

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
WASHINGTON, D.C.

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In the Matter of \*  
\*  
EASTERN BUS COMPANY \*  
Employer \*  
\* Case No. 1-RC-082285  
\*  
And \*  
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\*  
UNITED STEEL WORKERS INTERNATIONAL \*  
UNION, AFL-CIO \*  
Petitioner \*  
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**EMPLOYER'S EXCEPTIONS TO HEARING OFFICER'S REPORT AND  
RECOMMENDATIONS ON OBJECTIONS AND BRIEF IN SUPPORT**

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**September 6, 2012**

## PROCEDURAL BACKGROUND

Eastern Bus Company, Inc., hereinafter referred to as the “Employer” or “Eastern,” is a corporation which provides school bus services to several school districts in Massachusetts. Its main offices are located in Somerville, MA. Eastern is engaged in interstate commerce and is subject to the jurisdiction of the National Labor Relations Act, hereinafter referred to as the “Act.”

United Steel Workers International Union, AFL-CIO, hereinafter referred to as the “Union,” is a labor organization within the meaning of Section 2(5) of the Act. On June 4, 2012, the Union filed a Petition for Election with Region One of the National Labor Relations Board seeking a unit of:

All full-time bus drivers who regularly work 20 hours per week or more during the school year and who report to Somerville, MA (14 Chestnut Street), Wellesley, MA (Massachusetts Bay Community College), and Waltham, MA (18 Farwell Street) yards, but excluding all maintenance employees, monitors, dispatchers, and supervisors as defined by the National Labor Relations Act.

A Stipulated Election Agreement was executed by Eastern and the Union on June 7, 2012, and thereafter approved by the Regional Director on June 8, 2012. An election was conducted on June 18, 2012 in two locations (Somerville and Waltham, MA), resulting in 41 votes for the Union, 36 votes against the Union, and two (2) challenged ballots. On June 25, 2012, Eastern filed objections both to the Union’s conduct leading up to the election and the Union’s conduct at the election, all of which affected the results of the election.

On July 10, 2012, Elizabeth Gemperline, Acting Regional Director, National Labor Relations Board – First Region, found that the objections raised substantial and material factual issues, pursuant to Section 102.69 of the Board’s Rules and Regulations, and ordered a hearing to resolve the matter.

The hearing took place on Monday, July 16, 2012. Karen Hickey was the Hearing Officer. The Employer was represented by Joseph P. McConnell, Esq., Morgan, Brown & Joy, LLP, 200 State Street, Boston, MA 02109. The Union was represented by Timothy D. Zessin, Esq. and Warren H. Pyle, Esq., Pyle Rome Ehrenberg, PC, 18 Tremont Street, Suite 500, Boston, MA 02108.

The Hearing Officer issued her Report and Recommendation on Objections on August 23, 2012, recommending that Objections One, Three and Four be overruled, and further recommending that a Certification of Representative be issued.<sup>1</sup> Pursuant to the Board's Rules and Regulations, Eastern had until September 6, 2012 to file Exceptions to the Report, which are included herein.

#### **STATEMENT OF THE CASE**

Pursuant to Section 102.69 of the National Labor Relations Board's Rules and Regulations, Eastern Bus Company files Exceptions to the Hearing Officer's Report and Recommendations on Objections in the above referenced matter, and reasserts that due to the unlawful actions of the petitioning Union, the Board must set aside the results of the June 18, 2012 election and order a new election. Eastern's exceptions are based both on the Hearing Officer's misapplication of the law to the facts present in this case and the contradictory conclusions of fact arrived at in her report. These errors led the Hearing Officer to reject the Employer's Objections. The Hearing Officer instead should have found that the Union's conduct, both before and during the election, was sufficiently egregious to set aside the election.

Eastern therefore excepts to the Hearing Officer's findings, and requests that the Board sustain the objections made by Eastern, and set aside the June 18, 2012 election results.

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<sup>1</sup> Eastern withdrew its Objection Two at the outset of the Hearing.

## THE FACTS

### A. Introduction

Eastern Bus Company is a private corporation in the business of transportation. Mr. Charles Winitzer (hereinafter, "Mr. Winitzer") is Eastern's President. At its three locations in Somerville, Waltham and Wellesley, Eastern employs 81 bus drivers who regularly work 20 hours or more per week during the school year. Among its other services, Eastern provides transportation for several public school systems in Massachusetts in a variety of capacities, including taking students to and from school, and driving them to different sporting events and after school activities. Eastern also provides charter services.

### B. Pre-Election Conduct

Mr. Steven Kirschbaum (hereinafter, "Mr. Kirschbaum") is an organizer for the Union who led the organizing effort at Eastern. (July 16, 2012 Hearing Transcript at p. 105 [hereinafter "T. \_\_\_"]). The first interaction Mr. Kirschbaum had with management at Eastern "was volatile." Mr. Winitzer testified that on June 4, 2012, Mr. Kirschbaum, who was accompanied by other members of the organizing committee for the Steel Workers (T. 106), "stormed into" his office "and exploded." (T. 88). Mr. Kirschbaum was demanding that Eastern sign a voluntary recognition sheet. (T. 83). He "started screaming" at Mr. Winitzer "*[i]n front of all the employees,*" and then "cornered" him in his office. (August 23, 2012 Hearing Officer's Report at p. 29 [hereinafter "H.O.R. \_\_\_"]). The interaction became so heated that Mr. Winitzer's son David had to intervene, pushing his way into the office where he told Mr. Kirschbaum to tone it down. (T. 89; H.O.R. 29). Mr. Winitzer refused to consent to the recognition, and the Union subsequently filed the Petition for Election. The parties ultimately signed a Stipulated Agreement.

Once the election date was set for June 18, "Winitzer received an average of 3-5 phone calls a day from Kirschbaum looking for the voting list" (H.O.R. 30), a list the Union would have lawfully received from the Board after service of the *Excelsior* list. After the Stipulated Election Agreement was executed, Mr. Kirschbaum was on Eastern's property on June 5, conducting a meeting with Eastern employees on one of the buses. (T. 90). After giving Mr. Kirschbaum permission to use the bus, Winitzer explained to him, that "[a]fter that, you have no reason to come back here...Do not come on my property after today." (T. 90; H.O.R. 30).

The following day, without permission, Mr. Kirschbaum returned to the property with a couple of drivers, "and they posted union literature around the whole office." (T. 90; H.O.R. 30). On Thursday June 7, Mr. Winitzer informed Mr. Kirschbaum that he would not be allowed to post literature on the property. (H.O.R. 30). Mr. Kirschbaum subsequently returned to the property and told Eastern's Office Manager that "[Mr. Winitzer] said he had to have the list." (T. 91). On Friday June 8, Mr. Kirschbaum again returned and continued to ask for the list. Mr. Winitzer reiterated that he had no reason to be on the property. (H.O.R. 30). He also told him that he would fax the list to Mr. Kirschbaum once he received it, which he did later that day. (T. 92; H.O.R. 30).

