

in Glen Cove, New York. The petitioned-for unit consisted of no more than 15 employees, as confirmed by the underlying *Norris-Thermador* agreement. The tally of ballots reflected a vote in favor of representation by ten to five.

On June 5, Respondent filed timely Objections to Conduct Affecting the Results of the Election ("Objections") alleging, *inter alia*, that the Union, by and through its supporters and agents, verbally intimidated and threatened bargaining unit employees with acts of retribution in the event that they chose to exercise their rights to vote against representation, and that the close confines of the designated polling area served to deprive eligible voters of sufficient safeguards to protect their right to cast ballots in an atmosphere of sufficient confidentiality. Respondent supported its objections with notarized affidavits from four witnesses.

On June 19, the Regional Director summarily issued a Report on Objections overruling Respondent's Objections in their entirety, and recommending that the Union be certified as the exclusive bargaining representative of the petitioned-for employees. In doing so, the Regional Director deprive Respondent of the opportunity for an evidentiary hearing on its underlying Objections. On July 2, Respondent filed timely Exceptions to the Report on Objections, asserting in part that the Region abused its discretion in denying an evidentiary hearing.

On September 13, the Board issued a Decision and Certification of Representative, denying Respondent's Exceptions and certifying the Union as exclusive representative of the petitioned-for unit. Respondent thereafter admittedly refused to bargain with the Union, prompting it to file the unfair labor practice charge that gave rise to the instant complaint.

II. LEGAL ANALYSIS

General Counsel's Motion for Summary Judgment should be denied and a hearing directed on Hassel Volvo's objections because it made a *prima facie* showing of substantial and material issues of fact that warrant setting aside the election. See *NLRB v. Valley Bakery, Inc.*, 986 F.2d 339, 342 (9th Cir. 1993) ("To obtain an evidentiary hearing on an election objection, the objecting party must make a *prima facie* showing that substantial and material issues of fact

exist that would warrant setting aside the election.”) (citing 29 C.F.R. § 102.69(d)); *NLRB v. Claxton Mfg Co., Inc.*, 613 F.2d 1364, 1365 (5th Cir. 1980) (“Due process requires the Board to grant a post-election hearing to a losing party who has supplied *prima facie* evidence raising substantial and material issues that would warrant setting the election aside.”).

A. Objectionable Threats and Intimidation

Hassel Volvo made a *prima facie* showing that substantial and material issues of fact exist as to whether unit employees were unlawfully threatened and intimidated by the Union. Specifically, Respondent submitted affidavits of four witnesses who confirmed that at least one unit employee (Mike Ebrimian) did not want to vote for the Union but was “pressured” to do so. The witnesses further attested that Mr. Ebrimian reported that the Union and its supporters would “give him a hard time” and “make life difficult” for him if he did not vote for the Union. These affidavits were more than sufficient to warrant a hearing on Hassel Volvo’s objection.

In *Valley Bakery, supra* at 339, the Ninth Circuit Court of Appeals declined to enforce a refusal-to-bargain order under similar circumstances, remanding the case for an evidentiary hearing on the employer’s election objections. In that case, the employer alleged that the union or its agents coerced employees to vote in favor of the union. In support of its objections, the employer proffered an affidavit from its personnel director, who averred that after the election, she asked a known union supporter why the employer lost, and the union supporter told her that employees were afraid to vote against the union because they were told that those employees who previously had signed authorization cards would be discharged if the union did not win the election. According to the affidavit, the union supporter would not disclose to the personnel director who allegedly made the statement.

Based solely on the personnel director’s affidavit, the employer requested an evidentiary hearing in order to compel sworn testimony of adverse witnesses. The Regional Director denied the employer’s request, finding that even if threats were made, the affidavit was

insufficient to establish that the union was responsible for making them. The Board adopted the Regional Director's finding. The Ninth Circuit, however, disagreed.

According to the Ninth Circuit, the affidavit constituted "circumstantial evidence that implied threats were made that employees would lose their jobs if they had signed authorization cards and the Union lost the election" and that "the only reasonable inference to draw from the employee's invocation of her pledge of confidentiality is that the Union or its agents made the statements." *Id.* at 343. The Court continued, "Because the subjective reactions of the employees to the alleged threats are relevant, an evidentiary hearing would help to determine if the statements influenced any votes." *Id.*

In reaching its conclusion that an evidentiary hearing was warranted, the Ninth Circuit explained that "an employer seeking evidence to prove election misconduct has access to very limited discovery [and] must proceed in an exceedingly careful manner to avoid being accused of coercive interrogation of employees." *Id.* at 342 (internal quotations omitted). Thus, according to the Court, it is "unreasonable to expect an employer to document its objections with the kind of evidence that realistically could be uncovered only by subpoena and an adversarial hearing." *Id.* (internal quotations omitted). Consequently, the Court held, "with the evidence the Company was able to present and the reasonable inferences to be drawn from that evidence, the statements may have influenced some employees' votes and, therefore, the Regional Director should have conducted an evidentiary hearing." *Id.* at 344.

