

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

CEMEX CONSTRUCTION MATERIALS  
FLORIDA, INC.

Employer,

and

INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, LOCAL 79

Petitioner.

Case 12-RC-257813

**EMPLOYER’S REQUEST FOR REVIEW**

Pursuant to Sections 102.67 and 102.69(c)(2) of the Rules and Regulations of the National Labor Relations Board (the “Board”), Cemex Construction Materials Florida, Inc. (“Cemex or “the Employer”), by and through its undersigned counsel, hereby submits this Request for Review of the Acting Regional Director’s October 30, 2020 Decision and Certification of Representative (“Decision”) as compelling reasons exist for the Board’s intervention.

Pursuant to Section 102.67 of the Board’s Rules and Regulations, this Request for Review must be granted because the Regional Director erroneously found (1) that outspoken Union supporter Carlos Peregrin (“Peregrin”) did not interfere with employee free choice when he attempted to pressure employee-voters into sharing pictures of their completed ballots with him (Decision, pg. 3-4); and (2) that, even if Peregrin engaged in this interference and coercion, he was not acting as a Union agent at the time. (Decision, pg. 4)

## PROCEDURAL BACKGROUND

On March 10, 2020, the International Brotherhood of Teamsters, Local 79 (“Union”), filed a petition with Region 12 of the NLRB, seeking recognition as the bargaining representative for certain Cemex employees. (Board Exhibit 1(a)) Pursuant to a Stipulated Election Agreement, a secret mail-ballot election was held from May 18, 2020 through June 8, 2020. (Board Exhibit 1(a))

The Stipulated Election Agreement identified the Unit and Eligible Voters to include:

All full-time and regular part-time ready mix drivers, operator loaders, and general drivers employed by the Employer out of its Naples Florida facilities located at 15555 East Tamiami Trail, 1425 Wiggins Pass Road East, and 3728 Prospect Avenue, Naples, Florida.

(Board Exhibit 1(a)) Excluded were “[a]ll other employees, plant foremen, mechanics, dispatchers, customer service representatives and clerks, guards, and supervisors as defined in the Act.” (Board Exhibit 1(a))

Additionally, the parties agreed that certain other employees were permitted to vote under the following circumstances:

Others permitted to vote: The parties have agreed that block drivers employed by the Employer out of its facility located at 1425 Wiggins Pass Road East, Naples, Florida may vote in the election, but their ballots will be challenged because their eligibility has not been resolved. No decision has been made regarding whether the individuals in this classification or group are included in, or excluded from, the bargaining unit. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

(Board Exhibit 1(a))

Following the June 12, 2020 virtual vote count, the tally of ballots provided the following results:

Number of eligible voters	32
Number of votes cast for Petitioner	17
Number of votes cast against participating labor organization	10

Number of valid votes counted	31
Number of challenged ballots	4

(Board Exhibit 1(a))

On June 19, 2020, Cemex filed two timely objections. (Board Exhibit 1(a)) On June 24, 2020, the General Counsel entered an Order transferring all further proceedings in the matter from Region 12 to Region 8. (Board Exhibit 1(a)) Cemex subsequently withdrew its second objection, and a hearing was scheduled on Cemex’s first objection.

On July 28, 2020, the parties presented evidence and testimony regarding Cemex’s second objection which alleged that, during the critical period of the election, Carlos Peregrin (“Peregrin”) directed employees to take photographs of their completed ballots and submit them to Peregrin, with the inference that the photographs would be sent to the Union for review, and that such conduct prevented a free and fair election from occurring. On September 2, 2020, Hearing Officer Melanie Bordelois issued a report recommending that Cemex’s objection be overruled, and that a certification issue. (Hearing Officer’s Report on Objection, “Report,” at pg. 1) On September 16, 2020, Cemex filed Exceptions to the Hearing Officer’s Report, along with a supporting brief. (“Exceptions”)

**SUMMARY OF THE RULINGS**

On October 30, 2020, the Regional Director issued the Decision and Certification of Representative currently at issue. The Regional Director found that the Hearing Officer’s Report was free from prejudicial error, and accordingly adopted the Hearing Officer’s recommendations and issued a Certification of Representative Election. (Decision, pg. 1). Specifically, the Regional Director found that the Hearing Officer did not err in adopting Peregrin’s description of his own misconduct, and found that Peregrin was not acting as a Union agent when he committed the misconduct at issue, and found that Peregrin’s conduct did not have a tendency to interfere with

employees' freedom of choice. (Decision, pgs. 3-5) Cemex seeks review of these findings as they are contrary to Board precedent, clearly erroneous on the record, and raise compelling policy issues.