Later that afternoon, when Mr. Winitzer was away from the property, Mr. Kirschbaum once again returned without permission and held another group meeting with several Eastern employees on a bus, located on Eastern's property. (H.O.R. 30). Mr. Winitzer was again forced to try and remove Mr. Kirschbaum from his property, attempting to call him directly to tell him to leave. His calls were not answered by Mr. Kirschbaum. (H.O.R. 30-31). Mr. Winitzer subsequently attempted to have the employee who had called to inform him of Mr. Kirschbaum's presence on the property, hand the phone to Mr. Kirschbaum, but the employee

was not allowed onto the bus. (H.O.R. 30). The following Monday, June 11, Mr. Kirschbaum *again* returned to Eastern's property to talk about the voting list, despite being told several times not to return. (H.O.R. 31).

In response to Mr. Kirschbaum's *repeated* intrusions onto Eastern property, and *repeated* instances of ignoring Mr. Winitzer's directions not to return, Eastern was forced to involve the Somerville Police Department. A "no trespass" order was issued to Mr. Kirschbaum on June 12, a mere six days before the election. (H.O.R. 31). In his testimony, Mr. Kirschbaum admitted that he had come onto the property "on a number of occasions" prior to June 12, even after he had been told not to on several occasions. (T. 90, 107; H.O.R. 31).

### C. Election Day Conduct

On June 18, the morning of the election, Eastern employees, and Union supporters, Carlos Fernandez and Yohalmo Chiquillo arrived at the property at 3:30AM to set up a "union table" a short distance from the entrance to the Employer's premises. The table was approximately eight (8) feet long and two to two and a half feet wide. (H.O.R. 9). Neither party had an exact measurement from the entrance of the property to the table, but a picture presented at the hearing (Union Exhibit #4 [hereinafter "Union # \_\_\_"]) shows that there were only four and one half segments of chain link fence between the two points. (Union #4). Mr. Kirschbaum agreed that the distance was most likely 50-60 feet away (T.152), but was not positive. In any event, the picture shows that the table was clearly visible from Eastern's entrance, which is the only entry into Eastern's fenced-in property. (H.O.R. 4).

Eastern employees do not park inside the property; instead, they must park on the streets nearby and walk through the one entrance to get to work. (H.O.R. 4). Because of the table's close proximity to the entrance, Eastern employees were forced to walk by it to get to the polling area

located on a bus on Eastern's property. The table was decorated with Union fliers which read "Better Wages and Benefits. Vote Union yes (check mark) for fairness and respect." (H.O.R. 9). Refreshments (doughnuts, waters, etc.), were set up on top of, and adjacent to, the table as well. (H.O.R. 9). Mr. Kirschbaum testified that maybe 40% of the employees actually *stopped* by the table that day (T. 141).<sup>2</sup> While it was unclear exactly how many employees *passed directly* by the table, due to the close proximity of the entranceway, coupled with the chanting and yelling (T. 33), it is reasonable to conclude that all of Eastern's employees saw the table when they walked in. Similarly, all of Eastern's employees would be recognizable to the Union supporters who were working at the table.

When Mr. Kirschbaum arrived at the table on the morning of June 18, he had with him two lists which contained the names and contact information of all of Eastern's employees. (Employer Exhibits #1(a) and #1(b) [hereinafter "Er. # \_\_\_"]). Mr. Kirschbaum testified that the lists were there if the employees wanted to verify their information, and "[i]f an individual wanted to know whether they were actually on the list and could vote[.]" (T. 21; H.O.R. 7). The lists were placed on the table, on the side closest to the entrance (T. 156; Union #4), and Mr. Kirschbaum informed the other supporters at the table of their location. He said, "I have a list here, and it has -- we need to get correct addresses and phone numbers. And if anybody wants to check and see if theirs are correct can do that." (T. 136). Mr. Fernandez testified that he heard "discussions about these lists to make sure that people had the correct addresses and phone numbers, and *were eligible to vote on that particular site.*" (H.O.R. 9) (emphasis added). He testified that he was directed to "*make sure everybody's...eligible to vote.*" (T. 187).

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<sup>2</sup> This, however, may be a low estimate considering Mr. Kirschbaum was the witness providing the information, and he was cited by the Hearing Officer as giving self-serving testimony in his recollection of other events taking place on the morning of the election.

The election was scheduled to start at 5:00 AM on June 18. Pierre Jacques, who is an employee at Eastern, and an eligible voter, arrived to work on June 18, at 6:15AM. (H.O.R. 10). He parked on the opposite side of the street from the Union table, and further up the road. Mr. Jacques was late that morning, and testified that he was running to get to work and start his route. (H.O.R. 10). Mr. Kirschbaum similarly testified that when he saw him, Mr. Jacques was “moving at a pretty good clip.” (T. 161). After Mr. Jacques had passed the table and was about 20 feet into the bus yard, “he was called over by some of the union supporters at the table to come check in with them before he voted.” (H.O.R. 10). He was shown a list of names and employees, and once he checked his own information, Lionel Supris (a Union supporter and Eastern employee) “made a dash mark next to his name in his presence.” (H.O.R. 17). Mr. Supris then said to Mr. Jacques, it was “now okay to go vote” or that he was “good to go vote.” (H.O.R. 17). Mr. Supris did not testify to dispute Mr. Jacques’s testimony.

Shortly thereafter, Karen Sauer, another employee at Eastern and an eligible voter, arrived to work at 6:35AM. (H.O.R. 18). She was running in when she was stopped at the table by two co-workers, Exerte Numa and Joseph Laguerre. (H.O.R. 18). Ms. Numa offered Ms. Sauer breakfast. Ms. Sauer declined the offer and was heading to her bus when Ms. Numa said to her, “Oh, wait a minute, there’s a list, *you need to check in.*” (H.O.R. 18) (emphasis added). Ms. Sauer explained to Ms. Numa that she could not read the list without her glasses, so Ms. Numa and Mr. Laguerre helped her find her name, pointing out that it was on the third page. (H.O.R. 12). Once she located it, Exerte handed her a writing utensil to check her name. Ms. Sauer noticed that there were “little dash type lines next to some of the names,” so she marked hers in similar fashion. (H.O.R. 12). Mr. Laguerre and Ms. Numa, did not ask her to look at her other information (address, phone number), nor did they read the information to her, for the purpose of

verifying it, once they were informed she could not see without her glasses. (H.O.R. 12). Neither Mr. Laguerre nor Ms. Numa testified to dispute Ms. Sauer's rendition regarding what occurred.

