

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RELENTLESS PURSUIT ENTERPRISES, INC.,
D/B/A LEXUS OF SAN DIEGO

Case: 21-RC-255451

Employer,

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS
LOCAL LODGE NO. 1484 DISTRICT LODGE
190

Petitioner.

**EMPLOYER'S REQUEST FOR REVIEW OF
CERTIFICATION OF REPRESENTATIVE AND REQUEST TO VACATE AND/OR
STAY CERTIFICATION OF ELECTION PENDING OUTCOME OF UNFAIR LABOR
PRACTICE CHARGE**

John P. Boggs, Esq.
Fine, Boggs & Perkins LLP
80 Stone Pine Road, Suite 210
Half Moon Bay, CA 94019
Office: (650) 712-8908
Direct: (650) 712-7540
Cell: (415) 378-3150
fax: (650) 712-1712
jboggs@employerlawyers.com

ATTORNEYS FOR EMPLOYER

JULY 7, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	5
I. SUMMARY OF ARGUMENT	5
II. SUMMARY OF EVIDENCE	7
III. LEGAL ARGUMENT	11
A. Juarez’s Conduct In the Showroom In Front of Voters Removed Voter’s Ability to Make Decisions Without Coercion or Intimidation	11
B. The Union’s Conduct After the Showroom Incident Increased the Level of Coercion By Engaging in Additional Unlawful Acts	16
C. The Regional Director’s Decision to Allow a New Election Without Taking Proper Steps to Restore the Laboratory Conditions Renders the Election Invalid.....	17
D. Extraordinary Relief Is Warranted to Restore the Laboratory Conditions Before a Certification is Issued Following The ULP Proceedings, a Proper Notice to Voters and a Valid Election	19
CONCLUSION.....	20

TABLE OF AUTHORITIES

Cases

<i>Decaturville Sportswear Co. v. NLRB</i> 406 F.2d 886, 889 (6th Cir. 1969)	18
<i>Home Town Foods</i> 416 F.2d 392 (1969).....	17
<i>NLRB v. Hale Mfg. Co.</i> 602 F.2d 244 (2d Cir. 1979).....	18
<i>Rapid Mfg. Co. v. NLRB</i> 612 F.2d 144 (3d Cir. 1979).....	18
<i>Sure-Tan, Inc. v. NLRB</i> 467 U.S. 883 (1984).....	18

Board Decisions

<i>Avis Rent-A-Car System</i> 280 NLRB 580 (1986)	15
<i>Baja's Place</i> 268 NLRB 868 (1984)	15
<i>Communications Workers Local 4372 (Ohio Telephone Co.)</i> 120 NLRB 684 (1958), enfd. as modified 266 F.2d 823 (6th Cir. 1959), affd. as modified 362 U.S. 479 (1960)	15
<i>Culinary Workers Local 226 (Casino Royale, Inc.)</i> 323 NLRB 148 (1997)	15
<i>Donelson Packing Co.</i> 220 NLRB 1043 (1975)	18
<i>E.L.C. Electric, Inc.</i> 344 NLRB 1200 (2005)	14
<i>Gaines Elec. Co.</i> 309 NLRB 1077 (1992)	18
<i>Glacier Packing Co., Inc.</i> 210 NLRB 571 (1974)	15
<i>In re Gen. Shoe Corp.</i> 77 NLRB 124 (1948)	17
<i>In Re Nathan Katz Realty, LLC</i> 29-CA-23280, 2002 WL 1883790 (Aug. 12, 2002)	15, 17
<i>Laborers Local 806</i> 295 NLRB 941 (1989), enfd. Mem. 974 F.2d. 1343 (9th Cir. 1992).....	15

