UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

JACMAR FOOD SERVICE DISTRIBUTION

Employer,

and Case 21-RC-175833

FOOD, INDUSTRIAL & BEVERAGE WAREHOUSE,
DRIVERS AND CLERICALA EMPLOYEES,
TEAMSTERS LOCAL 630, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

Petitioner.

REQUEST FOR REVIEW OF ACTING REGIONAL DIRECTOR'S REPORT ON OBJECTIONS AND CERTIFICATION OF REPRESENTATIVE DATED SEPTEMBER 26, 2016

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TABLE OF CONTENTS

Page

I. RULE SUPPORTING REQUEST FOR REVIEW 2

II. STATEMENT OF THE CASE 2

III. STATEMENT OF FACTS 6

IV. ARGUMENT 9

A. The Acting Regional Director Incorrectly Rejected Jacmar's Objections Concerning Union Authorization Cards Because The Events Were Pre-Petition. 9

B. The Acting Regional Director Made Repeated Factual Findings That Are Clearly Erroneous or Unsupported. 12

1. Objection No. 1. 12

2. Objection Nos. 2 and 3 16

3. Objection No. 4. 18

C. The Acting Regional Director Improperly Denied a Hearing. 19

V. CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Cases

Gibson's Discount Center,
214 NLRB 221 (1974) 10

Harborside Healthcare, Inc.,
343 NLRB 906 (2004) 10, 11

Lyon's Restaurants,
234 NLRB 178 (1978) 10, 11

May Dept. Stores Co. v. NLRB,
707 F.2d 430 (9th Cir. 1983)(Kennedy, J.) 14

NLRB v. Georgetown Dress Corp.,
537 F.2d 1239 (4th Cir. 1976) 13, 14

NLRB v. International Longshoremen's and Warehousemen's Union, Local 10,
283 F.2d 558 (9th Cir. 1960) 13

NLRB v. Kentucky Tennessee Clay Co.,
295 F.3d 436 (4th Cir. 2002) 14

NLRB v. L & J Equipment Co., Inc.,
745 F.2d 224 (3d Cir. 1984) 13, 14, 16

NLRB v. Local Union No. 3, International Brotherhood of Electrical Workers,
467 F.2d 1158 (2d Cir. 1972) 13

NLRB v. Savair Manufacturing Co.,
414 U.S. 270 (1973) 10, 11, 16, 17

Pacific Coast M.S. Industries Co., Ltd,
355 NLRB 1422 (2010) 11

Penn Yan Express,
274 NLRB 449 (1985) 13

Statutes

29 U.S.C. § 158(b) 13

29 U.S.C. § 185(e) 13

Request for Review of Acting Regional Director's Report on Objections and Certification of Representative Dated September 26, 2016

The Acting Regional Director's Report in this case warrants review by the Board, in order to prevent the erroneous certification of election results in a climate involving threats and other intimidation by the Union or its agents – all of which deprived employees of their free choice in the election concluded on May 25, 2016, to which Jacmar Food Service Distribution ("Jacmar" or "Company") timely filed an Objection on June 2, 2016. Our September 26, 2016, the Acting Regional Director of Region 21 issued his "Report on Objections" dismissing all of the election objections that Jacmar filed concerning the election involving the Food, Industrial & Beverage Warehouse, Drivers and Clerical Employees, Teamsters Local 630, International Brotherhood of Teamsters ("Union"), and certifying both the results of the election and the Union as bargaining representative.

In an obvious rush to gloss over Jacmar's clearly meritorious objections and certify the Union, the Acting Regional Director ignored applicable Board precedent – and United States Supreme Court authority – and held that threatening and coercive activities to obtain union authorization cards could somehow not be the basis for objection and challenge to the election. In supporting his holding, the Acting Regional Director essentially found that most any activity is permissible as long as it is pre-petition, thus depriving employees of their free choice. In addition, the Acting Regional Director made clearly erroneous factual findings with respect to each of Jacmar's objections. While finding Jacmar's objections unsupported in many respects, despite its Offer of Proof and supporting declarations, the Acting Regional Director ignored significant evidence supporting Jacmar's objections already otherwise in Region 21's possession. That

evidence must be considered as well. Finally, the Acting Regional Director also erred in failing to order a full evidentiary hearing on Jacmar's objections.

I. Rule Supporting Request for Review

Jacmar requests review pursuant to Sections 102.67(c)(1) and (2) of the Board's Rules and Regulations. First, the Board may grant review when a substantial question of law or policy is raised because of the absence of, or departure from, officially reported Board precedent. Board Rules and Regs. § 102.67(c)(1). Second, the Board may also grant review when a decision on a factual issue is clearly erroneous on the record and such error prejudicially affects a party's rights. *Id.*, § 102.67(c)(2).

Here, the Acting Regional Director's Report departed substantially from established Board precedent and United States Supreme Court authority in rejecting Jacmar's objections, based on threats and coercion used to obtain union authorization cards, and incorrectly held that such pre-petition activity cannot be the subject of an election challenge. In addition, with respect to each of Jacmar's objections, the Acting Regional Director made determinations that are factually erroneous, with such error leading to certification of the election results and prejudicially affecting Jacmar's rights.

II. Statement of the Case

On May 9, 2016, the Union filed a petition for a representation election concerning a proposed unit of Jacmar's drivers. The unit consisted of "[a]ll full-time and regular part-time delivery drivers employed by the Employer at its facility currently located at 300 Baldwin Park Boulevard, City of Industry, CA 91746." The Board, under the supervision of one of its agents, conducted an election on May 26, 2016. The unit consisted of approximately 30 potential voters. At the conclusion of voting, the Board's agent tallied 15 votes in favor of the Union, with nine votes against unionization. In addition, there was one challenged ballot and a blank ballot.

On June 2, 2016, Jacmar filed timely election objections concerning both pre-election misconduct by the Union or its agents, as well as misconduct by the Board's agent at the election.

Jacmar made four separate objections.[1] The first three objections concerned actions that irretrievably compromised the laboratory conditions required for a valid election:

- Objection No. 1 asserted that threats, coercion, or intimidation by the Union or its agents interfered with employees' free choice, by forcing employees to sign Union authorization cards. Specifically, one driver experienced pressure to sign a Union card, culminating in a threat to have his employment terminated if he did not sign. Another driver felt he also did not sign voluntarily.

- Objection No. 2 involved additional coercion and intimidation by the Union or its agents in placing a pro-Union sticker on at least one employee's vehicle without his knowledge or consent, further compromising the laboratory conditions required for a fair election.

- Objection No. 3 concerned repeated violation by the Union or its agents of Jacmar's posting policies. In particular, the Union or its agents posted eight pro-union posters on Jacmar's property, including next to the Board's required neutral notice of the election. Again, these actions – especially when considered as a whole with the other conduct by the Union or its agents – irretrievably compromised the laboratory conditions required for a valid election.

Jacmar's Objection No. 4 centered on the Board agent's conduct during the election process. In several respects, her actions showed a lack of impartiality, with a bias favoring the Union.

