UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PORTOLA PACKAGING, INC.,		
and	Case No.	28-CA-067274
MARTA MAGALLON CORONA, an Individual		
and	Case No.	28-CA-067345
JORGE GARCIA, an Individual,		
and	Case No.	28-CA-070621
UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 99,		
and		
PORTOLA PACKAGING, INC.,		
Employer,		
and	Case No.	28-RC-067973
UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 99		
Petitioner.		

PETITIONER UFCW LOCAL 99'S ANSWERING BRIEF TO EMPLOYER'S EXCEPTIONS

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I. Introduction

In his decision, Administrative Law Judge Gregory Z. Meyerson found that Portola Packaging, Inc. committed numerous and significant unfair labor practices during the critical period leading up to the December 1, 2011 election petitioned-for by UFCW Local 99, and that Portola's conduct destroyed the laboratory conditions required by the Board.[1] The ALJ found that Portola's violations of the Act were "severe" and "pervasive" and included threats of discharge, threats of reduced wages and benefits, threats of other unspecified reprisals; interrogation, creating the impression of surveillance, and the solicitation of complaints and the promise of benefits. ALJD at 43, 49, 51-52. As the ALJ pointed out, improper conduct was committed during the critical period by "literally every company official supervising the employees in the voting unit." ALJD at 51. The ALJ found merit to fourteen unfair labor practice allegations and two election objections, and sustained the Union's three ballot challenges. He also recommended that, in view of the "extremely close" nature of the election (a tie vote), the severe and pervasive nature of the Portola's unfair labor practices and objectionable conduct, and the fact that Portola's illegal conduct was widely disseminated among unit employees, the results of the election do not reflect the free and fair choice of employees, and should be set aside. ALJD at 51.

The ALJ's analysis of whether Portola's conduct required that the election be set aside was not a close call by any measure. Of the four factors evaluated by the ALJ to

[1] United Food and Commercial Workers Union, Local 99 is referred to as "the Union" or "Local 99." Portola Packaging, Inc. is referred to as "the Employer" or "Portola." The Administrative Law Judge's decision is referred to as "the ALJD." "TR." refers to the transcript from the hearing held March 20-22; April 26-27, 2012. "GCX-__" refers to exhibits introduced by General Counsel at the hearing. "EX-__" refers to exhibits introduced by Portola at the hearing. "UX-__" refers to exhibits introduced by the Union at the hearing.

determine whether Portola's misconduct was sufficient to warrant setting aside the election—the narrowness of the result, the number of violations, the severity of the violations, and the dissemination of the violations among employees in the unit—the ALJ found that all four factors weighed in favor of setting aside the result and ordering a new election. ALJD 50-51. Nevertheless, Portola has filed twenty-five separate exceptions to the ALJ's decision, including an exception to his determination that the results of the election should be set aside.

In this brief, the Union addresses Portola's exceptions to the following rulings by the ALJ: (a) the determination that plant manager Tim Tyler's letter to each employee on the Excelsior list demanding that they vote "NO" in the election interfered with employees' Section 7 rights and interfered with employees' free choice in the election; (b) the ruling that supervisor Fabian Franco's statement that he would not help an employee with his excess workload because that employee was a union supporter threatened unspecified reprisals against union supporters; (c) the ruling that the "process technician" classification is not part of the bargaining unit stipulated by the parties, such that the Union's challenges to the three ballots cast by process technicians must be sustained; (d) the recommendation by the ALJ that, considering the severe and pervasive unfair labor practices and objectionable conduct by Portola during the critical period leading up to the December

Portola's exceptions find no support in the factual record or in relevant law and accordingly, the ALJ rulings excepted to by Portola must be upheld.

II. Statement of the Case

On November 1, 2011, Petitioner and Charging Party United Food and Commercial Workers Local 99 ("Union" or "Local 99") filed a petition with the National Labor Relations

Board, Region 28, seeking to be certified as the collective bargaining representative of certain employees at Respondent Portola Packaging Inc.'s ("Portola") Tolleson, Arizona facility. Between the filing of the petition, and the election, held on December 1, 2011, Portola waged an aggressive and extensive anti-union campaign. Out of thirty-eight votes cast on December 1, nineteen were for the Union, and nineteen against. The Union challenged the three ballots cast by employees in the "process technician" classification. The Union also filed objections and an unfair labor practice charge.

On January 13, 2012, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing ("the Complaint") based on the Union's unfair labor practice charge and the unfair labor practice charges filed by two individuals, Jorge Garcia and Marta Magallon Corona, for a hearing before Administrative Law Judge Gregory z. Myerson ("the ALJ"). On February 15, 2012, the Regional Director ordered that the unfair labor practice allegations be consolidated with the Union's objections and challenges in this combined matter.

On September 13, 2012, Administrative Law Judge Gregory Z. Meyerson ("the ALJ") issued his decision in this case ("the ALJD"). The ALJ ruled that Portola committed numerous and significant unfair labor practices in violation of Section 8(a)(1) of the Act by: orally promulgating overly-broad and discriminatory rules prohibiting employees from discussing their wages and what occurred at meeting with supervisors with other employees; unlawfully soliciting employee complaints and grievances, and promising employees increased benefits and improved terms and conditions if they did not select the Union as their collective-bargaining representative; unlawfully interrogating employees; creating the

impression of surveillance; unlawfully threatening employees with a reduction in benefits and wages; unlawfully demanding that employees vote "no" in the upcoming representation election; and maintaining an overly broad and discriminatory rule it its Employee Handbook. ALJD at 11-12, 18, 26-33, 38.

The ALJ also ruled that Portola's pre-election conduct was interfered with employees' free choice in the election held on December 1, 2011, and recommended that the election be set aside. ALJD at 49-51. This recommendation was based on his finding that the meritorious objections and unfair labor practiced committed by Portola were pervasive, and would clearly have had a tendency to seriously inhibit employees' willingness to engage in union activity, and thus destroyed the laboratory conditions required by the Board.

