

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25**

WAYNE/SCOTT FETZER COMPANY)
D/B/A WAYNE COMBUSTION,)
SYSTEMS,)

Employer,)

and)

MATTHEW PASSWATER,)

Petitioner,)

and)

UNITED STEEL, PAPER AND)
FORESTRY, RUBBER,)
MANUFACTURING, ENERGY, ALLIED)
INDUSTRIAL AND SERVICE WORKS)
INTERNATIONAL UNION, AFL-CIO)
AND ITS LOCAL 903-2,)

Union.

Case No. 25-RD-256161

**REQUEST FOR REVIEW OF THE
REGIONAL DIRECTOR'S ORDER
DIRECTING A LIMITED HEARING
ON OBJECTIONS**

I. INTRODUCTION AND SUMMARY

Pursuant to the Rules and Regulations of the National Labor Relations Board, including Sections 102.67 and 102.69, Wayne/Scott Fetzer Company d/b/a Wayne Combustion, Systems (“Employer” or “Company”) hereby submits the following Request for Review of the Regional Director’s Order Directing a Limited Hearing on Objections in connection with the election conducted by Region 25 on March 5, 2020,¹ following the petition filed by Matthew Passwater (“Petitioner”) to decertify the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Works International Union, AFL-CIO and its Local 903-2 (“Union”).

¹ All dates hereinafter refer to 2020, unless otherwise noted.

The Union represents a bargaining unit working in the Employer's facility located in Fort Wayne, Indiana. The decertification election was decided by a single vote, with 18 votes cast in favor of Union representation, and 17 votes cast against Union representation.²

Shortly after the election, Company managers learned of a disturbing course of conduct perpetrated by Union agents and supporters, including Union President Melissa Waldren and Union Stewards Mike Labarbera and Jeana Ellis, which included conduct that occurred prior to the filing of the petition but which continued after the petition was filed. The Union, through its agents and supporters, launched a campaign of coercion and intimidation, including specific threats of violence, which began when the Union learned that an employee would be circulating a decertification petition and continued through the election. The Union's bullying and fear tactics must be reviewed in totality because they created an atmosphere that destroyed the laboratory conditions and made a fair election impossible.

On March 12, the Company timely filed Objections to Conduct Affecting the Results of the Election, which included three Objections, supported by separately filed Offers of Proof. On March 26, the Regional Director issued an Order directing a hearing on the Objections, but erroneously rejected certain Offers of Proof that demonstrate how the Union's misconduct interfered with a fair election and destroyed laboratory conditions. Although the Regional Director correctly ordered a hearing on all three Objections, she erroneously and prematurely made evidentiary rulings to exclude certain Offers of Proof that specifically describe events in the Union's broad campaign to threaten and intimidate employees so as to create an atmosphere of intimidation, which narrowly swayed the election in the Union's favor. The Board's Rules and

² During the election, an employee voted and then resigned from his position with the Company while the election was still ongoing. The former employee's vote was counted in the tally of votes. This issue is the subject of one of the Company's Objections and is scheduled for hearing, but is not at issue in this Request for Review.

Regulations do not authorize the Regional Director to split Offers of Proof in the manner that occurred here, especially where a hearing was directed on all of the Company's objections. The case law cited in the Regional Director's Order addresses decisions whether to direct hearings on Objections, not whether evidence related to specific Offers of Proof would be accepted at the hearing. The Regional Director's Order prematurely makes evidentiary judgments and decisions prior to the hearing. Because a hearing has already been directed on all three Objections, the Regional Director should not limit the evidence that is presented in support of those Objections.

The Regional Director's decision to categorically exclude evidence of the Union's coercion and intimidation that occurred after the Union learned that bargaining unit members were planning to circulate a decertification petition, but prior to the filing of the petition conflicts with established law because the Union's pre-petition conduct is directly related to the Union's post-petition conduct, which the Regional Director has already ordered be resolved through a hearing. In addition, the Regional Director's decision erroneously excludes additional post-petition conduct of harassment and coercion occurring during the critical period, all of which fits into the Union's campaign of intimidation to influence the results of the election. The Regional Director erred by analyzing each incident of harassment or coercion and each threat separately, in isolation, as assessed by whether each incident, standing alone, was sufficient to set aside the election. The Union's coercive tactics must be reviewed as a whole, because viewing each incident in a vacuum fails to adequately demonstrate the scope of the Union's inappropriate conduct that destroyed the laboratory conditions required for a fair election.

