

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 31**

**GRILL CONCEPTS SERVICES, Inc., d/b/a  
THE DAILY GRILL,**

**Employer,**

**and**

**Case No. 31-RC-209589**

**UNITE HERE LOCAL 11,**

**Petitioner.**

**REQUEST FOR BOARD REVIEW OF  
DECISION AND CERTIFICATION OF REPRESENTATIVE**

Employer/Respondent, Grill Concepts Services, Inc. dba The Daily Grill (“Daily Grill” or “Employer”), pursuant to Section 102.67 of the Board’s Rules and Regulations, requests that the Board review and promptly reverse the July 24, 2018 Decision and Certification of Representative issued by the Regional Director of Region 31, Mori Rubin.

**I.**

**INTRODUCTION**

This Request for Review follows a mail-ballot election tainted by the Union’s misconduct, about which at least nine of the 76 voting-eligible employees complained -- unsolicited -- to Employer. The testimony of these nine employees establishes that the Union’s unwelcomed and repeated home visits to employees was intimidating and coercive, and affected the employees’ thoughts and actions over the course of the voting period. The result was a 29 to 25 vote in favor of the Union, with 7 ballots voided. Nearly 30% of the eligible employees had no voice in this close election, including those seven whose ballots were voided. The Union’s conduct was clearly

designed to interfere with the employees' free choice in the election, and the evidence shows that it had the intended effect.

The Union's misconduct took root in Region 31's unjustified departure from "The Board's longstanding policy . . . that representation elections should, as a general rule, be conducted manually." (NLRB Case Handling Manual § 11301.2.) The Region's deviation from longstanding policy in ordering a mail ballot election enabled the Union to harass and annoy the voting employees through unwelcomed home visits. It carried out these visits systematically, targeting employees on the day they were to receive their ballots in the mail, often ambushing them as they came and went for work.

Employer requests review of the Regional Director's Decision and Certification of Represented on each of the grounds set forth in Board Rule 102.67(d). The Region's ruling and the Union's conduct raise substantial questions of policy due to the departure from established Board practice and precedent. (Rule 102.67(d)(1).) The Regional Director's decision, finding no objectionable conduct by the Union and that the home visits did not interfere with the employees' choice in the election, is erroneous and prejudices both employer and the affected employees. (Rule 102.67(d)(2).) As such, the Regional Director's rulings which overrule Employer's election objections have resulted in prejudicial error. (Rule 102.67(d)(3).) Finally, the circumstances of this election present compelling reasons for reconsideration of the Board's rules and policy with regard to mail ballot elections.

## **II.**

### **FACTUAL AND PROCEDURAL BACKGROUND**

#### **A. Employer Background**

Daily Grill is a full-service restaurant located in the lobby of the Westin Hotel on Century

Boulevard in Los Angeles, near Los Angeles International Airport. Although Daily Grill occupies a space in the Westin<sup>1</sup>, neither Daily Grill nor its employees are controlled by or affiliated with the Hotel. Daily Grill operates independently, and leases the space from Westin. As of the date of the RC petition and election which underlie this Request, Daily Grill had 76 hourly, non-supervisory employees.

**B. The RC Hearing and Direction of Mail Ballot Election**

On November 8, 2017, Unite Here! Local 11 (“Local 11” or “the Union”) filed an RC Petition seeking to represent the Daily Grill non-supervisory employees, in which it requested a mail ballot election. Employer, in its position statement, objected to a mail ballot election and requested a manual election as directed by the Board’s “longstanding policy” noted in the Case Handling Manual. On November 20, the Regional Director of Region 31 held a pre-election hearing, pursuant to which she considered the Union’s request for a mail ballot. The Region took testimony from the Union’s witnesses and received unauthenticated documents from the Union’s counsel, but refused to hear testimony from managers with the Employer (whom the Union had subpoenaed), regarding facts relevant to the mail-ballot issue. After lengthy argument, and pursuant to Employer’s request, the Region ordered the parties to submit supplemental briefing and evidence on the question of whether a mail ballot election was appropriate. The brief submitted by Employer, along with a supporting declaration from its Regional Director of Operations, demonstrated that a manual election would provide the best opportunity for maximum voter turnout. (See attached Exhibit 1, Employer’s RC Hearing Supplemental Brief and Supporting Declaration of Michael Burnett.)

