

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

MERRY MAIDS OF SOUTH BOSTON	*	
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Employer	*	
	*	
and	*	01-RC-097257
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INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS LOCAL 7 AFL-CIO	*	
	*	
Petitioner	*	

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**BRIEF IN SUPPORT OF EXCEPTIONS TO THE HEARING OFFICER'S REPORT  
AND RECOMMENDATION ON OBJECTIONS**

Merry Maids of South Boston (“Merry Maids” or “Employer”) hereby submits in Brief in Support of Exceptions to the Hearing Officer's Report and Recommendation on Objections, and in support thereof states as follows:

**I. INTRODUCTION**

Merry Maids timely submitted an objection to the election in the above-referenced matter. The election took place on March 28, 2013, between 8:00 a.m. and 10:00 a.m. The voting took place in the employee lunch room which is located around the corner from the management offices in the small Merry Maids facility in Boston, Massachusetts. The evidence established that during the election around eight to ten employees who represented themselves to be supporters of the Union engaged in improper electioneering right outside of the room in which the voting was taking place. For nearly an hour they accosted voters as they entered the area, ridiculing the employer, and threatening their co-workers that they needed to vote for the Union, and that if they did not do so they would be fired when the Union came in. The

immigration status of voters was threatened by the group, and newer employees were targeted in a particularly aggressive manner. There was evidence that as many as ten or more voters were subjected to these actions, in an election where a shift of just two votes would change the result. This conduct disrupted the voting procedure and destroyed the atmosphere necessary to the exercise of a free choice in the representation election.

The Hearing on the Employer's objections took place on May 16, 2013. On June 26, 2013, the Hearing Officer's Report and Recommendation on Objections was issued. The Hearing Officer credited all of the testimony of the witnesses called to testify as to the abuse and harassment they suffered at the hands of a group of employees who stood by the voting room, with no purpose other than to harass and intimidate those employees entering to vote, but found that the objectionable conduct was insufficient to warrant setting aside the election. As set forth below, Merry Maids excepts to the Hearing Officer's dividing of third party misconduct into different categories, rather than looking at it collectively, to his finding that threats of job loss carried little or no weight because they were made by co-workers, and to his finding that the evidence of electioneering was insufficient to warrant setting aside the election; to the Hearing Officer's discounting of the effects of the objectionable conduct because of its distance from the voting room and because he determined that it was "relatively restrained"; to the Hearing Officer's determinations that because the threats of deportation were supposedly understood by employees to be an issue only if the Union was voted in these threats were insignificant, and that the deportation threats alone were not sufficient to warrant setting aside the election; and to the Hearing Officer's discounting of the closeness of the election.

## II. BACKGROUND FACTS

Merry Maids is a provider of housekeeping services to homes in the Boston area. Johanna Corona is an office employee and cleaner who works for Merry Maids. Among her duties, Corona is responsible for preparing the materials and "books", or directions, for the cleaners employed by Merry Maids regarding the work they must perform that day. (Tr. 10). In accordance with the directions of the NLRB Agent who was conducting the election on March 28, Corona (along with the management team) was told that she needed to remain in the management offices throughout the election period, and that she could not leave that area. She was also directed to cover up the lone window in the offices with paper, so that nobody could see in or out. (Tr. 10).

As Corona explained, the cleaners often go through the management offices in the morning to get their books and supplies for the day. (Tr. 15). Because there was to be no contact between management and the cleaners during the election, she stationed herself at the lone door to the offices, which door did not have a working lock, and leaned against the door to prevent the cleaners from entering. (Tr. 15, 21).

