

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

In the Matter of:

BAKER DC LLC,

Employer

and

**OPERATIVE PLASTERERS &
CEMENT MASONS INTERNATIONAL
ASSOCIATION LOCAL 891,**

Petitioner.

Case No. 05-RC-135621

**EMPLOYER’S BRIEF ON REVIEW OF THE REGIONAL DIRECTOR’S
SUPPLEMENTAL DECISION ON EMPLOYER’S OBJECTION TO ELECTION**

Baker DC, LLC (“Baker” or “Employer”), by its attorneys, hereby submits its brief in response to the Board’s Order granting review of the Regional Director’s Supplemental Decision overruling Employer Objection 2 to the election. In Objection 2 the Employer averred that the Union improperly engaged in surveillance or created the impression of surveillance of eligible voters. The Regional Director overruled the objection without a hearing.¹ The Board has granted the Employer’s Request for Review from the Regional Director’s Decision(s), because the Employer “raised a substantial issue” regarding unlawful surveillance. This Brief is being filed pursuant to Section 102.67(g). As further explained below, the Board should find that the Regional Director erred in failing to set aside the election or hold a hearing on the Employer’s Objection 2, because the Union engaged in unlawful surveillance during the election.

¹ The Regional Director first overruled the objection in his Supplemental Decision dated November 25, 2014, which failed to distinguish the surveillance issue in Objection 2 from the Employer’s electioneering objection (No. 3). After the Employer filed exceptions to the Regional Director’s failure to address the surveillance issue, the Regional Director *sua sponte* issued a Second Supplemental Decision on June 26, 2015, specifically addressing (and overruling) the Employer’s Objection 2. Second Supp. Dec. at 2-3. The Employer excepted to this Decision also.

1. The Undisputed Facts And The Regional Director's Finding of Facts Applicable To The Objection.

The Regional Director did not dispute the Employer's factual sworn submission that a group of 5-6 union officials and agents stood at the front door of the office building where the election was being held, beginning prior to the vote at or before 5:15 am and continuing throughout the voting that took place in the building that morning. The union agents also entered the lobby and spoke to at least one employee who was waiting to vote. The Regional Director also did not dispute that the Union agents remained by the lobby doors and watched each Baker employee enter the building to vote until every employee had voted and left the facility. As the Regional Director further conceded, all voting employees were required to enter the lobby of the building in order to access elevators taking them directly to the voting area in the Employer's eighth floor office.

Notwithstanding these undisputed Employer allegations, the Regional Director found that the Union agents were not positioned to observe employees while they were "in line waiting to vote" and were otherwise too far from the polling area or the voting line to be engaged in unlawful surveillance. (Dec. at 2). Solely on this basis, the Regional Director purported to distinguish such cases as *Performance Measurements Co.*, 148 NLRB 1657, 1659, supp. by 149 NLRB 1451 (1964); and *Electric Hose and Rubber Co.*, 262 NLRB 186, 216 (1982); and *Nathan Katz Realty v. NLRB*, 251 F. 3d 981 (D.C. Cir. 2001), relied on by the Employer.

I. Contrary To The Regional Director's Decision, The Board Should Adhere To Its Precedent, And That Of The D.C. Circuit, And Hold That the Union Conduct Here Constituted Unlawful Surveillance.

In *Performance Measurements*, the Board held that the continued presence of the Employer's president at a location where employees were required to pass in order to enter the polling place was improper conduct, even though no electioneering occurred. There was no

evidence that the supervisor observed voters in line waiting to vote. Likewise in *Electric Hose*, a supervisor was found to have engaged in surveillance without any evidence that he observed voters in line waiting to vote. In addition, two other supervisors stood in a section of the plant where employees had to pass in order to reach a voting area, which was not immediately outside the polling area. Again the Board held that such conduct constituted unlawful conduct during an election. Based on these precedents, the D.C. Circuit in *Nathan Katz Realty* held that union agents engaged in objectionable conduct when they sat in their car outside a church where voting was being held, such that employees had to pass under the agents surveillance in order to reach the polls. Again no electioneering occurred.

In *Nathan Katz Realty*, the Board attempted to distinguish *Electric Hose* and *Performance Measurements* on the same ground as the present Decision, *i.e.*, that the union agents in their car were too far from the voting area to be engaged in unlawful surveillance. The D.C. Circuit rejected this argument, as follows:

This distinction is manifestly inadequate. In *Electric Hose*, only one of the supervisors stood immediately outside the polling area. The other two supervisors simply stood in an area where employees “had to pass in order to vote.” Nothing in the *Electric Hose* decision indicates that these two supervisors were anywhere near the actual polling place.

* * *

Together, *Electric Hose* and *Performance Measurements* seem to stand for the proposition that a party engages in objectionable conduct sufficient to set aside an election if one of its agents is continually present in a place where employees have to pass in order to vote.

251 F.3d at 992-993.

The Regional Director in the present case erroneously relied on the Board’s decision in *J.P. Mascaro & Sons*, 345 NLRB 637, 639 (2005), which overruled a surveillance objection after distinguishing the foregoing line of cases. In *Mascaro*, unlike here, the company official accused

of surveillance was not stationed in a spot that employees had to pass in order to access the polls. As the Board held: “[The supervisor] had no direct view of the vending/snack room area [the entrance to the polls]. Although he could see who entered the facility, he had no way of knowing who was entering to vote and who was entering to perform job-related duties or to eat and drink in the vending/snack room.” *Id.* at 639. Distinguishable for the same reason is the case of *Blazes Broiler*, 274 NLRB 1031, 1032 (1985), relied on in *Mascaro*. There too, the Board noted that the union agent accused of election surveillance “had no way of knowing who was entering the hallway [leading to the voting area] to vote....”²

In the present case, it is undisputed that a group of union officials/agents stood at or near the entrance to the lobby of the building in which the vote was being held, and that all of the voters had to pass a few feet from the union agents in order to vote. The election was held at an early hour (5:30 am) when the building was otherwise closed and empty, so the union officials knew that anyone entering the building was a voter. (The small size of the voting unit also allowed the Union officials to recognize the voters by sight.) It is also undisputed here that there was only one way for the voters to gain access to the polls, *i.e.*, through the lobby entrance where the union officials were congregated. It is thus irrelevant that the polling area was a short elevator ride above the lobby, because no voter could *access* the elevator without passing by the group of union officials/agents stationed at the entrance to the lobby. It is also irrelevant that the lobby had not been declared a “no electioneering” area, because surveillance does not require proof of electioneering. The sole question is supposed to be whether officials of either the

² Again distinguishable is a case relied on by the Union in its previous brief, *U-Haul of Nevada, Inc.*, 341 NLRB 195, 197 (2004). There, all but a handful of voters had cast their votes before a union official arrived in a parking lot outside the building, and the parking was also not visible to employees entering the polling area. There was no evidence that voters had to pass by the union official in order to vote.

Employer or the Union stationed themselves at a position where voters had to pass by on their way to vote. The answer to that question in the present case is undisputed: the Union officials were emphatically so positioned. The case law is thus clear that the union actions in the present case constituted unlawful surveillance and the election must therefore be set aside.

Conclusion

For each of the reasons set forth above, the Board should overrule the Regional Director's decision and should set aside the election or at minimum order the Regional Director to conduct a hearing with regard to Objection 2.³

Respectfully submitted,

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³ The Employer hereby preserves all arguments in support of its Objection 3 (union electioneering), as to which the Board has denied review, and Objection 1 (union threats), as to which the Regional Director has not yet issued a decision.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing are being served by electronic mail on the following this 10th day of February, 2016:

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