UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

AMAZON.COM SERVICES LLC,	)	
	)	
Employer,	)	
	)	
And	)	Case No. 29-RC-288020
	)	
AMAZON LABOR UNION,	)	
	)	
Petitioner.	)	
	)	

AMAZON LABOR UNION'S MOTION TO DISMISS AMAZON.COM SERVICES LLC'S OBJECTIONS TO THE RESULTS OF THE ELECTION

Petitioner Amazon Labor Union submits the below Motion to Dismiss the majority of the Employer's objections to the certification of the union as the exclusive bargaining agent at Amazon's JFK8 facility. The majority of Amazon's 25 objections are defective on their face. The Regional Director should dismiss Objections 1-9, 12, 14, 15, 16, 17, 18, 20, 21, 23, 24, and 25 in order to narrow the issues for the hearing.[1]

In ruling on this motion, the Regional Director should consider the fact that the Union won the election by a margin of 523 votes and that it is well established that "in making its determination as to whether the [alleged] conduct has the tendency to interfere with employees' freedom of choice, the Board will consider, inter alia, the closeness of the election." *Cambridge Tool & Mfg. Co*., 316 NLRB 716, 716 (19950). The Regional Director should also consider the Board's admonition in *Newport News Shipbuilding & Dry Dock Co.*, 239 NLRB 82, 90 (1978), to "avoid unrealistic standards which insist on improbable purity of word and deed on the part of the

[1] The Union also requests that the Hearing Officer order Amazon to make an offer of proof on the record concerning the remaining objections, Objections 10, 11, 13, 19 and 22 before taking evidence, because the Union believes there is no evidence to support the facts alleged.

parties or Board agents. Otherwise, in any hard-fought campaign involving a large number of voters, it would be impossible to conduct an election which could not be invalidated by a party disappointed in the election results." *See also NLRB v. Herbert Halperin Distrib. Corp*., 826 F.2d 287, 290 (4th Cir. 1987) (it has long been recognized that representation elections are "heated affair[s]" and, consequently, an election will not be set aside "unless an atmosphere of fear and coercion rendered free choice impossible.")

Objections 1 and 2

Objections 1 and 2 threaten the heart of the Section 7 rights enshrined in the NLRA and the power and duty of the General Counsel to enforce those rights when she determines they were likely violated. Amazon's objections to the filing of a petition for a preliminary injunction under Section 10(j) and to the timing of processing of unfair labor practice charges cannot be a basis for a claim that the "Region failed to protect the neutrality and integrity of the Board procedures creating the impression of Board assistance to the ALU." To allow such an objection to proceed would mean every determination by the General Counsel prior to an election could be subject to a claim of bias by the disappointed party when the General Counsel was merely acting within her unreviewable discretion to enforce the NLRA.

Before even proceeding to the law, simple logic suggests that those claims are baseless. The Board sought 10(j) relief on March 17, 2022, but the court did not act on the request prior to the election and the General Counsel took no affirmative action in relation to the unspecified unfair labor practice charges prior to the election. Thus, Amazon alleges no action that in any way might have benefited the Union or influences employees to favor union representation. In fact, unsuccessfully seeking 10(j) relief and failing to issue complaints in response to unfair labor practice charges are more likely to have discouraged employees from supporting the union than

encouraged them. In respect to the petition for 10(j) relief, the Regional Director had already found merit in the charge and issued a complaint on December 22, 2020. Nothing about filing a petition for but not obtaining 10(j) relief adds to that finding of probable cause to believe Amazon violated the Act and Amazon does not and could not allege that issuance of the complaint was objectionable. There is simply no reason to believe the alleged actions or omissions had any "tendency to interfere with the employees' freedom of choice" or affected the outcome of the election. *Cambridge Tool & Mfg. Co.*, 316 NLRB 716, 716 (1995). The alleged actions or omissions simply cannot have "had a probable effect on the employee's action at the polls." *Great Atl. & Pac. Tea Co.*, 177 NLRB 942, 942-43 (1969).

