

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

NATIONAL HOT ROD ASSOCIATION,

Respondent,

-and-

INTERNATIONAL ALLIANCE OF  
THEATRICAL STAGE EMPLOYEES  
MOVING PICTURE TECHNICIANS,  
ARTISTS AND ALLIED CRAFTS OF THE  
UNITED STATES, ITS TERRITORIES  
AND CANADA, AFL-CIO, CLC (IATSE)

Petitioner and Charging Party.

Case Nos. 22-RC-186622  
02-CA-185569  
22-CA-192686  
22-CA-190221

**IATSE'S POST HEARING MEMORANDUM  
TO THE ADMINISTRATIVE LAW JUDGE**

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## PRELIMINARY STATEMENT

The International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists, and Allied Crafts of the United States, Its Territories, and Canada, AFL-CIO, CLC (the “IATSE,” “Petitioner,” or “Union”), by and through its counsel respectfully submits this post-hearing memorandum in above-captioned matter. In these consolidated representation and unfair labor practice cases, the National Hot Rod Association (“NHRA,” “Employer,” or “Respondent”) argues that purported errors by agents of the National Labor Relations Board (“NLRB” or “Board”), in conducting a mail ballot election, should nullify the election results. The Employer does not allege that the Union engaged in any misconduct relating to any aspect of the election.

NHRA alleges that a handful of employees (out of approximately 100) did not promptly receive a mail ballot. It further claims that two employees mailed their ballots late, which did not arrive at the Regional Office before the initial tally. NHRA then speculates that the Board’s agents or Regional Office must have been at fault for these so-called “errors.” As a result, NHRA requests that the Board open and count the late-received ballots. Contrary to the Employer’s speculative claims, there were no irregularities that provide a basis for overturning the election results here. Rather, as described below, the Board’s agents did everything appropriate to ensure that employees were given a reasonable opportunity to submit ballots in this mail election.

Further, the General Counsel has proven the material allegations in its unfair labor practice complaint, as amended (the “Complaint”).<sup>1</sup> The Complaint, as amended, alleges that

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<sup>1</sup> References to the September 8, 2017 Order Further Consolidated Cases, Partial Decision on Objections, Order Directing Hearing and Notice of Hearing on Challenged Ballots and Objections (w/attachments) by the Regional Director for Region 22 appear as “RDO \_\_\_.” References to the hearing transcript (from various dates between December 7, 2017 and March 13, 2018) (the “Hearing”) appear as “Tr. [page]:[lines].” Exhibits introduced by the Petitioner

NHRA violated the National Labor Relations Act, (the “Act”) by discharging a leading Union supporter during the period leading up to the election. NHRA further violated Section 8(a)(1) by threatening employees with unspecified reprisals; creating an impression of surveillance; soliciting grievances; and withholding a grant of benefits. As described below, the Administrative Law Judge should find that the Employer violated the Act as alleged.

### **BACKGROUND & FACTS**

The parties—NHRA, the Union, and the Acting Regional Director for NLRB Region 22—entered into a stipulated election agreement (the “Agreement”) in 22-RC-186622 on November 2, 2016. The agreement called for a mail ballot election among television broadcast technicians in an appropriate bargaining unit employed by NHRA. (Pet. Ex. 2.) The parties agreed that ballots would be counted on December 2, 2016. Further, the Agreement provided that the voters “must return their mail ballots so that they will be received in the National Labor Relations Board, Region 22 office by 5:00 p.m. on Wednesday, November 30, 2016.” (*Id.*) The Agreement specified that, “[i]f any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region 22 office by no later than 5:00 p.m. on Tuesday, November 22, 2016 in order to arrange for another mail ballot kit to be sent to that employee.” (*Id.*)

The parties also agreed that they “waive their right” to a representation hearing. (*Id.*) The Employer agreed to distribute an NLRB Notice of Election in accordance with the Board’s standard practices, and “[a]ll procedures after the ballots are counted shall conform with the Board’s Rules and Regulations.” (*Id.*)

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during the Hearing are referenced as “Pet. Ex. \_\_\_.” Counsel for the NLRB General Counsel’s exhibits are referenced as “GC. Ex. \_\_\_.” Employer exhibits are referenced as “Resp. Ex. \_\_\_.”

The Stipulated unit includes,

All broadcast technicians employed by the National Hot Rod Association ("NHRA") including technical directors (TD Technical Director), associate directors (AD Associate Director, AD Satellite Feed), assistant producers (PRO Pit Producer, PRO Video Board), camera operators (HC Hard Camera, HH Handheld Camera), audio technicians (A 1 Audio Lead), audio assists/assistants (A2 Audio Assist, SUB Sub Mixer), replay producers, videotape operators, digital recording device operators (EVS Replay Operator), video technicians (V1 Senior Video, V2 Video Operator), video technician assistants (Video Assist), graphics operators (VIZ Graphics Operator), graphics coordinators (GPSC Graphics Coordinator), bug operators (Bug Operator), runners (RNR Runner), and utility technicians (UTE Utility) performing work in connection with telecasting of live or recorded racing events at remote locations; but excluding all office clerical employees and professional employees, guards, and supervisors as defined in the Act, and all other employees.

*(Id.)* Recognizing that virtually all of the NHRA's technical employees are freelance employees who might work for several different employers over the course of a year, the parties stipulated to an appropriate eligibility formula. *(Id.)*

The Employer provided its voter list to the Union on November 7, 2016. It identified approximately 100 voters in the stipulated bargaining unit. (Pet. Ex. 6.) In accordance with the Stipulation, the initial tally of ballots was conducted December 2, 2016. (Pet. Ex. 10.) It showed 33 votes in favor of the Union, 22 votes against representation and 17 challenged ballots, a determinative number. (Pet. Ex. 10.)

Pursuant to Section 102.69 of the Board's Rules and Regulations, the parties filed objections to the election with the Regional Director on December 9, 2016. While both parties filed objections initially, the Union's sole objection was subsequently withdrawn. NHRA's December 9, 2016 objections ("Objections") have been consolidated with the NLRB General Counsel's unfair labor practice Complaint in the present case.

The Employer's Objections include specific allegations involving four voters—Robert Logan, Todd Veney, Pat Ward, and Paul Kent. (*See* RDO Att. B at ¶¶ 4-7.) NHRA alleged that these four voters did not cast a ballot because they experienced alleged problems in connection with their receipt and return of ballots. (*Id.*) However, the Board's records indicate that it did everything it reasonably could to give them an opportunity to vote. The Board provided duplicate ballots to each voter upon request.

Logan, NHRA alleged did not promptly receive a ballot kit and when he called the NLRB to inquire about it, Region 22 was nonresponsive. (*See* RDO at Att. B.) However, the Board sent Logan a duplicate ballot on November 28, 2016. (Resp. Ex. 3.) Nonetheless, Logan never voted at any time before or after the ballot deadline of November 30, 2016. (*Id.*) Ward, NHRA alleged, requested multiple duplicate ballots. (RDO Att. B at ¶ 6.) The Board responded to his multiple requests by mailing him duplicate ballots on November 23, 2016 and November 29, 2016. (Resp. Ex. 3.) Kent requested a duplicate ballot on November 25, 2016—after the date specified in the election notices for requesting replacement ballots. (Resp. Ex. 10.) The Board responded by mailing him a duplicate ballot on November 29, 2016. (*Id.*) Veney, NHRA alleged, returned his ballot on November 28, 2016 using a special postal delivery method, which estimated an *expected* two-day delivery. (Resp. Ex. 1.) Yet, Veney's ballot did not arrive in Region 22 until December 5, 2016 (the next business day after the December 2, 2016 tally). (Resp. Ex. 3.) There is no evidence that the Board or its agents interfered with the delivery or receipt of Veney's ballot. In fact, NHRA's objections fail to plausibly allege any specific misconduct by the Board or its agents in connection with the ballots of these voters.