[1] A copy of Jacmar's Objections to the Conduct of the Representation Election on May 26, 2016 or to Conduct Affecting the Results of the Election is attached as Attachment 1.

Jacmar submitted both an Offer of Proof and several declarations supporting its Objections to Region 21 at the same time it filed its objections. These declarations included declarations from drivers in the proposed unit, with the declarations obtained voluntarily after appropriate *Blue Flash* warnings and their consent.

On September 26, 2016, Region 21's Acting Regional Director issued his "Report on Objection and Certification of Representative" in which he overruled Jacmar's objections in their entirety and also certified the Union as the employees' collective bargaining representative.[2]

The Acting Regional Director dismissed the threat to terminate the driver's employment if he did not sign an authorization card, because it predated the election petition. The ruling stated generally that "the Board has held that threats made prior to the filing of a petition should not be the basis for setting aside an election." Report on Objections ("Report"), p. 4. It held essentially that an authorization card cannot form the basis of an objection because such conduct is pre-petition – giving unions and their agents a free pass in that respect, regardless of how coercive and egregious the misconduct. *Id.*

In addition, the Acting Regional Director dismissed the threat as "an isolated remark." *Id.* He claimed there was no evidence that the employee who made the threat was a Union agent. *Id.* The Acting Regional Director faulted a "lack of evidence" that other employees on probationary periods were told similar statements and "the absence of a bargaining history" between Jacmar and the Union. *Id.* Moreover, he found "no specific conduct" that the other driver, who stated he did not sign a card voluntarily, was coerced. *Id.*

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[2] Jacmar attaches the Acting Regional Director's Report on Objections and Certification of Representative as Attachment 2.

The Acting Regional Director also dismissed Jacmar's objections regarding Union stickers in summary fashion, utterly fail to explain his rejection of Jacmar's objection about the Union sticker at all, other than to say that it did "not interfere with coercing employee free choice." *Id.* As for the numerous unauthorized Union posters, including next to the required election notice, the Acting Regional Director merely noted that "the posters that were posted did not contain any threats to employees (sic)." *Id.*

In sum, in overruling Objection Nos. 1 through 3, the Acting Regional Director concluded that no conduct by the Union or any third party interfered with employees' "freedom of choice." *Id.*, pp. 4-5. He also found no such conduct affected the election results. *Id.*, p. 5.

With respect to Objection No. 4, the Acting Regional Director apparently found nothing wrong with the Board agent's conduct of the election. He determined "there is no evidence that the Board agent's action deviated from normal Board processes during elections or that her conduct in any way affected the integrity of the process." *Id.* He attributed to "standard procedure" the agent having more ballots than voters and in allowing "observers to check the names of employee who had come to vote." *Id.* The Acting Director Regional further held that Board agent properly handled an extra ballot given to a voter – and later found in the ballot box – by placing it in a challenged ballot envelope. *Id.*, pp. 506. Without denying that the Board agent's comments and manner may have favored the Union, he dismissed those parts of Jacmar's objection by concluding without explanation that they "[did] not affect the laboratory conditions or affect the integrity of the election process." *Id.*, p. 6.

Furthermore, the Acting Regional Director denied any hearing to develop the record further. He failed to find "any material or substantial issue of fact that would warrant a hearing."

Id. Despite Jacmar's detailed offer of proof and supporting declarations, he at least suggested that Jacmar relied on "bare assertions." *Id.*, p. 6, fn. 2.

Accordingly, rejecting Jacmar's objections in their entirety, the Acting Regional Director certified the election results and the Union as bargaining representative.

III. Statement of Facts[3]

Jacmar sells and distributes fine food products, mainly to restaurants. It operates a warehouse and delivers products to customers from its City of Industry location.

Before the election petition, Jacmar's drivers experienced threats, coercion, and intimidation by the Union or its agents, in forcing employees to sign Union authorization cards. In particular, around March 2016, a driver supporting the Union asked Driver #1 multiple times to sign a union authorization card.[4] Driver #1 refused. *See* Driver #1 Decl. ¶¶ 1, 3. In April 2016, the organizer confronted Driver #1 a third time. This time, he told Driver #1 that Driver #1 had "two choices." They were that Driver #1 either "wanted to" sign "voluntarily," or if Driver #1 did not sign the card, the organizer would tell the supervisor "that you are not a good worker so you will not pass probation." Driver #1 knew that the supervisor determined whether or not he passed probation and kept his job. *Id.*, ¶ 3.

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[3] Although Section 102.67(d) of the Board's Rules and Regulations ordinarily requires page citations to the transcript, no transcript exists in this case because the Acting Regional Director denied a hearing. Jacmar provides a summary of all evidence here, based on the evidence it provided in its Offer of Proof. *See* Board Rules and Regs. § 102.67(d). Because Jacmar's Offer of Proof and its supporting declarations were provided to the Board, but not to the Union, Jacmar does not attach them here. However, Jacmar cites to the declaration evidence. It does not identify the drivers involved or who provided declarations by name, in order to protect them from retaliation or hostile acts by the Union or its agents. Because Jacmar's Offer of Proof and supporting declarations are part of the record in this matter, and thus available to the Board, Jacmar requests that the Board exercise its discretion to review these items in considering Jacmar's Request for Review. *See id.*

[4] The employee identified Carlos Garcia as the employee who requested he sign a Union authorization card. See Driver #1 Decl. ¶¶ 1, 3.

After this threat, the organizer saw Driver #1 later the same day. The organizer, having intimidated Driver #1, asked, "So, are you going to sign it?" Driver #1 signed the union authorization card, without saying anything. Driver #1 declared that he "felt threatened." He signed the authorization card "only because I was afraid of losing my job," because of what the organizer said about his "two choices." Driver #1 did not feel that he signed the card voluntarily, as "I did not feel that I really had a choice" because of the threat to his job if he did not sign. *Id.*, ¶ 5.

Another driver also felt that he did not sign a union authorization card voluntarily. Driver #2 felt that he had to sign the card, when asked, in order to be part of the group of drivers. Still, "I did not really feel that I did so voluntarily." Driver #2 Decl. ¶ 3.

During the election campaign, the Union or its agents engaged in additional coercive and intimidating activities that further undermined the laboratory conditions required for a valid election. First, at least one driver found that the Union or one of its agents put a pro-Union sticker on his personal vehicle, without his knowledge or consent. *See* Ventura Decl. ¶ 18.[5] Second, between the petition and the election, the Union or its agents posed eight unauthorized posters supporting the Union on Jacmar's property. One of the posters was next to the legally-required and neutral Board notice announcing the election. The posters announced "We've Filed for our Election!" and "We're One Step Closer to Becoming Teamsters." Jacmar did not allow postings of any type on the company's billboards or property, other than postings from Jacmar and concerning official business. Jacmar's video showed a driver, who served as the Union's observer

[5] Declarant Gonzalo Ventura, Jr. is Jacmar's Director of Human Resources. In its Offer of Proof, Jacmar identified the particular driver subjected to this coercion and intimidation. He would be available to testify in a hearing concerning Jacmar's objections.

in the election, putting up the posters in the drivers' room, including next to the election notice. *See id.* ¶¶ 4-14, Exh. A.

