

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

WAYNE/SCOTT FETZER COMPANY)
D/B/A WAYNE COMBUSTION,)
SYSTEMS,)
Employer,)
and)
MATTHEW PASSWATER,)
Petitioner,)
and)
UNITED STEEL, PAPER AND)
FORESTRY, RUBBER,)
MANUFACTURING, ENERGY, ALLIED)
INDUSTRIAL AND SERVICE WORKS)
INTERNATIONAL UNION, AFL-CIO)
AND ITS LOCAL 903-2,)
Union.)

Case No. 25-RD-256161

**EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S
DECISION ON OBJECTIONS AND CERTIFICATION OF REPRESENTATIVE**

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Pursuant to Section 102.67(d) of the Board's Rules and Regulations, the National Labor Relations Board ("Board" or "NLRB") must review and reverse the Regional Director's Decision on Objections and Certification of Representative ("Decision") issued January 25, 2021, by the Regional Director, NLRB Region 25 ("RD"), because (1) the Decision raises substantial questions of law or policy based on a departure from officially reported Board precedent, and (2) the Decision on substantial factual issues is clearly erroneous on the record and such error prejudicially affects the rights of the Employer, Wayne/Scott Fetzer Company d/b/a Wayne Combustion, Systems ("Employer" or "Company").¹ Because the 35 unit employees at the Company's Ft. Wayne, Indiana plant were denied the opportunity for a free and uncoerced decertification election, the Board should grant the Request for Review, reverse the Decision and order a re-run election.

The RD's Decision is transparently results-based and makes a mockery of the "laboratory conditions" standard for ensuring a fair election. The decertification election occurred in a small assembly facility where 35 bargaining unit employees all work very closely together on a single shift. It's one of those small plants where everyone knows everyone else's business. At the time of the election, only eight of the 35 unit employees – eight; less than a fourth of the unit – were members of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO ("USW") and its Local 903-2 ("Union" or "Local"). And only three of those eight conducted the Union's business within the small plant, as officers (and agents) of the Union. Collectively, those three – President Melissa Waldren and Stewards Jeana Ellis and Mike Labarbera – selectively and unsubtly threatened or

¹ The Regional Director summarily affirmed all of the Hearing Officer's factual findings and legal conclusions. Therefore, the Hearing Officer's Report ("Report") is also cited throughout the Request for Review.

coerced various individual co-workers. As these discrete incidents all occurred within a brief three week period prior to the election, they inescapably cascaded through the plant and chilled voters.

The RD sidestepped the true scope and effect of the Union's election interference only by ignoring the *collective* nature of the misconduct perpetrated and through the crutch of claiming to rely of false Hearing Officer "credibility determinations" that were, in fact, illogical conclusions not rationally drawn from the credited testimony. Though the number of objectionable incidents introduced at the hearing was small, their aggregate effect was immense. This is particularly so because one Union agent's pre-petition threat to physically beat the Petitioner (Matthew Passwater) set an ominous tone for the misconduct that followed. Only by artificially and inappropriately segmenting the Union's misconduct into discrete buckets could the RD reach her unsupportable conclusion that the Union's conduct did not interfere with the election.

The Regional Director's misapplication of *Taylor Wharton* factors raises a substantial question of law that is a departure from established Board precedent, and thus warrants review of the Decision. 336 NLRB 157 (2001). The Decision also is based on numerous substantial factual errors that prejudicially affect the Company's rights. Finally, the Company was further prejudiced by the RD's decision to exclude pre-petition misconduct by Union agents that plainly set the stage for the resulting misconduct that destroyed the laboratory conditions.

There is no dispute the various incidents of objectionable Union agent misconduct occurred within a truncated 2½ week window prior to the election on March 5, 2020. The Union forewarned of the misconduct to follow on the eve of the petition's filing on February 11, 2020. A few days prior, and immediately upon learning that the Petitioner (Matthew Passwater) and a co-worker were considering a decertification effort, Labarbera, a Union in-plant officer and agent, loudly signaled the intent to intimidate by explicitly threatening to "crack in the skull with a bat" of that

putative petitioner. The Union continued its campaign of objectionable conduct through the morning of the election. During a short window period, the Union's agents committed the following intimidating and coercive acts that interfered with the laboratory conditions necessary for a free and fair election:

- *On or about February 12:* Union agent Jeana Ellis confronted Passwater, got within inches of his face and yelled at him for filing the Petition.
- *February 18:* Ellis approached unit employee Robin Davis during working time, pointed a finger in Davis's face and interrogated her about signing the petition, thereby intimidating and frightening Davis.
- *February 18:* Union President Melissa Waldren separately approached Davis during working time and also questioned her about signing the Petition, causing Davis to become "defensive" and "irritated."
- *February 21:* Shortly after Ellis shouted during and interrupted a Company meeting about the upcoming election, she stated during working time and in a working area that she "was going to punch Matt Passwater in the face if the Union got voted out," a threatening comment that reasonably intimidated Davis. (Davis 114-15).²
- *February 21:* Ellis angrily confronted Davis in the bathroom, pointed her finger in Davis's face, called Davis a "bitch," bullying conduct that caused Davis to start carrying her cell phone to the bathroom to protect her against future threats by Ellis.
- *After February 21:* Ellis followed Glenda White into the bathroom, yelled "I will beat you bitch" and slammed the door to a stall, scaring White and causing her to also start taking her cell phone into the restroom so she could record any additional erratic behavior by Ellis. (White 160, 162, 168)
- *March 5:* On the morning of the election, Ellis had her fingers in employee Allen Richardson's face and loudly and repeatedly stated "you better vote for the Union, bitch," and "that bitch Robin [Davis], she better be voting for the Union or I will beat that bitch," explicit threats of violence that frightened White. (White 164-166)

This course of misconduct – occurring during a period of 16 work days – plainly interfered with the laboratory conditions necessary for a free and fair election and compromised the integrity

² In this Request for Review, the Company uses the following abbreviated citations: hereinafter, "Report __" refers to specific pages of the Hearing Officer's Report; "Decision __" refers to specific pages of the Regional Director's Decision; "ER __" refers to the Company's Exhibits; and "[Witness Name] __" refers to the witness and the transcript pages of the witness's testimony introduced at the hearing before the Hearing Officer.

of the election process. That the election held on March 5 was decided by a single vote – 18-17 in favor of the Union – compels a conclusion that this course of misconduct reasonably tended to interfere with the requisite laboratory conditions.

The Decision relative to Objections 1 and 2 errs as a matter of law because it failed to consider and evaluate the Union’s course of misconduct *in the aggregate*. The Decision instead erroneously considered and evaluated each separate incident in isolation and without considering whether the totality of the misconduct reasonably tended to interfere with the employees’ free and uncoerced choice in the election. Board law is clear that the *cumulative* effect of credited testimony must be considered in this context.

