

**NO. 16-1871, 16-2031
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

THESIS PAINTING, INC.,

Petitioner – Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent – Cross-Petitioner

On Petition for Review from a National Labor Relations Board Decision
NLRB Case No. 5-CA-172905, 364 NLRB No. 53 (2016)

BRIEF FOR PETITIONER THESIS PAINTING, INC.

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

No. 16-1871, 16-2031 Caption: *Thesis Painting, Inc. v. NLRB*

Pursuant to FRAP 26.1 and Local Rule 26.1, Petitioner Thesis Painting, Inc.

(“Thesis”) makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?

YES NO

2. Does party/amicus have any parent corporation?

YES NO

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?

YES NO

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?

YES NO

5. Is party a trade association?

YES NO

6. Does this case arise out of a bankruptcy proceeding?

YES NO

Signature: /s/ Maurice Baskin
Counsel for Petitioner

Date: October 3, 2016

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STATEMENT OF JURISDICTION

This is a petition for review from a decision of the National Labor Relations Board (the “Board”), and a cross-application for enforcement by the Board, as to which this Court has jurisdiction pursuant to Section 10 of the National Labor Relations Act (the “NLRA” or the “Act”), 29 U.S.C. § 160. The Board’s Order is final with respect to all parties.

STATEMENT OF THE ISSUE

Whether the Board unlawfully departed from precedent or otherwise erred in failing to set aside the union election, certifying the union as majority representative of Petitioner’s employees, and ordering Petitioner to bargain, in light of misconduct engaged in by agents of the Union during the election.

STATEMENT OF THE CASE

On July 9, 2015, the International Union of Painters and Allied Trades, AFL-CIO, District Council 51 (the “Union”) filed a petition with the Board seeking an election among a unit of painters and lead painters employed by Thesis. (JA 6-7). Following a representation election held on July 31, 2015 and won by the Union, Thesis filed timely objections to conduct of the election and conduct affecting the results of the election. (JA 7-10). The objections asserted that the

Union through its agents or alternatively through employees acting as agents or Union supporters, engaged in improper electioneering, pressure or surveillance of voters within or immediately outside the polling area while the polls were open and while employees were waiting to vote or on their way to vote. (JA 8-9).

Region 5 of the Board held a hearing to consider Thesis's objections on August 21, 2015. (JA 10-119) (Transcript). Following that hearing, the Hearing Officer issued a Report on Objections, in which he overruled them, notwithstanding evidence of unlawful electioneering and surveillance during the election by union agents that should have required the election to be set aside under *Milchem, Inc.*, 170 NLRB 362 (1968), and/or *Nathan Katz Realty v. NLRB*, 251 F.3d 981 (D.C. Cir. 2001). (JA 118-131). Thesis filed timely exceptions to the Hearing Officer's Report with the Regional Director. (JA 132-136). The Regional Director largely affirmed the Hearing Officer's Report, upheld the results of the election, and certified the Union as the exclusive representative of Thesis's employees. (JA 137-145). Central to the Regional Director's decision was the finding that former employees Aza Guzman and Jose Raymundo, who the evidence showed to have engaged in improper surveillance and electioneering immediately outside (and inside) the polling area, were not agents of the Union.

Thesis filed a timely Request for Review with the Board (JA 145-155), which denied the Request on March 24, 2016. (JA 157).¹

Thesis thereafter refused to bargain with the Union as the sole means of obtaining judicial review of the Board's Decision certifying the Union based on the improperly conducted election. *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964); *AFL v. NLRB*, 308 U.S. 401 (1940). Upon filing of an unfair labor practice charge by the Union (JA 157) and issuance of a Complaint by the General Counsel of the Board, (JA 158), the Board issued a summary judgment declaring Thesis to be in violation of the Act and ordered the Company to begin bargaining with the Union. (JA 243-245). Thesis thereupon filed the present Petition for Review (JA 244), and the Board cross-filed for enforcement of its order. (JA 246-259).

STATEMENT OF FACTS

The record evidence establishes that two non-employees, Adan Guzman and Jose Raymundo, engaged in improper electioneering and surveillance during the election within 10 feet of the polling area, where employees were waiting in line to vote, and even inside the polling area. The first substantial factual (and legal)

¹ In denying the Request for Review, the Board reversed the Regional Director's finding that Raymundo was not a Union agent, conceding that Raymundo "may have been the Petitioner's limited agent during the election while he served as the Petitioner's observer." (Order Denying Request for Review, n.1) (JA 156). The Board nevertheless upheld the Regional Director's certification of the Union based on the results of the election. (*Id.*).

question presented by this case is whether these non-employees were agents of the Union.