Finally, the ALJ concluded that the employees in the "process technician" job classification do not share a significant community of interest with the classifications in the stipulated unit. He thus sustained the Union's challenges to the ballots of Thomas Turner, Michael Burns, and Gabriel Hernandez. ALJD at 46.

A. Background

Portola Packaging, Inc. manufactures plastic bottles and plastic bottle closures. Tr. 36-38. The company is based in Naperville, Illinois, with eight facilities in North America, as well as additional facilities worldwide. Tr. 496-97.

This case concerns Portola's facility in Tolleson, Arizona. The Tolleson facility produces plastic bottle caps using injection-mold technology. There are 39 injection-mold presses in operation at the Tolleson facility. Tr. 37. The basic technology used to manufacture the caps is as follows: plastic pellets are melted into a fluid state, injected into a cavity in a steel mold, cooled, and then ejected. Tr. 499.

The Tolleson facility employs 91 workers, in 27 different job classifications. Tr. 36. Tim Tyler is the General Manager. Tr. 35. There are seven managers working beneath him. Tr. 35-36. These include Production Manager Tim DeCrow and Safety and Human Resources Manager Chris McClanahan. Tr. 93, 135.

B. The election timeline

The Union's November 1, 2011 petition defined the unit as follows:

> Included: All full-time and regular part-time production workers including machine operators, sanitation, and packaging employees.
>
> Excluded: All other employee including maintenance mechanics, shipping and receiving employees, quality control employees, office clericals, managers, guards, and supervisors as defined in the Act.

EX-2. On November 7, 2011, the parties entered into a stipulated election agreement, agreeing that an election would be held December 1, 2011, for the following unit of employees:

> Included: All full-time and regular part-time production workers including machine operators, sanitation, and packaging employees employed by the Employer at its facility in Tolleson, Arizona.
>
> Excluded: All other employee including maintenance mechanics, shipping and receiving employees, quality control employees, office clericals, managers, guards, and supervisors as defined in the Act.

EX-4.

On November 8, 2011, Portola hired anti-union consulting firm LRI Consulting Services Inc. ("LRI"), to assist them with their campaign. GCX-4. Portola agreed to pay LRI $50,000, plus expenses, for fifteen days of consulting services. *Id*. Portola agreed to pay $3,000 per day for any additional days of consulting services. *Id*.

Under Portola's agreement with LRI, if the Union is certified by the NLRB, LRI will refund the cost of its services, less a $5,000 nonrefundable fee for the use of LRI's materials. *Id*. LRI's services were performed through a man named Armando Talancon. Talancon arrived at the Tolleson facility on November 8. Tr. 678. His last day at the plant was two days prior to the election. Tr. 719. Talancon testified that his contract with LRI provided hat he would be paid $50,000 for his work on the Portola election, but only if the Union lost the election. Tr. 713.

On December 1, 2011, the election was held pursuant to the stipulated election agreement. Of the 44 employees eligible to vote, 41 cast ballots. GCX-1(o). Nineteen ballots were cast for the Union, and nineteen against. *Id.* The Union challenged three ballots. *Id.*

The Union filed objections to the conduct of the election on December 8, 2011. *Id*. On January 26, 2011, the Regional Director for Region 28 directed a hearing on the challenged ballots and objections. *Id*. On February 15, 2011, the Regional Director ordered that the objections and challenges be consolidated with unfair labor practice charges pending against Portola, and set the consolidated matters for a hearing. GCX-1(t).

On March 20 through March 22, and April 26 through 27, 2012, a hearing was held in Phoenix, Arizona before Administrative Law Judge Gregory Z. Meyerson on the complaints, objections, and challenges in the consolidated cases.

III. Argument

A. The ALJ correctly ruled that Plant Manager Tim Tyler's widely disseminated letter demanding that employees vote against the Union interfered with employees' Section 7 rights and interfered with emloyees' free choice in the election.

The Complaint alleges that in mid-November, Tim Tyler, by letter, threatened employees with unspecified reprisals by demanding that they vote "no" in the upcoming representation election. The Union filed an objection based on the same letter, alleging that the letter had a tendency to interfere with the employees' free choice in the December 1 representation election.

1. Facts

On November, 18, 2011, General Manager Tim Tyler sent a letter to all employees in the proposed bargaining unit. Tr. 61, 72; GCX-5, GCX-6. Each letter was addressed to the individual employee recipient, so that the employee's first name was in the salutation. Tr. 61. For example, the letter sent to Marta Magallon Corona opened with "Dear Marta:" GCX-5, p.2. The letter was written in English by Tyler. Tr. 54. It was then translated into Spanish by Armando Talancon. Tr. 141. All of the letters, be they in English or Spanish, were signed by Tim Tyler. Tr. 54.[2]

Armando Talancon's first language is English. Tr. 706. He himself admitted that he is not fluent in Spanish. Tr. 705. Some of the employees testified that they could understand his spoken Spanish, but one, Alicia Martinez, did not believe that Talancon spoke Spanish very well. Tr. 351.

[2] Tyler is a supervisor of Portola within the meaning of Section 2(11) of the Act, and an agent of Portola within the meaning of Section 2(13) of the Act. Tr. 20.

The majority of the employees in the proposed bargaining unit speak Spanish, with limited English, or no English at all. When Tyler testified about the employees he had spoken with in the weeks leading up to the election, he said he spoke with "almost all English-speaking employees that were identified within the bargaining unit." Tr. 526. Looking at a copy of the *Excelsior* list, which contained forty-four names, Tyler identified thirteen individuals that he had spoken with. Tr. 529. That leaves approximately thirty employees—sixty-eight percent of the employees on the *Excelsior* list—that do not speak English, according to Tyler. Tyler testified that employees at the facility who do not speak English speak Spanish. Tr. 45.[3]

The closing line in the Spanish-language version of Tyler's November 18 is a *demand* that employee's vote against the Union on December 1. The Spanish-language version of the sentence reads as follows: "Te exijo que votas NO en Diciembre 1, 2011." GCX-5-6.

Translated into English, using common, everyday Spanish as used by Spanish-speakers in the state of Arizona, the sentence reads as follows: "I demand that you vote NO on December 1, 2011." Tr. 306.