Following the Ninth Circuit's rationale, other courts have consistently denied enforcement of refusal-to-bargain orders where the Region refuses to hold an evidentiary hearing on the basis that the underlying affidavits offer only limited details. See, e.g., *NLRB v. McCarty Farms, Inc.*, 24 F.3d 725, 730 (5th Cir. 1994) ("[W]e conclude that the Company's affidavits considered in the light most favorable to the Company establish a prima facie case that would, if proven true, warrant setting the election aside, and we remand this case for an evidentiary hearing to determine if the conduct, in fact, destroyed the atmosphere of free choice

necessary for a valid election.”); *NLRB v. J-Wood/A Tappan Div.*, 720 F.2d 309, 317 (3rd Cir. 1983) (“We...hold that the Regional Director should have held an evidentiary hearing on [the employer’s] election objection to consider whether [a prounion employee’s] actions were attributable to the Union and whether [his] statements may have influenced employees’ freedom of choice in the election.”); *NLRB v. Nixon Gear, Inc.*, 649 F.2d 906, 913 (2nd Cir. 1981) (“Firsthand testimony establishing that the Union intended the improper conduct could only come from [the employee who allegedly was induced by the Union] or Union officials. But it was impossible for the Company to obtain their testimony because without a hearing an employer must rely upon voluntary cooperation of witnesses to develop its case.”).

Like the employers in the above-cited cases, Hassel Volvo was constrained by its legal obligation to refrain from interrogating employees about union activities and sympathies. Specifically, Respondent’s managers could not ask the employee who reported multiple times that he felt “pressured” whether certain Union representatives and/or supporters threatened to “give him a hard time” and “make life difficult” for him. Moreover, Hassel Volvo’s managers could not inquire whether others may have been similarly coerced and intimidated.

Consequently, Respondent offered *prima facie* evidence in the form of four affidavits demonstrating that an evidentiary hearing was necessary to resolve substantial and material issues of fact that, if proven true, would warrant setting aside the election.² See *Bellagio, LLC*, 359 NLRB No. 128, slip op. at 1 (2013) (finding that a former employee’s comments to an employee in the petitioned-for unit that he “better not vote” and that if the vote “went through” he would be “toast” constituted objectionable conduct sufficient to set aside an election); *Paperworkers Local 710 (Stone Container)*, 308 NLRB 95, 98 (1992) (finding that the union

² Notably, Hassel Volvo exceeded its obligation by producing affidavits of witnesses with first-hand knowledge of reported Union coercion and intimidation. Cf. *The Daily Grind*, 337 NLRB 655, 656 (2002) (recognizing that an employer can demonstrate the need for an evidentiary hearing merely by identifying witnesses and providing a description of the relevant information to be shown).

violated the Act when its agent told an employee, "Anybody who testifies against the Union, it's not going to be a very pleasant place to work").

By ignoring this evidence and denying a hearing, the Regional Director failed to afford Hassel Volvo sufficient due process during the post-election objections stage, thereby justifying its subsequent refusal to bargain with the Union. See *Valley Bakery*, 986 F.2d at 342 ("If the Board abused its discretion in failing to hold a hearing, the employer's refusal to bargain with the Union is not an unfair labor practice.").

B. Objectionable Polling Area

Second, Hassel Volvo made a *prima facie* showing that substantial and material issues of fact exist concerning whether the close confines of the polling area deprived employees of a secret ballot election. Specifically, Respondent established that the polling area was confined to an extremely small room (with dimensions of approximately 8' x 12'), that was largely occupied by a table, a few chairs, and a refrigerator. Consequently, the election observers were necessarily situated only a few feet away from the polling booth. Being in such close proximity to the voters could have permitted the observers to make eye contact with the voters or observe their arm movements while casting their ballots.

As the Board has long since held, "if the integrity of the Board's election process is to be maintained it is manifestly essential that employees be balloted in a secret election, for the secret ballot is a requisite for a free election." *The Royal Lumber Company*, 118 NLRB 1015, 1017 (1957). Any doubts regarding the integrity or secrecy of an election require that the election be rerun. *Id.* (citing *Imperial Reed & Rattan Furniture Co.*, 118 NLRB 911 (1957)).

In *Imperial Reed*, 118 NLRB at 913, the Board held that the "voting arrangements were entirely too open and too subject to observation to insure secrecy of the ballot and freedom of choice by the employees in the selection of a bargaining representative." In that case, the Board agent overseeing the election created an improvised voting booth that included stacking chairs and cushions in an effort to obscure observers' view of voters' actions. *Id.* 912. The

evidence demonstrated that “the table at which the observers sat was located approximately 7 feet from the voting table and within their line of vision as they sat at the table.” *Id.* Additionally, “the union observer stated that he could see some of the ballots as the employees placed them on the voting table although he could not see how they were marked.” *Id.* at 912-913.

