

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20**

TRACY AUTO, L.P. DBA TRACY TOYOTA

Employer

and

Case 32-RC-260453

**MACHINISTS AND MECHANICS LODGE NO.
2182, DISTRICT LODGE 190, INTERNATIONAL
ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO**

Petitioner

**REGIONAL DIRECTOR'S DECISION ON OBJECTIONS, NOTICE OF HEARING
AND
ORDER CONSOLIDATING CASES FOR HEARING**

Based on a petition filed on May 15, 2020,¹ and pursuant to the parties' approved Stipulated Election Agreement, Region 32 conducted a mail-ballot election herein to determine whether the following unit of employees of Tracy Auto, L.P. DBA Tracy Toyota (the Employer) wish to be represented for purposes of collective bargaining by Machinists and Mechanics Lodge No. 2182, District Lodge 190, International Association of Machinists and Aerospace Workers, AFL-CIO (Petitioner).

INCLUDED: All full-time and regular part-time technicians employed by the Employer (or who had accepted offers of employment) as of May 21, 2020, parts department employees, and service advisors employed by the Employer at its facility located at 2895 North Naglee Road, Tracy, California.

EXCLUDED: Porters, warranty administrators, confidential employees, office clerical employees, guards, and supervisors as defined by the Act.

¹ All dates herein are calendar year 2020, unless otherwise specified.

The August 7 Tally of Ballots shows that of the approximately 37 eligible voters, 17 votes were cast for Petitioner, 8 votes were cast against Petitioner, with 3 challenged ballots, an insufficient number to affect the election results.

THE EMPLOYER'S OBJECTIONS

On August 14, the Employer filed timely Objections to Conduct of Election and Conduct Affecting the Results of the Election (the Objections) and timely submitted an offer of proof in support thereof. A copy of the Objections is attached to this Order as **Attachment A.**²

Below, I discuss the Board's standards for setting aside elections and for evaluating offers of proof, and I then provide a brief overview of the Employer's proffered evidence. Finally, I turn to the Objections, which are grouped by subject, and set forth more specific proffered evidence and my conclusions for each.³

Board Standards for Setting Aside Elections and for Evaluating Offers of Proof

"Representation elections are not lightly set aside" *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (citations omitted) and "[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Id.* at 328. The objecting party bears the "entire burden" of showing evidence that misconduct warrants overturning the election. *Id.* at 328. The burden of proof is on the party

² On October 6, General Counsel Peter Robb issued an order transferring the instant case from Region 32 to Region 20 for processing.

³ Only conduct which occurred during the "critical period" (between the May 15 filing date of the petition and through the election) can form the basis for objectionable conduct in mail-ballot elections. *Goodyear Tire and Rubber Co.* 138 NLRB 453 (1962). All of the conduct encompassed by the subject Objections allegedly occurred during the critical period.

seeking to set aside a Board-supervised election, and that burden is a "heavy one." *Lalique N.A., Inc.*, 339 NLRB 1119, 1122 (2003); *Chicago Metallic Corp.*, 273 NLRB 1677, 1704 fn. 163 (1985). The objecting party's burden encompasses every aspect of a *prima facie* case. *Sanitas Service Corp.*, 272 NLRB 119, 120 (1984).

The standard used to determine whether objectionable conduct occurred varies depending upon who is alleged to have committed the misconduct. Where, as here, the objecting party alleges that the other party to the election, or its agent, committed the objectionable conduct, the objecting party must show not only that the acts occurred by the other party's agent, but also that they "interfered with the employees exercise of free choice to such an extent that they materially affected the results of an election." *NLRB v. Gulf States Cannery*, 634 F.2d 215, 216 (5th Cir. 1981). See *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004) (citing *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995) (conduct is objectionable "if it has the tendency to interfere with the employees' freedom of choice.")).

The Board places the burden on the objecting party to furnish evidence or a description of evidence that, if credited at hearing, would warrant setting aside the election. *Jacmar Food Service Distribution*, 365 NLRB No. 35, slip. op. 1, fn. 2 (2017), citing *Transcare New York, Inc.*, 355 NLRB 326 (2010). The Board has long held that an objecting party must provide probative evidence in support of its objections; it is not sufficient to rely on mere allegation, conclusory statements, or suspicion. See *Allen Tyler & Son, Inc.*, 234 NLRB 212, 212 (1978) ("In the absence of any probative evidence, [the Board] shall not require or insist that the Regional Director conduct a further investigation simply on the basis of a 'suspicious set of circumstances"). In short, to merit investigation by a regional director and to warrant a hearing, the offer of proof must be "reasonably specific in alleging facts which *prima facie* would warrant

setting aside an election.” *Audubon Cabinet Company*, 119 NLRB 349, 350-351 (1957); *Care Enterprises*, 306 NLRB 491 (1992). The Board has repeatedly upheld Regional Directors’ decisions to overrule objections when the supporting offer of proof is deficient. See e.g., *Builders Insulation, Inc.*, 338 NLRB 793 (2003); *The Daily Grind*, 337 NLRB 655 (2002) (unsupported allegations are insufficient to trigger administrative investigations); *Heartland of Martinsburg*, 313 NLRB 655 (1994); *Holladay Corp.*, 266 NLRB 621 (1983); *North Shore Ambulance*, 2017 WL 1737910 (NLRB) (May 3, 2017) (Citing *Park Chevrolet-Geo, Inc.*, 308 NLRB 1010, 1010 fn. 1(1992), and Secs. 102.69(a) and 102.69(c)(1)(i) of the Board's Rules and Regulations, wherein the Board held that the Regional Director properly overruled the employer's Objection "without a hearing based on the Employer's deficient offer of proof”).

In *XPO Logistics Freight, Inc.*, 2017 WL 1294849, fn. 1 (Apr. 6, 2017), the Board denied the employer's request for review of the Regional Director's decision overruling objections and issuing a certification of representative where the employer's evidence in support of its objections failed to "constitute grounds for setting aside the election if introduced at a hearing under Sec. 106.67 (c)(1)(i).” The Board went on to explain that its conclusion that the employer's offer of proof was deficient "stems not from its failure to submit a voluminous offer of proof, but from the Employer's failure to allege and support conduct which, if credited, *would* warrant setting aside the election." Citing NLRB Casehandling Manual, Part Two-Representation Proceedings, Sec. 11395.1. (emphasis in original).

In *XPO Logistics Freight, Inc.*, 365 NLRB No. 105. fn. 1(2017), the test-of-certification case that arose after the Board’s denial of the employer’s request for review, *supra*, the Board granted the General Counsel's motion for summary judgment. The employer then appealed the Board's decision to the Court of Appeals for the District of Columbia. In denying the employer's

petition for review that challenged the Board's decision to overrule its objections without a hearing in the underlying representation case, the D.C. Circuit noted that an evidentiary hearing is "called for only when a party makes a *prima facie* showing of substantial and material issue of fact, which if true, would warrant setting aside the election." *XPO Logistics Freight, Inc. v. NLRB*, 2018 WL 2943938, *2 (D.C. Cir. May 25, 2018) (citations omitted). The Court also noted that the *prima facie* showing "cannot be conclusory" and must "point to specific events and specific people." *Id.* (citations omitted). It therefore agreed that the employer's offer of proof was "devoid of factual specifics about who said or did what to whom that, if credited by a factfinder," could support a determination that the conduct was coercive. *Id.*

The objective test for election-party misconduct is whether the party's misconduct "has the tendency to interfere with employees' freedom of choice." *Cambridge Tool & Mfg. Co.*, *supra*; see *Hopkins Nursing Care Center*, 309 NLRB 958 (1992); *Baja's Place*, 268 NLRB 868 (1984); see also *Jurys Boston Hotel*, 356 NLRB 927, 928 (2011) (expressing test as whether conduct "could . . . reasonably have affected the results of the election"); *Safeway Inc.*, 338 NLRB 525, 526 fn. 3 (2002) (same); *NLRB v. Enterprise Leasing Co. Southeast, LLC*, 722 F.3d 609, 619 (4th Cir. 2013) (subjective reactions of employees irrelevant to question of whether there was, in fact, objectionable conduct).

In determining whether party misconduct has the tendency to interfere with freedom of choice, the Board considers: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the

bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. *Taylor Wharton Division*, 336 NLRB 157, 158 (2001) (citing *Avis Rent-a-Car*, 280 NLB 580, 581 (1986)); see *Cedars-Sinai Medical Center*, supra; *Phillips Chrysler Plymouth*, 304 NLRB 16 (1991).

The Proffered Evidence:

In support of the Objections, the Employer submitted witness statements from: Service Manager Robert Gallego; Foreman/Master Diagnostic Technician (Foreman) Josh Spier; and Parts Manager Mike Felix. The Employer also provided documentary evidence in the form of text messages sent to Spier, emails to the Employer's management and employees, a no trespass notice, surveillance footage, and social media posts. The evidence presented below is culled from those witness statements and documentary evidence.

Setting the stage, the Employer's facility consists of a car lot with a large building containing offices and an area for servicing vehicles. On May 15, the same day that the instant petition was filed, Petitioner Representative Jesse Juarez led a walkout of the Employer's technicians. On or about May 18, Juarez and the technicians began picketing the Employer on the sidewalk, near the driveway of the service area. Most of the Objections pertain to Petitioner Representative Juarez' conduct during the picketing and his campaign messaging at and away from the Employer's premises.

Objections 1-3, 7, 8, 15, and 18

Objections 1-3, 7, 8, 15, and 18 raise duplicative and/or related allegations and will be addressed together. In these Objections, the Employer contends that Juarez's conduct warrants nullifying the election results. The conduct at issue involves Juarez using a megaphone to degrade and hurl personal attacks at the Employer's managers and supervisors. He also threatened certain managers with job loss if the Petitioner prevailed in the election and bragged about the existence of a video in which he confronted the manager of another employer during an unrelated organizing campaign in southern California.⁴

Here, the offer of proof shows that Juarez, the Petitioner's agent, repeatedly directed rude and demeaning comments and accusations at the Employer's managers and supervisor over a two-month period in front of most, if not all voters. Specifically, the Employer proffered evidence in support of Objections 1, 3, and 15 that establishes that Juarez engaged in offensive and derogatory ad hominem attacks against Manager Bob Gallego over a megaphone by calling him, among other things, a bully, an idiot, scumbag, mentally incompetent, mentally disabled, and incapable of running a service department. Juarez also regularly stated Gallego's name over the bullhorn, pointed out what Gallego was wearing, and derided him.