From her position leaning against the office door Corona could hear a crowd of female cleaners who had stationed themselves in the foyer, right between where eligible voters would enter the building, and the kitchen, where the voting would take place. The ladies were assembled around fifteen feet from the entrance to the kitchen, where the voting was taking place. (Tr. 84-85). Corona could clearly hear eligible voters Adilenia Alcantara, Altagracia Pimentel, Nanci Mejia, Rosanna Tejeda, Susan Soto, Flor Guzman, Lesmarie, Flor Angel, Nidia, and Dominga Molina in this group. (Tr. 31-32, 94-95, 104-105, 137-138, 161, 187). Comments by the group to voters went on for around 45 minutes to an hour, during which time Corona

heard the door to the foyer open, signifying that employees were coming in to vote, eight or nine times. (Tr. 36, 40).

In particular, Corona heard Alcantara and Mejia each say to voters: "You know how you need to vote if you want to keep your job. That the newer employees were going to get fired if they voted "NO". (Tr. 28-31). Given her familiarity working with the cleaners each day, Corona could tell who was speaking, and she heard these comments made four or five times as individuals came in the front door and were passing by the group on the way to vote. (Tr. 31-34). Corona also heard Rosanna Tejeda approach voter Wendy and say "Wendy, you know how you're going to vote. We're counting on your vote. We need you on our side." (Tr. 34). After Wendy passed the group to go vote, she heard Tejeda tell Alcantara "Don't worry, Wendy's vote is for us. And Adilenia -- Adilenia responded to her, 'Are you sure?' She said, 'Yes, don't worry. Her vote is for us.'" (Tr. 35). The crowd of ladies also approached voter Jonas "and I heard the girls approach, 'Oh, Jonas' and blowing kisses at him, 'We need your help. We need your support. We're counting on you. We need your vote.' I know it was Jonas because they were like 'Jonas.' And I heard them blowing kisses at him, telling him 'We need your help. We need your support. We need you on our side.'" (Tr. 37-38). Corona also heard Alcantara tell eligible voters that "the office staff, calling us pieces of trash. She referred to us as prostitutes. She also referred to some of the fellow co-workers as crackheads and also as prostitutes. And that the people that supported the non-Union side, we were all basically pieces of trash. . . . She also referred to the owner -- one of the owners, Mindy, she said that she was an old miserable hag and that she was wrinkled up like a raisin." (Tr. 35-36).

Maria Martinez was an eligible voter who was confronted with the throng of ladies when she entered the building to vote. On her way to vote Martinez was told "that I should vote for

the Union. If I wanted to get more pay I had to vote "YES" because otherwise all of the new people were going to be fired. . . . New employees would be terminated if they didn't vote for the Union " (Tr. 94, 97). Martinez, who had been employed only since January 2013, stated: "New employee, I understand that they were referring to me because the thing is I am one of the new employees in the Company. I started to work the first week of January of this year." (Tr. 94-95).

Arelis Tamaro is another Merry Maids cleaner who was an eligible voter. When she entered the building to vote she was confronted by the same group of ladies who, after Tamaro greeted them, insulted her. (Tr. 104). The ladies also told Tamaro that cleaners who supported the Company in the election were "a bunch of ass lickers . . . . [that] we were crazy". (tr. 106-107). Tamaro was also told that " when the Union enters, when they enter into the Company, that they win, those of us workers that do not have legal documents would be fired from the Company. The Union was going to remove us from the Company." (Tr. 106-107).

Eligible voter Lourdes Guerrero had a similar experience. She heard "Riza" say to one of the eligible voters "who she was going to vote for because whoever did not vote for the Union was going to be dismissed. . . . The comments that if those that would not vote for the Union, they were going to be thrown out or -- they were going to be thrown out." (Tr. 113, 114). She heard these comments while employees were waiting in line to vote. (Tr. 116).

Another eligible voter, Diomara Gonzalez, was on her way to vote when she was confronted by the group and told by Altagracia that "whoever doesn't vote for the Union is going to be thrown out, for example, the new ones." (Tr. 124-125). She was a new employee at the time. (tr. 125). She voted immediately thereafter. (Tr. 124-125). During the voting process

she was also told "by Susan that the persons who did not have papers within the Company, if the Union would win, they were going to be thrown out." (Tr. 125).