In several respects, at the election on May 26, 2016, the Board's agent demonstrated both incompetent handling of the matter and an evident bias in favor of the Union. Prior to the start of the election, the agent did not figure out how many people were in the unit or could vote. Although there was discussion of how many employees might be challenged and how many people had left their jobs, the Board agent never figured out how many people were in the unit and could vote. She never used a voter list. Instead, she asked the observers who people were when they came to vote. She did not even check employees when they voted. *See* Driver #2 Decl. ¶ 5.

The Board agent also had a problem managing the ballots, including the fact that an extra ballot ended up in the ballot box. When counting the ballots, the agent unfolded one ballot that, in fact, turned out to contain another ballot as well. The two ballots were folded together, which could not have happened with voters simply randomly dropping their ballots into the ballot box. Instead, the Board agent incorrectly gave one voter two ballots. She held up the two ballots, with one being a "yes" vote and the other ballot blank. She counted the "yes" vote and put the blank ballot aside with another challenged ballot. *See id.*, ¶¶ 4, 6. Jacmar's attorney objected to both ballots. The Board agent became annoyed, and instead counted the "yes" vote and set aside only the blank ballot. *See* Ventura Decl. ¶17.

Every time a voter came to vote, the Board agent gave the employee a ballot and explained how to complete it. The way that she did so showed overt favoritism to the Union. Even though the Board's ballot is simple and easy to understand by design, the agent always explained what to do "if you want to vote yes," which she said in a more favorable time. She then added, "or if you

wanted to vote no," then to mark the "no" box. The Board agent favored the "yes" side in how she spoke to employees and explained how to vote. *See* Driver #2 Decl. ¶ 7.

The Board agent also demonstrated a further lack of impartiality when counting the ballots. She counted the ballots by reading the vote and showing the ballot to everyone. When announcing a "yes" vote, the agent smiled and enthusiastically announced "Yes!" But when she found a "no" vote, the agent simply read "no," as if to dismiss the vote. Her manner seemed to be playing to the Union supporters, who became more excited as she continued counting and reading "yes" votes in this manner. Ventura Decl. ¶ 15.

The Board counted the "no" votes three times, but the "yes" votes only twice. She then remarked that she had to counted the "yes" votes a third time as well. When the counting was done, and it was time to complete paperwork, the Board agent again showed favoritism toward the Union and the result by commenting to everyone about "Now that we have the fun part over with," meaning the voting for the Union. *Id.*, ¶ 16.[6]

IV. Argument

A. The Acting Regional Director Incorrectly Rejected Jacmar's Objections Concerning Union Authorization Cards Because The Events Were Pre-Petition.

The Acting Regional Director incorrectly dismissed Jacmar's objections about employees being threatened, coerced, and intimidated into signing Union authorization cards. He did so on the basis that pre-petition conduct generally, or specifically as it involves obtaining authorization cards, cannot form the basis for an election objection. *See* Report, p. 4. This ruling reads applicable precedent too narrowly. Indeed, it ignores authority from the United States Supreme Court and the Board.

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[6] Jacmar is informed and believes that this Board agent is no longer with the Board, but now works for the United Farm Workers union.

Contrary to the Acting Regional Director's reading of precedent, the Supreme Court has clearly held that pre-petition conduct can form the basis for an election objection. *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270, 273 fn. 4, 277-278 (1973)(pre-petition offer to waive union initiation fees). *Savair*, in fact, recognized that an employee signing a "recognition slip" could form the basis for an objection based on coercion – even if an employee theoretically could vote "no" later. *Id.* at 277-278 ("while it is correct that the employee who signs a recognition slip is not legally bound to vote for the union and has not promised to do so in any formal sense, certainly there are employees who would feel obliged to carry through on their stated intention to support the union.").

The Board also has held that a union supporter's pre-petition actions in soliciting authorization cards can form the basis for challenging an election result. *Harborside Healthcare, Inc.*, 343 NLRB 906, 912 (2004). *Harborside Healthcare* involved a union supporter's coercion of employee who signed cards that they faced job loss if they did not support the union. *Id.* at 907-908. As the Board recognized in *Harborside Healthcare*, it has held that, "because most card solicitations occur prepetition, if the Court's *Savair* rationale was to have any practical effect, it would have to apply to both prepetition and postpetition statements which involve the solicitation of authorization cards." *Id.* at 912. *See also Gibson's Discount Center*, 214 NLRB 221, 222 (1974)(union's pre-petition offer to waive fees in soliciting cards objectionable).

The Acting Regional Director failed to address *Harborside Healthcare* at all, even though Jacmar's objections expressly cited that Board decision. *See* Objections, p. 4. Region 21 cannot ignore that decision, which remains good law. The Acting Regional Director incorrectly and too narrowly limited the basis for setting aside an election because of pre-petition solicitations to the specific factual situation in *Lyon's Restaurants*, 234 NLRB 178 (1978). That case involved

membership dues and a previous collective bargaining history. *Id.* at 178. Still, *Lyon's Restaurants* held that the union "solicited its authorization cards on the basis of a proscribed statement" threatening a loss of employment. *Id.* at 179. In this respect, *Lyon's Restaurants* supports Jacmar's position.

Nor does *Pacific Coast M.S. Industries Co., Ltd*, 355 NLRB 1422 (2010), which the Acting Regional Director cited, support overruling Jacmar's objection. In a cursory discussion, the administrative law judge there stated that pre-petition conduct can be considered only in the context of "dues waivers/vote purchasing." *Id.* at 1443. This statement is incorrect, and reads applicable law too narrowly. As noted, *Lyon's Restaurants* prohibited solicitation based on proscribed statements threatening job loss if the employees did not join the successor union and pay fees. *Id.* at 179. It thus proscribed threats to coerce solicitation of support, not just benefits such as waiving dues and buying votes. *Harborside Healthcare* also recognized that threats, as well as a promise of benefits, may form the basis for objections based on pre-petition conduct. *Harborside Healthcare, Inc.*, 343 NLRB at 912 ("it is clear that coercion and interference can emanate from a fear of detriment just as they can emanate from promise of reward. Sticks as well as carrots can be used in coercive and interfering ways. Thus, we will not limit *Savair* to the latter.") *Pacific Coast* also did not address *Harborside Healthcare* at all, which as discussed, remains current law.

Accordingly, because the Acting Regional Director's ruling on this issue was failed to follow applicable Board precedent and other authority, it was incorrect.

B. The Acting Regional Director Made Repeated Factual Findings That Are Clearly Erroneous or Unsupported.

With respect to each of Jacmar's objections, the Acting Regional Director repeatedly made factual findings that were clearly erroneous or even unsupported. These errors led to certification of the election results, thus prejudicially affecting Jacmar's rights.