The Decision compounded this error by not providing substantive analysis of the relevant *Taylor Wharton* factors. 336 NLRB 157 (2001). The RD also erred by following an illogical and inconsistent analytical framework that relies largely on the false narrative that the misconduct was not “disseminated” to other eligible voters, yet ignores or discredits the uncontested evidence proving such dissemination occurred. This irrational reasoning evidences a results-based conclusion and not one grounded on proper application of the *Taylor Wharton* factors.³

There is no factual dispute that Union agents Waldren and Ellis (as well as Labarbera) engaged in collective misconduct that threatened, surveilled and sought to intimidate those whom they believed did not support the Union. By doing so, they created an atmosphere of fear of reprisals that destroyed any possibility for a fair election. The law is supposed to provide and protect laboratory conditions necessary to ensure a free and fair election. That did not occur here. The bargaining unit deserves an opportunity to vote in a fair election untainted by an atmosphere of fear and intimidation.

³ It is undisputed that during material times Melissa Waldren, Jeana Ellis, and Mike Labarbera were agents of the Union. (Decision 5; Report 4-5).

The Regional Director also erred relative to Objection No. 3, which presents a novel question of law. It is undisputed that former bargaining unit employee Tyler Adams voluntarily resigned from his employment shortly after the voting period started at 7:00 a.m. on March 5 but before the voting period ended (at 8:00 a.m.). Under this unique set of facts, the Board should determine that Adams' vote should not be counted, as a matter of law. A former employee should not be able to determine the result of the election.

For these reasons, the Union, through its officers and agents, destroyed the laboratory conditions needed for a free and fair election. The Board should grant this Request for Review, reverse the Decision, and order a re-run election.

II. EMPLOYER OBJECTIONS TO DECERTIFICATION ELECTION

OBJECTION 1

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

OBJECTION 2

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

OBJECTION 3

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

III. SUMMARY OF FACTS

A. Background of the Parties

Wayne Combustion Systems manufactures and assembles powered gas burners and oil burners in its sole facility at 801 Glasgow Avenue, Ft. Wayne, Indiana. (Kuczanski 35-36). Gas burners produced by the Company are used in a variety of industrial products such as pizza ovens, bakery ovens, and smokers. (Kuczanski 36). Oil burners produced by the Company are primarily used in high-pressure washers, but also for incineration, de-icing vehicles, and other uses. *Id.* At all relevant times, Ken Kuczanski was the Company's General Manager, Tim Mann was the Plant Manager, and Jake Grandmaison was the Production Supervisor. (Kuczanski 34, 60).

The Company employs 35 hourly bargaining unit employees working in seven departments: Assembly, Facilities and Maintenance, Shipping and Receiving, Testers, Paint and Pack, Shipping and Receiving, Machine Shop and Welding, and Quality. (Kuczanski 38; ER Ex. 1). Hourly employees are scheduled to work from 7:00 a.m. to 3:30 p.m., Monday through Friday, with two regularly scheduled rest breaks and a lunch break. (Kuczanski 41-43). The plant has two production floors. The oil burner assembly room and gas burner assembly room are located on the main production floor. The main production floor also has the employee cafeteria, connected to the oil burner assembly room, which is adjacent and connected to the gas burner assembly room. The two restrooms are located in the cafeteria, which also contains vending machines, a refrigerator and a microwave oven. Thus, an employee who walks from the gas burner assembly room to the cafeteria must walk through the oil burner assembly room to get to the cafeteria or restrooms. (Kuczanski 42-43; Davis 128; White 159).

At all material times, Local 903-2⁴ has been the designated exclusive-bargaining representative of the bargaining unit and recognized as such by the Company.⁵ (Decision 1). This recognition has been embodied in successive Collective Bargaining Agreements (“CBAs”), the most recent of which is effective from April 16, 2020 through April 15, 2023 (“2020 CBA”). (ER Ex. 4). The previous CBA was effective April 16, 2017 through April 15, 2020 (“2017 CBA”). (ER Ex. 2). At all relevant times, Melissa Waldren was the Local President and employed by the Company as a Quality Inspector. (Kuczanski 50). Waldren became the Local President in mid-2019, and previously served as an elected Steward and Grievance Chair. (Waldren 309).

Jeana Ellis and Michael Labarbera were the Local Stewards during all material times. (Decision 2, 4). Ellis worked as an Assembler on the main floor, while Labarbera worked as a Machine Operator on the lower floor. (Waldren 312). Ellis's workstation is in the oil burner assembly room where she could easily see employees going from the gas burner assembly room to the cafeteria or restroom. (Davis 128). Ellis voluntarily resigned her employment with the Company on June 21, 2020. (Ellis 395). The Hearing Officer correctly determined that at all relevant times, Ellis and Waldren were agents of the Union with actual authority to act on the Union's behalf. (Report 5). Under that same analysis, Labarbera also was a Union agent.

B. Matt Passwater Circulates a Decertification Petition and Union Officials Harass and Threaten Supporters of the Petition

Petitioner Matt Passwater works for the Company as a Material Handler. Passwater initially discussed circulating a petition to decertify the Union (“Petition”) with coworker and bargaining

⁴ Prior to March 6, 2018, the bargaining unit was represented by USW Local 7-00729. On March 6, 2018, USW notified the Company that members of USW Local 7-00729 had become members of Local 903-2. (ER Ex. 3).

⁵ The parties to the CBA are the Company and the United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers International Union (“USW”) on behalf of Local 903-2. (ER Ex. 2, p. 2; ER Ex. 4, p. 1-2).

unit member Jason Sundquist. (Passwater 187-89). Sundquist asked Passwater what he thought about putting a Petition together because he felt the Union could not help them improve working conditions beyond the status quo. (Passwater 189). After researching how to decertify the Union, Passwater used his lunch and rest breaks to talk with assemblers and testers to see if there was interest in supporting a decertification petition and ultimately found many of his coworkers supported decertification. (Passwater 190).

Passwater attempted to maintain the secrecy of individuals who signed the Petition. While collecting signatures, Passwater assured those who signed that he would not reveal their names to coworkers. (Passwater 193). Also, Passwater kept the Petition in a folder in a concealed location behind a closed door of a room not normally used by employees. (Passwater 201). Before filing the Petition, Passwater noticed the door to that room was open, boxes had been moved, and the file with the Petition was sticking out of its location, which demonstrated someone had accessed the Petition and saw the names of those who signed it. (Passwater 233-34).