The Board has long recognized that elections are vigorously contested and that emotions frequently run high. Therefore, it has held that name calling, "though not condoned, will not be grounds for setting aside elections." *Carrom Division*, 245 NLRB 703, 705 (1979). In the absence of physical confrontations, threats of bodily harm and/or other serious misconduct, the Board does not find "mere rudeness and offensive language" to constitute objectionable conduct.

⁴ This latter allegation is duplicative and is addressed separately in Objection 17, below.

See e.g. *1199, National Health & Human Service Employees Union, SEIU, AFL-CIO*, 339 NLRB 1059, 1064 (2003)(while the totality of egregious misconduct in a hospital setting was found coercive, “mere rudeness” and offensive statements, standing alone, were not), in which the Board explained:

....we are mindful of the latitude we have afforded parties in the manner in which they express their positions, not only recognizing the “industrial realities of speech in a workaday world” but the full freedom necessarily guaranteed them under the Act. Thus, the Board carefully distinguishes between statements that reasonably tend to coerce employees, and mere rudeness, which does not.

To be sure, the Board has long permitted non-threatening expressions of free speech. See *Dal-Tex Optical Co.*, 137 NLRB 1782, 1787 fn. 11 (1962). It also grants unions wide latitude in their campaign messaging; including misstatements of fact and law. *Midland National Life Insurance Co.*, 263 NLRB 127, 130 (1982). Here, Juarez’s derogatory remarks were aimed at nonemployees, and while uncivil, were not accompanied by threats of bodily harm or any physical confrontations. In *Firestone Textiles Co.*, 244 NLRB 168 (1979), the Board affirmed the ALJ’s finding that even a union’s derogatory remarks directed at union dissidents were not objectionable, including calling employees “company suckass” and “son of a bitch.”

The insults that Juarez directed at management officials would not reasonably tend to interfere with employee free choice in the election. Unlike here, and typically in an unfair-labor-practice context, when union “threats, violence, harassment, intimidation, and coercion,” against nonemployees are at issue, the Board considers whether the employees who witnessed or learned of them would reasonably “regard [them] as an indication of what may befall them” if they fail to support the union. *Auto Workers Local 695 (T. B. Wood's)*, 311 NLRB 1328, 1337 (1993)(death threats, threats of rape, violent and intimidating attacks and other serious misconduct against nonemployees found coercive); *1199, National Health & Human Service*

Employees Union, SEIU, AFL-CIO, 339 NLRB 1059, 1064 (2003)(unlawful coercion found where union agent trespassed in a hospital and subjected employer agents to deliberate, repeated, and unprovoked verbal abuse, including profanity, racial and sexual slurs, and threats of physical harm); *Meat Packers (Hormel & Co.)*, 291 NLRB 390, 395 (1988)(verbal and physical threats directed toward, and physical confrontations against, nonemployees found to unlawfully coerce employees); *Teamsters Local 115 (Oakwood Chair)*, 277 NLRB 694, 698 (1985)(violent assault on nonemployee in presence of employees found coercive); *Lumber Workers Local 3171 (Louisiana-Pacific)*, 274 NLRB 809 (1985). See also *Teamsters Local 703 (Kennicott Bros.)*, 284 NLRB 1125 (1987)(Board set aside election when two union agents threatened to physically harm the decertification petitioner and assaulted the employer's president and manager in the presence of 15 employees).

In the case at bar, there is no allegation that Juarez assaulted or threatened anyone with physical violence, and as the above cases illustrate, his aforementioned conduct does not approach in kind or severity that which the Board considers objectionable.

In addition to the above conduct, Objection 3 alleges that, on one occasion, Juarez called out Gallego's name and yelled, "Get off my neck. I can't breathe." Presumably, Juarez was referring to the death of George Floyd, which was widely reported in the media.⁵ Although the Employer asserts that this comment suggests to the listener that Gallego is a racist and stoked racial emotions, there is no evidence that Juarez ever stated that Gallego was racist. Assuming for the sake of analysis that Juarez did call Gallego a racist and/or that the comment could be

⁵ I shall assume that the death of George Floyd and the ongoing Black Lives Matter movement and protests were well known by all involved in this election campaign. However, neither of those events has been shown to have spawned or imbued the organizing campaign. There is no claim or evidence that race was a theme or focal point of the campaign.

construed as a racial appeal, the Board's test for evaluating racial appeals, as enunciated in *Sewell Mfg. Co.*, 138 NLRB 66, 71-72 (1962), is as follows:

So long . . . as a party limits itself to truthfully setting forth another party's position on matters of racial interest and does not deliberately seek to overstress and exacerbate racial feelings by irrelevant inflammatory appeals, we shall not set aside an election on this ground. However, the burden will be on the party making a racial message to establish that it was truthful and germane, and where there is doubt as to whether the total conduct of such party is within the described bounds, the doubt will be resolved against him.

While the Board has held that inflammatory racial appeals can be objectionable, *Sewell* is applicable only in those circumstances where it is determined that the 'appeals or arguments can have no purpose except to inflame the racial feelings of voters in the election.'" *Bancroft Mfg. Co.*, 210 NLRB 1007, 1008 (1974) (quoting *Sewell*, supra at 71), *enfd.* 516 F.2d 436 (5th Cir. 1975); accord: *Englewood Hospital*, 318 NLRB 806, 807 (1995). In *Catherine's, Inc.*, 316 NLRB 186 (1995), the Board, in refusing to set aside an election, held that a union's references to the employer's "Jewish law firm," while irrelevant to the campaign, "were not inflammatory in nature and did not occur on the election eve, they were not part of a recurrent or persistent campaign appeal to the religious or racial prejudice of the eligible voters, and the Union did not reiterate the subject in campaign literature." The Board has adhered to the distinction between *Sewell's* condemnation of a "sustained course of conduct, deliberate and calculated in intensity, to appeal to racial prejudice" and "isolated, casual, prejudicial remarks." *Beatrice Grocery Products, Inc.*, 287 NLRB 302, 302 (1987), *enfd.* 872 F.2d 1026 (6th Cir. 1989) (Table). See also *Seda Specialty Packaging Corp.*, 324 NLRB 350, 352 n. 5 (1997) (employer's comments in single meeting that union agent was racially prejudiced did not warrant overturning election). Here, taking Juarez's comment in context, in an atmosphere that

the proffered evidence shows was devoid of racial tension and in which race was not a campaign theme, the comment does not rise to the level of an objectionable “inflammatory racial appeal.”

Turning to Objections 2, 7 and 8, the Employer alleges that, in the presence of employees, Juarez threatened Department Manager Robert Gallego with job loss if the Petitioner won the election. He also threatened the employment of other managers, including the outside employment of Parts Manager Mike Felix, outside the presence of employees. With regard to Gallego’s threatened removal, it is well established that the Board will not find a threat by a party to be objectionable where, as here, the party does not have the ability to carry out the threat. See e.g., *Smithfield Packing Co.*, 344 NLRB 1, 11 (2004), enf’d 447 F3d 821 (D.C.Cir. 2006); *Pacific Grain Products*, 309 NLRB 690, 691 (1992). The Employer proffered no evidence that the Petitioner, if it won the election, would be able to cause Gallego’s discharge.

Similarly, the allegation that Juarez threatened to interfere with Felix’s outside employment likewise lacks merit. The Employer offered a copy of email correspondence from Juarez to Felix in which Juarez criticized Felix for denouncing the Petitioner while holding a second job with Teamsters benefits. Juarez wrote that Felix needed to “shut the hell up and stay neutral,” and indicated that he has a working rapport with the Teamsters; arguably suggesting that he might attempt to interfere with Felix’s second job.

Notwithstanding the above conduct, Felix averred that he hasn’t held his second job for over one year and that he is no longer a member of the Teamsters. More importantly, there is no offer of proof that Juarez’s email was disseminated to employees or that employees otherwise

learned of it. Accordingly, the email message cannot be found to have interfered with employee free choice in the election, irrespective of its contents.

In Objection 18, the Employer alleges that Juarez sent daily emails to management and employees where he falsely accused the Employer and its agents of criminal acts of aggression against women, stealing, looting, sabotage, brainwashing employees, and retaliation against a victim of rape. Juarez is alleged to have gloated about turning customers away from the Employer's service department by falsely asserting that the technicians were not certified. Juarez also allegedly bragged about deceiving the Employer's security guard in order to trespass on company property, and of his assaults on an agent of another employer that opposed the Petitioner.⁶ Finally, this Objection reiterates the allegations addressed above regarding Juarez's rude attacks on management, his statements that management is incompetent to run the dealership and/or its departments, and accusing management of being liars and cheats, scumbags, pigs, and bullies. Juarez allegedly claimed that ownership and management were suffering from medical problems that disabled them mentally, referring to the Employer's agents as, among other things, sleazy, looters, and con artists. The Employer further claimed, but without offering proof, that Juarez shared these messages with all voters to create an atmosphere of fear and intimidation of any voter who considered opposing the Petitioner.

Distilled down, the majority of the above alleged conduct consists of more of the same rude and offensive comments and campaign rhetoric that the Board does not condone, but does not consider objectionable. *1199, National Health & Human Service Employees Union, SEIU,*

⁶ This "bragging-about-assault" allegation is duplicative of Objection 17, and shall be addressed therein.

