

**United States Court of Appeals
for the District of Columbia Circuit**

No. 20-1435; 1438

GADECATUR SNF d/b/a East Lake Arbor,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

*On Petition for Review from the Decision and Order
of the National Labor Relations Board in Case No. 10-CA-262818.*

PETITIONER'S OPENING BRIEF

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February 16, 2021

CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW
AND RELATED CASES

Petitioner GaDecatur SNF LLC d/b/a East Lake Arbor is a skilled nursing facility located in Decatur, Georgia. GaDecatur SNF LLC d/b/a East Lake Arbor does not issue debt or equity securities to the public nor does it have subsidiaries which issue shares or debt to the public.

GaDecatur SNF LLC d/b/a East Lake Arbor has petitioned the Court to review and set aside the National Labor Relations Board's Decision and Order in *GaDecatur SNF LLC d/b/a East Lake Arbor*, Case No. 10-CA-262818, entered on October 15, 2020, reported as 370 NLRB No. 34 (October 15, 2020).

GaDecatur SNF LLC d/b/a East Lake Arbor's Petition for Review of the cited decision of the National Labor Relations Board, No. 20-1435 has been consolidated by the Court with the National Labor Relations Board's Cross-Petition for Enforcement of the same decision, No. 20-1438.

**UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT**

GADECATUR SNF LLC D/B/A)	
EAST LAKE ARBOR,)	
)	
Petitioner,)	
)	
v.)	
)	PETITION FOR REVIEW
NATIONAL LABOR RELATIONS)	
BOARD,)	
)	
<u>Respondent.</u>)	

CORPORATE DISCLOSURE STATEMENT

Petitioner GADecatur SNF LLC d/b/a East Lake Arbor (herein “Petitioner”), in accordance with the requirements of Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, states that no parent company or publicly held corporation owns more than 10% of Petitioner’s stock. Petition further states that it is a skilled nursing facility providing elderly and rehabilitative care.

Respectfully submitted this 30th day of October, 2020.

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STATUTES & OTHER AUTHORITIES:

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STATUTES AND REGULATIONS

29 U.S.C. § 157:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of [29 U.S.C. § 158(a)(3)].

29 U.S.C. § 158:

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer –

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title; ...
- (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

29 U.S.C. §159:

(a) Sec. 9 [§ 159.] (a) [Exclusive representatives; employees' adjustment of grievances directly with employer] Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective- bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) [Determination of bargaining unit by Board] The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act [subchapter], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit votes against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) [Hearings on questions affecting commerce; rules and regulations] (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) [subsection (a) of this section], or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsection (a) of this section]; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsection (a) of this section]; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

GLOSSARY

“Employer” refers to Appellant GaDecatur SNF LLC d/b/a East Lake Arbor.

“Union” refers to Retail, Wholesale & Department Store Union-Southeast Council.

“RD” refers to the Acting Regional Director for Region 10 of the National Labor Relations Board.

“Decision and Order” or the “Decision” means the National Labor Relations Board’s October 15, 2020 Decision and Order in *SNF LLC d/b/a East Lake Arbor*, Case No. 10-CA-262818, reported as 370 NLRB No. 34 (October 15, 2020).

“NLRA” or the “Act” means Section 8(a)(1) of the National Labor Relations Act.

“NLRB,” the “Board” or “Respondent” means Respondent National Labor Relations Board.

Unless otherwise noted, page/line transcript citations refer to the Hearing Transcript¹ from the representation hearing which took place December 4, 2019 in NLRB Case No. 10-RC-24998.

The Employer’s hearing exhibit is referred to as “EX -1-”.

¹ Petitioner will be submitting a Deferred Appendix pursuant to the Court’s briefing schedule and will submit a brief with cites to the pages in that compendium at that time.

JURISDICTIONAL STATEMENT

GaDecatur SNF LLC d/b/a East Lake Arbor has petitioned the Court to review and set aside the National Labor Relations Board's Decision and Order in *SNF LLC d/b/a East Lake Arbor*, Case No. 10-CA-262818, reported as 370 NLRB No. 34 (October 15, 2020). The Board's Decision and Order is final and appealable, and the Court has jurisdiction over the appeal pursuant to 29 U.S.C. § 160(f).

PETITIONER'S STATEMENT OF ISSUES

1. Whether the Petition for Review should be granted because the National Labor Relations Board (“NLRB”) erred in certifying Retail, Wholesale & Department Store Union-Southeast Council (the “Union”) as the collective bargaining representative of employees employed by GaDecatur SNF LLC d/b/a East Lake Arbor (the “Employer”).

2. Whether the Petition for Review should be granted because the NLRB erred in denying the Employer’s Request for Review of the Decision and Certification of Representative issued by the NLRB’s Acting Regional Director.

