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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 REPLY BRIEF FOR PETITIONER**

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**TABLE OF CONTENTS**

SUMMARY OF ARGUMENT .....1

ARGUMENT .....2

    1. Troutbrook Presented Evidence That Conduct Which Occurred  
    Prior To The Election Impacted Employee Free Choice During  
    The Rerun Election.....3

    2. The Objectionable Conduct Was Not Remedied .....6

    3. The Unremedied Misconduct Prior To The Election Should Have  
    Been Considered.....8

CONCLUSION .....11

CERTIFICATE OF COMPLIANCE.....12

CERTIFICATE OF SERVICE .....13

## TABLE OF AUTHORITIES

### Cases

<i>Barker Automation</i> , 132 NLRB 794, 796 (1961) .....	4
<i>General Shoe Corp.</i> , 77 NLRB 124, 126 (1948) .....	2
<i>Gibson’s Discount Center</i> , 214 NLRB 221, 221 (1974) .....	8
<i>Harborside Healthcare, Inc.</i> , 343 NLRB 906, 912 (2004) .....	8, 9, 10
<i>Lufkin Rule Co.</i> , 147 NLRB 341 (1964) .....	6, 7
<i>Lyon’s Restaurants</i> , 234 NLRB 178 (1978) .....	8
<i>North of Market Senior Services v. NLRB</i> , 204 F.3d 1163, 1168 (D.C. Cir. 2000) .....	2
<i>Royal Packaging Corp.</i> , 284 NLRB 317, 317-318 (1984) .....	8
<i>Savair Mfg., Co.</i> , 414 U.S. 270, 277 (1973) .....	3
<i>Sewell Manufacturing Co.</i> , 138 NLRB 66, 70 (1962) .....	2
<i>Times Wire &amp; Cable</i> 280 NLRB 19 (1986) .....	9
<i>United Broad Co. of N.Y.</i> , 248 NLRB 403, 403-404 (1980) .....	3

### Rules

29 CFR § 102.67(c) .....	8
29 CFR § 102.69(c)(2) .....	8

Pursuant to Fed. R. App. P. 28, Petitioner Troutbrook Company LLC d/b/a Brooklyn 181 Hospitality LLC files this reply in support of its petition for review of the Board's<sup>1</sup> Decision on Objections to the Rerun Election and Certification of Representative that issued on September 24, 2018<sup>2</sup>, certifying HTC as the employee's exclusive bargaining representative.

### **SUMMARY OF ARGUMENT**

As set forth below, as well as in the Initial Brief for Petitioner, during the course of its election campaign, HTC utilized threats and intimidation to win the election and such conduct was ultimately rubber stamped by the Board. The Regional Director for Region 22, the Board, and now the General Counsel, have all brushed aside HTC's unlawful and unremedied conduct during the critical period of the Election, ignoring the fact that it interfered with employee free choice during the Rerun Election. Feeding into HTC's campaign of threats and intimidation, the Board's own conduct throughout the course of the election process gave Troutbrook employees the impression that HTC could control and manipulate the Board's election procedures. This conduct too interfered with employee free choice during the Rerun Election. More specifically the culmination of HTC's and the Board's actions resulted in the withdrawal of Local 811 from the Rerun Election,

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<sup>1</sup> All abbreviated terms used in this submission are defined in the "Glossary of Abbreviation" contained in the Initial Brief for Petitioner.

<sup>2</sup> All Dates occur in 2018, unless otherwise noted.

which, *ipso facto*, limited employee free choice at the Rerun Election. This fact cannot be ignored, especially because Local 811 enjoyed majority status just before the Election.