Once she finished checking in, Ms. Sauer went inside and told Human Resources Manager Jim Misercola and Mr. Winitzer what happened. (H.O.R. 12.) She was instructed by Mr. Misercola to tell the Board agent on the bus, which she did. (H.O.R. 12). Ms. Sauer also told Mr. Kirschbaum what happened: that she needed to check in outside as well as inside (H.O.R. 12), but Mr. Kirschbaum told her not to worry about it. (H.O.R. 12). She then got on her bus and left to start her run.

At the conclusion of the voting, the election results were 41 votes for the Union, 36 votes against the Union, and two (2) challenged ballots. As a result of the Union members' conduct leading up to, and including, the day of the election, Eastern filed Objections asserting that the results should be set aside because the Union conduct destroyed the "laboratory conditions" required by the Board in order to have a free and non-coerced election. The Hearing Officer overruled the Objections, and Eastern now files these Exceptions.

Eastern's Exceptions are based on the Hearing Officer's failure to apply established Board precedent to the facts presented at the Hearing. Further, her conclusions are *not* supported by her own findings of fact, and as such, her recommendations should be overruled, and Eastern's Objections should be sustained.

## ARGUMENT

### **I. Eastern Excepts to the Hearing Officer's Conclusion that There was No Evidence that the Union Was Tracking Employee Voting, As The Union Clearly Engaged in Impermissible List Keeping Throughout the Election Period.**

#### **A. Introduction**

List keeping during an election is a practice that has been “condemned by the Board for more than a half century.” *Snap-On Tools, Inc.*, 342 NLRB 5, 18 (2004), *see also Days Inn Management Co., Inc.*, 299 NLRB 735, 736 (1990); *International Stamping Co.*, 97 NLRB 921 (1951). Accord: *Premier Maintenance*, 282 NLRB 10, 19-20 (1986); *Sound Refining*, 267 NLRB 1301 (1983); *Masonic Homes of California*, 258 NLRB 41 (1981); *Piggly-Wiggly #011*, 168 NLRB 792 (1967); *Belk's Department Store*, 98 NLRB 280 (1951). It has been a long and well-established policy of the Board, in the interest of free elections, “to prohibit anyone from keeping any list of persons who have voted, aside from the official eligibility list used to check off the voters as they receive their ballots.” *Piggly-Wiggly*, at 793, *citing International Stamping, Inc.*, at 922. Further, “[t]he keeping of any other list of individuals who have voted is prohibited and is grounds in itself for setting aside the election when it can be shown or inferred from the circumstances that the employees knew their names were being recorded. And this is so even when there has been no showing of actual interference with the voters’ free choice.” *Days Inn Management Co., Inc.*, at 736. In the present case, not only did the Union *admit* to having a list at the table to “make sure people ... [are] *eligible to vote on that particular site*[]” (T. 186), but there is clear testimony, credited by the Hearing Officer, that clearly establishes that Eastern employees knew their names were being recorded before they voted in the election.

The Hearing Officer’s conclusion, that “[t]here is no evidence here that the Union or its supporters gave the impression they were tallying or keeping track of those employees who

voted, or whether they had voted for or against the Union[,]”<sup>3</sup> is erroneous, and completely contradicts the evidence in this case, and is not supported by the Hearing Officer’s own findings of fact.

**B. The Hearing Officer’s Determinations on the Credibility of the Witnesses Supports the Employer’s Position.**

The Hearing Officer’s assessment of the credibility of the witnesses supports the Employer’s contention that there was impermissible list-keeping.

The Hearing Officer states in her Report that she made “certain factual findings based upon the testimony of the employees[,]” and stated that she “*credit[s] the testimony of both Pierre Jacques and Karen Sauer as to what transpired on their way in to vote the morning of June 18.*” (H.O.R. 17) (emphasis added). She explained that they appeared “straightforward and earnest in their testimony,” and she did “not believe there was any bias on their part.”

In stark contrast to her credibility findings of the Employer’s witnesses, the Hearing Officer had a completely different view of the Union’s main witness, Steven Kirschbaum, as she “found [him] in many respects to have been an *unreliable, non-credible witness* due to his *evasiveness, argumentativeness* and *non-responsiveness* to many questions posed to him during his cross-examination on the witness stand.”<sup>4</sup> (H.O.R. 18) (emphasis added).

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<sup>3</sup> It should be noted that the second part of the Hearing Officer’s conclusion (“*or whether they had voted for or against the Union*”) is irrelevant to this analysis. The Board has never required a showing that the individuals keeping an impermissible list must also be keeping track of who the employee voted for, or even who they *thought* an employee might be voting for, for purposes of setting aside an election. Eastern has not accused the Union supporters of this conduct, and it should not have been a consideration in the decision. Eastern maintains that the Union’s list keeping, in itself is in violation of Board law, and should be the basis of sustaining the objection.

<sup>4</sup> The Hearing Officer generally discredited Kirschbaum’s testimony, and also gave specific examples of his lack of credibility. In discussing the discrepancy between Mr. Sauer’s and Mr. Kirschbaum’s version of the facts, the Hearing Officer again credited Ms. Sauer’s testimony, and stated, “I believe [Mr. Kirschbaum] refused to acknowledge this conversation in the fear that it could strengthen the Employer’s position that some of the employees believed the Union was keeping track of who voted in the election.” (H.O.R. 18-19).

In her specific findings of fact in this case, the Hearing Officer credited Jacques' testimony that "he was called back over to the union's table by Lionel Supris...and shown a list of names and addresses and told to check his own for accuracy and that Lionel then made a dash mark next to his name in his presence." (H.O.R. 17). She further credited his testimony that he was told by Supris that "it was '*now okay to go vote*' or that he was '*good to go vote.*'" (H.O.R. 17) (emphasis added). The Hearing Officer also noted that the Union "did not produce Mr. Supris, one of its supporters, to testify in contravention to what Mr. Jacques said concerning their conversation." (H.O.R. 17). This is telling, especially given the fact that Mr. Supris was *present at the hearing* and available to testify.

The Hearing Officer similarly credited Ms. Sauer's testimony that Exherte Numa, a Union supporter working at the table, said to her as she passed the table, "Wait a minute, there is a list, you need to check in." (H.O.R. 18). Ms. Sauer was not wearing her glasses that morning, and explained to Numa that she could not see the list of names without her glasses. Ms. Numa and another employee (Joseph Laguerre) helped her find her name on page 3, and when Ms. Sauer "noticed that there were little dash type lines next to some of the names on the right hand side...[s]he marked her own name in a similar fashion." (H.O.R. 12). Ms Sauer was *not* asked to check her address, her phone number, or any other information on the list. Once Ms. Numa and Ms. Laguerre helped her locate and mark her name on the list, she went into the yard to vote. Once again, the Union did not produce Ms. Numa or Mr. Laguerre to confirm or deny the events described by Ms. Sauer. *See Grimmway Farms*, 314 NLRB 73, 76 fn. 2 (1994), *citing Property Resources Corp.*, 285 1105, 1105 fn. 2 (1987), *enfd.* 863 F. 2d 964 (D.C. Cir. 1988) ("The Board has held that '[a]n adverse inference is properly drawn regarding any matter about which a

witness is likely to have knowledge if a party fails to call that witness to support its position and the witness may reasonably be assumed to be favorably disposed to the party.””).