AFL-CIO, supra; *Midland National*, supra. With regard to the duplicative allegations of threatening managers with job loss and subjecting them to insults, those fail for the reasons set forth above in Objections 2, 7 and 8. See *Smithfield Packing Co.*, supra. **Accordingly, I overrule Objections 1-3, 7, 8, 15, and 18.**

Objections 9-12

Objections 9-12 raise related issues and will be addressed together. In these Objections, the Employer contends that Juarez threatened Foreman Josh Spier⁷ with job loss if he did not support the Petitioner or assist in the campaign effort, and promised Spier a manager position or a better paying job elsewhere if he supported the Petitioner. However, the Employer's proffered evidence; namely, the exchange of text messages between Juarez and Spier, do not support these allegations. The text exchange and testimony provided by Spier reflect a relatively casual conversation regarding Spier's employment aspirations and potential opportunities. The full text exchange is attached as **Attachment B**. To summarize, the texts show that Juarez asked Spier to "stand down" and remain neutral, and Spier replied that he was amenable. The two also discussed Spier's potential job prospects, the ongoing picketing, the Employer's labor consultant, and Petitioner benefits. All told, it was an innocuous exchange that does not rise to the level of objectionable conduct.

Even assuming without finding that Juarez's messages constituted a promise of benefits or threats of adverse employment consequences, the Petitioner clearly lacked the authority to make good on them. See Objections 2, 7, and a portion of 18, supra; citing *Smithfield Packing Co.*; *Pacific Grain Products*. I also note that Spier's supervisory status remains in question,

⁷ It is unclear whether Spier is a supervisor as defined by Section 2(11) of the Act.

although it does not alter the outcome here. These Objections lack merit in any event.

Accordingly, I overrule Objections 9-12.

Objections 4, 5, and 13

In Objections 4, 5, and 13, the Employer contends that Juarez refused to leave its premises and trespassed on the Employer's property to erect anti-employer campaign propaganda and to engage in personal attacks on management. The Employer asserts that, despite asking Juarez not to trespass, Juarez repeatedly trespassed on its property and gave employees the appearance that the Employer was powerless to protect its private property rights in a confrontation with the Petitioner.

The Employer's offer of proof describes a couple of occasions in which Juarez entered its premises under the guise of serving subpoenas in order to surreptitiously campaign. Specifically, in Objection 4, the Employer alleges that Juarez entered the premises under false pretenses to serve subpoenas and that he hoodwinked the Employer's security guard into escorting him by misrepresenting the guard's liability under the law. In support of this Objection, Spier testified that Juarez, accompanied by the Employer's security guard, served him with a Board subpoena in the Employer's shop. Juarez told Spier that he was required to report to a federal court hearing (the pre-election hearing in this matter, which never occurred) or he would be held in contempt.⁸ Juarez asked for Spier's contact information, and Spier obliged. One hour later, Juarez returned to the Employer's shop with the security guard in tow and handed out Board subpoenas to other employees. Manager Gallego confronted Juarez while he was issuing

⁸ To the extent that the Employer is arguing Juarez's statement about being held in contempt was a misstatement of the law, see *Didlake, Inc.*, 367 NLRB No.125 (2019) (misstatements of the law are not objectionable); see also *Virginia Concrete Corporation, Inc.*, 338 NLRB 1182, 1186 (2003).

subpoenas and told him to leave or the police would be called. Juarez handed out three more subpoenas before promptly leaving the Employer's shop. Spier testified that Juarez texted him later that day and told him to disregard the subpoena, as the parties had stipulated to an election.

In Objection 5, the Employer cited one occasion where Juarez drove onto the Employer's premises and proceeded to yell obscenities on a megaphone directed at management while the Employer was holding a meeting with employees. Spier's testimony reflects that Juarez drove onto the Employer's property, interrupted a meeting the Employer was having with employees by yelling over a megaphone from his vehicle, and then promptly left once the security guard approached him and asked him to leave. Spier estimated that the entire interruption lasted approximately five minutes.

In Objection 13, the Employer alleges that Juarez, in the presence of employees, refused to leave the Employer's premises, causing the police to be called to remove him from blocking the entrance to its facility. However, the offer of proof tells a different story. The Employer's witnesses would testify that Gallego called the police in response to the placement of a sign that picketers posted on the small lawn on the Employer's property. Gallego handed Juarez a no-trespassing letter and asked him to remove the sign, but there is no evidence that Gallego ever asked Juarez to leave the premises. Juarez told Gallego that the sign was placed on an easement and was thus allowed. In response, Gallego summoned the police. The police arrived and spoke to Juarez, but what was discussed remains unknown. The police did not remove the sign or have the picketers remove it. Before leaving, they told Gallego to contact the City of Tracy for code enforcement. By the following day, the sign was moved to the sidewalk.

Based on the offer of proof, it is unclear whether Juarez had been trespassing at all or whether the sign was placed on an easement. However, I shall assume for the sake of analysis

that Juarez and the sign were on the Employer's property. Nevertheless, the Board has rejected other "powerless-against-union" objections that involved behavior far more aggressive than that attributed to Juarez in this case. See, e.g., *Reliable Trucking*, 349 NLRB 812 (2007), in which the Board upheld the election results when seven or eight union agents barged into a private hotel room rented by the employer for an election meeting attended by 15 to 20 employees the day before the mail-ballot election commenced, yelled profanities, and left the hotel room only after police arrived.

With regard to the allegation that Juarez inveigled the Employer's security guard into escorting him into the building, that conduct likewise falls short of impressing upon employees that the Employer was powerless against the Petitioner. Rather, by all appearances, the Employer was in full control of its property and dictated the terms of Juarez's visits (i.e. that he required an escort). That impression was bolstered by Juarez obeying Gallego's subsequent demand that he leave the Employer's premises on his second subpoena-service trip. Juarez did not refuse to leave or tarry or otherwise give employees the impression that he was winning the private-property battle.

In *Phillips Chrysler Plymouth*, 304 NLRB 16 (1991), the Board set aside an election decided by one vote based on the refusal of two union representatives to stop talking to unit employees and to leave the employer's shop area approximately 75 minutes before the election. The Board relied on the fact that the union representatives "repeatedly and belligerently refused to heed requests of the employer's president to leave" the premises, even after the police were summoned. The Board found that the union agents' conduct conveyed to employees the message that the employer was powerless to protect its own legal rights in a confrontation with the union. That conduct was exacerbated by its proximity in time to such a close election.

Conversely, in *Station Operators, Inc.*, 307 NLRB 263 (1992), the Board distinguished *Phillips* and found unobjectionable a union's confrontation with employer officials during an employee meeting two weeks before an election that the union won handily. The Board reasoned that, "unlike in *Phillips*, the Petitioner's representatives left the premises when told to do so by the Employer's officials, after being on the scene for approximately 5 minutes in each of three instances." In that case, as here, the union representatives left the premises upon demand. The parallels between the instant case and *Station Operators* compel a finding that Juarez's conduct was not objectionable. Indeed, it was less severe than the conduct found unobjectionable in *Station Operators*. Juarez's "interruption" likewise lasted approximately a total of five minutes, but it was nonconfrontational. He did not direct any threats or obscenities toward anyone, and he left without resisting when Gallego told him to leave.

Similarly, the Employer's argument that Juarez conveyed Petitioner dominance by repeatedly hiding behind vehicles to trespass on its lot lacks merit. On the contrary, this sophomoric display of cat and mouse falls far short of the bravado and stubborn defiance that the Board has found to project employer weakness. That Juarez hid to avoid detection produces the opposite effect.

In sum, and viewed together, the various instances in which Juarez accessed the Employer's lot to serve subpoenas, erect a sign, or to disrupt a meeting, do not warrant setting aside the election results under extant law. Based on all of the above, **I overrule Objections 4, 5, and 13.**

Objection 17

In Objection 17, the Employer contends that Juarez sent an email to employees during the critical period that intimidated and coerced them, and interfered with employee free choice in the

election. Specifically, the offer of proof consists of a campaign email from Juarez to employees in which he informed them of the existence of a video that went “viral” showing him “straighten[ing] out a 350 lb. bully GM” during a campaign to organize employees at an unrelated dealership in southern California.⁹ Juarez asserted in that same e-mail that his “face is on a wanted poster all over the state in the dealer world,” and indicated that the aforementioned manager was fired after the Petitioner prevailed in that election by a unanimous vote. Juarez then went on to explain that he was not proud of the video, but that the employees reportedly appreciated it because they had previously been belittled by the same manager.

Juarez did not attach the video to his email, but he indicated that the Employer might show the employees the video to try and smear his image. The Employer did not proffer any witnesses or documentary evidence to establish that any employee ever saw the video. Thus, the Employer’s offer of proof establishes two things: that such a video exists, and that Juarez told employees about it. Absent a viewing audience, Objection 17 boils down to Juarez’s storytelling of his past organizing exploits. That tale falls squarely into *Midland National* territory, an area into which the Board does not venture. Neither shall I. **I overrule this Objection.**

Objections 6 and 14

Objections 6 and 14 allege that Juarez and other voters attempted to prevent customers from entering the Employer’s facility and that Juarez falsely informed customers that the work being performed was not being performed by certified technicians. Spier testified that the

⁹ The Employer provided a copy of the video, in which Juarez aggressively confronted the subject manager and engaged in boisterous name-calling for several minutes before acquiescing to management’s instructions to leave the property. Despite the claim that the video went “viral,” a diligent internet and YouTube search unearthed nary a mention of the video.

picketers generally held signs, handed out flyers to customers and, at times, blocked customers from entering the Employer's driveway. Customers complained about it, and the Employer hired a security guard to prevent the blockage. There is no claim or offer of proof that Petitioner agents impeded the ingress or egress of employees. The Employer did not file a charge alleging that Petitioner's picketing violated the Act.

It is axiomatic that unions are responsible for controlling picketing that it spearheads. If a union is unwilling or unable to take the necessary steps to control its pickets, it must bear the responsibility for the participants' misconduct. See e.g., *Boilermakers Local 696 (Kargard Co.)*, 196 NLRB 645, 647-648 (1972). In general, picket line misconduct is characterized by incidents of overt intimidation of employees, such as threats, violence, property damage, and interfering with crossover employee ingress/egress. See, e.g., *Auto Workers Local 695 (T.B. Wood's)* 311 NLRB 1328 (1993), *supra* (violations involved, *inter alia*, mass picketing, swarming a car and pushing it back into the street, property damage, threats while holding clubs, scattering of nails in driveway); *Local Joint Executive Bd. of Las Vegas*, *supra* (threats of violence, physical violence in presence of employees, videotaping in context of abusive remarks and with evidenced intent to intimidate); *UNITE HERE! Local 5 (Aqua Aston Hotel)* 365 NLRB. No.169 (2017); *enfd.* 768 Fed Aprx. 627 9th Cir. (2019)(blocking ingress/egress of employees' vehicles crossing the picket line).