1. Objection No. 1.

Objection No. 1 concerned threats, coercion, or intimidation by the Union or its agents in obtaining employee authorization cards. As discussed above, the Acting Regional Director erred here by reading applicable precedents too narrowly, in order to place most Union pre-petition activity beyond prohibition regardless of how appalling or egregious. His factual findings on Objection No. 1 compounded that error.

With respect to Objection No. 1, the Acting Regional Director dismissed the threat to Driver #1 merely an "isolated remark." Report, p. 4. This characterization erroneously downplays and minimizes what happened. Rather than a mere "remark," the incident involving Driver #1 concerned an actual threat to his continued employment. The Acting Regional Director's determination also ignores the real impact on the hearer, as Driver #1 felt in fact felt threatened and signed the authorization card for fear of losing his job – as demonstrated by Jacmar's supporting evidence. The dismissal of the threat as "isolated" also ignores the fact that another driver felt he had to sign an authorization card, as well as other instances (unauthorized postings and stickers) showing a climate of intimidation and coercion. As discussed below, they also included other instances of aggressive and coercive solicitation of authorization cards – evidence that the Acting Regional Director also had in his possession.

The Acting Regional Director found no evidence that the driver who made the threat to Driver #1 was a Union agent or capable of carrying out the threat. *See* Report, p. 4. In fact, Region

21 had supporting evidence in its possession that demonstrates at least apparent authority under applicable precedent. From the employees' perspective at least (which is what matters), the Union organizers or supporters who solicited authorization cards would have to be considered Union agents.

The NLRA prohibits unfair labor practices by a union or its agents. *See* 29 U.S.C. § 158(b). The Act imposes a "broad principal-agent standard." *NLRB v. L & J Equipment Co., Inc.*, 745 F.2d 224, 232 (3d Cir. 1984). In determining whether someone was a union agent, the law considers common law or general agency principles. *NLRB v. International Longshoremen's and Warehousemen's Union, Local 10*, 283 F.2d 558, 563 (9th Cir. 1960). However, "the common law has been liberalized" by this section of the NLRA. *NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239, 1244 (4th Cir. 1976). Unlike the common law, the NLRA expressly does not require actual authorization or subsequent ratification for actions to be attributed to a union. *See* 29 U.S.C. § 185(e)("in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.").

An individual's authority does not even have to be express, but rather may only be "implied or apparent." *NLRB v. Local Union No. 3, International Brotherhood of Electrical Workers*, 467 F.2d 1158, 1159 (2d Cir. 1972). The Board has found union agency based only on "apparent authority." *Penn Yan Express*, 274 NLRB 449 (1985). The circumstances that someone "could reasonably have believed" that an individual acted on behalf of the union "is what the Board requires in finding apparent authority." *Id.*

Apparent authority thus looks at the issues from the eyes of the employee, and how he or she may reasonably perceive the apparent agent's role. "Apparent authority turns on the

interpretation of the principal's actions by a third party – the party with whom the agent deals." *L & J Equipment, supra,* 745 F.2d at 233. It exists "where employees could reasonably believe that they spoke for the union on the question involved." *Id.* Thus, individuals have been held to be apparent agents of the union where they, "in the eyes of other employees were the representatives of the union." *Georgetown Dress, supra,* 537 F.2d at 1244. *See also NLRB v. Kentucky Tennessee Clay Co.*, 295 F.3d 436, 444 (4th Cir. 2002)(employees were apparent agents "in the eyes of other employees" when they were the union's only in-plant contact with other employees, and thus apparent agents of the union); *May Dept. Stores Co. v. NLRB*, 707 F.2d 430, 434 (9th Cir. 1983)(an individual who represented the union "in the eyes of other employees" a sufficient basis for finding agency based on apparent authority)(Kennedy, J.).

Here, in rejecting Jacmar's charge on the ground that no evidence showed the employees at issue were Union agents or capable of carrying out the threat, the Acting Regional Director erred. He apparently ignored the above law clearly holding that apparent authority – rather than any express authority – suffices for union agency. In fact, to the extent the Acting Regional Director required any formal establishment of a relationship with the union to find any agency, none is necessary. To qualify as an "agent," an individual does not have to an employee of the union. He or she does not have to be paid, and may be a volunteer. *Georgetown Dress, supra,* 537 F.2d at 1244. The union also does not need to have given an individual a title for him or her to be an "agent." *NLRB v. Kentucky Tennessee Clay, supra,* 295 F.3d at 444.

Under the circumstances here, the employee who threatened Driver #1 qualified as an apparent agent. During the gathering of union cards for a showing of interest, and through the campaign, the union had no access to Jacmar's premises. Its only access, then, would have been through employees acting as its agents. The employees in question were involved in soliciting

union cards – or, more accurately, in coercing employees to sign them. Drivers complained to Jacmar Esteban Ochoa and Carlos Garcia (who solicited and threatened Driver #1) were "very aggressive," to say the least, in soliciting union cards. *See* Ventura Aff., pp. 2:6-13, 3:9-17, 4:10-11; Ventura Supp. Aff., pp. 1:6-2:20.[7]

Carlos Garcia repeatedly asked Driver #1 to sign a union card. Driver #1 refused. Eventually, in April 2016, Garcia told Driver #1 that he could sign, or Garcia would tell Driver #1's supervisor that he was not a good worker, causing Driver #1 not to pass his probationary period and lose his job. Driver #1 signed, because he "was afraid of losing my job" and "felt threatened." *See* Driver #1 Decl., ¶¶3-5.

More incidents show these employees acting as union agents. Ochoa served as the union's observer at the election. *See* Ventura Decl., ¶ 7. During the campaign, Ochoa posted two posters supporting the Union in the driver's room, next to the two Board-required notices of the election that Jacmar posted. (Jacmar found identical posters around its property at the same time.) *Id.*, ¶¶3-10; Ventura Aff., pp. 5:22-6:17. Ochoa's postings were of a Teamsters poster, announcing that "We've Filed for our Election!" and "We're One Step Closer to Becoming Teamsters!" Ventura Decl., ¶10, Exh. A. At the same time, someone placed pro-union stickers on employees' cars. *Id.*, ¶18; Ventura Aff., p. 5:15-19.

Again, the union and its officials had no access to Jacmar's property. Without such access, Jacmar employees must have committed these acts on behalf of the Union – as video showed Ochoa posting in the drivers' room. These actions – following the active and coercion solicitation of union cards by the same individuals – at least strongly indicate that these Union supporters acted

[7] This citation is to Gonzalo Ventura's affidavit, which he gave to the Board through the Field Attorney on June 21, 2016, in Case No. 21-CB-177879. The Acting Regional Director had this affidavit in considering Jacmar's objections. The citation to Ventura's Supplemental Affidavit is to the affidavit from his further July 6, 2016 interview with Region 21's Field Attorney, which Region 21 also had.

as either authorized or apparent agents of the union.

Thus, on all of this evidence, including the evidence from Jacmar and what the Acting Regional Director otherwise had, demonstrates that his determination of "no evidence" supporting Union agency or that the threat would be understood to be real is clearly erroneous. To the contrary, all of the evidence supports Jacmar's objection.

