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ORAL ARGUMENT NOT YET SCHEDULED

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**United States Court of Appeals**  
for the  
**District of Columbia Circuit**

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Nos. 19-1127 and 19-1132

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TROUTBROOK COMPANY LLC, d/b/a BROOKLYN 181 HOSPITALITY LLC,

*Petitioner,*

– v –

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

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NEW YORK HOTEL AND MOTEL TRADES COUNCIL, AFL-CIO,

*Intervenor for Respondent.*

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ON REVIEW FROM THE NATIONAL LABOR RELATIONS BOARD

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**FINAL BRIEF FOR PETITIONER**

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**CORPORATE DISCLOSURE STATEMENT**

Petitioner Troutbrook Company LLC d/b/a Brooklyn 181 Hospitality LLC discloses it is not a publicly held corporation, it has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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## GLOSSARY OF ABBREVIATION

Troutbrook Company LLC d/b/a Brooklyn 181 Hospitality LLC	<b>Petitioner, Troutbrook, or the Company</b>
Warehouse Production Sales and Allies Service Employees Union Local 811	<b>Local 811</b>
New York Hotel & Motel Trades Council, AFL-CIO	<b>HTC</b>
National Labor Relations Board	<b>NLRB or Board</b>
National Labor Relations Act	<b>NLRA or Act</b>
NLRB Election held on June 26, 2018	<b>Election</b>
Employer's Objections to Conduct Affecting the Results of the Election file July 3, 2018	<b>Objections</b>
Offer of Proof filed July 10, 2018	<b>Offer of Proof to Objections</b>
August 3, 2018 Decision on Objections, Order Setting Aside Election, Order Canceling Hearing on Objections and Direction of Second Election by the Regional Director for Region 22	<b>Decision on Objections</b>
Employer's Objections to Conduct Affecting the Results of the Election file September 13, 2018	<b>Objections to Rerun Election</b>
Offer of Proof filed September 13, 2018	<b>Objections to Rerun Election Offer of Proof</b>
September 24, 2018 Decision on Objections to Rerun Election and Certification of Representative by the Regional Director for Region 22	<b>Decision on Objections to Rerun Election</b>
NLRB Rerun Election held on September 6, 2018	<b>Rerun Election</b>
NLRB's June 3, 2019 Decision and Order issued in Case No. 29-CA-232891, reported at 367 NLRB No. 139	<b>Decision and Order</b>
Troutbrook's Petition for Review of the Board's Decision and Order in Case No. 29-CA-232891, filed with the Court on June 12, 2019	<b>Petition for Review</b>

**CERTIFICATE AS TO THE PARTIES, RULINGS  
AND RELATED CASES**

Pursuant to D.C. Circuit Rule 28(a)(1), Petitioner Troutbrook Company LLC d/b/a Brooklyn 181 Hospitality LLC in Case No. 19-1127 (consolidated with Case No. 19-1132) hereby submits this certificate as to parties, rulings, and related cases.

**A. Parties and Amici**

1. Troutbrook Company LLC d/b/a Brooklyn 181 Hospitality LLC is the Petitioner. Troutbrook is the Petitioner based on its Petition for Review filed in Case No. 19-1127. The NLRB filed an Application for Enforcement that the National Labor Relations Board filed in Case No. 19-1132. The Court consolidated the two cases. Troutbrook was the employer and Respondent in the underlying proceedings before the Board.

2. The NLRB is the Respondent. It is the Respondent here, based on Troutbrook's Petition for Review of the Board's Order, filed in Case No. 19-1127. The NLRB is also filed an Application for Enforcement in Case No. 19-1132, which was consolidated with 19-1127.

3. New York Hotel & Motel Trades Council, AFL-CIO is the Intervenor. HTC was the charging party in the underlying unfair labor practice proceeding before the Board, and has also intervened in Case No. 19-1132.

4. At this time, there are no amici in this matter. Troutbrook is not aware of any amici or potential amici. There were no amici in the underlying proceedings before the Board.

**B. Ruling Under Review**

Troutbrook seeks review of the NLRB's Decision and Order on June 3, 2019 in its Case No. 29-CA-232891. It is reported at 367 NLRB No. 139. Troutbrook further seeks review of the NLRB's Decision on Objections to Rerun Election and Certification of Representative that issued on September 24, 2018 in the underlying representation proceeding in Case No. 29-RC-216327, as part of its review of the Decision and Order. *See Canadian American Oil Co. v. NLRB*, 82 F.3d 469, 471, n. 1 (D.C. Cir. 1996).

**C. Related Cases**

This case has not been previously before this or any other court. Counsel is unaware of any related cases currently pending before this Court or any other Court.

## **JURISDICTIONAL STATEMENT**

This case is before the Court based on the Petition for Review that Troutbrook Company LLC d/b/a Brooklyn 181 Hospitality LLC filed, seeking review of the Decision and Order of the National Labor Relations Board in its Case No. 29-CA-232891 and reported at 367 NLRB No. 139. The Board had jurisdiction to issue the Decision and Order pursuant to 29 U.S.C. §§ 158(a)(1) and (5), which authorizes the Board to resolve alleged unfair labor practices, including issuing the disputed Decision and Order concerning Troutbrook's allegedly improper refusal to bargain with New York Hotel & Motel Trades Council, AFL-CIO, after the Board's disputed certification of HTC as the collective bargaining representative.

This Court has jurisdiction over Troutbrook's Petition, under 29 U.S.C. § 160(f). This provision of the National Labor Relations Act authorizes such petitions in a federal circuit court of appeals.