In addition, in an effort to cast doubt on the integrity of the regional office, Amazon misstates the identity of the party that sought 10(j) relief. Of course, under the Act, it is the Board and not the General Counsel or "the Region" that authorizes a petition for 10(j) relief. 29 U.S.C. § 160(j). Amazon's objection concerning "the Region" is thus misplaced.

And even if there was any logic to these two objections, the law is clear that Amazon cannot challenge the General Counsel's prosecutorial decisions through an objection. Quoting the Conference Committee Report on the Taft-Hartley amendments, the Supreme Court has made clear that it is the "General Counsel of the Board ... [who] is to have the final authority to act in the name of, but independently of any direction, control, or *review* by, the Board *in respect of the investigation of charges and the issuance of complaints of unfair labor practices,* and in respect of the prosecution of such complaints before the Board." H.R.Conf.Rep. No. 510, 80th Cong., 1st Sess., 37 (1947), U.S.Code Cong.Serv.1947, p. 1135." *NLRB v. United Food and Commercial Workers Union, Local 23*, 484 U.S. 112, 124-25 (1987) (emphasis added). The Court characterized the General Counsel's authority in these respects as "unreviewable discretion" and made clear that

"'prosecutorial' determinations" are "to be made solely by the General Counsel" and "are not subject to review under the Act." *Id*. at 126, 130. Thus, the General Counsel's decisions about how quickly to investigate charges, whether to dismiss charges, and whether to recommend to the Board that it petition for 10(j) relief are not reviewable by the Board or the courts in any proceeding under the Act, including a representation proceeding in which the Board is the ultimate decision-maker. *See* 29 U.S.C. § 153(b); 29 C.F.R. § 206.69(c)(2).

Of course, there are many factors that may bear on how the General Counsel exercises her discretion in a case like this. The regional office may be busy and understaffed. Charges that appear on their face to be meritorious may be prioritized over other charges for investigation. The General Counsel may wish to wait for the record to close in an unfair labor practice proceeding or for a decision by an Administrative Law Judge before seeking authorization to pursue 10(j) relief. That complex of consideration is why Congress deliberately chose to insulate the General Counsel's decisions from review by the Board and the courts.

Finally, allowing Amazon to pursue these objections would be contrary to the fundamental policies underlying the Act and open a floodgate for objections to pour through. Unions will object that the General Counsel failed to issue a complaint or failed to issue a complaint soon enough. Employers will object that the General Counsel issued a complaint or issued it during the critical period. Unions will object that the General Counsel failed to seek 10(j) relief. Employers will object that the General Counsel sought 10(j) relief. The fundamental policy of the Act is that employees be able to exercise their Section 7 rights free of the forms of interference outlawed in Section 8. It is the General Counsel's and the Board's duty to uphold that policy using the mechanisms available under Section 10. If parties subject to unfair labor practice charges can question and investigate the General Counsel's and Board's actions under Section 10 via a

collateral attack under Section 9, the policies underlying the Act will be undermined and its enforcement crippled.

Not surprisingly, Amazon cites no precedent even remotely supporting these objections. Instead, Amazon erroneously conflates Board agents' actions in the conduct of an election, which were at issue in *Ensign Sonoma LLC*, 342 NLRB 933, 933 (2004), and *Athbro Precision Eng'g Corp.*, 166 NLRB 966, 966 (1967), with the normal actions of the General Counsel exercising her unreviewable prosecutorial discretion. Those actions taken to enforce the NLRA, are not and cannot be objectionable.

Objections 3-5

Objections 3-5 concern the Regional Director's finding that there was an adequate showing of interest for the petition to proceed. It is clearly established, however, that the adequacy of the showing of interest cannot be litigated post-election.