Finally, the Acting Regional Director made unsupported determinations that clearly were erroneous (and even irrelevant in this case) in dismissing Objection No. 1. He asserted the threat to Driver #1 was too distant in time at a month before the petition, there a "lack of evidence that other employees who were on their probationary periods were told similar statements," and "the absence of a bargaining history" between Jacmar and the Union. Report, p. 4. The one-month period is not too remote, *NLRB v. L & J Equipment Co., Inc.*, 745 F.2d 224, 236-238 (3d Cir. 1984), especially when pre-petition coercion in gathering authorizations easily can carry over to the actual election. *Savair, supra,* 414 U.S. at 277-278. The Acting Regional Director made an unsupported assumption that there may have been other employees on probationary periods at the time and, if so, whether they ever may have been solicited. That point is an irrelevant and unsupported assumption. The absence of a bargaining history between Jacmar and the Union also is beside the point where, as here, the whole issue is an election to decide union representation in the first instance.

Accordingly, for all of these reasons, the Acting Regional Director's factual findings in dismissing Objection No. 1 were clearly erroneous or unsupported.

2. Objection Nos. 2 and 3.

Objection Nos. 2 and 3 involved unauthorized stickers on employee vehicles and pro-Union postings, respectively. The Acting Regional Director's factual findings also were clearly erroneous in rejecting these objections.

First, with respect to Objection No. 2, the Acting Regional Director did not make a direct factual finding. He simply stated that it did "not interfere with coercing employee free choice." Report, p. 4. This statement is nonsensical, as the issue was whether there was interference with employee free choice, or if coercion happened. Whatever the conclusion, or any implied factual finding that there was no violation of employees' rights, the Acting Regional Director's finding is clearly erroneous here. Placing an unwanted sticker supporting the Union on an employee's personal vehicle is a personal violation. It sends a coercive and intimidating message – especially in light of aggressive solicitation of union cards – that an employee better support the Union, or else.

With respect to Objection No. 3, the Acting Regional Director dismissed it because the posters "did not contain any threats to employees." *Id.* This finding is clearly erroneous, as it looks at the evidence too literally and not as a whole. Although the posters may not have contained any express threat, they again were coercive and intimidating when viewed in context. Against a backdrop of aggressive solicitation and other threats, the posters reasonably could be viewed as menacing and aimed at intimidating employees into feeling they were surrounded and had no choice but to vote for the Union. In particular here, one poster was placed directly next to the neutral and Board-required notice announcing the election. That placement sends a clear message that the process is not neutral and that employees had no choice, except to support the Union. Undoubtedly, then, employees would have no free choice, and any finding to the contrary is clearly erroneous.

Accordingly, the Acting Regional Director's factual findings on these objections were clearly erroneous as well.

3. Objection No. 4.

Finally, the Acting Regional Director overruled Jacmar's objections to the Board agent's conduct of the election. As discussed above, the Board's agent conducted the election in a manner that lacked steps to assure confidence that there was a valid election result. In particular, the Board agent's manner evidenced favoritism and bias in favor of the Union. The Acting Regional Director dismissed Jacmar's objections, claiming that the agent followed "standard procedure." Report, p. 5. While not addressing the Board agent behaved as claimed in counting and announcing the votes, the Acting Regional Director summarily found those points "[did] not affect the laboratory conditions or affect the integrity of the election process." Report, p. 6. These determinations also were clearly erroneous.

The Acting Regional Director's determinations fail to address at all Jacmar's objection that the Board agent never failed to determine how many employees would be eligible to vote, much less that she did not use a voter list. Instead, he simply found that allowing observers to check employee names is "standard procedure." *Id.*, p. 5. To the contrary, however, standard procedure obligates an agent to determine at the outset how many employees may be eligible and who they are. Relying on observers alone is not standard procedure or adequate protection of the integrity of the process.

The finding that the Board agent's undisputed manner in conducting the election – including her statements – did not affect the laboratory conditions or the integrity of the process also is clearly erroneous. Alone, these statements undermined confidence in the fairness of the process and reliability of the result. Specifically, the agent's instructions – which emphasized voting "yes" – likely indicated to employees that they should vote that way. On top of the other coercion and intimidation by the Union and its agents, the Board agent's conduct would have affected the laboratory conditions further and undermined the integrity of the process even more.

The factual findings to the contrary were clearly erroneous, especially in light of all of the evidence as a whole.

Accordingly, with respect to Objection No. 4, the Acting Regional Director's factual findings were clearly erroneous. His dismissal of this objection also was error.

C. The Acting Regional Director Improperly Denied a Hearing.

The Acting Regional Director improperly denied a hearing in this case. Here, Jacmar raised substantial and material issues, with ample support. The Acting Regional Director still denied a hearing. His Report erroneously claimed that Jacmar relied on "bare assertions." Report, p. 6 fn. 2. He is wrong.

Jacmar's objections are not merely bare or supported assertions. To the contrary, Jacmar submitted declarations along with its Offer of Proof. Even more and as discussed above, as part of matters related to this election, Region 21 obtained affidavits that further support Jacmar's objections. The Acting Regional Director should not – and cannot ignore – that evidence. It shows that further evidence likely would be developed in a hearing, especially with employees otherwise afraid to testify in an atmosphere with intimidating conduct by the Union and its agents. Accordingly, on the information that Jacmar submitted and on the evidence before Region 21 as a whole, the Acting Regional Director erroneously denied a hearing.

V. Conclusion

For all of the these reasons, Jacmar respectfully requests that the Board grant review in this case or, alternatively, remand the matter to Region 21 for a hearing on Jacmar's objections.

With respect to Objection No. 4, the Acting Regional Director found nothing wrong with the Board agent's conduct of the election. He determined "there is no evidence that the Board agent's action deviated from normal Board processes during elections or that her conduct in any way affected the integrity of the process." Id. He attributed to "standard procedure" the agent having more ballots

than voters and in allowing "observers to check the names of employee who had come to vote." Id. The Acting Director Regional further held that Board agent properly handled an extra ballot given to a voter – and later found in the ballot box – by placing it in a challenged ballot envelope. Id., pp. 506. Without denying that the Board agent's comments and manner may have favored the Union, he dismissed those parts of Jacmar's objection by concluding summarily that they "[did] not affect the laboratory conditions or affect the integrity of the election process." Id., p. 6.

Dated: October 11, 2016 ARENT FOX, LLP

By:

/s/
Robert K. Carrol
Paul R. Lynd
Counsel for Employer Jacmar Food
Service Distribution

ATTACHMENT NO. 1

UNITED STATES OF AMERICA
NATIONAL LABOR REVIEW BOARD

BEFORE THE REGIONAL DIRECTOR, REGION 21

JACMAR FOOD SERVICE DISTRIBUTION, Employer, and **FOOD INDUSTRIAL & BEVERAGE WAREHOUSE DRIVERS AND CLERICAL EMPLOYEES, TEAMSTER LOCAL 630, INTERNATIONAL BROTHERHOOD OF TEAMSTERS** Petitioner.	Case No. 21-RC-175833

JACMAR FOOD SERVICE DISTRIBUTION'S OBJECTIONS TO THE CONDUCT OF THE REPRESENTATION ELECTION ON MAY 26, 2016 OR TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION

Pursuant to 29 C.F.R. section 102.69(a), Jacmar Food Distribution makes the following objections to the conduct of the election on May 26, 2016, or to conduct affecting the results of the election.