Although Passwater did not tell Ellis, Waldren, or Labarbera about the Petition, or ask them to sign it, at the outset of Passwater's effort Labarbera made it known he was aware of the Petition. Less than two days before Passwater filed the Petition on February 11, Passwater heard Labarbera tell Mark Borjas, a member of the bargaining unit, that Sundquist needed to be "cracked in the skull with a bat," and that "that guy needs to have a blanket party" in the parking lot, i.e., a reference to a group of people surrounding an individual and violently beating him. (Tr. 199).⁶ Labarbera

⁶ Evidence of Labarbera's statements about Sundquist was entered in the record through an offer of proof. Although this conduct occurred two days before the Petition was filed, it provides relevant context for the objectionable conduct that followed. In its prior briefing, the Company reserved its right to argue, based on this and other evidence in the record, that the Board should reconsider its standards for considering pre-petition conduct as a basis for setting aside an election. (See BX-1(e), Order, dated September 24, 2020).

made this comment on the shop floor and during working time, and said it to one bargaining unit employee (Borjas) and in front of another (Passwater).

C. Passwater Files the Petition and the Union Continues its Campaign of Harassment and Threats

Passwater filed the Petition on February 11, 2020. The Regional Director subsequently approved a Stipulated Election Agreement for an election to be held on March 5, 2020.

1. Ellis' Confrontation of Passwater

Around the time the Petition was filed, Union Steward Jeana Ellis directly confronted Passwater about it and set the tone for the coercive conduct that would follow.⁷ (Passwater 194). While Passwater was working on the production floor and talking with bargaining unit employee Wes Davis, Ellis approached Passwater from behind. When he turned around, Ellis was inches away from Passwater's face. (Passwater 194). Ellis yelled at Passwater, said she knew about the Petition, and ominously asked him "what did they offer you?" (Passwater 194-95). Passwater described Ellis's aggressive confrontation as "ballsy," as though she were trying to intimidate him or start a fight. *Id.* Wes Davis was present for the confrontation and heard Ellis's threats. (Ellis 411). Ellis corroborated key elements of Passwater's account of the confrontation. Ellis confirmed that Passwater reported her conduct to Production Supervisor Jake Grandmaison. (Ellis 390). Specifically, Passwater reported that Ellis was "yelling in his face," causing Grandmaison to instruct Ellis to stay away from Passwater. (Ellis 390).⁸

⁷ The Hearing Officer credited Passwater's testimony that this incident occurred prior to the filing of the Petition, and rejected Ellis's testimony that it occurred during the critical period. (Report 6, Fn. 7).

⁸ Ellis admitted that this confrontation occurred after the filing of the Petition and when Passwater was talking with another employee. (Ellis 387). Ellis corroborated that Passwater reported the incident to the Production Supervisor, thus supporting Passwater's testimony. (Ellis 390).

2. Ellis and Waldren create an impression of surveillance

On February 18, bargaining unit member Robin Davis returned to work after a trip to Florida. Shortly before leaving for her trip on February 7, Davis signed the Petition. (Davis 111; Report 6). When she signed it, Passwater assured her he would not tell anyone. Upon her return to work on Tuesday, February 18, and shortly after the start of her shift, Ellis immediately confronted Davis at her workstation and during work time. (Davis 114; Report 7; Decision 3). Ellis wagged her finger in Davis's face and loudly interrogated Davis, asking why she signed the petition and if she knew what she was doing. (Davis 114). Davis testified credibly that she was intimidated and frightened by Ellis, especially because Davis had not told anyone she had signed the Petition, and also knew Passwater would not have told anyone. (Davis 115; Report 7).

Escalating matters, the same day (February 18), Waldren separately approached Davis while she was working on the gas burner line, and said "I thought you told me you weren't going to sign that Petition." (Davis 117; Report 7; Decision 3). Davis understood that signing the Petition was supposed to be confidential and was reasonably quite intimidated by the Union President directly confronting her about it. (Davis 122). Although the Hearing Officer tried to minimize this incident, he credited Waldren's testimony that Davis appeared "defensive" and "irritated" during this discussion. (Waldren 316; Report 7). After Waldren and Ellis separately confronted Davis about the Petition, the two Union officers stopped eating lunch with Davis as they had previously done on a daily basis. (Waldren 318-19; Report 6).

The Hearing Officer specifically credited Davis' testimony regarding these incidents. Moreover, his findings contradict his baseless conclusion that "[t]here is no evidence the statements were disseminated" to other employees. (Report 8; Decision 5). In fact, the Hearing Officer noted in footnote 10 that Davis discussed these confrontations with other unit employees who had signed the Petition, which employees also told Davis they too were scared because they

also had been confronted by Ellis and Waldren about signing the Petition. (Report 8, Fn. 10; Davis 120). The Hearing Officer also acknowledged that Passwater likewise testified that Davis told him about being confronted by Ellis and Waldren, and that he also confirmed that other employees informed him they too had been confronted by Waldren and Ellis about signing the Petition (specifically including Brad Nichter, Rod Dubuisson, and Glenda White). (Passwater 207-08). Notwithstanding that Davis and Passwater provided corroborative testimony on this issue, the Hearing Officer attempted to discredit Passwater's account as "vague, unspecific and hearsay." (Report 8, Fn. 10).

D. February 21: The Company Holds a Meeting about the Election and Ellis Directly Threatens A Bargaining Unit Employee

On February 21, General Manager Ken Kuczanski held a meeting with plant employees about the upcoming election. (Davis 122). Ellis was very disruptive and disrespectful of Kuczanski throughout the meeting, continually shouting and interrupting Kuczanski and others when they tried to speak. (Davis 123). Davis described the meeting as "total chaos." (Davis 123). In the meeting, Passwater stated publicly that he had started and filed the Petition. (Davis 124).

Later the same day (February 21), Ellis told Davis that "she was going to punch Matt Passwater in the face if the Union got voted out." (Davis 124). Hearing Ellis' threat of violence against Passwater made Davis feel "very intimidated... [b]ecause if she wants to punch him in the face, then that means she wants to punch everybody that signed the Petition in the face." (Davis 125). Inexplicably, the Hearing Officer discredited Davis' testimony regarding Ellis' threat of physical violence against Passwater.

In the afternoon of the February 21 meeting, Davis saw Ellis in the women's restroom. She suggested to Ellis that, as a Union representative, she should let everyone have a chance to speak during such meetings (a reference to Ellis' disruptive conduct). (Davis 125-26; Decision 4). Ellis

became very angry, pointed her finger in Davis's face, and loudly said "it is called freedom of speech" because she is in the Union. (Davis 125-26; Decision 4). As she walked out of the bathroom, Ellis called Davis a "bitch." (Davis 126; Decision 4). Davis was forthright in explaining that she felt intimidated by these interactions with Ellis. As a result of the February 21 bathroom incident, Davis began to carry her cell phone when she went to the restroom *and* set it to record audio just in case Ellis were to follow her into the bathroom. (Davis 128; Report 11). As stated, Davis had to walk past Ellis's work area to get to the bathroom. (Davis 128).