The Board has clearly held that the adequacy of the showing of interest is a matter for the Board alone and is not litigable by the parties. Moreover, given that the purpose of the requirement is to ensure that conducting an election is not a waste of resources, after an election is held, the adequacy of the showing of interest is irrelevant. Thus, in *Gaylord Bag Co.*, 313 NLRB 306, 306-07 (1993), the Board explained:

> The Board consistently has held that the showing of interest is a matter for administrative determination, and is not litigable by the parties. See, e.g., *Barnes Hospital*, 306 NLRB 201 fn. 2 (1992); *Globe Iron Foundry*, 112 NLRB 1200 (1955); *Potomac Electric Power Co.*, 111 NLRB 553, 554 (1955). It is exclusively within the Board's discretion to determine whether a party's showing of interest is sufficient to warrant processing a petition. *S. H. Kress & Co.*, 137 NLRB 1244, 1248 (1962). The purpose of a showing of interest is to determine whether the conduct of an election serves a useful purpose under the statute—that is, whether there is sufficient employee interest to warrant the expenditure of time, effort, and funds to conduct an election. *NLRB v. J. I. Case Co.*, 201 F.2d 597 (9th Cir. 1953); *Stockton Roofing Co.*, 304 NLRB 699 (1991), and cases cited there. Whether

> the employees desire representation is determined by the election, not by the showing of interest. *NLRB v. J. I. Case Co.*, supra.

Amazon attempts to evade this clear law by characterizing its objections to the finding that the Union satisfied the showing of interest requirement as objections to the Region failing to "protect the integrity and neutrality of its procedures and creat[ing] the impression of Board assistance and support for the ALU." Objections 3-5. But the sole result of the Board actions described by Amazon was a finding that the showing of interest requirement was satisfied. That finding is not litigable and neither are the procedural steps taken to make the finding. As early as 1946, the Board made clear that the adequacy of a showing of interest is "not subject to direct *or collateral* attack at hearings." *O.D. Jennings & Co*., 68 NLRB 516, 518 (1946).

Objections 6 and 7

Objections 6 and 7 amount to no more than *ex post facto* criticism of reasonable choices made by the Regional Director in conducting the election. Objection six states that the Regional Director did not allocate sufficient staff or voting booths for the election. Objection seven states that Board agents required employees to vote in groups by the first letter of their last names. Those allegations do not describe objectionable conduct.

Of course, regional directors have discretion to determine how elections are conducted. *v. LaRosa & Sons*, 121 NLRB 671, 673 (1958); *Independent-Rice Mill,* 111 NLRB 536, 537 (1955). That necessarily involves predictions about turnout, weather, and other contingencies. Elections are not and should not be overturned when they do not proceed exactly as planned.

Even when Board agents' conduct on an election is not "optimal," the Board will not overturn an election when a party has failed to create "reasonable doubt as to the fairness and validity of the election." *Trustees of Columbia University in the City of New Yor*k, 365 NLRB No. 136, slip op. at n.2 (2017). *See also San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998);

1621 Route 22 West Operating Co. v. NLRB, 725 F. App'x 129, 140 (3d Cir. 2018); *Garda CL Atlantic, Inc. v. NLRB*, 2018 WL 2943941 (D.C. Cir. May 22, 2018). "The objecting party's showing of prejudicial harm must be more than speculative to establish that a new election is required." *Guardsmark, LLC*, 363 NLRB No. 103, slip op. at 4 (2016).

Amazon's allegations, even if proven, do not come close to satisfying that standard in an election where the Union prevailed by 523 votes. As the Board observed in *Newport News Shipbuilding & Dry Dock Co.*, 239 NLRB 82, 89-90 (1978), "These objections illustrate the unanticipated problems which often arise in the conduct of large elections. . . . Although reasonable people can differ whether the decision of those Board agents was the best one, our task is to decide whether it amounted to an abuse of discretion. We think not."

