

**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)

REPLY BRIEF FOR PETITIONER THESIS PAINTING, INC.

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. Contrary To The Board’s Brief, The Board Unlawfully Departed From Precedent In Failing To Find That Former Employee Adan Guzman Was An Agent Of The Union.....	2
II. In Light Of The Board’s Failure To Contest The Impropriety Of Guzman’s Conduct If He Was An Agent Of The Union, As He In Fact Was, The Board’s Order Must Denied Enforcement And The Election Must Be Set Aside.....	6
III. Contrary To The Board’s Brief, Undisputed Agent Raymundo’s Election Day Conduct Required The Election To Be Set Aside.....	8
CONCLUSION	10
CERTIFICATE OF COMPLIANCE WITH RULE 32.....	11
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Bellagio LLC</i> , 359 NLRB No. 128 (2013)	2
<i>Bio-Medical of Puerto Rico</i> , 269 NLRB 827 (1984)	2
<i>Boston Insulated Wire & Cable Co.</i> , 259 NLRB 1118 (1982) <i>enf'd.</i> , 703 F. 2d 876 (5th Cir. 1983)	7
<i>Cone Mills Corp. v. NLRB</i> , 413 F.2d 445, 553 (4th Cir. 1969).....	5
<i>Cornell Forge Co.</i> , 339 NLRB 733 (2003)	5
<i>Detroit East, Inc.</i> , 349 NLRB 935 (2007)	8
<i>Electric Hose and Rubber Co.</i> , 262 NLRB 186 (1982)	9
<i>Milchem, Inc.</i> , 170 NLRB 362 (1968)	1, 7
<i>Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29, 50 (1983).....	5
<i>Nathan Katz Realty v. NLRB</i> , 251 F.3d 981 (D.C. Cir. 2001).....	1, 7, 9
<i>NLRB v. Georgetown Dress Corp.</i> , 537 F.2d 1239 (4th Cir. 1976)	1, 2
<i>NLRB v. Kentucky Tennessee Clay Co.</i> , 295 F.3d 436 (4th Cir. 2002)	1, 2
<i>NLRB v. L & J Equip. Co.</i> , 745 F.2d 224 (3d Cir. 1984)	2

<i>NLRB v. Urban Tel. Corp.</i> , 499 F.2d 239 (7th Cir. 1974)	2
<i>Pan-Oston Co.</i> , 336 NLRB 305 (2001)	2
<i>Performance Measurements Co.</i> , 148 NLRB 1657	9
STATUTES	
29 U.S.C. § 160(e)	4

SUMMARY OF ARGUMENT

The Board's Brief fails to justify the agency's departure from precedent on the question of Mr. Guzman's agency status. Under settled principles of common law, Board law, and Circuit law, the Union vested Guzman with apparent authority to speak on the Union's behalf. The largely undisputed evidence here is even more direct than the cases on which Petitioner has relied, and the Board's Brief fails to distinguish such Circuit precedent as *NLRB v. Kentucky Tennessee Clay Co.*, 295 F.3d 436 (4th Cir. 2002); and *NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239, 1242 (4th Cir. 1976).

As Petitioner has previously argued, 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. The Board's Brief does not contest that the election should be set aside if Guzman is found to be a Union agent, and that is the proper result here. *See Milchem, Inc.*, 170 NLRB 362 (1968), *Nathan Katz Realty v. NLRB*, 251 F.3d 981 (D.C. Cir. 2001), and related cases discussed in Petitioner's opening brief.

The Board's Brief also fails to justify the Board's holding that Union agent Raymundo did not engage in unlawful electioneering or surveillance during the election. The Board's Order should be denied enforcement on this additional ground.

ARGUMENT

I. CONTRARY TO THE BOARD'S BRIEF, THE BOARD UNLAWFULLY DEPARTED FROM PRECEDENT IN FAILING TO FIND THAT FORMER EMPLOYEE ADAN GUZMAN WAS AN AGENT OF THE UNION.

As explained in Petitioner's opening brief, both the Board and this Court have previously held that common law principles of agency compel a finding of apparent authority where a union has given employees reason to believe that an individual is authorized to speak on the union's behalf. *NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239, 1244 (4th Cir. 1976) (volunteer members of an in-plant organizing committee found to be union agents based on apparent authority vested in them by the Union); *Ky. Tenn. Clay Co. v. NLRB*, 295 F.3d 436, 444 (4th Cir. 2002) (union supporters found to be agents given apparent authority); *see also 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); *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).

In response, the Board's brief attempts to distinguish these cases from the present facts, and in doing so misstates the record. Contrary to the Board's brief, the facts here compel a finding of agency status on the basis of apparent authority,

in light of the admitted actions of the Union vesting such authority in non-employee Guzman.