Rejecting the argument that the election should not be set aside in the absence of proof that the observers could and did see how the ballots were marked, the Board explained that it is “responsible for assuring properly conducted elections, and its role in the conduct of elections must not be open to question.” *Id.* at 913 (citing *New York Telephone Co.*, 109 NLRB 788, 790 (1954)). The Board further explained that, “[a] secret ballot is essential to a free election.” *Id.* Consequently, the Board set aside the election and directed a new one “[i]n the interest of preserving the integrity of [its] election processes....” *Id.*

Similarly, in *Royal Lumber*, 118 NLRB at 1017, the Board found that, “the employees voted under circumstances which at least raise doubts concerning the integrity and secrecy of the election.” In that case, the election was held in a small shed, and the voting booth was positioned near a doorway, which remained open throughout the voting period. *Id.* The evidence demonstrated that during the voting period, two non-voters approached the area, and at least one of them stood outside the doorway long enough to see four employees vote. *Id.*

Although that non-voter stated to the election officer that he could not see what the employees had marked on their ballots, the Regional Director concluded that, “this person was within such proximity to the shed at the time some of the employees voted that he could have seen how they voted and that the voters could have believed that he saw their vote.” *Id.* The Board agreed, finding no alternative but to set aside the election and direct a new one, “[i]n the interest of maintaining [its] high standards of election procedure....” *Id.* at 1018.

More recently, in *Columbine Cable Co.*, 351 NLRB 1087, 1088 (2007), the Board ordered a rerun election where evidence demonstrated that employees, “voted without the privacy and secrecy afforded by a voting booth or a completely private room.” In that case, “the

Board agent and the observers for the parties were in the same room as... voters, positioned only 15 feet away, and observed their backs and left shoulders while they were marking their ballots.” *Id.* The Board concluded that these circumstances “raise doubts concerning the integrity and secrecy of the election[] . . . even though there is no affirmative proof that any person actually saw how the ballots were marked.” *Id.* (citing *Royal Lumber* and *Imperial Reed*).

As in *Imperial Reed*, *Royal Lumber*, and *Columbine Cable*, the close confines of the polling area on May 29th raised serious doubts concerning the integrity and secrecy of the election.³ As Hassel Volvo explained to the Regional Director in support of its Objections, the election observers and Board agent were situated mere feet away from the voters and in their direct line of vision. Without a hearing to resolve substantial and material issues concerning whether the observers could have made eye contact with the voters or seen their arm movements when they were casting their ballots, Hassel Volvo was denied due process in its effort to support its election Objections. Thus, its refusal to bargain with the Union is not unlawful. *Valley Bakery*, 986 F.2d at 342 (“If the Board abused its discretion in failing to hold a hearing, the employer’s refusal to bargain with the Union is not an unfair labor practice.”).

III. CONCLUSION

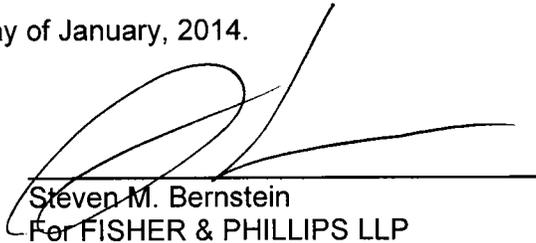
Hassel Volvo made a *prima facie* showing that substantial and material issues of fact exist that would warrant setting aside the election. It proffered four affidavits that sufficiently demonstrate the need for a hearing to examine whether Union coercion and intimidation affected the results of the election. Moreover, it amply described unsuitable voting arrangements that raise doubt about the integrity and secrecy of the election process. Consequently, the Board should deny the General Counsel’s Motion for Summary Judgment and order either a rerun election or a hearing on Hassel Volvo’s objections. See *NLRB v.*

³ The Board’s Casehandling Manual also envisions an entirely private polling space. Specifically, Sec. 11304.3 provides, “What is required is a compartment or cubicle that not only provides privacy but that also demonstrates the appearance of providing privacy, while maintaining a level of dignity appropriate to the election process.”

McCarty Farms, Inc., 24 F.3d 725, 728 (5th Cir. 1994) (“We will remand for a hearing when the objecting party raises substantial and material factual issues supported by a specific proffer of evidence which, if true, would be sufficient to set aside the election.”).

WHEREFORE, having fully responded to the Board’s Notice to Show Cause, Hassel reiterates its request that the Complaint be dismissed in its entirety, and that an evidentiary hearing be directed with respect to the underlying Objections.

Respectfully submitted this 10th day of January, 2014.



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

NY-FV, INC., d/b/a HASSEL VOLVO)	
of GLEN COVE)	
)	
and)	CASE NO. 29-CA-116941
)	
INTERNATIONAL ASSOCIATION OF)	
MACHINISTS & AEROSPACE WORKERS,)	
DISTRICT LODGE 15, LOCAL LODGE 447)	

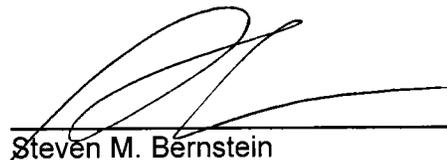
CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2014, I e-filed the foregoing RESPONSE TO NOTICE TO SHOW CAUSE using the Board's e-filing system, and immediately served it by electronic mail upon the following:

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