Objection 8

Objection eight states that there was media present "in and around the voting area" and that media agents filmed employees and asked employees how they intended to vote. That is not objectionable under the high standard applicable to third party conduct.[2]

Conduct by third parties, such as the media, is only objectionable if it "creates a general atmosphere of fear and reprisal that renders a fair election impossible." *Accubuilt, Inc*. 340 NLRB 1337, 1337 (2003). *See also Millard Processing Services v. NLRB,* 2 F.3d 258, 261 (8th Cir. 1993); *Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 265-268 (D.C. Cir. 1998) (applying third-party standard to objection based on video-taping by union supporters on day of election). The Board has also specifically held that the *Milchem* rule concerning party conduct in and around the polling

[2] Amazon alleges that among the media was "a documentary film crew retained by (b) (6), (b) (7)(C)," but that is incorrect as (b) (6), (b) (7)(C) did not retain any documentary film crew. The Hearing Officer should require Amazon to make an offer of proof on that allegation. If the offer fails, Objection 24 should also be dismissed.

place does not apply to third parties. *Rheem Mfg. Co.*, 309 NLRB 459, 463 (1992) (not applying *Milchem, Inc.*, 170 NLRB 362 (1968)). *See also Yukon Mfg. Co.*, 310 NLRB 324, 330 (1993); *Crestwood Convalescent Hospital*, 316 NLRB 1057, 1057 (1995).

Amazon cannot evade that high standard by casting the objection as one against the region for permitting the third-party conduct. If the third-party conduct was not objectionable, there is no grounds for overturning the election.

Objections 9, 23, and 25

Objection 9 alleges that (b) (6), (b) (7)(C) was allowed "to loiter around the polling location and within the 'no-electioneering zone' . . . during polling times, where (b) (6), (b was able to observe who participated in the election." Objection 23 alleges that (b) (6), (b) (7)(C) posted a video to (b) (6), social media account of (b) (6), (b) (7)(C) standing outside the voting area after voting began.[3] Objection 25 alleges that ALU officials and agents and supporters loitered in the "no-electioneering zone" while polls were open. Those allegations do not describe objectionable conduct.

Amazon's suggestion that asking when employees plan to vote "gave the impression that the ALU would surveil when and if they chose to vote," does not follow logically and, even if it did, it is not objectionable for a union agent to observe the polling area—Board precedent, endorsed by the Sixth Circuit, holds that "[p]resence alone, in the absence of evidence or coercion or other objectionable conduct, is insufficient to warrant setting aside an election." *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 121 (6th Cir. 1974); *C & G Heating & Air Conditioning, Inc.*, 356 NLRB 1054, 1054 (2011) (upholding election after union representative sat in his truck and

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[3] (b) (6), (b) (7)(C) was invited to the pre-election meeting with representatives of the Employer where the Board Agents were setting up and explaining the proceedings, and (b) (6) was invited to attend the meetings each night to view the sealing of the voting boxes and sign off on them for the ALU. Those facts cannot be contested. Thus, (b) (6) was properly in the vicinity of the polls.

observed entrance to polling area for half the time polls were open); *Lowe's HIW, Inc.*, 349 NLRB 478, 478-79 (2007) (upholding election after employer's agent held the door open for voters entering the polling area for at least twenty minutes and later waited outside the office where voting was taking place). Indeed, Board regulations provide that union representatives may observe election proceedings. 29 CFR § 102.69(a)(5).

The Board has made clear that the mere presence of union representatives in the vicinity of the polling area, without more, is not objectionable. *See Station Operators*, 307 NLRB 263 (1992); *see also C & G Heating & Air Conditioning, Inc.*, 365 NLRB No. 133 (2011). Indeed, the Board has affirmed that both union and employer representatives may observe election proceedings. *See Breman Steel Co.*, 115 NLRB 247 (1956).

Objection 12

Objection 12 alleges that it was objectionable for a Board agent to advise an employee who "complained about Amazon's actions during the campaign," to "file unfair labor practice charges against Amazon with the NLRB." Amazon does not allege that the agent initiated the conversation or in any way commented on the merits of the employee's complaint. Amazon only alleges that the agent gave the employee accurate and neutral advice about how to proceed. There was no statement of opinion of any sort by the agent and thus there is no construction of the Board's standard for judging agent's statement under *Athbro Precision Engineering Corp*., 166 NLRB 966 (1967), under which the alleged conduct was objectionable. *See Ensign Sonoma LLC*, 342 NLRB 933 (2004) (holding that *Athbro* remains controlling standard and presenting various construction of that standard).

