**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 34**

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| NEW COUNTRY AUDI, INC.<br><br>and<br><br>INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 26 | Case 34-CA-12563<br><br>DATE OF MAILING January 25, 2010 |

**AFFIDAVIT OF SERVICE OF copies of MOTION FOR SUMMARY JUDGMENT AND FOR ISSUANCE OF BOARD DECISION AND ORDER** and **MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT FOR AND ISSUANCE OF BOARD DECISION AND ORDER**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by regular mail upon the following persons, addressed to them at the following addresses:

John Vitro, General Manager
New Country Audi
181 W. Putnam Avenue
Greenwich, CT 06830

Michael R. Hekle, Esquire
Jackson Lewis LLP
One North Broadway
White Plains, NY 10801

Franklin H. Goldberger, Esquire
Jackson Lewis LLP
18 Corporate Woods Boulevard
Albany, NY 12211

James D. Smith, Grand Lodge Representative
Int'l Assoc. of Machinists & Aeorspace
Workers, AFL-CIO
Executive Plaza III
135 Merchant Street, Suite 265
Cincinnati, OH 45246

Everett Corey, Directing Business Rep.
Local Lodge 700, District Lodge 26, IAMAW
365 New Britain Road
Kensington, CT 06037

| | |
|---|---|
| Subscribed and sworn to before me this 25th day | DESIGNATED AGENT Loida Caro |
| of January, 2010 | NATIONAL LABOR RELATIONS BOARD |

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 34**

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| NEW COUNTRY AUDI, INC.<br><br>and<br><br>INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 26 | Case No. 34-CA-12563 |

**MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT FOR AND ISSUANCE OF BOARD DECISION AND ORDER**

## I. FACTS

The essential facts and supporting exhibits are described in the Motion for Summary Judgment. In its Answer, Respondent admits paragraphs 3 through 7, and 10 of the Complaint, which allege jurisdiction, employer status, supervisory and agency status, Unit appropriateness and the Union's demand for recognition. Respondent also admits the allegation of paragraph 8 of the Complaint alleging that the Union was certified as the exclusive collective bargaining representative of the Unit, but avers that (i) "the Board improperly certified the Union because it engaged in conduct that interfered with the results of the July 17, 2009 election"; and (ii) "the Board was not properly constituted under Section 3(b) of the Act, thus, the Board did not have authority to schedule and conduct the July 17, 2009 election, deny Respondent's Exceptions to the Regional Director's Report on Objections, or issue its November 18, 2009 Decision and Certification of Representative." Respondent further admits the allegations of paragraph 11 of the Complaint alleging that it has refused to recognize and bargain with

the Union as the exclusive collective-bargaining representative of the Unit, while denying that the Union is "properly certified as exclusive bargaining representative of the employees in question."

In its Answer, Respondent denies, or partially denies, the following: (i) "knowledge or information sufficient to form a belief" regarding the allegations of the filing of the charge as alleged in Complaint paragraph 1, but admits service of the charge on the date specified; (ii) that Respondent is a Connecticut corporation as alleged in Complaint paragraph 2, but admits that Respondent is a New York corporation and otherwise admits the remaining allegations contained in paragraph 2 of the Complaint; and (iii) paragraph 9 of the Complaint alleging the Union as the exclusive collective bargaining representative of the Unit, as it contends the Union has not been properly certified; and (iv) paragraphs 12 and 13 of the Complaint alleging that it has committed unfair labor practices that affect commerce by refusing to recognize and bargain with the Union.

Respondent also asserts the following Additional Defenses in is Answer, essentially repeating claims made in its responses to the allegations of the Complaint, that: (i) the Union was improperly certified because it engaged in objectionable conduct that destroyed the laboratory necessary to conduct a Board election; (ii) at all times relevant to the instant matter, the Board was not properly constituted under Section 3(b) of the Act and, thus, did not have authority to schedule or conduct the July 17, 2009, election, deny Respondent's Exceptions to the Regional Director's Report on Objections, or issue its November 18, 2009, Decision and Certification of Representative. As a further Additional Defense, Respondent averred that, even

assuming, *arguendo*, that the Board acted within its statutory authority under Section 3(b) of the Act, it clearly erred as a matter of law where the Board failed to conduct an evidentiary hearing to fully assess all relevant evidence involving the alleged objectionable conduct.

Accordingly, in the absence of any newly discovered or previously unavailable evidence or any special circumstances, the Board should find that there are no factual issues in dispute and that none of the Respondent's denials of the Complaint's allegations require a hearing.

## II. ARGUMENT

It is readily apparent from Respondent's Answer and additional defenses that it seeks to challenge the validity of the Board's certification, but in doing so, Respondent raises no material issue of fact. It is well settled that issues raised, litigated and decided in a prior representation case may not be re-litigated in a subsequent unfair labor practice case, and that the findings on those issues are binding on the parties, absent newly discovered or previously unavailable evidence, or that some special circumstances exist requiring the Board to reexamine its prior decision. See Rules and Regulations of the Board, Section 102.67(f); *Pittsburgh Plate Glass v. NLRB*, 313 U.S. 146, 162 (1941). The Board has since reiterated this policy in numerous cases. See *Biewer Wisconsin Sawmill*, 306 NLRB 732 (1992); *Terrace Gardens Plaza, Inc.*, 315 NLRB 749 (1994); and *JRED Enterprises, Inc., d/b/a Deadline Express*, 313 NLRB 1244 (1994).

In the instant case, Respondent, through its denial of certain Complaint paragraphs and its affirmative defense, clearly seeks to re-litigate the issue of whether

the Union engaged in certain objectionable pre-election conduct, which was fully resolved by the Regional Director in his Report on Objections issued on August 26, 2009, and by the Board in its Decision and Certification of Representative issued on November 18, 2009 in which it affirmed the Regional Director's findings and conclusions in his Report. Accordingly, as a matter of law, Respondent's refusal to recognize the validity of the Board's certification of the Union by failing to bargain with the Union following the issuance of the certification violates the Act. See *Terrace Gardens Plaza, Inc.*, supra; Biewar Wisconsin, supra.

With regard to Respondent's argument that the Board was not properly constituted under Section 3(b) of the Act, and thus, did not have the authority to, *inter alia*, issue the Certification of Representative, the Board already addressed matter in its Decision and Certification of Representative issuing on November 18, 2009 (see Exhibit G to the Motion for Summary Judgment). Accordingly, the issue has already been decided and is not subject to re-litigation.

## III. CONCLUSION

Based upon the facts admitted by Respondent, the record of the proceeding in Case No. 34-RC-2320, and the arguments made herein, it is submitted that Respondent has raised no issues which require an evidentiary hearing and has failed to assert any valid defense to the allegations in the Complaint. Respondent's claims regarding the Union's pre-election conduct and its Objections have been fully resolved by the Regional Director in the previous representation case. Moreover, as noted above, the two-member Board constitutes a quorum under Section 3(b) of the Act. Thus, the Employer's argument is without merit. Accordingly, it is respectfully requested that the

Motion for Summary Judgment be granted and that the Board issue a Decision and Order requiring Respondent to recognize and bargain with the Union and to post an appropriate Notice to Employees.

Dated at Hartford, Connecticut this 25th day of January, 2010.

Respectfully submitted,

Patrick E Daly (PAC)

Patrick E. Daly
Counsel for the General Counsel
National Labor Relations Board
Region 34

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 34**

| | |
|---|---|
| NEW COUNTRY AUDI, INC.<br><br>and<br><br>INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 26 | Case No. 34-CA-12563 |

**MOTION FOR SUMMARY JUDGMENT AND FOR ISSUANCE OF BOARD DECISION AND ORDER**

Counsel for the General Counsel hereby moves for Summary Judgment on the pleadings and supporting papers and for issuance of a Decision and Order by the National Labor Relations Board (herein called the Board), pursuant to Sections 102.24 and 102.50 of the Board's Rules and Regulations, and in support of the said Motion states the following:

1. On June 8, 2009, International Association of Machinists & Aerospace Workers, AFL-CIO, District Lodge 26 (herein called the Union) filed a representation petition in Case No. 34-RC-2320 (Exhibit A), seeking an election among certain employees of New Country Audi, Inc. (herein called Respondent).