### **REQUEST FOR EXTRAORDINARY RELIEF**

A party requesting the Board's review may also move for certain forms of extraordinary relief set forth in 29 C.F.R. § 102.67(j). Cemex submits this written request for the following forms of relief: (1) expedited consideration of its Request for Review, and (2) a stay of the Regional Director's Opinion, including the Certification of Representative contained therein. This relief will be granted upon a clear showing that it is necessary under the circumstances. In the present case, such relief is required in order to avoid unduly prejudicing Cemex, and the voting unit, by certifying election results and requiring bargaining based on a campaign and election unlawfully tainted by repeated and serious misconduct.

### **ARGUMENTS AND EVIDENCE**

#### **A. Board Review is Required Under Section 102.67(d).**

The grounds for Board review of a Regional Director's decision are set forth in 29 C.F.R. § 102.67(d). A request for review may be granted on one or more of the following grounds: (1) a substantial question of law or policy is raised due to the absence of, or a departure from, Board precedent; (2) the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party; (3) the conduct of any hearing or any ruling made in connection with the preceding has resulted in prejudicial error; and (4) there are compelling reasons for reconsideration of an important Board rule or policy. 29 C.F.R. § 102.67(d)(1) – (4). Three of the four grounds for review are present in this case.

First, the Regional Director departed from Board precedent and the record evidence to erroneously find that Peregrin's misconduct at issue in this case did not interfere with employee free choice and does not require a new election. The Board recognizes that "the proper test for evaluating conduct of a party is . . . whether it has the 'tendency to interfere with the employees' freedom of choice.'" *Taylor Wharton Div. Harsco Corp.*, 335 NLRB 157, 158 (2001). This standard is an objective one and does not turn on whether any employee was *actually* coerced. *Id.*; *Baja's Place*, 268 NLRB 868 (1984). The Regional Director failed to properly apply this precedent, and instead minimized the impact of Peregrin's misconduct.

The Regional Director again misapplied precedent in finding that Peregrin was not an agent at the time of this misconduct. Employees clearly viewed Peregrin as the leader of the Union, and specifically of the Union's campaign effort. (Tr. 35:5-36:13; 59:20-60:7) As part of this role, Peregrin approach employees approximately once or twice a week during the campaign in order to discuss Union matters. (Tr. 61:15-24) Peregrin himself acknowledged that he regularly and widely served as a source of Union information. (Tr. 86:11-87:1) The Regional Director erred in finding that this factual record was nonetheless insufficient to establish Peregrin's agency status.

Finally, there are compelling policy reasons to reiterate and reinforce the rule on the scope of misconduct and interference required before a new election is warranted. As noted by the case law cited above, the applicable standard for unlawful interference or coercion is not whether or not an employee was in fact coerced. Indeed, it defies logic to argue that coercive conduct is only objectionable if the coercion actually works. To the contrary, the misconduct tending to interfere with free choice, regardless of whether employees actually succumbed to it, is objectionable and destroys laboratory conditions. *Taylor Wharton Div. Harsco Corp.*, 336 NLRB 157, 158 (2001).

While the Regional Director does not deny this standard, her decision directly undermines this precedent and review is required as a result.

**B. Standard for Evaluating Objectionable Conduct and the Interference with Employee Free Choice**

Peregrin, while acting as the Union’s agent, destroyed the “laboratory conditions” required by the Board in election proceedings. “[T]he proper test for evaluating conduct of a party is an objective one – whether it has ‘the tendency to interfere with the employees’ freedom of choice.’” *Taylor Wharton Div. Harsco Corp.*, 336 NLRB 157, 158 (2001). The issue is not whether a party’s conduct in fact coerced employees, but whether the misconduct *reasonably tended to interfere* with the employees’ free and uncoerced choice in the election. *Baja’s Place*, 268 NLRB 868 (1984) (emphasis added).