Thereafter, on November 30, the Region issued a Decision and Direction of Election

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<sup>1</sup> The Westin LAX is a union property, organized under Unite Here! Local 11.

(“DDE”), directing a mail ballot election. Curiously, nowhere in the DDE’s discussion of the appropriate method of election does the Region cite “The Board’s longstanding policy . . . that representation elections should, as a general rule, be conducted manually.” (NLRB Case Handling Manual § 11301.2.) The Regional Director, instead, based her decision on a finding that the Daily Grill employees are “scattered” – a disingenuous finding, given the fact that all employees work at the *same* physical location, and within the Daily Grill’s regular operating hours. (See attached Exhibit 2, November 30, 2017 Decision and Direction of Election.)

The ballots were mailed to employees at 3:00 p.m. on Thursday, December 7. They were to be returned to the Region by Thursday, December 21, and opened and counted on December 22.

**C. The Union’s Unwelcome Visits to Employees’ Homes.**

Between the direction of election and the deadline for the submission of ballots, the Union – by its admission – made 80 visits to employees’ homes. (See Exhibit 6, pp. 452:21-454:17). As particularly relevant here, Union representatives systematically targeted specific employees for home visits on or around December 9, 2017, when the ballots were expected to arrive at employees’ homes. (See Exhibit 6, pp. 460:20-461:13.)

Shortly thereafter, several employees complained to Employer that Union representatives had come to their homes unwelcome. Each complaining employee came to Employer voluntarily and unsolicited to report the Union’s conduct, and each gave a contemporaneous written statement. As the employee statements plainly show, the Union’s home visits were unwelcome and coercive. For example, Employee Benjamin Acosta stated that Union representatives were waiting for him as he arrived home on December 9, and then “wanted me to take out the ballot so they could tell me how to vote . . .” (See Acosta Statement, included in Exhibits 3 and 4.) When Union

representatives appeared at Stephanie Mendez’s home, she and her sister, Kimberly Mendez, also an employee, did not want to talk to them. They tried to ignore them, “but they wouldn’t go away.” She also stated that the Union representatives “were trying to make [Kimberly] vote in front of them and when she said no that she was probably not going to vote yes they got mad . . .” (See Mendez Statement, included in Exhibits 3 and 4.) Similarly, Union representatives gained unauthorized access to Kurt Mann’s apartment complex, where they tried to convince him to allow their help in filling out his ballot. (See Kurt Mann Statement, included in Exhibits 3 and 4.)

Several of the employee statements show that these visits created fear and apprehension that their mail ballots would not be anonymous. As a result, some employees refused to sign the ballot return envelopes. (See *e.g.*, Statement of Daniel Guitron, and Statement of Macey Sheets, included in Exhibits 3 and 4.) Finally, one employee stated that she never received a mail ballot, despite calling the Region twice to obtain a ballot, as instructed. (Statement of Nataly Ramirez, included in Exhibits 3 and 4.)

On December 14, 2017, Employer filed an Unfair Labor Practices charge against the Union, and a Request to Block the election, based on the inappropriate and coercive home visits, supported by an offer of proof attaching 11 employee statements. (See Exhibit 3, Request to Block and Offer of Proof.) The Region refused to block the election.<sup>2</sup>

#### **D. The Vote Count, Objections, and Hearing on Objections**

On December 22, 2017, The Region opened the mail ballots and counted the votes. The tally was 29 in favor of the union and 25 against, with seven ballots voided because the outer

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<sup>2</sup> The Region ultimately dismissed the ULP without investigation, claiming Employer failed to cooperate, despite the Employer’s submission of numerous employee statements.

envelope was not signed.<sup>3</sup> Employer filed timely filed objections based on (1) the inappropriate direction of a mail ballot election, and (2) the Union’s misconduct in visiting the employees’ homes to coerce and intimidate. The objections were supported by offers of proof attaching the employee statements. (See Exhibit 4, Employer’s Election Objections and Offers of Proof.)