In comparison, the Board found no violation in *Service Employees International Petitioner Local 50 (Evergreen Nursing Home)*, 198 NLRB 10 (1972), where over the course of several days of picketing, incidents included briefly hindering employees' entry to work, tugging on an employee, and a racial slur, but "[n]o one was injured, nothing was thrown, no one was

prevented from going to work or leaving, and no vehicle was harmed or excluded from the premises.”

The instant case is distinguishable from those cited above. The alleged objectionable conduct concerns the picketers’ interaction with customers, rather than employees. While assaults and threats of bodily harm exacted on nonemployees can be found to be unlawfully coercive in violation of Section 8(b)(1)(A) of the Act and/or objectionable conduct, as discussed above, the alleged conduct in this case pales in comparison. But for the inconvenience it caused customers and the Employer, the picketing did not impede employees and it was lawfully and peacefully carried out. Accordingly, it would not reasonably tend to interfere with employee free choice in the election. **I overrule Objections 6 and 14.**

Objection 16

Objection 16 alleges that Juarez engaged in objectionable conduct by disclosing Foreman Josh Spier’s name, telephone number, and home address over a megaphone in the presence of other employees.¹⁰ Thereafter, Spier reportedly received text messages from other technicians warning him not to go to work, had unannounced visits from striking technicians at this home, received repeated hang-up calls from blocked numbers, and experienced vandalism at his home during the night. The Employer asserts that these actions impacted the election by instilling fear among voters that if they did not support the Petitioner, they would be subject to the same conduct.

¹⁰ As noted above, Spier’s supervisory status remains in question. However, for the sake of analyzing the vandalism allegation, I shall assume that he is an employee, as defined by Section 2(3) of the Act.

In support of this Objection, Spier would testify that Juarez disclosed his name and address over the megaphone in the presence of approximately eight unidentified employees. Sometime after Juarez disclosed his name and address, Spier began receiving phone calls from unknown callers who hung up once he answered. Also, a few pieces of property were vandalized by an unknown person(s) at his home. There is no claim or offer proof that Spier disseminated this information to employees. Also missing is evidence or an offer of proof that Spier had unannounced visits from employees to his home, that Juarez disclosed Spier's telephone number over the megaphone or to the picketers in general, that the phone calls from blocked numbers were from the Petitioner or striking employees, and that Spier received text messages from other technicians warning him not to go to work.

The offer of proof and its omissions reduce Objection 16 to two allegations; to wit: 16(a)—that Juarez impliedly threatened Spier and, by extension, any employee witnesses, by disclosing his name and home address over a megaphone; and 16(b)—that anonymous vandalism occurred at his residence after that disclosure.

Beginning with Objection 16(b), in *Cedars-Sinai Medical Center*, 342 NLRB 596 (2004), the ALJ found unobjectionable anonymous vandalism to anti-union employees' property during the critical period. Because there was no evidence to justify attributing the vandalism to the union, the judge analyzed it under the Board's nonparty-threats standard and found that it would not tend to create a general atmosphere of fear and coercion.¹¹ The Board majority found it unnecessary to pass on the ALJ's disposition of this objection because it found other conduct

¹¹ *Id* at 603-604; citing *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984) (Nonparty or third-party threatening conduct rises to the level of objectionable conduct only when it is "so aggravated as to create a general atmosphere of fear of reprisal rendering a free election impossible.").

objectionable and sufficient to overturn the election results. Notably, none of the Board members disagreed with the ALJ's application of the somewhat heightened *Westwood Horizons* nonparty-threats standard.

Here, as in *Cedars-Sinai*, the vandalism cannot be attributed to the Petitioner or the picketers, and there is no evidence whatsoever that it was linked to the election. The coincidental timing raises suspicion, but the Board does not abide mere suspicion.¹² Without more, the evidence is insufficient to attribute the conduct to Petitioner or its agents. The offer of proof establishes that the conduct was isolated, occurred away from the workplace, and was not disseminated. Consequently, and applying both of the Board's tests for determining whether nonparty conduct is objectionable, I conclude that the anonymous vandalism was not "so aggravated as to create a general atmosphere of fear of reprisal rendering a free election impossible" or that it "so substantially impaired the employees' exercise of free choice" as to require that this election, which was not particularly close, be set aside. *Westwood Horizons*, supra; *Rheem Mfg. Co.*, 309 NLRB 459, 463 (1992). **Accordingly, I overrule Objection 16(b).**

However, the remaining portion of this Objection; 16(a)- Juarez's disclosure of Spier's name and home address over a megaphone- will be set for hearing. See e.g., *Local Joint Executive Bd. of Las Vegas (Casino Royale)*, 323 NLRB 148, 160-61 (1997) (bullhorn disclosure of employees' names accompanied by statements, such as "we're going to get you; [w]e know where you live," constituted implied threats of bodily harm). This allegation raises substantial and material issues of fact and law regarding Spier's status as a statutory supervisor, the nature,

¹² See e.g., *Allen Tyler & Son, Inc.*, supra ("In the absence of any probative evidence, [the Board] shall not require or insist that the Regional Director conduct a further investigation simply on the basis of a 'suspicious set of circumstances.'")

timing, and context of Juarez's disclosure, whether and how many employees heard the disclosure, and whether, standing alone, the megaphone disclosure of an employee's identity and home address constitutes an implied threat of bodily harm sufficient to warrant setting aside the election results.

Accordingly, I shall direct a hearing on this portion of Objection 16.

Objection 19

This objection encompasses the allegations set forth in the pending unfair labor practice charges in Cases 32-CB-262676 and 32-CB-261970 (alleging threats and picket-line misconduct), which are currently being held in abeyance.¹³ The Employer contends that Region 32 erred in proceeding with the representation election while these two cases were pending.

On July 30, the Employer submitted a request to block the instant Petition based on its two pending unfair labor practice charges. The Regional Director of Region 32, in her discretion, decided to deny the Employer's request to block and to proceed with the processing of the Petition and the conduct of the election. The Board's 2017 edition of the Casehandling Manual, Part Two- Representational Proceedings, Sections 11730 and 11731, which apply here, contemplate a regional director's use of such discretion.¹⁴ Put simply, her denial of the

¹³ The unfair-labor-practice cases were placed in abeyance due to certain overlapping alleged objectionable conduct, the more restrictive burden of proof in representation cases (See e.g., *General Shoe Corp.*, 77 NLRB 124 (1948)), the material issues of fact and law that warrant a hearing, and the potential for the hearing record to resolve certain of the unfair-labor-practice allegations.

¹⁴ The instant Petition was filed before the Board's April 1, 2020 "election protection" Rules' effective date of July 31, 2020. See 85 Fed. Reg. 18366 (Board amends blocking charge policy to require conduct-and-count or conduct-and-impound procedures). Accordingly, the Rules in existence as of the filing date herein control.

Employer's request to block the petition is not objectionable conduct. **I overrule this**

Objection.

Objection 20 and 21

Objections 20 and 21 raise related issues and will be addressed together. In these Objections, the Employer contends that two individuals, Kevin Humeston and Tyrome Jackson, are supervisors under Section 2(11) of the Act and that those two supervisors engaged in pro-Petitioner activity; thereby intimidating, coercing and interfering with employee free choice in the election.

The governing case on supervisory taint of the kind claimed here is *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004), wherein the Board set forth a two-prong test to determine whether laboratory conditions for a fair election have been undermined:

1. Whether the supervisor's pro-Petitioner conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election, including (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the pro-Petitioner conduct and (b) an examination of the nature, extent, and context of the conduct in question.

2. Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct. *Id* at 909.

Based upon the Employer's proffered evidence, I have decided that the Employer's Objections 20 and 21 raise substantial and material issues of fact that warrant a hearing. At issue in the hearing will be Humeston's and Jackson's alleged status as statutory supervisors under Section 2(11) of the Act; the nature and degree of such supervisory authority, the nature, extent, and context of Humeston's and Jackson's alleged pro-Petitioner conduct; and whether Humeston's and/or Jackson's conduct interfered with employees' freedom of choice and materially affected the outcome of the election. See *Madison Square Garden Ct, LLC*, 350 NLRB 117 (2007); *Harborside*, supra, and cases cited therein. **Accordingly, I shall direct a hearing on the issues raised by Objections 20 and 21.**

CONCLUSION AND ORDER

Objection 16(a), including Spier's status as a 2(11) supervisor, and Objections 20 and 21 raise material and substantial issues of fact that warrant a hearing. The remaining Objections lack merit and are overruled.

Thus, in accordance with Section 102.69(c)(1)(ii) of the Board's Rules and Regulations, **IT IS ORDERED** that a hearing shall be held before an Administrative Law Judge for the purpose of receiving evidence to resolve the issues raised with respect to Objection 16(a), and Objections 20 and 21. At the hearing, the parties will have the right to appear by video, to give testimony, and to examine and cross-examine witnesses.

NOTICE OF HEARING AND ORDER CONSOLIDATING CASES FOR HEARING

YOU ARE HEREBY NOTIFIED that a hearing, limited to Employer's Objections 16(a), 20, and 21 as outlined in this Decision and Order, will be conducted by an Administrative Law Judge of the National Labor Relations Board. Because these election parties are scheduled to appear before an Administrative Law Judge at the hearing in Cases 32-CA-260614 and 32-CA-262291 on November 30, pursuant to the *Order Consolidating Cases and Consolidated Complaint* that I issued on August 25, I conclude that the purposes of the Act will best be effectuated by considering them jointly in a single consolidated hearing before an Administrative Law Judge.

Accordingly, pursuant to Sections 102.33 and 102.72 of the Board's Rules and Regulations, Series 8, as amended, **I HEREBY ORDER** the consolidation of Case 32-RC-260453 with Cases 32-CA-260614 and 32-CA-262291 for the purpose of a hearing before an Administrative Law Judge.