Objection 14

Objection 14 alleges that the Union promised employees that they would not be charged dues unless and until the Union secured a raise in collective bargaining. That is not a promise or grant of benefit that is objectionable. Amazon does not allege that the promise was contingent on voting yes or on joining the union prior to the election. The Board has clearly held that when a union promise to waive dues "until a contract was negotiated, "it is not unlawful or objection under the [*NLRB v.*] *Savair* [*Mfg. Co.*] decision, [414 U.S. 270 (1973)], in which the Supreme Court held prejudicial a waiver of an initiation fee conditioned on an employee's act of signing with the Union *prior to* the election." *L.D. McFarland Co.*, 219 NLRB 575, (1975), *aff'd*, 572 F.2d 256 (9th Cir. 1978). Indeed, the Court in *Savair* signaled its approval of this form of categorical waiver when it explained, the union's "... interest can be preserved . . . by waiver of initiation fees available not only to those who have signed up with the union before an election but also to those who join after the election." 414 U.S. at 274 n. 4. *See also NLRB v. River City Elevator*, 289 F.3d 1029, 1032 (7th Cir. 2002); *U-Haul of Nev. Inc. v. NLRB*, 490 F.3d 957, 961-62 (D.C. Cir. 2007).

The cases cited by Amazon are inapposite. *Aleyeska Pipeline Serv. Co.*, 261 NLRB 125 (1982), involved a promise of jobs through the union's hiring hall. *Go Ahead N. Am., LLC*, 357 NLRB 77 (2011), involved a waiver of back dues that were already due and owing. A promise not to require employees who voluntarily choose to join the union any dues until a collective bargaining agreement is reached is entirely different and expressly lawful and non-objectionable under existing Board law.

Objection 15

Objection 15 alleges that Union agents disrupted Amazon's captive audience meetings, solicited employees during the meetings, and destroyed Amazon's campaign literature. But in *Station Operators, Inc.*, 307 NLRB 263 (1992), the Board dismissed an objection based on similar

conduct when "the Petitioner's representatives' confrontations with the Employer's officials during the employee meeting occurred 2 weeks before the election, and the results of the election were not close." *Id.* at 263. Those facts are also present here and thus the objection should similarly be dismissed.

As to the allegation that Union agents destroyed Amazon's campaign literature, even if it were true, Amazon's overwhelming ability to communicate with employees during the work day and in the workplace could not possibly have been impaired by any Union destruction of Amazon's literature.

Objection 16

Objection 16 alleges that Union agents repeatedly trespassed on Amazon property, including during the critical period and, on one occasion, were arrested. But mere trespass is not coercive and is not grounds for overturning an election under all but the most extreme circumstances.

The one case cited by Amazon, *Phillips Chrysler Plymouth*, 304 NLRB 16 (1991), illustrates why the objection here is not sound. In that case, the trespass occurred on the same day as the election, only 75 minutes before voting began, and the election was decided by a single vote. None of those facts exist here. They are not alleged by Amazon and they cannot be proved by Amazon. The Board has distinguished *Phillips Chrysler* on precisely these grounds and been affirmed in the courts of appeals. *See NLRB v. Earle Industries, Inc.*, 999 F.2d 1268, 1274 (8th Cir. 1993); *Family Services Agency San Francisco v. NLRB*, 163 F.3d 1369, 1383 (D.C. Cir. 1999).

Objection 17

Objection 17 alleges that the Union polled employees, engaged in interrogation, and created the impression of surveillance. But, of course, a union is permitted to poll employees and

ask them about their support for the union, including how they plan to vote and when. *See Springfield Discount*, 195 NLR 921, *enf'd*, 82 LRRM 2173 (7th Cir. 1972); *Keeler Die Cast v. NLRB*, 185 F.3d 535, 539 (6th Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000); *Maremont Corp. v. NLRB*, 177 F.2d 573, 578 (6th Cir. 1999). Indeed, a union must poll in order to support its petition with a showing of interest.