On April 11, 2018, The Region issued its Partial Decision on Objections and Notice of Hearing. The objection to the mail ballot process was overruled. However, an evidentiary hearing on the Union’s home visits was ordered, which took place April 23 through 25, 2018. (See Exhibit 5, Partial Decision on Objections and Notice of Hearing.) The Region heard testimony from nine employee witnesses, and five witnesses for the Union. Each of the employee witnesses who testified provided testimony that corroborated and expounded upon their written statements. (See Exhibit 6, complete transcript of evidentiary hearing on election objections.)

The Region’s hearing officer, on June 7, issued a Report and Recommendations on Objections (“RRO”), finding no misconduct by the Union and recommending that the Region overrule Employer’s objections based on the Union home visits. (See Exhibit 7.) On June 21, 2018, Employer timely filed exceptions to the RRO. (See Exhibit 8.) On July 24, the Region issued the Decision and Certification of Election, adopting the hearing officer’s recommendation finding no Union misconduct, overruling Employer’s objections, and certifying Local 11 as the Daily Grill employees’ representative. (Exhibit 9.)

Employer now requests that the Board review and overturn the Region’s Decision and Certification of Election.

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<sup>3</sup> One of the voided ballots appeared to have writing on the outer envelope that had been pen-scratched over and whited-out.

### III.

#### SUMMARY OF EVIDENCE PRESENTED

Multiple employees gave testimony affirming, and then expounding upon, their written statements. The hearing testimony is summarized as follows:

Benjamin Acosta, Lucas Chim, Kimberly Mendez, and Jose Palacios testified that they were upset, felt uncomfortable, and/or pressured by the Union's home visits. (Exhibit 6, pp. 37:18-21; 130:1-10; 242:3-15; 153:13-17; 260:10-25; 261:19-21). Employees even testified that they feared opening their mailboxes and receiving the mail ballots in front of the Union representatives who were waiting for them at their homes. (Exhibit 6, Testimony of Stephanie Mendez, pp. 371:7-372:8). Ashlynn Camberos had her ballot delivered to her mother's address to avoid receiving it at her home in the presence of the Union. (Exhibit 6, pp. 167:18-168:13.)

Kurt Mann testified that the Union's demeanor was intimidating. (Exhibit 6, Testimony of Kurt Mann, pp. 223:23-224:16-25, "[The Union demeanor is] . . . always a little intimidating, kind of; not mean, but definitely forceful, for sure . . . insisting upon not leaving until [he] could help them, or they were pretty forceful in telling me, like hey, we want to make this sure this happens, can you -- can we do it, can we do it now, can we -- you know, it was pretty forced. It was tough to not notice the -- they were trying to be nice about it, but at the same time, like, you could tell they weren't going to take no really, for an answer"). The Union representatives even entered Lucas Chim's home without his knowledge or consent. (Exhibit 6, Testimony of Lucas Chim, pp. 87:24-88:9).

The testimony establishes that the Union representatives attempted to convince employees to open their ballots in their presence, conduct which the Union agrees is illegal. (See e.g., Exhibit 6, pp. 576:20-577:6, pp. 753:5-25, pp. 728:4-729:10, pp. 770:16-771:25.) Benjamin Acosta,

Stephanie Mendez, Kurt Mann, and Macey Sheets each testified that the Union representatives who visited them attempted to “help” them complete their ballots, or tried to convince them to open and complete their ballots in the Union’s presence. (Exhibit 6, pp. 36:21-37:10; 143:12-144:11; 222:24-25; 317:20-25.)

Macey Sheets, Kurt Mann, and Kimberly Mendez testified as to how the Union’s home visits created concerns and fear amongst employees that their votes were *not* anonymous. (Exhibit 6, Testimonies of Macey Sheets, Kurt Mann, and Kimberly Mendez, pp. 153:20-154:2; 224:16-225:22; 320:3-18; 333:9-22). Ashlynn Camberos testified that she re-directed her ballot to be sent to her mother to avoid receiving the ballot at home and in front of the Union representatives. (Exhibit 6, Testimony of Ashlynn Camberos, pp. 167:18-168:13).