<i>Madison Square Garden CT., LLC</i> 350 NLRB 117 (2007)	15
<i>Med. Ancillary Serves.</i> 212 NLRB 582 (1974)	17
<i>Midland Nat'l Life Ins. Co.</i> 263 NLRB 127 (1982)	17
<i>Passavant Mem'l Area Hosp.</i> 237 NLRB 138 (1978).....	18, 19
<i>Quest International</i> 338 NLRB 856 (2003)	15
<i>Retail Wholesalers Union District 65 (I. Posner, Inc.)</i> 133 NLRB 1555 (1961)	15
<i>Service Employees District 1199 (Staten Island University Hospital)</i> 339 NLRB 1059 (2003)	15
<i>Webster University Employer And Service Employees International Union, Local 1</i> 14-RC-149539, 2015 WL 4235283 (July 7, 2015).....	17
<i>Westwood Horizons Hotel</i> 270 NLRB 802 (1984)	15

Rules and Regulations

NLRB Case handling Manual (Part One) Compliance, Sec. 10050	16
-------------------------------------------------------------------	----

STATEMENT OF THE CASE

Pursuant to section 102.67 of the National Labor Relations Board's ("Board") Rules and Regulations ("R&R"), the Employer RELENTLESS PURSUIT ENTERPRISES, INC., D/B/A LEXUS OF SAN DIEGO (hereinafter "Company" or "Employer") seeks review of the Certification of Representative issued by the Regional Director of Region 21 on June 24, 2020 ("Certification", attached hereto as Exhibit K), and the underlying decision allowing the election proceed given the overwhelming coercion by the union interfering with voter's rights, including refusing to issue a complaint on the charge in Int'l Assoc. of Machinists and Aerospace Workers Local Lodge No. 1484 District Lodge 190 Case 21-CB-256136 (hereinafter the "Charge") and instead simply causing employees to vote again in a new election which was insufficient to remedy the interference with employees' free and untrammelled choice in the new election as it left un-remedied an outstanding unfair labor practice by the Union. This Request for Review is filed because: (1) the Certification of Representation raises a substantial question of law or policy because the Regional Director departed from Board precedent in making sure voters were informed of the actual violations of the Act so as to restore the laboratory conditions before holding the second election, and (2) the Regional Director's Notice of Election lacked the required specificity of the Union's unlawful conduct and therefore resulted in prejudicial error.

In addition, pursuant to section 102.67(j) of the Board's R&R, the Employer requests that the Board stay or place in abeyance the Certification of Representative until after the proceedings in the Unfair Labor Practice Charge filed on July 7, 2020 (Exhibit M) to allow a proper remedy for an otherwise un-remedied unfair labor practice.

I. SUMMARY OF ARGUMENT

The Union engaged in conduct which can only be characterized as a gross violation of employees' rights under the Act that eviscerated the employees' free choice in the election process. Initially, the Union organizer, in front of practically the entire unit of voters, made threats toward and verbally attacked the General Manager of the facility, calling him out for a physical confrontation just days before the election. The entire incident was videotaped and

went viral on the internet. The Employer filed an Unfair Labor Practice Charge and request to block the election. The Region did not issue a complaint saying the initial conduct was not sufficiently violent for a prolonged period (*i.e.*, that it was isolated). The Employer made a request to the Board to review Regional Director's decision, which was denied.

After the filing of the Charge, the Union continued to coerce and intimidate voters. Indeed, the Union organizer and known union supporters by: (1) demanding that voters take cameras into the voting area and take pictures of the ballots; (2) demanding that voters prove that they voted Yes with a photo would have their union initiation fees waived; (3) threatening voters that they would not have a job if they did not vote for the union; and (4) demanding that voters sign a written statement agreeing to vote for the union immediately prior the election.

The Employer timely filed objections to the election based on this unlawful activity. Shortly thereafter, the Board indicated that the Union would agree to a new election. The Board indicated that it would accept the Union's offer and hold a new election and asked the Employer to stipulate to the election, which the Employer did. The Board, however, caving in to the Union's demands removed references to the specific unlawful acts committed by the Union and instead issued a watered-down version of a Notice of Election that did not sufficiently restore the laboratory conditions. Indeed, the Notice of Election did not unconditionally condemn the Union's conduct, but instead barely included a vague reference to the reason for the new election. The new election was held by mail and 25% of voters simply did not vote this time. The impact of the Union's conduct is clear.

The extensive misconduct and lack of proper notice to voters cannot go unremedied once again. For this reason, the Employer has also filed a second Unfair Labor Practice Charge (Exhibit M) seeking a proper remedy for workers that should be issued by the Board prior to any future Certification.