Regardless of whether the Union had presented other witnesses, it is significant that the Hearing Officer’s found both Mr. Jacques and Ms. Sauer to be credible witnesses, taking their statements to establish facts in this matter, while generally discrediting the Union’s main witness, Mr. Kirschbaum.

Taking into account her own determination on the credibility of the witnesses, the Hearing Officer’s conclusion that “[t]here is no evidence here that the Union or its supporters gave the impression they were tallying or keeping track of those employees who voted[.]” is clearly erroneous. Not only did Eastern’s witnesses clearly establish they were told to “check in” prior to voting, but further evidence presented at the hearing corroborates the witnesses’ testimony, and shows the strong likelihood that other voters were “checked in” as well. The Hearing Officer observed that “[a]bout eight of these names on the list have a dash or check mark on the left hand side of the employee’s name.” (H.O.R. 6). This appears consistent with the *Union’s own witness*, who stated that he was directed to, among other things, make sure “[the employees were] eligible to vote,” and to “check their eligibility.” (H.O.R 9, 21). Both the Board and federal courts have made clear that “[t]he party objecting to an election can prove voter knowledge...both by direct evidence and by circumstantial evidence.” *Medical Center of Beaver County, Inc. v. N.L.R.B.*, 716 F.2d 995, 999 (3rd Cir. 1983), *citng Piggly-Wiggly*, at 792-93. In the present case, the Hearing Officer was presented with both direct *and* circumstantial evidence of list keeping, but failed to follow long standing Board policy, by overruling the Objections to this behavior.

It is equally as telling that the Union presented no witnesses with first-hand knowledge of the conversations involving Mr. Jacques and Ms. Sauer, especially considering the fact that these individuals were able to testify at the hearing but failed to be called to do so. The only witness the Union put forward regarding these two instances was Mr. Kirschbaum, whom the Hearing Officer found not to be credible. (H.O.R. 18). Mr. Kirschbaum repeatedly stated that he paid no attention to the list all day, yet he *knew* the conversation with Mr. Jacques did not take place because at that moment, coincidentally, “[he] was present, paying attention and in fact that did not happen.” (T. 162). He further denied having a conversation with Ms. Sauer after she voted regarding the checking in at the table. The Hearing Officer again refused to believe Mr. Kirschbaum’s version of the story, “I believe he refused to acknowledge this conversation in the fear that it could strengthen the Employer’s position that some of the employees believed the Union was keeping track of who voted in the election.” (H.O.R. 19). Mr. Kirschbaum’s credibility was so tarnished that the Hearing Officer questioned whether or not the list provided to Eastern, per subpoena, was in fact the list used at the table on the morning of the election. She notes the “possibility that there may have been yet another copy of the list identified as Er. 1(a) which may have been misplaced *and/or replaced* with the current version[.]” (H.O.R. 19) (emphasis added), a seemingly clear indictment of some of the behaviors and impermissible actions carried out by the Union in this case. Again, it is necessary to emphasize that with all of the evidence presented, direct and circumstantial, it is improper (and illogical) for the Hearing Officer to hold that it was “not reasonable to conclude from the circumstances that the voters would think that the Union was keeping track of who voted.” (H.O.R. 20).

**C. The Cases Cited by the Hearing Officer Are Distinguishable, and Do Not Support the Report.**

The applicable law utilized by the Hearing Officer to arrive at her conclusions is not supported by the findings of fact in this case, as the circumstances in the various cases cited by the Hearing Officer are distinguishable from those presented here, and thus cannot sustain the recommended conclusions of law. While the Hearing Officer correctly stated that an election will be set aside when it can be “shown or inferred from the circumstances” that employees know their names are being recorded, her conclusion that it cannot be shown or inferred from the circumstances in this case is not supported by her findings of fact.

In the cases relied upon by the Hearing Officer to support her conclusions, the facts are distinguishable from those present in this case and cannot be used to justify the decision. Generally, in these cases, the Board, upheld the elections either (1) because it noted that the list-keepers concealed their actions, resulting in *none* of the employees being aware of a list being made, or, (2) because the “lists” used by the list keeper either contained *no employee names*, or only those names a party wished to challenge. These salient facts are absent in the present case.

In *Textile Service Industries, Inc.*, 284 NLRB 1108 (1987), the Employer objected to the election results (211 for, 190 against) based on improper list keeping by the union. The union’s observer kept a *blank piece of paper in her lap* during the voting, and made marks on it as each employee came in to vote. There was no evidence that the paper contained *any names* of the employees voting in the election. The Board found that the Petitioner’s actions did not warrant setting aside the election due to the fact that the observer was simply making marks on a blank sheet of paper. While there may have also been words on it written in Portuguese, the Board found that there were *not any* names. Further, the list keeper “made some attempt to conceal

from the voters what she was doing” and there was no evidence that any employees understood that their names were being recorded. *Textile Services*, at 1109.

Similarly in *Cerock Wire & Cable Group, Inc.*, 273 NLRB 1041 (1984), the employer objected to the election (139 for, 77 against) based on a union observer keeping a list while the election was in progress. However, the Petitioner’s observer:

*did not have a list of the voters.* The paper she had in front of her during the election had a list only of the names of *six employees to be challenged.* She used the reverse side of the paper to keep a tally which *bore no names*, but *consisted only of hash marks* arranged in two unidentified columns. Further, [she] *attempted to conceal her activity* by keeping her arm over the paper.

*Cerock*, at 1041. On these unique facts, the Board overruled the employer’s objections.

While these cases show certain situations where a form of list keeping will not cause the setting aside of an election, none of the circumstances presented in those cases was present at the Eastern election, and thus, the general rule that prohibits list keeping should still apply. Here, the Union freely admits that it had a full list of employees, in plain view, on top of a table that they were *encouraging employees to stop*, and in at least two instances, actually required that the employee stop and “check in” before they voted. There was no hiding the list, nor was there any attempt to be discreet about placing a mark next to an employee who was going to vote. Unlike the blank sheet in *Textile*, or the challenge list in *Cerock* (where the marks were actually made on the blank side), the list used by the Union in this case contained the names of every employee at Eastern. The credible testimony in this matter showed that the employees knew that their names were being recorded and marked by the union.

