of the statements submitted, the employee feared"... losing her job to her co-worker constantly treating her to sabotage her work and *turn the rest of her co-workers against her and be outcasted in housekeeping*". One of the major, if not the most major, union supporters attended and witnessed the anti union employee being beaten up and told to shut her mouth about how she would vote. The employer, of course, has no way of forcing her, or any other employee including the one that did the beating, to testify about what dissemination, of the beating and threats to keep her mouth shut, she engaged in. Only at a hearing could the Employer force the pro union employees, including the most actively pro union one, to testify what they told other employees and what they did to "outcast" the anti union employee and turn the other employees against her. The hearing could explore, with subpoena power, what "sabotage" was engaged in the anti union worker's work so that she would be at risk for losing her job because of her anti union sentiments.

The position statement alluded to by the RD states that the Employer did not "proffer any evidence in support of its claim...that Employee A [the beaten employee] refused to file a police report because she feared "retribution" from the other two employees". Yet the Employer cannot force an employee to speak to them, give them statements etc. unless there is subpoena power given to it. An employee that fears retribution will, of course, not sign a statement that would then risk that very retribution. The only way that the employer can force testimony is at a hearing with subpoena power.

Thus, as noted by the RD in citing *Horizons Hotel*, 1) there was not only a "threat" of violence but *actual* violence carried out here 2) whether and to what extent the threats of violence, sabotage of work to get employees fired, and causing "outcasting" of employees because of their anti union sentiments, "encompassed the entire unit", can only have been clarified at a hearing 3) the extent of dissemination of all of this could only be properly examined at a hearing with subpoena powers 4) the person making the threat *carried out the acts of violence* in beating up the anti union employee *right in front of the major pro union employee*; who, in turn, was accused by the beaten employee of trying to get her fired and outcasting her and whether "it is likely that employees acted in fear of that capability", could all be only brought to light at a hearing and 5) the (earlier) threats to the anti union employee's job were culminated in her getting physically beaten *up right before election day*, an unmistakable message to the other voters.

The RD, badly misreads *Horizon Hotel* in not seeing a distinction between a threat

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of violence and *actual violence* against an employee *simply because* of a pronounced intent to exercise a vote in a particular way.

Even when applying the third-party test, the Board has consistently considered threats of physical violence and property damage to create an atmosphere of fear and reprisal sufficient to set aside an election. Robert Orr-Sysco Food Services, LLC, *supra* at slip op. 2, and cases cited therein; Stannah Stairlifts, Inc., 325 NLRB 572 (1998); Westwood Horizon Hotel, *supra*; Electra Food Machinery, Inc., 279 NLRB 279 (1986); RJR Archer, Inc., Filmco Division, 274 NLRB 335 (1985).

Cedar Sinai 342 N.L.R.B. 596 (N.L.R.B. 2004). Moreover, "Few actions have a more direct tendency to coerce employees in the exercise of their statutory rights than threats of physical harm *and genuine acts of physical violence.*" *New Life Bakery*, 301 NLRB 421, 428 (1991). As the Board has also held, even a *threat* of violence against a *single* employee can result in an election being set aside. The Board has noted:

However, the fact that the threats were directed at only one employee does *not necessarily lead to the conclusion that no general atmosphere of fear and coercion* existed. In the instant case, threats of bodily harm and reprisals were directed at a 16-year-old employee with the obvious aim of influencing him to vote for the Union or to abstain from voting. As a result of these threats, he chose the latter course. In these circumstances, we are of the opinion that the character of the conduct was so aggravated as to create an atmosphere of fear and reprisal rendering a free expression of choice of representatives impossible. We shall therefore set aside the election and direct that a second election be held.

Steak House 206 N.L.R.B. 28 (N.L.R.B. 1973) [*emphasis supplied*]

In this case, of course, there was *actual* violence against a voter, not a threat of it. That violence against the employee was solely due to the employee's articulated intent to vote "no" in the election. Moreover, the employee was so fearful of retribution that she refused to file a police report. The unit is small with people working near each other. It requires no imagination to realize that the "news", as well as the subsequent suspension (pending investigation) of the three employees involved, rapidly flowed through the work force

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The effect on employees of an assault upon a union agent is the same when the assault does not occur in the presence of *any* employee, if the circumstances are such that the employees could reasonably be expected to become aware of them." Schrementi Bros., Inc., 179 NLRB 853, 857 (1969)

Paper Products 2002 NLRB LEXIS 130 (N.L.R.B. Apr. 12, 2002) [*emphasis supplied*]

The Employer cannot realistically carry a "heavy" burden of proof if it is not even given a hearing forum where it could develop a record. Only in that record could the Employer be judged as to whether he carried that heavy burden. One cannot carry a burden if his hands are tied behind his back. The fear of retribution brought out by the acts of violence and sabotage etc. can only be determined if the Employer is given the tools to overcome that very fear that was wilfully, and so successfully, instilled. Or else, the fear of retribution instilled because of despicable acts, including outright acts of violence, results in the protection of those engaging in this conduct ever being brought to account for them. The Board should not cite a lopsided vote as the rationale for ignoring serious violence and threats that likely caused the election to be so lopsided in the first place. In any event, there should be a fact hearing to determine to what extent the vote was tainted by this egregious, violent, threatening and potentially vote implicating, conduct.

Very truly yours,



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MT:pf
cc: Thomas W. Meiklejohn, Esq. (By electronic mail)
Regional Director, Region 34 (By electronic mail)