In determining whether a party’s conduct has the tendency to interfere with employee free choice, the Board considers the following factors: 1) the number of incidents; 2) the severity of the incidents and whether they were likely to cause fear among employees in the voting unit; 3) the number of employees in the voting unit who were subjected to the misconduct; 4) the proximity of the misconduct to the date of the election; 5) the degree to which the misconduct persists in the minds of employees in the voting unit; 6) the extent of dissemination of the misconduct to employees who were not subjected to the misconduct but who are in the voting unit; 7) the effect (if any) of any misconduct by the non-objecting party to cancel out the effects of the misconduct alleged in the objection; 8) the closeness of the vote; and 9) the degree to which the misconduct can be attributed to the party against whom objections are filed. *Taylor Wharton Division*, 336 NLRB at 158, citing *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

While the Board considers all these factors in considering whether a party’s misconduct warrants setting aside an election, the Board has determined that a single act can overturn an

election. *See, e.g., Randell Warehouse of Arizona, Inc.*, 347 NLRB 591 (2006) (union photographing employees receiving union literature outside the company’s facility); *Pepsi Cola Bottling Co.*, 289 NLRB 736, 737 (1988) (one instance of a union representative appearing to aim his camera at two eligible voters constituted conduct that warranted setting aside an election.) The record evidence in this case establishes that the election should be set aside based solely upon Carlos Peregrin’s intimidating, repeated and coercive actions during the election.

**C. Peregrin’s Conduct Interfered with Employee Free Choice and Necessitates a New Election**

In support of its objection, Cemex presented testimony that Peregrin separately approached two employee voters and intentionally interfered with their free choice and their right to a secret ballot election.

1. Peregrin’s Efforts to Coerce Driver Doug Kates

Ready Mix Driver Doug Kates (“Kates”) testified that, during the campaign period, Peregrin approached him and suggested that he (Kates) take a picture of his completed ballot to send to Peregrin. (Tr. 22:7-22) Kates could not recall the exact date of this request, but knew it was before the election. (Tr. 23:3-7) Kates explained that the interaction occurred in the “washout” area, where drivers go to rinse their truck and chutes so that no concrete dries on the vehicle. (Tr. 23:11-25) Specifically, Peregrin told Kates “there was a group of people . . . that were going to be, basically, sending pictures of the ballots to each other and asked if [Kates] would do that.” (Tr. 24:5-9) Kates responded that the election was a secret ballot process, so he would not send the requested picture. (Tr. 24:10-12) Peregrin continued to press the matter, and further questioned Kates on why he wouldn’t share his ballot before Peregrin initially walked away and returned to his own work. (Tr. 24:13-21)

Peregrin then approached Kates a second time only minutes later, this time bluntly stating that if Kates would not text a picture of his completed ballot, then Peregrin would know he (Kates) was voting “no” in the election. (Tr. 24:20-25:2) Kates understood that Peregrin was attempting to determine which employees were supporting the Union, and which were not. (Tr. 25:3-12) Kates confirmed that these repeated requests made him increasingly uncomfortable, but he continued to refuse Peregrin’s request for a picture of his completed ballot. (Tr. 25:15-19) Kates testified further that Peregrin subsequently approached him a third time, and again rehashed the same conversation and pushed for a picture of Kates’s completed ballot. (Tr. 25:23-24)

Kates confirmed that he considered these requests inappropriate and increasingly uncomfortable. (Tr. 28:1-6) Indeed, Kates considered the conversation inappropriate enough to immediately report it to his supervisor, Plant Manager Ken Ritter (“Ritter”). (Tr. 29:18-22) Kates felt it was necessary to report Peregrin’s behavior because he knew Peregrin should not be requesting pictures of completed ballots from Kates or any other member of the voting unit. (Tr. 29:23-30:5) While Kates considered it important that management was aware of the misconduct, he also refused to provide a written statement documenting the conversation with Peregrin out of fear that the statement might “single [Kates] out” for a negative reaction and poor treatment in the future. (Tr. 46:6 – 20)