2. Pursuant to a Stipulated Election Agreement approved by the Regional Director of Region 34 (herein called the Regional Director) on June 19, 2009 (Exhibit B), an election was held on July 17, 2009 among the following employees of Respondent (herein called the Unit):

All full-time and regular part-time service technicians employed by the Respondent at its Greenwich Connecticut Audi facility; but excluding all other employees, office clerical employees, and guards, professional employees, and supervisors as defined in the Act.

3. On July 17, 2009, Respondent's employees in the Unit voted in a secret ballot election under the supervision of the Regional Director. The Tally of Ballots (Exhibit C) revealed the following results:

Approximate number of eligible voters.....22
Void Ballots .....0
Votes cast for International Association of Machinists & Aerospace Workers , AFL-CIO, District Lodge 26, .....13
Votes cast against participating labor organization.....9
Valid votes counted .....22
Challenged ballots .....0
Valid votes counted plus challenged ballots .....22

Challenges are not sufficient in number to affect the results of the election.

4. On July 24, 2009, Respondent filed timely Objections to the conduct of the election and to conduct affecting the results of election (Exhibit D), and on August 26, 2009, the Regional Director issued a Report on Objections in which he recommended that the Objections be overruled in their entirety (Exhibit E).

5. On September 22, 2009, Respondent filed with the Board Exceptions to the Report (Exhibit F).

6. On November 18, 2009, the Board issued a Decision and Certification of Representative in Case No. 34-RC-2320 (Exhibit G) certifying the Union as the exclusive collective bargaining representative of the employees in the Unit.

9. On January 4, 2010, the Union filed the charge herein (Exhibit H), alleging that Respondent has violated Section 8(a)(1) and (5) of the Act by refusing to recognize

and bargain with the Union. The charge was served upon Respondent by regular mail and facsimile transmission on January 5, 2010 (Exhibit I).

10. On January 8, 2010, the Regional Director of Region 34 issued a Complaint and Notice of Hearing (Exhibit J) alleging, inter alia, that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to recognize and bargain with the Union. The Complaint and Notice of Hearing was served by certified mail upon Respondent at its business address in Greenwich, Connecticut on January 8, 2010 (Exhibit K).

11. On January 21, 2010, Respondent filed an Answer to the Complaint (Exhibit L).

12. In its Answer, Respondent admits paragraphs 3 through 7, and 10 of the Complaint, which allege jurisdiction, employer status, supervisory and agency status, Unit appropriateness and the Union's demand for recognition. Respondent also admits the allegation of paragraph 8 of the Complaint alleging that the Union was certified as the exclusive collective bargaining representative of the Unit, but avers that (i) "the Board improperly certified the Union because it engaged in conduct that interfered with the results of the July 17, 2009 election"; and (ii) "the Board was not properly constituted under Section 3(b) of the Act, thus, the Board did not have authority to schedule and conduct the July 17, 2009 election, deny Respondent's Exceptions to the Regional Director's Report on Objections, or issue its November 18, 2009 Decision and Certification of Representative." Respondent further admits the allegations of paragraph 11 of the Complaint alleging that it has refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit, while

denying that the Union is "properly certified as exclusive bargaining representative of the employees in question."

13. In its Answer, Respondent denies, or partially denies, the following: (i) "knowledge or information sufficient to form a belief" regarding the allegations of the filing of the charge as alleged in Complaint paragraph 1, but admits service of the charge on the date specified; (ii) that Respondent is a Connecticut corporation as alleged in Complaint paragraph 2, but admits that Respondent is a New York corporation and otherwise admits the remaining allegations contained in paragraph 2 of the Complaint; (iii) paragraph 9 of the Complaint alleging the Union as the exclusive collective bargaining representative of the Unit, as it contends the Union has not been properly certified; and (iv) paragraphs 12 and 13 of the Complaint alleging that it has committed unfair labor practice, that affect commerce by refusing to recognize and bargain with the Union.

14. Respondent also asserts the following Additional Defenses in is Answer, essentially repeating claims made in its responses to the allegations of the Complaint, that: (i) the Union was improperly certified because it engaged in objectionable conduct that destroyed the laboratory necessary to conduct a Board election; (ii) at all times relevant to the instant matter, the Board was not properly constituted under Section 3(b) of the Act and, thus, did not have authority to schedule or conduct the July 17, 2009, election, deny Respondent's Exceptions to the Regional Director's Report on Objections, or issue its November 18, 2009 Decision and Certification of Representative. As a further Additional Defense, Respondent averred that, even assuming, *arguendo*, that the Board acted within its statutory authority under Section

3(b) of the Act, it clearly erred as a matter of law where the Board failed to conduct an evidentiary hearing to fully assess all relevant evidence involving the alleged objectionable conduct.

15. For the reasons set forth in the attached Memorandum, and noting that the supporting papers and Respondent's Answer establish facts sufficient to conclude that Respondent has violated the Act as alleged in the Complaint and that Respondent has raised no material issue of fact requiring a hearing, Respondent has no valid defense to the Complaint.

**WHEREFORE**, Counsel for the General Counsel respectfully moves:

1. That all the allegations in the Complaint be deemed to be true and so found;

2. That the Board issue a Decision and Order finding that Respondent violated Section 8(a)(1) and (5) of the Act; and

3. That the Board grant such further relief as may be appropriate.

Dated at Hartford, Connecticut this 25th day of January, 2010.

Respectfully submitted,

Patrick E. Daly (PAC)

Patrick E. Daly
Counsel for the General Counsel
National Labor Relations Board
Region 34

FORM EXEMPT UNDER 44 U.S.C. 3512

FORM NLRB-502 (3-96)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
PETITION

| DO NOT WRITE IN THIS SPACE | |
|---|---|
| Case No. 34-RC-2320 | Date Filed 6/8/09 |

**INSTRUCTIONS: Submit an original and 4 copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located. If more space is required for any one item, attach additional sheets, numbering item accordingly.**

**The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.**

1. **PURPOSE OF THIS PETITION** *(If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.)* **(Check One)**

- [X] **RC-CERTIFICATION OF REPRESENTATIVE** - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.
- [ ] **RM-REPRESENTATION (EMPLOYER PETITION)** - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
- [ ] **RD-DECERTIFICATION (REMOVAL OF REPRESENTATIVE)** - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.
- [ ] **UD-WITHDRAWAL OF UNION SHOP AUTHORITY (REMOVAL OF OBLIGATION TO PAY DUES)** - Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.
- [ ] **UC-UNIT CLARIFICATION** - A labor organization is currently recognized by Employer, but Petitioner seeks clarification of placement of certain employees: *(Check one)* [ ] In unit not previously certified. [ ] In unit previously certified in Case No. _____
- [ ] **AC-AMENDMENT OF CERTIFICATION** - Petitioner seeks amendment of certification issued in Case No. _____ *Attach statement describing the specific amendment sought.*

| 2. Name of Employer | Employer Representative to contact | Telephone Number |
|---|---|---|
| NEW COUNTRY AUDI | JOHN VITRO, GENERAL MANAGER | 203-661-1800 |
| **3. Address(es) of Establishment(s) involved *(Street and number, city, State, ZIP code)*** | | Telecopier Number (Fax) |
| 181 W. PUTNAM AVENUE, GREENWICH, CT, 06830 | | 203-302-2053 |
| **4a. Type of Establishment *(Factory, mine, wholesaler, etc.)*** | **4b. Identify principal product or service** | |
| AUTO GARAGE | AUTO SALES, SERVICE, AND REPAIR | |

**5. Unit involved** *(In UC petition, describe present bargaining unit and attached description of proposed clarification.)*

Included: All full-time & regular part-time service technicians employed at its' Greenwich, CT. Audi facility.

Excluded: All office clerical employees, professional employees, guards & supervisors as defined by the act.