On August 4, 2017, the Regional Director for Region 22 issued a letter ordering resolution of a vast majority of the challenged ballots. Pursuant to the terms of the Regional

Director's August 4, 2017 order, Region 22 conducted a supplemental tally of ballots on August 16, 2017 where it counted the ballots of 14 previously challenged voters. Region 22 issued a revised tally, which showed 35 votes in favor of the Union, 34 votes against representation, and two remaining undetermined challenges. (Pet. Ex. 11.)

Following issuance of the revised tally, on September 8, 2017, the Regional Director for Region 22 issued an Order Further Consolidated Cases, Partial Decision on Objections, Order Directing Hearing and Notice of Hearing on Challenged Ballots and Objections ("RDO"). This case was scheduled for a hearing, which took place on various dates between December 7, 2017 and March 13, 2018.

The election proceedings involving the Employer's Objections were heard together with the General Counsel's allegations that NHRA's pre-election conduct violated the Act. The General Counsel focuses on NHRA's unlawful conduct at race events occurring around September 2016 and thereafter. The Employer's high-level management personnel—including its vice president of human resources, Marleen Gurrola and CEO Peter Clifford—visited racing events. (Tr.401:17-18.) At a race in Charlotte, North Carolina, Gurrola delivered a speech to employees in which she threatened them with consequences if they joined a union. (Tr. 402:14-17; GC Ex. 26A-B.) At the Charlotte race, Gurrola also visited small groups of NHRA employees where she asked them what issues they were having with work. (Tr. 119:18; 405:19-21; 406:7-14.) Gurrola wanted employees to come to her and let NHRA try to "fix" things. (Tr. 402:19-02.)

The Employer also made its position against unionization known to employees in emails and a video message distributed to employees. NHRA routinely urged employees to vote "no" on union representation. (Pet. Ex. 3-5; GC Ex. 11). More remarkably, on the eve of the election, the

Employer circulated an email to employees stating that it was withholding job offers for the following (2017) NHRA racing season because of the Union election. (GC Ex. 6.)

NHRA's anti-Union campaign culminated with its unlawful discharge of unit employee Nathan Hess. Hess worked as the tape producer or replay producer on telecasts of NHRA's premier drag racing series. (Tr. 226:1-6.) Hess was active in the Union's campaign and attended several Union meetings at NHRA race sites around the country. (Tr. 258:16-21.) Hess signed a union authorization card in August 2016. (GC Ex. 23.) He took an active role generating Union organizing support among coworkers. (Tr. 260:19-24.) In fact, Hess was one of two leaders of the Union campaign and was practically "running the group." (Tr. 172:24-173:1.) He spoke regularly at Union meetings and talked to coworkers about the Union in the hotels where they were lodged by the Employer and at the workplace. (*Id.*; 260:19-24; 173:20-22.) He invited other NHRA television crew employees to Union meetings and distributed Union authorization cards. (Tr. 262:11-25; GC Ex. 24.)

Hess had no negative prior work history nor any previous disciplinary record. It is uncontroverted that Hess never received complaints, warnings or reprimands about any aspect of his work. (Tr. 275:24-276:10.) To the contrary, his colleagues repeatedly told him that they liked his work. (Tr. 276: 11-14.) Nonetheless, NHRA discharged Hess around September 14, 2016 because of unspecified issues that occurred at a 2016 NHRA race in Indianapolis. (Tr. 274:9-10, 24-25.) The major issues surrounding the Indianapolis race stemmed from an equipment failure involving a device called the Xfile 3. (GC Ex. 25.) That equipment had recurring problems throughout the 2016 racing season. (Tr. 273:7-10.) Hess tried to fix the problems with the Xfile 3 in Indianapolis with no luck. (Tr. 271:22-25.) Hess also relied on the mobile broadcast truck engineer to fix the equipment, since it was the engineer who would be responsible for doing so.

(Tr. 270:25-271:3.) Nonetheless, NHRA claimed it discharged Hess because of Hess's alleged failure to load video clips that were unavailable for replay due to the Xfile 3's failure. (GC Ex. 5 at 6.) This was despite Hess's diligence in notifying NHRA's managers that an equipment failure was preventing video segments from loading. (Tr. 269: 2-11.)

Shortly before his termination, NHRA gave Hess a pay raise. (Tr. 227:5-8.) NHRA's claimed reason for Hess's discharge is further weakened by this fact since NHRA was apparently implementing a cost-savings plan around the time of his discharge in September 2016. (E.g., GC Exs. 2-3.)

## ARGUMENT

### I. NHRA'S OBJECTIONS TO THE ELECTION MUST BE OVERRULED

#### A. Legal Standards Governing Objections

It is well settled that representation elections are not lightly set aside. 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) (citations omitted). *See also NLRB v. Black Bull Carting Inc.*, 29 F.3d 44, 46 (2d Cir. 1994) ("A party seeking to overturn an election on the ground of a procedural irregularity has a heavy burden"); *Sonoma Health Care Center*, 342 NLRB 933, 933 (2004) (Board will not lightly set aside the results of a representation election. *citing Safeway, Inc.*, 338 NLRB 525, 525-26 (2002)); *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000) (same).

When alleging that Board misconduct interfered with the election results—as NHRA alleges here—the facts must raise a reasonable doubt as to the fairness and validity of the election. *Polymers, Inc.*, 174 NLRB 282 (1969). NHRA cannot succeed in voiding the election results by simply alleging that the election "fall[s] short of perfection." *NLRB v. Duriron Co.*,

*Inc.*, 978 F.2d 254, 256-57 (6th Cir. 1992). It is not “sufficient for a party to show merely a ‘possibility’ that the election was unfair.” *Black Bull Carting*, 29 F.3d at 47.

NHRA fails to carry its heavy burden here. Its evidence does not show that the election results should be overturned. The Board will not overturn election results based on the vagaries of mail delivery as NHRA urges. *J. Ray McDermott & Co. v. NLRB*, 571 F.2d 850, 855 (5th Cir. 1978), cert. denied 439 U.S. 893, 99 S. Ct. 250 (1978) (“It cannot be said that an election by mail is per se invalid whenever a potentially decisive number of votes . . . is lost through the vagaries of mail delivery.”)

In fact, NHRA provides no specific evidence of conduct by the Board or its agents that resulted in the possible disenfranchisement of any eligible voter. In its objections, the Employer thus fails to establish any reasonable doubt about the fairness of the election. *See Mercedes-Benz of San Diego*, 357 NLRB 650, 651 (2011) (in objection cases alleging Board misconduct, “[t]he only question properly before the Board ... is whether the Board agent's actions ... rais[e] a “reasonable doubt as to the fairness and validity of the election””) (citing, *Rheem Mfg. Co.*, 309 NLRB 459, 460 (1992) quoting, *Polymers, Inc.*, 174 NLRB 282 (1969), enforced, 414 F.2d 999 (2d Cir. 1969)).<sup>2</sup> To the contrary, the evidence unequivocally shows that the Board took all reasonable steps that it could to ensure that eligible voters had an opportunity to vote. Here, the Employer’s objections fail to raise any serious doubt about the fairness and validity of the election. They must be overruled.