3. Whether the NLRB’s Decision and Order should be denied enforcement because the decision is contrary to prevailing law and precedent, and unsupported by substantial evidence on the record as a whole.

4. Whether the Petition for Review should be granted because the NLRB erred in failing to order a rerun of the underlying representation election based on the Employer’s objection to the conduct of the election.

5. Whether the Petition for Review should be granted because the NLRB erred in failing to overturn the underlying representation election based on the Employer’s objection that the Union interfered with the fair conduct of the election by engaging in a loud, hostile exchange in the immediate proximity of the polling

area during the vote; by effectively blocking egress into the polling area during the vote; and by preventing eligible voters from casting ballots.

6. Whether the Petition for Review should be granted because the NLRB erred in failing to overturn the underlying representation election because the Union's opprobrious conduct in the immediate vicinity of the polling area within view of eligible voters created an atmosphere of fear and coercion among the Employer's employees thereby interfering with the fair conduct of the election.

STANDARD OF REVIEW

Although the Board is, in general, entitled to deference, the Court will not affirm Board decisions that are not supported by substantial evidence, nor will it affirm decisions where the Board has applied the law incorrectly. *See Jackson Hosp. Corp. v. NLRB*, 647 F.3d 1137, 1142 (D.C. Cir. 2011) (vacating Board decision because it was not supported by substantial evidence). In that regard, this Court has noted that it will not uphold an order of the Board when it has “erred in applying established law to the facts of the case.” *Jochims v. NLRB*, 480 F.3d 1161, 1167 (D.C. Cir. 2007).

STATEMENT OF THE CASE

I. Background and Election History

a. The Facility

To understand how the opprobrious conduct of Union agents adversely impacted employee free choice in the underlying representation election, the Court must be cognizant of the layout of the Employer’s facility.

The Employer operates a skilled nursing facility (the “facility”) staffed, during the relevant period, by approximately 86 (eighty-six) employees. (Tr. 15:17-18; 16:4-5). The Administrator serves as the highest-ranking individual at the facility and is responsible for managing the day-to-day operations². (Tr. 15:23-25; 16:1-2).

² During the relevant period, Mr. Lesly Gervil served as Administrator of the facility.

The facility has two floors. (Tr. 16:6-7). A main hallway on the first floor is used by employees and residents. (Employer Ex. 1; Tr.16:19-21). This first-floor hallway runs the entire length of the facility. (Employer Ex. 1; Tr. 17:11-21). To travel from one end of the first floor to other, one must use the hallway. (Employer Ex. 1; Tr. 17:19-21). The hallway is approximately fifteen (15) feet wide. (Employer Ex. 1; Tr. 43:2-4). One has an unobstructed view from one end of the hallway to the other. (Employer Ex. 1; Tr. 109:21-25).

The Administrator's office and the business manager's office are located at one end of the hallway. (Employer Ex. 1; Tr.17:5-6). The Administrator's office door opens to a vestibule area rather than directly into the main hallway. (Tr.47:7 – 48:15). Thus, the main hallway cannot be seen from the Administrator's office with the door closed. *Id.* The facility's first floor nursing station is located at the opposite end of the hallway. (Employer Ex. 1; Tr. 19:25 – 20:1-14). Moving down the hallway from the offices, on the right side of the hallway, one encounters another hallway that leads to the facility's only employee breakroom. (Employer Ex. 1; Tr. 19:7-9, 13-14). On the left side of the hallway is a conference room that served as the polling area during the November 12, 2019 election. (Employer Ex. 1; Tr. 18:3-13). The conference room has a single door to the hallway. On election day, a sign was posted on the wall outside of the conference room designating it as the official polling place. (Employer Ex. 1; Tr. 21:2-12).

The door to the conference room is visible from the nursing station. (Employer Ex. 1; Tr. 18:14- 20; 19:25-20:6). The hallway leading to the breakroom is directly across from the door to the polling area. (Employer Ex. 1; Tr.19:2-8). In sum, any employee walking to or from, or standing at the nursing station, can see the entrance to the polling area. Any employee walking into or out of the break room can see the entrance to the polling area. Any eligible voter in the main hallway can see the entrance to the polling area.

