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

SEIU Local 49,

Petitioner/Union,

CASE 19-RC-231425

and

Providence Portland Medical Center,

UNION'S RESPONSE IN
OPPOSITION TO EMPLOYER'S
PETITION FOR REVIEW

Employer.

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I. INTRODUCTION

Petitioner Service Employees International Union, Local 49 ("SEIU 49" or "Union") submits this response in opposition to the request for review filed by Portland Providence Medical Center ("PPMC" or "Employer") that seeks review of portions of the Region 19 Regional Director's April 11, 2019, Decision relating to "Ballot 1."¹ In his Decision, the Regional Director determined that two void ballots at issue should be counted, and issued a certification of representative.

Compelling reasons must exist for the Board to grant this request for review. Section 102.67(d). Requests for review may be granted only where:

- (1) a substantial question of law or policy is raised because of the absence of or a departure from officially reported Board precedent;
- (2) the regional director's decision on a factual issue is clearly erroneous on the record and prejudicially affects a party's rights;
- (3) the conduct of the hearing or ruling has resulted in prejudicial error; or
- (4) there are compelling reasons for a reconsideration of an important Board rule or policy.

¹ "Ballot 1" refers to the ballot marked as Board Exhibit ("BE")-2, and is Appendix B to the Employer's Petition for Review ("App. B").

1 *Id.* The Employer relies upon (1), (2), and (4) in requesting review. As set forth herein, none of
2 these reasons warrant granting review in this case. Therefore, the Union requests that the Board
3 deny the Employer's request for review.

4 **II. FACTS**

5 Pursuant to a stipulated election agreement, on December 12 and 13, 2018, the Board
6 conducted an in-person election for a unit at PPMC. On December 13, 2018, a tally of ballots
7 issued following the vote count, listing three void ballots and 44 challenged ballots. Appendix A
8 to Employer's Petition for Review ("App. A"). That tally indicates challenges were sufficient to
9 affect the results of the election. *Id.* Ballot 1, with a clear "X" mark in the "yes" box and a
10 diagonal line with obvious erasure marks in the "no" box, was tallied by the Board agent as a
11 void ballot. The envelope used by the Board agent to store that ballot contains the label
12 "challenged ballot," and lists the Union's position that the ballot is valid. Appendix C to
13 Employer's Petition for Review ("App. C"), RP 14:14-23. The Board agent listed two other
14 ballots as void on the tally. App. A.

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16 On December 20, 2018, the Employer filed objections, none of which addressed the void
17 ballots. That same day, both parties filed position statements but did not serve those position
18 statements on each other.

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20 On January 30, 2019, after the parties discussed a stipulation during the first and second
21 days of the scheduled hearing and nearly a month and a half following the due date for
22 objections, the Employer amended its previously-filed objections to add an entirely new
23 objection. Exhibit A (BE-1(d)). This new "Objection 12," objects to any consideration of Ballot
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1 1 but does not raise any objection regarding Ballot 2.² *Id.* The Union objected to this untimely
2 amendment. RP 12:13.

3 Also on January 30, the parties entered into a Stipulation Resolving Challenged Ballots
4 and Objections, which resolved all challenged ballots except those declared void by the Board
5 Agent. App. D, ¶ 23. The Stipulation further provided that the parties withdraw objections,
6 except the Union’s objection regarding void ballots and the Employer’s untimely objection
7 regarding Ballot 1. *Id.*, ¶ 22, 23. It provided that one of the ballots was void. Appendix D to
8 Employer’s Petition for Review (“App. D”), ¶ 24. The stipulation left for resolution, if necessary,
9 two remaining ballots declared void by the Board agent at the December 13, 2018, vote count.
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11 Pursuant to the stipulation, fifteen previously-challenged ballots were opened and
12 counted on January 30, resulting in a revised tally of ballots with 383 votes for representation by
13 the Union and 382 votes against representation by the Union. See Appendix E to Employer’s
14 Petition for Review (“App. E”) p. 3. Given that ballots declared void by the Board Agent became
15 determinative, the hearing officer conducted a hearing on January 31, 2019, regarding those two
16 ballots.
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18 The hearing officer, Judge Eleanor Laws, on February 21, 2019, issued a report and
19 recommendations regarding the two ballots, recommending that both ballots be counted.
20 Regarding Ballot 1, the hearing officer found that the voter’s intent to vote “yes” was clear from
21 the ballot and that the irregular marking in the “no” box was caused by attempted erasure.
22 Appendix E to Employer’s Petition for Review (“App. E”). The hearing officer also found that
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² “Ballot 2” refers to the ballot marked as BE-3.