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

### **ARGUMENT**

The Board's role in processing an election petition is simple – preserve employees' right to choose whether to have a bargaining representative, and if so, which representative. It is axiomatic that during any election campaign the Board requires that the election take place “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). Further, the Board and its agents *must* remain neutral in the process. *North of Market Senior Services v. NLRB*, 204 F.3d 1163, 1168 (D.C. Cir. 2000) (the NLRA “requires the Board and its agents to maintain a stance of neutrality in conducting fair and impartial elections.”); see also, *General Shoe Corp.*, 77 NLRB 124, 126 (1948) (Board elections are to be conducted in an atmosphere allowing for freedom of choice). However, at every turn of this case, the Board failed to meet its obligations to ensure laboratory

conditions and maintain a neutral appearance, which impacted employee free choice during the Rerun Election. Therefore, the Board's certification of HTC as the exclusive bargaining representative must be overturned.

**1. Troutbrook Presented Evidence That Conduct Which Occurred Prior To The Election Impacted Employee Free Choice During The Rerun Election**

As set forth fully in the Initial Brief for Petitioner, HTC's and the Board's conduct prior to the Election had a continuing impact on employee free choice during the Rerun Election's critical period. To be sure, Troutbrook presented proof in its Objections to the Rerun Election that HTC engaged in the following improper conduct: (1) advised employees that strike benefits would only be given to employees who voted for HTC; (2) threatened employees with termination if they did not support HTC; and (3) deliberately make 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-49-50; Objections to Rerun Election Offer of Proof, at pp. 1-6 at JA-57-62). Board law is clear that such conduct occurring during the critical is unlawful, interferes with employee free choice, and therefore, requires that an election be overturned. *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). Despite Troutbrook's Objections, the Regional Director for Region 22 refused to pass on this conduct, and therefore, such conduct went unremedied during the Rerun Election.

Further, Troutbrook presented evidence in its Objections to the Rerun Election that the Board's own actions over the course of the election process gave the impression that it was not a neutral party, but could instead be manipulated by HTC. Indeed, HTC ran its campaign on a theme that it was a stronger union and therefore could impact the Board.

More specifically, Troutbrook presented evidence that just after the March 12 election petition was filed the Board erroneously deferred to the AFL-CIO's constitution to resolve the jurisdictional dispute between HTC and Local 811. This deferral (1) placed the rights of HTC and Local 811 above the Section 7 rights of employees, (2) created the impression that the NLRB itself is inferior to the AFL-CIO, and (3) caused significant delays in the processing of the election petition which allowed HTC access to employee information it would not have otherwise been entitled to. (*See* Initial Brief for Petitioner, pp. 15-16; *see also* Objections to Rerun Election, ¶¶ 6-8 at JA-138-140).

Then, Regional Director for Region 29 inexplicably, and contrary to Board precedent, cancelled the election to be held on May 31, based on the change in the employing entity. *See Barker Automation*, 132 NLRB 794, 796 (1961). Notably,

this occurred at a time when Local 811 had regained majority support. (*See* Objections to Rerun Election, ¶ 9 at JA-139; Objections to Rerun Election Offer of Proof, at p. 8 at JA-151). Accordingly, the cancellation resulted in additional delays, allowing HTC time to continue its campaign of threats, intimidation, and furthered HTC's narrative that it could manipulate the Board's election procedures. (*See* Objections to Rerun Election ¶ 8 at JA-138; Objections to Rerun Election Offer of Proof, at pp. 7-9 at JA-150-152).

Finally, on the day of the Election the Board Agent in charge of the election was advised by an HTC representative that the corrected notice of election misstated the voting times. In response, the Board Agent wrote in the correct times to conform to the times set forth in the parties stipulated election agreement. This conduct 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).

Troutbrook objected to all of this conduct following the Election. Just as the Regional Director for Region 22 refused to address HTC's conduct, he also refused to address the vast majority of Board's conduct about which Troutbrook objected. (*See* Decision on Objections at JA-193-196).

HTC's and the Board's foregoing conduct impacted the Rerun Election. To be sure, the facts show that as of June 7 – just days before the Election – Local 811

enjoyed majority support. (*See* Objections to Rerun Election Offer of Proof, at p. 8 at JA-151). Yet, after HTC's and Board's continuing course of action, on or about August 23, Local 811 withdrew from the Rerun Election, leaving employees with just one choice of bargaining representative at the Rerun Election. Because HTC and the Board's conduct caused Local 811 to withdraw from the Rerun Election, it impacted employee free choice during that election, and the Rerun Election should be overturned. (*See* Objections to Rerun Election Offer of Proof, at p. 8 at JA-151).