The main entrance to the facility is located on the main hallway. (Employer Ex. 1; Tr. 17:14-20). Directly across from the main entrance is a receptionist's area, which faces the main entrance. (Employer Ex. 1; Tr. 18:24-25 – 19:1, 30:15-17). Access to the facility through the main entrance is restricted. To enter through the main entrance, one must either 1) enter a periodically changing code to unlock the door or 2) ring a doorbell and be admitted by the receptionist. (Tr. 20:15-22). It is undisputed that the main entrance is approximately twenty (20) feet from the polling area. (Employer Ex. 1; Tr. 18:21-23).

b. The Termination of Tabatha Martin

Tabatha Martin (“Ms. Martin”) worked for the Company during the 2019 election representation election campaign. Approximately one week before the election, the Employer terminated Ms. Martin’s employment for inappropriate, rude conduct. (Tr. 24:19-25 29:7-8; 38:15-25). On November 4, 2019, Ms. Martin

became confrontational with the Employer's Director of Nursing, disrupted residents in the facility and used profanity during the confrontation. *Id.*

c. Union Representatives Disturbed the Laboratory Conditions of the Election

The NLRB conducted the election at the facility on November 12, 2019 during two (2) voting periods. (Tr. 29:14-20). The first voting period occurred between 6:00 AM and 8:00 AM. *Id.* The second voting period occurred between 2:00 PM and 4:00 PM. *Id.* The Administrator was present at the facility during voting times and remained in his office to avoid the polling area. (Tr. 29:21-30:4).

At approximately 3:45 PM, the facility's receptionist paged the Administrator, who was in his office with the Employer's attorney John Chobor ("Mr. Chobor"). The receptionist notified the Administrator that a discharged employee was seeking to access the facility. (Tr. 30:20-24; 31:21-23; 45:21-24). The Employer's general practice is to prohibit discharged employees from entering the facility or the Employer's premises. (Tr. 78:9-17). The Administrator and Mr. Chobor left the Administrator's office to identify the discharged employee and prevent them from entering the facility. (Tr. 30:25 – 31:5). They walked down the main hallway towards to the main entrance where they encountered Ms. Martin, who was yelling and screaming that she should be allowed to vote and threatening to call the Union's agents. (Tr. 31:1-4, 16-20; 39:1-7; 54:7-14). The Administrator told Ms. Martin that she must leave the premises because of the nature of her discharge. (Tr. 31:25 – 32:1-3). Ms. Martin left the facility, and the Administrator and Mr. Chobor returned to the Administrator's office. (Tr. 32:7-10).

Around 3:50 p.m., the Administrator received another page from the receptionist informing him Ms. Martin was attempting to reenter the facility. (Tr. 32:11-16; 33:1-5). Once again, the Administrator and Mr. Chobor left the Administrator's office and walked down the main hallway towards the main entrance. (Tr. 31:17-20). They observed Ms. Martin in front of the receptionist area, but this time she was accompanied by at least five (5) Union agents wearing Union-labeled jackets, including Union President James Shackelford and the Union's Secretary-Treasurer. (Tr. 32:21-24; 34:2-3; 34:11-25; 35:1-11, 35:22-25, 92:1-5, 115:7-16). Ms. Martin and the Union's agents were aggressively demanding that Ms. Martin be allowed to vote. (Tr. 32:21-25). The Administrator and Mr. Chobor encountered Ms. Martin and the Union's agents in front of the reception area in the middle of the main hallway and asked that she and the Union's agents leave the premises. (Tr. 35:12-25).

Ms. Martin and the Union's agents refused to leave the premises and instead propagated a loud disruption in the usually sedate facility. (Tr. 39:16-23). The disruption was so intense and prominent that several eligible voters came to identify the source of the loud commotion. (Tr. 36:8 – 37:9). In fact, eligible voters from the second floor came down to the first floor of the facility to witness the altercation. (Tr. 40:5-14).

During the altercation, as they migrated towards the door to the polling area, (Tr. 79:1-13) the Union's agents vociferously demanded Ms. Martin be allowed to vote. (Tr. 74:6-11). It is undisputed that the Union's agents then moved *directly* in front of the door to the polling area, while the polls remained open, continuing to

loudly demand that Ms. Martin be allowed to cast a ballot. (Tr. 79:11 – 80:1; 113:4-7). This loud, disruptive altercation in the main hallway between the representatives of the Employer and the Union lasted at least five (5) minutes, but both Employer and Union witnesses testified that the altercation could have lasted as long as ten (10) minutes, while the polls remained open. (Tr. 33:1-5; 42:3-5; 112:14-22).