1 Ballot 2 should be counted. Both parties filed exceptions to the hearing officer's
2 recommendations, and only the Union filed an answer opposing exceptions.

3 The RD's Decision affirmed the Hearing Officer's findings and accepted her
4 recommendations that both ballots be counted. In regard to Ballot 1, the RD held that Ballot 1
5 "shows clear intent to vote 'yes'" and sustained the Union's objection finding that "Ballot 1 is
6 not void" and counts "as a 'yes' vote in favor of the Petitioner." Appendix F to Petition for
7 Review ("App. F"), p. 4. The Decision, like the hearing officer's report and recommendations,
8 found that Ballot 2 should also be counted. The Decision included a certification of
9 representative based upon a revised tally of ballots of 384 ballots for the Union and 383 against,
10 certifying the Union as the exclusive bargaining representative for employees in the unit. *Id.*

11 Thus, Ballot 1 is not necessarily determinative, as averred by the Employer. If Ballot 2
12 were not counted,³ the Board should reach, but would not need to reach, Ballot 1 because the
13 Union would still win the election.
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15 **III. ARGUMENT**

16 **A. The Regional Director's decision comports with and in no way departs from** 17 **established Board law.**

18 The Regional Director correctly applied – and did not depart from – Board precedent to
19 find Ballot 1 must be counted. To find Ballot 1 void, the Board would have to depart from
20 established Board precedent. This is because the Board has consistently found that where there
21 are marks in both boxes of a ballot (including an "X" in both boxes), and an attempt to obliterate
22 or erase the mark in one box, the ballot is valid and must be counted as a vote for the preference
23 associated with the box that contains no signs of erasure or obliteration. *J.L.P. Vending Co.*, 218
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25 ³While the Union does not seek to disenfranchise voters, the Union out of necessity filed a conditional request for review of the Regional Director's determinations regarding Ballot 2, but does not seek review if the Board denies the Employer's request for review.

1 NLRB 794, 794 (1975) (line in “no” box with attempt to erase and diagonal lines (not an “X”) in
2 “yes” box shows intent to vote “yes”); *Osram Sylvania, Inc.*, 325 NLRB 758, 759 (1998) (marks
3 on “no” side of ballot plus “smudge” mark on diagonal line in “yes” box of ballot evince clear
4 intent of voter to vote no);⁴ *Abtex Beverage Corp.*, 237 NLRB 1271, 1271 (1978) (voter placed
5 “X” in both boxes, using pen, then scratched out, instead of erased, one of the boxes); *Mediplex*
6 *of Conn., Inc.*, 319 NLRB 281, 300 (1995) (counting ballot as “no” where “X” in “yes” box is
7 “smudged attempted erasure,” finding intent of voter clear);⁵ *Brooks Brothers, Inc.*, 316 NLRB
8 176, 176 (1995) (counting ballot as “no” where there were full “X” marks in both boxes but
9 where the voter “scratched over with additional pencil markings” the “X” in the “yes” box, even
10 with evidence voters had access to erasers, finding the ballot clearly expressed the voter’s
11 intent); *Gifford-Hill & Co., Inc.*, 181 NLRB 729, 729 (1970) (distinct “X” in “no” box plus
12 marking in “yes” box attempting to blur slant mark reveal intent to vote no).⁶ Stated another way,
13 “where a voter marks both boxes on a ballot *and the voter’s intent cannot be ascertained from*
14 *other markings on the ballot (such as an attempt to erase or obliterate one mark),”* the ballot is
15 void. *TCI West, Inc.*, 322 NLRB 928, 928 (1997), enf. denied, 145 F.3d 1113 (9th Cir. 1998)
16 (emphasis added). (emphasis added). Thus, the Employer’s statement that the “Board
17 consistently voids ballots that contain marks in both the ‘yes’ and ‘no’ boxes” is an incorrect
18 statement of the law. Further, in the above cases the Board found the intent of the voter to be
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22 ⁴ Notably, in *Osrom*, the Board stated that it would still find clear intent of the voter to vote no *even if the “yes” box*
23 *lacked a smudge mark.* 325 NLRB at 759.