Kates’s concern that Peregrin would confront him about the report to management was confirmed when Peregrin approached Kates approximately one week later and accused Kates of making the report. (Tr. 26:3-5) Kates considered Peregrin’s demeanor in this interaction “confrontational” and a continued deterioration of their working relationship. (Tr. 26:6-16) Kates confirmed that he continued be concerned with retaliation related to his interactions with Peregrin, and his testimony at the hearing regarding the same, so much so that he independently raised these

concerns with Cemex Human Resources. (Tr. 31:3-11) Indeed, Kates's fear of retaliation ultimately caused him to apply for a new office position with Cemex shortly before the Objections Hearing was held on July 28, 2020. (Tr. 47:18 – 48:3)

2. Peregrin's Efforts to Coerce Driver David Dick Jr.

David Dick Jr. ("Dick") provided similar testimony about Peregrin's coercion efforts. Specifically, Dick was coming into work and walking to his ready-mix truck when Peregrin approached him and issued the following instructions: "When you get your ballot and you decide whatever vote you're going to have, which way you're going to vote, just take a picture of it and sent [sic] it to me. Send it to my phone and let me know." (Tr. 53:1-11) Peregrin's comments to Dick were preceded by his encouragement that the employees really "need this union" and "your vote really counts," leaving no doubt as to how Peregrin believed Dick's ballot should be completed. (Tr. 54:19-23) Peregrin then provided his cell phone number for Dick to send him the picture of his completed ballot. (Tr. 55:8-11)

Dick testified that he didn't provide much of a response to Peregrin, other than to say that the vote was supposed to be confidential. (Tr. 55:19-22) While no employees were direct witnesses to this conversation, Dick confirmed that Peregrin was making the rounds and talking to multiple other drivers in the yard immediately before and after approaching Dick. (Tr. 57:6-20)

Approximately three or four weeks later, after Dick received his ballot, Peregrin again confronted him and requested a picture of his completed ballot. (Tr. 56:15-23) Dick told Peregrin that he had already submitted his ballot. (Tr. 55:22 – 25) Peregrin once again pressed Dick on why he didn't send a picture of the completed ballot to Peregrin's phone, and Dick again responded that the vote was supposed to be confidential. (Tr. 56:1-3) As Dick put it, Peregrin then "tried another way of finding out which way did I vote" by specifically asking Dick which side of the

paper he marked with a check. (Tr. 56:4-7) Dick clearly understood that identifying whether he checked the left box or right box on the ballot would clarify for Peregrin whether Dick voted “yes” or “no.” (Tr. 56:8-14) Dick ultimately told Peregrin that he didn’t know how he had voted. (Tr. 58:4-12)

Dick confirmed that he felt “pressured” during both encounters with Peregrin and could not wait until the conversations were over. (Tr. 58:16-24) Dick clarified that he specifically felt pressured to vote “yes” for the union. (Tr. 58:25-59:6)

### 3. Peregrin’s Misconduct Invaded and Coerced Employee Free Choice

The Board has previously considered misconduct comparable to Peregrin’s and concluded that it warranted a new election. In *Atlas Roll-Off Corp.*, 2014 NLRB Reg. Dir. Dec. LEXIS 37 (Mar. 20, 2014), for example, an agent of the employer told employees to take pictures of their ballots and show the pictures to the employer. *Id.* at \*8. Employees who refused were told by the agent that they would be fired or given less work assignments. *Id.* The union filed an objection related to this conduct, and the objection was sustained, even though the employer never endorsed these comments from the agent. *Id.* at \*45. Notably, the Regional Director recognized that “***the requirement that an employee produce proof of his or her ballot is also a serious infringement on the secrecy of the election process.***” *Id.* at \*28 (emphasis added).

The importance of secrecy in the election process is also emphasized by the Board’s repeated findings that even one instance of using photography to invade and coerce employee free choice is egregious enough to overturn an election. In *Randell Warehouse of Arizona, Inc.*, 347 NLRB 591 (2006), for example, the union photographed employees receiving union literature outside the company’s facility prior to the election, but provided no valid explanation for the photographs. *Id.* at 598. The Board did not require such misconduct to be accompanied by any

explicit threat or other coercion, and instead found that “[t]he very presence of a union photographer recording Section 7 activity would tend to induce employees unsympathetic to the union to accept its proffered literature simply to avoid being permanently recorded as antiunion and becoming identifiable as such on sight.” *Id.* at 596. The Board explained that “[j]ust as some employers have used the means at their disposal for retaliation, some unions have used their influence and authority to retaliate against employees who displease them” both inside and outside their role as the unit’s elected representative. *Id.* at 594-595 (citing cases).