In addition to the interpreter's translation, several additional sources demonstrate that the sentence, in Spanish, would be read as "I demand that you vote NO, on December 1, 2011." The Spanish word "exijo" or "I demand" is conjugated from the verb "exigir" or "to demand." According to the McGraw-Hill Spanish and English Legal Dictionary, the definition of "exigir" is "To demand, command, order, require." GCX-8.

[3] When asked if Portola wanted a labor-relations consultant who spoke Spanish, in order to speak with "the majority of the employees," Tyler replied "To speak to those employees that did not speak English, yes." Tr. 45.

In the Webster's New World Concise Spanish Dictionary, the primary definition of "exigir" is "to demand": "1. *vt* (**a**) (pedir) to demand; **exijo saber la respuesta** I demand to know the answer; **e. algo de** *o* **a alguien** to demand sth from sb;". GCX-9 (formatting in the original).

Armando Talancon admitted that his translation of the sentence was "kind of simple. It is elementary translation. It is not that great." Tr. 705. He said he believed the word "exigir" to mean "urge" or exhort." *Id.* But he admitted that substituting "urge" or "exhort" as the English word for "exigir" in the example provided by Webster's dictionary would result in nonsense – "I urge to know the answer" or "I exhort to know the answer." Further, as the Webster's dictionary shows, the word "exhort" has its own direct translation, "exhortar." GCX-9. Thus, Talancon's statement that he believed the word "exijo" to mean "exhort" or "urge" is not credible.

At the hearing Portola was reminded by the Administrative Law Judge that it was free to "offer other authorities as far as the meaning of this word . . ." Tr. 65. But Portola did not produce any such authorities.

The employees read the sentence as a demand that they vote against the Union. Marta Magallon testified that the letter "clearly told us that we were expected not to vote for [the Union.]" Tr. 295. Magallon discussed the letter with other employees, including Maria Soto, Adolfo Renteria, Alicia Martinez, Salvador Barragan. Tr. 295. All of the employees Magallon mentioned by name were also on the *Excelsior* list prepared by Portola. UX-7. When asked what they discussed, Magallon replied, "Our fear that we had of losing our work and that if we voted in favor of the union, what would happen to us." Tr. 295.

Evangelina Villegas testified that she also felt threatened by the letter, and that shenspoke with the majority of her co-workers about it. Tr. 367. Because of what the letter said, and because it was signed by Tim Tyler, the General Manager of the facility, Villegas felt afraid, and felt that she could lose her job. *Id*.

2. Analysis

The Spanish-language version of Tim Tyler's November 18 letter both interfered with employees' free choice in the election and violated section 8(a)(1). By its final sentence – "I demand that you vote NO on December 1, 2011," Tyler's letter crossed the line between a permissible election communication and a prohibited threat of unspecified reprisals.

Section 8(a)(1) of the Act prohibits employers from attempting to control employees' actions vis-à-vis the union. *Endo Laboratories, Inc.*, 239 NLRB 1074, 1076 (1978) (Employer remark that employees "had better" vote for the company's proposed agreement went beyond mere electioneering and violated 8(a)(1)). It also prohibits employers from coercing employees in the exercise of their free choice as to whether or not to support the union's cause. *Red Oaks Nursing Home*, 241 NLRB 444 (1979) (violation of 8(a)(1) where employer told employee not to sign a union card).

A threat need not be explicit to violate 8(a)(1). In *Martech MDI*, 331 NLRB 487, 500 (2000), the employer's order that an employee "knock it off" regarding union sympathies was found to contain an implied threat in violation of 8(a)(1).

Nor does must the threat specify the reprisal that will be taken against the employee or employees. In *Valleydale Packers, Inc.*, 238 NLRB 1340, 1343 (1978), the Board held that the employer's warning that an employee "had better leave the Union alone" constituted an implicit threat to the employee, although the exact reprisal against the employee which

was implied in the threat was not spelled out. "This constitutes a violation of employees' Section 7 rights, and, consequently, constitutes a violation of Section 8(a)(1) of the Act." *Id.* at 1343.

Here, the Spanish-language letter sent out to employee on November 18, 2011, threatened employees with unspecified reprisals by demanding that they vote "no" in the election. This demand, made in the name of the General Manager of the facility, had a tendency to coerce employees into voting against the union based on their reasonable fear of the consequences of defying Tyler's demand. In the context of the workplace, employees naturally take any demand made by a manager or supervisor very seriously. Here, that is evidenced by the fear and concern that Tyler's demand instilled in Magallon, Villegas, and the many co-workers they spoke with about the letter. Tr. 295, 367.

In the election context, the standard is an objective one. It does not matter what Tyler's intent was, or what the English-language version of the letter said. What matters is whether Talancon's Spanish translation of the letter had a tendency to interfere with the employees' freedom of choice in the election.

In making its determination as to whether the conduct has the tendency to interfere with employees' freedom of choice, the Board will consider the extent of dissemination. Here, the letter was sent directly to each employee on the *Excelsior* list, with his or her own first name in the salutation line. Tr. 61. According to Tyler, of those employees on the *Excelsior* list, approximately thirty spoke Spanish, but not English, and more may have spoken Spanish as their primary language. Tr. 45, 526, 529.

The Board also takes into account the time between the conduct and the election. Here, the letter was sent out fewer than two weeks prior to the election.

As discussed above, in evaluating 8(a)(1) violations, the Board takes into account "the economic dependence of the employees on their employers, and the necessary tendency of the former . . . to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *Gissel*, 395 U.S. 575, 617 (1969). That dynamic is certainly at play here, where this was one of very few communications that most of the Spanish-speaking employees had with Tim Tyler, the General Manager of the facility. As he testified, he does not speak Spanish, so he was only able to speak personally to those employees who speak English. Tr. 526.

The Employer is expected to make several arguments related to this objection, none of which will overcome the impact that Tyler's letter had on the employees' exercise of free choice in the election.