Nancy Mejia testified that voter Carmen Lopez was instructed "You know what you got to do. When Carmen Lopez entered inside I said -- I said to her, No one has to order you what to do. You know what you have to do and we know have to do -- what you have to do because we are not in agreement with those that are on this side." (Tr. 128).

Eligible voter Brenda Roman was in the voting area when she heard other voters, like Ivelisse, being told by the group that "they knew how they had to vote" when they went in to the kitchen to vote moments later. (Tr. 155-156). Eligible voter Mayra Puello testified that she and other voters were told by the group of ladies that "if the Union won the persons who did not have documents would be removed." (Tr. 161-162). Eligible voter Yasmine Baez was confronted by "Riaza. "Riaza asked me just how new was I. I asked her why and she told me 'Because if you're new you're going to be thrown out. . . . She asked me just how new I was because if I was new I was going to be fired or thrown out.'" (Tr. 167-169).

## **II. ARGUMENTS IN SUPPORT OF EXCEPTIONS**

### **A. Union elections should be conducted under laboratory conditions.**

It is well established that "Union elections should be conducted under laboratory conditions and that an election must be invalidated upon a finding of a substantial breach of those conditions." M & M Supermarkets, Inc. v. NLRB, 818 F.2d 1567 (11th Cir. 1987); N.L.R.B. v. Handy Hardware Wholesale, Inc., 542 F.2d 935, 938 (5th Cir. 1976); cert. denied, 431 U.S. 954 (1977). In Hometown Foods, Inc. v. N.L.R.B., 416 F.2d 392 (5th Cir. 1969), the court stated "the 'laboratory conditions' test represents an ideal atmosphere in which a free choice may be made by employees, protected from interference by employer, union, Board agent, or

other parties." 416 F.2d at 396. See also M & M Supermarkets, Inc. v. NLRB, 818 F.2d 1567 (11th Cir. 1987).

"[I]n election proceedings it [the Board] seeks to provide a laboratory in which an experiment may be conducted, under conditions as nearly as ideal as possible, to determine the uninhibited desire of the employees." Sewell Manufacturing Co., 138 N.L.R.B., 66, 70 (1962). "It is the province of the Board to safeguard its elections from conduct which inhibits the free choice of the voters, and the Board is especially zealous in preventing intrusions upon the actual conduct of its elections." Claussen Baking Co., 134 NLRB 111, 112 (1961); see also Star Expansion Industries Corp., 170 NLRB 364, 365 (1968). "In furtherance of this responsibility, the Board prohibits electioneering at or near the polls." Claussen, supra at 112; Star, supra at 365; Milchem, Inc., supra at 362 ("The final minutes before an employee casts his vote should be his own, as free from interference as possible."). The Board mandated in Milchem, Inc., 170 NLRB 362 (1968), that "the final minutes before an employee casts his vote should be his own, as free from interference as possible."

In evaluating electioneering by nonparties, the standard is "whether the conduct at issue so substantially impaired the employees' exercise of free choice as to require that the election be set aside." Rheem Mfg. Co., 309 NLRB 459, 463 (1992); Southeastern Mills, 227 NLRB 57, 58 (1976). In Home Town Foods, Inc. v. NLRB, 379 F.2d 241 (5th Cir. 1967), the court wrote: "We are not impressed with the argument that all coercive acts must be shown to be attributable to the union itself, rather than to the rank and file of its supporters. The important fact is that such conditions existed and that a free election is hereby rendered impossible." Accordingly, "[a]cts not attributable to the union warrant setting aside the election if the acts disrupted the voting procedure or destroyed the atmosphere necessary to the exercise of a free choice in the

representation election." NLRB v. Carroll Contracting, 636 F.2d 111(5th Cir. 1981). See also NLRB v. Claxton Manufacturing Co., 613 F.2d 1364, 1371 (5th Cir. 1980).