24 ⁵ The Employer’s attempt to distinguish *Mediplex* because the ALJ characterized the “X” in the “no” box as “more
25 intense” fails. In *Mediplex*, the voter also placed an “X,” rather than only a partial line as here, in the “yes” box. 319
NLRB at 300. And, what the Board stated with respect to a worn eraser is that “it is not even known whether *that*
voter may have worn down the eraser.” *Id.* at 298 (emphasis added).

⁶ A circuit court has also so held. *Ruan Transport. Corp.*, 674 F.3d 672, 676 (7th Cir. 2012) (“X” mark in both boxes
with attempt to obliterate in one shows clear intent to select choice associated with non-obliterated box).

1 clear, not ambiguous, despite marks in both boxes on a ballot, where there was an attempt to
2 erase or obliterate.

3 With the exception of one case described below, the cases relied upon by the Employer in
4 support of its assertion that Ballot 1 is void contain *no evidence of an attempt to erase or*
5 *obliterate one of the marks. See TCI West, Inc., 322 NLRB 928, 928 (1997); Bishop Mugavero*
6 *Center, 322 NLRB 209, 209 (1996); Caribe Industrial, 216 NLRB 168, 168 (1975).* Thus, *TCI*
7 *West, Bishop Mugavero, and Caribe* are not applicable here as Ballot 1 contains an attempt to
8 erase the single line in the “no” box.
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10 In only one case, *Mercy College, 212 NLRB 925 (1974)*, has the Board held that a ballot
11 with marks in each box and a purported attempt at erasure is void. There, the Board found a
12 ballot that contained a heavily shaded-over discernible “X” in the “no” square and a standard
13 “X” in the “yes” square was void. *Id.* at 926. Unlike that ballot, Ballot 1 does not have “X”
14 marks in both squares, but instead contains a single unmistakable “X” mark in the “yes” box, and
15 an incomplete, smudged, and erased diagonal line (not an “X”) in the “no” box, clearly showing
16 the voter’s intent to cast a “yes” vote. Further, unlike in *Mercy College*, where the Regional
17 Director inferred an intent to obliterate, the Regional Director here found the smudging to be an
18 “obvious attempt at erasure.” Finally, *Mercy College* predates the more recent Board decisions
19 described above and is distinguished in *J.L.P. Vending*.
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21 The Employer articulates a number of theories that are not supported by Board precedent.
22 For example, the Employer seems to aver that where there are marks in both boxes and either
23 mark would be a sufficient expression of voter intent viewed alone, then a ballot must be voided.
24 This ignores the well-established Board precedent holding that an attempt to erase or obliterate
25 one mark shows a clear intent to cast a vote for the choice associated with the box containing the

1 other mark. Further, the Regional Director's statement that a ballot is counted if it shows "any
2 unambiguous intent" was not relied upon by him in reaching his conclusion on Ballot 1, and the
3 case he cites for that proposition held that a ballot with only "si" written on it would be counted
4 as a vote for the union. *Hydro Conduit Corp.*, 260 NLRB 1352 (1982). Additionally, the
5 Employer's assertion that the Board requires that there be some other mark in addition to an
6 attempt to erase or obliterate is negated by the outcomes in *J.L.P. Vending*, *Abtex Beverage*,
7 *Mediplex*, *Brooks Brothers*, and *Gifford-Hill*, where there were no marks on the ballot other than
8 the marks in each box and an attempt to erase or obliterate.
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10 Here, the Regional Director correctly applied Board precedent to find Ballot 1 must be
11 counted. There is a clear "X" in the "yes" box, with an "obvious attempt to erase" the single
12 diagonal line in the "no" box, based upon smudges around that line consistent with a pencil
13 eraser. Thus, the Regional Director did not depart from Board precedent.