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<sup>2</sup> In *Polymers*, the court recognized the importance of the evidence in each case: “A per se rule [setting an election aside if there is a] possibility [of irregularity] would impose an overwhelming burden in a representation case. If speculation on conceivable irregularities were unfettered, few election results would be certified, since ideal standards cannot always be attained.” *Polymers*, 414 F.2d at 1004.

**B. NHRA's Objections Alleging that Proceedings Should Have Been Transferred to Region 31 for a Mixed Manual-Mail Election Must be Overruled.**

NHRA's Objections 1 and 9 in its December 9, 2016 Objections allege proceedings in this representation case should have been transferred to Region 31 and the NLRB should have conducted a mixed manual-mail election. (RDO at Att. B, ¶¶ 5-6.) Those arguments are easily rejected.

The Regional Director for Region 22 declined to transfer this case to Region 31. His decision was within the discretion of the agency. *See* 29 C.F.R. §§ 102.60, 102.72. The Employer requested a transfer of proceedings to Region 31 on October 25, 2016. The Regional Director of Region 22 on October 27, 2016 denied NHRA's transfer request. The Employer did not file a timely request for review of that decision (nor any other timely appeal). Therefore, NHRA's contentions here are meritless and time-barred.

Further, the Employer stipulated to a mail ballot election. It agreed that the election in this case would be conducted entirely by mail. As part of that stipulation, the Employer agreed that it would "waive" its right to hearing. (Pet. Ex. 2.) Consequently, the Employer is estopped from complaining about its decision to conduct a mail ballot election—which it voluntarily agreed to. NHRA now change its mind. An employer waives its right to object to the balloting method in these circumstances. *Premier Living Center*, 331 NLRB 123 (2000). *See also Cmty. Care Sys., Inc.*, 284 NLRB 1147, 1147 (1987) (party cannot contest election details that it stipulated to). In addition, a Regional Director has broad discretion in determining the election methods. *E.g., Nouveau Elevator Industries*, 326 NLRB 470, 471 (1998). Decisions about the method of balloting cannot be set aside unless a Regional Director clearly abuses that discretion. *Id.* NHRA has not (and could not) demonstrate an abuse of Regional Director discretion relating to the stipulated election details here.

Further, the Board's Casehandling Manual (while not binding authority) offers support for the election's validity. For the parties to reach a stipulated election agreement, "all details must be agreed upon." NLRB Casehandling Manual: Representation Proceedings, Section 11084.3 (Jan. 2017). The parties, "failure of accord in such details as date, hours, or place of election will serve to send a matter to hearing." *Id.* Here, NHRA had a right to argue that a mixed mail/manual ballot was appropriate. It waived that opportunity. (*See* Pet. Ex 2 ("The parties waive their right to a hearing...").) Therefore, all NHRA's allegations concerning Regional office processing and the manner of balloting must be rejected. Objections 1 and 9 must be overruled.

**C. NHRA's Unsupported Contentions in Objection 2 Must be Overruled.**

In its second Objection, NHRA alleges that it "is aware of several voters who did not timely receive ballots" and then speculates that the ballots weren't timely mailed. This unsupported assumption does not meet the Employer's heavy burden of establishing the election results should be overturned. *E.g., The Daily Grind*, 337 NLRB 655, 656 (2002) (A party must cannot "rely on its bare allegations" in support of objections).

NHRA and the NLRB both stipulated to the details of this mail ballot election. In the stipulated election agreement, the parties agreed that ballots would be mailed on November 15, 2016. (Pet. Ex. 2.) NHRA offered no evidence to support its claim that the Board failed to mail ballots on that date. To the contrary, evidence offered by NHRA *disproves* this objection. At least one of the Employer's witnesses testified that the ballot he received had been mailed by the Board on November 15, 2016. (Tr. 39:10-12.) Additional evidence also indicates that Region 22 mailed ballots voters on the appropriate date. (*See* RDO at 1; Resp. Ex. 3.) Accordingly, NHRA's speculative Objection 2 must be overruled. Objections must be rejected where the

objecting party “offered no independent evidence in support” of its contention. *E.g., Cal. Gas Transp.*, 347 NLRB 1314, 1360 (2006). Here, NHRA’s deficient and unsupported allegations in Objection 2 must be overruled entirely.<sup>3</sup>

**D. In Objection 3 NHRA Fails to Plausibly Allege Objectionable Conduct By the Board’s Agents.**

NHRA alleges that voters “had difficulty” reaching “the contact person” at NLRB Region 22’s office during the election. This allegation in Objection 3 is entirely without merit and should be overruled. According to NHRA’s Objection 2, it claims that people calling an NLRB telephone number, “had to leave voice messages” and didn’t receive timely responses. This, the Employer claims, should lead to the election results being set aside.

NHRA relies on the Board’s Casehandling Manual, which NHRA asserts sets forth so-called “requirements” imposed on the Board. NHRA mischaracterizes the Casehandling Manual. In Casehandling Manual: Representation Proceedings, Sections 11336.2(c) and 11336.3, the Board notes that, a “designated Regional Office employee named on the notice of election as the contact person *should* be an individual who is readily available in the event voters attempt to contact him/her.” (emphasis added.) The Casehandling Manual is not binding authority on the Board. *E.g., Superior Industries*, 289 NLRB 834 (1988). Here, the evidence shows that individuals successfully contacted the Board by phone and by email in order to inquire about ballots. (*E.g., Resp. Ex. 3, 10. Tr. 40:1-15; 203:16-204:2.*) Moreover, employees were not

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<sup>33</sup> NHRA’s allegations and requests in paragraph 10 of its Objections need not be addressed. (*See* RDO at Att. B, ¶ 10.) These requests pertain to “scheduling a hearing on challenges and/or objections.” (*Id.*) Therefore, paragraph 10 includes no cognizable objection to the conduct of the election. Further, there was no hearing scheduled or held on any of the dates mentioned in paragraph 10 of NHRA’s Objections. The Employer’s requests in paragraph 10 are both immaterial and moot. To the extent that paragraph 10 could be reasonably construed as an objection, it must be overruled.

limited to using only one Board phone number. Employees could contact the Board's Region 22 office or "our national toll-free line" (Pet. Ex. 1.)

The testimony does not support NHRA's claim here. Paul Kent, for example, the Employer's witness, could not remember the number he called to request a mail ballot. (Tr. 203:20.) Robert Logan testified that he called the Region 22 telephone number set forth in the election notices, but notably, he did not contact the Board through its alternative national toll-free line. (Tr. 40:8-15.) Neither Logan nor Kent complied with the instructions in the Board's election notices by contacting the NLRB if they "did not receive a ballot in the mail by Tuesday, November 22, 2016." (Pet. Ex. 1.) They waited until later. (Pet. Ex. 3-10.) Todd Veney, who testified for the Employer did not make any efforts to contact Region 22 about his ballot. Most importantly, the evidence shows that the Board responded to messages it received from Kent and Logan by dispatching duplicate ballots to both of them. (Resp. Exs. 3, 10.) Under the circumstances, NHRA's Objection 3 allegations concerning the actions of Board agents are meritless. Simply put, these circumstances provide no basis for overturning the results of the election. The Employer's Objection 3, which alleges that the Board's agents were nonresponsive, should be overruled.