While the reliance on the above cited cases is unsupported, the Hearing Officer incorrectly applied the rules from both *Cross Pointe Paper Corp.*, 330 NLRB 658 (2000) and *Days Inn Management Co., Inc.* 299 NLRB 735, 736 (1990). First, the Hearing Officer dismissed

*Cross Pointe* because she found it to be “distinguishable on the grounds that, unlike the Union’s conduct here, the objectionable conduct in *Cross Pointe* involved a union observer writing things down on a piece of paper in open view of voters who admitted that he was ‘keeping a sheet of who he thought was voting yes and no.’”. *Cross Pointe* is very much germane to the Board’s analysis of the facts of this case, and the Hearing Officer was incorrect as a matter of law in attempting to side-step its direct application to the case at hand. In *Cross Pointe*, the Board first found *Cerock* and *Textile, supra*, to be distinguishable, based on the fact that in those cases, “it appears that the observers successfully concealed from voters not only what they were writing but also the fact they were writing.” *Cross Pointe*, at 662.<sup>5</sup> In both *Cross Pointe* and here, the “list keepers” *did not* conceal their activities, and as both Ms. Sauer and Mr. Jacques pointed out, the list keeper went so far as to locate the employees’ names and check them off while they were both still at the table. It is clear from the facts that the Union supporters at the table made no effort to conceal their activities.

Further, and perhaps more importantly, the Hearing Officer’s emphasis on the list keeper in *Cross Pointe* admitting that he was keeping a sheet of “who he thought was voting yes or no[,]” should have no bearing on this case, as it was ultimately of no consequence in *Cross Pointe*. “In these circumstances, and because the appropriate focus of inquiry in these cases is on what the employees saw and reasonably could believe, *it is unnecessary for me to determine exactly what [the list keeper] was writing.*” *Id.* (emphasis added). The Board’s concern in *Cross Pointe* was whether the list keeper had a list containing the employees’ names on it. Regardless of whether the list keeper was also predicting which employee was voting which way, it was not

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<sup>5</sup> The Board also focused on the closeness of the results of the election, as the final tally in *Cross Pointe* was 46 for, and 41 against. “Finally, in *Cerock Wire*, the union won the election by a margin of almost 2 to 1, and, in *Textile Service*, the petitioning union beat the intervening union by a comfortable margin. Here... *a change in 3 votes may have affected the results of the election.*” *Cross Pointe*, at 662. (emphasis added).

a determining factor in that case. The *only* distinguishing factor was that the list keeper in *Cross Pointe* was an observer; however, the Board has not held that to be a deciding factor in other cases. See *Piggly-Wiggly #011*, 168 NLRB 792 (1967); *Days Inn Management Co., Inc.*, 299 NLRB 735 (1990).

Lastly, the fact that the table was outside of the voting area, should not be a determining factor in the Board's decision. While the Union's table was not visible from the actual polling area (which was in a school bus in the company lot), it is clear that every Eastern employee would have either walked directly by it, or saw it from the entrance. The pictures of the table clearly show the entrance to Eastern's property was a short distance away from the table. In *Days Inn*, a case cited by both the Union and the Hearing Officer, the list keeper was on an entirely different floor than where the polls were located. The only difference between *Days Inn* and the present case is that the list keeper there was standing *just inside* the entrance to the hotel in the lobby, while the list keepers in the present case were *just outside* the entrance to the voting area. Otherwise, the facts are strikingly similar:

As each of [the employees] arrived in the lobby, *Albani met them, took their names, openly crossed them off the list, and directed them to the elevator to the polling area.*

*Days Inn*, at 736 (emphasis added). Similarly, in the present case,

As Eastern employees arrived to work, Union supporters met them at the table (H.O.R. 10, 18), took their names (H.O.R. 17, 12), openly crossed them off the list (H.O.R. 17, 12), and then told them they were "good to go vote" as they proceeded to the entrance and the polling area. (H.O.R. 17, 12).

The Board held that "[a]pplying the well-settled Board standard set forth in the cases cited above, we find that by openly maintaining a list of individuals who voted in the election, when the employees were shown to have known that the names of voters were being recorded, the Respondent engaged in objectionable conduct interfering with the election." *Days Inn*, at

736. This rule must be applied in this matter, and the Hearing Officer erred as a matter of law in failing to do so.

**D. Eastern Excepts to the Hearing Officer's finding That The Keeping of a List For the Stated Purpose of "Verifying Addresses and Phone Numbers" During a Union Election, is a Valid Business Reason Known by the Employees.**

The Hearing Officer further incorrectly relied upon *Red Lion*, 301 NLRB 33 (1991), to justify the Union's list keeping. The facts in that case are also distinguishable from those present here and the case ultimately does not support the conclusion drawn by the Hearing Officer. In *Red Lion*, the employer had a well-established policy of paying off-duty employees who attended meetings at the Employer's facility. The policy similarly applied to employees who reported to the worksite to vote in union elections. The employees were to receive one-half hour's pay for reporting to work while off-duty and voting in the election. In order ensure their employees were compensated for coming to work, "the employer needed to know, for payroll purposes, which employees were to get the payment." *Red Lion*, at 33. "The Employer's standard method of recording daily attendance and hours was by a signature roster. In the past, off-duty employees who attended meetings at the Employer's facility had to sign a special roster in order to be paid." *Id.* The Board found the employer's list keeping in *Red Lion* was not a justification for setting aside an election as "[t]he Employer has demonstrated a *valid business reason* for keeping a list of off-duty employees who voted and who wanted to receive the one-half hour's pay... [and t]he employees understood the *legitimate administrative purpose* of the election day payroll roster for off-duty employees." *Id.* (emphasis added). Contrary to the Hearing Officer's Report, in the instant case, the facts do not support a finding that the petitioner proved either a valid business reason for keeping a list, or that the employees understood that the checking of addresses was a legitimate purpose for keeping a list.

The Hearing Officer's finding that the Union had a "legitimate reason" for keeping a list of names, is invalid. Verifying the addresses contained on a list of employees, *prior to the employees voting in an election*, cannot be considered a "valid business reason" in the same way as an employer verifying payroll information to ensure its employees are compensated for coming to work while off duty, *after an employee votes*. Further, the procedure used to check the information by the employer in *Red Lion* was *entirely different* from the way the union kept a list in the present case. The list in *Red Lion* was kept in an office, on a different floor from the polling area, and the employees "did not have to identify themselves as voters until *after* they had voted." *Id.* (emphasis in the original) Here, the union table containing the list was in plain view of the *only* entrance to the polling area, and Eastern employees were stopped by union supporters *on their way* to vote, and told they needed to "check in" *prior to voting*. Both Mr. Jacques and Ms. Sauer verified this, and the Hearing Officer credited their testimony.