Multiple employees testified that the Union visits persisted in the employees’ minds and even created tension at work. (Exhibit 6, Testimony of Macey Sheets, pp. 355:12-356:1, “The discussions regarding the home visits had not decreased as time had passed and rather, had continued and remained ongoing amongst her co-workers within the last four months and as of the date of her testimony on April 24, 2018”). Lucas Chim testified that at least 20 of his co-workers discussed the home visits and stated that they were not going to vote because the Union members were going to their homes. (Exhibit 6, Testimony of Lucas Chim, pp. 119:23-120:14.)

Multiple employees testified as to tension and conflict at work due to the Union’s home visits. Ashlynn Camberos felt as though she was being retaliated against and that some employees were not receiving as much help as usual after disclosing whether they voted for the Union. (Exhibit 6, Testimony of Ashlynn Camberos, pp. 212:1-14: “. . . it felt like there was a lot of tension at work with certain people, where they weren’t doing certain things of their job and that would affect me, because they were backing up from helping me with tables when they had to do their



jobs”; Testimony of Macey Sheets, pp. 320:14-20, “she didn’t want to have like any like problems with any coworkers. So, like – if anyone would say anything or talk about it, I just kept my mouth shut. And I didn’t want anyone to know what I voted”; pp. 320:23-321:7, “Home visits affected her coworkers, as some coworkers were not receiving as much help after disclosing what they voted for”.)

The evidence presented in the hearing on Employer’s election objections, both through the employees’ written statements and their corroborating testimony, establish that the Union’s unwelcome home visits constituted misconduct which tended to interfere with the Employees’ free choice in the election. There is no question that such misconduct did in fact bear on some of the employees’ actions in casting their votes.

#### **IV. ARGUMENT**

The Region’s decisions related to the mail ballot election, and Union’s misconduct in this matter provide a basis for Board review on each of the grounds stated in Board Rule 102.67(d).

##### **A. The Region’s Rulings and the Union’s Conduct Raise Substantial Policy Issues.**

The stated purpose of the National Labor Relations Act is to protect “the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . .” (NLRA, 29 U.S.C. § 151.) To this end, ensuring the integrity of elections is of critical importance. Where employees’ freedom of choice is hampered by coercion or intimidation by any party, they are unable to fully enjoy their rights to self-organization and designation of representatives of their own choosing. The Union’s visits to employees’ homes in this case raises important policy issues regarding whether mail ballot elections, which are

inherently less secure than manual elections and enable the misconduct complained of by the Daily Grill employees, should be allowed in these circumstances.

It has been long recognized that manual elections better preserve the integrity of representation elections. This is clear from the Board's own Case Handling Manual and Board precedent, which expressly favor manual elections. "The Board's longstanding policy is that representation elections should, as a general rule, be conducted manually." (NLRB Case Handling Manual, § 11301.2.) Even the case widely cited in support of mail ballot elections recites this rule as the starting point for evaluating the appropriate election procedure:

Because of the value of having a Board agent present at the election, the Board's long-standing policy, to which we adhere, has been that representation elections should as a general rule be conducted manually, either at the workplace or at some other appropriate location.

(*San Diego Gas & Elec.*, 325 NLRB 1143, 1144 (1998) [allowing for a mail ballot election where the voting employees worked in multiple offices throughout San Diego County, separated by up to 60 miles].)

Concerns regarding the deficiencies of mail ballot elections have been expressed by representatives of the Board itself, as noted in Daniel V. Yager's monograph, *NLRB Agency in Crisis* (1996). Yager quotes comments from Richard J. Roth, Assistant Director of Brooklyn NLRB Regional Office, and Nina Rzymiski, NLRB Region 6, Election Specialist, to the effect that:

- The presence of a Board agent at an election gives employees a greater sense of security that their rights are being preserved over mail balloting;
- The potential in a mail ballot election for interference by either party increases the likelihood of a second election having to be conducted because of misconduct;
- By including ballots with other "junk mail" that employees typically receive, it "dilutes the seriousness of the process;" and

- If the voter is confused or uncertain about the process, there is no official agent available to answer questions, increasing the likelihood that the voter will procrastinate and/or “find it easier to not vote.”