As to Guzman's agency status, employee Nelson Caceres credibly testified that Guzman visited the home of another employee, Jose Viera, to solicit an authorization card on behalf of the Union. (JA 25-27, 32, 41-42). Viera reported that Guzman showed him his paycheck from the unionized employer where he worked and encouraged Viera to vote for the Union. (JA 26). Employee Jose Carranza Arias further testified that Guzman was known to "work for the union." (JA 50-51). Guzman in his own testimony admitted telling Viera he made more money at the unionized company in order to "help the union." (JA 71-72). But he denied working for the union and denied making any pre-election visits to Thesis employees at the behest of the union. (JA 56-71). Guzman was contradicted in his claim to have acted alone, however, by the Petitioner's own marketing director (and chief organizer), Mr. Baiza, who admitted that he did enlist Guzman to accompany him ("to come help me") on a home organizing visit to Viera. (JA 82-86). From Baiza's testimony and that of the employee witnesses, it is clear that the union clothed Guzman with apparent authority to speak on its behalf and that he did so.

Employee witnesses Caceres and Carazzo credibly testified that Union agent Guzman, who admitted that he had previously resigned his employment and

therefore had no justification for being present at the election, nevertheless showed up at the polling area. Guzman then spent a full hour standing at the front entrance to the Employer's office, approximately 10 feet from the conference room where the ballot box was located – separated only by a clear glass door - together with and talking to employees who were waiting in line to vote. (JA 24-26). It is undisputed that all the voters had to pass by Guzman in order to enter the polling area. (*Id.*). He was wearing a black union T-shirt and was separated from the polling area itself only by a glass door through which he was fully visible throughout the hour standing with and talking to employees who were lined up and entering to vote. (*Id.*).

At one point, Guzman himself entered the polling area to cast a challenged ballot, though he was clearly not eligible to vote, and during the voting process he was seen by Caceres talking to voters in a circus-like atmosphere so crowded and noisy that the Board agent was forced to call for the employees to quiet down. (JA 34). Employee Jose Viera reported to Caceres that Guzman was asking him and other employees why they were not returning his phone calls regarding the union, which was itself coercive. (JA 25, 33, 39).²

² The Regional Director made a clear error of fact in upholding the Hearing Officer's finding that Guzman only stood in proximity to the polls for "only three to four minutes." (RD Dec. at 6-7) (JA 148-149). To the contrary, employee Nelson Caceres plainly testified that Guzman and another unidentified union agent were present "almost the whole time of the voting at the glass door within 10 feet

SUMMARY OF ARGUMENT

The Board departed from precedent and clearly erred in upholding the Regional Director's decision certifying the results of the union election in this case. The Regional Director's decision applied an erroneous standard of agency in failing to find that the non-employees at issue, Guzman and Raymondo, both had apparent authority to speak on the Union's behalf. Under settled law of this (and other) circuits, both individuals should have been found to be Union agents. *See NLRB v. Kentucky Tennessee Clay Co.*, 295 F.3d 436 (4th Cir. 2002); *NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239, 1242 (4th Cir. 1976); and related cases discussed below.

The Board's erroneous finding on the agency issue led it to apply the wrong standard for overturning elections due to unlawful electioneering and surveillance by union agents at or near the polls. Under the principles set forth in *Milchem, Inc.*, 170 NLRB 362 (1968), *Nathan Katz Realty v. NLRB*, 251 F.3d 981 (D.C. Cir. 2001), and related cases discussed below, the Union here violated both the no-electioneering and no-surveillance rules, requiring that the election results be set aside.

of the polls.” (JA 26). The “three to four minutes” to which the Regional Director refers was only the time spent by Guzman actually voting and standing inside the office area immediately adjacent to the conference room where the voting took place.) (JA 34).

STANDARD OF REVIEW

Both the Supreme Court and this Court have recognized that NLRB-supervised representation elections must be conducted under “laboratory conditions,” “free from behavior that improperly influences the outcome,” in order to protect the right of employees to exercise a fair and free choice in a representation election. *See NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); *NLRB v. Kentucky Tennessee Clay Co.*, 295 F.3d 436 (4th Cir. 2002); *NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239, 1242 (4th Cir. 1976).