Objection No. 1:

Threats, coercion, or intimidation by the union, its agents, or supporters interfering, and tending to interfere, with free choice related to the election in forcing employees to sign union authorization cards (and support the Union during the critical period which irretrievably compromised the laboratory conditions requisite for a free and fair election: Before the election, a driver who either was an actual or *de facto* union agent or a union

supporter, repeatedly pressured another driver to sign a union authorization card to either obtain an election or union recognition. On the third occasion, the employee was threatened that he had "two choices," with one being to sign, or he could continue to refuse and have his supervisor told that "you are not a good worker so you will not pass probation." The driver then signed the union card involuntarily, because he felt his job was threatened. He had a reasonable belief that the other driver had the ability to carry out the threat and end his employment in the probationary period. In another instance, at least one other driver who signed a union authorization card when asked, but also did not do so voluntarily. That driver felt that he had to do so to be part of the group of drivers. This misconduct reasonably tended to interfere with employees' free choice, by creating an atmosphere of confusion and fear of reprisals.

Objection No. 2:

Coercion and intimidation by the union, its agents, representatives or supporters tending to interfere with free choice in the election by placing pro-union sticker on an employee's vehicle without his knowledge or consent which irretrievably compromised the laboratory conditions requisite for a valid election: Following the petition, and before the election, at least one driver who was a member of the proposed bargaining unit had a pro-union sticker urging a "yes" vote placed on his car without his knowledge or consent. This action, which would have been by the union, its agents, or representatives/supporters, served to intimidate the employee. It also reasonably tended to interfere with free choice, by creating an atmosphere of confusion and reprisals.

Objection No. 3:

Repeated violation by the union, its agents, or supporters of Jacmar's policies by posting eight pro-union posters on Jacmar property, including next to the Board's required

notice of the election in violation of the Company's valid "no solicitation, no distribution" policy and irretrievably compromised the laboratory conditions requisite for a valid election: Following the petition and before the election, the union, its agents, or supporters placed eight pro-union posters at various locations on Jacmar's property. Two of the locations were in the drivers' room and next to the time clock, both places where Jacmar placed the Board's required notice of the election. The poster on the wall of the drivers' room, next to the required election notice, was placed by a driver who also served as the union's observer for the election. This misconduct was in violation of Jacmar's neutral, well-established, and consistently-applied policies concerning posting, distribution of materials, and solicitation. These postings also served to create an atmosphere of intimidation and confusion, especially with the placement of pro-union posters next to the Board's required election announcement, undermining employees' free choice.

Objection No. 4:

The Board Agent's actions during the election process, including, but not limited to, giving two ballots to at least one employee and her handling of that issue, demonstrated a lack of impartiality and a favoring of the union in the election, with the Agent's actions raising a reasonable doubt concerning the fairness and validity of the election and irretrievably compromising the laboratory conditions requisite for a valid election: In several respects, the Board Agent's conduct during the election process demonstrated a bias in favor of the union. The particular instances are: (1) the Board Agent failed to use a voter list or figure out how many employees were in the unit or could vote, instead saying she would see who came to vote; (2) the Board Agent gave at least one voting employee two ballots, a problem not discovered until two ballots were found folded together during the counting. One ballot was

marked, while the other was blank. Although Jacmar objected to both ballots, the Board Agent counted the "yes" vote and discarded the blank ballot in the "challenged" pile; (3) the Board Agent improperly interfered with employees' free choice by showing every voting employee a blank ballot and explaining how to vote "yes" in a manner that seemed to favor that side; (4) in counting the ballots, the Board Agent smiled and enthusiastically announced "yes!" when she counted a "yes" vote, but simply read "no" when she counted with a subdued and negative vote, as if dismissing those votes; (5) the Board Agent counted the "no" votes three times, but then only counted the "yes" votes twice. She finally, but reluctantly, counted the "yes" votes a third time; and (6) after counting the votes, the Board Agent inappropriately commented "Now that we have the fun part over with," referring to the voting and, again, showing favoritism toward the union. All of this conduct demonstrated partiality, raising a reasonable doubt about the fairness and partiality of the election.

Separately, as well as together, those issues undermined the Board's well-established goal to conduct elections "in a laboratory under conditions as nearly ideal as possible to determine the uninhibited desires of employees." *Sewell Manufacturing Co.*, 138 NLRB 66, 70 (1962). The critical time period includes not only the election or the time after a petition, but also extends to pre-petition conduct in connection with the union's attempt to develop a showing of interest. *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004); *Consolidated Foods Co.*, 234 NLRB 178 (1978).

Jacmar also notes that this election involved a small unit. Even though the Board Agent failed to bother to determine how many employees were involved, the voter list had only 29 employees. Three of them had left employment before the election, leaving 26 employees. Twenty-four votes were cast, for a final vote of 15-9 among the counted votes, with one

challenged ballot and the disputed blank ballot. In such a small unit, these issues raised in these objections are magnified. *Arthur Briggs, Inc.*, 265 NLRB 299, 311 (1982).

Accordingly, the results of the May 26, 2016 election should not be certified.

Respectfully submitted,

Date: June 2, 2016

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Counsel for Employer

CERTIFICATE OF SERVICE

I certify that the foregoing JACMAR FOOD SERVICE DISTRIBUTION'S OBJECTIONS TO THE CONDUCT OF THE REPRESENTATION ELECTION ON MAY 26, 2016 OR TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION was served this **2nd day of June, 2016**, by electronic mail and First-Class mail on:

(Via Email and U.S. Mail) Renée Q. Sánchez, Esq. WOHLNER KAPLON CUTLER HALFORD & ROSENFELD 16501 Ventura Blvd., Suite 304 Encino, CA 91436-2067 Email: rsanchez@wkclegal.com	*Counsel for Petitioner*
(Via U.S. Mail only) FOOD, INDUSTRIAL & BEVERAGE WAREHOUSE DRIVERS AND CLERICAL EMPLOYEES, TEAMSTERS LOCAL 630, INTERNATIONAL BROTHERHOOD OF TEAMSTERS 750 Stanford Avenue Los Angeles, CA 90021-1416	*Petitioner*

Date: June 2, 2016

Christine Coopey

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Confirmation Number: 1000075572
Date Submitted: 6/2/2016 6:14:12 PM (GMT-08:00) Pacific Time (US & Canada)

Case Number: 21-RC-175833
Case Name: JACMAR FOOD SERVICE DISTRIBUTION
Filing Party: Employer
Submitted E-File To Office: Region 21, Los Angeles, California

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Attached E-File(s):
Objections to an Election Jacmar - Objections.pdf

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ATTACHMENT NO. 2

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

JACMAR FOOD SERVICE DISTRIBUTION

Employer

and **Case 21-RC-175833**

FOOD, INDUSTRIAL & BEVERAGE WAREHOUSE, DRIVERS AND CLERICAL EMPLOYEES, TEAMSTERS LOCAL 630, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Petitioner

REPORT ON OBJECTIONS AND CERTIFICATION OF REPRESENTATIVE

Based on a petition filed on May 9, 2016 and pursuant to a Stipulated Election Agreement, an election was conducted on May 26, 2016 to determine whether a unit of employees of Jacmar Foodservice Distribution (Employer) wished to be represented for purposes of collective bargaining by the Food, Industrial & Beverage Warehouse, Drivers and Clerical Employees, Teamsters Local 630, International Brotherhood of Teamsters (Petitioner or Union). That voting unit consists of:

Included: All full-time and regular part-time delivery drivers employed by the Employer at its facility currently located at 300 Baldwin Park Boulevard, City of Industry, CA 91746.

