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## United States Senate

COMMITTEE ON HEALTH, EDUCATION,  
LABOR, AND PENSIONS

WASHINGTON, DC 20510-6300

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Delivered Via E-mail

Lisa Henderson  
Regional Director, Region 10  
National Labor Relations Board  
401 West Peach St. NW, Suite 472  
Atlanta, GA 30308

Dear Ms. Henderson:

On November 29, 2021, you issued an Order mandating a re-run election on behalf of the Retail, Wholesale and Department Store Union (RWDSU) at Amazon's warehouse in Bessemer, Alabama. We write to you to express our concern with a number of contradictions and omissions within the Order.

Ordering a re-run election for improper interference is an extraordinary remedy. Circuit court precedent has held that "ballots cast under the safeguards provided by Board procedure [presumptively] reflect the true desires of the participating employees".<sup>1</sup> Given this presumption, the Board is permitted to set aside a previous election when the alleged objectionable conduct not only taints the results of the election, but also so "interfered with the necessary 'laboratory conditions' as to prevent the employees' expression of a free choice in the election."<sup>2</sup> Both Board and circuit precedent have held that the burden is not met by proof of mere misrepresentations.<sup>3</sup> After reading the Order, it is clear RWDSU failed to meet this heavy burden.<sup>4</sup>

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<sup>1</sup> Kux Mfg. Co. v. NLRB, 890 F.2d 804, 806 (6th Cir. 1989) (quoting NLRB v. Zelrich Co., 344 F.2d 1011, 1015 (5th Cir. 1965) and Harlan # 4 Coal Co. v. NLRB, 480 F.2d 117, 120 (6th Cir. 1974) (internal quotation marks omitted))

<sup>2</sup> Dairyland USA Corp., 347 NLRB 310, 313 (2006).

<sup>3</sup> NLRB v. White Knight Manufacturing Co., 474 F.2d 1064, 1067 (5th Cir. 1973).

<sup>4</sup> See Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) (Finding that whether a reviewing court "would reach the same conclusion as the Board is immaterial so long as the Board's finding is . . . supported by substantial evidence [in] the record as a whole.") (emphasis added)

The Order cites Amazon’s posting of a USPS mailbox with company insignia outside the Bessemer distribution center as evidence of improper interference. Yet, it fails to explain how a simple ballot mailbox meets the burden for such an extraordinary remedy. For example, the Order cites Atlantic Limousine Inc. as standing for the proposition that the mere posting of a mailbox was objectionable conduct intended to influence the election. However, the circumstances the Board confronted in that case dealt not with a ballot mailbox, but with a raffle. The Board found raffles imposed undue influence, in part, because they were “ announced in election propaganda exhorting the employees to vote in favor of the party sponsoring the raffle, or at the very least, linking the raffle to issues raised by that party, such as the amount of dues employees will be required to pay if they choose union representation.”<sup>5</sup> In contrast, the mailbox in question contained no specific exhortations to vote in favor or against a certain party, with the tent erected around it merely imploring employees generally to speak for themselves by mailing their ballot.<sup>6</sup> The Order then notes that the installation of the mailbox in proximity to security cameras “gave the impression of surveillance,” however, the Order goes on to dispel this argument and states “there is no evidence that employees were actively surveilled.”<sup>7</sup> The Order even cites Board precedent establishing “that it is neither unlawful nor objectionable to operate security cameras that happen to record protected activity while operating in a normal, customary manner.”<sup>8</sup>

The Order goes on to assert that Amazon’s distribution of “Vote No” paraphernalia pressured employees to make an “open and observable choice” in contravention of Section 7 of the National Labor Relations Act (NLRA). Once again, the Order fails to explain how an employer’s constitutionally protected advocacy merits such an extraordinary remedy. The paraphernalia distributed was fully in accord with Amazon’s First Amendment rights, and the notion that the exercise of such free speech constitutes implicit polling stretches credulity. Within your Order, you penalize Amazon for daring to exercise their First Amendment rights to ensure dissemination of their message to the broadest possible audience of employees, yet fail to note that RWDSU conducted a campaign that was just as comprehensive and widespread. Taken together, it is difficult to conclude that the neutral activity and advocacy conducted by Amazon rose to the level of interference and intimidation required by precedent.