The Certification of Representative should be vacated and the Region should proceed with the investigation of the second Unfair Labor Practice Charge prior to any election taking place.

II. SUMMARY OF EVIDENCE

The Union filed a Petition for Election on January 30, 2020, seeking to represent a proposed bargaining unit comprised of the company's automotive service technicians. The original election was held pursuant to a stipulated election agreement approved on February 10, 2020. An election by secret ballot was conducted in the unit agreed appropriate for the purposes of collective bargaining on February 21, 2020. On February 28, 2020, the Employer timely filed objections to conduct affecting the election results.

In addition, an Unfair Labor Practice Charge was filed on February 11, 2020 (Case: 21-CB-256136, hereafter the "Charge"). The Charge alleged the Union engaged in illegal activity, in violation of Section 8(b)(1)(A) of the Act, that restrained and coerced employees in the exercise of their Section 7 rights. The facts alleged at the time of the filing of the charge (along with supporting evidence) were that on Tuesday February 4th, after the filing of the Petition, Union agent Jesse Juarez, with assistance from Union agent Kevin Kucera, entered the sales showroom of the company facility located at 4970 Costa Mesa Rd, San Diego. The sales showroom is not the location where the employees of the proposed unit worked. Mr. Juarez entered the sales showroom bringing with him the overwhelming majority (over 20) of the voters that would be included in the proposed bargaining unit. Mr. Juarez entered without invitation.

Without provocation, the Union agent Juarez in front of Kucera aggressively verbally attacked and physically assaulted—yelling profanities, waving arms close to and putting his finger in the face of—the General Manager Eric Leys. Leys calmly repeatedly asked Union agent Jesse Juarez to leave the showroom and he refused. At that point Juarez was trespassing unlawfully. Juarez stood within one foot of Mr. Leys and shouted profanities and derogatory statements such as "fuck you fat ass," "fuck you," "asshole" and other vulgarities. Union Agent Juarez made grossly demeaning statements regarding Mr. Ley's intelligence,

physical appearance, character and authority. Union Agent Juarez shouted at other company managers, customers, and employees. Union Agent Juarez's tirade undermined Mr. Leys' authority to direct the workforce and serve his customers. Juarez also screamed at Leys that Leys was "brainwashing" the employees referring to a management meeting with employees. Juarez threatened to shut down the business and said the voters were no longer the Employer's employees. Juarez tried to cause a physical altercation with Leys by telling Leys that Leys was a big guy and he would be waiting outside on the sidewalk for him. Juarez specifically said there would be a "war" multiple times. Union Agent Juarez refused to leave the premises at the direction of the company's management team.

Union Agent Juarez's behavior intimidated company automotive technicians who are members of a bargaining unit, which the Union had petitioned to represent. Juarez said repeatedly that he would start a war with Leys and he was "done" with them. Juarez humiliated and physically assaulted Leys in front of the voters and made it clear that anyone that didn't support the Union would get the same treatment. This was done in front of more than 20 voters and in front of customers and other employees. There is a video of this entire incident and Affidavits to support it that were filed with the Region. Exhibit A is a transcript of the exchange between Juarez and Leys, the General Manager. Exhibits B and C are Affidavits from bystanders to the incident. The video was then circulated to all voters by the Union. The link to the video is <https://www.reachoutthewindow.com/dropbox/otw/LSD-JesseJuarezVisit-2-4-2020.mp4> and it is concurrently electronically filed herewith as an MP4 filed as Exhibit D.