It is uncontroverted that 1) the first-floor main hallway is relatively narrow, 2) the altercation blocked most of the hallway, 3) the altercation would have been visible to anyone in the hallway, including the nursing station and any employee accessing the hall to the dining room or employee breakroom, and 4) the polls were still open at the time of the disturbance. (Tr. 109:10-25). Ultimately, to deescalate the confrontation, the Employer agreed to let Ms. Martin vote subject to challenge. (Tr. 59:18-25).

d. The Election Results and the Employer's Objection to the Election

The election Tally of Ballots showed that of forty-eight (48) eligible voters, twenty-two (22) cast valid votes for the Union and seventeen (17) cast valid votes against the Union. Four (4) ballots were challenged. Thus, approximately five (5) eligible employees (comprising 10% of the eligible voters) did not vote. The Employer filed timely Objections to conduct affecting the election³. The challenged

³ The Employer subsequently withdrew two of its three objections. The third objection, the subject of this case, read as follows: “The petitioner, its agents, or representatives escorted a terminated employee into the voting area and the terminated employee engaged in an outburst. The Employer alleges that this conduct intimidated other eligible voters and destroyed the laboratory conditions requisite to a free and fair election.”

ballots and disenfranchised voters were sufficient in number to affect the results of the election.

On December 20, 2019, following a hearing, the Hearing Officer issued her Report on the Employer's Objection, in which she recommended the Employer's Objection be overruled. On January 15, 2020, the Employer filed its Exceptions to The Hearing Officer's Report on Objections. On February 4, 2020, the NLRB Acting Regional Director (the "RD") issued her Decision and Certification of Representative, adopting the Hearing Officer's Report and certifying the Union as collective bargaining representative of a unit of the Employer's employees.⁴ On February 19, 2020, the Employer filed with the Board a Request for Review of the Acting Regional Director's decision and certification. On June 2, 2020, the Board issued an order summarily denying the Employer's Request for Review.

e. The Test of Certification Proceedings

The Act does not provide for direct judicial review of the NLRB's certification of a union in a representation proceeding. The "ruling of the Board determining the appropriate unit for bargaining is not subject to direct review under the statute."

Pittsburgh Plate Glass Co. v. National Labor Relations Board, 313 U.S. 146, 154

⁴ The bargaining unit is: All regular part-time and full-time employees including CNA's, LPN's, Activity and Maintenance employees employed by the Employer at its facility located at 304 5th Avenue, Decatur, Georgia, excluding all other employees, office clerical employees, manager, guards, and supervisors as defined in the Act.

(1941). Instead, employers must refuse to recognize or bargain with the union, to avoid waiving their opposition. If, in response, the union files an unfair labor practice (“ULP”) charge against the employer, the employer may then seek collateral judicial review of the Board’s underlying decision and certification by raising infirmities in the representation proceedings as a defense in the ULP proceeding. *Id.*

Here, the Union filed an unfair labor practice charge on July 9, 2020 (10-CA-262818) alleging the Employer violated Section 8(a)(1) and (5) of the Act by refusing the Union’s demand to begin collective bargaining. On July 17, 2020, the Regional Director issued an administrative Complaint regarding the Union’s charge

The Employer answered the Complaint asserting, inter alia, that the Board’s rejection of the Employer’s Objection to the election and its underlying certification of the Union was improper. On August 3, 2020, the General Counsel filed a Motion for Summary Judgment and the Board issued a show cause order. In response to the show cause order the Employer explained that it was testing the validity of the Union’s certification by virtue of the NLRB’s rejection of its election Objection.

On October 15, 2020, the Board issued an order granting the General Counsel’s Motion for Summary Judgment and directing the Employer to bargain with the Union as representative of its employees. 370 NRLB No. 34 (2020).

SUMMARY OF THE ARGUMENT

The Board erred in two respects. In the underlying representation case, the Board erred in upholding the RD's rejection of the Employer's objection to the election and therefore upholding the Union's certification as the exclusive collective bargaining representative for certain Employer's employees. Next, the Board erred in declining to revisit that improper certification in the instant ULP proceeding. Consequently, based on that errant certification, the Employer committed no violation of the Act when it refused to accede to the Union's demand to bargain with it.

The RD committed two fundamental errors when she overruled the Employer's objections and certified the Union. First, she inexplicably imposed on the Employer the burden of proving that potential voters were dissuaded from voting by the Union's misconduct. Second, contrary to the law in this Circuit, the RD failed to accord proper weight to the consequences of the Union's disruption of the election process.

The RD cited the foundational precept of NLRB election law, and then misapplied it. She properly observed that, "To prevail, the objecting party must establish facts raising a 'reasonable doubt as to the fairness and validity of the election.'" *Patient Care of Pennsylvania*, 360 NLRB No. 76 (2014), citing *Polymers, Inc.*, 174 NLRB 282 (1969), *enfd.* 414 F.2d 999 (2d Cir. 1969), *cert. denied* 396 U.S.

1010 (1970). The standard of proof is “reasonable doubt” and the Employer should not be compelled to prove more than that. Yet, the RD consistently imposed on the Employer the burden of affirmatively establishing additional facts pertaining to matters that were either uncontested or subject to reasonable inference.