Amazon's suggestion that asking when employees plan to vote "gave the impression that the ALU would surveil when and if they chose to vote," does not follow logically and, even if it did, it is not objectionable for a union agent to observe the polling area—the mere presence of union representatives in the vicinity of the polling area, without more, is not objectionable as explained above in relation to Objections 9, 23, and 25.

Amazon's further suggestion that asking employees to "sign a commitment that they would vote "Yes," "gave the impression that they could not change their mind," borders on the absurd in a secret ballot election. The same could be said about the cards unions are required to gather to support a showing of interest in every election conducted by the Board.

The case cited by Amazon, *Kusan Mfg. Co. v. NLRB*, 749 F.2d 362, 365 (6th Cir. 1984), actually undermines the objection. It holds, "pre-election polling by the union is not inherently coercive." *Id*. at 364. While it continues to state that "an employer may successfully challenge a representation election if he shows that pre-election polling by the union *in fact* was coercive and *in fact* influenced the result of the election," *id*. at 365, Amazon's objection does not state any facts suggesting the polling here was coercive in any way.[4]

Objections 18 and 21

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[4] At a minimum, Amazon should be required to make an offer of proof of coercive conduct by the Union specifically tied to the polling.

Objection 18 alleges that the Union made contradictory statements about its independence, made representations about support from established unions, and failed to file reports with the Department of Labor (DOL). Amazon itself characterizes this alleged conduct as "misrepresentations." Objection 21 again alleges that the Union failed to file reports with the DOL as required by the Labor Management Reporting and Disclosure Act (LMRDA).

For 40 years, however, it has been clear that campaign misrepresentations are not objectionable. *See Midland National Life Ins. Co.*, 263 NLRB 127 (1982). The only exceptions are forged documents and official Board documents that are altered to suggest the Board favors one outcome over another. Neither exception is implicated here.

Representations of support from third parties are not objectionable whether they are well founded or not. At most they are misrepresentations or mere puffery. *See Shirlington Supermarkets,* 106 NLRB 666, 667 (1953); *Smith Co*., 192 NLRB 1098, 1101-02 (1971).

Failure to file reports with the DOL, whether they are required by some other law such as the LMRDA or not, are not objectionable. The Board rejected an objection identical to that made here and was affirmed by the D.C. Circuit in *Family Services Agency San Francisco v. NLRB*, 163 F.3d 1369, 1383-84 (D.C. Cir. 1999). In that case, like here, the employer argued, "the union's refusal to file was a violation of employees' Section 7 rights to know about union finances and other matters in order to make an informed election choice." *Id*. at 1383. But the Board and Court held that the LMRDA has its own enforcement mechanisms and is enforced by the DOL not the NLRB. Id. at 1383-84. The NLRA gives the Board no authority to enforce the provisions of the LMRDA through the objection procedure. *See also Desert Palace, Inc. v. Local 711 Union of Gaming,* 194 N.L.R.B. 818, 818 n. 5 (1972) ("The NLRB is not entrusted with the administration of the [LMRDA]. An organization's possible failure to comply with that statute should be litigated

in the appropriate forum under that act, and not by the indirect and potential duplicative means of our consideration).

Objection 20

Objection 20 alleges that the Union projected messages onto the face of the facility in the 24 hours before the election and that constituted both objectionable misrepresentations and a violation of the rule against addressing massed assemblies established in *Peerless Plywood Co*., 107 NLRB 427 (1953). Both theories are baseless.

First, as we demonstrated above, misrepresentations are not objectionable.

Second, projecting images onto the facility is not a violation of the 24-hour rule established in *Peerless Plywood*. That case established a rule "that employers and unions alike will be prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election." 107 NLRB at 429. Most obviously, there was no "massed assembl[y]." Equally obviously, there was no "speech[]" to anyone massed or not.