After the initial position statement (attached hereto as Exhibit E), the Employer provided additional evidence in a Statement of Objections in support of the Objections to the election. A true and correct copy of the Statement of Objections and Offer of Proof is attached hereto as Exhibit F. Indeed, these additional acts in and of themselves constituted violations of Section 8(b)(1)(A) of the Act. The Statement of Objections, the Offer of Proof and the evidence

filed in the Objections, were filed under the case number of the Charge and this RD case. The Region was notified that additional information had been filed in support of this charge.¹

The additional unlawful acts committed after the filing of the Charge included the following acts by the Union and the Union's known supporters (also attached to Exhibit F):

- Identifiable Union supporters, during the period after the filing of the Petition and prior to the election, demanded in writing that voters take photographs of their ballots thereby destroying the secrecy of the ballots and the election. These written demands were done by text messages sent to all voters in the proposed unit. The text messages were provided to the Region and are attached hereto as Exhibit G.
- Identifiable Union Supporter Aleksandar Kostic approached Keith Diomino, an employee who was voting in the election, and told him that they would vote Diomino out of his position, indicating that Diomino would not have a job if he didn't support the Union cause.
- Identifiable Union Supporter Hoa Ngu sent text messages to all voters on a group list (26 participants) that Union agent Jesse Juarez was using to communicate to all voters. Hoa Ngu instructed all voters to take pictures of the ballot at the time of the election. Ngu also instructed everyone that he would sneak his camera in to take pictures of the ballot. These messages are also in written text messages from Hoa to voters.
- Identifiable Union Supporter Aleksandar Kostic told Billy Bolander, another voter, that everyone must take pictures of their ballot and if they proved they voted Yes, they would not be charged the Union's initiation fee and those that didn't vote Yes would have to pay it. Bolander felt coerced to take a picture of his ballot to avoid the Union's threats and did so to comply with the Union's demand.
- Known Union supporter Kostic approached Bolander the day before the election and gave him a piece of paper and told him he had to sign it. The paper given to Kostic had the names of more than 20 voters signed on it and Kostic told him he had to sign it. Kostic told Bolander the Signature was so that he would indicate to the Union that he was going to vote for the Union 100% without exception the following day at the election.

¹ In fact, the Employer stated in its Statement of Objections, "This Petition for Election (Case No.: 21-RC-255451) and the Objections filed herein are related to and overlap to some extent with the Unfair Labor Practice Charge already on file with National Labor Relations Board (Case: 21-CB-256136) and for that reason should be consolidated for investigation and hearing."

- Known Union supporter Kostic verbally attacked Bolander the day before the election in front of other voters in order to coerce him into voting for the Union. Kostic then had more than a dozen Union supporters called Bolander a traitor and a sell-out.
- Known Union Supporter Hoa Ngu told Billy Bolander on this way to the voting booth that “it was nice working with you” indicating that if he didn’t support the Union he would not work at the Company any more.

The additional information and supporting evidence demonstrated that the incident in the showroom was not an isolated intrusion on the free choice of employees, but instead was part of an overall pattern of Union abuse intended to and having the tendency to restrain and coerce employees.

After the filing of objections, the Union voluntarily offered to hold a new election. The Region informed the Employer that given the offer by the Union, the Board was going to hold a new election by mail. The Employer agreed to a Stipulated Election Agreement on the condition that it would not have an effect on the appeal of the Charge or the filing of additional charges. (See Exhibit H emails between Region and Employer’s legal counsel). The Region then notified the Employer that the appeal of the Charge had been rejected and so the Board was going to proceed with a new election by mail. *Id.* In order to avoid the time and expense of a hearing to resolve the Employer's election objections, based upon the Employer's objections alleging Petitioner interference, it was agreed upon by the Parties that the original election conducted in this matter on February 21, 2020, be set aside. After a Stipulation for a new election was executed (See Exhibit I), but before the second election was conducted, the Employer is informed and believes that Jesse Juarez told the technicians (proposed bargaining unit voters) that the General Manager of the Employer had been terminated due to Jesse Juarez. Juarez allegedly sent an email to technicians stating this. It is the Employer’s position that simply having a new election without the Union completely disavowing its unlawful conduct or adequate postings by the Board with sufficient time to pass does not restore the laboratory conditions required for making a choice for a representative free of coercion as required by the Act.

III. LEGAL ARGUMENT

A. **Juarez's Conduct In the Showroom In Front of Voters Removed Voter's Ability to Make Decisions Without Coercion or Intimidation**

By letter dated March 6, 2020, Acting Regional Director Nathan Seidman dismissed the charge and refused to issue a complaint. The Acting Regional Director found that

“[T]he Union representative made threats to engage in Section 7 activity or other lawful economic action, the evidence fails to establish that the Union representative engaged in or made any specific threats of violence, or that he otherwise engaged in conduct that restrained or coerced employees in the exercise of their Section 7 rights. The evidence also reflects that the confrontation was of a limited duration; that the Union representative left the property within minutes; and that the Union representative has not since attempted to come back on the Employer's property in the same manner.”