I FURTHER ORDER that at the same time and place as the hearing in Cases 32-CA-260614 and 32-CA-262291, currently scheduled for hearing at 9:00 a.m. on November 30, and consecutive days thereafter, a hearing will be conducted in the Natalie P. Allen Memorial Courtroom, 901 Market Street, 4th Floor, Suite 400, San Francisco, California or in a manner (including via videoconference technology) or at a location otherwise ordered by the Administrative Law Judge of the National Labor Relations Board, at which time and place the parties will have the right to appear in person, or otherwise, to give testimony, and to examine and cross-examine witnesses with respect to the issues that I identified above.

Finally, **I HEREBY REQUEST** that the Administrative Law Judge designated for the purpose of conducting the hearing prepare and cause to be served upon the parties a report containing resolution of credibility of witnesses, findings of fact, and recommendations to the

Board as to the disposition of the above Objections, and on other conduct bearing on the validity of the election.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, you may obtain a review of this final disposition of Objections 1-15, 16(b), and 17-19 by filing a request with the Executive Secretary of the National Labor Relations Board. The request for review must conform to the requirements of Section 102.67(d) and (e) of the Board's Rules and Regulations and must be filed by **November 6, 2020**.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: October 23, 2020



JILL H. COFFMAN
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 20

ATTACHMENT A

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 32

TRACY AUTO, L.P. DBA TRACY TOYOTA

Employer

and

**MACHINISTS AND MECHANICS LODGE
NO. 2182, DISTRICT LODGE 190,
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO**

Petitioner.

Case 32-RC-260453

**EMPLOYER'S STATEMENT OF OBJECTIONS
TO CONDUCT OF THE ELECTION AND
CONDUCT AFFECTING RESULTS OF THE ELECTION**

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AUGUST 12, 2020

**EMPLOYER’S STATEMENT OF OBJECTIONS
TO CONDUCT OF THE ELECTION AND
CONDUCT AFFECTING RESULTS OF THE ELECTION**

Pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board, Tracy Auto, L.P. dba Tracy Toyota (hereinafter “Employer”) files the following Employer’s Statement Of Objections To Conduct Of The Election And Conduct Affecting Results Of The Election conducted by mail with a ballot count date of August 7, 2020.

BACKGROUND

On Friday, May 15, 2020, Jesse Juarez (hereinafter “Juarez”), Union Organizer for Machinists and Mechanics Lodge No. 2182, District Lodge 190, International Association of Machinists and Aerospace Workers, AFL-CIO (the "Union"), brought a group of all active service department technicians, just before mid-day, to confront management and demand recognition of the Union. Prior to this time, there had been no Petition for Election filed to the Employer’s knowledge and no prior communication with management regarding the Union. Juarez confronted Jae Lee, the General Manager of Tracy Toyota, and demanded that Lee immediately recognize the Union on the spot. Lee informed Juarez that he was not the owner of the dealership and could not make any such decisions and that he would have to notify the owner. While the identity of ownership is rarely important, in this case it becomes a critical part of the analysis, as the owner in this case the owner, Ronnie Lott, is a well-known celebrity who is famous for his career in the National Football League playing for the San Francisco 49ers.

The entire group of active technicians (approximately 15) all left the premises without permission during the middle of their shift and did not return to work that day. On their way out, the technicians’ department manager, Robert Gallego, saw the group of technicians together and approached them to find out what was going on. Juarez, in front of all technicians, told Gallego

that Gallego did not have any right to talk to his own subordinates as they were leaving the premises. Later that same day, the Employer received the Petition for an election from the National Labor Relations Board.¹

The technicians did not report for work on Saturday, May 16, 2020 and Monday, May 18, 2020 either. Instead, on Monday, May 18, 2020, the Union and the striking workers began to picket the Employer. There were approximately fourteen strikers at the time picketing the Employer. That day, the Employer notified all technicians that a Petition had been received on the prior Friday afternoon, May 15, 2020 (after the technicians went on strike) and that the Employer would not voluntarily recognize the Union and instead would follow the legal process for a secret-ballot election. The Employer invited all technicians to return work. The Employer notified the technicians that it would be required to hire permanent replacements as it had to maintain service operations for customers. In fact, it is a condition of the employer's franchise agreement with Toyota Motors Sales USA. Only one technician returned to work the next day.

The Employer notified all technicians in writing on May 18, 2020, that if they failed to return to work after May 19, 2020, there may or may not be available positions for them depending upon when they return to work and who has been hired to permanently replace striking workers in the interim. The workers were also notified in writing if a position is not available when they abandon the strike, they would be placed on a preferential recall list and if positions were to become available, they would be notified.

Instead of returning to work, the Union continued the recognitional strike and picketing,

¹ The Union, Machinists and Mechanics Lodge No. 2182, District Lodge 190, International Association of Machinists and Aerospace Workers, AFL-CIO (the "Union"), filed a Petition (32-RC-260453) to represent technicians on May 15, 2020. Pursuant to the stipulated election agreement, the voter unit was agreed to include not only technicians, but also Service Advisors and Parts Department Employees. The voter list consisted of 37 employees.

and on May 20, with the strike now in its sixth day, with picketing having commenced on June 18, 2020, the Employer again notified the striking workers in writing that they were invited to return to work unconditionally. Again, the Employer notified workers that permanent replacements were being hired and made clear to striking workers that they should return to work sooner rather than later to avoid the possibility of there not being any available positions.

Two of the striking employees, Tyrome Jackson and Kevin Humeston, were Shop Foremen, at the time. The Employer has always taken the position that Jackson and Humeston are both 2(11) supervisors in the shop. They direct the work of the technicians, distribute the work to technicians, recommend discipline, monitor and address attendance and leave issues, conducting technicians training, as well as numerous other supervisory duties. They, in fact, get paid off the production of all the technicians below them.

Jackson and Humeston, despite being 2(11) supervisors, picketed, campaigned and influenced employees during the more than 2 months of picketing that occurred from mid-May to mid-July. Both actively assisted Juarez in influencing employees to vote for the Union. In fact, on May 21, 2020, about 11:15 a.m., some 14 striking employees entered the dealership and proceeded to the conference room where Jae Lee was located during a meeting. With the striking technicians stood Jackson and Humeston, the two shop foremen that had also gone on strike. The technicians and the two supervisors Humeston and Jackson had all been picketing in front of the dealership since around 7 a.m. and the prior days that week. Humeston commenced the discussion on behalf of the striking technicians. Humeston stated that all the technicians were there together as technicians to find out whether they could all come back to work and whether the Employer would accept the Union. Humeston stated that all of them (including Humeston and Jackson) would come back to work if the Employer recognized the shop as being

a “union shop.” After some back and forth, Tyrome Jackson then stated, “Will the company accept that the technicians are part of the union?” Lee responded to the technicians and told them all that the dealership does not accept the Union as your representative at this time. Humeston asked if Lee was going to respond to their emails (referring to emails sent the day prior). Lee told Humeston that they already had his response. Jackson stated, “So are you saying that we are locked out or that we can come back but without the union?” It was always clear that the two supervisors, Humeston and Jackson, were there to support the Union and to demand recognition by the Employer in front of all of their subordinates. Humeston informed Lee that the strikers would all have to talk about it before deciding whether they were offering to return to work unconditionally. They all left.

A bit later that afternoon, all striking technicians and the two supervisors, Humeston and Jackson, returned to the same conference room where Lee was still in a meeting with others. When they all entered the room, Jackson announced that everyone wanted to return to work the next day. Lee asked them if it was unconditional and Jackson informed Lee that it was an unconditional offer to return to work.

Because of the delay between the strike on May 15 and the unconditional offer to return to work on May 21, the dealership has already hired a number of permanent replacements. As a result, only four technicians were recalled at that time, in addition to the technician who offered unconditionally to return to workdays prior. The Employer has later recalled more.

The Union’s incredibly aggressive, and rarely used approach, to start to the organizing effort (calling a strike and walking off the job before the Petition is even served on the Employer) set the stage for what was a two-month period of constant intimidating, coercive and threatening conduct committed by the Union and by the two 2(11) supervisors Humeston and

Jackson.

Pursuant to the Stipulated Election Agreement, ballots were mailed out on July 17 and had to be received by the Region no later than the close of business on August 5, 2020. During the more than two months of picketing, there were numerous acts of unlawful conduct committed by the Union, through Juarez, some of which became the subject of two Unfair Labor Practice Charges filed by the Employer in cases 32-CB-262676 and 32-CB-261970. Neither one of those cases were resolved by the Region prior the election and both remain as unremedied unfair labor practices. The Employer even formally filed a Request to Block Election with the Region to allow a resolution and remedy of the Unfair Labor Practice Charges that were pending and the Region summarily denied the request and proceeded with the election and ballot count.

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. It is the Board's duty to establish those conditions; it is also the Board's duty to determine whether they have been fulfilled. "When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present, and the experiment must be conducted over again." *General Shoe Corp.*, 77 NLRB 124, 127 (1948). Even if only one vote was impacted by the actions credibly explained by the Employers' witnesses, that one vote changes the outcome of the election. 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). *See also* *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995) (ordering that election can be set aside where the objectionable conduct "could well have affected the outcome of the election")

In this case, May 15, 2020 through August 5, 2020 (ballots were mailed out on July 17).

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).

Moreover, because Humeston and Jackson as 2(11) supervisors engaged in pro-union campaign activity on a daily basis in front of all voters, carried picket signs attacking the employer and supporting the union, led the union organizing effort in front of voters in confronting the Employer and demanding relieve for voters, blocking the entrance to the service department in front of voters so that customers could not enter the facility to cause injury to the Employer and to benefit the Union, and posted pro-union, anti-Employer information to voters, this conduct tended to coerce and influence voters and take away their free choice. As a result, the election should be overturned. *Madison Square Garden CT. LLC* 350 NLRB 117, 119 (2007); *Harborside* 343 NLRB 909 (2004).

As set forth in the objections below, which all occurred after the filing of the Petition and throughout the more than two months up until the election, the Union, through its representative Juarez, and supervisors Humeston and Jackson engaged in numerous unlawful acts justifying overturning the election.

EMPLOYER'S OBJECTIONS

Objection No. 1: Juarez engaged in almost daily personal attacks over a two-month period in front of voters using a megaphone to call the voters' department Manager Bob Gallego a bully, an idiot, scumbag, mentally incompetent, mentally disabled, racist, and incapable of being running a service department. *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).