The case cited by Amazon, *Bro-Tech Corp*., 330 NLRB 37 (1999), is not on point. It involved a union blasting pro-union messages via a sound-truck to a massed assembly, the workers inside the facility. The Board explained that the Hearing Office concluded that:

> the *Peerless* prohibition, as interpreted in *U.S. Gypsum Co*. and *O'Brien Memorial*, included within its proscription the use of sound trucks for communicating campaign speech when those communications extended through the time the election was in progress. She found that the music, unavoidably audible to employees at their work stations, constituted "speech" within the meaning of the proscription because the songs' lyrics were more than mere *exhortations* to vote, and included campaign phrases which amounted to last minute emotional appeals designed to sway voters.

Id. at 38. Thus, in *Bro-Tech*, unlike here, there was both a massed assembly and an address to that assembly. In fact, the only cases in which the Board has applied *Peerless Plywood* to union conduct

have similarly involved the use of a sound truck or loudspeaker system to reach employees assembled inside a facility. Compare *United States Gypsum Co.,* 115 NLRB 734 (1956) (setting aside the election where a union blasted campaign speeches into the employer's facility from a sound truck for more than seven hours the day before the election), and *Industrial Acoustics v. NLRB*, 912 F.2d 717 (4th Cir. 1990) (holding that the broadcast of union campaign messages from a loudspeaker within a parked car near the plant entrance violated *Peerless Plywood*), with *NLRB v. Glades Health Care Ctr.*, 257 F.3d 1317, 1320 (11th Cir. 2001) (finding no *Peerless Plywood* violation where a union held a rally across the street from the employer's facility within twenty-four hours of the election because there was no "firm purpose to use vehicles equipped with loudspeakers to intentionally broadcast campaign speeches into the employer's facility so that the employees at their work stations could not avoid hearing it").

Even when employer conduct is at issue, the Board has clearly held that "[t]he *Peerless Plywood* rule . . . does not apply to posters or other campaign literature." *Pearson Education, Inc.*, 336 NLRB 979, 0979 (2001). *See also Myrna Mills, Inc.*, 133 NLRB 1740, 1743 (1961) ("since the poster does not constitute a speech to massed assemblies of employees," *Peerless Plywood* does not apply). Indeed, in *Peerless Plywood* itself, the Board made clear that "This rule will not interfere with the rights of unions or employers to circulate campaign literature on or off the premises at any time prior to an election." 107 NLRB at 430. The projection is analogous to literature and a poster and is not analogous to an address blasted into a facility via a sound truck. It clearly falls outside the *Peerless Plywood* prohibition.

Objection 22

Objection 22 alleges that the ALU distributed marijuana to employees in return for their support in the election, constituting an impermissible grant of benefits. But this alleged

misconduct, if it occurred at all, occurred more than four months before the election and before the representation petition was filed, *i.e.*, well before the critical period, which renders this objection baseless.[5] Moreover, the Union denies that any sharing of marijuana that took place was contingent on support in the election.

"As a general rule, the period during which the Board will consider conduct as objectionable is the period between the filing of the petition and the date of the election." *Dolgencorp, LLC v. NLRB* 950 F.3d 540, 545 (8th Cir. 2020) (citing *Cedars-Sinai Med. Ct. & Cal. Nurses Assoc.*, 342 NLRB 596, 598 n. 13 (2004)). The Board "will not consider instances of prepetition conduct as a basis upon which to set aside an election," *Ashland Facility Operations, LLC v. NLRB*, 701 F.3d 983, 993 (4th Cir. 2012), citing *Dresser Indus. Inc.,* 242 NLRB 74, 74 (1979), and events occurring prior to the filing of the petition are assumed not to affect the outcome of an election. *NLRB v. Blades Mfg. Corp.*, 344 F.2d 998 (8th Cir. 1965).