The Employer may argue that Armando Talancon believed the word "exigir" to mean "to exhort." Talancon, the anti-union consultant who translated the letter, claimed that he believed the word to mean "exhort" or "urge." Tr. 705. However, the final sentence of the English-language version of the letter produced by Portola at the hearing is "I urge you to vote NO on December 1, 2011". EX-5. Neither the interpreter, nor any other authority in the record, provided "urge" as a definition for "exigir." Furthermore, Talancon's belief about what the word meant is irrelevant. As he admitted, he is not fluent in Spanish. CITE. He also admitted that his translation of the sentence was "kind of simple. It is elementary translation. It is not that great." Tr. 705.

The Employer may also emphasize that the interpreter used the word "exhort" when interpreting some of the witnesses' testimony about what the letter said. However, while the interpreter explained that there may be shades of meaning based on the context and the

inflection used by a speaker, the interpreter clearly and unequivocally interpreted the written sentence, in the exact context and form that it was presented to employees, as "I demand that you vote NO on December 1, 2011". Tr. 306.

Any argument that the threat was neutralized by later statements should likewise be rejected, because neither Tyler, nor any other representative of Portola, ever specifically repudiated the demand that employees vote against the Union, nor did Tyler assure employees against further interference with their Section 7 rights. *Passavant Memorial Hospital*, 237 NLRB 138 (1978).

Finally, as discussed above, the standard for evaluating pre-election interference is an objective one. Tyler's intent in writing the statement, or Talancon's intent in translating it, do not matter. What matters whether the statement tended to interfere with employees' free choice in the election. The only reasonable conclusion here is that the demand, attributed to Tyler, prevented such a free choice from taking place. As such, the ALJ's ruling that the letter constituted an improper threat was correct, and Portola's exceptions regarding the letter should be denied.

B. The ALJ correctly ruled that supervisor Ray Buchanan's statement that he would not help Jorge Mendez with Mendez' excess workload because Mendez was a union supporter threatened unspecified reprisals against union supporters.

Portola's twelfth exception takes issue with the ALJ's findings and conclusion that Portola, through production supervisor Ray Buchanan, violated Section 8(a)(1) of the Act by threatening employees with unspecified reprisals by not assisting them because they engaged in concerted activities. Portola's twenty-fourth exception objects to the ALJ's finding of

merit in the Union's Objection 3, which alleged that the same conduct by Mr. Buchanan interfered with employees' free choice in the December 1 election.

1. Facts

The threat at issue here was made during a conversation between employee Herlinda Cervantes and Buchanan in the lunch room of the plant on November 16, 2011. Cervantes has worked for Portola for nine years as an operator/Production Team Member. Tr. 246. Production supervisor Ray Buchanan is her direct supervisor. Tr. 255. On November 16, 2011, Cervantes was taking her break in the lunch room when she had a conversation with Buchanan. Tr. 246. Another employee named Daisy Malabo was present during the conversation but did not testify at the hearing. Tr. 247, 854.

Based on the testimony of Cervantes, the ALJ found that, during part of the conversation, Cervantes told Buchanan that he should help an employee named Jorge Mendez, because Mendez had too much work, and wasn't getting his breaks. Tr. 249, 270. Buchanan replied that he would not help Mendez, because Mendez was "involved with the union." Tr. 270. Cervantes' testimony on this point was credited by the ALJ and found to be "reassuringly detailed." ALJD at 28. Buchanan's account of the conversation was found to be self-serving. *Id.*

2. Analysis

An employer's conduct violates Section 8(a)(1) if it has a reasonable tendency to coerce employees or interfere with their Section 7 rights. Buchanan's statement had the reasonable tendency to lead Cervantes and Daisy Malabo, the other employee in the break room, to believe that if they engaged in Union-related activities, or expressed support for the Union, they would be singled out for inferior treatment. The ALJ's ruling that such a threat

of unspecified reprisals violated 8(a)(1) and interfered with employees' free choice in the election was proper, and Portola's twelfth and twenty-fourth exceptions should be denied.[4]

C. The ALJ correctly ruled that the "process technician" classification is not part of the bargaining unit stipulated by the parties and correctly sustained the Union's challenges to the three ballots cast by process technicians.

In addition to the unfair labor practice allegations and the Union's objections to conduct affecting the election, the ALJ also ruled on the Union's challenges to the three ballots cast by employees in the "process technician" classification. The ALJ sustained the challenges, finding that the process technicians did not share a community of interest with the employees in the stipulated unit. Portola's exceptions nineteen through twenty-two take issue with the ALJ's findings and conclusions regarding the Union's challenges, and the ALJ's commentary that Portola engaged in a "campaign" to include process technicians as voters in the representation election.

1. Facts

The Union challenged the ballots of three employees: Michael Burns, Thomas Turner, and Gabriel Hernandez. GCX-1(o). During the payroll period under the stipulated election agreement, these three employees were classified as "Process Technicians." Tr. 130-31.

Process Technicians are not included in of the definition of the stipulated unit. The unit includes "production workers" as well as several named classifications. The term "production workers" should be construed to mean all employees directly supervised by the Production Supervisors. Production Supervisors oversee three classifications, Team Leads, Production Team Members, and Staging Team Members.

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[4] Cervantes and Malabo were both eligible to vote in the December 1, election.

Instead, Portola appears to argue that the term "production workers" includes all employees supervised by the Production *Manager*, Tim DeCrow. This construction of the term brings in a number of classifications that perform primarily technical functions, rather than the line work performed by the Production Team Members, Team Leads, and Staging Team Members.

The Union's proposed interpretation of the stipulation comports with both the objective intent of the parties, and the Board's traditional community of interest factors. As such, the ALJ's findings and conclusions with regard to the process technicians should be upheld and the Union's challenges should be sustained.

i. The Stipulated Unit

On November 1, 2011, the Union filed a petition with the National Labor Relations Board, Region 28, seeking to be certified as the collective bargaining representative of certain employees at Portola's Tolleson facility. EX-2.