Objection No. 2: Juarez engaged in almost daily personal attacks over a two-month period in front of voters using a megaphone to state that Bob Gallego would not have a job once the Union won the election and that the Union would cause the termination of Gallego. *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).

Objection No. 3: After the George Floyd incident, Juarez would engage in daily personal attacks in front of voters by using the megaphone to call our Gallego's name, to tell Gallego that he knew where he was from and to tell Gallego (after stating Gallego's name), "get off my neck, I can't breathe" indicating that Gallego is a racist.

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).

Objection No. 4: Juarez was informed in front of all voters that he was not allowed on the Employer's premises. Juarez, after being notified not to trespass, repeatedly trespassed on the Employer's premises to conduct Union business in full view of voters. Specifically, Juarez placed anti-employer signage on the Employer's property, Juarez entered the Employer's property under false pretenses to serve subpoenas to voters telling the Employer's security guard that he had to allow him to enter the premises or he was breaking law. This created an appearance that the Union had the right to the Employer's security guard, who Juarez had accompanying him to serve the subpoenas while telling subpoenaed workers that Juarez was going to shut this place down. Juarez repeatedly trespassed on the Employer's premises and hid behind vehicles parked on the Employer premises to intimidate and coerce voters while they were working.

Objection No. 5: On July 15, 2020, Juarez trespassed just before the ballots were mailed out by driving his vehicle onto the Employer's premises, parking against the wall of the

conference room below the window of the conference room while the Employer was holding a meeting with voters to discuss Union issues and the election. Juarez used the megaphone while trespassing during this meeting to yell obscenities to management where voters in the meeting could hear it and Juarez disrupted the meeting. The screaming could be heard 75 feet away by other voters as well. Juarez screamed through the megaphone that Gallego needs to go, that Gallego needs a one-way ticket back to Sacramento, that Gallego is a bully, that the Union could get the place fixed, and that person hired by management to give the information meeting about the Union to employees, Steve Beyer was a fraud and a crook. Juarez also screamed repeatedly that Gallego is a scumbag. *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).

Objection No. 6: Juarez and other voters, with the involvement of Humeston and Jackson, over a two month period on a daily basis, block customers from entering the facility and falsely informed customers that the work being performed was not being performed by certified technicians and that the customer should take the work to another Toyota dealership, Livermore Toyota.

Objection No. 7: Juarez threatened Gallego that he would not have a job if the Union won the election and told voters the same.

Objection No. 8: Juarez threatened Mike Felix that the Union would interfere with Felix's second job (which Juarez believed that Felix had which was a union job with UPS and Juarez claimed he had an close connection with the UPS union agent) if Felix did not "shut his mouth" about the Union and stay neutral.

Objection No. 9: Juarez threatened replacement technician Josh Spier that he would lose his job if he did not support the Union in the election. Juarez demanded that he assist the Union to oppose the Employer. *Lyon's Restaurants, Subsidiary of Consolidated Foods Co.*, 234 NLRB 178 (setting aside the election "based on Petitioner's various threats of job loss made to the employees prior to the election which the employees could reasonably have believed Petitioner was capable of carrying out"); *Chicago Metallic Corp.*, 794 F.2d at 533 (setting aside an election where "[k]nown anti-union employees were targeted," and "[e]ffective debate was chilled by the unit's knowledge that those employees who [opposed the union] risked physical harm, property damage or job reprisal"). See also *Cedars-Sinai Medical Center*, 342 NLRB 596

(2004) (setting aside an election where two antiunion employees received anonymous telephonic threats, reasoning that the threats were no less “threatening” simply because they were made anonymously as opposed to directly).

Objection No. 10: Juarez promises Josh Spier the Service Manager position claiming Juarez could get the position if Spier assisted Juarez in supporting the Union.

Objection No. 11: Juarez then told Spier he would get Spier a better, higher paying job at an aerospace company if Spier assisted the Union and left the employ of the Employer.

Objection No. 12: Juarez sent Spier numerous text messages threatening Spier if Spier did not support the Union and assist Juarez with getting additional votes from other voters.

Objection No. 13: Juarez, in front of voters, refused to leave the premises of the Employer when trespassing causing the police to be called to remove him as he was blocking the entrance to the facility.

Objection No. 14: Juarez caused strikers to block the driveway causing unsafe conditions causing customers to complaint about the safety issues created by Juarez and his strikers blocking the driveway.

Objection No. 15: Juarez, in front of voters and customers, yelled over the bullhorn that Gallego was mentally ill.

Objection No. 16: Juarez, in front of voters, verbally attacked another replacement technician Josh Spier when Juarez thought Spier did not support the Union. In front of other voters and in open public Juarez called out Spier’s private information over the megaphone including his name, telephone number and home address. In fact, Spier receive texts from other technicians warning him not to go to work at Tracy Toyota, had unannounced visits at his home from a striking technician and three vehicles belonging to Spier were vandalized at his

home during the night. Voters observed this conduct and such conduct would intimidate anyone thinking about not support the Union. These actions could have had an impact on the election by instilling a reasonable fear of voting against the Union. *See 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." *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 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) By this conduct, the Union and Identifiable Union Supporters improperly affected the free choice of the employees in voting for or against representation by the Petitioner Union.

Objection No. 17: Juarez sent an email to more than 30 of the voters informing them of a video that went viral showing him having to "straighten out a 350lb bully GM and they videoed me in the show room. During the video that Juarez identified to voters, Juarez is trespassing at San Diego Lexus and Juarez stood within one foot of the GM and shouted profanities and derogatory statements such as "fuck you fat ass," "fuck you," "asshole" and other vulgarities. Juarez made grossly demeaning statements regarding Mr. Ley's intelligence, physical appearance, character and authority. Juarez shouted at other company managers, customers, and employees. Juarez refused to leave the premises at the direction of the GM on video. Juarez stated on the video that he would start a war with the GM and the Employer. Juarez directed voters at Tracy Toyota about this video stating that his "face is on a wanted

poster all over the state in the dealer world” and that the San Diego Lexus voters gave a 100% pro-union vote as they were happy that Juarez did it. Juarez then states that the GM was fired shortly thereafter. Juarez obviously did this to show Tracy Toyota voters what he is capable of doing to anyone that opposes him, including physical attacks and getting people fired, and such conduct has the tendency to intimidate and coerce voters in the exercise of their freedom to choose a representative or not.

Objection No. 18: Jesse Juarez almost on a daily basis over a three-week period in June and July 2020 sent at least 17 emails to management and employees of Tracy Toyota wherein Juarez falsely accused Tracy Toyota and its owners and agents of criminal acts, acts of aggression against women, stealing, looting, sabotage, brainwashing employees, retaliation against a victim of rape, gloating over causing customers to not use the services of Tracy Toyota by falsely telling customers that Tracy Toyota did not have certified technicians, threatening the employment of the General Manager, Service Manager and Parts Manager, bragging about his assaults on another person that opposed the union, spreading rumors that management was incompetent to run the dealership and/or its departments, bragging how he misused the company’s security guard to trespass on company property by lying to the security guard, accusing management of being liars and cheats, stating that company agents were scumbags/pigs, calling the Service Department Manager a bully, stating that ownership and management was suffering from medical problems that disabled them mentally, referring to the Employer’s agents as sleazy, and looters, referred to owners and management as con-artists, referring to management as elderly in a derogatory fashion, referring to management as dumbasses, sending emails threatening the second job of one manager if he didn’t keep his mouth shut, and calling Employer agents dirtbags, among other names, defamatory statements

and false accusations. Juarez shared these messages with all voters to create an atmosphere of fear and intimidation for voters who even considered opposing the Union. Juarez also shared these messages with voters so that voters would believe that the Employer is helpless against the Union and to fear what Juarez might do if they opposed the Union.

Objection No. 19: The Board permitted the election to proceed while there were unremedied Unfair Labor Practices pending in cases 32-CB-262676 and 32-CB-261970.

Objection No. 20: Kevin Humeston, a 2(11) supervisor, referred to as a Shop Foreman, engaged in pro-union activity thereby intimidating, coercing and influencing voters to vote in favor of the Union. Humeston's conduct had the tendency to affect the outcome of the election in violation of *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004). The Board has long held that when a supervisor engages in pronoun activity, the "continuing relationship" between the supervisor and an employee creates a possibility that an employee could be "coerce[d] into supporting the union out of fear of future retaliation by a union- oriented supervisor." *Madison Square Garden Ct., LLC*, 350 NLRB 117, 119 (2007) (quoting *Sheraton Motor Inn*, 194 NLRB 733, 734 (1971)). In *Harborside*, the Board held that it will look to two factors to determine whether supervisory pronoun conduct upsets the requisite laboratory conditions for a fair election:

1. Whether the supervisor's pronoun conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election, including (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the pronoun conduct and (b) an examination of the nature, extent, and context of the conduct in question.
2. Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.

Harborside, 343 NLRB at 909. In addition to establishing a new test for evaluating the impact of pronoun supervisor conduct on employee free choice, the *Harborside* Board reversed

prior law concerning the solicitation of union authorization cards by supervisors. Under prior law, the solicitation of cards was not objectionable where “nothing in the words, deeds, or atmosphere of a supervisor’s request for authorization cards contains the seeds of potential reprisal, punishment or intimidation.” *Millsboro Nursing & Rehabilitation Center*, 327 NLRB 879, 880 (1999). In *Harborside*, the Board held that such supervisory solicitations are “inherently coercive absent mitigating circumstances.” *Harborside*, above at 906. The Board in *Harborside* further held that the effects of a supervisor’s coercive solicitation of authorization cards may continue to be felt during the critical period between the filing of the petition and the election, even if the card solicitation occurred prior to the filing of the petition. *Id.* at 912. No employer can sufficiently mitigate the impact of a stealth campaign that takes advantage of the unique relationship between a supervisor and his employees. See *Madison Square Garden Ct., LLC*, 350 NLRB 117, 121 (2007) (“[A] first-line supervisor has the most day-to-day contact with the employees and can broadly impact employees’ daily working lives.”) (citing *Harborside*).