The Board must also realize the serious ramifications of a ruling that holds that the checking of addresses and phone numbers *while an election is taking place* is a valid business reason for keeping a list. The Union was provided with a list of all Eastern employees, as well as their contact information. Although some of the contact information may have needed an update, the Union chose *the day of the election* "to have employees check the list to verify their information," the one day in which the Board has outlawed the keeping of any list for the longstanding reason of ensuring free and unbiased elections. The Union was able to check some of the employee information before the day of the election, and it is safe to assume they could have continued to do so after the election, had they been successful. If the Board agrees with the Hearing Officer that employees "checking their correct addresses and phone numbers" while the election is taking place is a valid business reason for a union to flaunt a list before eligible

employees before they vote, then the Board's long established rule prohibiting list keeping of any kind during an election will essentially be nullified. Moving forward, a union or employer could keep a separate list of who is voting, but simply tell employees they need to verify their contact information on an employee list before they go vote, and it will no longer be grounds to set aside the election.

In *Red Lion*, the employer demonstrated a "valid business reason" for keeping a list of off-duty employees who voted so that the employees could properly be paid, and it was clear the employees knew exactly why that list was being kept. The Board cannot hold that a union allegedly merely "checking addresses" of employees on a voter list, while the election is taking place, is similarly valid unless it is prepared to upset its long-standing policy against "list keeping."

In addition, even if, *arguendo*, the Board finds that using a voter list to verify employee information was a "valid business reason" under *Red Lion*, it is clear that the employees did not reasonably believe that was the Union's purpose for keeping the list. The Hearing Officer states that "the lists at issue were left lying on the table throughout the day for the stated purpose of employees checking their correct addresses. This was the understanding of both Fernandez and Chiquillo and is what the Petitioner maintains was their only purpose." (H.O.R. 21). Regardless of whether the Petitioner maintains that the *only* purpose of keeping a list of employees was to check their address, the facts and witness testimony (from both employer and union witnesses), simply do not support that assertion. Both Mr. Jacques (H.O.R. 10, 17) and Ms. Sauer (H.O.R. 12, 18) credibly testified that they were stopped by union supporters at the table, and told they needed to "check in" prior to voting.<sup>6</sup> In Mr. Jacques' case, he was told he was "now okay to go

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<sup>6</sup> The Hearing Officer suggests that Ms. Numa "could just as easily have said 'you need to check *it*' which would connote an entirely different meaning." (H.O.R. 18). However, Ms. Sauer was clear in her testimony, and found to

vote” (or “good to go vote”), and in Ms. Sauer’s case, the Union supporters did not actually verify her address or her phone number. They simply checked her name, before she went on to vote. Even Union witnesses (Mr. Kirschbaum and Mr. Fernandez) testified that *at the very least*, part of their intentions was to check voter eligibility. (T. 21, 186, 187; H.O.R. 21). The Hearing Officer points out in footnote 5 (H.O.R. 21) that simply because Fernandez believed a “secondary purpose” was to make sure the employees were eligible to vote does not mean the voters “would have reason to believe that their vote was being recorded.” (H.O.R. 21). This conclusion is unfounded, and indeed, it does not make any logical sense. The Union workers believed that at least part of the reason for the list was to check voter eligibility; Eastern presented evidence that *at least* two witnesses were *told* to check in before they voted (and evidence discussed *supra* shows that it is likely others did as well); and the Union did not present even *one* witness who could contradict the statements made by Mr. Jacques and Ms. Sauer. This evidence, viewed in its entirety, clearly shows that Eastern employees reasonably believe their vote was being recorded.

Based on the entirety of the circumstances, it cannot reasonably be said that “there is convincing evidence that [ensuring the union had accurate contact information] is what was understood by the employees who were aware these lists were on the table during the election.” (H.O.F. 22). Clearly the employees did *not* understand that the *legitimate reason* for keeping the list was for the *sole* purpose of checking their addresses, and Ms. Sauer would have had absolutely no reason to think the purpose of the list was to check contact information, considering she could not read the list, and none of the union supporters actually checked her

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be absolutely credible by the Hearing Officer. The Hearing Officer cannot substitute her presumption for what the only credible witness testified was said. And because the Union did not present any witnesses to testify as to the substance of the conversation, there is no countervailing reason to twist the witness’ testimony to prove something different from that which was testified.

address or phone number to verify they were correct. The Board cannot hold that as long as a party has one “legitimate reason” for keeping a list, then they are free to violate Board law by keeping track of voters prior to the election. In *Red Lion*, it was understood that the singular purpose for keeping a list *after* the employees had voted was to ensure they were compensated for their time. Here, there was no such clarity of purpose among the employees.

In the present case, the Union has failed to demonstrate a legitimate reason for keeping a list, and they have similarly failed to show that the Eastern employees understood a legitimate administrative purpose for keeping the list. Thus, the Hearing Officer’s reliance on *Red Lion* is unfounded.

**II. Eastern Excepts to the Hearing Officer’s Finding that the Impact of the List Keeping Was *De Minimis*.**

In some cases, the Board has held, that the improper keeping of an employee list, other than the official voter eligibility list, only had a *de minimis* impact on the election. The Hearing Officer made the same finding here. However, the circumstances of the Board cases that the Hearing Officer cites in support are not present here. The Hearing Officer relies on several Board decisions to support her *de minimis* finding, however, they are all factually distinguishable from the situation at Eastern, and her conclusions of law were not consistent with the holdings in those cases.

In *Tom Brown Drilling Company, Inc.*, 172 NLRB 1267 (1968), the “list keeper” made check marks next to only a few names before he was told to stop by the Board agent. In finding a *de minimis* impact, the Board held that it was “not clear, on the facts before us, that *any* voter was aware his name was being checked off by [the list keeper].” *Tom Brown Drilling Co.*, at 1267 (emphasis added). More importantly, the results ended with a tally of 20 for representation and 45 against, a 25 vote margin requiring the need for at least 13 employees to change their

vote. Similarly in *Locust Industries, Inc.*, the Board noted “the lack of evidence that *any* employee knew his name was being checked off.” *Locust Industries, Inc.*, 218 NLRB 717, 718 fn. 2 (1975) (emphasis added).<sup>7</sup> Lastly, *In Robert’s Tours, Inc.*, the Board found that “[c]onduct tending to interfere with the vote of one person *is of course significant*...But then, after all, there were 15 ballots cast for the Union [as opposed to 3 cast against the Union].” *Robert’s Tours, Inc.*, 244 NLRB 818 (1979) (emphasis added). The Board in *Robert’s Tours* ultimately made its decision based on the margin of victory in the election, *not* because only one person was aware of the list keeping. In the present case, the final tally was 41 for and 36 against, a margin significantly smaller than any of those cases cited by the Hearing Officer. Further, there is direct evidence that Eastern employees were aware their names were being recorded, prior to casting their votes.