E. Ellis Threatens a Second Bargaining Unit Employee

Glenda White is a bargaining unit employee who works as an Assembler in the oil burner assembly room. (White 159). Because White worked in the oil burner room, she, like Davis, had to walk past Jeana Ellis's workstation whenever she (White) went to the restroom. (White 159). Through broken English, White testified quietly and candidly that after the Petition was filed, Ellis followed White into the bathroom on one occasion, and yelled "I will beat you bitch" and slammed the door to the stall where White was standing. (White 160). Ellis also told White "I don't know why these stupid people don't want to vote for Union. . . You guys are going to lose your job, losing money, and maybe they're going to pay you guys like \$10 or \$11 per hour." (White 168).

Ellis's threat and bullying frightened White. (White 161). She was so fearful of Ellis that she also began carrying her cell phone into the restroom to record any additional erratic behavior by Ellis. (White 162).⁹

⁹ As discussed in Section IV(C), *infra*, the Hearing Officer erred in discrediting White's testimony regarding this incident and the March 5 incident. The Board should overturn his credibility determination, based on the clear preponderance of all the relevant evidence. See *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957).

F. March 5: Ellis' Threats on the Morning of the Election

Voting was scheduled to occur on March 5, from 7:00 a.m. to 8:00 a.m., which is the first hour of the scheduled shift. Prior to the election, as employees arrived to work, USW Staff Representative Jeffrey Gleason handed out leaflets titled "Small Insiders Group." Gleason conceded the important point that the USW developed the flyer with the help of the Local's in-plant officers. (Gleason 265, 269-70; ER Ex. 10). This was the third leaflet the Union distributed throughout the campaign, and Gleason readily admitted that the Local officers provided information and assistance for the USW's campaign materials. (*See* ER Exs. 8-10).

On the morning of the election, White arrived for work about 6:45 a.m. While standing in the cafeteria, White witnessed Ellis arrive to work with bargaining unit member Allen Richardson. (White 163-64). According to White, Ellis appeared very angry and "had her fingers in [Richardson's] face," and loudly and repeatedly said "you better vote for the Union, bitch." (White 164). Within a few moments thereafter, White heard Ellis say to Richardson "that bitch Robin [Davis], she better be voting for the Union or I will beat that bitch." (White 165). Naturally, these threats of violence scared White. (White 166).

At approximately 7:00 a.m., as Davis was preparing to go vote with others working on the gas line, Ellis confronted her and whispered in Davis' ear a deeply personal attack on Davis' parenting. (Tr. 133; ER Ex. 11).¹⁰ Davis was utterly stunned by the comment and broke down on the spot. Ellis' personal attack on Davis unquestionably was intended to antagonize and bully Davis. (Tr. 134). Immediately after Ellis made this comment, Waldren approached Edward "Slim" Bregenzer and then quickly escorted him to the voting area. Notably, Bregenzer had quietly told

¹⁰ Evidence of Ellis's statement to Davis on the morning of the election and evidence relating to Slim Bregenzer was entered into the record through the Company's offer of proof. The Company reserves its right to argue that the Board should consider this evidence when deciding whether to order a re-run election.

Davis the previous day (March 4) that he would be voting "no" in the election, and indicated he wanted to keep it a secret by putting his finger over his mouth and saying "shhh." (Tr. 134). Ellis's personal comment to Davis was intended as a distraction, to allow Waldren to approach Bregenzer and walk him to the polls, presumably to get him to vote for the Union. (Tr. 134). Davis reported Ellis's offensive comment to Grandmaison that same morning, and on March 9 Ellis received a written disciplinary warning for her "harassment" of Davis on March 5. (ER. Ex. 11).

G. Tyler Adams Resigns During the Voting Period

At approximately 7:30 a.m. on March 5 – 30 minutes before the voting period ended – former Sales Director Neil Myers smelled cigarette smoke and noticed a light on in a closet near the sandblaster in the facility's lower level. (Grandmaison 177-78). Myers found Tyler Adams, a bargaining unit employee, smoking a cigarette in the closet, which contains the air filtration unit for the sandblaster. (Grandmaison 178). Myers notified Plant Manager Tim Mann, who contacted Production Supervisor Jake Grandmaison. (Grandmaison 176-68). Mann asked Grandmaison to come to an area known as the "Pizza Lab," which is near the sandblaster and closet where Adams was found. (Grandmaison 177). At the time, Grandmaison was with Human Resources Specialist Melanie Richards, so he asked her to go with him to the Pizza Lab. (Grandmaison 177). When Grandmaison and Richards arrived, Mann, Myers, and Adams were standing near the sandblaster. (Grandmaison 177). Grandmaison heard Adams say "I quit, he's lying. I didn't do anything. I don't need this f'ing job." (Grandmaison 178; Report 15). Adams repeatedly said "I quit!" (Grandmaison 178; Report 30). Thereafter, Adams walked to the exit, followed by Grandmaison and Richards. (Grandmaison 179; ER Ex. 7(a), (b), (c)). Adams quit approximately 7:40 a.m. and before the voting period ended.

At no time during this encounter did Adams claim that he performed any work that day or that he was performing work in the closet near the sandblaster. (Grandmaison 180). Although the

Union tried to create an impression that Adams may have been working, Grandmaison testified credibly that Adams had no work purpose to be in the closet, particularly at that hour of the morning. (Grandmaison 179-80)

Ultimately, all 35 bargaining unit employees voted in the election, which was decided by a *single vote*: with 18 votes to retain the Union and 17 votes to decertify.

IV. ARGUMENT

A. Standard of Review

A request for review may be granted only upon one or more of the following grounds:

- (1) That a substantial question of law or policy is raised because of:
 - (i) The absence of; or
 - (ii) A departure from, officially reported Board precedent.
- (2) That 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) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
- (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

29 C.F.R. 102.67 (d).

B. The Board Should Reconsider its "Critical Period" Policy, And the Regional Director Erred by Precluding and Ignoring Evidence of the Union's Petition-Eve Misconduct

Union agents Jeana Ellis, Melissa Waldren, and Mike Labarbera began their campaign of intimidation and threatening conduct when they first learned Matt Passwater and Jason Sundquist were circulating the Petition. They did not wait until the Petition was filed to make threats of physical violence and to begin publicly intimidating their coworkers who the Union believed supported a decertification election. This is the ideal case for the Board to reconsider its "critical-period policy" to protect employees from election interference by coercive threats made shortly before the filing of the Petition, and overturn *Ideal Electric and Mfg. Co.*, 134 NLRB 1275

(1961).¹¹ The Union should not be granted immunity to interfere with an election when they were aware the Petition was being discussed and circulated, immediately before the Petition was filed. The RD erred by failing to consider the Union's coercive tactics to interfere with employees' rights when deciding whether to continue to allow the Union to represent the bargaining unit, simply because the misconduct occurred a few days before the Petition was filed.