II. OBJECTIONS

Following the election, the Company submitted three objections to conduct affecting the results of the election. The Regional Director ordered a hearing on all three objections and jointly considered Objection 1 and Objection 2 as they both relate to the Union's campaign of coercion

and intimidation, but improperly limited the scope of the hearing by rejecting certain Offers of Proof that support Objections 1 and 2.³ The Company's Objections state the following:

Objection 1: Prior to the election, and during the critical period after the Petition was filed, the Union, by its agents, representatives, employees and/or supporters interfered with the fair operation of the election process, destroyed the necessary laboratory conditions, by making threats of violence or other adverse consequences if employees did not vote in favor of Union representation.

Objection 2: Prior to the election, and during the critical period after the Petition was filed, the Union, by its agents, representatives, employees and/or supporters engaged in misconduct so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.

Objection 3: A former employee voted in the election then resigned during the voting period, and therefore he was ineligible to vote in the election. The ineligible voter was counted in the final tally, which was decided by a single vote.

Notably, the Regional Director mischaracterized Objections 1 and 2 by limiting the time period of misconduct as "on unspecified dates during the critical period after the petition was filed and prior to the election." (Regional Director's Decision, p. 2). However, the Company's objections, as filed, include Union conduct occurring both before and after the petition was filed. Rather than simply quoting the Company's objections directly, the Regional Director mischaracterized them.

III. OFFERS OF PROOF AND THE REGIONAL DIRECTOR'S DECISION

A. Offers of Proof Accepted by the Regional Director to Be Addressed At Hearing

The Regional Director specifically identified five of the Company's Offers of Proof that may warrant invalidating the results of the election and directed a hearing based on these Offers

³ Objection 3 is not at issue in this Request for Review, as the Regional Director did not limit the Company's Offers of Proof related to Objection 3.

of Proof. Each of the five Offers of Proof relate to threatening and intimidating conduct by Union President Melissa Waldren and Union Steward Jeana Ellis. Specifically, the Regional Director ordered a hearing on Objections 1 and 2 based on the following Offers of Proof, as characterized by the Regional Director⁴:

1. On unspecified dates during the critical period after the petition was filed and prior to the election, Union President Melissa Waldren confronted and interrogated employees who had signed the petition;⁵
2. On an unspecified date during the critical period after the petition was filed and prior to the election, Union Steward Jeana Ellis told an employee that she would punch another employee [Petitioner] in the face if the Union got voted out;
3. On or about February 13, 2020, Ellis approached an employee and pushed two fingers into the side of their cheek;
4. On an unspecified date during the critical period after the petition was filed and prior to the election, Ellis followed an employee into the restroom, slammed a stall door, and called the employee a “bitch;” and
5. On or about March 5, 2020, Ellis approached an employee, put a finger in their face, and demanded several times, “You better vote.” Ellis also called an employee who opposed the Union a “bitch” and stated that she had “better not vote.”

B. Offers of Proof Erroneously Rejected by the Regional Director

The Regional Director rejected four of the Company’s Offers of Proof, each of which is critical to demonstrate the Union’s pattern of coercive and intimidating behavior that began when

⁴ The Regional Director’s descriptions of the Offers of Proof are not directly quoted from the actual Offers of Proof submitted by the Company. These descriptions are incomplete and often lack the necessary context provided in the Offers of Proof as submitted by the Company. Such context is critical in this case to fully understand the Union’s pattern of intimidating and threatening misconduct.

⁵ The Regional Director’s description of this Offer of Proof is incomplete. Waldren began confronting and interrogating employees who signed the petition after the Petitioner noticed that someone rummaged through his personal effects, which included a copy of the signed petition. It is believed that whoever rummaged through Petitioner’s personal effects informed Waldren of the identities of the employees who signed the petition. Waldren then confronted employees indicating that she knew who signed the petition.

agents of the Union first learned of rumors that employees were considering circulating the decertification petition.

First Rejected Offer of Proof: The following is the first Offer of Proof rejected by the Regional Director, and her justification for the rejection:

On an unspecified date prior to the filing of the petition on February 11, 2020, Ellis aggressively confronted and interrogated employees about a rumor that employees were considering circulating a petition to have the Union removed. The Employer's offer of proof on this matter relates to pre-petition conduct, which is outside the scope of its objections, and further merely provides its own conclusions as to the impactful nature of the incident without sufficiently describing the alleged misconduct by the Union agent. The offer of proof does not describe the substance, manner, or circumstances of the alleged confrontation or interrogation. The offer of proof on this matter, viewed objectively in the minimal context provided, fails to furnish evidence or a description of evidence that, if credited at hearing, would warrant setting aside the election.