Finally, in *Pepsi-Cola Bottling Co. of Los Angeles*, 289 NLRB 736, 737 (1988), where the union *appeared* to videotape two employees as they were offered union leaflets on the eve of the election, the Board ruled that the election must be set aside. The Board found:

[T]he videotaping intruded on the *employees’ Section 7 rights to refrain from any or all union activities*. . . [E]mployees could reasonably believe that the Union was contemplating some future reprisals against them. Clearly, such conduct would be intimidating and would reasonably tend to interfere with employee free choice in the election. Furthermore, the conduct cannot be dismissed as isolated or de minimis. The incident was disseminated among employees in the unit, and a change in only one vote would have altered the election’s outcome.

*Id.* at 736, 737.

The primary difference between this misconduct and the misconduct presently at issue is that Peregrin’s behavior even more seriously interfered with the voting unit’s right to a free and uncoerced election. Peregrin did not simply photograph the distribution of Union pamphlets—he demanded pictures of the very ballots themselves. In doing so, Peregrin destroyed the sanctity of the “secret ballot” election process.

Indeed, Peregrin’s conduct ensured that employees, some of which may not have otherwise been inclined to vote for the union, felt heavy pressure to vote for Local 79 and provide proof to Peregrin for his approval. Indeed, Kates repeatedly reported his concerns of retaliation to management, and ultimately applied for an entirely different job in an effort to avoid the consequences of refusing Peregrin’s requests. (Tr. 46:21-48:3) Dick explicitly confirmed that he

could not wait for his interactions with Peregrin to end, and that he felt pressured to vote for the Union during the course of his interactions with Peregrin. (Tr. 58:16-24; 58:25-59:6) Moreover, there is no way to determine how many other employees were pressured into taking a picture of their ballot and/or voting for the Union but, unlike Kates and Dick, were too intimidated to come forward and report Peregrin's behavior because they feared retaliation. Indeed, Dick testified that Peregrin was "going around the yard" talking to drivers on the same morning that Peregrin initially approached Dick and asked him to take a picture of his completed ballot. (Tr. 57:6-20)

There is only one logical reason that Peregrin engaged in this behavior—to intimidate and coerce employees into voting for the Union. That is the exact impact Peregrin's conduct had in this case, and a new election is the only adequate remedy to rectify this coercion and invasion of employee free choice.

#### 4. The Regional Director Erred in Crediting Peregrin's Testimony

While Peregrin denies ever requesting pictures of employee ballots, this testimony should not be credited, as Peregrin was not a credible witness. Notably, Peregrin's denials were contradicted by two other witnesses, as outlined in detail above.

Dick's testimony, specifically, was repeatedly labeled "false" by Peregrin, who claimed that he never asked a single employee, including Dick, about pictures of ballots. (Tr. 117:24-118:3) In order to credit Peregrin's testimony as credible, we must conclude that Dick's detailed, specific, and credible testimony about his conversations with Peregrin were entirely fabricated. There is simply no way to find that both witnesses were credible and telling the truth.

Peregrin's credibility is further undermined by his theory that it was, in fact, Kates who raised the idea of taking pictures of ballots. Peregrin raised this theory for the first time at the very end of his extensive testimony, and after evading several direct questions on the topic from Employer's counsel. (Tr. 120:23-122:3) The extent of Peregrin's conversations about taking

pictures of ballots was raised at several points during Peregrin's testimony, and each time Peregrin unequivocally denied that he any conversations related to that topic. (Tr. 109:19-20) ("I never told anybody about photographing ballots."); (Tr. 127:6-8) ("The right answer is I never asked nobody to take the picture, yes, sir. I never asked."); (Tr. 109:16-20) ("I never told anybody about photographing ballots."). Perhaps most notably, when Peregrin was asked whether Silva asked Peregrin to take pictures of ballots, Peregrin responded emphatically: "**Nobody. I said nobody.**" (Tr. 110:3-5) (emphasis added). The natural interpretation of this testimony is, of course, that Peregrin had no involvement whatsoever with any scheme to solicit pictures of employee ballots.