Here, the supervisor engaged in much worse prounion conduct than did the supervisor in *Harborside*.

Here, Humeston engaged in the following pro-union activity.

- a. Humeston led technicians to demand that the Company recognize the Union as the bargaining representative alongside Jesse Juarez, the Union Organizer, on May 15, 2020.
- b. From May 18 until mid-July, 2020, daily, Humeston engaged in daily picketing alongside technicians and held picket signs which were pro-union and anti-employer in content.
- c. Humeston assisted in blocking the entrance so customers could not freely enter and informed customers that work was performed by non-certified

technicians and on more than one occasion informed customers to get their service work done elsewhere. Specifically, on one occasion, on June 23, 2020, a customer came to the dealership in a Lexus vehicle to have her car serviced. Humeston told her that she should instead go to Livermore Toyota and gave her the name of the person to speak with at Livermore Toyota.

- d. Humeston led the striking technicians to confront management and speak on behalf of the technicians on May 21, 2020 and demanded that as a condition of returning to work from strike that the Employer had to recognize the Union as the legal bargaining representative.
- e. Humeston against led the striking technicians to management to speak on behalf of the Union and to give an unconditional offer to return to work by the striking workers.
- f. Humeston engaged in pro-union activity as set forth herein in detail above in the Background section which is incorporated herein by reference.
- g. Humeston actively met with technicians to get their support for the Union and against the Employer.
- h. Humeston actively campaigned against the Employer and for the Union by posting anti-company social media posts criticizing the Employer, making false and defamatory statements about the Employer and its services, and stating that the Union should be accepted by management.
- i. Humeston attended the ballot count by video stating he was one of the workers.

Objection No. 21: Tyrome Jackson, a 2(11) supervisor, referred to as a Shop Foreman,

engaged in pro-union activity thereby intimidating, coercing and influencing voters to vote in favor of the Union. Tyrome Jackson engaged in the following pro-union activity:

- a. Jackson led technicians to demand that the Company recognize the Union as the bargaining representative alongside Jesse Juarez, the Union Organizer, on May 15, 2020.
- b. From May 18 until mid-July, 2020, daily, Jackson engaged in daily picketing alongside technicians and held picket signs which were pro-union and anti-employer in content.
- c. Jackson assisted in blocking the entrance so customers could not freely enter the facility.
- d. Jackson led the striking technicians to confront management and speak on behalf of the technicians on May 21, 2020 and demanded that as a condition of returning to work from strike that the Employer had to recognize the Union as the legal bargaining representative.
- e. Jackson against led the striking technicians to management to speak on behalf of the Union and to give an unconditional offer to return to work by the striking workers.
- f. Jackson engaged in pro-union activity as set forth herein in detail above in the Background section which is incorporated herein by reference.
- g. Jackson actively met with technicians to get their support for the Union and against the Employer.
- h. Jackson actively campaigned against the Employer and for the Union by posting anti-company social media posts criticizing the Employer, making

false and defamatory statements about the Employer and its services, and stating that the Union should be accepted by management.

- i. Jackson attended the ballot count by video stating he was one of the workers.

Together or separately, these objections identify conduct which could have affected the results of the election. *See Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995) (ordering that election can be set aside where the objectionable conduct "could well have affected the outcome of the election"). The number of "Yes" votes (17) exceeded the number of "No" votes (8). However, there were 37 eligible voters (with three ballots challenged). Such a high number of employees not even voting is strong evidence that employees were afraid to vote against the Union. In one instance, only 1 person in the entire Parts Department voted (same Department where Parts Manager was threatened to keep his mouth shut or risk interference with another job) which makes no sense at all absent fear of opposing the Union. It can be presumed that voters were affected by the coercive conduct engaged in by the Union, especially given that both Shop Foreman, Humeston and Jackson (both 2(11) supervisors) were actively campaigning against the Employer and in support of the Union. As a result, eligible voters have been interfered with, coerced, and restrained in the exercise of their Section 7 rights, and the "laboratory conditions" required for a free, fair and secret-ballot election were not preserved.

This Petition for Election and the Objections filed herein are related to and overlap with the Unfair Labor Practice Charges already on file with National Labor Relations Board (Cases 32-CB-262676 and 32-CB-261970) and for that reason should be consolidated for investigation and hearing. A Certification of Election should not be issued for these reasons until these

Objections and the related Unfair Labor Practice Charges are resolved and remedied.

WHEREFORE, the Regional Director should set a hearing to hear evidence to support a decision to set aside the results of the election and direct that a new election be held in which the eligible voters can decide, in an atmosphere free from improper conduct, whether they wish to be represented for purposes of collective bargaining by the Petitioner.

Respectfully Submitted,



John P. Boggs
FINE, BOGGS & PERKINS, LLP

Dated: August 14, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this day, I served the forgoing EMPLOYER'S STATEMENT OF OBJECTIONS TO CONDUCT OF THE ELECTION AND CONDUCT AFFECTING RESULTS OF THE ELECTION by mail and email on the following parties:

FOR THE EMPLOYER

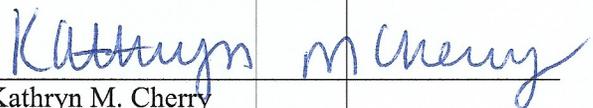
Jae Lee, General Manager
Tracy Toyota
2895 North Naglee Road
Tracy, CA 95304
jlee@tracytoyota.com

FOR THE UNION

Jesse Juarez
Machinists and Mechanics Lodge No. 2182,
District Lodge 190, International Association of
Machinists and Aerospace Workers, AFL-CIO
967 Venture Court
Sacramento, CA 95825
jjuarez1173@sbcglobal.net

Caren Sencer
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Ste. 200
Alameda, CA 94501
NLRBnotices@unioncounsel.net

This 14th day of August 2020.



Kathryn M. Cherry
Fine, Boggs & Perkins LLP
80 Stone Pine Road, Suite 210
Half Moon Bay, CA 94019
Tel: (650) 712-8908
Fax: (650) 712-1712
kcherry@employerlawyers.com

ATTACHMENT B

Dude, we resolved our voting unit. Ignore subpoena.

Hopefully you can help us get the real techs back inside and live happily ever after. 🍺

Jesse Juarez your friendly union guy.

The glass is half full right now and it's in everyone best interest to fill it all the way.

The sender is not in your contact list.

[Report Junk](#)



iMessage



lucky to be employed at Tracy Toyota. You didn't do anything spectacular. You just crossed a picket line. How can you be pro-union and clueless. You want to be service manager? A real pro-union guy would have never crossed. In fact come outside n support by helping the men picket. Show u r with the real men outside.

You want a guarantee? How about listening to the men and their issues. What can you guarantee ? Since you say they r your employees why don't u put your guarantees on white paper if they vote no. Ask Steve Beyer to show you his guarantees. I guarantee it's a lot more than you make.



iMessage



of us.

If you want to help and you get approached let the newbies know how the union has helped your family.

That's if you want to be service manager.

Yesterday 4:31 PM

Sorry dude. I'm disappointed 😞 and need to do my job.

I hope you land the job at Applied Aerospace.

I heard you n Mike going to get recruited by Beyer consultants Con-Artists group. They earn \$400 an hour.

No gas card or car 🚗 though.



iMessage





Jesse >

iMessage
Tue, Jun 23, 6:25 PM

Dude, we resolved our voting unit. Ignore subpoena.

Hopefully you can help us get the real techs back inside and live happily ever after. 🍺

Jesse Juarez your friendly union guy.

The glass is half full right now and it's in everyone best interest to fill it all the way.

Fri, Jun 26, 4:03 PM

Thanks for the support

Yup, we can go have a drink 🍺 one of these days. Seriously, Bob needs to go and we need to return the real technicians back so everyone makes 💰💰💰 Work on that. Careful with that lawyer Boggs



iMessage



Exhibit B (1 of 12)



JJ

Jesse >

one of these days. Seriously,
Bob needs to go and we need
to return the real technicians
back so everyone makes 💰💰
💰 Work on that.

Careful with that lawyer Boggs
he's a snake 🐍 and just wants
billable hours. I been dealing
that snake 🐍 for 20 years.

I'm an MDT too. 😞😞😞

The legal stuff is way above my
pay grade I'm just trying to
support my family the vote is
inevitable I asked to bring
everybody back yesterday it
doesn't make sense to have a
customers do without. Union or
nonunion we still need those
customers I'm all about people
making the most money they
can. Trust me I know the
presidents of 242 342 I get it

Sat, Jun 27, 8:58 AM

Dude, one favor of you.
Just stand down and stay



iMessage



Exhibit B (2 of 12)





Jesse >

Dude, one favor of you.
Just stand down and stay
neutral. Once the union wins if
you become manager the men
will be able to work with you.
It's not personal, it's business.

I have been neutral

Like I said I just care about feed
my family I don't wanna see
anybody without a job as big as
the industry is it's real small
when it comes to knowing
people and doing right by
people

I understand. If you're standing
down we're good.
Please understand you talk
about your family with all due
respect every man out there is
trying to feed their families to.
Just keep pushing them to
return the men.
We're good. Have a blessed
day.



iMessage



JJ

Jesse >

return the men.
We're good. Have a blessed day.

I have like I said asked to bring people back I need help if I was the manager there would be nobody out of work

I know you have. Perhaps they will listen to you soon. Keep it up.

Together we can fix that place.

Sat, Jun 27, 10:55 AM

Just let me know when you get something put together so I can show all of the new techs their options

I will do that. I got it.
You just push from the inside and let Mike Felix do their dirty work. That's all am asking.
When the union wins the election thinas will aet better



iMessage



JJ

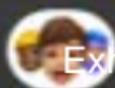
Jesse >

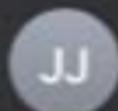
I will do that. I got it.
You just push from the inside
and let Mike Felix do their dirty
work. That's all am asking.
When the union wins the
election things will get better
for everyone.
You told me you know that
unions are good for workers
and you have friends in other
locals. That you were raised in
union household. Your son is in
the IBEW apprentice program.
If the newbies ask you for your
opinion. Be honest, tell them
what unions have done for your
family. Give them a wink 🙄
too. You will win them over
trust me.
The stronger the election
outcome the faster the
employer will come to their
senses.