It is critical to understand that Ellis initiated the Union's campaign of coercion and intimidation upon the earliest rumors suggesting that employees were seeking to decertify the Union. Not only did Ellis aggressively confront and interrogate employees about the rumor pre-petition, she specifically confronted the Petitioner during that period. Ellis actively attempted to intimidate the Petitioner and his supporters in an effort to stop the Petition from being filed and to stop the election before it was initiated. This early course of conduct by Ellis is directly connected to her campaign of coercion and intimidation that occurred post-petition, and to the specific incidents that the Regional Director ordered be resolved through a hearing. Ellis's pre-petition misconduct is part and parcel of her post-petition campaign of fear and intimidation.

Moreover, the Regional Director's assertion that this incident was "outside of the scope of [the Company's] Objections" is patently false. The Objections clearly include conduct prior to the election, which includes conduct occurring before the petition was filed, as well as after it was filed. The Board does not preclude consideration of pre-petition conduct "insofar as it lends

meaning and dimension to related postpetition conduct, or assists in evaluating it." *Shamrock Coal Co., Inc.*, 267 NLRB 625, (1984). In *Shamrock Coal*, the Board overturned the Regional Director's decision to preclude evidence of pre-petition conduct consisting of threats and intimidation, and expanded the scope of the hearing to include pre-petition conduct where threats and intimidation continued after the filing of the petition. Here, Ellis and Waldren engaged in a similar campaign of threatening behavior and intimidation from the time they first heard rumors of the decertification petition, which continued through the election. Therefore, the Union's threatening and intimidating conduct that occurred prior to the petition must be considered because that course of conduct continued through the election, destroyed laboratory conditions and improperly swayed the election in favor of the Union. This Offer of Proof must be considered in the hearing.

Second Rejected Offer of Proof: The following is the second Offer of Proof rejected by the Regional Director, and her justification for the rejection:

On an unspecified date prior to the filing of the petition on February 11, 2020, an employee overheard Union Steward Mike Labarbera state, in reference to employees who were considering circulating a petition to remove the Union, **"That scab, I'd like to take a bat to [their] head."** The Employer's offer of proof on this matter relates to pre-petition conduct, which is outside the scope of its objections, and further fails to sufficiently describe the event to warrant setting it for hearing. To that end, the offer of proof does not identify to whom Labarbera was speaking, how the witness came to hear the alleged statement, where the incident took place, nor any other context of the purported statement. (emphasis added).

This is an explicit threat of violence towards an employee because he opposes the Union, made by a Union steward, made in front of bargaining unit members who would ultimately vote in the election. The steward's message is loud and clear – he wants to commit violent acts against those who oppose the Union and take action to have the Union removed. There can be no more objectionable conduct than a Union steward's threat to "take a bat" to the head of a co-worker that

does not support the union! And such patent misconduct cannot rationally be shielded by the coincidence that it occurred a few days before a decertification petition is filed.

This Offer of Proof come from a witness who heard Labarbera make the violent statement first-hand. That the Offer of Proof does not identify who Labarbera was speaking to or where he was when he made the statement is no reason to ignore Labarbera's egregious misconduct. The statement was made in the presence of at least one employee who would vote in the election. Moreover, to the extent that additional details about Labarbera's statement may be relevant in determining whether to overturn the election, those details can be addressed in the hearing. It is simply not feasible for an Offer of Proof to address every possible contextual detail. This was a threat of violence that a bargaining unit member heard first-hand and was part and parcel of the Union's campaign of coercion and intimidation.

Third Rejected Offer of Proof: The following is the third Offer of Proof rejected by the Regional Director, and her justification for the rejection:

On March 5, 2020, Ellis asked an employee "So, how long were your kids in foster care." Immediately after this comment was made, Waldren approached a different employee in the area and walked to the voting area with them in order to interfere with the employees' plans to walk to the polling place together. The Employer further offered a witness to testify to the fact that they saw Waldren speaking with the same employee while "cornered" by the time clock. Although the Employer makes a number of conclusionary (sic) statements about the assumed intent and perceived impact of these purportedly related events, the Employer's offer of proof fails to furnish evidence or a description of evidence that, if credited at hearing, would warrant setting aside the election.