In its petition, the Union defined the unit as follows:

> Included: All full-time and regular part-time production workers including machine operators, sanitation, and packaging employees.
>
> Excluded: All other employee including maintenance mechanics, shipping and receiving employees, quality control employees, office clericals, managers, guards, and supervisors as defined in the Act.

EX-2. On November 7, 2011, the parties entered into a stipulated election agreement, agreeing that an election would be held December 1, 2011, for the unit of employees described in the petition, with one change. A phrase limiting the unit to the Tolleson facility was added to the end of the description of employees included in the unit: "All full-time and

regular part-time production workers including machine operators, sanitation, and packaging employees *employed by the Employer at its facility in Tolleson, Arizona*." EX-4.

Otherwise, the stipulated unit is identical to the unit petitioned for by the Union. The Employer suggested no changes or clarifications to the unit description. Tr. 552. Nor had it provided the Union with any information about its job classifications or organizational structure prior to the Union's filing of the petition, or between the filing of the petition and the execution of the stipulated election agreement. *Id.*

ii. Portola's Operations

In order to understand the functions and roles of the different classifications of employees included and excluded from the unit, this section will review the various classifications that perform the work in question.

There are 39 injection-mold presses in operation at the Tolleson facility. The presses melt pellets of plastic into a fluid state, add color to the plastic, inject the plastic into a steel mold with a number of cavities, cool the fluid plastic back into a solid state, and then eject the individual caps from the mold onto a conveyor belt. Tr. 499.

A number of variables affect the dimensions, color, and pliability of the caps produced by the machines. These include the time the plastic spends in the press, the heating and cooling times and temperatures, and the amount of material inputs—plastic and liquid coloring agents—fed into the machine.

A specific combination of these different variables – times, temperatures, inputs – is referred to as a "process." Tr. 556. Each injection-mold press has a monitor with a digital control panel that can be used to set or adjust the process running on that machine. Tr. 557. If a cap that is produced by one of the machines has excess plastic, is short of plastic, or is

deformed in some way, adjustments can be made to the process programmed into that machine to address the specific problem or defect. *Id.*

The Tolleson facility also has secondary equipment that is used to print, label, or insert foam into the plastic caps. Only 15% of the caps produced in the Tolleson facility interface with the secondary equipment. Tr. 38.

For 85% of the caps, once they are ejected from the steel molds, they fall onto a conveyor belt. Tr. 498. The conveyor belt transports the caps to the end of the machine where they are dropped into a box. *Id.* Once the box is full, it is sealed and labeled, and then transported to a central conveyor belt where it is moved back to the staging area. *Id*. These functions, as well as a few others that will be detained below, are performed by the "Production Team Member" classification. Tr. 500.

In the staging area, the boxes of caps are placed onto pallets according to cap type and customer, and then the pallets are moved to the shipping department. Tr. 500. These functions are performed by the "Staging Team Member" classification.. *Id.*

iii. Classifications Relevant to the Challenges

There are twenty-seven different classifications of employees at the Tolleson facility. Tr. 36. The parties agree that vast majority of employees in the stipulated unit are classified by Portola as "Production Team Members." Out of a total of 44 employees included on the *Excelsior* list, 33 were Production Team Members. UX-7; Tr. 130-31. Four were Team Leads. *Id.* Three were Staging Team Members. *Id.* Three were Process Technicians. *Id.* One was a Sanitation employee. *Id.* Of the classifications included on the *Excelsior* list, the Union disputes that the Process Technician classification is included in the stipulated unit.

The classifications relevant to the challenged ballots are described here.

As mentioned above, Production Team Members monitor the output of the presses, and facilitate the process of packing the caps into boxes as they come off of the conveyor belt. They then close the boxes, seal them, label them, and move them to a central conveyor that transports them to the staging area. Tr. 498.

Production Team Members are directly supervised by Production Supervisors. Tr. 560. During each shift Production Team Members are assigned to a specific machine or machines. Tr. 83-84. Their breaks are determined by the Production Supervisor, and they cannot leave their machines without being relieved. Tr. 453. Generally, Production Team Members are relieved by employees in the Team Lead classification. Tr. 121.

There are no educational or skills requirements for the Production Team Member classification. According to the job description, the only requirement is that new employees in the classification be able to pass a basic reading and math test. UX-1. Production Team Members do not use tools in the course of their work. Tr. 453-54. Nor do they use computers. Tr. 548.

Production Team Members appear to be paid the least out of all of the classifications discussed at the hearing. According to Chris McClanahan, the hourly wage for Production Team Members starts at $10. Tr. 831. McClanahan estimated that the average is between $11 and $14 per hour. *Id.* However, Marta Magallon Corona has been with Portola for seventeen years, and makes just $12.45 per hour. Tr. 278-289. Herlinda Cervantes has been with Portola for nine years (Tr. 246), and makes $10.35 per hour. Tr. 253. These two specific examples suggest that the average is lower than that estimated by McClanahan.

The primary responsibility of the Team Lead or "Team Leader" classification is to assist the Production Supervisor. Tr. 315; UX-4. Team Leads also relieve Production Team

Members when they take their breaks. Tr. 121; UX-4. According to Tim Tyler, they do not perform any supervisory functions. Tr. 503. Team Leads report to the Production Supervisor Classification. UX-4.

The primary responsibility of Staging Team Members is to receive boxes of caps from the Production Team Members, and sort the boxes on to the appropriate pallets, according to the customer and the product. Tr. 562. They also move loaded pallets from the staging area to the warehouse. UX-10. Staging Team Members are required to have a high school diploma or GED equivalent. UX-10. They report to the Production Supervisor classification. Tr. 562.

Process Technicians have two primary responsibilities. First, they are responsible for programming the various computerized settings– temperature, speed, etc.–that affect the output of the machines. Tr. 500. They are also have duties related to the steel molds that are "hung" on the presses, and that contain the cavities into which the plastic is injected. Tr. 607. One is to provide a daily report on the performance of the molds – the percentage of individual cavities within each mold that are functioning properly. Tr. 557-59. They also open up the presses to inspect and sometimes block off cavities that are not functioning properly. Tr. 598.