I'm sure you recognize change
needs to come to Tracy Toyota
and without accountability
things will go back to the way



iMessage





Jesse >

I'm sure you recognize change needs to come to Tracy Toyota and without accountability things will go back to the way they were.

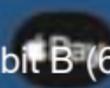
The union will be the checks n balances for the workers.

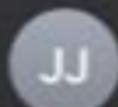
If your deal to become SM comes with dirty conditions. The job is not worth taking and losing your respect and integrity with the workers. You won't live with yourself no matter how much we say it's only "business". Sabotaging workers rights is just plain wrong. I know what they tell their managers during organizing campaigns. Selling our souls to the devil 🖤 is not worth it.

I'm thinking of picketing Bobs and Ronnies houses.



iMessage





Jesse >

I know what they tell their managers during organizing campaigns. Selling our souls to the devil 🤖 is not worth it.

I'm thinking of picketing Bobs and Ronnies houses.

Wed, Jul 1, 7:30 PM

Haven't got any paperwork from you to give to the employees but I know there's meetings tomorrow with union busters

Wed, Jul 1, 8:37 PM

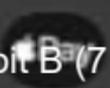
I know. Just get well and stand down. Do you know who the union busters are?

I do not know who they are I have been home you know how vote will go idk what you mean by stand down

Mike the parts manager is up to



iMessage





JJ

Jesse >

I do not know who they are I have been home you know how vote will go idk what you mean by stand down

Mike the parts manager is up to no good pestering the Parts people. He's has lost the respect from the workers. Unless you wear a union button and help organize the men, standing down means just let the workers decide for themselves by not giving an opinion one way or the other. If you get a good offer from Applied Aerospace I would image you're gone. We're trying to fix Tracy Toyota for years to come. This labor movement is larger than both of us.

If you want to help and you get approached let the newbies know how the union has helped your family.



iMessage





Jesse >

of us.

If you want to help and you get approached let the newbies know how the union has helped your family.
That's if you want to be service manager.

Monday 4:31 PM

Sorry dude. I'm disappointed 😞 and need to do my job.

I hope you land the job at Applied Aerospace.

I heard you n Mike going to get recruited by Beyer consultants Con-Artists group. They earn \$400 an hour.

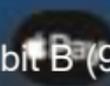
No gas card or car 🚗 though.

Monday 6:02 PM

I have not said or sided with either side I just asked



iMessage





Jesse >

I heard you n Mike going to get recruited by Beyer consultants Con-Artists group. They earn \$400 an hour.

No gas card or car 🚗 though.

Monday 6:02 PM

I have not said or sided with either side I just asked questions I have heard nothing about any offer with the buyer group

He's the Con-Artists group. I'm going email some info and you be the judge of who your employer retained.

Read what I sent you. Then convince me this place doesn't need a union.

Monday 8:20 PM

I am pro union that was never



iMessage





Jesse >

Monday 8:20 PM

I am pro union that was never an argument give me a white paper to give my employees with the fax dollars per hour dollars per pension what's going to be negotiated I asked this a couple weeks ago give me a white paper with a guarantee

Delivered

They r not your employees. You weren't there when this labor movement started. You are lucky to be employed at Tracy Toyota. You didn't do anything spectacular. You just crossed a picket line. How can you be pro-union and clueless. You want to be service manager? A real pro-union guy would have never crossed. In fact come outside n support by helping the men picket. Show u r with the real men outside.



iMessage





Jesse >

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iMessage





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Hopefully you can help us get the real techs back inside and live happily ever after. 🍺

Jesse Juarez your friendly union guy.

The glass is half full right now and it's in everyone best interest to fill it all the way.

Fri, Jun 26, 4:03 PM

Thanks for the support

Yup, we can go have a drink 🍺 one of these days. Seriously, Bob needs to go and we need to return the real technicians back so everyone makes 💰💰 💰 Work on that. Careful with that lawyer Boggs



iMessage



Exhibit B (1 of 12)



JJ

Jesse >

one of these days. Seriously,
Bob needs to go and we need
to return the real technicians
back so everyone makes 💰💰
💰 Work on that.

Careful with that lawyer Boggs
he's a snake 🐍 and just wants
billable hours. I been dealing
that snake 🐍 for 20 years.

I'm an MDT too. 😞😞😞

The legal stuff is way above my
pay grade I'm just trying to
support my family the vote is
inevitable I asked to bring
everybody back yesterday it
doesn't make sense to have a
customers do without. Union or
nonunion we still need those
customers I'm all about people
making the most money they
can. Trust me I know the
presidents of 242 342 I get it

Sat, Jun 27, 8:58 AM

Dude, one favor of you.
Just stand down and stay



iMessage



Exhibit B (2 of 12)





Jesse >

Dude, one favor of you.
Just stand down and stay
neutral. Once the union wins if
you become manager the men
will be able to work with you.
It's not personal, it's business.

I have been neutral

Like I said I just care about feed
my family I don't wanna see
anybody without a job as big as
the industry is it's real small
when it comes to knowing
people and doing right by
people

I understand. If you're standing
down we're good.
Please understand you talk
about your family with all due
respect every man out there is
trying to feed their families to.
Just keep pushing them to
return the men.
We're good. Have a blessed
day.



iMessage



JJ

Jesse >

return the men.
We're good. Have a blessed
day.

I have like I said asked to bring
people back I need help if I was
the manager there would be
nobody out of work

I know you have. Perhaps they
will listen to you soon. Keep it
up.

Together we can fix that place.

Sat, Jun 27, 10:55 AM

Just let me know when you get
something put together so I
can show all of the new techs
their options

I will do that. I got it.
You just push from the inside
and let Mike Felix do their dirty
work. That's all am asking.
When the union wins the
election thinas will aet better



iMessage



JJ

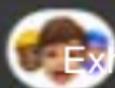
Jesse >

I will do that. I got it.
You just push from the inside
and let Mike Felix do their dirty
work. That's all am asking.
When the union wins the
election things will get better
for everyone.
You told me you know that
unions are good for workers
and you have friends in other
locals. That you were raised in
union household. Your son is in
the IBEW apprentice program.
If the newbies ask you for your
opinion. Be honest, tell them
what unions have done for your
family. Give them a wink 🙄
too. You will win them over
trust me.
The stronger the election
outcome the faster the
employer will come to their
senses.

I'm sure you recognize change
needs to come to Tracy Toyota
and without accountability
things will go back to the way



iMessage





Jesse >

I'm sure you recognize change needs to come to Tracy Toyota and without accountability things will go back to the way they were.

The union will be the checks n balances for the workers.

If your deal to become SM comes with dirty conditions. The job is not worth taking and losing your respect and integrity with the workers. You won't live with yourself no matter how much we say it's only "business". Sabotaging workers rights is just plain wrong. I know what they tell their managers during organizing campaigns. Selling our souls to the devil 🖤 is not worth it.

I'm thinking of picketing Bobs and Ronnies houses.



iMessage





Jesse >

I know what they tell their managers during organizing campaigns. Selling our souls to the devil 🤩 is not worth it.

I'm thinking of picketing Bobs and Ronnies houses.

Wed, Jul 1, 7:30 PM

Haven't got any paperwork from you to give to the employees but I know there's meetings tomorrow with union busters

Wed, Jul 1, 8:37 PM

I know. Just get well and stand down. Do you know who the union busters are?

I do not know who they are I have been home you know how vote will go idk what you mean by stand down

Mike the parts manager is up to



iMessage





Jesse >

I do not know who they are I have been home you know how vote will go idk what you mean by stand down

Mike the parts manager is up to no good pestering the Parts people. He's has lost the respect from the workers. Unless you wear a union button and help organize the men, standing down means just let the workers decide for themselves by not giving an opinion one way or the other. If you get a good offer from Applied Aerospace I would image you're gone. We're trying to fix Tracy Toyota for years to come. This labor movement is larger than both of us.

If you want to help and you get approached let the newbies know how the union has helped your family.



iMessage





Jesse >

of us.

If you want to help and you get approached let the newbies know how the union has helped your family.
That's if you want to be service manager.

Monday 4:31 PM

Sorry dude. I'm disappointed 😞 and need to do my job.

I hope you land the job at Applied Aerospace.

I heard you n Mike going to get recruited by Beyer consultants Con-Artists group. They earn \$400 an hour.

No gas card or car 🚗 though.

Monday 6:02 PM

I have not said or sided with either side I just asked



iMessage





Jesse >

I heard you n Mike going to get recruited by Beyer consultants Con-Artists group. They earn \$400 an hour.

No gas card or car 🚗 though.

Monday 6:02 PM

I have not said or sided with either side I just asked questions I have heard nothing about any offer with the buyer group

He's the Con-Artists group. I'm going email some info and you be the judge of who your employer retained.

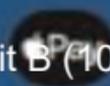
Read what I sent you. Then convince me this place doesn't need a union.

Monday 8:20 PM

I am pro union that was never



iMessage





Jesse >

Monday 8:20 PM

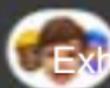
I am pro union that was never an argument give me a white paper to give my employees with the fax dollars per hour dollars per pension what's going to be negotiated I asked this a couple weeks ago give me a white paper with a guarantee

Delivered

They r not your employees. You weren't there when this labor movement started. You are lucky to be employed at Tracy Toyota. You didn't do anything spectacular. You just crossed a picket line. How can you be pro-union and clueless. You want to be service manager? A real pro-union guy would have never crossed. In fact come outside n support by helping the men picket. Show u r with the real men outside.



iMessage





Jesse >

They r not your employees. You weren't there when this labor movement started. You are lucky to be employed at Tracy Toyota. You didn't do anything spectacular. You just crossed a picket line. How can you be pro-union and clueless. You want to be service manager? A real pro-union guy would have never crossed. In fact come outside n support by helping the men picket. Show u r with the real men outside.

You want a guarantee? How about listening to the men and their issues. What can you guarantee ? Since you say they r your employees why don't u put your guarantees on white paper if they vote no. Ask Steve Beyer to show you his guarantees. I guarantee it's a lot more than you make.



iMessage