While there may have arguably have been some lawful threats of Section 7 activity scattered meagerly throughout the verbal and physical assault on General Manager Leys, the evidence is clear that Union agent Jesse Juarez's intent was to intimidate everyone in his presence and his conduct would objectively tend to do so. The majority of the verbal and physical assault was not lawful threats. During the entire assault on Leys, Juarez was yelling, causing a public disturbance and physically assaulting Leys by getting in his face and putting his hand and fingers right up to Leys (see attached screenshots of Video attached hereto as Exhibit G.) The transcript of the assault is as follows:²

Juarez: Go get Wolfe. Go get Wolfe. I thought you were a bully, I thought you were big. You yell at all these workers. [pointing to the 20 plus workers behind him]

Leys: I think you're the one yelling at me right now.

Juarez: You yell at these workers. You steal from these workers.

Go call Mr. Wolfe

Go call Mr. Wolfe

Leys: You walk out of the dealership right now.

Juarez: I'm gonna picket your fucking ass. You understand me? I'm taking action.

² For clarity, the statements of Mr. Juarez are reflected in bold-face type.

Leys: Close your mouth . . .

Juarez: You broke the law!

Leys: . . . and walk outside.

Juarez: We have rights and we're taking you on. You want a problem? You want a war? You're going to get one!

Leys: This is not your property.

Juarez: I don't care. Workers have rights. I represent them.

Leys: You walk outside.

Juarez: Call Wolfe. Are you going to call Wolfe or not?

Leys: I'm instructing you to leave the property right now.

Juarez: I don't care what you're instructing me. You don't work for me. Are you going to call Mr. Wolfe or not?

Leys: You're not allowed on this property.

Juarez: Is he a coward too or what?

Leys: Leave this property.

Juarez: You think we're cowards? We're right here in front of you. You better work on your own cars bully.

Leys: Who's the bully, you or me?

Juarez: Where's Nelson? Call him out.

Leys: Walk outside, you're not welcome here.

Witness: Get out showroom, please.

Juarez: I get it. You've been engaged in a lot of shenanigans. You're brainwashing workers.

Leys: I haven't done anything.

Juarez: Yes you did. You guys want a problem, you're gonna get one. I'm going to shut your dealer down. I'm out on the sidewalk alright? We're done with you.

Leys: As long as you're out of the store I'm happy.

Juarez: We're done with you. We're done.

Leys: These technicians are welcome to go back to work.

Juarez: **No, I'm out there on the sidewalk. I represent the workers – we're not working.**

Leys: Hey, Jesse –

Juarez: **You fix your own cars**

Leys: I'll tell you right now –

Juarez: **You fix your own cars!! You thought you were a big bully didn't you?**

Leys: No. I'm not being a bully – you're being a bully

Juarez: **Yes you are. You're a bunch of cowards. Alright? I'm here, you want a war? I'm here.**

Leys: Leave the property. Don't ever return to the property.

Juarez: **I'm going to picket the whole fuckin' lot! I'm gonna put a rat out there. You want a problem?**

Leys: Hey Jesse, can I be clear?

Juarez: **Am I being clear to you?**

Leys: You walk out there and don't ever return, you understand?

Juarez: **I'll be on the sidewalk.**

Leys: the next time –

Juarez: **You don't have to worry – I will be on the sidewalk.**

Leys: - Next time I'm calling the police –

Juarez: **You don't have to worry, I'll be on the sidewalk**

Leys: - and I'll have you arrested.

Juarez: **Arrest me!**

Leys: You not allowed here.

Juarez: **It won't be the first time! You guys want a problem, you're going to get one!**

Leys: Please leave, you're not welcome back.

Juarez: **I don't care what you – I'm walking the sidewalk**

Leys: You're not allowed on the property.