The Court further has jurisdiction to review the Board's certification of HTC as the bargaining representative of the unit employees on September 24, 2018 in Case No. 29-RC-216327. The Board's Decision and Order denied Troutbrook's Request for Review of the Director's Report on Objections to Rerun Election and Certification of Representative and resulted in HTC's disputed certification. Therefore, it becomes part of this Court's review. See 29 U.S.C. § 159(d) (providing that the entire record of the proceedings underlying a certification

decision shall be before the court on a petition for review or application for enforcement of a Board order “based in whole or in part” upon a certification decision); *Canadian American Oil, supra*, 82 F.3d at 471, n. 1 (employer may “challenge a certification decision indirectly by refusing to bargain with the union and then raising its election objection in the ensuing unfair labor practice proceedings”).

### **STATEMENT OF ISSUES RAISED**

1. Whether the Board erred in certifying HTC as the collective bargaining representative.
2. Whether the Board erroneously overturned Troutbrook’s objections to the Rerun Election concerning HTC misconduct which interfered with employee free choice and the result of the Rerun Election.
3. Whether the Board erroneously overturned Troutbrook’s objections to the rerun election concerning the Board’s conduct which gave the impression that HTC controlled Board processes, which interfered with employee free choice and the result of the Rerun Election.
4. Whether the Board erroneously concluded that Troutbrook unlawfully refused to recognize and bargain with HTC in Case No. 29-CA-232891.

## STATUTES AND REGULATIONS

Section 7 of the Act, 29 U.S.C. § 157, provides in relevant part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing ...

Sections 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1), (5), provides in relevant part:

(a) It shall be an unfair labor practice for an employer:

(1) to interfere with, restrain , or coerce employees in the exercise of rights guaranteed in Section 7.

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(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Section 9(a) of the Act, 28 U.S.C. § 159(a), provides in part:

Representatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

Sections 10(f) of the Act, 28 U.S.C. § 160(f)

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in

or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. ...

### **STATEMENT OF THE CASE**

#### **A. Nature of the Case**

This case involves an unfair labor practice alleging that Troutbrook refused to bargain with HTC in violation of §§ 8(a)(1) and 8(a)(5) of the Act. Troutbrook refused to bargain in order to test the validity of HTC's certification as the bargaining representative issued in the underlying representation proceeding between the parties.

#### **B. Course of the Proceedings and Disposition Below**

On or about March 12, 2018<sup>1</sup>, Local 811 filed a representation petition for the for: "All full-time and regular part-time front-desk employees, housemen/bellmen, housekeepers, laundry attendants and food and beverage employees employed ... at 181 3<sup>rd</sup> Avenue, Brooklyn, New York; Excluding: Executive management, sales personnel, fire safety directors, all other employees including guards and supervisors as defined by the National Labor Relations Act." (See Representation Petition at JA-7). Four days later, on March 16, HTC sought to intervene.

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<sup>1</sup> All dates occur in 2018, unless otherwise noted.

The Region 29 Regional Director scheduled a pre-election hearing for March 24. That pre-election hearing was cancelled on March 23. (*See Order Cancelling Hearing and Holding Case in Abeyance at JA-9-10*). The Board scheduled the election for May 31. (*See May 18 Notice of Election at JA-23-25*). However, the election was cancelled at the last minute due to a change in the employing entity. (*See May 30 Order Cancelling Election at JA-26-27*). The representation petition was amended on May 31. (*See First Amended Petition at JA-28*).

On June 8, a stipulated election agreement was executed and approved; an election was scheduled and held by Region 29 on June 26. (*See Stipulated Election Agreement at JA-29-34*). At the election, 8 votes were cast for Local 811, 19 votes for HTC and 1 vote against representation. (*See June 26 Tally of Ballots at JA-48*).

On July 3, Troutbrook filed with the Regional Director for Region 29 timely objections to the election, alleging: (1) significant misconduct by HTC during the critical period; (2) that the Board's policies and processes, as well as the Region 29 Regional Director's actions, created the impression that HTC was allowed to dictate the Board's processes; and (3) Region 29 made certain errors with the Notice of Election that warranted overturning the election. (*See Objections at JA-49-56*). Because Troutbrook's objections included allegations of misconduct on the part of Region 29, the case was transferred to the Regional Director for Region 22.

On August 3, 2018, the Regional Director for Region 22 found merit to one of Troutbrook's objections without holding a hearing or considering the remainder of Troutbrook's objections. Accordingly, based on the only objection considered, the Regional Director for Region 22 issued a decision overturning the first election and ordering a rerun election. (*See* Decision on Objections, Order Setting Aside Election, Order Canceling Hearing on Objections and Direction of Second Election at JA-123-129).

A Notice of Election was thereafter issued, and the Rerun Election was scheduled for September 6. (*See* August 29 Notice of Election at JA-132-134). However, on August 23, Local 811 requested to withdraw from the Rerun Election. (*See* August 27 Order Granting [Local 811's] Request to Withdraw from Further Participation in Petition and Notice of Rerun Election at JA-130-131).

The Rerun Election was ultimately held on September 6 with only HTC participating. At the election, there were approximately 29 eligible voters: 18 employees voted for HTC and 8 employees voted against HTC. (*See* Rerun Election Tally of Votes at JA-135).

Troutbrook timely filed objections to the Rerun Election on September 13. (*See* Objections to Rerun Election at JA-136-143). These objections again challenged (1) the HTC misconduct that was never addressed (*id.* at ¶¶ 1-5 at JA-136-137), (2) Board policies and conduct which created an impression that HTC

was controlling the election process (*id.* at ¶¶ 6-11 at JA-138-140), and (3) the Board Agent's conduct on June 26 in amending the election times on the spot after it was noted by HTC (*id.* at ¶ 12 at JA-140). Such objections were made because this conduct interfered with employee free choice during the Rerun Election.