**6a. Number of Employees in Unit:**
Present 24
Proposed *(By UC/AC)*

**6b. Is this petition supported by 30% or more of the employees in the unit?*** [X] Yes [ ] No
*Not applicable in RM, UC, and AC

*(If you have checked box RC in 1 above, check and complete EITHER item 7a or 7b, whichever is applicable.)*

7a. [X] Request for recognition as Bargaining Representative was made on *(Date)* Petition serves as demand and Employer declined recognition on or about *(Date)* _____ *(If no reply received, so state.)*

7b. [ ] Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

| 8. Name of Recognized or Certified Bargaining Agent *(If none, so state.)* | Affiliation |
|---|---|
| Address, Telephone No. and Telecopier No. (Fax) | Date of Recognition or Certification |

| 9. Expiration Date of Current Contract, If any *(Month, Day, Year)* | 10. If you have checked box UD in 1 above, show here the date of execution of agreement granting union shop *(Month, Day, and Year)* |
|---|---|
| 11a. Is there now a strike or picketing at the Employer's establishment(s) involved? Yes _____ No X | 11b. If so, approximately how many employees are participating? |

11c. The Employer has been picketed by or on behalf of *(Insert Name)* _____, a labor organization, of *(Insert Address)* _____ Since *(Month, Day, Year)* _____

12. Organizations or individuals other than Petitioner *(and other than those named in items 8 and 11c)*, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in unit described in item 5 above. *(If none, so state.)*

| Name | Affiliation | Address | Date of Claim / Telecopier No. (Fax) |
|---|---|---|---|
| | | | |

| 13. Full name of party filing petition (If labor organization, give full name, including local name and number) | |
|---|---|
| INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DL 26 | |
| **14a. Address *(street and number, city, state, and ZIP code)*** | 14b. Telephone No. 513-772-9310 |
| 135 MERCHANT STREET, SUITE 265<br>CINCINNATI, OH 45246 | 14c. Telecopier No. (Fax) 513-772-8596 |

**15. Full name of national or international labor organization of which it is an affiliate or constituent unit** *(to be filled in when petition is filed by a labor organization)*
INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DL 26

**I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.**

| Name *(Print)* | Signature | Title *(If any)* |
|---|---|---|
| BRIAN BRYANT | | GRAND LODGE REPRESENTATIVE |
| **Address *(street and number, city, state, and ZIP code)*** | | Telephone No. 513-772-9310 |
| SAME AS 14(a) | | Telecopier No. (Fax) 513-772-8596 |

**WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE P NMENT (U.S. CODE, TITLE 18, SECTION 1001)**

cc Bd.

Exhibit A

FORM NLRB-652
(4-03)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

# STIPULATED ELECTION AGREEMENT

The parties agree that a hearing is waived, that approval of this Agreement constitutes withdrawal of any notice of hearing previously issued in this matter, that the petition is amended to conform to this Agreement, and further **AGREE AS FOLLOWS:**

1. **SECRET BALLOT.** A secret-ballot election shall be held under the supervision of the Regional Director in the unit defined below at the agreed time and place, under the Board's Rules and Regulations.

2. **ELIGIBLE VOTERS.** The eligible voters shall be unit employees employed during the designated payroll period for eligibility, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, employees engaged in an economic strike which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Employees who are otherwise eligible but who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are 1) employees who have quit or been discharged for cause after the designated payroll period for eligibility, 2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and 3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced. The employer shall provide to the Regional Director, within seven (7) days after the Regional Director has approved this Agreement, an election eligibility list containing the full names and addresses of all eligible voters. **Excelsior Underwear, Inc.** 156 NLRB 1236; **North Macon Health Care Facility**, 315 NLRB 359.

3. **NOTICE OF ELECTION.** Copies of the Notice of Election shall be posted by the Employer in conspicuous places and usual posting places easily accessible to the voters at least three (3) full working days prior to 12:01 a.m. of the day of the election. As soon as the election arrangements are finalized, the Employer will be informed when the Notices must be posted in order to comply with the posting requirement. Failure to post the Election Notices as required shall be grounds for setting aside the election whenever proper and timely objections are filed.

4. **ACCOMMODATIONS REQUIRED.** All parties should notify the Regional Director as soon as possible of any voters, potential voters, or other participants in this election who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603, and who in order to participate in this election need appropriate auxiliary aids, as defined in 29 C.F.R. 100.603, and request the necessary assistance.

5. **OBSERVERS.** Each party may station an equal number of authorized, nonsupervisory-employee observers at the polling places to assist in the election, to challenge the eligibility of voters, and to verify the tally.

6. **TALLY OF BALLOTS.** Upon conclusion of the election, the ballots will be counted and a tally of ballots prepared and immediately made available to the parties.

7. **POSTELECTION AND RUNOFF PROCEDURES.** All procedures after the ballots are counted shall conform with the Board's Rules and Regulations.

8. **RECORD.** The record in this case shall include this Agreement and be governed by the Board's Rules and Regulations.

Exhibit B

9. **COMMERCE.** The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act and a question affecting commerce has arisen concerning the representation of employees within the meaning of Section 9(c). *(Insert commerce facts.)*

The Employer, New Country Audi, a Connecticut corporation with an office and facility located at 181 W. Putnam Avenue, Greenwich, Connecticut, is engaged in the retail sales and service of automobiles. During the past twelve months, the Employer purchased and received at its Connecticut facility goods valued in excess of $50,000, directly from points outside the State of Connecticut.

10. **WORDING ON THE BALLOT.** When only one labor organization is on the ballot, the choice shall be "Yes" or "No". If more than one labor organization is on the ballot, the choices shall appear as follows, reading left to right or top to bottom. *(If more than one labor organization is on the ballot, any labor organization may have its name removed by the approval of the Regional Director of a timely written request.)*

**FIRST.**
**SECOND.**
**THIRD.**

**11. PAYROLL PERIOD FOR ELIGIBILITY - THE PERIOD ENDING:** June 16, 2009

**12. DATE, HOURS, AND PLACE OF ELECTION:**

| | |
|---|---|
| DATE: | Friday, July 17, 2009 |
| TIME: | 10:30 a.m. to 12:00 p.m |
| PLACE: | Employer's facility – Technicians lunchroom |

**13. THE APPROPRIATE COLLECTIVE-BARGAINING UNIT.**

All full-time and regular part-time service technicians employed by the Employer at its Greenwich, Connecticut Audi facility; but excluding all other employees, office clerical employees, and guards, professional employees and supervisors as defined in the Act.

NEW COUNTRY AUDI
(Employer)

By /s/ Franklin H. Goldberger 6/18/09
(Name) (Date)

Attorney
(Title)

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DL 26
(Labor Organization)

By /s/ Brian Bryant 6/18/09
(Name) (Date)

Grand Lodge Representative
(Title)

**Recommended:**

/s/ Douglas K. Peary 6/19/09
(Board Agent) (Date)

Date approved 6/19/09

/s/ Jonathan B. Kreisberg
Regional Director
National Labor Relations Board

Case No. 34-RC-2320

.M NLRB-760
(12-82)

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

NEW COUNTRY AUDI

Employer

and

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DL 26

Petitioner

Case No. 34-RC-2320

DATE FILED 06/08/2009

Date Issued 07/17/2009

**Type of Election:** *(Check one:)*

- [X] Stipulation
- [ ] Board Direction
- [ ] Consent Agreement
- [ ] RD Direction

Incumbent Union *(Code)*

***(If applicable check either or both:)***

- [ ] 8(b) (7)
- [ ] Mail Ballot

## TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated above, were as follows:

| | | |
|---|---|---|
| 1. | Approximate number of eligible voters | 22 |
| 2. | Number of Void ballots | 0 |
| 3. | Number of Votes cast for PETITIONER | 13 |
| 4. | Number of Votes cast for | |
| 5. | Number of Votes cast for | |
| 6. | Number of Votes cast against participating labor organization(s) | 9 |
| 7. | Number of Valid votes counted (sum of 3, 4, 5, and 6) | 22 |
| 8. | Number of Challenged ballots | 0 |
| 9. | Number of Valid votes counted plus challenged ballots (sum of 7 and 8) | 22 |

10. Challenges are (not) sufficient in number to affect the results of the election.
11. A majority of the valid votes counted plus challenged ballots (Item 9) has (has not) been cast for PETITIONER

For the Regional Director — 7/17/09

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For EMPLOYER

For PETITIONER

For

For

* U.S.G.P.O.: 1994 - 384-162

Exhibit C

**UNITED STATES OF AMERICA**
**BEFORE THE**
**NATIONAL LABOR RELATIONS BOARD**
**REGION 34**

| | | |
|---|---|---|
| **NEW COUNTRY AUDI INC.,** | : | |
| **Employer,** | : | **CASE NO.: 34-RC-2320** |
| **-and-** | : | |
| **INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DL 26,** | : | |
| **Petitioner.** | : | |

**EMPLOYER'S OBJECTIONS TO THE CONDUCT OF THE ELECTION AND TO THE CONDUCT AFFECTING THE RESULTS OF THE ELECTION**

Pursuant to Section 102.69 of the National Labor Relations Board's Rules and Regulations, as amended, New Country Audi (the "Employer") hereby objects to the conduct of the election and to conduct affecting the results of the election in the above matter for the following reasons:

1. During the critical pre-election period, Union agents, supporters or others acting in concert with them, harassed and coerced eligible voters by and through act of intimidation.