**E. NHRA's Objection 8—Alleging that Ineligible Voters Should Not Have Their Ballots Counted—Should Be Overruled.**

In Objection 8, NHRA alleges that employees who were *not* on the Employer's voter list, and who *did not* submit ballots prior to the December 2, 2016 tally should not have their ballots opened or counted. The Employer's contention in this objection is mystifying and entirely moot. The Board's well-settled policy precludes opening and counting ballots received after the tally. *E.g., Classic Valet Parking, Inc.*, 363 NLRB No. 23 slip op at \*1 (2015). Therefore, the ballots of voters (regardless of whether or not they appeared on the Employer's voter list) would not be

counted if they were received after the tally. If such employees had submitted ballots to be counted at any time, the parties would have an opportunity to address the ballots through the Board's challenge procedure. Indeed, the Board agent "must" challenge the ballot of anyone not on the voter list. NLRB Casehandling Manual: Representation Proceedings, Section 11338.2(b) (Jan. 2017). In Objection 8 NHRA objects to something which has not and could not occur. Thus, Objection 8 is illegitimate and must be overruled entirely.

**F. Ballots Received After the Tally Cannot be Counted and NHRA Objections 5, 6, and 7 Should be Overruled.**

NHRA points out that a few voters—from a pool approximately 100—submitted late ballots (after the tally), which were not counted. NHRA's evidence shows ballots of two employees who testified (Paul Kent and Todd Veney) were received after the ballot deadline and after the December 2, 2016 tally of ballots. (Resp. Ex. 3.) In these circumstances, there are no legitimate questions as to the validity of the election process. The Board has long held that late returned ballots shall not be counted. Therefore, as described below, NHRA's Objections numbered 5, 6, and 7 must be overruled. (RDO at Att. B, ¶¶ 5-6).

As described above, the Board refuses to count ballots that arrive after the tally. *Classic Valet*, 363 NLRB No. 23 slip op at \*1. Ballots received after the deadline but before the tally may be counted. *E.g.*, *Watkins Constr. Co.*, 332 NLRB 828, 828 (2000) (“[A] ballot should be counted if it is received before the count begins.”); *Am. Driver Serv., Inc.*, 300 NLRB 754, 754 (1990) (late ballot counted when it was “received prior to the time of the first ballot count”). However, the Board's long-standing rule against counting ballots received after the tally precludes NHRA's objections from being sustained here. *Classic Valet*, 363 NLRB No. 23 slip op at \*1 (citing *Kerrville Bus Co.*, 257 NLRB 176, 177 (1981)).

The Board was recently upheld by the D.C. Circuit when it overruled objections to the conduct of an election in similar circumstances. The Court rejected allegations that mail ballots returned to the Board after the ballot count should be tallied. *NCR Corp. v. NLRB*, 840 F.3d 838, 842 (D.C. Cir. 2016). In *NCR Corp.*, the employer alleged that the Board should have counted seven ballots, which arrived too late by mail to be counted by a Board regional office. 840 F. 3d at 839. The *NCR* ballots, the employer claimed, would have been outcome-determinative. *Id.* Nonetheless, the Board overruled the employer’s objections and declined to count the ballots. *Id.* at 839-842.

In *NCR Corp.*, the parties voluntarily entered into a stipulated election agreement, which explicitly included a well-defined ballot-return deadline. *Id.* at 840. The employer distributed election notices to employees detailing the mail ballot deadline. *Id.* at 841. A Board agent “opened and counted the . . . ballots received by the time of the count.” *Id.* Nonetheless, the employer contended that the Board “should have counted the seven additional ballots that arrived” two days after the tally “because the postmark dates show employees sent them in sufficient time for them to have been received” by the deadline. *Id.*

The Board concluded that the ballots must have been received before the tally in order to be counted (as described in the stipulated election agreement and the election notices). *Id.* at 842. In upholding the Board’s decision, the *NCR* court noted—as in the present case—the employer’s “objections to the election stem . . . from a disagreement with the Board’s policy on handling late-received ballots.” *Id.*

Similarly, in the present case, as described above, the parties voluntarily stipulated to all material details about the processes of the election. (Pet. Ex. 2.) In accordance with the Agreement and the Board’s Rules and Regulations, NHRA circulated a Notice to Employees

specifying the election details. (Pet. Ex. 2; 29 C.F.R. §102.62.) As in *NCR*, the voters—who were identified by the Employer—received a standard Election Notice including “Instructions to Employees Voting by U.S. Mail.” (Pet. Ex. 1.) The Notice stated that voters must return the ballots “so that they will be received” by the ballot-return deadline of November 30, 2016. (*Id.*)

It further specified that “[a]ll ballots will be commingled and counted at the Region 22 Office on Friday, December 2, 2016 at 10:00 a.m. In order to be valid and counted, the returned ballots must be received in the Region 22 Office prior to the counting of ballots.” (*Id.*) Here, as in *NCR*, NHRA agreed to these election processes and the Board plainly put employees on notice that ballots received by the Board after the December 2, 2016 tally would not be counted.<sup>4</sup>

Accordingly, there is no evidence that the Board or any party caused irregularities, which resulted in employees’ disenfranchisement. *See NCR Corp.* 840 F.3d at 843. Here, the election results were fair, final, and binding. Late-received ballots, which arrive after the initial tally cannot be counted (regardless of when they were allegedly mailed).

In urging that such ballots should be counted, NHRA here emphasizes the closeness of the election results. However, the appropriate consideration is the employees’ participation in the election. In this case approximately 75% of the employees submitted ballots. (*See* Pet. Exs. 10-11.) In *NCR Corp.*, the returned ballots represented a “76% participation rate,” *NCR Corp.*, 840 F.3d at 843. That return rate, the *NCR* court noted, was greater than other cases where a party had failed to show that election results were invalid, despite allegations that some voters claimed they did not receive ballots *Id. citing Antelope Valley Bus Co. v. NLRB*, 275 F.3d 1089, 1095-96 (D.C. Cir. 2002). Under these circumstances (absent any showing of misconduct, which NHRA

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<sup>4</sup> Also here, as in *NCR*, the parties agreed that, “[a]ll procedures after the ballots are counted shall conform with the Board’s Rules and Regulations.” (Pet. Ex. 2; *NCR*, 840 F.3d at 842.)

has not proven here) an employer fails to meet its heavy burden of showing the election must be set aside. *Id.*

Even if the Employer's scant evidence were sufficient to call the election results into question (which it is not) the only appropriate remedy would be to rerun the election. There is no applicable Board authority that would allow late-received ballots to be opened and counted. As described above, ballots that arrive at the Board's Regional Office after the initial tally are not counted. Nonetheless, the Employer argues that the late-received ballots of several voters should be opened. The Board has rejected this contention. *See Classic Valet*, 363 NLRB No. 23 slip op. at \*1.

As the Board and *NCR* court have noted, an unpublished Board decision in *MCS Consultants*, 29-RC-11339, does not provide precedential support for this conduction. *See Classic Valet*, 363 NLRB No. 23 slip op. at n.2 ("*MCS Consultants, Inc.*, 29-RC-11339 (Sept. 25, 2006) . . . is neither precedential nor consistent with the Board's established rule on late-arriving mail ballots."). *See also Premier Util. Servs., LLC*, 363 NLRB No. 159 slip op at \*1 (2016) (Regional Director properly refused to count ballots received after the tally even in extreme case where dozens of ballots were late.)