Properly construed in the context of the shop floor – where Ellis's intimidating tactics were well known – this unequivocally was Ellis's direct effort to intimidate and frighten a co-worker who may not support the Union. Critically, the employee who Ellis asked "how long were your kids in foster care?" is the same employee to which Ellis said she would punch the Petitioner in

the face if the Union got voted out. (Offer of Proof #2, above). It is the same employee who, one week before the election, received an email from Ellis disavowing their friendship, and then received a call from Ellis's phone and heard Ellis tell another person "I got this bitch I'm dealing with. I'm going to kick her ass." (Rejected Offer of Proof, below). This is the same employee who Waldren confronted and aggressively asked "I thought you weren't going to sign the petition?" (Offer of Proof #1, above). This is the same employee referenced by Ellis when she said "that bitch [] better not vote." (Offer of Proof #5, above). Ellis and Waldren targeted this employee because they believed the employee did not support the Union and supported the petition to decertify the Union. Ellis and Waldren harassed this employee to set an example for the rest of the bargaining unit about how employees would be treated if the Union was voted out.

Ellis asked the employee "how long were your kids in foster care?" after Ellis disavowed their friendship and said "I got this bitch I'm dealing with, I'm going to kick her ass," and "that bitch [] better not vote." Ellis's comment about the employee's kids in foster care – as the employee was getting ready to go vote in the election with her team – was clearly intended as an act of intimidation as the employee was preparing to vote. Making matters worse, when Ellis made the comment to the employee, Waldren took an intellectually disabled member of the employee's team to vote, despite previous discussions that the team would go vote together. Another witness saw Waldren talking with the intellectually disabled employee that morning while Waldren had the employee cornered by the time clock. Plain and simple, this was a planned scheme to bully an employee whom Waldren and Ellis believed supported decertification, and then remove an individual with an intellectual disability from his team to influence him to vote in support of the Union. This Offer of proof must be considered in the hearing.

Fourth Rejected Offer of Proof: The following is the fourth and final Offer of Proof rejected by the Regional Director, and her justification for the rejection:

Around February 28, 2020, Ellis sent to another employee hostile text messages which disavowed their friendship and then, when Ellis inadvertently called that employee thereafter, was overheard saying **“I got this bitch I’m dealing with. I’m going to kick her ass.”** The offer of proof fails to describe the alleged hostile language or circumstances of the text messages or to otherwise show there was any relationship of the text messages to the decertification petition or union support. Similarly, the offer of proof fails to describe any evidence that the Employer plans to introduce which would connect the alleged threat during the unintentional phone call to the decertification petition or union support. (emphasis added).

The critical flaw in the Regional Director’s decision is that she fails to see the forest for the trees. Ellis’s threat to “kick [the employee’s] ass” is directly related to the employee’s support for the decertification petition. This incident occurred one week before the election, when Ellis referenced the employee when she said “that bitch [] better not vote.” (Offer of Proof #5, above). From the time the petition was circulated through the election, Ellis and Waldren targeted and harassed this employee, attempting to make an example out of her to show the other bargaining unit employees how they would be treated if they supported the petition. The Regional Director’s claim that this incident is not sufficiently connected to the decertification petition belies the fact that Ellis and Waldren had been harassing this employee for weeks, beginning with Waldren’s accusation to the employee “I thought you said you didn’t sign the petition.” (Offer of Proof #1, above). This Offer of Proof must be considered in the hearing.

IV. CONCLUSION

The Regional Director’s decision to exclude evidence relating to the four aforementioned Offers of Proof must be reversed. The decertification election must be rerun as the first election was tainted by the Union’s campaign of coercion and intimidation which destroyed laboratory conditions and made a fair election impossible. The Regional Director’s primary error was to

evaluate each Offer of Proof in isolation to determine whether each of the Union's acts, each standing alone, were sufficient to overturn the election. The Regional Director's approach ignores context and ignores the broad impact of the Union's persistent threats and acts of intimidation, which swayed the election in the Union's favor by a single vote. For all of these reasons, the Board should overturn the Regional Director's decision to exclude evidence related to the aforementioned Offers of Proof.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was electronically filed this 8th day of April, 2020 via the Board's electronic filing system. A copy was also served via electronic mail upon the following:

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