2. During the election, the Union, its agents and supporters engaged in conduct that compromised the integrity of the voting process and the requisite 'laboratory conditions.'

3. The above coercive acts and other conduct which took place during the critical pre-election and actual voting period were sufficient to affect the results of the election.

4. By the above and other conduct, Petitioner has interfered with and/or coerced eligible voters with regard to the exercise of their Section 7 rights under the National Labor Relations Act and destroyed the "laboratory conditions" necessary for the conduct of a fair election. Moreover, the campaign conducted by the Union and its supporters created a pervasive atmosphere of fear and reprisal rendering free choice impossible.

WHEREFORE, for all the foregoing and any other reasons recognized by law, the Employer respectfully requests that the Regional Director review and investigate the aforementioned conduct and set aside the results of the election or, in the alternative, order a hearing thereon.

Respectfully submitted,

JACKSON, LEWIS LLP
One North Broadway
White Plains, New York 10601
(914) 328-0404

By: _____
Franklin H. Goldberger
Michael R. Hekle

Dated: July 24, 2009
White Plains, New York

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 34**

| | |
|---|---|
| **NEW COUNTRY AUDI**<br><br>**Employer**<br><br>**and**<br><br>**INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DL 26**<br><br>**Petitioner** | Case No. 34-RC-2320<br><br>DATE OF MAILING August 26, 2009 |

**AFFIDAVIT OF SERVICE OF copies of REPORT ON OBJECTIONS**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by mail upon the following persons, addressed to them at the following addresses:

John Vitro, General Manager
New Country Audi
181 W. Putnam Avenue
Greenwich, CT 06830

Franklin H. Goldberger, Esquire
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| | |
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| Subscribed and sworn to before me this 26th day<br><br>of August, 2009 | DESIGNATED AGENT Marcelina Cabrera<br><br>NATIONAL LABOR RELATIONS BOARD |

Exhibit E

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 34**

| | |
|---|---|
| NEW COUNTRY AUDI<br><br>Employer<br><br>and<br><br>INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 26<br><br>Petitioner | Case No. 34-RC-2320 |

## REPORT ON OBJECTIONS

Pursuant to a Stipulated Election Agreement approved by the undersigned on June 19, 2009, a secret ballot election was conducted on July 17, 2009, among certain employees of the Employer.[1] The Tally of Ballots prepared after the election and served upon the parties reveals that a majority of the valid votes was cast for the Petitioner.[2] On July 24, 2009, the Employer filed timely Objections to conduct affecting the results of the election (Exhibit A), a copy of which was sent to the Petitioner.

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the undersigned issues this report.

### Objection 1

Objection 1 alleges that during the critical pre–election period, "Union agents... harassed and coerced eligible voters by and through acts of intimidation." In a subsequent letter to the Region, the Employer specified that employees "were compelled to provide private contact information due to the Union's intimidatory and improper conduct."

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[1] The unit consists of all full-time and regular part-time service technicians employed by the Employer at its Greenwich, Connecticut Audi facility; but excluding all other employees, office clerical employees, and guards, professional employees and supervisors as defined in the Act.

[2] The Petitioner received 13 of 22 votes cast.

In support of this objection, the Employer presented one employee witness who stated that, shortly after the filing of the petition on June 8, 2009, he attended a union campaign meeting at which unidentified "union representatives" spoke to employees. He states that at the outset of the meeting, he was handed a clipboard with a sign-in sheet asking for his name, address and phone number. He merely provided his name and city of residence. He relates that during the meeting the union representatives mostly talked about the Employer's anticipated response to the petition. As employees were preparing to leave, a man "from the Union" asked him for the rest of his information on the sign-in sheet. He replied that he did not give out his "personal information". The union representative said "all right" and walked away.

The employer's evidence described above does not reveal any harassment, coercion or act of intimidation by Union representatives. Accordingly, I find Objection 1 to be without merit, and recommend that it be overruled.

**Objection 2**

Objection 2 alleges that during the election, "the Union... engaged in conduct that compromised the integrity of the voting process and the requisite laboratory conditions." In subsequent letters to the Region, the Employer described the conduct at issue as involving two events. One incident pertains to an oral communication between an employee and the Union's observer in the polling area during the election. The other incident pertains to alleged statements by Union representatives at a campaign meeting to the effect that the Federal government and President Obama were pro-union and that the Union would get the full support of the Labor Board if it was voted in.

In support of the allegation concerning the incident in the polling area, the Employer presented its election observer, who states that at around 11:30 am [3] an employee "stuck his head" through the doorway, looked at the Union's observer, and said that another named employee was on his way and would come in to vote. The witness states further that the Board agent conducting the election immediately informed the employee that he couldn't talk to the observers, and instructed the Union's observer not to respond. The Board agent then shut the door. The exchange was

[3] The polling hours were from 10:30 am to noon.

estimated to have lasted only about 10 seconds. The witness adds that there were no eligible voters present in the polling area at the time other than the observers and the employee at the door, and that all the eligible voters, other than the named employee, had already voted.

The proffered testimony fails to describe conduct that would constitute interference with, or compromise the integrity of, the voting process sufficient to provide a basis for setting aside the election. In this regard, I note that the evidence does not reveal any conduct that can be attributed to the Union. The Employer's unsubstantiated contention that the conduct indicates the possibility of record keeping by the Union as to employees' participation in the election is wholly speculative. There is also no evidence of conduct that would constitute electioneering in the polling area.

In support of the allegation concerning statements by Union agents that the Federal government supported the Union, the Employer provided an employee witness who stated that during a meeting on May 6 or May 13, prior to the filing of the petition, a Union representative told employees that they would have the full support of the Board, that President Obama was very much in support of unions, and that therefore the Federal government would be supporting the Union. The conduct alleged clearly occurred prior to the filing of the petition and therefore cannot be considered as a basis for filing objections. *Ideal Electric Mfg. Co.*,134 NLRB 1275 (1961).

Accordingly, I find Objection 2 to be without merit and recommend that it be overruled.

**Objections 3 and 4**

Objection 3 alleges that "[t]he above coercive acts and other conduct which took place during the critical pre-election and actual voting period were sufficient to affect the results of the election." Objection 4 alleges that "[b]y the above and other conduct, Petitioner has interfered with and/or coerced eligible voters with regard to the exercise of their Section 7 rights under the National Labor Relations Act and destroyed the laboratory conditions necessary for the conduct of a fair election."

Thus, Objections 3 and 4 consist solely of conclusionary language and do not allege any specific conduct. Subsequent to the filing of these objections, the Employer proffered testimony from an employee witness who states that at a Union campaign meeting prior to the filing of the petition, a Union representative was asked if its representatives would be present at the facility on election day. The Union representative replied that only the government agent would be in the voting area, but that Union representatives would be in the parking lot to show support. Once again, the conduct alleged clearly occurred prior to the filing of the petition and therefore cannot be considered as a basis for filing objections. *Ideal Electric Mfg. Co.*, supra.

However, the Employer contends that the Union representative's statement, even if uttered prior to the filing of the petition, reflects an intent to violate the Board's rule in *Milchem, Inc.*, 170 NLRB 362 (1968) precluding certain types of electioneering during the hours of an election, and thus constitutes conduct occurring during the critical period.

> Section 11392.11 of the Board's Casehandling Manual provides the following:
>
> If evidence of misconduct unrelated to the timely filed objections comes to the Regional Director's attention during the investigation at the initiative of the objecting party after the time for filing objections has expired, the new evidence should not be considered as a basis for setting aside the election unless the objecting party has provided clear and convincing proof that the evidence was not only newly discovered, but also previously unavailable.

//

Although requested, no proof has been submitted by the Employer that the proffered evidence was newly discovered and previously unavailable. Moreover, the mere presence of Union representatives in the Employer's parking lot would not violate the *Milchem* rule or otherwise constitute objectionable conduct,[4] so merely telling employees in advance of the election that its representatives would be in the parking lot on the day of the election in order to support the employees is similarly unobjectionable. I also note the absence of any evidence showing that the Union engaged in any electioneering conduct during the election.