Even if the Board were to consider opening ballots received post-tally—which would be inconsistent with the Board's establish rules described above—the facts of this case would not warrant such action. In *Classic Valet*, 363 NLRB No. 23 slip op. at \*1-2, for instance, former Board Member Miscimarra dissented from the majority's opinion to note that opening late-received ballots that arrive after the tally might be contemplated in "an extremely unusual case." (citation omitted.) However, in *Classic Valet* the number of "unopened ballots were equal to the larger of the votes cast for or against representation" *Id.* There are no such similar circumstances

in the present case. The present case, where approximately 75% of voters timely returned a ballot, is not “an extremely unusual case” that would justify departure from the Board’s ordinary rules. Notably, former Member Miscimarra later recognized that adherence to the Board’s standard approach (i.e., ballots received after the initial tally are not counted) is appropriate where there was “a high level of participation in the election” and the number of voters who were potentially excluded was “relatively small (though possibly determinative).” *PSAV Presentation Servs.*, 19-RC-161471, 2016 NLRB LEXIS 358, \*1 (May 19, 2016). Here as in *PSAV*, NHRA alleges the late-returned ballots of only a few voters should be opened—a relatively nominal number in comparison with the total pool of eligible voters.

**G. Allegations that Voters did not Promptly Receive Ballots (or Duplicate Ballots) Do not Satisfy NHRA’s Heavy Burden of Showing that the Election was Unfair or Invalid.**

To the extent that the Employer’s Objections 4, 5, 6 and 7 allege that eligible voters did not receive ballots, the Employer’s objections must also be overruled. These allegations do not call the election results into question. NHRA’s evidence in support of these objections does not satisfy its heavy burden of proving Board misconduct. Therefore, the election results here cannot be set aside.

Region 22 mailed ballots to voters on the Employer’s voter list on November 15, 2016. (RDO at 1; Resp. Ex. 3; Pet. Ex. 1.) The employer distributed the election notices in accordance with the Board’s Rules and Regulations to eligible voters by electronic mail and physical postings. (Pet. Ex. 1; Tr. 277:13-25.) Even if these procedures did not amply demonstrate that the election results must stand—which they plainly do—the evidence conclusively shows that Region 22 mailed a duplicate ballot to individuals who requested one. (Resp. Exs. 3, 10.) Notably, Josh Piner and Nathan Hess who did not appear on the Employer’s voter list both

requested ballots from the Region and timely returned them before the tally on December 2, 2016. (Tr. 281:9-282:7; Pet. Ex. 6; Resp. Exs. 3, 10.) Under these circumstances, the Board followed all appropriate procedures in conducting the election. There is no evidence of any Board agent misconduct. Consequently, here there is no evidence supporting NHRA's unproven contention that the election results were unfair or invalid.

Moreover, the Employer voluntarily stipulated to the mail ballot election process. Where a party "consented to the mechanics of the mail ballot election when it entered into the Stipulated Election Agreement, which set forth the timeframe and duplicate-request procedures" the Board will find "no basis for permitting the Employer to attack the election on the basis of conditions to which it previously agreed." *Guardsmark, LLC*, 05-RC-143199, 2016 NLRB LEXIS 67, \*n2. (Jan. 29, 2016).

Since NHRA failed to meet its burden of showing that the election should be set aside, a voter-by-voter analysis of the Employer's allegations is unnecessary. *Kirkstall Road Enterprises, Inc.*, 02-RC-23547, 2012 NLRB LEXIS 512, \*1 (Mar. 30, 2011). Where a party objected to the Board's conduct of the election, the "Employer, as the objecting party, must show Board agent misconduct." *Id.* at \*2. If it fails to do so, the Board need not make voter-by-voter findings about individual experiences with the election processes. *Id.* at \*6. Even where an objecting party, "introduced testimony from some voters whose ballots were not counted" such testimony, "without more, fails to sustain the Employer's burden of proof to show" that alleged Board misconduct affected the fairness and validity of the election. *Id.* at \*5.

## **H. NHRA's Evidence Concerning Individual Voters Does Not Offer Compelling Support for Its Objections.**

As demonstrated above, the evidence does not show any misconduct or impropriety that would call the election's fairness and validity into question. As the Board noted in *Kirkstall*, an examination of each voter's alleged experience is thus unnecessary. Nonetheless, the evidence submitted in support of objections 4, 5, 6, and 7 is examined below to show that it does satisfy NHRA's heavy burden of setting aside the election.

### **i. NHRA Failed to Offer Reliable Evidence in Support of Its Allegations in Objection 6 Concerning Voter Pat Ward.**

In Objection 6, the Employer alleges that the ballot of voter Pat Ward should be opened and counted. NHRA alleges that Ward—who did not testify in the Hearing—requested duplicate ballots and returned one ballot that he received to the Board on November 30, 2016. (RDO at Att. B, ¶ 6.)

The evidence shows that Ward requested a duplicate ballot on November 22, 2016 (Resp. Ex. 10.) The Board responded by mailing Ward a ballot on November 23, 2016. (Resp. Ex. 3.) Ward then requested a ballot again on November 29, 2016. (Resp. Ex. 10.) The Board again responded by mailing Ward a replacement ballot on that date. (Resp. Ex. 3.) Ward returned a ballot on December 1, 2016—the day *after* the deadline for Region 22's receipt of ballots. (*See* Pet. Ex. 1.)

No Board conduct prevented Ward from casting a timely ballot. To the contrary, the Board took reasonable steps to give Ward an opportunity to vote. As described above, the Board will not overturn election results merely because the election, “fall[s] short of perfection.” *NLRB v. Duriron Co., Inc.*, 978 F.2d at 256-57. This election cannot be overturned due to the vagaries

of mail delivery rather than the actions of the Board or a party. *J. Ray McDermott & Co.* 571 F.2d at 855. In these circumstances, Employer's Objection 6 should be rejected.

ii. Todd Veney's Testimony About the Balloting Process Does Not Raise a Reasonable Doubt About the Fairness and Validity of the Election.

NHRA focuses on the ballot of Todd Veney in Objection 5. Veney, NHRA claims, did not timely receive a ballot. Veney did not testify that he contacted the Board to request a duplicate ballot as instructed by the Election Notices. (Pet. Ex. 1.) Further, Veney testified that he was away from home for an unspecified number of days during the balloting period. (TR 27:25-28:8.) There is no evidence that the NLRB failed to deliver Veney a ballot. To the contrary, the evidence unequivocally shows that all ballots were mailed to voters on the Employer's voter list on the stipulated ballot-mailing date—November 15, 2016. In these circumstances, the Employer's evidence concerning Veney's ballot offers no basis for overturning the election results, and comes nowhere close to meeting its heavy burden.

Veney left home "for Thanksgiving" on an unspecified date and then when he "got back from Thanksgiving" his ballot "was there." (TR 28:1-2; 30:9-10). Thus, Veney's ballot was obviously delivered to his residence when he was away from home, for an unspecified period, "for Thanksgiving." (*Id.*) Veney then went to an Indiana post office and allegedly mailed his ballot back by means of, "[a] two-day thing." (TR 29:19.) Again, Veney did not contact the NLRB concerning his ballot before he left home "for Thanksgiving." (*See* TR 28:1-2; 30:9-10.) This was in spite of the instructions on the NLRB's Election Notices, which direct employees to request a replacement ballot if they did not receive one by November 22, 2016. (Pet. Ex. 1.)