Process Technicians report directly to Production Manager Tim DeCrow. Tr. 563. While Tim Tyler initially testified that Process Technicians report to Production Supervisors (Tr. 502), DeCrow confirmed in his testimony that Tyler was mistaken. Tr. 563 ("They report directly to me."). Process Technicians do not have to ask permission to take breaks during their shifts. Tr. 546. The same goes for the other technician classifications–the Maintenance Technicians and Mold Technicians. Tr. 546.

Portola issues each Process Technician a laptop computer. Tr. 558. They use these computers for various job-related duties. One is to prepare their daily mold performance reports. Tr. 557-9. They also use the computers for e-mail communication with the Process Engineers (Tr. 610) and to communicate with other plants. Tr. 548. According to Production Supervisor Fabian Franco, Process Technicians spend about 40% to 50% of their time on the production floor; the rest of the time is spent doing reports. Tr. 784.

Process Technicians also use tools in the performance of their duties. Tr. 454, 608. They use tools to open up the presses to perform various functions on the cavities in the steel molds. Tr. 448, 608.

According to Tim DeCrow, Process Technicians make between $20 and $30 per hour. Tr. 605. According to Chris McClanahan, they make between $16.50 and $22 per hour. Tr. 831.

In addition to Process Technicians, there are two other classifications in the facility that are involved with the development and implementation of the molding processes. These are the Process Specialist and Process Engineer classifications.

According to DeCrow, both classifications, as with the Process Technicians, focus on the performance of the molds, and the process-related variables that influence that performance. DeCrow agreed that the differences between Process Technicians, Process Specialists, and Process Engineers, could be characterized as a spectrum of abilities that focus on processing molds, noting that the Process Engineer classification requires an engineering degree. Tr. 610.

Those Process Specialists who are on GO-Teams are supervised by DeCrow. Tr. 563. According to DeCrow, they make between $35 and $40 per hour. Tr. 605. Chris McClanahan testified that the figure was more like between $21 and $29. Tr. 833.

The Process Engineers who are on GO-Teams are also supervised by DeCrow. Tr. 563. Process Engineer is a salaried classification. According to DeCrow, they make between $55 and $72 per hour. Tr. 605. According to Chris McClanahan, they make between $21 and $29 per hour. Tr. 833.

2. Analysis

When resolving determinative challenge ballots in cases involving stipulated bargaining units, the Board uses a three-step analysis: "The Board must first determine whether the stipulation is ambiguous. If the objective intent of the parties is clearly and unambiguously expressed in the stipulation, then the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal methods of contract interpretation, including examination of extrinsic evidence. If the parties' intent still cannot be discerned, then the Board determines the bargaining unit by employing its normal community-of-interest test." *Caesars Tahoe*, 337 NLRB 1096 (2002).

In order to determine whether the stipulation is clear or ambiguous, the Board will compare the express language of the stipulated bargaining unit with the disputed classifications. *Viacom Cablevision*, 268 NLRB 633 (1984). The Board will find a clear intent to include those classifications that match the express language, and will find a clear intent to exclude those classifications not matching the stipulated bargaining unit description. *Id*. Within this framework, "if the classification is not included, and there is an exclusion for

'all other employees', the stipulation will be read to clearly exclude that classification". *Bell Convalescent Hospital*, 337 NLRB 191 (2001). *See also National Public Radio, Inc.*, 328 NLRB 75 (1999); *Prudential Insurance Co.*, 246 NLRB 547 (1979).

In determining whether employees share a "community of interest", the Board considers the following factors: "[W]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised." *United Operations, Inc.*, 338 NLRB 123, 123 (2002).

i. The Process Technician classification should be excluded from the unit because it is not expressly included, and the unit description expressly excludes "all other employees."

Under *Bell Convalescent Hospital*, 337 NLRB 191 (2001), if a classification is not included in the unit definition, and there is an exclusion for "all other employees," the stipulation will be read to clearly exclude that classification. Here, the unit description does not include the "Process Technician" classification, and expressly excludes "all other employees." EX-4. Given the express exclusion of "all other employees," any ambiguity about Process Technicians should be resolved in favor of excluding them.

Portola has argued that the term "operator," as used in the unit description, should be construed to refer to the Process Technician classification. This argument is unavailing for two reasons. First, among employees, the term "operator" is widely used to refer to the

Production Team Member classification. *Every single Production Team Member who testified at the hearing* referred to herself as an "operator".

- Marta Magallon Corona referred to herself as a "machine operator" or "operator". Tr. 278, 318, 323.
- Herlinda Cervantes testified that her position is described in the plant as "operator". Tr. 253.
- Alicia Martinez described herself as a "packer" or "operator" (Tr. 348), and said she had never heard the term "team member". *Id.*
- Evangelina Villegas referred to herself as an "operator." Tr. 355.

Furthermore, Jorge Garcia, a Maintenance Technician, also referred to various Production Team Members as "operators". These included Graciela Sandoval (Tr. 208), Evangelina Villegas (Tr. 208-09), Marta Magallon (Tr. 183 (as "machine operator" and "relief")). Garcia explained that "operator" is the same as "team member". Tr. 208-9. According to Portola, each of the above employees is a Production Team Member.[5]

DeCrow and several other management witnesses initially denied knowledge that Production Team Members refer to themselves, and are referred to by others as "operators". When asked if employees refer to themselves as operators, DeCrow initially replied, "Individual employees, I'm not sure what they would refer to themselves as, but as far as our job descriptions go, they're production team members". Tr. 94. However, later in the hearing, De Crow admitted that he was aware the Production Team Members refer to themselves as "operators". Tr. 620.

[5] When reviewing the Excelsior list at the hearing, Tim DeCrow indicated that each of the above employees was a "Production Team Member." Tr. 130-31.

Given the widespread use of the term "operator" by the employees, it unlikely that all of the managers involved in putting together the *Excelsior* were ignorant of the fact that Production Team Members refer to themselves as "operators." Unlike the Union, which did not have access to detailed information about the job descriptions and classifications used in the Tolleson facility when it submitted the petition, Portola management could have proposed changes or clarifications to the unit description based on the actual job titles used at the facility. But Portola proposed no changes or clarifications. Tr. 552.