## **2. The Objectionable Conduct Was Not Remedied**

The objectionable conduct outlined above was not sufficiently remedied. In deciding on Troutbrook's Objections to the Rerun Election, the Regional Director for Region 22 found, and the General Counsel argues here, that the Rerun Election was the only remedy to cure the objectionable conduct. However, both the Regional Director for Region 22 and the General Counsel ignore the importance of the *Lufkin* Notice. *Lufkin Rule Co.*, 147 NLRB 341 (1964).

It is axiomatic that notice to employees of a party's wrongdoing is a cornerstone of the NLRB's enforcement mechanisms. Indeed, the Board requires a notice to be posted following a finding of a violation of the NLRA or where it has approved the settlement of an unfair labor practice. Despite the importance of this

notice to the NLRB's enforcement procedures, the General Counsel now asserts that the *Lufkin* notice is unimportant.

Such argument is absurd and is not supported by Board law or its practices. As set forth in the Initial Brief for Petitioner, 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). The *Lufkin* notice to employees is necessary to avoid its continued interference with the free choice of employees so that employees understand the issues. This would have been particularly important here, given that Local 811 had enjoyed majority support just prior to the Election.

Because the Regional Director for Region 22 ruled as to only one portion of one objection, the resulting remedial notice did not contain a full explanation as to the other improper conduct which occurred prior to the Election, and therefore, was not sufficient to fully remedy the conduct. Since such conduct continued to impact the Rerun Election, HTC's certification should be overturned.

Finally, the General Counsel's argument that such conduct should not be considered because Troutbrook did not request a review the Regional Director's Order Directing a Rerun Election is without merit. The Board's rules provide that "[t]he request for review may be filed at any time following the action until 14

days after a final disposition of the proceeding by the Regional Director.” 29 CFR § 102.67(c). A “final disposition” occurs when, inter alia, a regional director issues a certification of representative. 29 CFR § 102.69(c)(2). Accordingly, Troutbrook had until 14 days after the certification of HTC as the bargaining representative to file its request for review, which it timely did. Moreover a request to review following the Election would not have stayed the proceeding. 29 CFR § 102.67(c). Because the election was scheduled only weeks following the Decision on Objections, there would have been no resolution prior to the Rerun Election.

### **3. The Unremedied Misconduct Prior To The Election Should Have Been Considered**

It is undisputed that the Board has in other circumstances considered misconduct which occurred outside of the critical period 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).

The General Counsel's reliance on *Times Wire & Cable* is misplaced. 280 NLRB 19 (1986). Importantly, in that case, the parties both *agreed* to set aside the first election and hold a Rerun Election, as both parties engaged in misconduct during the critical period. The Regional Director in that case did not decide to pass on investigating alleged misconduct, which was the case here. Further, in reviewing the employer's misconduct prior to the first election in that case, the Board observed that the union won the election despite the fact that the employer had committed certain unfair labor practices. 280 NLRB at 20 ("Of greater significance is the fact that the violation did not dissipate the Union's majority. Rather, the Union won the election"). As described above, HTC's misconduct here clearly impacted the Rerun Election.

As set forth above, HTC's unremedied misconduct, supported by the Board's continuous course of conduct, reasonably tended to coerce and interfere with employee free choice through the Rerun Election. See *Harborside, supra*, at 913. Thus, the Regional Director should have considered such conduct, even though it fell outside the critical period.

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, Board's Decision and Order should be overturned and enforcement denied.

## CONCLUSION

For each and all 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 its certification of HTC as the bargaining representative was invalid, and Troutbrook therefore had no obligation to recognize and bargain with HTC.

Dated: December 10, 2019

/s/Raymond J. Pascucci  
Raymond J. Pascucci

## 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 2,167 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 REPLY BRIEF FOR PETITIONER**, with the Clerk of the U.S. Court of Appeals for the District of Columbia Circuit for service on:

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