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4 *See U-Haul Co. of Nevada, Inc.*, 341 NLRB 195 (2004)

Accordingly, I find Employer Objections 3 and 4 to be without merit and recommend that they be overruled.

Having recommended that the Employer's Objections be overruled in their entirety, I further recommend that a Certification of Representative issue on behalf of the Petitioner.

## Right to file Exceptions

Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570, or electronically pursuant to the guidance that can be found under "E-gov" on the Board's web site at www.nlrb.gov. This request must be received by the Board in Washington, D.C. by September 9, 2009.

Dated at Hartford, Connecticut this 26th day of August, 2009.

Jonathan B. Kreisberg, Regional Director
National Labor Relations Board
Region 34

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**UNITED STATES OF AMERICA**
**BEFORE THE**
**NATIONAL LABOR RELATIONS BOARD**
**REGION 34**

| | | |
|---|---|---|
| **NEW COUNTRY AUDI INC.,** | : | |
| **Employer,** | : | **CASE NO.: 34-RC-2320** |
| **-and-** | : | |
| **INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DL 26,** | : | |
| **Petitioner.** | : | |

COPY

**EMPLOYER'S OBJECTIONS TO THE CONDUCT OF THE ELECTION AND TO THE CONDUCT AFFECTING THE RESULTS OF THE ELECTION**

Pursuant to Section 102.69 of the National Labor Relations Board's Rules and Regulations, as amended, New Country Audi (the "Employer") hereby objects to the conduct of the election and to conduct affecting the results of the election in the above matter for the following reasons:

//

1. During the critical pre-election period, Union agents, supporters or others acting in concert with them, harassed and coerced eligible voters by and through act of intimidation.

2. During the election, the Union, its agents and supporters engaged in conduct that compromised the integrity of the voting process and the requisite 'laboratory conditions.'

EXHIBIT A

3. The above coercive acts and other conduct which took place during the critical pre-election and actual voting period were sufficient to affect the results of the election.

4. By the above and other conduct, Petitioner has interfered with and/or coerced eligible voters with regard to the exercise of their Section 7 rights under the National Labor Relations Act and destroyed the "laboratory conditions" necessary for the conduct of a fair election. Moreover, the campaign conducted by the Union and its supporters created a pervasive atmosphere of fear and reprisal rendering free choice impossible.

WHEREFORE, for all the foregoing and any other reasons recognized by law, the Employer respectfully requests that the Regional Director review and investigate the aforementioned conduct and set aside the results of the election or, in the alternative, order a hearing thereon.

Respectfully submitted,

JACKSON, LEWIS LLP
One North Broadway
White Plains, New York 10601
(914) 328-0404

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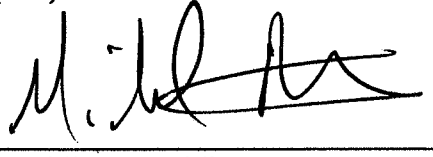
By: 

Franklin H. Goldberger
Michael R. Hekle

Dated: July 24, 2009
White Plains, New York

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

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| NEW COUNTRY AUDI INC., | : | |
| Employer, | : | CASE NO.: 34-RC-2320 |
| -and- | : | |
| INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DL 26, | : | |
| Petitioner. | : | |

# EMPLOYER'S BRIEF

Jackson Lewis, LLP
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(914) 328-0404

ATTORNEYS FOR
NEW COUNTRY AUDI INC.

Of Counsel
Franklin Goldberger
Michael R. Hekle

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

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| **NEW COUNTRY AUDI INC.,** | : | |
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| **Employer,** | : | **CASE NO.: 34-RC-2320** |
| | : | |
| **-and-** | : | |
| | : | |
| **INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DL 26,** | : | |
| | : | |
| **Petitioner.** | : | |

## BRIEF IN SUPPORT OF THE EMPLOYER'S EXCEPTIONS TO THE REGIONAL DIRECTOR'S REPORT ON OBJECTIONS

On June 8, 2009, the International Association of Machinists & Aerospace Workers, District Lodge 26, AFL-CIO (hereinafter the "Union" or "IAM") filed a petition with the National Labor Relations Board (hereinafter the "Board"), Region 34, to represent service technicians at New Country Audi, Inc. (hereinafter the "New Country" or the "Employer) in Greenwich, Connecticut.

Pursuant to a Stipulation Agreement, approved by the Regional Director on June 19, 2009, a secret ballot election in case 34-RC-2320 was scheduled for July 17, 2009 at the Employer's Greenwich, Connecticut facility.

The Stipulation Agreement indentified the following group of eligible employees:

> All full-time and regular part-time service technicians employed by the Employer at its Greenwich, Connecticut Audi facility; but excluding all other employees, office clerical employees, and guards, professional employees and supervisors as defined in the Act.

The election was conducted on July 17, 2009. The tally of ballots for the election provided the following results:

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|---|---|
| The approximate number of eligible voters | 22 |
| Votes cast for Petitioner | 13 |
| Votes cast against participating labor organization | 9 |
| Valid votes counted | 22 |
| Challenged ballots | 0 |
| Valid votes counted, plus challenged ballots | 0 |

On July 24, 2009, the Employer timely filed Objections To The Conduct Of The Election And To The Conduct Affecting The Results Of The Election. On July 31, 2009, consistent with Section 102.69 of the Board's Rules and Regulations and Acting Regional Director John Cotter's July 24 letter to New Country's counsel, the Employer filed detailed information outlining the factual basis for each of the objections. Without a hearing and opportunity to fully investigate this matter, the Regional Director issued a Report on Objections on August 26, 2009, (hereinafter the "Regional Director's Report" or the "RD Report") recommending all of the Employer's Objections be overruled and a Certification of Representation be issued.

The Employer's Exceptions to the Regional Director's recommendations includes the Board's failure to conduct a hearing in this matter to fully review and assess all of the related evidence in this matter, as well as the following incidents of objectionable conduct:

1. The Regional Director's failure to consider the Union's comments of government bias to eligible voters, in favor of the Union, created an environment rendering a free and fair election impossible;

2. The Regional Director incorrectly concluded an employee's surveillance and reporting to the Union's observer, during the polling period, did not equate to objectionable conduct; and
3. The Regional Director's finding Union representatives' threat to be stationed in the Employer's parking lot, and in full view of the voting area, throughout the course of the election period was not objectionable conduct.

## POINT I

## THE UNION'S COMMENTS OF GOVERNMENT BIAS, IN SUPPORT OF UNIONIZATION, DESTROYED THE LABORATORY CONDITIONS MANDATED UNDER THE ACT

Contrary to the Regional Director's recommendation, the Union engaged in clear objectionable conduct when it informed eligible voters at a Union meeting that the federal government, more specifically President Obama and the Labor Board, supported the IAM and unionization. In fact, as set forth in the Regional Director's own Report, the Union's representatives told eligible voters in encouragement and solicitation of their support in the then-upcoming election that:

- "They [the Union] would have the full support of the Board"
- "That President Obama was very much in support of unions"
- "...therefore, the Federal government would be supporting the Union"

It is axiomatic that "the Board's function is to provide a laboratory in which an experiment may be conducted [i.e., an election], under conditions as nearly ideal as possible to determine the uninhibited desires of the employees." General Shoe Corp., 77 NLRB 124, 127 (1948). Preventing misrepresentations is an important aspect in conducting free and fair elections. More specifically, the Board "will not countenance the use of its name in a manner which gives the impression that the Agency has granted a party to an election its imprimatur or support." GAF Corp., 234 NLRB 1209, 1213 (1978). As such, a union that solicits support in an up-coming representation election based upon government preference engages in objectionable conduct, especially if the employee has a "reasonable impression" that the NLRB is biased and

the government supports the union. See generally, Sofitel San Francisco Bay, 343 NLRB 769 (2004); Ryder Memorial Hospital, 351 NLRB 214 (2007).