In determining whether improper behavior has materially influenced the outcome of an election, the source of the behavior is an important consideration. More weight is accorded the comments and conduct of the employer or union than of third parties who are not agents of either entity. *Kentucky Clay*, 295 F.3d at 442 (citing *Georgetown Dress*, 537 F.2d at 1242); *see also NLRB v. Urban Tel. Corp.* 499 F.2d 239, 242 (7th Cir. 1974) (noting that a “stricter standard” of conduct applies to the union and to the company than to third parties). Where misconduct is committed by union agents, as opposed to mere employee supporters, an election will be set aside for improper conduct when threats, acts of coercion, or other

improprieties occurred and “materially affected the election results.” *Id.*; *see also NLRB v. Herbert Halperin Distr. Corp.*, 826 F.2d 287, 290 (4th Cir. 1987).

In determining whether an agency relationship exists between individuals and a union under the Act, this Court applies the general common law of agency as developed by the Act. *Kentucky Tennessee Clay*, 295 F.3d at 442; *see also PPG Indus., Inc. v. NLRB*, 671 F2d 817, 821 (4th Cir. 1982). Thus, this Court has held that whether the specific acts performed were actually authorized or subsequently ratified is not controlling, but whether “apparent authority” exists to speak for the union. *Id.* (“The final inquiry is always whether the amount of association between the Union and [employee organizers] is significant enough to justify charging the Union with the conduct.”).

ARGUMENT

I. THE UNION ELECTION SHOULD HAVE BEEN SET ASIDE DUE TO MISCONDUCT BY AGENTS OF THE UNION DURING THE VOTE.

A. The Board Unlawfully Departed From Precedent In Failing To Find That Former Employee Adan Guzman Was An Agent Of The Union.

In *NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239, 1244 (4th Cir. 1976), this Court held that volunteer members of an in-plant organizing committee were union agents based on apparent authority vested in them by the Union such that the

employees' misconduct vitiated the results of an election; *see also Ky. Tenn. Clay Co. v. NLRB*, 295 F.3d 436, 444 (4th Cir. 2002) (union supporters found to be agents given apparent authority); *NLRB v. L & J Equip. Co.*, 745 F.2d 224, 235 (3d Cir. 1984); *NLRB v. Urban Telephone*, 499 F.2d 239, 241 (7th Cir. 1974). The same principles compel a finding of agency here. Indeed, the present facts are significantly stronger than in the above cited Circuit precedents, because here the individuals who engaged in the misconduct during the election were no longer employees of Thesis when they acted on the Union's behalf. They had both resigned their employment weeks before the election, and had no legitimate reason to be present at or inside the polling area. Their sole reason for attending the vote could only have been to act as the eyes, ears, and voice of the Union.

The Board itself, prior to this case, has observed that agency principles must be expansively construed, including when questions of union responsibility are presented. *Pratt Towers, Inc.*, 338 NLRB No. 8, slip op. at 12 (2002), citing among other cases *Longshoremen ILA (Coastal Stevedoring Co.)*, 313 NLRB 412, 415 (1993). In the latter case, the Board explained that under the Taft-Hartley Amendments to the Act, the common law of agency applies equally to employers and unions alike.³ As the Board in *Pratt Towers* further explained: “[C]ommon law

³ “Courts have concluded that under the NLRA, agency principles must be expansively construed, including when questions of *union* responsibility are presented.” *Id.* at 415.

principles of agency incorporate principles of implied and apparent authority,” which is created “through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question.” *Id.* at 12.

Thus, whether the specific acts performed were authorized or subsequently ratified by the Union is not controlling; rather, if there is apparent authority or a reasonable basis for the belief that the union has authorized the alleged agent to perform the acts in question, then agency principles impute responsibility to the union. *Bellagio LLC*, 359 NLRB No. 128 (2013) (apparent authority found); *Bloomfield Health Care Center*, 352 NLRB 256 (2008); *Pan-Oston Co.*, 336 NLRB 305, 306 (2001); *Bio-Medical of Puerto Rico*, 269 NLRB 827, 828 (1984) (apparent authority found where the union allowed pro-union employee to speak on its behalf); *see also NLRB v. L&J Equip. Co., Inc.*, 745 F.2d 224, 233 (3rd Cir. 1984) (holding that agency relationship exists between an employee and a union if “the union cloaked the employee with sufficient authority to create a perception among the rank-and-file that the employee acts on behalf of the union”); *Kitchen Fresh, Inc. v. NLRB*, 716 F.2d 351, 355 (6th Cir. 1983) (an individual can be held to be a union agent if the union instigated, authorized, solicited, ratified, condoned, or adopted the individual’s actions or statements or clothed the individual with apparent authority to act on behalf of the union).