Excluded: All other employees, warehouse employees, employees employed by an employment agency, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined by the Act.

At the conclusion of the election, the ballots were counted and a tally of ballots was provided to the parties. The tally of ballots shows that of the approximately 30 eligible voters in the unit, 15 votes were cast for and 9 votes were cast against representation. There was one non-

determinative challenged ballot and one void ballot. Thus, a majority of the valid ballots were cast in favor of representation by the Petitioner.

THE OBJECTIONS

On June 2, 2016, the Employer filed timely objections to the conduct of the Petitioner and the Board agent prior to and on the same day as the election. A copy of the objections is attached to this Report.

Objection Nos. 1, 2, and 3

The Employer's objections concerning the Petitioner's conduct assert the following:

1. Threats, coercion, or intimidation by the Union, its agents and supporters interfering with employee free choice in forcing employees to sign union authorization cards.
2. Coercion and intimidation by the Union, its agents, and supporters, by placing a pro-Union sticker on an employee's vehicle without his knowledge or consent.
3. Repeated violation by the Union, its agents, and supporters by posting pro-Union posters on Employer property, in violation of the Employer's no-solicitation/no-distribution policy.

In support of these Objections,[1] the Employer proffered documentary evidence and prepared declarations for three of its four offered witnesses, who can testify as to the following:

- Prior to the filing of the petition on May 9, 2016, an employee-driver coerced another employee-driver into signing a union authorization card by threatening that employee-driver's job. Specifically, the employee-driver in question stated that if the other driver did not sign the card, the employee-driver would inform the driver's supervisor that he was not a good worker, so that he would not pass his probationary period and would be fired. As a result of this threat, the driver signed the authorization card.
- Another employee-driver feels that he did not sign his union authorization card voluntarily. He felt that he had to do so in order to be part of the group of drivers, and so signed a card when another employee-driver asked him to do so.
- At least one employee-driver found a sticker supporting the Petitioner had been placed on his car without his knowledge or permission.

[1] The Employer also filed a charge against the Petitioner, Case 21-CB-177879, on June 7, 2016. The allegations in the charge include Objection Nos. 1 and 2 listed above. In addition, the Charge alleges that the Union, by its agents and supporters: 1) has attempted to cause the Employer to discriminate against employees because of their exercise of their rights and views; and 2) after the election, in May and June 2016, has persisted in threatening and intimidating employees, including potential witnesses, including threatening trouble if an employee did not go along with what the Petitioner and its supporters want and swearing at him, and questioning him about his right to speak with management. On July 29, 2016, the Region dismissed the charge in Case 21-CB-177879, which dismissal is currently on appeal. This Report on Objections is based on the evidence proffered by the Employer in Case 21-RC-175833, in its Offer of Proof, dated June 2, 2016.

- An employee-driver and supporter of the Petitioner improperly posted eight pro-union posters on the Employer's property, including two pro-union posters next to the Board's notices, in violation of the Employer's policies on postings, distribution of written materials, and no-solicitation. The Employer immediately removed each of these posters. The Employer has proffered a copy of one of the posters.

The Employer contends that the above-conduct by the Petitioner and its alleged agents interfered with employees' free choice, raising a reasonable doubt concerning the fairness and validity of the election, and compromising the laboratory conditions requisite for a valid election, and, therefore, the election must be set aside.

Analysis

It is well settled that "[r]epresentation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Therefore, "the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one." *Delta Brands, Inc.*, 344 NLRB 252, 253, (2005), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). To prevail, the objecting party must establish facts raising a "reasonable doubt as to the fairness and validity of the election." *Patient Care of Pennsylvania*, 360 NLRB No. 76 (2014), citing *Polymers, Inc.*, 174 NLRB 282, 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970). Moreover, to meet its burden the objecting party must show that the conduct in question affected employees in the voting unit. *Avante at Boca Raton*, 323 NLRB 555, 560 (1997) (overruling employer's objection where no evidence that unit employees knew of the alleged coercive incident).

In determining whether to set aside an election, the Board applies an objective test. The test is whether the conduct of a party has "the tendency to interfere with employees' freedom of choice." *Cambridge Tool Pearson Education, Inc.*, 316 NLRB 716 (1995). In determining whether a party's misconduct has the tendency to interfere with employees' freedom of choice, the Board considers, among other factors, the number of incidents; the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; the number of employees in the bargaining unit subjected to the misconduct; the proximity of the misconduct to the election; the closeness of the final vote; and the degree to which the misconduct can be attributed to the party. See, e.g., *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986). Thus, under the Board's test the issue is not whether a party's conduct in fact coerced employees, but whether the party's misconduct reasonably tended to interfere with the employees' free and uncoerced choice in the election. *Baja's Place*, 268 NLRB 868 (1984). See also, *Pearson Education, Inc.*, 336 NLRB 979, 983 (2001), citing *Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970). Regarding third party conduct, the Board will not set aside an election based on third-party threats unless the objecting party proves that the conduct was "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." See *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). In *PPG Industries*, 350 NLRB 225 (2007), the Board repeated the standards for assessing the nature of third-party conduct, which it set in *Westwood Horizons Hotel*:

> In assessing the seriousness of such threats, the Board considers (1) the nature of the threat itself; (2) whether the threat encompassed the entire bargaining unit; (3) whether reports of the threat were widely disseminated within the unit; (4) whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and (5) whether the threat was "rejuvenated" at or near the time of the election.

Additionally, the Board has held that threats made prior to the filing of a petition should not be the basis for setting aside an election. *The Ideal Electric and Manufacturing Company*, 134 NLRB 1275 (1987). However, the Board has set aside an election where employees were threatened with job loss if they did not join a petitioner when it considered the context of the threats and the bargaining history between the employer and union in question. *Lyon's Restaurants*, 234 NLRB 178, fn. 6 (1978). In that case, the threat was made to employees by a shop steward concerning dues membership fees, in the context of an existing bargaining relationship between the petitioner and the employer; the employees in that case were signing cards to pay union membership fees. *Id.* at 178. The Board has distinguished these situations from "an isolated solicitation of an authorization card intended to demonstrate an adequate showing of interest," where it has overruled a party's objection. *Pacific Coast M.S. Industries Co., Ltd.*, 355 NLRB 1422, 1443.