It is undisputed the Union agents were aware when the Petition was being circulated. Despite Passwater's attempt to keep the Petition hidden from Union agents, someone was able to find it and see who signed it before it was filed. (Passwater 233-34). In addition, Jeana Ellis admitted that Allen Richardson told her who signed the Petition. (Ellis 380, 382).

Shortly thereafter, less than two days before Passwater filed the Petition, he heard Union agent Labarbera disseminate a threat of physical violence about Jason Sundquist. Passwater and Mark Borjas heard Labarbera say Sundquist needed to be "cracked in the skull with a bat," and that "that guy needs to have a blanket party" in the parking lot, i.e., a violent beating. (Tr. 199). Labarbera made this comment on the shop floor and during working time, and said it to one bargaining unit employee (Borjas) and in front of another (Passwater).

In addition, Ellis directly confronted Passwater about the Petition just days before it was filed,¹² setting the tone for the coercive conduct that would follow. (Passwater 194). Ellis approached Passwater from behind when he was talking with Wes Davis on the production floor.

¹¹ In an unpublished decision in this case dated September 24, 2020, the Board noted "there may be an important issue to be considered in a future case about whether the Board's critical-period policy established in *Ideal Electric and Mfg. Co.*, 134 NLRB 1275 (1961), adequately protects employees from election interference by coercive threats made immediately prior to the filing of an election petition."

¹² The Regional Director affirmed the Hearing Officer's erroneous finding that Ellis's confrontation of Passwater occurred before the Petition was filed. As described below, the record evidence demonstrates that the confrontation occurred after the Petition was filed. This issue demonstrates why the Board's "critical period" policy is arbitrary and should be overturned. Ellis's misconduct was designed to interfere with the election, regardless whether it occurred before or after the Petition was filed.

Ellis got within inches from Passwater's face, yelled at Passwater, said she knew about the Petition, and ominously asked him "what did they offer you?" (Passwater 194-95). Ellis's aggressive confrontation was clearly intended to intimidate Passwater while he circulated the Petition. *Id.* Wes Davis was present for the confrontation and heard Ellis's threats. (Ellis 411). Passwater told Production Supervisor Jake Grandmaison that Ellis was "yelling in his face," causing Grandmaison to instruct Ellis to stay away from Passwater. (Ellis 390).

It is clear that as soon as Union agents learned the Petition was being circulated, the Union began interfering with the bargaining unit's right to a free and fair election to decide whether to retain the Union's representation. The Board's policy under *Ideal Electric and Mfg. Co.*, 134 NLRB 1275 (1961), limits the evaluation of election interference to the "critical period," that begins with the filing of the petition and ends at the conclusion of the election. This case plainly demonstrates the reality that a union coercion campaign does not necessarily begin the day a petition is filed, but when the agents first learn a petition is being circulated. There is no rational justification to arbitrarily begin the "critical period" on the day the petition is filed where, as here, the Union engages in plainly objectionable misconduct at the seminal stage when employees are considering whether or not to sign the petition. The RD erred by refusing to consider the Union's misconduct in the pre-petition period when the Union was aware of the Petition. Therefore, the Board should grant this Request for Review, reconsider its "critical period" policy, and reverse the Decision and order a re-run election.

C. Several of the Hearing Officer's Ostensible "Credibility Determinations," Affirmed by the Regional Director, Should Be Overturned

The Hearing Officer erred in discrediting the testimony of Matt Passwater, Glenda White and Robin Davis relative to key aspects of the misconduct perpetrated by the Union's agents. The Hearing Officer erred in his credibility determinations regarding (a) the dissemination to other unit

employees of the Union agents' confrontations of Davis and Ellis' threat to punch Passwater in the face; and (b) White's testimony regarding the threats made by Ellis in the women's restroom and on the morning of March 5. The Hearing Officer's asserted bases for these determinations are inconsistent and irrational and do not stand up to scrutiny. Based on the clear preponderance of all the relevant evidence attending these issues, the Board should overturn the Hearing Officer's credibility determinations. See *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957).

A central, fatal flaw in the Hearing Officer's credibility determinations is the false premise that Company representatives ostensibly failed to investigate or take disciplinary actions in response to the various incidents of misconduct. This patent error is based on the misconception that Davis or White supposedly "reported" to management the misconduct during the critical period. This is false; yet the Hearing Officer relies on this fiction throughout the Report to support his flawed credibility determinations. (Report 9, 10, 11, 12, and 14). Critically, there is no record evidence that any of the incidents at issue were reported to management prior to the election. To the contrary, the parties' lengthy discussion on the record confirmed the Company did not become aware of any of the objectionable conduct until after the voting had ended on March 5, at which time Davis reported Ellis' threat that morning and Passwater reported on certain incidents that had occurred during the critical period. Passwater's account led to a fuller investigation and other objectionable conduct being reported by other employees. (Kuczanski 93-95; Tr. 97-100).

The illogic of this aspect of the Report is plainly illustrated by the Hearing Officer's odd treatment of the Ellis threat heard by White on the morning of March 5. The incident occurred early in the morning of March 5; the Company questioned White about it later that same day; and then filed Objections based on Ellis' threats on March 12. (BX-1(a)). There is no logical basis to discredit White's account of this incident based on an alleged failure to investigate or take action

where the Company *indisputably did both*. This patent error provides the initial foundation for reversing the subject credibility determinations, in addition to the reasons stated below.

1. The Hearing Officer Erred in Discrediting Testimony Proving the Dissemination of the Union's Misconduct to Bargaining Unit Employees

The Hearing Officer's determination, affirmed by the RD, that the Union's misconduct was not "disseminated" to bargaining unit employees is illogical and indefensible. The preponderance of all the relevant evidence proves the objectionable conduct was disseminated to other employees in the small plant.

The Hearing Officer specifically credited Davis' testimony that both Waldren and Ellis confronted her on February 18 about signing the Petition – which Davis had not revealed to anyone – *and* acknowledged Davis' testimony that other employees had expressed similar concerns to her about Waldren and Ellis knowing who signed the Petition. (Report 8). The Hearing Officer also acknowledged Davis' testimony that she told another employee of Ellis' threat to punch Passwater, yet discredited it solely because Davis understandably was unwilling to reveal the name of that employee. (Report 8, Fn. 10). The conduct of Ellis and Waldren plainly struck fear into Davis, who candidly testified she was intimidated and scared by the conduct.¹³ Davis was emotional throughout her testimony. She reasonably feared putting a co-worker in the Union's crosshairs.

The Hearing Officer also used circular logic to discredit Passwater's testimony on the dissemination issue. Passwater expressly testified other employees expressed concerns to him that the Union knew they signed the Petition, and he specifically identified several of them by name.