The Regional Director distinguished some of the foregoing cases on their individual facts, but failed to address the agency standard described by the Board in these cases as a matter of policy and law. (RD Dec. at 5) (JA 147). In particular, the Regional Director failed to apply correctly the basic agency principle of apparent authority, *i.e.*, whether there was a reasonable basis for Thesis employees to believe that the union authorized Guzman to speak on the union's behalf by enlisting him in its home visits, where he was accompanied by the chief union organizer. Based on the union's own admission to having enlisted Guzman to make a joint organizing presentation to a Thesis employee at his home, where Guzman spoke on the union's behalf, the agency standard of apparent authority was clearly met and the Regional Director clearly erred in failing to so find.

The Regional Director incorrectly characterized the evidence as showing only that Baiza "called Guzman prior to the election because Guzman knows the employees" and that Baiza "only wanted Guzman's help in getting employees to open the door and listen to him" (Baiza). (RD Dec. at 5) (JA 147). To the contrary, Guzman did more than just get employees to open the door; he spoke to the employees on the union's behalf about how they could make more money working for a unionized contractor. (JA 70-71). Guzman engaged in such activity in the union marketing director's presence and at the union's behest, and was thereby clearly clothed with apparent authority to speak for the union. The Regional

Director further erred in claiming that the union failed to “hold Guzman out” in an organizing role. (RD Dec. at 5) (JA 147). That is exactly what happened and that is how Guzman was perceived by employees Caceres and Viera – as a union organizer speaking at the behest of the union and on the union’s behalf.

Again, union marketing director Baiza plainly brought Guzman to visit Viera for the purpose of having Guzman tell the latter *on the union’s behalf* that Viera would make more money working for the union. Baiza manifested by his joint presence with Guzman that Guzman was an agent of the Union speaking on the union’s behalf. The credited testimony thus established that the union manifested to at least one employee (who told other employees in the small voting unit) that Guzman had apparent authority to speak on the union’s behalf. The Regional Director’s finding on this critical issue was factually clearly erroneous.

The Regional Director also erred in relying on the assertion that “pro-union individuals do not constitute union agents merely on the basis of their vocal and active union support.” (RD Dec. at 6, citing the Board’s holding in *Cornell Forge Co.*, 339 NLRB 733 (2003)) (JA 148). First, in purporting to state the holding of *Cornell Forge* above, it must be observed that the Regional Director improperly changed the key word “employees” in the Board’s holding to “individuals.” *Compare* RD Dec. at 6 (JA 148) *with* 339 NLRB at 733. The actual holding of the case is in fact limited to “prounion *employees.*” *Id.* The difference is quite

significant in the present case because it is undisputed that Mr. Guzman was *not* an employee when he made the home visit together with the chief union organizer and spoke on the union's behalf. Guzman was also not an employee when he engaged in unlawful electioneering and surveillance at the polls when the election took place.

In any event, as noted above, unlike the pro-union employees so described in *Cornell Forge Co.*, 339 NLRB 733 (2003), Guzman's agency status here is not based merely on the basis of his support for the union, but on the fact that Guzman was held out by the union marketing director as having authority to speak for the union on the subject of organizing in a joint home visit. It is this apparent authority that made Guzman an agent, not merely his support for the union as an employee (which he was not). *See also NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239, 1244 (4th Cir. 1976); *Ky. Tenn. Clay Co. v. NLRB*, 295 F.3d 436, 444 (4th Cir. 2002); *NLRB v. Urban Telephone*, 499 F.2d 239, 241 (7th Cir. 1974).

For similar reasons, the Regional Director erred in failing to find that non-employee Raymundo was also a union agent. (RD Dec. at 6) (JA 148), an error that the Board subsequently conceded. (Order Denying Request for Review, n.1) (JA 162). Again, Raymundo was no longer employed by the Employer, and he had no legitimate reason to be at the election except that the Union designated him as its observer and thereby vested him with apparent authority to act on its behalf.

Detroit East, Inc., 349 NLRB 935, 936 (2007) (“It is well settled that election observers act as agents of the parties that they represent at the election.”). Like Guzman, Raymundo also wore a black shirt communicating a pro-union message and identifying him as one of the union’s agents. Though he took the shirt off at the request of the Board agent, this did not occur until after he was seen wearing it by employees lined up to vote. Raymundo’s role as a non-employee observer on behalf of the Union in and of itself gave him apparent authority to act on the Union’s behalf.