Yet, after repeatedly denying that he had discussed taking photographs of ballots, Peregrin's testimony took an unexpected about-face when he suddenly revealed that he had, in fact, discussed taking pictures of ballots with Kates. However, Peregrin incredibly contended, out of the blue, that it was Kates's idea to take pictures of ballots. (Tr. 120:23-122:3) When asked how Peregrin could rectify this new position with his prior testimony, Peregrin stated as follows:

I remember that questions exactly as [Employer's counsel] said. And what I understand what you tell me, if I had the conversation to my co-workers means did the idea of the picture come from me. You never asked me if somebody talked to me about pictures, which is different. I understand that different in a question. What I understood was if I talked to somebody about doing picture, I say no. You never asked me do somebody talk to me about pictures.<sup>1</sup> That answer would be yes.

(Tr. 124:5-15)

Peregrin apparently believed that having a conversation with Kates in which they explicitly discussed a strategy of soliciting employees to take pictures of their ballots did not qualify as ever (1) telling anybody about photographing ballots, (2) asking anyone about photographing ballots, or (3) being asked by someone else to take pictures of ballots. This gamesmanship further

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<sup>1</sup> As previously noted, Peregrin was asked whether Silva asked him to take pictures of ballots and responded emphatically: "Nobody. I said nobody." (Tr. 110:3-5)

illustrates that Peregrin was not a credible witness, and that his version of the facts should be dismissed in its entirety. The Regional Director clearly erred in failing to reach this conclusion.

**D. Peregrin was Acting as a Union Agent Throughout his Campaign of Misconduct**

Finally, the Regional Director erred in finding that Peregrin was not acting as a Union agent when he undertook this campaign of misconduct. (Decision, pg. 5) To the contrary, the testimony confirms that Peregrin was largely viewed as **the** Union organizer among the workforce. Board law has established that agency exists when there is apparent authority to act for the Union. In *Bio-Medical of Puerto Rico*, 269 NLRB 827 (1984), the Board set out the principles of agency as follows:

[I]n determining whether any person is acting as an “agent” of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Rather, responsibility attaches to the Petitioner if, applying the “ordinary law of agency”, it is shown that [putative agents] were acting in the capacity of Petitioner’s agents. Thus, the determinative factor in establishing agency status is not authorization or ratification of the agent’s acts by the principal, but rather the nature of the agency.

*Id.* at 828 (quoting 29 U.S.C. § 152 (13)). *See also Tyson Fresh Meats, Inc.*, 343 NLRB 1335, 1337 (2004) (finding union stewards had actual authority to act on behalf of union).

A significant factor for establishing apparent authority is whether employees could “reasonably have believed” that the agent “was acting on behalf of the union.” *United Mine Workers of America, District 29*, 308 NLRB 1155, 1163 (1992), quoting *Penn Yan Express*, 274 NLRB 449 (1985). In *Bristol Textile Co.*, 277 NLRB 1637 (1986), the Board found the Union had given the employee apparent authority to act as its agent. In that case, the agent operated as the union’s contact among employees and served as the “spokesperson” for employees. *Id.* The Board found:

Thus, although the Union did not designate [agent] its representative or pay him for his services, he nonetheless served as the Union's presence within the plant. [Official] used him as a conduit between the Union and the employees, who perceived him to be the Union's representative. For these reasons we find that the union held out [agent] as its general agent.

*Id.* See also *Tyson Fresh Meats*, 343 NLRB at 1337 (finding union stewards also had apparent authority).

The testimony in this case clearly confirms the employee perception that Peregrin was acting as a Union agent throughout his campaign of misconduct. Kates testified that he viewed Peregrin's role as a Union organizer. (Tr. 34:23 – 35:1) Kates further explained that Peregrin was responsible for collecting union authorization cards, and that Kates received a number of calls and text messages from Peregrin regarding both the election procedure and the Union. (Tr. 35:5-36:13)

Dick similarly confirmed that he considered Peregrin to be the "leader of the [U]nion," given Peregrin's knowledge of the benefits the Union could offer as well as his efforts to help organize Union meetings. (Tr. 59:20-60:7) Dick also testified that he received video messages from Peregrin, containing pro-Teamsters messaging from former President Barack Obama. (Tr. 60:13-61:4) Dick testified that Peregrin approached him probably **once or twice a week** during the campaign in order to discuss Union matters. (Tr. 61:15-24)