Veney mailed his ballot for *expected* two-day delivery on November 28, 2016. (*See* Resp. Ex. 1. (emphasis added).) The Election Notices plainly stated that "voters must return their

ballots so that they will be received in the [Board's] Region 22 office by 5:00 p.m. on Wednesday November 30, 2016.” (Pet. Ex. 1 at p.3.). Consequently, Veney could not have reasonably expected his ballot to be delivered before the November 30, 2016 ballot deadline. The Board has long held that the results of an election will not be set aside where voters fail to cast valid mail ballots due to their lack of diligence. *National Van Lines*, 120 NLRB 1343, 1346 (1958) (late-received ballots not counted where voters were not excluded by “any defect in the election procedures utilized, but rather [were] occasioned by their lack of diligence and interest in mailing their ballots on a date which would have assured their timely receipt”). *Monte Vista Disposal Co.*, 307 NLRB 531, 534 (1992) (absent extraordinary circumstances, voters who do not cast timely ballots due to their own negligence will not have their votes counted).

In sum, Veney’s failure to cast a timely vote is not attributable to the manner in which the election was conducted. The NLRB mailed a ballot to Veney, which was available to him in the same way as the ballots mailed to nearly 75 employees who timely returned them. (Pet. Ex. 10-11.) Veney’s ballot arrived at Region 22 late due to his own neglect. Under these circumstances, his vote cannot be counted and the election results cannot be set aside. Finally, even if Veney’s testimony were material (which it is not) he could not testify credibly about: (1) the address to which he sent his ballot, or (2) whether he accurately wrote an address on the priority mail envelope in which he placed his ballot. (TR 33:21-35:7.) In sum, any contentions that Veney’s ballot should be counted and that his testimony should be found relevant are baseless.

iii. Robert Logan’s Unreliable Testimony Concerning the Election Does Not Satisfy the Employer’s Heavy Burden of Proving that the Election Should be Set Aside.

It is undisputed that Robert Logan never voted. Nonetheless, NHRA argues that Logan did not timely receive a ballot and that he contacted the NLRB to request a replacement ballot

and left a message about the election. (RDO at Att. B, ¶ 4.) Logan’s testimony cannot be credited. Logan was unable to recall various material facts about the balloting process. For example, Logan could not begin by recalling—without prompting from NHRA’s counsel—the date that mail ballots were being mailed to eligible voters. (Tr. 38:7-12.) More importantly, Logan offered shifting testimony about the date that he contacted the NLRB. He first believed he called concerning his ballot on November 21, 2016. (Tr. 44:4-9; 52:5-8.) Logan later rebutted his own testimony by specifying that—after reviewing his phone records—he first called the NLRB on November 23, 2016. (Tr. 601:1-20.) The evidence shows that Logan called the NLRB again on November 25, 2016 (*Id.* 601:2-3.) The Board’s records show that the Board sent a duplicate ballot to Logan on November 28, 2016, the next business day following his November 25 phone call. (Resp. Ex. 3.) Under these circumstances, Logan’s testimony is unreliable. It would be reversible error to credit a witness where the “testimony was inconsistent with the record evidence . . . .” *E.S. Sutton Realty*, 336 NLRB 405, 406 (2001).

Even if Logan’s testimony were credible (which it is not) the Board has held that the appropriate inquiry under these circumstances is whether employees have had an adequate opportunity to vote. *Waste Mgmt. of Northwest Louisiana, Inc.*, 326 NLRB 1389, 1389 (1998) (“When an employee does not vote for reasons that are beyond the control of a party or the Board, however, the failure to vote is not a basis for setting aside the election”); *Sahuaro Petroleum*, 306 NLRB 586, 587 (1992) (Objections overruled where two employees were disenfranchised but “the conditions that caused the disenfranchisement” were not attributable to a party or the Board). Logan had such an opportunity here.

Logan also testified that he lives with other family members. (Tr. 49:2-7.) He travels frequently for work (at times out of state) and is not the only household member who collects the

mail. (Tr. 49:13-50:11.) He testified that sometimes mail is discarded immediately. (Tr. 50:6-9.) In light of Logan's otherwise unreliable testimony, these facts raise a sufficient likelihood that the mishandling of mail at Logan's home—rather than any Board agent misconduct—resulted in the election difficulties he described. In sum the evidence concerning Logan cannot cause the election cannot to be set aside. On these facts, any irregularities Logan experienced were akin to the vagaries of mail delivery rather than the actions of the Board or a party. *J. Ray McDermott & Co.* 571 F.2d at 855. The Employer's Objection 4 should be overruled. NHRA has not met its heavy burden of establishing that the election was unfair or invalid.

iv. The Evidence Concerning Paul Kent Does Not Raise any Legitimate Doubts About the Validity of the Election.

The Employer alleges that Paul Kent did not promptly receive a ballot and did not get a prompt response when he inquired with the NLRB. (RDO at Att. B, ¶ 7.) For similar reasons as those described above, these contentions lack merit.

Kent "believed" that he contacted the NLRB on an unspecified date by phone and email in order to inquire about a ballot. (Tr.195:12-13.) Kent did not produce the alleged email he sent to the NLRB. Further, he could not identify the phone number he called. (Tr. 203:20.) Like Logan, Kent also travels frequently for work. (Tr. 197:4-10.) Kent testified that he was on a trip lasting five or six days during the last week of November 2016 (when ballots were due). (Tr. 204:3-5; 7-8.) Kent testified that when he is away for periods of time, someone else is checking his mail. (Tr. 204:10-11.) His trip at the end of November was not the only time Kent was away from home during November 2016. (Tr. 204:12-14.) Despite these facts—in particular the fact that someone else routinely handles Kent's mail—Kent claims that he did not timely receive a ballot. NHRA faults the NLRB for this supposed error.

Kent's testimony was colored by his loyalties to NHRA. Kent who currently works for NHRA was the employee hired to replace employee Nate Hess, who was unlawfully discharged in September 2016. (Tr. 582:11-14.) Kent (along with Todd Veney) also appeared in an anti-union campaign video for the Employer. (Pet. Ex. 5; Tr. 161:18-20.) These factors must be considered when assessing Kent's credibility. *E.g., Gibraltar Steel Corp.*, 323 NLRB 601, 601 n.4 (1997) (Adopting hearing officer's credibility determination in objections hearing based upon witnesses' "partisan interest ... general memory for detail ... conflicting testimony ... and self-serving answers.")

Even if Kent's testimony were fully credited (in spite of his bias), the evidence shows that the NLRB addressed Kent's ballot request appropriately. Again, as with Logan and Veney, there is no legitimate evidence of Board misconduct with respect to Kent's ballot. The Board's records show that Kent contacted the Board on November 25, 2016. (Resp. Ex. 10.) Region 22 then sent Kent a duplicate ballot in response to his request. (Resp. Ex. 3.) Under the circumstances, the Board satisfied its duties and Kent was given an adequate opportunity to vote. He was unable to do so in part because he chose to leave home for roughly 5 days during the end of the election period.<sup>5</sup> Kent did not mail his ballot back until December 10, 2016, over a week after the tally of ballots. (Resp. Ex. 3.) His testimony did not explain this lack of diligence. In sum, NHRA's evidence concerning Paul Kent is insufficient to overturn the election results.