B. As Agents Of The Union, Both Guzman And Raymundo Clearly Engaged In Improper Electioneering And/Or Surveillance Activity That Required The Election To Be Set Aside.

1. The Election Should Have Been Set Aside Due To The Union Agents’ Improper Electioneering In Close Proximity To The Polls.

Once it is recognized that either Guzman or Raymundo, or both, acted as union agents on election day, it is plain under the Board’s own precedent that the rules governing union elections were violated in this case. The Regional Director clearly erred in holding to the contrary, and the Board erred by refusing to address this issue in denying the Request for Review. As noted above, employee witnesses Caceres and Carazzo credibly testified that Union agent Guzman, who admitted that he had previously resigned his employment and therefore had no justification for being present at the election, nevertheless showed up at the polling area.

Guzman then spent a full hour standing at the front entrance to the Employer's office, approximately 10 feet from the conference room where the ballot box was located, together with and talking to employees who were waiting in line to vote. \ (JA 24-26). It is undisputed that all the voters had to pass by Guzman in order to enter the polling area. (*Id.*). He was wearing a black union T-shirt and was separated from the polling area itself only by a glass door through which he was fully visible throughout the hour standing with and talking to employees who were lined up and entering to vote. (*Id.*).

At one point, Guzman himself entered the polling area to cast a (properly) challenged ballot, though he was clearly not eligible to vote, and during the voting process he was seen by Cacaes talking to voters in a circus-like atmosphere so crowded and noisy that the Board agent was forced to call for the employees to quiet down. (JA 34). Employee Jose Viera reported to Caceres that Guzman was asking him and other employees why they were not returning his phone calls regarding the union, which was itself coercive. (JA 25, 33, 39).⁴

Similarly, the Regional Director erroneously found that union observer and agent Raymundo did not engage in prohibited electioneering when he walked by a line of 10 employees waiting to vote in the election wearing a black union T-shirt.

⁴ As noted above, the Regional Director made a clear error of fact in upholding the Hearing Officer's finding that Guzman only stood in proximity to the polls for "only three to four minutes." (RD Dec. at 6-7) (JA 137-138). See discussion above at p. 9.

(RD Dec. 6-7) (JA 142-143). To the contrary, the credited testimony established that union observer Raymundo, another non-employee who was not eligible to vote in the election, wore a black union shirt into the voting area until asked by the Board agent to remove it. Still wearing the union shirt, Raymundo then walked by the large group of employees waiting to vote (constituting almost half of the unit), and in this manner communicated his pro-union message to the employees within 10 feet of the voting area prior to changing his shirt and returning to act as the union's observer. This constituted prohibited electioneering inside and in proximity to the polls that required the election to be set aside.

Based on these facts, the Regional Director should have found that union agents Guzman and Raymundo engaged in unlawful electioneering in direct proximity to the polls that required the election to be set aside. The Board has held that "conversation[s] with prospective voters waiting to cast their ballots, regardless of the content of the remarks exchanged, constitutes conduct which, in itself, necessitates a second election." *Milchem* 170 NLRB 362 (1968). *See also Boston Insulated Wire & Cable Co.*, 259 NLRB 1118 (1982) *enf'd.*, 703 F. 2d 876 (5th Cir. 1983). Thus, Guzman's conversation with Jose Viera within 10 feet of the polling area, while the employees were waiting in line to vote, in and of itself, compels setting aside the election, regardless of what Guzman said. Indeed, the presence of this non-employee union agent in the voting area wearing a union T-

shirt constituted impermissible electioneering under the *Milchem* rule. The Regional Director failed properly to apply the *Milchem* rule's strict laboratory conditions approach to electioneering by union agents. *See also Star Expansion*, 170 NLRB at 364-65; *Claussen Baking*, 134 NLRB 111, 112 (1961); *Detroit Creamery Co.*, 60 NLRB 178, 179-80 (1945).

Contrary to the Regional Director's Decision (at JA 143), the Board's ruling in *Boston Insulated Wire & Cable Co.*, *supra*, 259 NLRB at 1118, does not excuse the misconduct here. In the *Boston* case, there was no testimony that the union electioneering occurred while employees were waiting in line or that the union agents themselves entered the polling area. Indeed, the Board made a point of finding that neither of those facts occurred in the *Boston* case, whereas both elements are present here. It is also significant that the employer in the *Boston* case expressly disclaimed any reliance on a strict application of the *Milchem* rule. *See* 259 NLRB 1118, at n.6. There has been no such disclaimer in the present case. Finally, the present case involved a much smaller voting unit than in *Boston Insulated*, meaning that employees were more likely to be intimidated by the presence of multiple union agents, both inside and in close proximity to the polls.⁵