Here, ***in an election won by only two votes***,[1] the Union instructed eligible voters during a captive audience speech that the Union had the "full support" of the Labor Board, President Obama supported unions and "therefore, the federal government would be supporting the Union." See Regional Director's Report on Objections, p. 3 ¶ 2. Relying incorrectly on Ideal Electric Mfg. Co., the Regional Director overruled the objection based on the objectionable comment allegedly occurring two weeks prior to the filing of the instant petition. See Regional Director's Report on Objections, p. 3 ¶ 3. However, as initially set forth in Lyon's Restaurants, the Board has deviated from the holding in Ideal Electric wherein the pre-petition objectionable conduct engaged in is both serious and permeates throughout the critical period. See Lyon's Restaurants, 234 NLRB 178, 179 (1978) (addressing the waiver of initiation fees). In Madison Square Garden and Harborside Healthcare, this important exception has been further expanded upon to include other forms of coercive conduct occurring pre-petition but with ramifications during the critical period. See Madison Square Garden, LLC, 350 NLRB 117 (2007); Harborside Healthcare, Inc., 343 NLRB 906 (2004).[2]

The Regional Director's cursory reference to (and reliance upon) Ideal Electric without any further examination of the pertinent facts or impact on the voting unit not only

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1 The objections in a close election should be more closely scrutinized. See Lake Mary Health & Rehabilitation, 345 NLRB 544 (2005).

2 Incredibly, the Region's "investigation" of this objection involved an inquiry to the Employer to address the potential impact of Columbia Tanning, 238 NLRB 899 (1978) and not Ideal Electric. Coincidentally, as set forth in the Employer's August 10, 2009 response to the Board, the Region's initial reliance on Columbia Tanning (an overruled objection based on a letter from the Massachusetts Commissioner of Labor endorsing the union involved as a "strong and honest union" is a far cry from claiming the IAM will get "***the full support of the Labor Board***." Moreover, the union held several meetings throughout the critical period with eligible voters right up to the July 17th election date. As such, repetition of union statements to the electorate attributing Board and government bias in favor of the union occurring and continuing during the critical period can only be adduced through a hearing.

supports the Employer's objection, but underscores the Regional Director's failure to call for a hearing in the instant matter. See NLRB Casehandling Manual, Sec. 11395.1 (requiring an objections hearing to resolve substantial credibility issues concerning material facts). Accordingly, the Employer objection regarding government bias should be sustained and the election set aside.

## POINT II

## THE CONDUCT OF PRO-UNION SUPPORTERS DURING THE VOTING PERIOD DESTROYED THE 'LABORATORY CONDITIONS' OF THE ELECTION AND DEMONSTRATED UNION SURVEILLANCE

The conduct of a Union supporter during the election period violated the Board's longstanding requirement of "laboratory conditions" during the critical period and, in particular, during the actual vote. Moreover, the comments recognized in the Regional Director's Report demonstrate the individuals involved were acting in the capacity of agents for the Union and were likely engaged in unlawful recordkeeping of those who participated in the election.

### A. The Union Agent's Conduct Compromised the Laboratory Conditions of the July 17 Election.

A Union agent reporting the status of potential voters to the Union's observer during the voting period and in the polling station is objectionable conduct sufficient to require a rerun election. As the Board initially held in General Shoe, NLRB elections must occur in an environment that allows for the "uninhibited desires" of the employees to occur without coercion or interference. See General Shoe Corp., 77 NLRB at 127 (1948). This premise has been the centerpiece to representational elections since the inception of the Act. Agents or representatives engage in objectionable conduct, if they communicate with and/or regarding voters at the polling station. See Parsec, Inc., 353 NLRB No. 96 (2009). However, the nature of the conversation, the location of the participants, the proximity of other potential voters, and the margin of the vote are all factors considered in determining the objectionable nature of these types of actions. See generally, Sir Frances Drake Hotel, 330 NLRB 638 (2000).

As the Regional Director's Report acknowledges, an employee entered the voting room (while the polls were still open) and through an ***open door*** reported that another employee (who was not at work that day) "was on his way and would come in to vote." See Regional Director's Report on Objections, p. 2 ¶ 4. The *Milchem Rule* prohibits conversations with voters in polling areas. See Milchem, Inc., 170 NLRB 362 (1968). Incredibly, and wholly inconsistent with Section 2 (13) of the Act, the RD Report states this objectionable conduct cannot be attributed to the Union – despite the fact the employee reporting the voter's whereabouts was speaking directly to the Union observer! Moreover, the actual conduct involved was highly prejudicial to the 'laboratory conditions' required for a representational election – this is particularly true in an election that was ultimately decided by a swing of two votes. The Regional Director's Report summarily dismiss the objection stating "[t]here is also no evidence of conduct that would constitute electioneering in the polling area." Regional Director's Report on Objections, p. 3 ¶ 2. Yet, remarkably, the RD Report fails to identify or consider whether any eligible employees may have been in the immediate vicinity of the polling station (potential on the other side of the closed in voting area) during the objectionable activity. The Union agent's conduct was tantamount to electioneering that requires voiding of the election results; however, at a minimum, the RD Report's cursory examination of this critical event further emphasizes the need for a hearing in this matter and a full review of the pertinent facts.

**B. The Union Agent's 'Recordkeeping' is Objectionable Conduct.**

The Regional Director's Report confirms an unnamed employee reported the voting status and location of an eligible voter to the Union's observer. However, the RD Report erroneously fails to determine whether a 'voting list' was maintained and, if so, who was

apprised of the list. The Board policy has long recognized and prohibited "anyone form keeping any list of persons who have voted, aside from the official eligibility list...[t]his policy was adopted in the interest of free elections and does not depend on a showing that there was actual interference with the free choice of the employees voting in the election [but rather] require[s] a showing that the employees knew that their names were being recorded." Janler Plastic Mold Corp., 208 NLRB 167, 172 (1974) (citing Piggly-Wiggly #011, 168 NLRB 792 (1967)).

Here, the Regional Director Report merely holds that "Employer's unsubstantiated contention that the conduct indicates the possibility of record keeping by the Union as to the employees' participation in the election is wholly speculative." Regional Director's Report on Objections, p. 3 ¶ 2. As such, the RD Report identifies this potentially significant objectionable conduct but fails to engage in any substantive investigation of a matter that could clearly compel the rescission of the election results.[3] See NLRB Casehandling Manual, Sec. 11395.11 (citing White Plains Lincoln Mercury, 288 NLRB 1133 (1988) (holding that if a Regional Director receives or discovers evidence during the investigation that shows the election has been tainted, they should not ignore such conduct even if it was not specifically alleged)). Clearly, the Union agent/employee was maintaining some sort of accounting to determine who had/had not voted based on his comments to the Union observer during the polling period. Moreover, the Union agent's knowledge of the voter's whereabouts and the fact he was coming into work to vote strongly implies the Union agent had a conversation with the voter about his voting status and potentially other employees' status.

Therefore, the Employer's Objection regarding potential 'recordkeeping' of voters is appropriate for a hearing and should be further investigated.

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3 It should be further noted, the Employer's ability to secure all relevant information related to this highly probable objectionable conduct is significantly limited without the use of a hearing and subpoenaed witnesses.

## POINT III

## THE UNION'S COMMENTS TO EMPLOYEES REGARDING THEIR LOCATION DURING THE ELECTION PERIOD CREATED THE IMPRESSION OF SURVEILLANCE

Where a party to a representational election creates the impression of surveillance upon members of the eligible voting unit the election results must be invalidated and a rerun election order. The Union's comment to eligible voters prior to the election that "Union representatives would be in the parking lot [during the voting period]" is undeniably objectionable conduct that requires a second election be conducted. It is well recognized that union or management representatives who are in close proximity to the entrance of the voting area, without valid explanation, are engaged in objectionable surveillance. See Performance Measurements Co., 148 NLRB 1657 (1964); Electric Hose & Rubber Co., 262 NLRB 186 (1982).

In the instant matter, Union representatives informed a number of eligible voters during a union meeting that they would be in the employer's parking lot during the polling period. While the comment alone creates the impression of surveillance, it is further exacerbated by the fact that an employee, acting as an agent for the Union, was potentially maintaining a list and disseminated information regarding who had voted in the election. See *supra*. Equally important, the Regional Director's investigation is severely lacking on this critical objection. For instance, the RD Report cites U-Haul Co. of Nevada for the proposition that "the mere presence of Union representatives in the Employer's parking lot would not violate the *Milchem Rule* or otherwise constitute objectionable conduct." Regional Director's Report on Objections, p. 4 ¶ 4.