14 B. The Regional Director's factual finding that the "smudging along the diagonal line in
15 the 'no' box is an obvious attempt at erasure of an incomplete 'X'" is correct and not
16 clearly erroneous.

17 In order for the Board to grant review under Rule 102.67(d)(2), the Regional Director's
18 decision on a substantial factual issue must be "clearly erroneous." Here, the Regional Director
19 did not err in finding that "the smudging along the diagonal line in the 'no' box is an obvious
20 attempt at erasure of an incomplete 'X,'" and there is no evidence that such finding meets the
21 "clearly erroneous" standard. App. F, p. 5. Nonetheless, the Employer argues that the erasure
22 marks around the single line in the "no" box are not erasure marks because (1) they could have
23 been caused by a sweaty palm, drop of moisture, or something else; (2) the diagonal line itself is
24 not smudged; and (3) a reasonable person attempting to erase should have done more to erase the
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1 line than what this voter did. None of these demonstrate the Regional Director's factual finding
2 was "clearly erroneous."

3 The diagonal mark in the "no" box of Ballot 1 is covered and surrounded by obvious and
4 intentional erasure marks and are not the kind of marks that could be caused by a drop of
5 moisture or a sweaty palm.⁷ The smudge marks show attempts to erase the mark, with smudging
6 caused by each pass of an inadequate pencil eraser, resulting in erasure marks over the darker
7 original diagonal mark, as well as to the right and left of it that are the width of a standard pencil
8 eraser. App. B. A drop of moisture simply would not leave marks so consistent with an eraser
9 being moved over the single diagonal mark, resulting in the smudging parallel to the darker,
10 original diagonal line.
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12 The Employer's argument that the line itself would be smeared if an eraser had passed
13 over it is purely speculative and without merit. First, the diagonal line does in fact smear into the
14 smudge mark at its upper right tip, despite the Employer's claim to the contrary. Second, anyone
15 that has used an ineffective and hardened pencil eraser knows the frustration of passing it over a
16 pencil mark to erase it, only for the eraser to instead smear the mark over a larger area on the
17 page, resulting in the exact smudging found on Ballot 1. Finally, Board cases support that such
18 smudges constitute erasure marks. *See i.e. Mediplex of Conn., Inc.* 319 NLRB 281, 281 (1995)
19 (affirming ALJ finding that smudges in the "yes" box indicated attempted erasure); *Gifford-Hill*
20 *& Co., Inc.*, 181 NLRB 729, 729 (1970) (ballot valid "no" vote where marking in "yes" box was
21 blurred with pencil, and the "no" box contained a distinct "X" in the "No" box); *Osram Sylvania*,

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25 ⁷ Ironically, the Employer cites *TCI West, Inc. v. NLRB*, 145 F.3d 1113 (9th Cir. 1998), a circuit court decision that
reversed the *TCI* Board decision upon which the Employer heavily relies. If Ballot 1 were decided under the *TCI*
West 9th Circuit decision, there is no question it would be counted as a "yes" vote for the Union.

1 *Inc.*, 325 NLRB 758, 759 (1998) (smudged diagonal line in “yes” box indicates attempted
2 erasure).

3 Finally, the Employer’s argument that any person attempting an erasure would have more
4 adequately attempted to do so is belied by the clear “X” in the yes box, free from smudging and
5 the conclusion of both the Hearing Examiner and Regional Director that Ballot 1 demonstrates a
6 “clear expression of the voter’s intent” to vote yes for Union representation. If the markings on
7 Ballot 1 provide a clear expression of the voter’s intent in the eyes of the Hearing Examiner, who
8 viewed the original ballot two times, and Regional Director, surely a reasonable voter would also
9 view the markings on Ballot 1 as sufficient to demonstrate intent to vote yes for union
10 representation, instead of making further attempts to erase or obliterate the single erased line in
11 the “no” box (or request a new ballot).