On September 24, the Regional Director for Region 22 issued the Decision on Objections to Rerun Election and Certification of Representative that is challenged here, refusing to hold a hearing concerning any of the objections. (*See* Decision on Objections to Rerun Election at JA-193-198).

On October 9, Troutbrook filed a Request for Review with the Board. (*See* Request for Review at JA-199-218), which the Board denied on December 13, (*see* Decision Denying Request for Review at JA-219), resulting in certification of HTC as the collective bargaining representative for the petitioned for unit.

Thereafter, HTC requested bargaining. Troutbrook, in order to challenge the underlying certificate on before this Court, refused to bargain. On December 18, HTC filed an unfair labor practice charge regarding the refusal to bargain (*see* Charge at JA-220), the General Counsel issued a Complaint, and then moved for summary judgment on that Complaint, asserting that Troutbrook violated § 8(a)(1) and (5) of the Act by refusing to bargain. (*See* Motion for Summary Judgement). Accordingly, Troutbrook was provided with the opportunity to petition for review of HTC's certification on the basis of HTC and the Board's unremedied conduct

that impacted the results of the Rerun Election. Troutbrook filed a timely Opposition to the Motion for Summary Judgment. (*See* Opposition to Motion for Summary Judgment at JA-445-457).

On June 3, 2019, the Board issued its Decision and Order in NLRB Case No. 29-CA-232891, granting the General Counsel's Motion for Summary Judgment and ruling that Troutbrook failed to bargain with HTC in violation of §§ 8(a)(1) and (5) of the NLRA. The Decision and Order is reported at 367 NLRB No. 139.

### **STATEMENT OF FACTS**

Troutbrook is in the business of operating a hotel in Brooklyn, New York. On March 12, Local 811 filed a petition with Region 29 to represent certain employees at the Employer's 181 3rd Avenue, Brooklyn, New York location. Four days later, HTC sought to intervene. An election campaign ensued whereby HTC engaged in a course of scare tactics and intimidation which impacted employee free choice. More specifically, HTC campaigned that it was a stronger and more powerful union than Local 811 and that it could influence the Board's processes. (*See* Objections at JA-49-56; Objections to Rerun Election at JA-126-143). The Board's conduct throughout the election, continuously played into HTC's campaign, and gave the impression that HTC had influence over the Board's election processes and procedures. (*Id.*) This conduct impacted employee free

choice during the Rerun Election, and thus, the results of that election should be overturned.

**A. HTC Engages in a Campaign of Threats and Intimidation**

Over the course of HTC's election campaign prior to the June 26 election, it engaged in intimidation tactics to gain favor amongst the employees and undermine Local 811. During the critical period HTC repeatedly threatened and intimidated bargaining unit employees by telling them that if the employees did not vote for HTC and HTC was ultimately selected as their representative, it would not protect such employees from termination or would "not have their backs." (*See* Objections, ¶ 1 at JA-49-56). Indeed, such threats were made on a daily basis in the employees lunch room for a period of a week from June 18 through June 22, and through a series of phone calls to employees in the weeks leading up to the June 26 election. (*See* Offer of Proof to Objections, at pp. 1-2 at JA-57-58).

Similarly, on numerous occasions in the weeks leading up to the June 26 election, HTC threatened to withhold strike benefits from those who did not support it and threatened employees with termination from employment while employees were gathered in the lunch room. (*See* Objections, ¶¶ 2, 3 at JA-49-50; Offer of Proof to Objections, at pp. 2-3 at JA-58-59).

Further, HTC also made false statements that (1) Troutbrook was required to agree to any bargaining demands HTC made; (2) employees with more than five

years' experience would automatically receive pensions; and (3) HTC would pay employees \$800 per week if they went out on strike. (*See* Objections, ¶ 5 at JA-50; Offer of Proof to Objections, at pp. 4-6 at JA-60-62).

Furthermore, during this time, HTC repeatedly undermined Local 811 by telling employees that Local 811 was weak. (*See* Objections at, ¶ 8 at JA-51-52; Offer of Proof to Objections, at pp. 7-8 at JA-63-64). Indeed, in a handout distributed to employees, HTC stated:

- Local 811 is “a terrible, weak, sweetheart union”
- Local 811 is “[Troutbrook’s] pet union”
- “if you vote for 811, you won’t have a union”
- “811 is pathetically weak”
- “811 is broke”

(*See* Offer of Proof to Objections, at Exhibit A at JA-66-69). This same handout, touted HTC as “one of the most powerful and effective unions in New York” and referred to itself as “The Real Union.” (*Id.*).

To underscore to employees how powerful of a union it was, HTC bragged to employees that it could manipulate the Board election process and gave the impression that the Board favored HTC. Indeed, the Board postponed the processing of the election petition filed on March 12, deferring to the AFL-CIO’s internal procedure found in Article XXI of the AFL-CIO constitution to resolve

disputes between two AFL-CIO affiliated unions. This resulted in significant delay and provided HTC the opportunity to access employee information and further is campaign theme that it was powerful and could manipulate Board procedures.

Further, following the Board's unlawful last minute cancellation of the election on May 30 due to a change in the employing entity, HTC falsely told unit employees that the reason the Board postponed the processing of the election petition was because Troutbrook committed unlawful actions that purportedly forced the Board to cancel and postpone the election and that HTC "had to sue" Troutbrook so that the election could go forward. (*See* Objections, ¶¶ 7, 8 at JA-51-52; Offer of Proof to Objections, at pp. 6-8 at JA-62-64).