(*Id.* at 46.)

Based on the evidence presented at the hearing on election objections, the first, second, and fourth bullet-pointed concerns materialized in this case. The absence of a Board agent during the election period enabled the Union to systematically target employees for uninvited home visits. The employees testified unequivocally that the visits caused them concern about the security and anonymity of their vote. Stephanie and Kimberly Mendez made a conscious effort to retrieve and conceal their ballots from Union representatives, for fear of tampering or interference. Ashlynn Camberos intentionally provided her mother’s address instead of her own for the ballot mailing, in order to keep it from the Union. Macey Sheets refused to sign the return envelope for fear that they would lose anonymity. Importantly, it was the employees -- whom the Act is designed to protect, and whom the Union purported to represent -- who complained of the Union’s conduct. Employer did not seek out the Employees’ complaints about the Union’s home visits; the employees brought their complaints to Employer voluntarily and on their own initiative. (Exhibit 6, pp. 229:15-232:5, pp. 118:17-19, pp. 176:1-177:7, pp. 267:17-268:11.)

In the Board’s recent Order on Employer’s Request for Review of the Regional Director’s Partial Decision on Objections, Member Emmanuel found, in a footnote, that:

This case illustrates why the Board should consider revising its policy in this area to restrict mail ballot elections to cases where a manual election is not feasible. Here, although the employees’ varied work schedules made a manual ballot election difficult, scheduling several voting sessions should have reasonably addressed the problem. Instead, the mail ballot process left nearly 30percent of eligible voters (22 of 76) uncounted, followed by the current litigation. In Member Emanuel’s view, a manual ballot election, which was certainly feasible, would have yielded more complete and certain results.

(See Exhibit 10.)

In addition to concerns regarding voter turnout, the Union's misconduct as complained of by the voting employees themselves provides further illustration of the need for revised policy on mail ballot elections. To expound on Member Emmanuel's comment, not only would a manual election have produced more complete voter turnout, it would have entirely prevented the Union from even attempting the misconduct complained of by the voting employees.

The Union's conduct here merits review on several important policy issues, including:

- (1) Whether the Board should allow a mail ballot election where a manual election is feasible;
- (2) Whether the NLRB procedural safeguards for mail ballot elections are sufficient to prevent misconduct by a party, and ensure employees' rights to participation and free choice in the election;
- (3) Whether, and to what extent, the Board should allow representatives of either party to make unwelcome visits to voting employees' homes, particularly during the voting period, where the contact with voting employees is not monitored by a Board agent; and
- (4) Whether the Board, and Regional Directors ruling on alleged election misconduct, should disregard unsolicited complaints by the voting employees of Union misconduct.

**B. The Regional Director's Finding of No Misconduct by the Union is in Error, and Prejudices the Employees and Employer.**

The Region's finding that the Union systematic targeting of employees for home visits did not constitute misconduct which interfered with the employees' choice in the election is based primarily on the conclusion that the Union representatives made no overt threats. This finding is

not supported by the law or the facts.

Even the cases cited by the Region in its Decision and Certification of Representation in support of its finding make clear that “coercive conduct” is not limited to overt threats. (See *Longwood Security Services, Inc.*, 364 NLRB No. 50, slip op. at 2 (2016), “Home visits by union representatives, however, are unobjectionable so long as they are unaccompanied by threats **or other coercive conduct.**”) Coercion need not be in the form of overt threats. The Region ignores that the Union’s conduct here is, as a whole, coercive. That the conduct is coercive is made clear by the employees’ contemporaneous and unsolicited complaints, by their conduct in response to the visits, and by their testimony at the hearing. The Union’s coercion is evidenced by the following actions and testimony:

- **Benjamin Acosta, Lucas Chim, Kimberly Mendez, and Jose Palacios** testified that they were upset, felt uncomfortable, and were pressured by the Union’s home visits. (Exhibit 6, pp. 37:18-21; 130:1-10; 242:3-15; 153:13-17; 260:10-25; 261:19-21).
- **Kurt Mann** testified: “[The Union demeanor is] . . . always a little intimidating, kind of; not mean, but definitely forceful, for sure . . . insisting upon not leaving until [he] could help them, or they were pretty forceful in telling me, like hey, we want to make this sure this happens, can you -- can we do it, can we do it now, can we -- you know, it was pretty forced. It was tough to not notice the -- they were trying to be nice about it, but at the same time, like, you could tell *they weren't going to take no really*, for an answer.” (Emphasis added.) (Exhibit 6, pp. 223:23-224:16-25).
- **Ashlynn Camberos** had her mail ballot delivered to her mother’s address rather than her own, to avoid receiving it in front of Union members. (Exhibit 6, pp. 167:18-168:13.)
- **Stephanie and Kimberly Mendez** rushed to get their mail ballots from their mailbox upon seeing the Union representatives arrive. (Exhibit 6, p. 371:2-372:9.)
- **Benjamin Acosta, Stephanie Mendez, Kurt Mann, and Macey Sheets** reported and testified that the Union representatives tried to convince them to let the Union representatives “help” them complete their ballots, or show them how to vote. (Exhibit 6, p. pp. 36:21-37:10; 143:12-144:11; 222:24-25; 317:20-25.)

- **Macey Sheets** did not sign her mail ballot for fear that it would not remain anonymous. The Union’s unwelcome home visits stoked this fear. (Exhibit 6, p. 333:9-22).

**Macey Sheets, Kurt Mann, and Kimberly Mendez** testified that the Union’s home visits had an effect on their concerns regarding the anonymity of their vote. (Exhibit 6, pp. 153:20-154:2; 224:16-225:22; 320:3-18.)

It is clear from these facts that the Union’s conduct actually had a coercive effect on the voting employees, such that it caused them to alter their own actions with respect to the vote. The Region’s findings ignore this plain fact. In *Super Thrift Markets, Inc.*, the Board found that “[a] violation of Section 8(a)(1) during the critical election period is, a fortiori, conduct that interferes with the results of the election *unless* it is so de minimis that it is “virtually *impossible* to conclude that [the violation] could have affected the results of the election.” (*Super Thrift Markets, Inc.*, 233 NLRB 409, 409 (1977 (emphasis added)).

The Region’s conclusory findings that the Union’s conduct did not tend to interfere with the election is directly contradicted by the evidence. In an election decided by a four-vote margin, nine voting employees were affected so much by the Union’s conduct that they felt compelled to complain to Employer and submit written statements of their complaints. They did so despite fear of retaliation from their pro-union co-workers. (See Exhibit 6, pp. pp. 212:1-14, 320:14-20, 320:23-321:7.) At least seven employees who wanted to vote did not have their votes counted, because they were voided. The evidence establishes that at least some of those voided ballots were unsigned due to concerns with anonymity, which was instigated or exacerbated by the Union’s misconduct. The evidence also shows that the Union’s home visits persisted in the minds of these employees, as they discussed it amongst themselves for months following the vote. (See Exhibit 6, pp. 355:12-356:1, and 119:23-120:14.) The Region’s finding to the contrary is clearly in error.

The Region’s error in finding that the Union committed no misconduct, and that its conduct

did not interfere with the employees' free choice in the election, has resulted in substantial prejudice to Employer, in that it will now be forced to bargain with the Union after a tainted election. More importantly, this error prejudices at least these nine employees -- whom the NLRA is designed to protect and whom the Union purports to represent -- who have come forward with complaints about the Union's home visits. These employees did not enjoy their right to a free and fair election to choose representation, or not, without harassment and intimidation by the Union.

For these reasons, the Board should review, and overturn, the Region's Decision and Certification of Representative on the grounds of prejudicial error.

**C. The Regional Director's Rulings Have Resulted in Prejudicial Error.**

From the outset, and throughout the pendency of this matter, Employer has objected to the mail ballot process and the Union's misconduct through its home visits. Employer's objections to the mail ballot process were based upon the lack of Board oversight in the election, which would enable the Union's misconduct. As this concern came to fruition, Employer presented the facts and renewed its objections at each procedural opportunity. Each time, the Region overruled Employer's objections.