However, in U-Haul Co., the employees' work areas and polling location were not readily visible to the union representative sitting in the company parking lot. See U-Haul Co. of Nevada, 341 NLRB 195 (2004). An assessment of the specific location of the employees' work areas, the polling area and location of the agent engaged in surveillance are critical to determining whether surveillance occurred. See McIndustries, Inc. 224 NLRB 1298, 1303 (1976) ("In order to fairly assess the question of surveillance it is necessary to consider the physical layout of the plant and the area of the plant where the voting took place."). A vital exercise that did not occur in the Regional Director's investigation. This is particularly significant here, where nineteen (19) of the twenty-two (22) eligible voters were required to walk across the parking lot to the polling station located in a separate building detached from New Country's primary service shop. Therefore, the Employer's Objection regarding the impression of surveillance should be upheld; or, at a minimum, a hearing should be conducted to provide for a full review of the applicable evidence.

**A. The Regional Director Improperly Dismissed Employer's Surveillance Objection Based on the Specificity of the Objection and Timing of the Conduct.**

The Regional Director's Report improperly dismisses the Employer's surveillance objection for purportedly failing to provide sufficient specificity and claiming the conduct in question allegedly occurred pre-petition. However, as detailed above and further explained below, the Employer's Objections provided the requisite specificity to initiate the investigation and was supplemented upon the Employer's ***learning of new facts***. Additionally, even assuming *arguendo*, that the Union threat of surveillance occurred pre-petition, the unlawful act threatened to occur on election day.[4]

4 The Employer adamantly contends that pre-petition conduct that continues to have a coercive affect on

1. **The Regional Director's Report erroneously claims the Employer failed to provide proof of newly discovered evidence.**

The Regional Director's Report erroneously claims that no proof was submitted by the Employer, despite being requested, that the proffered evidence was newly discovered and previously unavailable. This assertion by the Regional Director wholly ignores the sequence of communications between the Board and the Employer. More specifically, the Board's August 6, 2009 letter to Employer's counsel specifically raises the concern, under NLRB Casehandling Manual Section 11392.11, that evidence in support of the Employer's ***government bias objection*** (not its election surveillance objection) does not relate to an objection previously alleged by Employer. To this point, the Employer's August 10, 2009 letter to the Board provided a detailed response to the inquiry and explained the prior unavailability of the eyewitness to that objectionable conduct. For the Regional Director's Report to now claim the Employer failed to provide evidence to the instant objection, regarding the Union's impression of surveillance, based on the Board's prior request is simply untrue.

Additionally, the mere fact the Board discovers and/or is presented with evidence of objectionable conduct subsequent to a party's objection does absolve the Board from fully investigating the potential improper conduct. In American Safety Equipment, the Board held "the Regional Director is not required to, nor can he properly ignore evidence relevant to the conduct of the election...simply because the Union may not have specifically mentioned such conduct in its objections." American Safety Equipment., 234 NLRB 501 (1978). Therefore, while it is in the Regional Director's discretion to conduct and consider information during an objections investigation, "***...if he receives or discovers evidence during his investigation that***

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eligible voters during the critical period is objectionable conduct and, therefore, is not foreclosed by Ideal Electric. See Cedars-Sinai Medical Ctr., 342 NLRB 596 (2004); see also, Point I.

***shows that the election has been tainted, he has no discretion to ignore such evidence and it is reversible error if he fails to set aside the election."*** Id. In American Safety Equipment, the Regional Director received information regarding an unlawful employer handbook policy that was not specifically pled in the Union's objections. The Board found the Regional Director's consideration of the information not only permissible but necessary as a fundamental principal of the election process by stating "***Were we to close our eyes to objectionable conduct merely because a party has failed to frame its objections properly to include such conduct, we would make a mockery of our pledge to preserve employee rights to a fair election.***" Id., at 502. See also White Plains Lincoln Mercury, 288 NLRB 1133 (1988).

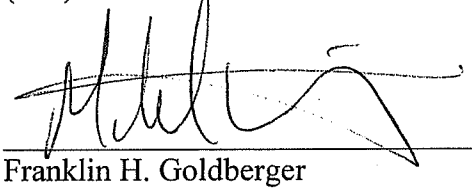
For the foregoing reasons, the Employer's Objection regarding the Union's impression of surveillance during the voting period should be sustained and the election set aside.

## CONCLUSION

For all the reasons stated above, the Employer's Objections 2, 3 and 4 should be sustained and a new election ordered. Alternatively, at a minimum, a hearing should be ordered to allow for a full examination of all facts relevant to the instant Objections.

Respectfully submitted,

JACKSON, LEWIS LLP
One North Broadway
White Plains, New York 10601
(914) 328-0404

By: 

Franklin H. Goldberger
Michael R. Hekle

Dated: September 22, 2009
White Plains, New York

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

| | | |
|---|---|---|
| **NEW COUNTRY AUDI INC.,** | : | |
| **Employer,** | : | **CASE NO.: 34-RC-2320** |
| **-and-** | : | |
| **INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DL 26,** | : | |
| **Petitioner.** | : | |

## CERTIFICATE OF SERVICE

The undersigned herby certifies that copies of the Employer's Brief In Support Of The Employer's Exceptions To The Regional Director's Report On Objections were served this day, via Federal Express, on the parties named below:

Jonathan Kreisberg
Regional Director
National Labor Relations Board – Region 34
280 Trumbull Street, 21st Floor
Hartford, Connecticut 06103-3503

James Smith
Grand Lodge Representative
International Assoc. of Machinist & Aerospace Workers,
District Lodge 26
Executive Plaza III
135 Merchant Street, Suite 265
Cincinnati, Ohio 45246

Michael R. Hekle

Dated: September 22, 2009
White Plains, New York

NOT TO BE INCLUDED
IN BOUND VOLUMES

LS
Greenwich, CT

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW COUNTRY AUDI INC.

Employer

and

Case 34-RC-2320

INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS,
AFL-CIO, DISTRICT LODGE 26

Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board[1] has considered objections to an election held on July 17, 2009, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. September 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. *granted*, __ S.Ct. __ , 2009 WL 1468482 (U.S. Nov. 2, 2009); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. August 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed, __U.S.L.W.__ (U.S. September 29, 2009)(No. 09-377).

Exhibit G

Agreement. The tally of ballots shows 13 for and 9 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the Regional Director's findings and recommendations,[2] and finds that a certification of representative should be issued.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for International Association of Machinists & Aerospace Workers, AFL-CIO, District Lodge 26, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time service technicians employed by the Employer at its Greenwich, Connecticut Audi facility; but excluding all other employees, office clerical employees, and guards, professional employees and supervisors as defined in the Act.

Dated, November 18, 2009, Washington, D.C.

//

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[2] In the absence of exceptions, we adopt pro forma the Regional Director's recommendation to overrule the Employer's Objection 1.

RECEIVED
NLRB, REGION 34
HARTFORD, CONNECTICUT
2009 NOV 23 AM 9:28

FORM EXEMPT UNDER 44 U.S.C. 3512

FORM NLRB-501
(11-94)

**UNITED STATES OF AMERICA**
**NATIONAL LABOR RELATIONS BOARD**
**CHARGE AGAINST EMPLOYER**

| DO NOT WRITE IN THIS SPACE | |
|---|---|
| Case | Date Filed |
| 34-CA-12563 | 1/4/10 |

**INSTRUCTIONS:**
File an original and 4 copies of this charge with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

**1. EMPLOYER AGAINST WHO CHARGE IS BROUGHT**

| a. Name of Employer | b. Number of Workers Employed | |
|---|---|---|
| NEW COUNTRY AUDI | 22 | |
| c. Address *(street, city, State, ZIP, Code)* | d. Employer Representative | e. Tel No. 203-661-1800 |
| 181 W. PUTNAM AVENUE<br>GREENWICH, CT 06830 | MR. JOHN VITRO,<br>GENERAL MANAGER | Fax No. 203-302-2053 |
| f. Type of Establishment *(factory, mine, wholesaler, etc.)* | g. Identify Principal Product or Service | |
| AUTO GARAGE | AUTO SALES, SERVICE AND REPAIR | |

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a), subsections (1) and (list subsections) ( 5 ) of the National Labor Relations Act, and these unfair labor practices are unfair practices affecting commerce within the meaning of the Act.