Juarez: **You want a problem, you got one! I'm done with you. I'm gonna have my Mercedes guys, my Acura guys – this whole fuckin' block and I'm gonna picket the fuck out of all you guys!**

Leys: Leave the property, please

Juarez: **Mr. Hanson, that's you, right? Who's the Regional, who's the . . ., is that him? You're the reason we're here! You and that other lady. You can only cheat these people so much – they've had it!**

Leys: inaudible

Juarez: **No! You've cheated these workers to the point of this! You don't understand the reality. You are the decision maker (inaudible)- you want a problem? You got it! I'm not playing games with you folks anymore. (Jesse walking away is inaudible, then....) Fuck you!!! (continues yelling)**

Just because a Union agent scatters about some lawful threats, as part of otherwise unlawful action, does not transform the actions so that there is no violation of the Act. Moreover, the statement that the actions of Juarez were limited in time is even more outrageous given the evidence submitted to the Region after the initial Charge was filed. There has been a clear violation of the Act in this circumstance.

The actions of Juarez in placing his hands and fingers in the face of Leys while telling him he “is big”, “I will give you a war”, “I am outside on the sidewalk”, “I am done with you”, etc., clearly send the message to anyone that Juarez’s conduct was in fact a threat of physical violence. Indeed, the Affidavits filed with the Region and herewith clearly state that witnesses to the conduct believed that Juarez was trying to initiate a physical fight with Leys. The factual finding was simply wrong.

The Acting Regional Director’s decision was also legally flawed. The critical period during which conduct allegedly affecting the results of a representation election must be examined “commences at the filing of the representation petition and extends through the election.” *E.L.C. Electric, Inc.*, 344 NLRB 1200, 1201 fn. 6 (2005). In this case, the relevant time period is January 30, 2020 through February 21, 2020. If the Union’s conduct had a “tendency to interfere” with employees’ free choice, the Employer has met its burden. *Madison*

Square Garden CT., LLC, 350 NLRB 117, 119 (2007); *Quest International*, 338 NLRB 856, 857 (2003). In this case, it would be borderline absurd to take the position that the actions listed above (and below herein) would not tend to interfere with employees' free choice.

Juarez's actions could have had an impact on the election by instilling a reasonable fear of voting against the Union. See *In Re Nathan Katz Realty, LLC*, 29-CA-23280, 2002 WL 1883790 (Aug. 12, 2002). The Board cannot condone such conduct by a Union in front of voters during the applicable election period. There is no requirement that actual violence take place or that a specific threat of violence is made. Implications are sufficient and the Acting Regional Director's decision is contrary to Board law. *Glacier Packing Co., Inc.* 210 NLRB 571, 573 (1974) (Board should not condone loud and threatening confrontations that take place in the context of an election); *Independence Residences, Inc.*, 355 NLRB No. 153 (2010); see also *Westwood Horizons Hotel*, 270 NLRB 802 (1984) (setting aside an election based on threats of physical harm); *Service Employees District 1199 (Staten Island University Hospital)*, 339 NLRB 1059 (2003) (Board found that a union violated Section 8(b)(1)(A) when its organizer engaged in verbal and physical abuse against the employer's representatives on the employer's property); *Baja's Place*, 268 NLRB 868 (1984); See also *Avis Rent-A-Car System*, 280 NLRB 580, 581 (1986), as referenced in *Phillips Chrysler-Plymouth, Inc.* 304 NLRB No. 7, Decision and Direction of Second Election. "Union misconduct of this character coerces employees who witness it or learn of it because they may reasonably conclude that if they do not support the union's goals, like coercion will be inflicted upon them." *Service Employees District 1199*, at 1061; See also *Culinary Workers Local 226 (Casino Royale, Inc.)*, 323 NLRB 148, 162 (1997); *Laborers Local 806*, 295 NLRB 941 (1989), enfd. Mem. 974 F.2d. 1343 (9th Cir. 1992) (security guards); *Retail Wholesalers Union District 65 (I. Posner, Inc.)* 133 NLRB 1555, 1566 (1961) (managerial employee); *Communications Workers Local 4372 (Ohio Telephone Co.)*, 120 NLRB 684, 868 (1958), enfd. as modified 266 F.2d 823 (6th Cir. 1959), affd. as modified 362 U.S. 479 (1960) (supervisors).