⁵ There was also a third union agent present at the vote whose name was not known to Mr. Caceres, and whose actions were ignored by the Regional Director. In combination with the two known agents, the third man contributed to the improper electioneering that required the election to be set aside, particularly in light of the small size of the bargaining unit. The unknown non-employee agent was testified

Even if it were appropriate to consider other factors referred to by the Board in *Boston Insulated*, 259 NLRB at 1119, those factors support setting aside the election here. The electioneering here, unlike in *Boston*, was conducted by union agents both inside, adjacent to and extremely close to the voting area and was directed at employees waiting in line to vote. Also unlike *Boston*, the voters were not insulated from the union agents' activity because two of the agents *entered the voting area itself*, one to act as a non-employee observer for the union, and the other for the illegitimate purpose of casting a ballot as a non-employee. No similar activity occurred in *Boston Insulated*, and the Regional Director clearly erred in claiming the facts of that case were "indistinguishable."

Similarly, the Regional Director and the Board erroneously found that union observer and agent Raymundo did not engage in prohibited electioneering when he walked by a line of 10 employees waiting to vote in the election wearing a black union T-shirt. (RD Dec. 6-7) (JA 142-143). To the contrary, the credited testimony established that union observer Raymundo, another non-employee who was not eligible to vote in the election, wore a black union shirt into the voting area until asked by the Board agent to remove it. Still wearing the union shirt, Raymundo then walked by the large group of employees waiting to vote (constituting almost half of the unit), and in this manner communicated his pro-union message to the

about by Caceres and complained about by another employee named Salvador on the day of the election. (JA 38-41).

employees within 10 feet of the voting area prior to changing his shirt and returning to act as the union's observer. This constituted prohibited electioneering inside and in proximity to the polls that required the election to be set aside. The case cited by the Board in denying the Request for Review, *Larkwood Farms*, 178 NLRB 226 (1969), is distinguishable in that it did not involve multiple non-employee union agents parading past and actually standing in the line of waiting voters while wearing pro-union shirts.

2. Regardless Of Whether Improper Electioneering Occurred, The Election Should Have Been Set Aside Due To the Union Agents' Unlawful Surveillance At The Polls.

For similar reasons, the Regional Director erred by failing to find that Guzman engaged in improper surveillance by stationing himself at the front entrance to the polling area in such a way that all the voters had to pass by him in order to cast their ballots. See *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 991-93 (D.C. Cir. 2001); *Electric Hose and Rubber Co.*, 262 NLRB 186, 216 (1982); *Performance Measurements Co.*, 148 NLRB 1657, 1659, sup. By 149 NLRB 1451 (1964). 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. Likewise in *Electric Hose*, a supervisor stood at a section of a plant where employees had to pass in order to reach a voting

area, and again the Board held that such conduct without more constituted unlawful surveillance 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, even though the union agents engaged in no electioneering. For the same reasons, union agent Guzman plainly engaged in unlawful surveillance in the present case and the election must be set aside.⁶

CONCLUSION

For the reasons set forth above, the Court should grant the petition for review and set aside the Board's Order(s). Because the election should have been set aside, the Union should not have been certified, and Thesis was under no duty to bargain with the Union.

Respectfully submitted,

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⁶ Contrary to the Regional Director's Decision, at 7, n.4 (JA 143), *Nathan Katz* is not distinguishable based on the existence of a no electioneering area in that case. The court did not base its decision on the no electioneering area, but on the fact that the union agents, who sat in their car at a significantly greater distance than occurred here, were positioned in a place where employees had to pass in order to vote. 251 F.3d at 991-3.

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REQUEST FOR ORAL ARGUMENT

Counsel respectfully requests oral argument on this matter.

STATUTORY ADDENDUM

Section 8 of the NLRA, 29 U.S.C. § 158(a):

It shall be an unfair labor practice for an employer – ...

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; ...

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 9(a) of the NLRA, 29 U.S.C. § 159(a):

Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

Section 9(c) of the NLRA, 29 U.S.C. § 159(c):

“(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board --”

“(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or”

“(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;”

“the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.”

Section 10 of the NLRA, 29 U.S.C. § 160:

(b) Complaint and Notice of Hearing...

[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made....

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question

was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4, 927 words, not including the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using the Word 2003 in Times New Roman, Font 14.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief of Petitioner was served by ECF on the following this 3d day of October, 2016:

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