Concerning the employee who felt forced to sign an authorization card because of a threat to his job by another driver, the alleged conduct occurring before the filing of the petition is distinguishable from the context described in *Lyon's Restaurants, supra*. The alleged threat here is an isolated remark made by an employee-driver who does not appear to be either a representative of the Petitioner or the Employer. There is no evidence that the employee-driver was capable of carrying it out the alleged threat. The conversation occurred over 1 month before the petition was filed and almost 2 months before the election itself. Given that the statement was made well before the Union election, the lack of evidence that other employees who were on their probationary periods were told similar statements, and the absence of a bargaining history between the Employer and the Petitioner, the statements made to the employee-driver do not appear enough to sway the outcome of an election which was not close. Moreover, the incident does not meet the standards set in *Westwood Horizons Hotel*, supra.

Concerning the employee-driver who signed an authorization card in order to fit in, there is no specific conduct described other than the fact that he was asked by his employees to sign a card. It should be noted that he later acted as an observer for the Employer, regardless of his fear of not appearing to be in support of the Petitioner.

Concerning the union stickers and posting of Union posters, I find that these actions do not interfere with coercing employee free choice, especially given the fact that the Employer immediately removed the Union posters. Further, the posters that were posted did not contain any threats to employees if they did not vote for the Petitioner.

The evidence proffered by the Employer fails to establish that the Petitioner's conduct interfered with employees' freedom of choice. Concerning whether conduct by the Petitioner or

any party prior to the election taking place affected the outcome of the election, the alleged conduct would not have done so. Moreover, the evidence proffered by the Employer does not establish that any third party reasonably tended to interfere with the employees' free and uncoerced choice in the election.

Accordingly, I am overruling Objection Nos. 1, 2, and 3 in their entirety.

Objection No. 4

In Objection No. 4, the Employer contends that the Board agent conducting the election gave two ballots to one voter and demonstrated a lack of impartiality in favor of the Union.

In support of Objection No. 4, the Employer proffered prepared declarations for two of its four offered witnesses, who can testify as to the following:

- One witness speculates that during the election, the Board agent did not know how many employees were in the unit or could vote, and as a result, had more ballots than were necessary. Further, she did not use the voter list; the observers for the Employer and the Union instead checked names off the voter list when unit employees came to vote. When the Board agent gave employees their ballot, she would explain how to mark a "yes" vote or a "no" vote, and would seem to use a more favorable tone referencing a "yes" vote.
- The other witness contends that during the ballot count, the Board agent appeared to announce "yes" votes more enthusiastically than she when she announced "no" votes, and at the conclusion of the count, counted the "no" votes three times while initially only counting the "yes" votes twice, before voluntarily counting the "yes" votes a third time. Just before preparing the tally of ballots form, the Board agent allegedly said, "Now that we have the fun part over with. Well maybe not the fun part."
- Both witnesses contend that during the ballot count, the Board agent showed the parties two ballots that were folded together; it appeared that two ballots had been given to one employee. One of the ballots was blank, and the other ballot was marked "yes." The Employer's attorney objected to both ballots as void. One witness contends that the Board agent was openly annoyed and dismissive of the objection, but placed the blank ballot in a challenged ballot envelope. The Board agent counted the ballot marked "yes" as a "yes" vote.

Analysis

Even if the Employer's proffered testimony was found to be fact, there is no evidence that the Board agent's actions deviated from normal Board processes during elections or that her conduct in any way affected the integrity of the process. The fact that she had more ballots than voters or that she allowed observers to check the names of employees who had come to vote is standard procedure. The Employer contends that the Board agent's failure to set aside a ballot with no evidence of identifying marks but with a clear vote raises doubt as to the fairness and validity of the process because it was folded with a blank ballot. However, the Board agent did not count the blank ballot, and did place it in a challenged ballot envelope. Further, even if it

was concluded that the Board agent should have set aside the ballot with the marked choice, one "yes" vote would not affect the outcome of the election. Finally, the way in which the Board agent announced the votes and counted them does not affect laboratory conditions or affect the integrity of the election process.

Accordingly, I am overruling Objection No. 4 in its entirety.

CONCLUSION

The Employer failed to raise any material and substantial issue of fact that would warrant a hearing, much less necessitate setting aside the election results.[2] Accordingly, for the reasons set forth above, I hereby overrule the Employer's Objections in their entirety, and find that that the following Certification of Representative should issue.

CERTIFICATION OF REPRESENTATIVE

It is CERTIFIED that a majority of the valid ballots has been cast for Food, Industrial & Beverage Warehouse, Drivers and Clerical Employees, Teamsters Local 630, International Brotherhood of Teamsters, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

Included: All full-time and regular part-time delivery drivers employed by the Employer at its facility currently located at 300 Baldwin Park Boulevard, City of Industry, CA 91746.

Excluded: All other employees, warehouse employees, employees employed by an employment agency, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined by the Act.

REQUEST FOR REVIEW

Pursuant to Section 102.69(c)(1)(i) and (2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision. The request for review must conform to the requirements of Section 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by **October 11, 2016**. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

---

[2] The Board has maintained that a hearing on objections is held only when there are substantial and material issues of fact. *Care Enterprises, Inc.*, 306 NLRB 491 (1992). Accordingly, a party raising objections cannot rely on bare assertions to raise an issue requiring a hearing. An objecting party has the duty of furnishing evidence or description of evidence that, if credited at a hearing, would warrant setting aside the election. *Builders Insulation, Inc.*, 338 NLRB 793 (2003); *The Daily Grind*, 337 NLRB 655 (2002) (unsupported allegations are insufficient to trigger administrative investigations); *Heartland of Martinsburg*, 313 NLRB 655 (1994); *Holladay Corp.*, 266 NLRB 621 (1983). *See* NLRB Casehandling Manual (Part Two) Representation Proceedings (CHM), Section 11392.6.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: September 26, 2016

William M. Pate

William M. Pate
Acting Regional Director
National Labor Relations Board, Region 21
888 South Figueroa Street, 9th Floor
Los Angeles, CA 90017

CERTIFICATE OF SERVICE

I certify that the foregoing:

Request for Review of Acting Regional Director's Report on Objections and Certification of Representative Dated September 26, 2016

was served this 11th day of October, 2016 by email and/or U.S. Mail on:

(Via Email and U.S. Mail) Renée Q. Sanchez, Esq. *WOHLNER KAPLON CUTLER HALFORD & ROSENFELD* 16501 Ventura Blvd., Suite 304 Encino, CA 91436-2067 Email: rsanchez@wkclegal.com	Counsel for Petitioner
(Via U.S. Mail) William M. Pate Acting Regional Director NLRB Region 21 888 South Figueroa Street, 9th Floor Los Angeles, CA 90017	

Dated: October 11, 2016

Michael Flanagan