The result of the ARD’s errant analysis was to distort the standards for evaluating election objections announced in *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).⁵ The RD’s decision demands far more than “reasonable doubt;” it demands proof beyond a reasonable doubt. Effectively, the RD demands that even uncontested testimony be corroborated, a mystifying and perverse interpretation of evidentiary principles.

Moreover, the RD and Board decisions ignore the law in this Circuit established in *Nathan Katz Realty LLC v. NLRB*, 251 F. 3d 961 (D.C. Cir. 2001). In that case this Court held that the mere presence of a union representative in the voting area during the election may be sufficient to justify setting aside an election. Here, undisputedly, four or five union representatives were not only present in the voting area during the election, they also fomented a loud confrontation with

⁵ The Employer’s citation to *Avis Rent-a-Car* should not be construed as an endorsement of slavish adherence to the nine-part test adopted by the Board in that case. The Employer submits that this test is not necessarily consistent with the “reasonable doubt” standard articulated in *Polymers, Inc.* In any event, reducing the *Avis-Rent-a-Car* guidance to a numeric comparison, as the RD has done here, is unjustifiably formulaic.

representatives of the employer effectively blocking ingress into the voting area. Since five employees did not vote in the election and since one disenfranchised vote could have been sufficient to change the outcome, the Union's misconduct was particularly salient.

This case involves a seminal intrusion on the actual conduct of an election. Here, the RD and the Board erred in failing to find the "laboratory conditions" required by the Board in election proceedings were destroyed by agents of the Union. "[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).

The RD and the Board misapplied this standard, demanding impossibly subjective evidence and summarily dismissing the undisputed and overwhelming objective evidence that the disruption in the hallway during the polling period reasonably discouraged employees from exercising their statutory right to vote in the representation election. Rather, the RD and Board applied a heightened standard requiring the Employer to prove *actual* interference instead of establishing that the Union's conduct *tended to interfere* with employees' free choice.

ARGUMENT

a. Introduction

With several minutes left in the election, the door to the polling area was closed and a loud confrontation, precipitated by the Union, was taking place immediately outside the voting room. To vote, an eligible employee would have had to pass by, and through, a cordon of angry union representatives. In these circumstances, it is unsurprising that nobody voted during the melee. If any one of the five employees who failed to cast ballots had voted during that time, the result of the election could have been altered.

Inexplicably, the RD and the Board concluded that this misconduct by the Union's agents did not interfere with employees' right to vote and did not require the election be rerun. This erroneous conclusion is contrary to the evidence and to the law in this Circuit.

b. The Board Failed to Apply the Law in this Circuit

The Employer cited to the Board three cases in support of its position that the presence of the Union representatives in the polling area during the vote constituted objectionable conduct. The Board erroneously concluded that *Nathan Katz Realty*, 251 F.3d 981 (D.C. Cir. 2001), *Electric Hose and Rubber Co.*, 262 NLRB 186 (1982) and *Performance Measurements Co.*, 148 NLRB 1657 (1964) are distinguishable because "in those cases, the party representative(s) were near the entrance to the

voting area for most, if not all, of the voting session.” But this is a classic “distinction without a difference.” The Board does not simply measure the length of time party representatives are present at the polling area. Rather, the Board gauges the impact of the misconduct on the election. In a close election such as this, the presence of the Union’s representatives for even the span of ten minutes could coerce enough employees into abstaining from the vote as to skew the outcome of the election. One affected employee would have been enough to change the election results. Moreover, here the Union’s representatives were not merely passively present in the polling area. They were engaged in a raucous verbal confrontation with the Employer’s representatives visible or within hearing distance from key areas of the facility such as the nursing station and breakroom, both areas where employees naturally congregate. This confrontation happened in the heavily traveled, primary thoroughway of the facility where eligible voters must have witnessed the incident.

The Board’s cavalier dismissal of the law in this Circuit represented by the *Nathan Katz* case, is relegated to one short paragraph just before the conclusion of the RD’s decision. But the misconduct here is far more egregious than the conduct reviewed in *Nathan Katz*. There, the union representatives sat in a car in the parking lot of the voting area. Here, the union representatives were standing in front of the door to the polling area. Objectively viewed, the combination of the closed door to

the voting room and the presence of an angry mass of people, some displaying union insignia, immediately outside that door was intimidating or discouraging to potential voters.