**B. Employer's Exceptions to Hearing Officer determinations that because the threats of deportation were supposedly understood by employees to be an issue only if the Union was voted in these threats were insignificant, and that the deportation threats alone were not sufficient to warrant setting aside the election.**

Respondent excepts to the Hearing Officer's determinations that because the threats of deportation were supposedly understood by employees to be an issue only if the Union was voted in, these threats were insignificant, and that the deportation threats alone (not to mention all of the other misconduct that accompanied them) were not sufficient to warrant setting aside the election. First, although the Hearing Officer found that the employees believed they would face deportation issues only if the Union was voted in, this was a language/translation issue, for employees who were obviously being harassed to support the Union. Moreover, it doesn't really matter how they understood the harassers to be directing them to vote through the deportation threats - the fact that threats of deportation relating to the election were being directed at immigrants for whom these threats were a concern should have, standing alone, warranted the setting aside of the election. See, e.g., Orr-Sysco Food Services, LLC, 338 NLRB 614 (2002) ("What *does* apply here, however, is the Board's finding in *Q. B. Rebuilders* that a deportation-related threat to call the INS--even one uttered in jest--constitutes a serious threat of economic and emotional harm. In an earlier case, the Board explained that threats of deportation are serious because they convey the warning that employees risk not just job loss, but also the loss of their homes and possibly even separation from their families by failing to support the union"); Crown Coach Corp., 284 NLRB 1010 (1987) ("Clearly, the threats made here were of a serious nature. They conveyed the explicit warning that employees not only risked job loss, but also the loss of their homes and possibly even separation from their families by failing to support the Union. . . .

[W]e conclude that the threats concerning immigration were sufficiently serious to create a general atmosphere of fear and confusion that interfered with the election").

**C. Employer's Exceptions to Hearing Officer's discounting threats of job loss.**

Respondent excepts to the Hearing Officer's discounting of the threats of job loss based on his determination that the employees who uttered the threats had no ability to carry them out. Although it was fellow employees uttering the threats, they were made them in the context of describing what would happen to the newly hired, and immigrant employees, based on how they voted in the election. It was not the co-workers who would be carrying out the threats, but Union officials. Threats of this nature, directed primarily at relatively new immigrant employees who had no understanding of the process or their rights, would carry great weight and impact as the last statements voters heard as they were going in to vote.

**D. Employer's Exceptions to Hearing Officer's evaluating third party misconduct in different categories, rather than looking at it collectively, and to his finding that the evidence of electioneering was insufficient to warrant setting aside the election.**

The testimony of the victimized employee voters in this case makes it clear that just outside of the election room there was a gauntlet of employees hanging around, not in line to vote, threatening employment and immigration status of other voters, demanding to know how other voters would be voting and attempting to influence their votes, and degrading ownership and management of the Employer to other voters. This was all happening just outside the room where the election was taking place, as individuals were going in to vote - the last things they would hear before voting.

The Hearing Officer credited the testimony of the witnesses as to the abuse and harassment they suffered but, after breaking it down into different categories (i.e., threats of job loss, threats of deportation, insults) he determined that none of the categories, standing alone, was sufficient to warrant setting aside the election. The Hearing Officer was wrong in breaking

down the misconduct into different categories - it was all electioneering occurring right outside the voting room directed at employees on their way in to vote - and in determining that the conduct was insufficient to warrant the setting aside of the election, particularly in a case like this, where the vote tally was so close that a change of just a couple of votes would have also changed the results of the election.

In Pepsi Cola, 291 NLRB 578 (1988), during the first 15 to 25 minutes of the election, approximately 20 union supporters (out of a unit of approximately 100), or one-fifth of the total complement of voters, formed lines on both sides of the aisleway outside the lunchroom (the voting area), near the line of employees waiting to vote. The Board in Pepsi-Cola described this situation as forcing employees to pass through a "gauntlet" on their way to vote. The Board concluded that in these circumstances, and particularly because the election margin was only one vote, the election did not reflect the free choice of the employees and should be set aside.