## **II. NHRA VIOLATED THE ACT AS ALLEGED IN THE UNFAIR LABOR PRACTICE COMPLAINT**

### **A. The Employer Unlawfully Discharged Nathan Hess in Violation of Sections 8(a)(1) and (3).**

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<sup>5</sup> It is equally plausible that Kent's ballot was mishandled by the person who checks his mail when he is away from home.

In determining whether a discharge violates the Act, the Board applies the framework set forth in *Wright Line*, 251 NLRB 1083 (1980). Under *Wright Line*, the General Counsel must first show that protected conduct was a motivating factor in the Employer's decision. See *Hawaiian Dredging Construction Co.*, 362 NLRB No. 10, slip op. at 3 (2015). The elements that support such a showing are the employee's protected union activity, the employer's knowledge of that activity, and the employer's anti-union animus. *Id.* See also *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065–1066 (2007).

Once the General Counsel has made this prima facie showing, the burden then shifts to the Employer to prove that it would have taken the same action even if the employee had not engaged in protected activity. *Id.* Yet, if the Employer's stated reason for the discharge is pretextual, it fails to prove that it would have taken the same action absent the protected activity. *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). Where the asserted non-discriminatory reason is pretext, the Board will have no reason to apply the second part of the *Wright Line* analysis. *Id.*

Here, the General Counsel has established all the elements to show that the Employer's decision to discharge Nathan Hess violated the Act. First, the evidence establishes that Hess was engaged in protected activities by attending Union meetings, openly supporting the Union organizing effort, distributing union authorization cards and speaking with co-workers about the Union. Second, the Employer's knowledge that Hess engaged in Union activities can be easily inferred—based on evidence of general union activity and the relatively small workforce. Third, there is ample evidence that Respondent held significant animus against the Union. Finally, as mentioned below, the Employer's reasons for discharging Hess were pretextual. Thus, the

second part of the *Wright Line* test need not apply. In sum, Hess's discharge violated Sections 8(a)(1) and (3) of the Act.

Here, Nate Hess was a leader of the Union organizing campaign. Hess attended employee meetings for the purpose of discussing Union organizing activity, and announced his support for the Union by signing a Union authorization card. These were protected activities under the Act. Engaging in discussions with his colleagues regarding the Union's organizing effort also falls squarely under the protection of Section 7. *See, e.g., Republic Aviation Corp. v. NLRB*, 324 U. S. 793, 798 (1945); *Ridgley Mfg. Co.*, 207 NLRB 193 (1973). The evidence plainly establishes that Hess engaged in activity protected under the Act.

Direct evidence is not necessary to establish the employer's knowledge of a discriminatee's protected activity. *Pan-Oston Co.*, 336 NLRB 305, 308 (2001) (It is "well established that, in the absence of direct evidence, an employer's knowledge of an employee's union activities may be proven by circumstantial evidence from which a reasonable inference may be drawn."). The Board will rely on a variety of factors in determining employer knowledge. *See Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), enforced, 97 F.3d 1448 (4th Cir. 1996). Here, several factors show that the Employer had knowledge of Hess's protected activities.

First, there is direct evidence that the Employer had knowledge of the IATSE's organizing efforts prior to Hess's discharge. (Tr. 324:6-15.) In these circumstances, the Board "has inferred knowledge based on ... the respondent's general knowledge of union activities." *Id. See also, Lucky Cab Co.*, 360 NLRB 271, 275 (2014) ("pretext evidence . . . further warrants an inference that the Respondent was aware of the discriminatees' organizing activities" ). Here, at the Indianapolis NHRA race around September 1, 2016, NHRA supervisors were aware that

the Union was holding organizing meetings (Tr. 324:6-15; GC Ex. 18.) That knowledge of protected activity may be imputed to the Employer. *See State Plaza, Inc.*, 347 NLRB 755, 756 (2006) (supervisor knowledge of union activities is imputed to the employer).

Second, the Board will readily infer employer knowledge of union activity in small workplaces. *See Frye Electric, Inc.*, 352 NLRB 345, 351 (2008) (ALJ relied on “small plant doctrine” to infer employer knowledge where workforce consisted of 35 employees) (citing cases).<sup>6</sup> In such cases, the Board assumes that the “employer at a small facility is likely to notice activities at the plant because of the closer working environment between management and labor.” *D&D Distribution Co.*, 801 F.2d 636, 641 fn.1 (3d Cir. 1986). However, employees need not work on-site at a single facility for the small plant doctrine to apply. For example, in *La Gloria Oil and Gas Co.*, 337 NLRB 1120, 1123 (2002), the small plant doctrine was applied to drivers who spent significant work time outside of the employer’s plant. 352 NLRB at 346.

Here, Hess was part of a small group of NHRA employees working at remote locations in small workspaces. The size of the workforce in this case—approximately 30 television production employees at each NHRA event—is consistent with employee populations in cases where judges have applied the small plant doctrine. Furthermore, the employees were generally all lodged in the same hotel where they carried on their correspondence about the Union. Thus, the Employer’s awareness of Union activities (as well as the identity of the employees who participated) can be easily inferred. In sum, compelling evidence supports a finding that NHRA was aware of protected union activity.

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<sup>6</sup> Two-member Board decision abrogated by *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010).

The Board may rely on either direct or circumstantial evidence to determine the presence of an unlawful motive leading to a discharge. “It is well established that a discriminatory motive may be inferred from circumstantial evidence and the record as a whole, and that direct evidence of union animus is not required.” *Tubular Corp. of Am.*, 337 NLRB 99, 99 (2001) (citing cases). *See also Electronic Data Systems Corp.*, 305 NLRB 219, 219 (1991) (“[T]he Board may infer animus from all the circumstances.”).

The abruptness and timing of the employer’s adverse action will support a finding that union activity was the motivating factor in discharging a union supporter. *E.g., NLRB v. Joy Recovery Technology Corp.*, 134 F. 3d 1307, 1314 (7th Cir. 1998). (In determining whether anti-union animus was a substantial factor in employer’s decision, “timing is everything.”). *See also Toll Mfg. Co.* 341 NLRB 832, 833 (2004) (citing cases).

Here, the timing of Hess’s discharge provides unusually strong circumstantial evidence of Employer animus. As discussed above, Hess was discharged soon after he engaged in protected activity in Indianapolis. *See DHL Express, Inc.*, 360 NLRB No. 87 slip op. at 1 n. 1 (2014) (timing of discharge, one day after union activity, supported inference of animus).

Second, Hess’s discharge came as a complete surprise to him. He had been neither constructively nor negatively criticized for his work. He had not been warned about the consequences if he did not improve. And he was not given any opportunity to answer for any alleged shortcomings. The abruptness and timing of Hess’s discharge offer compelling evidence that the Employer harbored anti-union animus.

The Employer’s disparate treatment of Hess will also support an inference that it was motivated by union animus. *E.g. Int’l Metal Co.*, 286 NLRB 1106 (1987). Here, the evidence shows that no other employee was penalized, let alone discharged for the events in Indianapolis.

That, coupled with Hess's prior positive work record, is also probative of the Employer's unlawful motive.