In reality, the facts presented here are indistinguishable from the facts that led the Board to overturn the election in *Performance Measurements Co.*, 148 NLRB 1657 (1964). There, as here, a representative of a party to the election stood by the door to the election area, within two feet of ingress to the voting area. There, the Board concluded that the mere presence of the representatives outside the polling area interfered with employee free choice in the election. Here too, the presence of a confrontational crowd of party representatives destroyed the “laboratory conditions” necessary to a fair election. Here too, the election should have been overturned and a rerun election ordered.

c. The Board Misapplied Its Own Test

Under existing Board law, in determining whether a party’s conduct has the tendency to interfere with employee free choice, the Board considers the following nine (9) 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 part against whom objections are filed. *Taylor Wharton Division*, 336 NLRB at 158, citing *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

The RD (erroneously) tallied the factors she perceived to favor the Employer and those which were averse to the Employer, tabulated and then compared the results. In this way the RD reduced the nine factors to a mathematical exercise. The Board improperly affirmed this mechanistic application of its test. Logically, every factor identified in *Avis* in every case cannot carry precisely the same weight. Indeed, in some contexts, certain of the factors may not be applicable at all. The Employer submits that when properly weighed and objectively judged, the factors lead inexorably to the conclusion that the election must be re-run.

Consideration of the first two *Avis* factors demonstrates the problem with the numerical compilation the RD applied here. The crux of the Employer's argument rests on one incident. However, that incident was so severe as to warrant special consideration. The Union representatives entered the facility during the final five or ten minutes of the voting period, displaying union insignia, congregated immediately outside the polling room, and effectively blocked the entrance to the room for last

minute voters. Moreover, they engaged the Employer in a loud and hostile exchange which, according to uncontroverted testimony, could be heard throughout the building. The incident occurred near at least two primary areas where eligible voters would be situated: the first-floor nurse's station, and the breakroom. Each area was within the direct line of sight or at least within hearing distance of the confrontation.

The RD cavalierly dismissed these facts because the incident was of relatively short duration. However, it is not the duration of the incident, but its intensity that made it severe. The incident blocked ingress to the polls in the critical minutes before the voting was to end. Given that ten percent of the bargaining unit did not vote, the barrier to voting the Union erected introduced a reasonable doubt concerning the ability of eligible employees to vote.

But the RD opined that employees would not have been in fear from the incident because the confrontation related to eligibility of a voter. This unsupported subjective leap defies logic. First, a loud, public argument among eight people blocking a hallway, objectively viewed, is fear-inducing. Second, the potential voter would not likely even be aware of the context of the confrontation before being dissuaded from approaching to vote. Third, the issue of eligibility to vote would have been foremost on the minds of potential voters who would have been disinclined to enter the fray if another potential voter's eligibility was being questioned in a loud and hostile manner.

The RD's evaluation of the third *Avis* factor is equally flawed. The RD concluded that the Employer failed to establish the exact number of employees in the bargaining unit subjected to the misconduct. This conclusion ignores the configuration of the building's interior. The first-floor hallway where the confrontation and the voting took place is the main thoroughfare of the facility. It is uncontroverted that (1) the first-floor main hallway is relatively narrow; (2) the altercation blocked most of the hallway; (3) the altercation would have been visible to anyone in the hallway, which ran the length of the building; and (4) the altercation would have been visible from the entrance to the breakroom. (Tr. 109:10-25; 19:7-8). Therefore, the altercation was visible from the nursing station at other end of the hallway, where several eligible voters routinely performed work tasks (Tr. 19:25-20:1-14). Moreover, the disruption was so great several eligible voters came to identify the source of the loud commotion. (Tr. 36:8 – 37:9). In fact, eligible voters from the second floor came down to the first floor of the facility to witness the altercation. (Tr. 40:5-14).

The RD dismissed this uncontroverted testimony⁶ because the record does not contain actual names of employees who witnessed the altercation. But this level of

⁶ The RD joined the Hearing Officer in declining to credit this testimony, dismissing it as vague, uncorroborated, and non-specific. However, in the absence of any countervailing evidence, the Hearing Officer and RD lacked any objective basis to discredit the witness. The failure to credit his testimony is a fundamental error and evidences the NLRB adhering to a strained conclusion in search of a rationale.

precision was unnecessary when the fact was uncontested. Ten percent of the bargaining unit did not vote. Therefore, the RD should have inferred that at least some of these prospective voters were subjected to the Union's misconduct. A contrary conclusion would defy logic and common sense. Moreover, the scrum was visible or audible to the majority of the workforce. Finally, one vote could have changed the result of the election. Therefore, if only one prospective voter was dissuaded by the incident from voting, the precise number of other employees subjected to the misconduct becomes inconsequential. The RD's adoption of the Hearing Officer's failure to credit this testimony is a critical error, one that is compounded through the RD's further analysis of the incident.

The fourth *Avis* factor weighs most heavily in the Employer's favor. The incident at issue was not just proximate to the election, it was during the election. The RD tallied this factor in the Employer's favor but discounted its significance. However, if the goal is to ensure "laboratory conditions" for the election, the situs and period of the election must be sacrosanct. Blocking ingress to the voting room during the election is as proximate to the election as is physically possible.