13 C. Board review is improper because the Employer did not timely object to
14 Ballot 1.

15 Further, here, the Union properly and clearly stated its position on Ballot 1 at the vote
16 count and timely raised an objection to the Board Agent not counting the ballot as a yes. App. D
17 ¶ 8; RP 10: 13-17.⁸ In contrast, the Employer cannot be allowed to untimely add a new objection
18 to the issue of void ballots.⁹ The Employer could have timely filed an objection to Ballot 1 but
19 failed to do so, instead amending its objections to include an objection to Ballot 1 on December
20 30, 2018. App. D ¶ 7. The record is clear that the Employer was aware that Ballot 1 was voided
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22 ⁸ Objections may be filed over the interpretation or validity of ballots, including void ballots, and in resolving such
23 an objection, the ballot is either counted, or not, if ultimately found void. *F. J. Stokes Corp.*, 117 NLRB 951, 954-5
24 (1957) (where validity of void ballots raised by timely objection, and ballots deemed void by Board Agent are valid,
25 they must be included in official tally of ballots); *Gifford-Hill* 181 NLRB at 729; *see also* NLRB Casehandling
Manual, Part 2, Representation Proceedings (Jan. 2017), Sections 11340.7, 11340.8(b)(1), and 11392.1(a). The
proper result is not to invalidate the election based on the disposition of an objection of or challenge to a void ballot
determination, and the Union does not seek such an outcome here.

⁹ Objections must be filed within seven days after a tally of ballots has been prepared. NLRB Rule Section
102.69(a). NLRB Rule Section 102.2(b), which allows certain documents to be filed late upon a showing of good
cause, does not mention objections.

1 by the Board agent at the time it filed its initial objections. *See* Appendix C (Showing that the
2 Employer was aware that Ballot 1 was voided on December 13, 2018, the night of the election).
3 And, in any event, the remedy to a challenge or objection regarding a voided ballot is to count it.

4 Thus, to effectuate the purposes of the Act and to give effect to the clear intent of the
5 voter who cast Ballot 1, the Board should decline review of the Regional Director’s decision.

6 D. There is no reason for the Board to alter existing Board law.

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8 The Employer argues in the alternative that the Board should create a new standard that
9 ballots with marks in both boxes are presumptively void, and that the presumption can only be
10 overcome “where the voter has gone to extraordinary lengths to discount or negate stray marks”
11 such as by circling one box or “effectively removing any trace of the incorrect mark.” Such a
12 change in Board law is not warranted because Board precedent already requires that its analysis
13 of stray marks be free from speculation. More importantly, the Employer’s proposed new
14 standard is inconsistent with the longstanding Board policy to give effect to the preference of
15 every voter when possible.

16
17 The Board’s primary purpose in representation elections is to protect the right of
18 individual employees to choose whether to be represented by a union. *General Shoe Corp.*, 77
19 NLRB 124, 127 (1948), enf’d. 192 F.2d 504 (6th Cir. 1951). To that end, the Board assumes that
20 by casting a ballot, a voter evinces an intent to participate in the election process and register a
21 preference and that this preference must be given effect whenever possible. *In re Daimler-*
22 *Chrysler Corp.*, 338 NLRB 982, 982-983 (2003). Adopting the presumption put forth by the
23 Employer turns this longstanding board presumption that a voter that casts a ballot evinces an
24 intent to register a preference in the election on its head, requiring the voter to go to
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1 “extraordinary lengths” to negate stray marks, such as “removing any trace of the incorrect
2 mark.”

3 Further, Board law already prohibits the counting of a ballot with marks in both boxes
4 unless the voters intent can be “ascertained from other markings on the ballot (such as a n
5 attempt to erase...)” *TCI West Inc.*, 322 NLRB 928 (1997). The Board should not change
6 longstanding precedent regarding the counting of ballots with irregular markings because the
7 Employer disagrees with the Regional Director-that the smudging in the “no” box of Ballot 1 is
8 an “obvious attempt at erasure.”
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10 **IV. CONCLUSION**

11 The Board should not accept review regarding Ballot 1 because the Regional Director’s
12 decision comports with and in no way departs from established Board law, the Regional
13 Director’s factual finding that the “smudging along the diagonal line in the ‘no’ box is an
14 obvious attempt at erasure of an incomplete ‘X’” is correct and not clearly erroneous, the
15 Employer did not timely object to Ballot 1, and there is no reason for the Board to alter existing
16 and longstanding Board law.
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19 Respectfully submitted,