By this conduct, the Union and Identifiable Union Supporters improperly affected the free choice of the employees and resulted in unlawful coercion and restraint of employees' rights.

B. The Union's Conduct After the Showroom Incident Increased the Level of Coercion By Engaging in Additional Unlawful Acts

The Acting Regional Director erred by not considering other unlawful acts of the Union in the applicable election period. Prior to the dismissal of the charge and refusal to issue a complaint, the Employer submitted additional evidence of Union misconduct arising to violations of the Act that undermines the Acting Regional Director's finding that the improper conduct was limited to a single instance of improper conduct by the Union. Despite this additional evidence, the Acting Regional Director dismissed the charge and failed to even mention the additional acts of misconduct that demonstrated the basis for the decision was factually and legally flawed. See, NLRB Case handling Manual (Part One) Compliance, Sec. 10050 ("Throughout the investigation, Board agents should assertively seek out all material evidence in the spirit of providing the Regional Director with a complete picture of the events so as to permit an informed decision on the case."); *Id.* Sec. 10054 ("Since the investigation serves as the basis for all action eventually taken in a case, it must reveal the totality of the circumstances, including relevant background information.").

Specifically, the Employer submitted a Statement of Objections and Offer of Proof (filed under both case numbers as set forth above) (see Exhibit F hereto) and requested that representation case and the unfair labor practice proceeding be consolidated for investigation and consideration. The Employer submitted the supporting text messages showing the unlawful conduct of the Union. Identifiable Union supporters, during the period after the filing of the Petition and prior to the election, demanded in writing that voters take photographs of their ballots thereby destroying the secrecy of the ballots and the election. These written demands were done by text messages sent to all voters in the proposed unit. The Union supporters also stated that initiation fees would be waived if pictures of the ballots were

shown to the Union. In addition, the Union made verbal threats to employees that were believed to not support the Union that they would not have a job if they voted against the Union. This was all set forth in detail. (Exhibit E). The Acting Regional Director completely ignored these facts in coming to a decision.

Ignoring such facts is legally erroneous. These actions could have had an impact on the election by instilling a reasonable fear of voting against the Union. *See In Re Nathan Katz Realty, LLC*, 29-CA-23280, 2002 WL 1883790 (Aug. 12, 2002) (“The question to be determined is whether the evidence established that the Union representatives engaged in unlawful surveillance by its conduct of observing employees leaving or entering the polling place. In that regard, the issue is whether that conduct is deemed to have a reasonable tendency to coerce employees.”). *See also, Webster University Employer And Service Employees International Union, Local 1*, 14-RC-149539, 2015 WL 4235283 (July 7, 2015) (Photographs of ballot invalidate the ballot).

By this conduct, the Union and Identifiable Union Supporters improperly affected the free choice of the employees and resulted in unlawful coercion and restraint of employees’ rights.

C. The Regional Director’s Decision to Allow a New Election Without Taking Proper Steps to Restore the Laboratory Conditions Renders the Election Invalid

In the election context, "Congress has entrusted a wide degree of discretion to the Board to establish the procedures necessary to insure the fair and free choice of bargaining representatives." *Midland Nat'l Life Ins. Co.*, 263 NLRB 127, 131 (1982). "In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." *See In re Gen. Shoe Corp.*, 77 NLRB 124, 127 (1948); *see also Med. Ancillary Serves.*, 212 NLRB 582, 584 (1974). “The Board should apply a single standard against which it will measure the campaign conduct of all parties who might have interfered with employee free choice." *Home Town Foods*, 416 F.2d 392, 397 n.9 (1969).

In the minds of prospective voters, misdeeds by competing parties do not erase or neutralize each other, as an alkali neutralizes an acid. Indeed, such conduct by a union, where found, compounds rather than nullifies employer misconduct, and minimizes rather than improves the likelihood that an election will produce a free and untrammelled employee choice.

Donelson Packing Co., 220 NLRB 1043, 1060 (1975).