¹³ Davis reasonably believed Ellis's threats. Ellis has a long history of bullying other employees and has been disciplined at least twice for harassing her coworkers. (Ellis 413-14; ER 11, 19). Ellis admitted to a number of conflicts with her coworkers. She admitted Passwater reported her "yelling in his face" to the Production Supervisor (Ellis 390). She admitted to conflicts with Glenda White that resulted in White blocking her on social media. (Ellis 392). She admitted to conflicts and confrontations with Allen Richardson. (Ellis 393-94). Ellis admitted that she stopped taking her breaks with Robin Davis shortly after the Petition was filed, claiming that Davis called Ellis and Waldren "bitches". (Ellis 403-05).

(Passwater 206-07). Although he discredited Davis for *not* identifying employees, he did not apply that same standard to Passwater! Without explanation, he instead discounted Passwater's account as "vague, unspecific and hearsay." (Report 8, Fn. 10). The Hearing Officer also completely ignored Passwater's cogent explanation of why unit employees had brought their concerns to him: As the Petitioner, co-workers felt comfortable discussing their concerns with him and knew that he would "not back off" and "stick to his guns" in pursuing the decertification effort. (Passwater 99).

The Hearing Officer's treatment of Ellis' pre-petition confrontation of Passwater further evidences his flawed and circular reasoning. The Report *credits* Passwater's testimony that this confrontation occurred prior to the filing of the Petition and discredits Ellis' testimony that it occurred after. That the Hearing Officer credited Passwater *only* on this one issue that supported his narrative is a powerful testament to the results-based character of the Report.

Finally, the Hearing Officer's finding that the Union's misconduct was not disseminated is simply inaccurate. Three bargaining unit employees told Passwater they also had been confronted by Ellis and Waldren about signing the Petition (Passwater 208); Passwater overheard Labarbera tell Mark Borjas that Jason Sundquist needed to be cracked in the skull with a bat (Passwater 199); and bargaining unit member Wes Davis witnessed Ellis confront Passwater about the Petition. (Passwater 194-95). Also, in front of former bargaining unit employee Allen Richardson and Glenda White, Ellis told Richardson "you better vote for the Union, bitch" and "that bitch Robin, she better be voting for the Union or I will beat that bitch." (White 165). On these facts alone, at least eight bargaining unit employees – nearly a quarter of the bargaining unit – witnessed at least some of the Union's objectionable threats and bullying.

For all these reasons, the conclusion of "no dissemination" cannot logically be drawn from

the evidentiary record. Accordingly, the preponderance of the evidence weighs heavily in favor of reversing the Hearing Officer's credibility determinations.

2. The Hearing Officer Erred in Discrediting Glenda White's Testimony Regarding Ellis' Threats

The Hearing Officer's determination to discredit White's testimony regarding the threats made by Ellis in the women's restroom and on the morning of March 5 is similarly flawed. The preponderance of the relevant evidence warrants reversing these credibility findings.

Glenda White was a particularly credible witness. English is her second language, so her words were broken and quiet, and difficult to hear clearly. Her testimony on direct and cross examination, however, was succinct and consistent, and unrefuted by Ellis. The evidentiary record, however, provides even more substantive reasons for crediting her testimony regarding the separate threats made by Ellis that plainly interfered with the laboratory conditions.

Foremost, the Hearing Officer pulled from thin air his baseless and self-serving musing that White's testimony was "embellished" or that she may have had some "personal animosity" towards Ellis. (Report 12) **There is absolutely no support in the record for that conclusion and the Hearing Officer cited nothing to substantiate that bald claim.** White's testimony on direct and cross examination took up less than nine (9) pages of the transcript and lasted about 10 minutes. On direct, she testified succinctly about Ellis' threat in the bathroom and the March 5 incidents. On cross exam, she did little more than repeat her account of those incidents. She confirmed that Ellis' conduct frightened her, but otherwise said nothing to even hint at personal animosity towards Ellis. Moreover, the Hearing Officer asked no questions of White. Had he sensed any "embellishment" or personal animosity, he failed to take advantage of the opportunity to elicit testimony on those issues.

Additional record evidence refutes the Hearing Officer's credibility finding. First, it is undisputed that after Ellis confronted White in the restroom, she started to carry her cell phone when she went to the restroom so that she could record any further misconduct by Ellis. The Hearing Officer acknowledged that testimony but did not reconcile it with his flawed conclusion. Second, White's testimony about Ellis' conduct on March 5 was not inconsistent. She explained on both direct and cross examination that she saw Ellis pointing her finger in Allen Richardson's face that morning. She did not "quickly" change her story that Ellis was "hitting" Richardson. For the Hearing Officer to mischaracterize this encounter as a "threat of physical violence" says more about his flawed logic than it does about White's credibility.

Further, discrediting White, in part, because she did not recall the exact date of Ellis' confrontation makes no sense. Davis was able to recall the date Ellis confronted her (February 21) only because it was the same date as the Company's employee meeting, and a date that was not disputed. Given White's language barrier and timid demeanor, her inability to recall a specific date eight months earlier is not a reasonable basis to discredit her testimony. Far more reliable is that White told Passwater about Ellis' conduct, a corroborated fact that the Hearing Officer did not credit. (Report 12, Fn. 13). Finally, the Hearing Officer had no logical basis to draw an adverse inference based on the Company's failure to call *former* unit employee Allen Richardson to testify. It is undisputed that Richardson *is no longer employed by the Company*. (Tr. 172; Walton 284-85). Interestingly, the Hearing Officer noted Ellis' testimony that she and Richardson had a personal relationship, yet failed to reconcile that finding with his analysis. He could just as easily – and improperly – drawn an adverse inference based on *the Union's* failure to call Richardson as a witness to corroborate Ellis' denial of her March 5 threats.

For all these reasons, the preponderance of the evidence weighs heavily in favor of

reversing the Hearing Officer's credibility determinations and crediting White's testimony.

D. The Decision Erred by Failing to Find Agents of the Union Engaged in Objectionable Conduct that had the Tendency to Interfere with Employees' Freedom of Choice in the Decertification Election

1. The Decision Erred by Failing to Consider the Cumulative Effect of the Union's Misconduct

The Regional Director committed manifest error by failing to consider the Union's objectionable conduct *in the aggregate* and instead erroneously assessing each incident of misconduct in isolation. Board law is clear that the *cumulative* effect of credited testimony must be considered. *Picoma Industries, Inc.*, 296 NLRB 498 (1989).