The Hearing Officer attempted to distinguish Pepsi Cola, writing that in our case "the electioneering was more restrained. There were no union hats or union shirts. The pro Union employees did not stand on both sides of employees waiting in line to vote. They did not campaign within an area that had been designated by the Board agent as the no electioneering area. There was no clapping or cheering." Report at p. 18.

The Hearing Officer was wrong, as Pepsi Cola clearly supports the setting aside of the election in the instant case. As in Pepsi Cola, individuals coming in to vote had to endure harassment and intimidation such as threats of discharge, threats on immigration status, questions on how they were going to vote, and attacks on the owners and management, just as they were heading in to vote. Although the pro Union employees did not stand on either side of a line of Merry Maids voters, the actual situation was far more intimidating and coercive than it was for

the voters in Pepsi Cola, who were together in a line and, as such, had "strength in numbers". The Merry Maids voters for the most part came in to vote alone, with no support, where they were forced to deal with an "eight on one" attack from the gang of Union supporters just as they went in to vote. The Hearing Officer's apparent belief that this "eight on one" attack scenario was less objectionable than a situation where employees in a line with other employees supporting their position are being harassed is misguided and in error.

Hollingsworth Management Service, 342 NLRB 556 ( 2004) is, in material part, also indistinguishable from the situation in the instant case. In Hollingsworth Management Service, the Board set aside the results of an election and directed a second election because of last minute electioneering by non-agent employees who were, like the gang of Union supporters in the instant case, not lined up to vote: "While waiting in line to exercise their right to vote, the employees essentially had no ready means of escaping the pro-union solicitations specifically directed at them." 342 NLRB at 558. In Hollingsworth, like the instant case, in addition to individuals who were not in line to vote ganging up on employees who were coming in to vote, the instances of harassment were not isolated, with employees exposed to it during the peak period when they were coming in to vote. As in Hollingsworth, employees coming in to vote were treated in an aggressive and hostile manner by those seeking to influence them. As in Hollingsworth, our election must be set aside.

In NLRB v. McCarty Farms Inc., 24 F.3d 725 (5th Cir. 1994), the court focused on a single employee engaging in electioneering conduct with a line of eight to fourteen voters waiting to vote in an election. Nevertheless, the court still found that this conduct, if proven, would be sufficient to set aside an election: "We cannot agree with Board's finding. We must reiterate that Jones's conduct took place in the voting line, moments before voting, and that some

8 to 14 voters observed and heard the confrontation." Id. Likewise, in NLRB v. Carroll Contracting & Ready Mix, Inc., 636 F.2d 111, 112-13 (5th Cir. 1981), an election was set aside after two former employees passively urged other employees who were standing in the voting line to vote for the union.

In other cases too, where conduct far less objectionable than what occurred at the March 28 election was at issue, the courts and the Board have set aside elections. Hood, 941 F.2d at 329, (election set aside where as a employee voter drove into the company parking lot on a day prior to the election, he was cursed and had his car swatted at with piece of union literature by an unidentified union supporter when he refused to accept that literature); Zeiglers Refuse Collectors, Inc. v. NLRB, 639 F.2d 1000 (3rd Cir. 1981) ("On election day, during the time the polls were open, Preston approached Null and Chappell at a spot forty feet from the polling place about five minutes before these two employees voted. According to Null, Preston stated: 'What are you voting, yes or no. If you vote no for the Union; me, Russ Knight and Barry Leisenring gets fired; we are going to kick your ass.' Chappell remembered Preston saying: 'When you go in there to vote, you had better vote for the Union or else you know what is going to happen'"); M & M Supermarkets, Inc. v. NLRB, 818 F.2d at 1573 (objection sustained and election set aside because of the inflammatory remarks made by employees to other voters); Season All Industries v. NLRB, 654 F.2d 932 (3rd Cir. 1981) (election set aside where an employee greeted individuals coming to vote and offered encouragement to them to vote for the union); Tyson Fresh Meats, Inc., 343 N.L.R.B. 1335 (2004) (election set aside due to electioneering misconduct where employees of the employer spoke to individuals who would be voting while they waited in line and encouraged them to vote for the union); Westwood Horizons Hotel, 270 N.L.R.B. 802 (1984) (setting election aside when several pro-union