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<sup>5</sup> 331 NLRB 1025, 1029 (2000).

<sup>6</sup> Order at \*5.

<sup>7</sup> Id. at \*10.

<sup>8</sup> Id. at \*9 (citing Pacific Coast Sightseeing Tours & Charters, Inc., 365 NLRB No. 131 (2017)); see also Robert Orr-Sysco Food Services, 344 NLRB 977, 978 (2001)(sustaining the union’s objection alleging improper surveillance due to the camera being “purposefully directed at protected concerted activity”, while noting “it is neither unlawful nor objectionable when a rotatable security camera, operating in its customary manner, happens to record concerted activity on videotape.”).

In addition to these contradictions and omissions, the NLRB's concern over a ballot mailbox to maximize turnout is ironic, given the zeal with which many urged mail voting in the last presidential election. Today the same people who view an unmarked mailbox with suspicion were willing to destroy the deliberative nature of the Senate to pass the Freedom to Vote Act, a bill that ironically required each voting jurisdiction to provide in-person, secured and clearly labeled ballot mailboxes for voters to return their absentee ballots in person.<sup>9</sup> One wonders why clearly labeled ballot mailboxes should be sufficient for electing our country's leaders, but are untenable for a union election.

Of the 5, 867 voters eligible to vote for unionization, only 738 saw fit to cast votes for the Union, with 1,798 casting affirmative votes against, a decisive defeat for the RWDSU by a 71% to 29% margin.<sup>10</sup> This Order indicates a troubling trend on the part of the NLRB to bend facts in favor of a union friendly result. If applied in future cases, the Order would permit unions to have multiple elections simply because employers rendered voting accessible to all employees and chose to exercise their First Amendment rights.

Given the severity of this issue, we request meaningful and forthright answers to the below questions no later than February 22, 2022.

1. At any stage in the process of RWDSU's appeal, did any individual or special interest groups, including representatives from RWDSU, contact Region 10 regarding either the pending decision of the hearing officer or the Regional Director?
2. Did any official from Region 10, at any point of the deliberative process relating to RWDSU's appeal, reach out to any special interest groups, including RWDSU, before either the hearing officer or the Regional Directorate reached a decision regarding RWDSU's petition for a re-run election?
3. The Order indicates that employers no longer have the right to distribute paraphernalia of any sort during a union election, nor to disseminate their message and advocacy to the widest possible audience of employers. Do you grasp the implications such a precedent has for the First Amendment rights of employers?
4. Throughout the election, the RWDSU had nearly unlimited prerogative to lobby and advocate for unionization in the same manner as their employer counterparts. Given the substance of your Decision and Order, why are you giving unions a prerogative employers do not have, and do you grasp the First Amendment implications of such a policy?

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<sup>9</sup> ["A Comprehensive Look at the Freedom to Vote Act."](#) Advancing Democracy Through Law. September 17, 2021.

<sup>10</sup> ["NLRB Announces Results in Amazon Election."](#) Office of Public Affairs. April 9, 2021.

Ms. Lisa Henderson

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5. In novel and unprecedented fashion, your Order also prohibits employers from conducting captive audience meetings, further curtailing their rights of free speech during an election campaign. Please explain to Congress why unions are to be accorded privileges and prerogatives that employers are to be denied.
6. Is it now the Board's position that employers can no longer surveil their own premises? Please reconcile your Decision finding against the use of an unmarked mailbox for ballot collection with Board precedent permitting employers to contain security cameras so long as union activity is not targeted for surveillance.

If you have any questions, please contact Matt Mimnaugh with the Senate Committee on Health, Education, Labor and Pensions at [matt\\_mimnaugh@help.senate.gov](mailto:matt_mimnaugh@help.senate.gov).

Thank you for your attention to this matter.

Sincerely,



Richard Burr  
Ranking Member  
Committee on Health, Education, Labor and Pensions



Tommy Tuberville  
Subcommittee on Employment and  
Workplace Safety