The RD diluted the incident's impact on the election by focusing on its duration. If, as appears from the record, the incident occurred ten minutes before the polls closed, this fact does not diminish its significance. Ten minutes is ample time for eligible voters to cast ballots. Anyone in line at the time the polls closed

would have been permitted to vote. Even one potential voter turned away by the incident could have altered the election outcome. But the presence of a loud hostile gathering of people immediately adjacent to the polling room constituted a virtually impenetrable barrier to potential voters. Therefore, the temporal limitation of the incident does not justify dismissing the factor of proximity, particularly where, as here, the incident occurred during the closing portion of the polling period. If an employee was dissuaded from voting, he or she could not return later; there was no later. The RD erred by minimizing proximity as a factor in evaluating the *Avis* factors.

The fifth factor in the *Avis* analysis is the degree to which the incident persisted in the minds of employees in the voting unit. This is a factor ill-suited to an event that occurred during the election. To be salient, the incident needed to persist only until the polls were closed. However, those minutes were fraught with conflict and hostility. The conflict was audible throughout the building. Therefore, if this factor is even weighed in the analysis, it must be weighted heavily in the Employer's favor.

The degree of dissemination of the Union's misconduct, is the sixth *Avis* factor. The RD rejected the Employer's argument that knowledge of the incident was widely disseminated. The rejection has dual aspects. First, the RD assumed lack of dissemination because the incident occurred near the end of the voting

session. Second, the RD erroneously shifted to the Employer the burden of adducing the names of employees who witnessed the incident.

In one sense, tallying the extent of dissemination misses the point entirely. The vote was sufficiently close that one vote could have altered the outcome of the election. Therefore, if even one eligible voter was dissuaded from voting by the fracas, any further dissemination would have been superfluous. In *Peppermill Hotel Casino*, 325 NLRB 1202, 1203 (1998), a representation election between the company and the union ended in a tie. Even though the Board did not find that the conduct at issue was widely disseminated within the small voting unit, the Board found that the outcome of the election could have been influenced by just one (1) change in the vote of any eligible voter who witnessed the misconduct. *Id.* at 1208.

In any event, the record is replete with evidence of dissemination. It is undisputed that any employee walking to or from, or standing at the nursing station, can see the entrance to the polling area. Any employee walking into or out of the break room can see the entrance to the polling area. It is also undisputed that the disruption was so great several eligible voters came to identify the source of the loud commotion. (Tr. 36:8 – 37:9). In fact, eligible voters from the second floor came down to the first floor of the facility to witness the altercation. (Tr. 40:5-14). Therefore, the evidence adduced by the Employer was enough to establish dissemination.

The RD cites no authority requiring the Employer to name each employee who may have heard the commotion. The Employer's witness was embroiled in the heated exchange and cannot be expected to have singled out individual employees as witnesses to the incident, nor is such level of detail required. To the extent dissemination factors into the analysis in the context of this case, the Employer proved the dissemination was widespread. The RD erred in failing to weigh this factor heavily in the Employer's favor.

The seventh and ninth *Avis* factors both measure aspects of the Employer's involvement in the objectionable conduct. The seventh factor weighs the effect of misconduct by the Employer in mitigating misconduct by the Union. This factor presupposes the Employer engaged in any misconduct. Here, the Employer was merely applying its policy against terminated employees entering the facility⁷. By contrast, the Union massed its agents at the entrance to the facility, entered the corridor where the voting was taking place, blocked the entrance to the voting room and precipitated a loud and hostile exchange with representatives of the employer who appeared solely in response to the Union's efforts at confrontation.

⁷ Application of the policy was particularly warranted here since the employee at issue was discharged for allegedly engaging in opprobrious conduct toward the Director of Nursing in the presence of residents (Tr. 38:18-21).

Thus, the Employer's "contribution" to the melee was merely a response to extreme provocation by the Union trespassers. That response did not "cancel out" the effects of the Union's disruption of the election process.

The RD is mistaken in her reliance on her conclusion that the Union acted in response to the Employer's putative refusal to let an eligible employee vote. The individual in question had been terminated before the election and was no longer an eligible voter. Her discharge was placed in question by a contemporaneously filed unfair labor practice charge. However, the pendency of the charge does not excuse the Union's action in sending a cadre of union agents to escort the individual in question directly into the polling area. Simply put, the Employer's actions did not disrupt the conduct of the election at the very room where the voting was taking place, while the Union's conduct directly and seriously impaired the laboratory conditions for the final minutes of voting. *See Baja's Place*, supra. at 868.