Importantly, such conduct had a clear impact on employee choice. As of May 31, just a few weeks before the rescheduled June 26 election, Local 811 enjoyed majority support. (*See* Offer of Proof to Objections, at p. 8 at JA-64 and Exhibit G at JA-95-96). Yet, at the election, 8 votes were cast for Local 811, 19 votes for HTC and 1 vote against representation. (*See* Tally of Votes at JA-48).

Perhaps more offensive than HTC's conduct during the critical period leading up to the June 26 election, was the Board's own conduct, which gave the impression that HTC indeed controlled and manipulated the Board's election processes, further impacting employee free choice.

**B. The Board Unlawfully Gave the Impression That HTC Controlled and Manipulated its Processes and Procedures**

Following HTC's intervention into the election just days after Local 811 filed the representation petition, the Board engaged in the first of many actions which gave the impression that HTC controlled and manipulated Board procedures. On March 15, Region 29 was aware of the possible internal issue between HTC and Local 811 and that Article XXI of the AFL-CIO Constitution may be implicated given the possible dispute between the two unions. (*See Offer of Proof to Objections*, at p. 6 at JA-62 and Exhibit D at JA-75-78). Indeed, this information was known well in advance of when Troutbrook was required to file and serve its statement of position in advance of the pre-election hearing and which included the mandatory disclosure of the names, titles, and job classifications of all employees in the proposed unit. The Statement of Position was due 12:00 noon on March 23 prior to the hearing. (*Id.* at JA-76)

Yet, despite this, the Regional Director for Region 29 waited seven days, and more specifically until after 12:00 Noon on March 23, to issue a last-minute cancellation of the pre-election hearing. At 1:49 p.m. a Representative for Region 29 advised Troutbrook that an order would issue cancelling the hearing and holding the petition in abeyance in light of a request from the AFL-CIO. The Region 29 Regional Director's Order issued shortly thereafter. (*See Order Cancelling Hearing and Holding Case in Abeyance* at JA-9-10). This resulted in

the disclosure of information to HTC that it would not have otherwise had access to, had the Board cancelled the hearing prior to the submission of the statement of position.

After a lengthy adjournment, the Regional Director for Region 29 reactivated the case and scheduled an election for May 31. Once again, Troutbrook provided a statement of position and a voter list, including the contact information of all employees in the proposed unit. However, due to a change in the employing entity (Troutbrook was the successor entity), on May 30 the Regional Director for Region 29 erroneously cancelled the election scheduled for the next day. (*See* Objections, ¶ 9 at JA-52; Offer of Proof to Objections, at p. 8 at JA-64).

Rather than simply amending the name of the employing entity and holding the election, consistent with existing Board authority, the election was cancelled, resulting in additional significant delay. *See Barker Automation*, 132 NLRB 794, 796 (1961); *see also New Laxton Coal Co.*, 134 NLRB 927, 929 (1961); *Texas Eastman Co.*, 175 NLRB 626 (1969); *Pacific Tankers, Inc.*, 84 NLRB 965 (1949); *Allan W. Fleming, Inc.*, 91 NLRB 612, 614 (1950); *Georgia Creosoting*, 133 NLRB 349 (1961); *Sindicato Puertorriqueno De Trabajadores*, 184 NLRB 538, fn. 3 (1970). Importantly, the cancellation occurred at a time when Local 811 enjoyed majority support. (*See* Offer of Proof to Objections, at p. 8 at JA-64 and Exhibit G at JA-95-96).

The Board then issued a Notice of Election, which was incorrect as it failed to list both HTC and Local 811 on the sample ballot. (*See Offer of Proof to Objections*, at p. 9 at JA-65 and Exhibit H at JA-97-98). Accordingly, the Board represented that a Corrected Notice of Election would be sent by mail. (*Id.*). However, the Corrected Notice of Election included the incorrect time of the election. (*See Offer of Proof to Objections*, at p. 9 at JA-65 and Exhibit J at JA-119-122). Further, the Corrected Notice of Election was not mailed to Troutbrook as the Board indicated, and therefore, was not posted until two business days before the election. (*See Offer of Proof to Objections*, at p. 9 at JA-65).

At the June 26 election, a representative of HTC noticed the time error on the Corrected Notice of Election and alerted the Board Agent in charge of the election of the issue. That Board Agent then changed the voting hours on the spot to conform to the erroneous notice and in contravention of the Stipulated Election Agreement, thus fostering further confusion among employees and yet again creating the appearance that HTC was controlling the process rather than the Board. (*See Offer of Proof to Objections*, at p. 9 at JA-65).

### **C. Troutbrook Files Objections and a Rerun Election is Ordered**

Accordingly, on July 3, Troutbrook filed 12 objections to the conduct of the election. Specifically, Troutbrook set forth, with supporting proof:

- Significant misconduct by HTC, including unlawful threats, deliberate false claims regarding the law, and unlawful promises of strike benefits and unlawful withholding of those benefits for employees who voted against HTC. (Objections, ¶¶ 1-5 at JA-49-50).
- An objection to the NLRB's biased pro-labor policy of adjourning representation cases when rival unions who belong to the AFL-CIO file Article XXI proceedings under the AFL-CIO's constitution. (Objections, ¶¶ 6-8, 10-11 at JA-51-53).
- An objection to the cancellation of the May 31, 2018 Election. (Objections, ¶¶ 9, 10-11 at JA-52-53).
- That the Board's 2014 Election Rules violate the Act, are impermissibly arbitrary and deny an employer's free speech and due process rights, both on their face and as applied to Troutbrook, and ultimately resulted in HTC having premature access to employee unit and contact information. (Objections, ¶ 11 at JA-52-53).
- That Region 29 issued an incorrect Notice of Election and failed to mail Troutbrook a Corrected Notice of Election which did not allow it to post the Corrected Notice within the required time. (Objections, ¶ 12 at JA-53).
- That the Corrected Notice of Election contained the wrong voting times and on June 26, 2018, the Board Agent conformed the election times to the

incorrect times on the corrected Notice of Election after it was pointed out by the HTC. (*Id.*).