Second, Portola's explanation for why "operator" should be construed to refer to the Process Technician classification was far-fetched at best. General Manager Tim Tyler claimed that Process Technicians "operate" the presses because they relate to the machines the way a driver relates to a car: "The Process Technician is an 'operator' of the equipment compared to the driver of an automobile". Tr. 506. "They drive the machines. They set the speed of the machine, the temperature of the machine, and those are the critical characteristics to operating the equipment; speed and temperature." Tr. 500. But Tyler agreed that once the Process Technicians set the speed and temperature, etc., they are free to walk away from the machine. Tr. 535. He admitted that when he drives his car, he does not simply set the speed and then walk away when the car is running. Tr. 536.

Tyler then reached for another analogy, "it would be like an auto-pilot on an airplane where you can set it and walk away from it, and it could take off, fly, and land by itself". Tr. 536. This second analogy is demonstrates why the Process Technician is not the "operator" of the equipment. The only classification of employee that must be present any time a press is in operation is the Production Team Member. They cannot put a machine on "auto pilot" and walk away. As Tyler testified, there are times when there are no Process Technicians on

duty at the facility. Tr. 535. But any time a machine is in operation, 24-hours of the day, a Production Team Member is there to attend to it. Tr. 534-35. Thus, the term "operator" cannot plausibly be construed to refer to the Process Technician classification.

The ALJ found that the testimony by DeCrow, Tyler, and other managers on this point to be "totally disingenuous":

> I find this position taken by some of the Employer's supervisors to be totally disingenuous. It is inconceivable that with the production team members regularly referring to themselves as "operators," the supervisors could be unaware of such. Further, as will be apparent following a description of the respective work performed by the production team members and the process technicians, the term "operator" much more closely describes the work performed by the production team members than it does that work performed by the process technicians. In my opinion, the effort on the part of the Employer to try and portray the process technicians as "operators" is merely part of the campaign to have them included in the stipulated unit so that they might vote in the election.

ALJD at 44. While the ALJ found that the term "operator" properly referred to the "Production Team Member" classification, he decided the matter based on the community of interest factors discussed below. However, Portola has revived the argument regarding which employees are "operators" by its exception 20. This exception is completely without merit, and should be denied.

ii. The Process Technician classification should be excluded from the unit because the term "production employees" should be construed to refer to those employees who report directly to a Production Supervisor.

Portola has also asserted, through its exception 20, that the term "production employees" should be construed to refer to all employees supervised, directly or indirectly, by Tim DeCrow, the Production Manager, including Process Technicians. Instead, the term

should be construed to refer to the three classifications that report directly to the Production *Supervisors*: Team Leads, Production Team Members, and Staging Team Members.

Portola's construction includes a number of classifications that are primarily technical or supervisory in nature. The classifications that DeCrow supervises directly are the Production Supervisors, Process Technicians, Process Specialists, Process Engineers, and Maintenance Mechanics.

Further, a close reading of the stipulation suggests that the term "production employees" should be construed in the way the Union suggests. The stipulated unit includes "production workers including machine operators, sanitation, and packaging employees" and excludes, "all other employees including maintenance mechanics, shipping and receiving employees, quality control employees, office clericals, managers, guards, and supervisors as defined in the act". EX-4. The use of the term "including" is illustrative, not specific. By including "production workers" and excluding "all *other* employees *including* maintenance mechanics", the unit description should be read to construe "maintenance mechanics" to not be part of the category "production workers". Only under the Union's construction of the term "production workers" is this true, because none of the Maintenance Technicians are directly supervised by the Production Supervisors.

Thus, Process Technicians are neither "operators" or "production workers" and are therefore expressly excluded from the stipulated unit.

iii. Process Technicians should be excluded from the unit because they do not share a community of interest with the other employees in the proposed unit.

Whether the above arguments resolve the issue here or not, resort to the Board's community of interest test leads to the same result. As the ALJ concluded, the Process

Technicians do not share a community of interest with the other employees in the stipulated unit. ALJD at 26.

The differences between Process Technicians and other classifications are numerous, and touch many factors in the Board's analysis:

- Process Technicians are directly supervised by the Production Manager (Tr. 563), while the other included classifications are directly supervised by the Production Supervisors. Tr. 560-63; UX-4.
- Process Technicians' duties require them to use tools and computers. Tr. 454, 557-59, 608. None of the other included classifications use tools or computers in their work. Tr. 453-54.
- Process Technicians determine when to take their breaks, and do not need to be relieved. Tr. 456. Production Team Members do not decide when to take their breaks, and need to be relieved any time they leave their machines. Tr. 453.
- Process Technicians can be paid more than twice as much as Production Team Members. Tr. 605, 831.
- Process Technicians are provided with technical training that is not provided to any of the other included classifications. EX-7; EX-8.

A key community of interest factor is the overlap between the duties of the disputed classification and those of the other classifications in the unit. While Process Technicians may interact with the other classifications in the proposed unit, there is little overlap in the work that they perform. Their work overlaps much more with the Process Specialist and Process Engineer classifications, and with other classifications that work directly with the steel molds.

The following Process Technician I job duties illustrate how much more closely they are aligned with the technical and supervisory classifications, rather than the other classifications in the stipulated unit:

- Working with Process Engineers and Corporate Engineering to bring new products to our customers in a timely manner.
- Working with Process Engineer [sic] and Mold Maintenance to effectively refurbish and maintain molds.
- Helping out in the day-to-day activities in the mold shop if necessary.
- Filling in as a supervisor or mold technician when the need arises.
- Giving feedback to mold technicians and supervisors as necessary.

UX-2. None of the duties listed on the Process Technician job description refer to any of the other classifications in the stipulated unit. *Id*.

Furthermore, the fact that many witnesses could not tell the difference between a Process Technician, a Process Specialist, and a Process Engineer suggests that the Process Technicians share far more in common with the other process classifications than with the classifications in the stipulated unit.