The RD also erred in upholding the Hearing Officer's finding that representatives for the Employer and the Petitioner "engaged in the same potential misconduct." The Hearing Officer failed to consider that the Employer attempted to deescalate the confrontation by asking the Union's agents to leave the premises. When Petitioner's agents refused to leave, they essentially became trespassers. Petitioner's refusal to leave the premises when requested created the appearance that

the Employer “was powerless to protect its own legal rights in a confrontation with the Union.” See *Phillips Chrysler Plymouth*, 304 NLRB 16 (1991).

The RD sought to distinguish the *Phillips Chrysler Plymouth* case on its facts. The differences in peripheral facts does not diminish the significance of the holding in *Phillips Chrysler Plymouth* or its applicability to the instant case. Here, as there, the Union agents were trespassers on the Employer’s premises, and here, as there, the Employer was unable to bar them from the premises or remove them. Although here the Union agents engaged in no electioneering, they fomented a confrontation that blocked ingress to the voting room, arguably a more serious transgression. Indeed, this incident involved five agents of the Union rather than the two involved in *Phillips Chrysler Plymouth*. Thus, the situation in that case was not more egregious than the situation in the instant case.

The RD wrongly blamed the Employer for the incident and wrongly concluded that Employer misconduct “canceled out” the Union’s misconduct. The fact remains that the Union chose confrontation over process. The Union had procedural mechanisms for handling their dispute over eligibility, but they chose instead to enter the facility *en masse* and force the issue while the election was still proceeding and in a manner that obstructed access to the voting room in full view of potential voters. The RD erred in misapplying the seventh and ninth *Avis* factors.

The RD did tacitly weigh the eighth *Avis* factor, the closeness of the vote, in the Employer's favor. However, once again the RD declined to accord this factor its proper weight. One vote could have altered the outcome of the election. One voter discouraged or obstructed from voting by the Union's misconduct could have changed the result. The Board has ordered a rerun in circumstances where a party's misconduct may have affected the outcome of a close election. *See Jurys Boston Hotel*, 356 NLRB 927, 928 (2011) (emphasizing misconduct could have affected election decided by one vote); *Cambridge Tool & Mfg. Co.*, 316 NLRB 716, 716 (2000) (finding that instances of objectionable conduct "could well have affected the outcome of the election" in setting aside election)⁸. Therefore, the RD should have accorded this factor special importance. Instead, she reduced the factor to an afterthought.

Of the nine *Avis* factors, the closeness of the vote must be recognized as one of the most critical. Logically, the closer the vote, the more likely that objectionable conduct affected the results of the election. Here, ten percent of the bargaining unit did not vote. Given that access to the voting room was effectively blocked by the Union's misconduct for up to ten minutes at the end of the voting period, the impact

⁸ The RD attempted to distinguish the two cited cases on the ground that the Employer allegedly failed to provide sufficient evidence that eligible voters witnessed the altercation. That contention is specious for the reasons stated earlier in this brief.

of the close vote is magnified. By merely consigning this impact to a tally mark in the Employer's column in a purely numerical analysis the RD does violence to the concept of "reasonable doubt." In truth, the closeness of the election coupled with the egregious nature of the Union's misconduct, supplies the requisite "reasonable doubt" as to the fairness of the election.

CONCLUSION

The cited *Nathan Katz* case has long been the law in this Circuit. Simply put, a party to an NLRB representation election may not station its representatives proximate to the polls while the polls remain open. Yet, that is precisely what happened in this case. The mere presence of the Union's representatives in the polling area while the polls were open should have prompted the RD and the Board to overturn and rerun the election. The Union's misconduct here was consequential. One vote could have changed the outcome of the election and five eligible voters failed to cast their ballots.

Moreover, any eligible voter who attempted to enter the polling area in the last minutes of the election would have had to pass by or through a cordon of angry men embroiled in a tense verbal confrontation. It is difficult to imagine a scenario less conducive to preserving the "laboratory conditions" requisite to a fair election.

Ultimately, employee free choice is the touchstone of the NLRB's representation election process. In this case, the RD and the Board would sacrifice the employees' expression of free choice to a "blame game." The mistake made by the RD and the Board was to focus on the question of fault. By holding the Employer partially accountable for the confrontation and thereby upholding the results of this flawed election, the RD and the Board deprive the bargaining unit employees of a

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32-1, I certify that this Opening Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this Opening Brief contains 6,657 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this Opening Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Opening Brief has been prepared using Times New Roman 14-point font, a proportionately spaced typeface.

Dated this 16th day of February, 2021.

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CERTIFICATE OF SERVICE

In addition to filing this **OPENING BRIEF** in the above captioned matter via the Court's electronic filing system, we hereby certify that copies have been served this 16th day of February 2021, by First Class Mail or email, upon:

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