Although a lack of evidence can sometime be the reason for a *de minimis* finding, there are also further cases where the Board set aside an election *even when the petitioner failed to present any evidence that employees were aware of the list keeping*. In *Sound Refining, Inc.*, the union observer had a copy of the *Excelsior* list inside a folder during the election, and made a note next to the names as employees came to vote. Because the employer was unable to present any evidence that *any* voter was aware his name was being checked off, the Regional Director concluded that “any breach of the Board’s election rules here was *de minimis* and did not constitute grounds for setting aside the election.” *Sound Refining, Inc.*, at 1301. However, the Board disagreed with the Regional Director’s assessment that the list keeping was *de minimis*:

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<sup>7</sup> The Hearing Officer’s direct quote in her report from *Locust Industries, Inc.* was incorrect and misleading. As stated above, the Board in *Locust Industries, Inc.* found no evidence of *any* knowledge by the voters that their names were being recorded. The Hearing Officer quoted the Board to have said, “*When only a small number of voters know that a list is being kept...*” There was no evidence in that case that a *single employee* knew his name was being recorded, whereas here, *at least* two Eastern employees testified that their names were being recorded prior to voting, and evidence presented at the hearing showed the likelihood of many more. When those facts are coupled with the extremely narrow margin of victory by the Union, a *de minimis* finding is unwarranted.

We further find that this action was not *de minimis*. Moreover, we find that Petitioner's *failure to present any evidence* that any employee other than Petitioner witnessed [the list keeper]'s listkeeping *does not* detract from our finding this to be a meritorious objection to the election... [*e*]lection rules which are designed to guarantee free choice must be strictly enforced against material breaches in every case, or they may as well be abandoned.

*Id.* (emphasis added). The Board found that "in all the circumstances, it can be inferred that the voters knew that [the list keeper] was recording their names." *Id.* at 1302, citing *Piggly-Wiggly*, at 792-93. The list keeper's conspicuous presence at the polls as an observer, coupled with absolutely no attempt to conceal the conduct, were the main reasons why the Board did not believe the conduct was *de minimis*.

In the present case, Eastern's two witnesses testified that they observed the union supporters at the table checking their names off an employee list, prior to voting in the election, which the Hearing Officer credited in its entirety. Further, other evidence showed there were other marks (consistent with those described by Mr. Jacques and Ms. Sauer) present on the voting list, as well as photos of employees looking over the list on the day of the election. This shows a strong likelihood that others were "checked in" prior to voting. Lastly, union witnesses admitted that the list was out in the open, on top of the table, making it reasonable that anyone who passed by the table would have been able to view it. There is absolutely no indication that the Union supporters attempted to conceal their activities --quite the contrary, actually. This evidence, coupled with the Board's willingness to set aside an election even without direct evidence, shows that the Hearing Officer's reliance on the fact that Eastern only presented two witnesses did not justify her finding.

Lastly, this election was extremely close. The Union carried the vote by a margin of 41-36, meaning a change in three employees' minds would have resulted in a 39-38 margin against the Union. These numbers cannot be discredited or overlooked. The Hearing Officer somehow

concluded that a three vote swing was not small enough and ignored the Union wrongdoing. The Board has imposed a heightened degree of scrutiny on a party's behavior where the margins were larger than the one present in this case, and it should do so here as well. The behavior of the Union agents and supporters should be magnified as a result of the narrow victory, not minimized. *See Anaconda Co.*, 241 NLRB 1091 (1979) (in an pre-election interrogation case, it was concluded that "[w]hile there were 125 eligible employees, the Union lost the election by *only seven votes* [; t]hus, the impact of the misconduct is the same as if the entire unit consisted of, at most, seven employees" and the election was set aside) (emphasis added). Thus, the impact of the Union's "list keeping" cannot be described as "de minimis," instead, it should justify the setting aside of the election.

**III. Eastern Expects to the Hearing Officer's Finding that Mr. Kirschbaum's Actions During the Critical Period Did Not Impact the Election.**

The "critical period" denotes the time when conduct of either party may affect the election, and therefore during which laboratory conditions must be maintained. In *Goodyear Tire and Rubber Co.*, the Board recognized that the "critical period" includes all conduct occurring from the time the petition is filed up until the completion of the election. "[W]e have decided to consider in future consent and stipulated elections any objectionable conduct *which occurs after the date of the filing of the petition.*" *Goodyear Tire and Rubber Co.*, 138 NLRB 453, 455 (1962) (emphasis added). The Board has made clear that laboratory conditions must remain intact not only on the day of the election, but on the days leading up to it as well. The Board will consider conduct occurring during *any part* of the critical period, as long as it has the effect of destroying the laboratory conditions required for the election. Mr. Kirschbaum's actions during the critical period were sufficient, based on Board precedent, to overturn the election results and require the ordering of a new election, as they "reasonably tended to interfere with the employees' free and

uncoerced choice in the election.” *Baja’s Place*, 268 NLRB 868 (1984). While the Hearing Officer may have minimized the impact Mr. Kirschbaum’s conduct had on Eastern employees prior to the election, she failed to consider that the change in *only three (3)* votes would have changed the outcome, and thus, his conduct must be viewed with heightened scrutiny.

Using the nine factor test from *Avis Rent-A-Car Systems, Inc.*, 280 NLRB 580 (1986), it is clear that most of the factors were present at Eastern, and it is reasonable to conclude that Mr. Kirschbaum’s conduct more than likely impacted the voters’ free choice.

(1) *Number of Incidents*, Mr. Kirschbaum went on to Eastern’s property on at least *six* different occasions, between June 4, and June 11. Each time resulted in some sort of confrontation, or him being told to leave and not come back. Further, he made 3-5 phone calls *a day* to Mr. Winitzer, complaining about a list which he was going to, and did, lawfully receive prior to the election;

(2) *the severity of the incidents and whether they were likely to cause fear among the employees*. During the initial incident, Mr. Kirschbaum, accompanied by other Union organizers, cornered Mr. Winitzer in his office and was yelling loud enough that Mr. Winitzer’s son had to come to his father’s aid, telling Mr. Kirschbaum to tone it down or leave; further, Mr. Kirschbaum blatantly ignored Mr. Winitzer’s attempt to speak with him while he was on the bus. This occurred in front of several Eastern employees;

(3) *the number of employees in the bargaining unit subjected to the misconduct*. It is unclear exactly how many employees were subject to Mr. Kirschbaum’s acts, but the evidence suggests that the number is not negligible. First, Mr. Winitzer testified that the initial incident was “[i]n front of all the employees.” And while Eastern is not implying that the conduct was literally viewed by every employee, it shows that the incident was not isolated, as suggested by the Hearing Officer. Further, Mr. Kirschbaum’s refusal to take Mr. Winitzer’s call while on the bus was similarly observed by a group of Eastern employees. Lastly, it is reasonable to believe that word of a Union organizer continually coming on to the property, and the President being forced to continually tell him to leave, would have spread pretty quickly throughout the employees during the week leading up to the objections;