Employer raised these objections immediately upon learning of the employees' complaints about Union home visits, through the filing of an Unfair Labor Practices charge and Request to Block the election. (See Exhibit 3.) The Region denied the Request to Block without investigation into the *employees'* complaints of Union misconduct. As a result, Employer and the employees have been prejudiced by the Region's ultimate decision certifying a Union that was not fairly elected. There is substantial evidence that this close election -- won by a four-vote margin -- was materially affected by the Union's misconduct targeting at least nine employees. These rulings by the Region -- including its direction of a mail ballot election, refusal to investigate the employee

complaints, and overruling of the election objections – provide grounds for review of the final Decision and Certification of Representative.

**D. There Are Compelling Reasons for Reconsideration of Board Rules and Policy.**

As member Emmanuel recognizes, “[t]his case illustrates why the Board should consider revising its policy in this area to restrict mail ballot elections to cases where a manual election is not feasible.” (See footnote in Exhibit 10.) Each of the issues and objections in this case arise from the Region’s departure from the Board’s longstanding policy favoring manual elections. Had the Region adhered to this plainly-stated default rule, the Union would not have had the opportunity for the misconduct complained of by the employees, and this protracted litigation over that misconduct would have been avoided.

While NLRB Case Handling Manual statement of the policy favoring manual elections seems clear, the authorities have been contorted by the Union to fit its agenda in seeking mail ballot elections. Here, the Regional Director adopted the Union’s interpretation of these authorities in casting aside the policy and its implicit limitations on mail ballot elections. A reasonable interpretation of the Case Handling manual dictates that the consideration of the appropriate type of election *starts* with the default rule of a manual election, and places the burden of establishing the appropriateness of a mail ballot election on the party requesting the deviation from the rule.

This interpretation is supported by Board precedent in *San Diego Gas & Electric*, 325 NLRB 1143, which begins the analysis by reciting the default rule of manual elections. In this case, the Union argued in favor of a mail ballot election as if it were mandatory in the circumstances, rather than discretionary. Strangely, the Regional Director’s DDE ordering a mail ballot election does not once cite the long-established general rule of manual elections clearly



stated in the Manual or *San Diego Gas & Electric*. Rather, the DDE adopts the Union's arguments and reasoning, proceeding as if it were Employer's burden to establish that the default rule should apply, and that a mail ballot election is not *mandated* in the circumstances.

Given the apparent flexibility in the Region's interpretation of what the Board has expressed as long-standing policy and a "general rule," there is good reason to reconsider the Board's rules and requirements with respect to mail ballot elections. Moreover, given the widely-recognized opportunity for misconduct, error, and voter disenfranchisement presented by mail ballot elections, there is good reason to reconsider the Board's rules regarding procedural safeguards and party contacts with voting employees for mail ballot elections. Employer respectfully posits that the Board should consider:

- Restriction of mail ballot elections only to situations in which a manual election is shown to be infeasible;
- The applicable burden in establishing the necessity of mail ballot elections;
- Restrictions on party contact with voting employees after the date of mailing of the mail ballots;
- Procedures to ensure voting employee confidence in anonymity of mail ballots, including handling of unsigned return envelopes to prevent voter disenfranchisement; and
- Procedures for investigating and responding to employee complaints of party misconduct during the voting period.

Each of these policy concerns, including the concern expressed by Member Emmanuel, is implicated in this case. As such, there are compelling reasons for the Board's review and correction of these important issues.

## CONCLUSION

The grounds discussed above individually and collectively support review of this matter by the Board. Employer respectfully requests that the Board review and overturn Region 31's Decision and Certification of Representative to correct the prejudicial errors therein.

Respectfully Submitted,

STOKES WAGNER

/s/ Adam L. Parry  
Diana Dowell  
Adam L. Parry  
555 West 5<sup>th</sup> Street, 35<sup>th</sup> Floor  
Los Angeles, CA 90013

ATTORNEYS FOR GRILL CONCEPTS  
SERVICES, INC. d/b/a THE DAILY  
GRILL