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EXHIBIT A



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January 30, 2019

Jessica Dietz, Officer in Charge
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Re: *Providence Health & Services – Oregon
d/b/a Providence Portland Medical Center,
Case 19-RC-231425*

Dear Ms. Dietz:

Davis Wright Tremaine LLP represents Providence Health & Services – Oregon d/b/a Providence Portland Medical Center (the “Employer” or “PPMC”) in this matter. This letter is submitted, pursuant to Section 102.69(c) of the Board’s Rules and Regulations, to amend PPMC’s objections to conduct that affected the results of the election filed December 20, 2018. A copy of this letter will be provided to the Union. A separate letter summarizing the Employer’s objections and its offers of proof has been submitted to the Region.

Objection 1 – One or more Union agents improperly communicated with eligible voters during the two-day election period. In those communications, the Union agents told eligible voters that the Union was keeping track of which employees had voted and which had not by, among other things, telling employees that there was a “something wrong” with their ballot and that they needed to vote again.

Objection 2 – One or more Union agents kept lists of which employees voted, and which had not.

Objection 3 – One or more Union agents impugned the Board’s election processes and the Board agents’ competence in communications with eligible voters. By openly questioned the integrity of the Board’s election procedures and the Board agents’ abilities to protect the integrity of the election in this case, specifically, the Union undermined the validity of, and employees’ confidence in, the election process and its results

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Objection 4 – By Its Conduct described in Objections 1 – 3, the Union restrained and/or coerced employees in the exercise of their Section 7 rights in violation of Section 8(b)(1)(A) of the National Labor Relations Act

Objection 7 – Union agents physically blocked eligible voters' access to election information sessions. While blocking employees' access, Union agents physically and verbally intimidated eligible voters, and created the impression the Union was identifying and keeping track of "anti-Union" or "No" voters.

Objection 8 – By its conduct set forth in Objections 7, the Union restrained and/or coerced employees in the exercise of their Section 7 rights in violation of Section 8(b)(1)(A) of the Act.

Objection 9 – Union observers and other Union agents violated the laboratory conditions for voting and, therefore, undermined voters' confidence that their right to cast a secret ballot was sufficiently protected by:

- Union agents instructing its observer to sit in a location that would allow the observer to determine how employees were voting;
- The Union observer engaging in electioneering in the voting area as well as the hallway approaching the voting area (a designated no-electioneering space);
- At least one Union agent using a personal cell phone to record activities in the voting area.

Objection 10 – During visits to employees' homes and workplaces, Union agents engaged in belligerent and threatening behavior towards employees and their family members. The Union agents, along with other conduct, banged on employees' doors, refused to leave employees' homes when asked to do so, badgered employees to declare support for the Union, left obscene messages for employees who were unable or unwilling to engage the agents, told employees they would not be permitted to vote in the Board election unless and until they signed a Union petition.

Objection 11 – By its conduct set forth in Objections 7, the Union restrained and/or coerced employees in the exercise of their Section 7 rights in violation of Section 8(b)(1)(A) of the Act

Objection 12 – Without waiving any argument that it was not required to file, or that it has properly amended its Objections, the Employer objects to the consideration of a ballot the Board Agent initially and properly declared void. The Board Agent appropriately determined that the ballot was void because the voter's intent was unclear under the Board's established policy and case law.

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The Employer immediately challenged the ballot as void, and preserved its position at the time of the count. The Employer's contemporaneous challenge and objection is clearly noted on the challenged ballot envelope provided by the Agency for just that purpose. Further, because the Board Agent properly treated the ballot as a challenged ballot, the Employer reiterated the basis for its challenge in its Statement of Position regarding the challenged ballots.

The basis for the Board Agent's determination, that the ballot was void because – like another ballot the parties stipulate is void – the voter marked both the "YES" and "NO" boxes of his or her ballot. That determination should be affirmed. As void, the ballot should not be counted.

Thank you for your time and attention to this matter. Please do not hesitate to contact me if you have questions regarding this matter.

Best regards,

Davis Wright Tremaine LLP

Peter G. Finch

cc: Providence Portland Medical Center
Kristen Kussmann, Esq. via email to kkussmann@qwestoffice.net