The Board's Brief, like the Regional Director's ruling, incorrectly characterizes the evidence as showing only that Union organizer Baiza "asked Guzman to accompany him for the purpose of 'getting employees to open the door and listen to [Baiza].'" (Board Br. at 18). 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. By holding Guzman out in this manner as a spokesperson, the Union clearly clothed Guzman with apparent authority to speak for the Union.¹

The Board Brief further errs in claiming that the Company "presented no further evidence" to suggest that the Union held Guzman out as an organizer (Board Br. at 19). The Board Brief ignores the testimony of employee Jose Carranza Arias, who testified that Guzman was known to "work for the union." (JA 50-51). Employee Nelson Caceres further testified that Jose Viera reported

¹ The Board's Brief further attempts to limit the above cited case law finding agency status to large facilities and employee "committees." (Board Br. at 21-22). No such limitation would be appropriate, nor does the common law discriminate against small employers such as the Petitioner here by creating a different agency standard.

that Guzman solicited his authorization card on behalf of the Union and encouraged him to vote for the Union, all within the presence of the chief Union organizer, and at the Union's invitation (JA 25-27, 32, 41-42). This testimony of Guzman's former co-workers, combined with the admissions made by Union organizer Baiza himself, amply establish Guzman's apparent authority to speak for the Union as its agent. In any event, that is exactly how Guzman was perceived by employees Caceres, Arias, and Viera – as a union organizer speaking at the behest of the Union and on the Union's behalf.

The Board Brief incorrectly claims that the Company has injected a “new suggestion that Guzman's presence at the election [as a former employee] also shows his agency status.” (Board Br. at 20). To the contrary, the Petitioner made the same argument in both its Request for Review submitted to the Board on November 16, 2015 (JA 202) and in its Response to Notice to Show Cause filed with the Board on June 8, 2016. (JA 236) (“[I]t is quite significant in the present case [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.”). Thus, the Board's claim that Petitioner's contention in this regard is somehow barred by Section 10(e) of the Act is completely without merit.

In further attempting to defend the Regional Director's mischaracterization of the Board's previous holding in *Cornell Forge Co.*, 339 NLRB 733 (2003), the Board itself impermissibly raises a new contention that appears nowhere in the Regional Director or Board decisions under review. Specifically, the Board now claims for the first time that Mr. Guzman's status as a non-employee was beyond the scope of Petitioner's objections. (Board Br. at 26). It is well settled that the General Counsel is not entitled to rely in this Court on *post hoc* rationalizations not advanced by the Board itself in ruling against the Petitioner. *Cone Mills Corp. v. NLRB*, 413 F.2d 445, 553 (4th Cir. 1969) ("[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action and an agency's discretionary order will be upheld, if at all, on the same bases articulated in the order by the agency itself."); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action.").

The Board's Brief also fails to rehabilitate the Regional Director's failure to adequately address the agency standard described by the Board in the cases cited by Petitioner, 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.

II. IN LIGHT OF THE BOARD'S FAILURE TO CONTEST THE IMPROPRIETY OF GUZMAN'S CONDUCT IF HE WAS AN AGENT OF THE UNION, AS HE IN FACT WAS, THE BOARD'S ORDER MUST DENIED ENFORCEMENT AND THE ELECTION MUST BE SET ASIDE

The Board's Brief does not contest Petitioner's assertion that if Guzman is found to be an agent of the Union then the Board's order must be denied enforcement, because Guzman clearly engaged in electioneering and surveillance that was unlawful for a union agent. No doubt the Board's Brief does not contest this point because the Board itself did not contest the issue in its decision. Instead, the Board relied entirely on the erroneous finding that Guzman was not the Union's agent. It is plain therefore that the illegality of the election must be deemed to be conceded for purposes of this appeal, if Petitioner's argument prevails as to Guzman's agency status (as it should under the longstanding precedents cited above).

In any event, upon a finding that Guzman was an agent of the Union on the basis of apparent authority, for the reasons set forth above and in Petitioner's

opening brief, the Board's order must be denied enforcement and the election must be set aside. As explained in Petitioner's opening brief, 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.*). Such conduct by a union agent clearly violated the no electioneering and no surveillance requirements of *Milchem* 170 NLRB 362 (1968); *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118 (1982) *enf'd.*, 703 F.2d 876 (5th Cir. 1983); and *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 991-93 (D.C. Cir. 2001), and related cases cited in Petitioner's opening brief.

III. CONTRARY TO THE BOARD'S BRIEF, UNDISPUTED AGENT RAYMUNDO'S ELECTION DAY CONDUCT REQUIRED THE ELECTION TO BE SET ASIDE.

The Board's Brief also concedes that the Regional Director erred in failing to find that non-employee Raymundo was also a union agent. (Board Br. at 9). 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.").

Contrary to the Board's Brief, 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 by an admitted union agent, both inside and in proximity to the polls, that required the election to be set aside. The cases relied on by the Board only addressed electioneering by co-workers who

were designated as union observers (Board Br. at 28-29), not the present circumstance in which the observer was a non-employee union agent.

In addition, it is also significant that the Board's Brief does not reconcile the Board's allowing a non-employee union agent to act as an observer with the case law stating that it is improper for agents of the parties to station themselves in such a way that all voters must pass by them 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). These cases hold that surveillance by an agent is unlawful in and of itself, even if no electioneering occurs. The cases relied on by the Board's Brief addressed only the electioneering rules and did not consider the unlawful surveillance aspects of non-employee union agents serving as observers. Union agent Raymundo, acting as the Union's undisputed agent, plainly engaged in unlawful surveillance in the present case and the election must be set aside on this ground as well.

CONCLUSION

For the reasons set forth above and in Petitioner's opening brief, 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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November 21, 2016

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 2,206 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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