Thereafter, the case was transferred from Region 29 to Region 22. On August 3, Regional Director for Region 22, without holding a hearing, issued a Decision finding that the failure to timely post the Corrected Notice of Election (which constituted half of the grounds for Objection 12), constituted objectionable conduct, and ordered a Rerun Election. (See Decision on Objections at JA-193-198). The Notice for the Rerun Election was to contain the following language:

#### NOTICE TO ALL VOTERS

The election conducted on June 26, 2018 was set aside because the National Labor Relations Board found that the Board issued an incorrect Notice of Election and failed to provide the Employer a correct Notice of Election and this interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this Notice of Second Election.

Significantly, in addressing only a portion of Objection 12 and finding it sufficient to overturn the election, the Region 22 Regional Director stated, "I further find that it is unnecessary to consider the issues raised by the Employer's remaining objections at this time." (Decision on Objections, p. 4 at JA-196). The Regional Director specifically declined to address or investigate any other objections. (*Id.*)

A Notice of Election was ultimately issued containing the language above that solely addressed the error in the posting of the Notice of Election, and the election was scheduled for September 6. (*See* Notice of Election at JA-132-134).

**D. The Board's and HTC's Unremedied conduct impacts Employee Choice During the Rerun Election**

On August 23, after being forced to endure the actions of HTC, the AFL-CIO, the prejudicial actions of the Regional Director for Region 29, the prejudicial actions of the Regional Director for Region 22, and the NLRB's countenance of this conduct, Local 811 requested to withdraw from participating in the Rerun Election, impacting the unit employees' choice of representative.

Accordingly, an election was held on September 6 with only HTC participating. At the election, there were approximately 29 eligible voters: 18 employees voted for HTC and 8 employees voted against HTC. (*See* Rerun Election Tally of Votes at JA-135).

In light of HTC's conduct and the Board's abuse of discretion, which culminated in Local 811's decision to withdraw from the Rerun Election, Troutbrook again filed objections to the Election (and supporting proof) on September 13. (*See* Objections to Rerun Election at JA-136-143). Troutbrook once again challenged HTC's misconduct. While such conduct occurred prior to the first election, it went unaddressed and interfered with employee free choice during the Rerun Election. More specifically, employee choice was limited because Local

811 withdrew from the election. This is especially true since Local 811 had at one time enjoyed majority support of the unit. (*See* Objections to Rerun Election Offer of Proof, at p. 8 at JA-64 and Exhibit G at JA-95-96). Therefore, HTC's conduct impacted the election held on September 6. (*See* Objections to Rerun Election, ¶¶ 1-5 at JA-136-137).

Troutbrook's September 13 Objections to the Rerun Election also challenged the Board's biased pro-labor policy relating to Article XXI of the AFL-CIO proceedings, the cancellation of the May 31 election, and the Board's 2014 Election Rules (*see* Objections to Rerun Election, ¶¶ 6-11 at JA-138-140), as well as the Board Agent's conduct on June 26 in amending the election times on the spot after it was noted by HTC (*see* Objections to Rerun Election, ¶ 12 at JA-140), because this conduct went unremedied and therefore continued to impact the Rerun Election.

Indeed, following this course of conduct from both HTC and the Board, Local 811 withdrew from the Rerun Election, thereby limiting and impacting employee free choice. This is especially true given that Local 811 enjoyed majority support during the critical period prior to the June 26 election.

**E. The Regional Director for Region 29 Erroneously Denies a Hearing on Troutbrook's Objections and Certifies HTC**

On September 24, the Regional Director issued his Decision on Objections to Rerun Election and Certification of Representative, which is challenged here.

The Regional Director refused to provide a hearing on any of the above-issues, relying primarily on the conclusion that none of the conduct which occurred prior to the date of the first election on June 26 could be considered. Further, the Regional Director erred in determining that review of such conduct was unnecessary because the only remedy was a rerun election, which had been ordered. The Regional Director also erred in declining to review the Board's conduct for the same reasons.

Troutbrook submitted a Request for Review of the September 24 Decision on Objections to Rerun Election and Certification of Representative. On December 13, the Board issued a decision denying Troutbrook's Request for Review, finding it "raises no substantial issues warranting review." 367 NLRB No. 56. Moreover, the Board held that with regard to the Board Agent's misconduct with regard to altering the Corrected Notice of Election on the date of the first election, such conduct could not form the basis for an objection to a rerun election. *Id.* at n. 2.

Thereafter, HTC requested to bargain with Troutbrook, which Troutbrook declined in order to challenge HTC's certification. HTC filed an unfair labor practice charge pursuant to § 8(a)(1) and (5). The Board's General Counsel filed a motion for summary judgment, opposed by Troutbrook on the basis that HTC's certification was improper. The Board granted the General Counsel's motion finding that certification was proper and erroneously rejecting Troutbrook's

assertion that HTC's conduct which occurred prior to the June 26 election had an impact on the Rerun Election. 367 NLRB No. 139. More specifically, the Board stated that Troutbrook "did not offer any evidence of such 'continuing impact' in its request for review and does not do so here." *Id.* at n. 2. Such finding was factually inaccurate as Troutbrook asserted in its Request for Review:

On August 23, after being forced to endure the actions of [HTC], the AFL-CIO, the prejudicial actions of the Regional Director for Region 29, and the prejudicial actions of the Regional Director for Region 22, and the NLRB's countenance of this conduct, [Local 811] requested to withdraw from participating in the Rerun Election.