Finally, there is direct evidence of employer animus in this case. NHRA supervisor Peter Skorich intended to "take care" of the Union. (Tr. 328:14-15.) This statement along other contemporaneous unfair labor practices (described below) will provide evidence of animus. *Novartis Nutrition Corp.*, 331 NLRB 1519, 1520 (2000). Furthermore, the Employer's expressed interest in keeping its workforce nonunion further establishes animus (even though the precise expression of that desire was not unlawful). *See Gencorp*, 294 NLRB 717 fn. 1 (1989). Overall, the facts show the Employer had union animus and that Hess's discharge was unlawfully motivated. The Region should issue a complaint alleging that the Employer discharged Hess for unlawful reasons.

The Employer's asserted reasons for discharging Hess are pretextual. NHRA's prior approval of Hess's work is demonstrated by the evidence here. Under similar circumstances an unexplained change in an employer's satisfaction with an employee's work supports a finding of pretext. *See Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354, 1368 (D.C. Cir. 1997) (discharge was unlawfully motivated where employer created negative, pretextual performance appraisals in spite of employee's positive reviews in each of the preceding three years).

Here, the Employer cannot show that it would have taken the same actions against Hess without his Union activities. Hess, who voiced union support, was sacrificed as a message to the remaining workforce. The Employer's explanations for his discharge were plainly pretextual. Accordingly, the Administrative Law Judge should find that Hess was discharged in violation of Sections 8(a)(1) and (3) of the Act based on the prima facie case described above.

**B. The Board's General Counsel has also Separately Established that NHRA Violated Section 8(a)(1) of the Act in Various Other Ways.**

As alleged in the Complaint, NHRA violated the Act in several additional ways. The Employer violated Section 8(a)(1) of the Act by threatening employees with unspecified “consequences.” An Employer violates the Act when its remarks create an implied threat of reprisal that would stem employees’ Section 7 protected activities. *See Stabilus, Inc.*, 355 NLRB 836, 872 (2010) (two-member decision) (Finding employer statement that there would be “consequences” resulting from employee’s support for the Union was an implied threat of unspecified reprisals). *J. P. Stevens & Co., Inc.*, 245 NLRB 198, 200 (1979) (Employer violated Section 8(a)(1) where it stated to employees that signing a union card could have “serious consequences”). Applying this rule to the facts here, it is undisputed that NHRA threatened employees with undefined “consequences” if they elected to join the Union. (*See GC Exs. 26A-B*, (“[W]e don’t fee that it is . . . a productive . . . relationship to get into. . . there are consequences, okay?”).) NHRA violated Section 8(a)(1) in this instance. This finding is particularly appropriate here, where the Employer has also unlawfully violated the Act in the other ways set forth below. *See J. P. Stevens*, 245 NLRB at 200.

By uncharacteristically placing employees under close supervision, an employer creates an impression that their union activities have come under surveillance. *See New Era Cap Co.*, 336 NLRB 526, 534 (2001) *citing Laser Tool, Inc.*, 320 NLRB 105, 109 (1995). In *New Era* for example, the Board adopted an Administrative Law Judge’s finding that an employer’s supervisors “changed the style and frequency of their observation of employees’ nominal work functions.” 336 NLRB at 526. This, the Board noted, would lead employees to “reasonably believe that they were subjected to this increased attention because of their” union activities. *Id.*

Here the evidence similarly establishes that on occasions while the union campaign was underway NHRA executive Marleen Gurrola appeared at race events to observe employees' work. (Tr. 508:7-15.) Her presence at these races was outside of the ordinary. (Tr. 401: 442:13-14.) Gurrola additionally engaged in routine questioning of employees in small groups. (Tr. 406:7-14.) Here, as in *New Era*, the increased, repeated, and unprecedented appearances at NHRA events created an impression of surveillance and inhibited employees' protected activities. Accordingly, NHRA violated Section 8(a)(1) by creating an impression of surveillance.

Similarly, Gurrola's questions to employees during the Union's organizing amounted to an unlawful solicitation of employee grievances. Gurrola and others met in large and small groups and Gurrola asked crew members, in effect, if they had any complaints, concerns or problems. (*E.g.*, GC 26A-B; Tr. 406:6-25.) The undisputed evidence thus shows that the Employer, through high level personnel, more than once solicited grievances in response to the Union's organizing campaign. The Employer then took steps to remedy, in part, some of these grievances (Tr. 407:14-25). The Employer produced no credible evidence to suggest that it had a practice of soliciting grievances in this manner prior to the Union's organizing effort. The solicitation of these grievances violated Section 8(a)(1) of the Act. *See Ishikawa Gasket America Inc.*, 337 NLRB 175 (2001).

Finally, the documentary evidence shows that NHRA violated the Act by withholding job offers from employees because of the Union election. On November 15, 2016, NHRA supervisor Mike Rokosa sent an email to NHRA employees, which stated that, "[b]ecause we are in the midst of a union election, our hands are tied as far as making offers for 2017. Once the votes are counted on December 2, if NHRA wins the election, we will be able to let you know promptly

when we can schedule you to work during 2018, based on your availability and our needs.” (GC Ex. 6.) Rokosa went further to state that “if the union wins the election, we will be obligated to bargain certain terms . . . and we do not know how long that might take.” (*Id.*)

Here, there is no dispute that unit employees would have received the job offers for the 2017 NHRA racing season *but for* their participation in a representation campaign. In essence, Rokosa told employees that their job offers for the upcoming season were being withheld because of their Union activities and because the Union filed an election petition. The Board has long held that an employer may not manipulate voters by withholding benefits that would have otherwise been provided absent the pendency of an election. *See, e.g., The Gates Rubber Co.*, 182 NLRB 95, 95 (1970). *See also Ann Lee Sportswear, Inc. v. NLRB*, 543 F.2d 739, 743 (10th Cir. 1976) (employer’s “freeze on promotions and transfers” violated the Act when it was implemented because of employees’ union activity). Thus, an employer, “in deciding whether to grant benefits while a representation petition is pending, should decide that question as he would if a union were not in the picture.” *The Great Atlantic & Pacific Tea Company, Inc.*, 166 NLRB 27, 29, fn. 1 (1967). NHRA failed to follow this rule when Rokosa sent employees the November 15, 2016 email. By informing employees that job offers were being withheld because of the Union election. NHRA violated the Act. Section 8(a)(1) of the Act is designed to prohibit precisely this sort of manipulation based upon withholding benefits.

### **CONCLUSION**

The Employer’s Objections must be overruled and the Petitioner certified as the collective bargaining representative of the employees in the stipulated bargaining unit. Based upon the evidence and all other proceedings had herein, the Union also respectfully urges the Administrative Law Judge to find that the Respondent violated Sections 8(a)(1) and (3) of the Act as alleged by the General Counsel.

Dated: New York, New York  
May 21, 2018

Respectfully submitted,

By:

A handwritten signature in black ink, appearing to read 'A. Healy', written over a horizontal line.

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## STATEMENT OF SERVICE

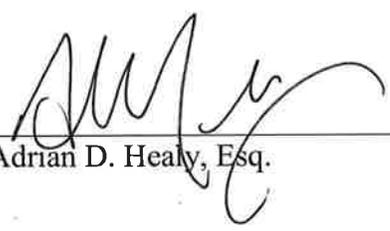
I hereby certify that on May 21, 2018, the foregoing Post Hearing Memorandum to the Administrative Law Judge was e-filed with NLRB Region 29, the NLRB Division of Judges at [www.nlr.gov](http://www.nlr.gov), and sent electronically to the following addresses:

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Dated this 21st day of May 2018