employees threatened several other employees before and during the election and intimidated some voters in the voting line); Steak House Meat Co., 206 N.L.R.B. 28 (1973) (the Board set aside a close election when two pro-union employees pressured an employee to vote for the union); Sewell Manufacturing Co., 138 N.L.R.B. at 72 (objection sustained and election set aside because of the inflammatory remarks made by employees to other voters); Claussen Baking Co., 134 N.L.R.B. 111, 112 (1961) ( where the pro-union employee standing "15 feet from the entrance of the polling place" urged other employees to vote for the union as those employees approached the entrance to the polling place. The Board found that the above electioneering, which continued only for fifteen minutes, nevertheless interfered with the employees' free choice in a close vote, and set the election aside); Steak House Meat Co., 206 NLRB 28 (1973) (the Board set aside a close election when two pro-union employees threatened a single employee in order to coerce him to vote for the union).

**E. Employer's Exceptions to Hearing Officer discounting of the effect of the objectionable conduct because of its distance from the voting room and his assessment that the Union supporters were "relatively restrained".**

The Hearing Officer also discounted the impact of the harassment, intimidation and electioneering by claiming that the misconduct was not sufficiently close to the voting area, and the responsible individuals were relatively restrained. Both practically and legally speaking, he was in error here as well. First, as the evidence made clear in the tiny interior area inside the Merry Maids building there was, essentially, the door where employees walked into the facility, the gauntlet of Union supporters waiting to harass them, and then the door to the kitchen where the voting took place. That's it. Furthermore, taking the Hearing Officer's determination as true that the electioneering took place fifteen feet from the vote, that is more than close enough to establish objectionable conduct. See, e.g., NLRB v. Carroll Contracting & Ready Mix, Inc.,

636 F.2d 111, 112-13 (5th Cir. 1981) (election set aside where electioneering took place around 25 feet from the voting area); Zeiglers Refuse Collectors, Inc. v. NLRB, 639 F.2d 1000 (3rd Cir. 1981) (election set aside where electioneering took place around forty feet from the voting area); Claussen Baking Co., 134 N.L.R.B. 111, 112 (1961) (election set aside where electioneering took place around fifteen feet from the voting area).

Regarding his assessment that the situation was "relatively restrained", this certainly doesn't describe the situation faced by around ten voters who arrived at the Merry Maids facility looking forward to being able to vote in "laboratory conditions", who were then forced to confront what was, at any given time, a gang of eight or more Union supporters harassing and threatening them, and attempting to alter their votes. This intimidating eight on one situation was hardly restrained, from either the perspective of the victims or any reasonable person who may be facing such a situation.

**F. Employer's Exceptions to Hearing Officer discounting of the closeness of the election.**

Finally, although the Hearing Officer stated that he gave consideration to the closeness of the election, he clearly did not give sufficient consideration. Eight employees testified about objectionable conduct they suffered in the voting area, affecting them and countless other employees, in an election in which just 28 votes were counted, with another vote challenged. The election results in this case - 16 votes for the Union and 12 against - were so close that if the electioneering impacted just two voters who would have voted for the Company, it would have won the election. As was the case in Orr-Sysco Food Services, LLC, 338 NLRB 614 (2002), "despite his statement to the contrary, the hearing officer did not sufficiently take into consideration the closeness of the election results. Objections must be carefully scrutinized in



**CERTIFICATE OF SERVICE**

This is to certify that on this 8<sup>th</sup> day of July, 2013, a copy of the foregoing Brief was served upon the following:

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