(Request for Review, at p. 5 at JA-199-205). Clearly then, the withdrawal of Local 811 had an impact on employee free choice at the Rerun Election, and the Board's decision has no basis in law or fact.

### **SUMMARY OF ARGUMENT**

The Board's Decision and Order should be vacated and enforcement denied based on several independent grounds. As set forth herein, Troutbrook's objections to the Rerun Election are well-founded and well-supported. The conduct of both HTC and the Board which occurred on and before the first election on June 26 had a continuing impact on the Rerun Election because such conduct was never addressed or remedied by the Regional Director for Region 22. Therefore, HTC's

campaign of intimidation and threats continued during the critical period of the Rerun Election, interfering with employee free choice during the Rerun Election.

Further, the Board's conduct during the critical period of the June 26 election, as well as its conduct on the date of the June 26 election, gave the impression that HTC was controlling the Board's processes and this conduct impacted the results of the Rerun Election. More specifically HTC and the Board's conduct resulted in the withdrawal of Local 811, which, by itself limited, and therefore impacted, the employees' choice of representative at the Rerun Election.

The Board erroneously overruled Troutbrook's objections to the Rerun Election concerning these issues, as they both departed from established Board precedent and ignored significant factual evidence that the objectionable conduct interfered with employee free choice during the Rerun Election.

### **STANDING**

Troutbrook has standing because it has been "aggrieved by a final order of the Board." 29 U.S.C. § 160(f). Troutbrook is aggrieved because the Board's order forces Troutbrook to negotiate with HTC, which was not properly certified as the bargaining representative.

## ARGUMENT

### **A. Standard of Review**

“Board orders will not survive review when the Board’s decision has no reasonable basis in law,” or “when the Board has failed to apply the proper legal standard” or “when it departs from established precedent without reasoned justification.” *Titanium Metals Corp. v. NLRB*, 392 F.3d 439, 445-446 (D.C. Cir. 2004). “Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administration decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.” *NLRB v. Brown*, 380 U.S. 278, 291 (1965). In addition, this Court sets aside decisions of the Board when the Board has “erred in applying established law to the facts, or when its findings of fact are not supported by ‘substantial evidence’ in the record considered as a whole.” *ConAgra v. NLRB*, 117 F.3d 1435, 1438 (D.C. Cir. 1997).

### **B. The Board Erroneously Certified HTC as the Bargaining representative**

As set forth fully above, prior to the June 26 election, HTC engaged in misconduct that inhibited the free choice of voters and such misconduct was never remedied by the Regional Director. Because it was never remedied, such behavior continued to have an impact on the Rerun Election and therefore, the Rerun Election should have been overturned. Indeed, the decision by both the Regional Director and Board to Certify HTC in such circumstances is inconsistent with

Board law and policy and ignores facts which show the unlawful misconduct impacted the Rerun Election. Further, Troutbrook was prejudiced by the decision to deny it a hearing on its objections alleging such conduct.

**1. The Board Erred in Overruling Troutbrook's  
Objections to the Rerun Election 1-5 Concerning  
HTC's Misconduct During**

**a. The Board Erred When It Failed to Consider  
HTC's Conduct prior to the June 26 election**

As set forth above, Troutbrook presented proof in its Objections to the Rerun Election that HTC engaged in the following improper conduct: (1) advising employees that strike benefits would only be given to employees who voted for HTC; (2) threatening employees with termination if they did not support HTC; and (3) deliberately making false claims regarding the law and the Board's longstanding principles pertaining to the bargaining process (*See* Objections to Rerun Election, ¶¶ 1-5 at JA-136-137; Objections to Rerun Election Offer of Proof, at pp. 1-6 at JA-144-149). There should be no legitimate dispute, that, if found to be true, this conduct impacts employee free choice and warrants overturning the election. *See Savair Mfg., Co.*, 414 U.S. 270, 277 (1973) (finding union promises of benefits before representation election unlawful if the benefit is not offered across the board to all potential unit employees); *United Broad Co. of N.Y.*, 248 NLRB 403, 403-404 (1980) (unlawful threats by union warranted overturning the election); *Claussen Baking, Co.*, 134 NLRB 111, 112 (1961).

Because this misconduct, if found to be true, interfered with employee free choice, the Regional Director's failure to order a hearing on this misconduct is inconsistent with Board precedent and the Board's longstanding policy that elections be conducted in an atmosphere allowing for freedom of choice. *See General Shoe Corp.*, 77 NLRB 124, 126 (1948).

The Regional Director's decision, merely rubber stamped by the Board, disregarded HTC's misconduct on the basis that it occurred prior to the June 26 election, citing to *Star Kist Caribe, Inc.*, 325 NLRB 304 (1998) (citing *Times Wire & Cable Co.*, 280 NLRB 19, 20 fn. 10 (1986)). However, reliance on this line of cases ignores the Regional Director's choice not to address and/or remedy this misconduct in any way when he had the opportunity to do so when reviewing Troutbrook's Objections to the first election. Indeed, *Star Kist* stands for the proposition that generally, the critical period for a rerun election begins on the date of the first election. That case is inapposite to the case here, where there was misconduct that was never investigated or remedied.