Accordingly, the ban on union conferral of a tangible benefit upon employees it seeks to represent applies only during the critical period. In *Mailing Services, Inc.* 293 NLRB 565 (1989), for example, the Board explained that a union is "barred *in the critical period* . . . from conferring on potential voters a financial benefit," *id.* at 565 (emphasis added), and the D.C. Circuit emphasized in *Freund v. NLRB*, 165 F.3d 928 (D.C. Cir. 1999) that "a union may not give voters anything of tangible economic benefit *during the critical period*" because the parties involved in a representation election are "prevented from exercising certain rights during the *brief* time when their exercise might interfere with the voters' free choice." *Id*. at 931, 934 (emphasis added). *See also Stericycle, Inc.*, 357 NLRB 582, 586 (2011) (holding that a union's financing of litigation on

[5] For this reason, the Hearing Officer should require Amazon to make an offer of proof concerning when the alleged conduct took place.

behalf of employees before the critical period is not objectionable even if it may be after the filing of a petition).

Indeed, in *Werthan Packaging, Inc.* v. *NLRB* 64 Fed.Appx. 476 (6th Cir. 2003), the Sixth Circuit held that a union's provision, before the critical period, of jackets, football tickets, pizza, and beer to employees at a facility it was attempting to organize "were of not moment because they did not occur during the critical period." *Id*. at 486. In the present case, ALU's supporters' alleged sharing of small amounts of marijuana similarly took place before the critical period and is therefore not objectionable.[6]

Respectfully submitted,

JULIEN MIRER & SINGLA, PLLC

__/s/ Jeanne Mirer_____
1 Whitehall Street, 16th Floor
New York, New York 10004
(212) 231-2235
jmirer@julienmirer.com

Eric Milner
Simon & Milner
99 W. Hawthorne Ave. Suite 308
Valley Stream, NY 11580
Tel No. – (516) 561-6622
Fax No. – (516) 561-6828
E-mail - emilner@simonandmilner.com

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[6] For the reasons explained above in relation to the LMRDA, the legality of possession and use of marijuana under federal or state laws, other than then NLRA, is not relevant here despite Amazon's overheated rhetoric to the contrary.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document was electronically filed with the NLRB and was served by electronic mail this 6th day of June, 2022 to:

Cornele A. Overstreet
Regional Director Region 28
NLRB Region 28, Phoenix
2600 N Central Ave., Suite 1400
Phoenix, AZ 85004
(602) 640-2160 office
(602) 640-2178 fax
Cornele.Overstreet@nlrb.gov

Lisa J. Dunn
Attorney/Hearing Officer
NLRB Region 28, Phoenix
2600 N Central Ave., Suite 1400
Phoenix, AZ 85004
(602) 640-2160 office
(602) 640-2178 fax
lisa.dunn@nlrb.gov

Christopher J. Doyle
Supervisory Field Attorney
NLRB Region 28, Phoenix
2600 N Central Ave., Suite 1400
Phoenix, AZ 85004
(602) 640-2160 office
(602) 640-2178 fax
Christopher.doyle@nlrb.gov

Lisa Friedheim-Weis
Senior Field Attorney, Region 13
(Co-representative for Region 29 Regional Director)
NLRB Region 13, Chicago
219 South Dearborn Street
Suite 808
Chicago, IL 60634
(312) 353-7570 office
(312) 886-1341 fax
Lisa.Friedheim-Weis@nlrb.gov

Elvira Pereda
Field Attorney, Region 21
(Co-representative for Region 29 Regional Director)
NLRB Region 21, Los Angeles
312 N Spring Street
Suite 10150
Los Angeles, CA 90012-4701
United States
(213) 894-5200 office
(213) 894-2778 fax
Elvira.Pereda@nlrb.gov

Kurt Larkin
Hunton Andrews Kurth, LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
(T): 804-788-8200
(F): 804-788-8218
(E): klarkin@HuntonAK.com

Amber Rogers
Hunton Andrews Kurth, LLP
Fountain Place
1445 Ross Avenue, Suite 3700
Dallas, Texas 75202-2799
(T): 214-979-3000
(F): 214-880-0011
(E): arogers@HuntonAK.com

*/s/ Jeanne Mirer*____
Jeanne Mirer