Peregrin himself admits that he sent text messages to approximately 17 or 18 of the employees in the 32-person voting unit. (Tr. 78:16-19) Peregrin acknowledges that he collected these employees' phone numbers for the very purpose of distributing Union information. (Tr. 79:1-9) Peregrin conceded that he used these numbers to distribute information about when and where Union meetings would be held. (Tr. 81:4-23) Peregrin explained that he would receive information from Union organizer Carlos Silva ("Silva") and pass that information along to the members of

the bargaining unit. (Tr. 83:16-24) Peregrin identifies Silva as the “only source” of information related to Union meetings, and that Peregrin was then responsible for distributing the information to the voting unit. (Tr. 86:11 – 87:1) Silva and Peregrin worked in close coordination and spoke directly several times over the phone and throughout the course of the campaign. (Tr. 89:2-18) Peregrin explains that the topic of conversation during these calls was discussion of how the campaign was going generally, as well as discussing specific questions or concerns raised by other Cemex employees related to the Union or the election. (Tr. 90:1-4) Peregrin acknowledged that employees often approached him with questions on various election-related topics due to his knowledge of the issues and close connection with the Union, specifically with Union organizer Silva. (Tr. 90:5-22)

In addition to Peregrin’s extensive involvement in the campaign, agency has also been found based on the impression given to employees from the lack of union official involvement in the organizing campaign. *Local 3, I.B.E.W. (Cablevision)*, 312 NLRB 487, 490-91 (1993), is particularly instructive here. In that case, four employees who played “leading roles” in the union’s efforts to organize the employer’s workforce were found to be union agents. In that case, the only involvement from the actual union officials working the campaign was attending two union meetings. *Id.* Consequently, the Board found that, in the absence of any officials who the employees could look to as being union representatives regarding the organizing campaign, the employees were left with the impression that their four coworkers who were the most vocal union supporters were the union representatives. *Id.* at 491. As a result, the Board found that employees “could reasonably believe” that those four coworkers possessed the authority to act for the union. *Id.*

Here, just like the union officials in *Local 3, I.B.E.W.* discussed above, Union Business Agent John Sholtes (“Sholtes”), who was responsible for the Cemex campaign, testified that the only involvement he had in the campaign process from January 1, 2020 until the ballots were counted on June 12, 2020 was attending two meetings. In fact, Sholtes acknowledged that he did not participate in a single phone call, Zoom meeting or home visit with any Cemex employees during that six-month period. (Tr. 158-160)

To the contrary, Peregrin was the face of the Union's campaign and played the leading role in the election. Indeed, Dick testified that did not receive a single phone call, home visit, text message or any other direct conversation with anyone from the Union during this time. (Tr. 62:4-23) Dick confirmed, in fact, that no other person provided more information or had more interactions with him about the Union than Peregrin. (Tr. 72:14-18) Based on the case law and facts analyzed above, it is clear that Peregrin was acting as a Union agent throughout the relevant period of time.

### **CONCLUSION**

Peregrin’s misconduct, which was committed while acting as an agent of the Union, destroyed the laboratory conditions, as there is no question his actions *reasonably tended to interfere* with the employees’ free and uncoerced choice in the election. Consequently, the Board should grant the Employer’s Request for Review, and overturn the Regional Director’s Decision and Certification of Representative.

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FLORIDA, INC.

**CERTIFICATE OF SERVICE**

I, Amanda Fray, certify that on November 13, 2020, I caused the *Employer's Request for Review* in the above-captioned matter to be filed electronically.

The undersigned also hereby certifies that on November 13, 2020, a true and correct copy of the above and foregoing document was served on the International Brotherhood of Teamsters, Local 79, Trustee/Business Agency John Sholtes and Attorney Thomas J. Pilacek, via email at [jsholtes@teamsters79.com](mailto:jsholtes@teamsters79.com) and [tpilacek@pilacek.com](mailto:tpilacek@pilacek.com), and Regional Director of Region 8 of the National Labor Relations Board Jennifer A. Hadsall at [Jennifer.hadsall@nlrb.gov](mailto:Jennifer.hadsall@nlrb.gov).

/s/ Amanda J. Fray