Further, the Board has in other circumstances considered misconduct which has occurred outside of the critical period (filing of petition through date of the election) where such conduct is likely to interfere with employee free choice. *See, Harborside Healthcare, Inc.*, 343 NLRB 906, 912 (2004) (observing that certain conduct should not be dismissed solely because it occurred outside of the critical

period, where the impact of the conduct would continue to be felt during the critical period); *see also, Lyon's Restaurants*, 234 NLRB 178 (1978) (Board overruled hearing officer's decision that a union's prepetition threats were not objectionable); *Royal Packaging Corp.*, 284 NLRB 317, 317-318 (1984); *Gibson's Discount Center*, 214 NLRB 221, 221 (1974).

Following this well-established line of cases the Regional Director and the Board should have applied to the case here an exception to the general proposition that conduct outside of the critical period is unobjectionable. This is particularly the case because the Regional Director specifically avoided any investigation concerning conduct which occurred prior to June 26. Therefore, HTC's unlawful misconduct was never remedied, and its impact reasonably tended to coerce and interfere with employee free choice through the Rerun Election. *See Harborside, supra*, at 913.

Further, the Board erred in finding Troutbrook did not present evidence that the Rerun Election was impacted. Notwithstanding the fact that it was reasonable to conclude that such conduct would tend to coerce and interfere with employee free choice through the date of the Rerun Election, Troutbrook indeed presented evidence that employee free choice was impacted. Following HTC's campaign of intimidation and fear, and in particular, its attacks on Local 811, Local 811 withdrew from the Rerun Election, leaving employees with just one choice of

bargaining representative. This is significant given that just prior to the June 26 election, Local 811 enjoyed majority support of the unit. (*See* Objections to Rerun Election Offer of Proof, at p. 8 at JA-151). It defies logic then to conclude that HTC's actions, which in part caused Local 811 to withdraw, did not interfere with employee choice.

**b. The Board Erroneously Concluded The  
Objectionable Conduct Had Been Remedied**

In his Decision on Objections to the Rerun Election, the Regional Director clearly erred in concluding that there was no need to address the remainder of the objections because “[t]he only remedy once one or more of the Employer’s July 3 objections was found to have raised issues affecting the June 26 election was to rerun that election.” (*See* Decision on Objections to Rerun Election, p. 4 at JA-196). Thus, he determined the only remedy available had been instituted and such conduct could not form the basis for overturning the Rerun Election.

This determination was clear error. Because the Regional Director overturned the first election only on the ground that the Board issued an incorrect notice of election and failed to provide Troutbrook with a corrected notice, the Notice of Election issued for the Rerun Election addressed only this very narrow issue. This is significant because there are two aspects to relief in a rerun election: the first is the rerun election itself, and the second is a notice to employees explaining the unlawful/improper conduct that made the rerun election necessary.

*See Lufkin Rule Co.*, 147 NLRB 341 (1964). In fact, in many cases, parties are forced to read such remedial notices aloud in order to effectively remedy the unlawful conduct that resulted in the rerun election. This notice to employees is necessary to avoid its continued interference with the free choice of employees.

Here, because the Regional Director refused to investigate Troutbrook's Objections to the first election, and instead, addressed only one portion of one objection, the resulting remedial notice explained to employees that the only improper conduct that resulted in the Rerun Election was the improper posting of the Notice of Election.

Accordingly, HTC's behavior went unchallenged and unremedied, despite its continuing and clear impact on employee free choice through the Rerun Election. Such a result is inconsistent with Board law and policy that ensures employee free choice in representation elections. *Harborside, supra*. Accordingly, the Board's Decision and Order should be overturned and enforcement denied.

**2. The Board's Conduct Created an Impression That  
HTC Controlled Board Processes, Which  
Interfered With Employee Free Choice in the  
Rerun Election**

Under the Act, the Board's well-established objective is to conduct elections "in a laboratory under conditions as nearly ideal as possible to determine the uninhibited desires of employees." *Sewell Manufacturing Co.*, 138 NLRB 66, 70 (1962). *See also North of Market Senior Services v. NLRB*, 204 F.3d 1163, 1167-

1168 (D.C. Cir. 2000). It also “requires the Board and its agents to maintain a stance of neutrality in conducting fair and impartial elections.” *Id.* at 1168. The Board, however, failed to follow these standards in this case.

As set forth above, the Board gave the impression that HTC had manipulated its processes by deferring to Article XXI of the AFL-CIO constitution to resolve any jurisdictional dispute between it and Local 811. Yet, the Regional Director and Board failed to address Troutbrook’s challenge to this Board policy of abandoning its statutory duties and deferring to the AFL-CIO’s internal dispute resolution procedures for petitioning unions. (*See* *Objections to Rerun Election*, ¶¶ 6-8, 10-11 at JA-138-139 and 139-140).

The Board’s policy directly interferes with employee free choice and subjugates the NLRB’s statutory duties to the AFL-CIO and should be overturned. In 1989, the Acting Associate General Counsel, William Stack, unilaterally took the position, without any supporting case law or statutory basis, that when rival unions who are affiliated with the AFL-CIO seek to represent the same group of employees, the NLRB should put its statutory duties aside for 40 days and defer to the AFL-CIO and its internal procedures for these 40 days. *See* NLRB Memorandum, OM-89-61. This policy has not been reviewed by any Board decision, but remains the policy set forth in the NLRB Representation Manual.

Effectively, this policy allows the AFL-CIO to decide which union is best for the employees. This procedure places the rights of unions above the Section 7 rights of employees, and perhaps most significantly, creates the impression that the NLRB itself is inferior to the AFL-CIO. This policy is an abdication of statutory responsibilities and should be expressly overturned.