The Union's agents engaged in six discrete incidents of objectionable conduct during the 16 work days between the filing of the Petition (February 11) and the date of the election (March 5), including bullying and threats by Ellis on the morning of the election.¹⁴ Four of these incidents occurred within the 10 work days between February 21 and March 5. When considered in totality, the following misconduct by the Union's agents during that tight window indisputably rendered a free and fair election impossible:

- Passwater heard Labarbera tell a member of the bargaining unit that Jason Sundquist (who initially piqued Passwater's interest in the Petition) needed to be "cracked in the skull with a bat" and subjected to a violent "blanket party" in the parking lot. (Tr. 199).
- While talking with Wes Davis, Passwater was confronted by Ellis, got within inches of his face, yelled at him, said she knew about the petition, and aggressively asked him "what did they offer you?" (Passwater 194-95). Passwater reported Ellis's conduct to Production Supervisor Jake Grandmaison. (Ellis 390).
- On February 18, Ellis approached Robin Davis while she was working, pointed her finger in Davis's face and loudly interrogated Davis, asking if she knew what she was doing and why she signed the petition. Davis was intimidated and frightened by Ellis. (Davis 114-5).

¹⁴ Assuming the Board properly reverses the Hearing Officer and credits the testimony of Passwater and White, Ellis' threats to punch Passwater (heard by Davis) and separate threats against White (in the ladies restroom) and threat against Davis (which White heard on March 5) also must properly be considered in assessing the totality of the Union's misconduct. See Section IV(C), *supra*.

- The same day Ellis confronted Davis, Waldren also approached Davis while she was working on the gas burner line and said "I thought you told me you weren't going to sign that Petition." (Davis 117). Waldren admitted that Davis became "defensive" and appeared "irritated." (Waldren 316).
- On February 21, Ellis angrily confronted Davis in the bathroom pointed her finger in Davis's face and shouted "it is called freedom of speech" because she is in the Union. (Davis 125-26). Ellis called Davis a "bitch" and that "she could give two fucks less about anybody who signed that Petition." (Davis 126). After that interaction, Davis started bringing her cell phone in the bathroom with her and setting it to record audio just in case Ellis were to follow her into the bathroom. (Davis 128).
- On March 5, 2020, at approximately 7:00 a.m., as Davis was preparing to go vote with her team members working on the gas line, she was confronted by Ellis, who whispered a deeply personal attack on Davis. (Tr. 133). Davis was shocked by the comment and which was done to antagonize and bully Davis. (Tr. 134). Immediately after Ellis made this comment, Waldren approached Edward "Slim" Bregenzer, who told Davis the previous day that he would be voting "no" in the election, and indicated the he wanted to keep it a secret by putting his finger over his mouth, and walked him to the voting area. (Tr. 134).

The Decision relative to Objections 1 and 2 (as well as the Hearing Officer's report) erred as a matter of law because they wrongly considered and evaluated each separate incident in isolation and without considering whether the totality of the misconduct reasonably tended to interfere with the employees' free and uncoerced choice in the election. The Decision (and the Report) not only address each incident in isolation, but do so out of chronological sequence, as if these were simply random events occurring over time. They were not. When properly viewed in the total context of *when* and *how* these inter-related events occurred during the very brief period prior to the election a very clear picture of their objectionable character appears.

Indeed, the Union set the stage for its campaign of intimidation even before the petition was filed on February 11. A few days prior, and immediately upon learning that Passwater and a co-worker were considering a decertification effort, Union Steward Mike Labrera loudly signaled the Union's intentions by explicitly threatening to "crack in the skull with a bat" of the co-worker.

Even if that pre-petition threat of physical violence is not considered as a separate Objection, it provides valuable context for the misconduct that followed.

Likewise, the Hearing Officer failed to consider that Ellis and Waldren confronted Davis regarding the petition **on the very same day that she returned to the plant** from her week-long vacation (February 18). On the very first day that Davis was back at work, the Union agents made it known to her they knew she had signed the Petition – even though Davis had told no one – and were not happy with her decision to support the decertification effort. This was no isolated incident, but a continuation of what Labrera started and Ellis continued by confronting Passwater.

Moreover, the Decision improperly ignored that Ellis’ threats on February 21 were made *on the same afternoon* that she was boisterous and disruptive during the Company meeting. Also, within minutes after learning that Passwater was the petitioner and repeatedly disrupting the Company meeting that day, Ellis made a threat to “punch [Passwater] in the face,” and *that same afternoon* bullied Davis in the ladies’ room by calling her a “bitch.” The Regional Director similarly erred by failing to analyze Ellis’ conduct on the morning of March 5 within the context of the overall incidents of misconduct.¹⁵

The Decision’s piece-meal analysis of the incidents of objectionable conduct is legally indefensible. When properly analyzed in the aggregate, the totality of the Union’s misconduct warrants review and reversal of the Decision.

2. The Decision Departed from Board Precedent by Failing to Substantively Analyze the *Taylor Wharton* Factors

There is no dispute Waldren and Ellis were agents of the Union. (Report 3). Therefore, the test to determine whether to set aside the election is whether their conduct has “the tendency

¹⁵ Assuming the testimony of Passwater and Glenda White is properly credited, the additional evidence of Ellis’ separate threats against White (in the ladies restroom) and threat against Davis (which White heard on March 5) further proves the legally deficient nature of the Regional Director’s analysis.

to interfere with employees' freedom of choice." *Cambridge Tool & Mfg. Co., Inc.*, 316 NLRB 716 (1995). Under the Board's test the issue is not whether a party's conduct in fact coerced employees, but whether the party's misconduct reasonably tended to interfere with the employees' free and uncoerced choice in the election. *Baja's Place*, 268 NLRB 868 (1984). *See also, Pearson Education, Inc.*, 336 NLRB 979, 983 (2001). In determining whether a party's misconduct has the tendency to interfere with employees' 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*, 336 N.L.R.B. 157, 158 (2001).

The Report failed to provide any substantive analysis of the *Taylor Wharton* factors, and instead erroneously stated in cursory fashion that "nearly all of those factors militate in favor of finding that the alleged conduct was not objectionable." (Report 8). The Report provided no analysis for that conclusion, however. Moreover, and as noted, the Report Officer failed to consider the cumulative effect of the evidence presented, which contravenes the first *Taylor Wharton* factor - "the number of incidents." *Taylor Wharton*, 336 N.L.R.B. at 158. The Decision essentially parroted the report's conclusory findings on these issues. (Decision 4-5).

There is no doubt the conduct of Ellis and Waldren struck fear into Robin Davis – who expressly and candidly testified she was intimidated and scared by the conduct – and were

disseminated through the small plant. Davis credibly testified about bullying and threats by Ellis, which caused her to start carrying her cell phone into the bathroom out of fear of Ellis.¹⁶ See generally *Baja's Place*, 268 NLRB 868, 868-869 (1984) (union representative's statement, that he would "get" an employee who opposed the union, found objectionable as a threat of unspecified reprisal); *Bellagio, LLC*, 359 N.L.R.B. 1116 (2013)(union agent's statements, "Bro, you know, if this vote goes through, you're toast," and "[t]he vote is going to go through . . . you better not vote" to an employee who opposed the union was found objectionable). Moreover, given that Glenda White separately also began carrying her cell phone following Ellis' threat to her proves the misconduct meets the "objective" employee standard.