“For a union certification to be valid, laboratory conditions necessary for the conduct of a free and fair election must be maintained” *NLRB v. Hale Mfg. Co.*, 602 F.2d 244, 249 n.11 (2d Cir. 1979). Although the selection of remedies to enforce the labor laws is a matter within the special competence of the Board (*see Rapid Mfg. Co. v. NLRB*, 612 F.2d 144, 145-46 (3d Cir. 1979)), the Board's chosen remedy should as nearly as possible restore the parties to the status quo that existed before the unfair labor practices occurred, and thereby eliminate the imbalance created by the employer's violations of the Act. *Decaturville Sportswear Co. v. NLRB*, 406 F.2d 886, 889 (6th Cir. 1969). *See also Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984) (stating that the remedy must be tailored to the unfair labor practice it is intended to redress).

Simply ordering a new election is not sufficient to remedy an otherwise valid unfair labor practice charge. Ordering a new election, without more, merely leaves the employees to vote under the impact of the original unfair labor practices committed by either party. For this reason, in order to effectively restore the laboratory conditions required for an election, a remedy must be put into place that restores that laboratory condition. For example, such laboratory conditions may be restored where a party disavows completely its unlawful conduct and does not return to commit any other unlawful acts during the period preceding the election. *Gaines Elec. Co.*, 309 NLRB 1077, 1081 (1992), *but cf. Passavant Mem'l Area Hosp.*, 237 NLRB 138 (1978) (disavowing is insufficient at times). In other instances, posting notices of the violation to voters along with a clear statement of voters' rights with time to consider those rights may restore those laboratory conditions. In this case, in the face of egregious violations of employees' rights, neither remedy was implemented and voters were forced to vote a second time without really understanding what the Union had done wrong or

being told that the action was unlawful. *See e.g., Passavant Mem'l Area Hosp.*, 237 NLRB 138 at 138-39 (1978).

In fact, the Regional Director's notice to employees was incredibly weak and did nothing to disavow the actions of the Union to restore the laboratory conditions. The Notice of Election (Exhibit J) to be provided to voters stated, in relevant part, as follows:

The election conducted on February 21, 2020 was set aside by agreement of the Parties because certain alleged conduct by the Petitioner 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 election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, free from interference by any of the parties.

The Notice should have included strong language that disavowed the conduct on the part of the Region/Board and that clearly stated that voters could not be told to take pictures of their ballots, that voters could not be adversely affected by their vote, that voters had the right to vote their conscience free of coercion and that the Union's improper conduct violated those rights. *See e.g., Passavant Mem'l Area Hosp., supra*, 237 NLRB at 138-39. None of this was set forth in the Notice and absent a prior or concurrent remedy to restore the laboratory conditions, the election was invalid and the Certification should be vacated.

D. Extraordinary Relief Is Warranted to Restore the Laboratory Conditions Before a Certification is Issued Following The ULP Proceedings, a Proper Notice to Voters and a Valid Election

As set forth above, the Union's conduct after the filing of first Charge continued unabated thereby interfering with the free choice of employees. As a result, the first election was set aside and a new election was held despite the pendency of new allegations brought to the Regional Director's attention. Because these new allegations led the Region to approve a second election, it should be assumed that the allegations sufficiently strong to require such action. However, instead of issuing a proper Notice of Election to voters that would restore the laboratory conditions, the Regional Director issued a vague explanation that made the entire

chain of unlawful acts look inconsequential and such Notice failed to restore confidence in employees that Union should not be threatening employees, surveilling the election, etc.

As a result, voters were not made aware that the prior actions were unlawful and that they would not be subjected to Union threats, surveillance, etc., in the second election. Indeed, now that an Unfair Labor Practice Charge is filed to challenge the Union's misconduct after the showroom incident, the Board should stay the Certification until those unfair labor practice proceedings are completed. Under these circumstances, extraordinary relief is appropriate.

CONCLUSION

WHEREFORE, the Board should grant review of the Certification and order that the laboratory conditions should be properly restored prior to any election proceeding in the future.

Respectfully Submitted,



John P. Boggs
FINE, BOGGS & PERKINS, LLP
Attorneys for Employer

Dated: July 7, 2020