Furthermore, as applied here, this policy interfered with employee free choice. One hour after Troutbrook was forced to turn over employee information in its statement of position, Region 29 issued a lengthy adjournment at the request of the AFL-CIO President to engage in these Article XXI AFL-CIO proceedings. This allowed HTC access to employee information over the lengthy hiatus period that it would not have otherwise been entitled to. HTC took advantage of the impression this created – that it had the power to suspend the Board’s processes – by campaigning on the position that it was the strong union while Local 811 was “pathetically weak.” (*See* Objections to Rerun Election Offer of Proof, at Exhibit A at JA-153-156).

The NLRB’s conduct in deferring to the AFL-CIO, while simultaneously allowing HTC access to employee lists, had the effect of creating the impression among bargaining unit employees that HTC had the power to manipulate Board processes. (*See* Objections to Rerun Election, ¶¶ 6-8 at JA-138). As noted, HTC deliberately fostered this impression by campaigning on the argument that Local

811 was a weak union, while HTC was the powerful union (*see* Objections to Rerun Election ¶ 8 at JA-138; Objections to Rerun Election Offer of Proof, at pp. 7-9 at JA-151-152), all of which impacted employee free choice because it was never remedied.

However, the Board's conduct which created the impression that HTC controlled Board processes did not end there. Indeed, the Region 29 Regional Director's cancellation of the May 31 cancellation was unsupported by Board law, resulted in an additional delay of nearly one month, and was again used as a tool by HTC to support its campaign theme that it was powerful and Local 811 weak. Thus, it created confusion among employees, fueled HTC's false claims regarding the delay of the election process and gave HTC additional time after receipt of the voter list to pursue its campaign of unlawful threats, intimidation, and false claims about the law and the Board's processes. Significantly, at the time the Regional Director cancelled the election on May 31, Local 811 had regained majority support, as reflected by a demand for recognition which Troutbrook did not act upon, because the election was upcoming. (*See* Objections to Rerun Election, ¶ 9 at JA-139; Objections to Rerun Election Offer of Proof, at p. 8 at JA-151).

It is even more perplexing given the well-established Board authority directly on point. The Regional Director stated that the May 31 election was cancelled due to a change in the entity employing the petitioned-for unit.

However, where a successor employer continues to employ the same group of employees at the same terms and conditions of employment, the original petition is construed as providing for an election among the employees of the successor. *See Barker Automation*, 132 NLRB 794, 796 (1961); *see also New Laxton Coal Co.*, 134 NLRB 927, 929 (1961); *Texas Eastman Co.*, 175 NLRB 626 (1969); *Pacific Tankers, Inc.*, 84 NLRB 965 (1949); *Allan W. Fleming, Inc.*, 91 NLRB 612, 614 (1950); *Georgia Creosoting*, 133 NLRB 349 (1961); *Sindicato Puertorriqueno De Trabajadores*, 184 NLRB 538, fn. 3 (1970).

Thus, without any authority for doing so, the Regional Director wrongfully cancelled the election at a time when Local 811 had evidence of majority support. This further interfered with employee free choice, as the proper course of action would have been to merely substitute the name of the successor company for that of the predecessor and move forward with the election.

This cancellation, which again resulted in significant delay, continued the impression that HTC controlled Board processes and fueled HTC's campaign of misinformation, threats, and other unlawful conduct, which interfered with employee free choice.

Finally, the Regional Director and Board erred in declining to review the entirety of Troutbrook's objections to the Board's conduct at the June 26 election. As noted, the Regional Director overturned the election based on just one portion

of one of Troutbrook's objections pertaining to the NLRB's failure to provide an accurate Notice of Election and Troutbrook's corresponding failure to post an accurate Corrected Notice of Election.

The Regional Director, however, did not address Troutbrook's further contention that at the June 26 election, the Corrected Notice of Election misstated the voting times that were set forth in the Stipulated Election Agreement. This additional error was noted by a representative of HTC on the day of the election and the Board Agent in charge of the election, on the spot, changed the voting hours to conform to the erroneous notice and in contravention of the Stipulated Election Agreement. This conduct fostered further confusion among employees and yet again created the appearance that HTC was controlling the process rather than the Board. (*See* Objections to Rerun Election, ¶ 12 at JA-140; Objections to Rerun Election Offer of Proof, at p. 9 at JA-152). Shockingly though, the Board did not even consider this conduct.

This cumulative course of conduct by the Board gave the impression through the date of the Rerun Election that HTC was controlling Board processes. Troutbrook presented evidence that such conduct impacted the Rerun Election, which the Board simply ignored. Indeed, Local 811 withdrew from the Rerun Election as a result of HTC unlawful campaign and the Board's ongoing course of conduct which gave the impression that HTC controlled the election and further

fueled HTC's campaign. Local 811's withdrawal because of misconduct impacted employee free choice at the Rerun Election. Thus, the Board's decision to certify HTC was erroneous, should be vacated and denied enforcement.

### **CONCLUSION**

For each of these reasons, Troutbrook respectfully requests that the Court grant its Petition for Review, vacate the Board's Decision and Order and deny enforcement, thereby overturning the results of the election and further finding that Troutbrook did not have an obligation to bargain with HTC as it was not the certified bargaining representative.

Dated: December 10, 2019

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**CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,391 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

Dated: December 10, 2019

/s/Raymond J. Pascucci  
Raymond J. Pascucci

**CERTIFICATE OF SERVICE**

I hereby certify that on December 11, 2019, I electronically filed the foregoing **FINAL BRIEF OF PETITIONER**, with the Clerk of the U.S. Court of Appeals for the District of Columbia Circuit for service on:

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