(4) *the proximity of the misconduct to the election date*. All of the conduct occurred during the “critical period,” the most recent incident taking place only a week prior to the election. It should also be noted that the employees were exposed to Mr. Kirschbaum’s conduct, and then were forced to see him again on their way into the polls to vote. Any impressions that may have worn off in the six days from when he was ordered not to trespass on to the property until the election would have easily been recalled by all employees exposed to it when they saw him immediately before they voted;

(5) *the degree of persistence of the misconduct in the minds of the bargaining unit employees.* As stated above, he made *six trips* to the property within one week, as well as 3-5 calls a day to Mr. Winitzer. It would be difficult to show a higher degree of persistence than Mr. Kirschbaum exhibited during the critical period;

(6) *the extent of dissemination of the misconduct among the bargaining unit employees.* Again, while an exact number cannot be placed on this, it is reasonable to think that word of the ongoing disturbances caused by Mr. Kirschbaum would have certainly made its rounds prior to the election;

(7) *the effect, if any, of misconduct by the opposing party in canceling out the effect of the original misconduct.* There is no evidence of *any* misconduct on the part of the employer;

(8) *the closeness of the final vote.* The final vote tally was 41 for and 36 against the union. The change in *only three (3) employee votes* would have changed the election results;

(9) *the degree to which the misconduct can be attributed to the union.* As Mr. Kirschbaum was the Union organizer, *all* of the misconduct can be attributed to the Union.

*Avis Rent-A-Car Systems, Inc.*, at 581.

Further, the Board acknowledges that “the failure of union representatives to vacate the premises at the employer’s request” may constitute objectionable conduct by the union warranting setting aside the election on the grounds that “*it suggests to employees that the employer is powerless to defend its property rights.*” *Sisters Food Group, Inc.*, 357 NLRB 168 (2011) (emphasis added); *see also Phillips Chrysler Plymouth*, 304 NLRB 16 (1991).<sup>8</sup> In the present case, Mr. Kirschbaum’s actions mirrored those of the organizers in *Phillips*. Over the course of nine days, Mr. Kirschbaum *repeatedly* ignored requests to leave the Employer’s property and as a result, seriously undermined Mr. Winitzer in front of his employees. Those

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<sup>8</sup> In *Phillips Chrysler*, the Employer filed an Objection alleging that the conduct of Union organizers destroyed the laboratory conditions of the election. The Employer’s president asked two organizers to leave the shop and to wait in the reception area, as they were not permitted to be there until the 9:00 AM preelection conference. The organizers refused to leave, and instead started a “shouting match” in front of the employees. Because the organizers were union agents, “the test to be applied is whether their conduct ‘reasonably tend[ed] to interfere with the employees’ free and uncoerced choice in the election.”

actions are precisely the type of conduct the Board tries to prevent when it considers setting aside election results (*see Phillips*) as it conveys to the employees that an employer cannot protect its own legal rights.

Not only do Mr. Kirschbaum's actions satisfy most, if not all of the factors in *Avis*, the Board must take sufficient notice that it required the service of a no-trespass notice that needed to be enforced by the Somerville Police Department to finally get Mr. Kirschbaum to stop coming onto Eastern's property. The Hearing Officer's conclusion that "it appears that the Employer successfully enforced its legal rights to bar unwanted trespasser from its premise[,] is unreasonable, and creates an untenable proposition for employers. An employer should *not* be forced to resort to police intervention to prove it is not powerless to protect its own property rights. It sets a dangerous precedent if the Board agrees that an opposing party will not run afoul of *Phillips Chrysler Plymouth*, until it ignores a police order to stop trespassing. This is clearly not the standard the Board wants set, and the fact that Eastern was forced to have the police intervene seems to be the very definition of an employer being "powerless to defend its property rights."

Lastly, these actions took place during the two weeks leading up to the election. The employees saw firsthand how Mr. Kirschbaum blatantly disregarded Mr. Winitzer's authority, and then were subject to seeing him only a week later as they walked in to cast their vote. Under those circumstances, it is impossible to argue that Mr. Kirschbaum's presence on Eastern's property did not have a profound effect on the employees voting in the election and made it impossible to consider the election "fair and uncoerced." As such, Objection 4 should not have been overruled, and the election results must be set aside.

CONCLUSION

To summarize, the conclusions that were reached by the Hearing Officer in her Report and Recommendations on Objections are not supported by her own findings of fact. In addition, the Hearing Officer's, reliance on specific Board cases to support her findings are inapplicable to the facts present in this case. Based on the facts of this case, the Board precedent which has been cited herein supports the Employer's position that the Union engaged in improper conduct both before and during the election.

Accordingly, Eastern respectfully requests that the Report and Recommendations on Objections be rejected, and that the June 18, 2012 election results be set aside, and that a new election be scheduled.

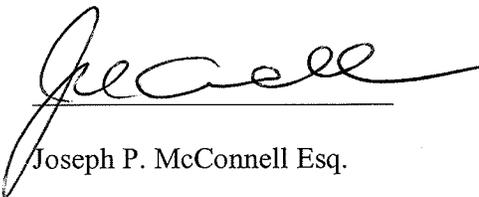
Respectfully submitted

EASTERN BUS COMPANY

By its attorneys

MORGAN, BROWN & JOY, LLP

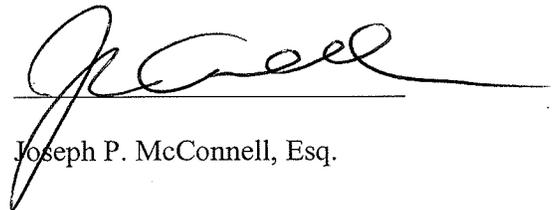
By

  
Joseph P. McConnell Esq.

September 6, 2012

**PROOF OF SERVICE**

I, Joseph P. McConnell, Esq., of Morgan, Brown & Joy, LLP, 200 State Street, Boston, MA 02109, hereby certify that a copy of the foregoing Employer's Exceptions to Hearing Officer's Report and Recommendations on Objections and Brief in Support has been filed electronically with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C., 20570-0001, and has been delivered, via electronic mail, to Petitioner's Counsel, Timothy D. Zessin, Esq. and Warren H. Pyle, Esq., Pyle Rome Ehrenberg, PC, 18 Tremont Street, Suite 500, Boston, MA 02108, this day, at [tzessin@pylerome.com](mailto:tzessin@pylerome.com) and [wpyle@pylerome.com](mailto:wpyle@pylerome.com).

  
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Joseph P. McConnell, Esq.

September 6, 2012