Further, this election was decided by a single vote, 18-17! And the fact the Union attained this slim majority with only eight Union members in the bargaining unit allows a reasonable inference some of the votes may have been improperly influenced. The closeness of the election, coupled with the union's minority status, provides reasonable bases for a rerun election. *Robert Orr-Sysco*, 338 NLRB 614, 615 (2002)(two threats in an election with a four-vote margin found objectionable); *Cambridge Tool & Mfg. Co.*, 316 NLRB 716, 716 (1995) (election set aside where the Board found three instances of objectionable conduct with regard to two employees); *Smithers Tire*, 308 NLRB 72 (1992) (several threats with three-vote spread found objectionable).

In addition, and as discussed in detail above, the Decision's conclusion that the Union's misconduct was not disseminated is inaccurate and irrelevant. This election was decided by a single vote. Where a threat is disseminated to a determinative number of unit employees, the

¹⁶ Davis reasonably believed Ellis's threats. Ellis has a long history of bullying other employees and has been disciplined at least twice for harassing her coworkers. (Ellis 413-14; ER 11, 19). Ellis admitted to a number of conflicts with her coworkers. She admitted Passwater reported her "yelling in his face" to the Production Supervisor (Ellis 390). She admitted to conflicts with Glenda White that resulted in White blocking her on social media. (Ellis 392). She admitted to conflicts and confrontations with Allen Richardson. (Ellis 393-94). Ellis admitted that she stopped taking her breaks with Robin Davis shortly after the Petition was filed, claiming that Davis called Ellis and Waldren "bitches". (Ellis 403-05).

setting aside of the election is required. *See Cedars-Sinai Medical Center*, 342 NLRB 596, 598 (2004). The credible evidence substantiates that at least eight bargaining unit employees – nearly a quarter of the bargaining unit – witnessed at least some of the Union's objectionable threats and bullying. This is an astounding figure in an election that was decided by a single vote.

Other *Taylor Wharton* factors support setting aside the results of the election. The Decision confirmed that the Union officers were actual agents of the Union, and therefore their misconduct must be attributed to the Union. (Decision 5). There is no evidence the Company engaged in any kind of misconduct. The Union's misconduct continued throughout the critical period, including on the morning of the election. Analyzing the Union's misconduct in the aggregate, it is clear that all *Taylor Wharton* factors weigh in favor of setting aside the results of the election.

The Union's misconduct, which was ongoing and pervasive throughout the critical period, including threats of physical violence, made a free and uncoerced election impossible, and therefore the Board must review and reverse the Decision and order a re-run election.

E. The Decision Erred by Failing to Consider Critical Threats and Other Objectionable Conduct by the Union

The Decision (and Report) wrongly downplayed, mischaracterized, and often ignored facts demonstrating how the Union's conduct created an atmosphere of coercion that made a free and fair election impossible. For example, the Decision disregarded the fact that Waldren and Ellis confronted the employees who signed the Petition, creating an impression of surveillance on Davis and others who signed the Petition. Davis discussed these intimidating confrontations with other unit employees who had signed the Petition, which employees told Davis they too were scared because they also had been confronted by Ellis and Waldren about signing the Petition. (Davis 120). Passwater corroborated that Davis told him about being confronted by Ellis and Waldren. (Passwater 207). Passwater also confirmed that other employees informed him they had been

confronted by Waldren and Ellis about signing the Petition, including Brad Nichter, Rod Dubuisson, and Glenda White. (Passwater 208). Creating the impression of surveillance inherently develops an atmosphere of intimidation, which is especially true here as it was followed with threats and violence and reprisals.

In addition, the Decision (and Report) ignored the incident where Ellis confronted Passwater about the Petition, claiming it occurred before the critical period. (Report 6, fn. 7). However, Ellis admitted this confrontation occurred *after* the Petition was filed and thus within the critical period.¹⁷ (Ellis 387). When Ellis confronted Passwater, she yelled at him, got within inches of his face, and aggressively asked him "what did they offer you?" (Passwater 194-95). The confrontation was significant enough that Passwater reported Ellis's conduct to Production Supervisor Jake Grandmaison, who instructed Ellis to stay away from Passwater. (Ellis 390).

Moreover, the Decision disregarded the fact that Passwater heard Labarbera tell a member of the bargaining unit that Jason Sundquist (who initially sparked Passwater's interest in the Petition) needs to be "cracked in the skull with a bat" and "that guy needs to have a blanket party" in the parking lot. (Tr. 199). Although this occurred prior to the filing of the Petition, the threat of physical violence provides critical context about the atmosphere of intimidation and coercion created by the Union and continued until the day of the election.

F. The Decision Erred by Counting Tyler Adams' Vote Despite the Fact he Resigned While the Election was Pending

On the morning of the election, Tyler Adams arrived to the Company's facility to start the workday at 7:00 a.m. By 7:30 a.m., 30 minutes prior to the closing of the polls, Adams resigned from his position with the Company. Adams' ballot was included at the time of the tally and the

¹⁷ Further demonstrating the Decision's results-based analysis, this is the only point on which the Hearing Officer credited Passwater's testimony (which the RD accepted). (Report 6, fn. 7).

election was decided by a single vote. To be clear, this is not a case where Adams resigned after the election. He resigned while the election was still ongoing and his vote should not have been counted. Adams' vote must not be considered as he has no interest in the future of the Company or the bargaining unit. Former employees should not be able to determine the future of the bargaining unit. The Hearing Officer's finding that the Company was somehow required to object to Adams' vote prior to the election is misplaced, as the Company had no way of knowing Adams' plan to resign. It simply was not possible for the Company to object before Adams cast his vote.

In addition, the manner in which Adams resigned, while the election was ongoing and employees were in the process of voting, yelling "I don't need this f'ing job" and "he's lying" in reference to Sales Director Neil Myers (who caught Adams smoking inside the facility), ruined the laboratory conditions necessary for a free and uncoerced election. Adams falsely and loudly accused a manager of lying while the election was still ongoing and before all employees cast their votes. This projection of chaos, at the most critical moments of the critical period, destroyed the laboratory conditions necessary for a free election, and therefore the Board should overturn the Regional Director's decision and order the election to be re-run.

V. CONCLUSION

For all the reasons discussed herein, Union agents Melissa Waldren, Jeana Ellis, and Mike Labarbera, through their threats, bullying, and intimidation tactics, destroyed the laboratory conditions necessary for a free and uncoerced election. Therefore, the Board should grant the Employer's Request for Review, reverse the Decision and order a re-run election to determine whether the majority of bargaining unit employees wish to be represented by the Union.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was electronically filed this 16th day of February, 2021 via the Board's electronic filing system. A copy was also served via electronic mail upon the following:

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