Even Portola's management witnesses were unclear among themselves as to whether employee Michael Burns was a Process Technician, a Process Engineer, or a Process Specialist during the relevant time for determining eligibility under the stipulated election agreement. On the first day of the hearing, Tyler and DeCrow both testified that Burns was a Process Technician. Tr. 85; Tr. 130. DeCrow later testified that he believed that Burns was a Process Specialist at the time. Tr. 599. He then testified that Burns was performing the functions of a Process Engineer. Tr. 616. Paul Rose, the Maintenance Manager at the plant, first testified that Burns was a Process Technician, but then testified that he was a Process Engineer. Tr. 673. Burns also participated in the training that Rose provided to the

Maintenance Technicians and Process Engineers on a computer system used to generate work orders and track maintenance costs. Tr. 674.

A few of Portola's witnesses suggested that Process Technicians relieve Production Team Members from time to time, and Portola may argue that this demonstrates overlap between their duties. But a technical classification occasionally standing in for a production-line classification does not demonstrate that their duties or functions actually overlap. No evidence was offered that Production Team Members ever fill in for Process Technicians in the performance of their duties.

In view of the factors discussed above, the Process Technicians do not share a community of interest with the other classifications in the stipulated unit. As such the ALJ correctly concluded that they are excluded from the unit.

D. The ALJ correctly recommended that the election be set aside.

Where the results of an election do not represent the free and uninhibited choice of the employees, the Board must set aside the results and order a new election. "In 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". *General Shoe Corp.*, 77 NLRB 124, 127 (1948).

When determining whether to set aside an election, the Board considers whether the misconduct, taken as a whole, has "the tendency to interfere with the employees' freedom of choice" and "could well have affected the outcome of the election." *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995); *see also Hopkins Nursing Care Center*, 309 NLRB 958 (1992).

The test for objectionable conduct is stricter than the test for unfair labor practices. "The test of conduct which may interfere with the 'laboratory conditions' for an election is

considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1)." *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786-87 (1962). *See also Overnite Transportation Co*., 158 NLRB 879 (1966); and *Excelsior Underwear*, 156 NLRB 1236 (1966).

Pre-election conduct that is an unfair labor practice is, *a fortiori*, conduct that improperly interferes with the election process, "unless it is so de minimus that it is virtually impossible to conclude that [the violation] could have affected the outcome of the election". *Airstream, Inc.*, 304 NLRB 151, 152 (1991), enforced, 963 F.3d 373 (6th Cir. 1992) (quoting *Enola Super Thrift*, 233 NLRB 409 (1977)).

The closeness of the election is a paramount factor in assessing objections. *SNE Enterprises, Inc*. 348 NLRB No. 69 (2006) at 4 n.9, *citing Robert Orr-Sysco Food Services,* 338 NLRB 614, 615 (2002). "The Board gives great weight to the closeness of the election in deciding whether conduct is objectionable." *Hopkins Nursing Care Center*, 309 NLRB 958, 959 n.8 (1992) (citing cases).

Conduct that might not have warranted setting aside a lopsided election result will be objectionable in a close election. For example, in *Double J Services*, 347 NLRB No. 58 (2006) at 2-3, the Board set aside an election decided by a three-vote margin, because one employee was unlawfully interrogated, and told one other employee about it. "In light of the fact that a swing of only two votes in the election would change the outcome, Terris' dissemination of Jones' objectionable conduct to just one other employee is sufficient to warrant setting aside the election."

Here, the election was tied, with nineteen votes for the Union, nineteen against, and three challenged ballots. A single additional vote for the Union could have changed the outcome of the election.

The Board has recently clarified that, in a consolidated hearing on both election objections and ULP charges, the Administrative Law Judge may rely on unobjected-to unfair labor practices in determining whether to set aside an election. *Austal USA, LLC*, 356 NLRB No. 65, at 3 (2010). In a consolidated hearing, "the interests of employee free choice require that the unfair labor practice allegations be considered as grounds for setting aside the election even though not specified in the election objections." *Community Medical Center*, 355 NLRB No. 128 (2010) (incorporating by reference *Community Medical Center*, 354 NLRB No. 26, slip op. at 1 fn. 3 (2009) (citing *White Plains Lincoln Mercury*, 288 NLRB 1133, 1137–1138 (1988)); *see also Fisher Island Holdings*, 343 NLRB 189, 189 fn. 2 (2004) (citing *White Plains Lincoln Mercury* as establishing that "in a combined unfair labor practice/representation proceeding, the Board has authority to set aside an election based on unfair labor practices that were not specifically alleged as objectionable conduct"), *enf. denied* on other grounds 140 Fed.Appx. 857 (11th Cir. 2005).

Thus, the Administrative Law Judge properly considered both unfair labor practices alleged by the General Counsel, including those that do not overlap with the Union's objections, in determining that Portola's employees were not able to make a free and uninhibited choice in the December 1, 2011 election.

On the record as a whole, considering both the Union's objections and the General Counsel's meritorious unfair labor practice allegations, there is no doubt that the ALJ was

correct in concluding that the December 1 election must be set aside in the interests of employee free choice.

IV. Conclusion

For all of the foregoing reasons, the ALJ's ruling that the Union's objections 1 and 3 should be sustained, and a new election directed should be upheld by the Board. Further, the ALJ's ruling that the Union's challenges to the ballots of Michael Burns, Thomas Turner, and Gabriel Hernandez should be sustained, and that the "process technician" classification is not included in the stipulated unit should be upheld by the Board, and the representation proceeding be remanded to the Regional Director for Region 28 for the purpose of conducting a second election, in which it is made clear that the process technicians are not eligible to participate.

Dated: October 25, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing PETITIONER UFCW LOCAL 99'S RESPONSE TO EMPLOYER'S EXCEPTIONS – Case Nos. 28-CA-067274, 28-CA-067345, 28-CA-070621 and 28-RC-067973. was filed using the National Labor Relations Board on-line E-filing system on the Agency's website and copies of the aforementioned were thereafter served upon the following parties via email on this 25th day of October, 2012:

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