**Since on or about January 2010 and at all times thereafter, the Employer, by its officers, agents and representatives, has refused to bargain in good faith with the International Association of Machinists and Aerospace Workers, AFL-CIO, a labor organization chosen by a majority of its employees in an appropriate unit, for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.**

**Specifically, the Employer refuses to bargain with the certified bargaining unit.**

3. Full name of party filing charge *(If labor organization, give full name, including local name and number)*
INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL/CIO, DISTRICT LODGE 26

| 4a. Address *(street and number, city, State, and ZIP Code)* | 4b. Telephone No. |
|---|---|
| Executive Plaza III, 135 Merchant Street, Suite 265<br>Cincinnati, Ohio 45246 | 513-772-9310<br>Fax No. 513-772-8596 |

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filed when charge is filed by labor organization)* International Association of Machinists and Aerospace Workers, AFL-CIO

**6. DECLARATION**
I declare that I have read the above charge and that the statements are true to the best of my knowledge or belief.

By JAMES D. SMITH — Grand Lodge Representative
*(Signature of representative or person making charge)* — *(Title, if any)*

Address Same as 4(a)

(513) 772-9310 — 01/04/2010
*(Telephone No.)* — *Date*

**Willful False Statements On This Charge Can Be Punished By Fine and imprisonment (U.S. CODE, TITLE 18, SECTION 1001)**

cc Bd.

Exhibit H

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 34**

| | |
|---|---|
| **NEW COUNTRY AUDI**<br><br>**and**<br><br>**INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 26** | **Case 34-CA-12563**<br><br>DATE OF MAILING January 5, 2010 |

**AFFIDAVIT OF SERVICE OF a copy of DOCKET LETTER AND CHARGE FILED**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by facsimile transmission and regular mail upon the following persons, addressed to them at the following addresses:

John Vitro, General Manager
New Country Audi
181 W. Putnam Avenue
Greenwich, CT 06830

Michael R. Hekle, Esq.
Jackson Lewis LLP
One North Broadway
White Plains, NY 10801

Franklin H. Goldberger, Esq.
Jackson Lewis LLP
18 Corporate Woods Boulevard
Albany, NY 12211

| | |
|---|---|
| Subscribed and sworn to before me this 5th day<br><br>of January, 2010 | DESIGNATED AGENT Loida Caro<br><br>NATIONAL LABOR RELATIONS BOARD |

Exhibit I

********** -COMM. NAL- ********** DATE JAN-05-201 *** TIME 12:33 *** P.01

MODE = MEMORY TRANSMISSION START=JAN-05 12:09 END=JAN-05 12:33

FILE NO.= 152

| STN NO. | COM | ABBR NO. | STATION NAME/TEL.NO. | PAGES | DURATION |
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| 002 | OK | & | 815184275956 | 004/004 | 00:01'51" |
| 003 | STOP | & | 819173281882 | 000/004 | 00:00'00" |

-NLRB REGION 34 -

********** -KITT - ***** - ++++- **********

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 34**

**NEW COUNTRY AUDI**

**and**

**INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 26**

**Case 34-CA-12563**

DATE OF MAILING January 5, 2010

**AFFIDAVIT OF SERVICE OF a copy of DOCKET LETTER AND CHARGE FILED**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by facsimile transmission and regular mail upon the following persons, addressed to them at the following addresses:

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New Country Audi
181 W. Putnam Avenue
Greenwich, CT 06830

Michael R. Hekle, Esq.
Jackson Lewis LLP
One North Broadway
White Plains, NY 10801

Franklin H. Goldberger, Esq.
Jackson Lewis LLP
18 Corporate Woods Boulevard
Albany, NY 12211

Subscribed and sworn to before me this 5th day of January, 2010

DESIGNATED AGENT Loida Caro

Loida Caro

NATIONAL LABOR RELATIONS BOARD

MODE = MEMORY TRANSMISSION START=JAN-05 12:40 END=JAN-05 12:42

FILE NO.= 154

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|---|---|---|---|---|---|
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-NLRB REGION 34 -

********** -KITT - ***** - ++++- **********

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 34**

**NEW COUNTRY AUDI**

**and**

**INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 26**

**Case 34-CA-12563**

DATE OF MAILING January 5, 2010

**AFFIDAVIT OF SERVICE OF a copy of DOCKET LETTER AND CHARGE FILED**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by facsimile transmission and regular mail upon the following persons, addressed to them at the following addresses:

John Vitro, General Manager
New Country Audi
181 W. Putnam Avenue
Greenwich, CT 06830

Michael R. Hekle, Esq.
Jackson Lewis LLP
One North Broadway
White Plains, NY 10801

Franklin H. Goldberger, Esq.
Jackson Lewis LLP
18 Corporate Woods Boulevard
Albany, NY 12211

| | |
|---|---|
| Subscribed and sworn to before me this 5th day of January, 2010 | DESIGNATED AGENT Loida Caro<br>Loida Caro<br>NATIONAL LABOR RELATIONS BOARD |

FORM EXEMPT UNDER 44 U.S.C. 3512

FORM NLRB-501
(11-94)

**UNITED STATES OF AMERICA**
**NATIONAL LABOR RELATIONS BOARD**
**CHARGE AGAINST EMPLOYER**

| DO NOT WRITE IN THIS SPACE | |
|---|---|
| Case | Date Filed |
| 34-CA-12563 | 1/4/10 |

INSTRUCTIONS:
File an original and 4 copies of this charge with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

**1. EMPLOYER AGAINST WHO CHARGE IS BROUGHT**

| a. Name of Employer | b. Number of Workers Employed | |
|---|---|---|
| NEW COUNTRY AUDI | 22 | |
| c. Address *(street, city, State, ZIP, Code)* | d. Employer Representative | e. Tel No. 203-661-1800 |
| 181 W. PUTNAM AVENUE<br>GREENWICH, CT 06830 | MR. JOHN VITRO,<br>GENERAL MANAGER | Fax No. 203-302-2053 |
| f. Type of Establishment *( factory, mine, wholesaler, etc.)* | g. Identify Principal Product or Service | |
| AUTO GARAGE | AUTO SALES, SERVICE AND REPAIR | |

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a), subsections (1) and (list subsections) ( 5 ), of the National Labor Relations Act, and these unfair labor practices are unfair practices affecting commerce within the meaning of the Act.

**Since on or about January 2010 and at all times thereafter, the Employer, by its officers, agents and representatives, has refused to bargain in good faith with the International Association of Machinists and Aerospace Workers, AFL-CIO, a labor organization chosen by a majority of its employees in an appropriate unit, for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.**

**Specifically, the Employer refuses to bargain with the certified bargaining unit.**

3. Full name of party filing charge *(If labor organization, give full name, including local name and number)*
INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL/CIO, DISTRICT LODGE 26

| 4a. Address *(street and number, city, State, and ZIP Code)* | 4b. Telephone No. |
|---|---|
| Executive Plaza III, 135 Merchant Street, Suite 265<br>Cincinnati, Ohio 45246 | 513-772-9310<br>Fax No. 513-772-8596 |

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filed when charge is filed by labor organization)* International Association of Machinists and Aerospace Workers, AFL-CIO

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge or belief.

By _____ JAMES D. SMITH
*(Signature of representative or person making charge)*

Grand Lodge Representative
*(Title, if any)*

Address Same as 4(a)

(513) 772-9310 01/04/2010
*(Telephone No.)* *Date*

Willful False Statements On This Charge Can Be Punished By Fine and Imprisonment (U.S. CODE, TITLE 18, SECTION 1001)

cc Bd.

United States Government
**NATIONAL LABOR RELATIONS BOARD**
Region 34
280 Trumbull Street, 21st Floor
Hartford, CT 06103-3503

Telephone (860) 240-3522
Fax (860) 240-3564
**www.nlrb.gov**

January 5, 2010

Via Facsimile Transmission
and Regular Mail

John Vitro, General Manager
New Country Audi
181 W. Putnam Avenue
Greenwich, CT 06830

Re: New Country Audi
Case 34-CA-12563

Dear Mr. Vitro:

A charge has been filed with this office alleging that you have been engaged in unfair labor practices within the meaning of the National Labor Relations Act, as amended. A copy of the charge is herewith served upon you. Enclosed is a copy of Form NLRB-4541, pertaining to our investigative and voluntary adjustment procedures and Form NLRB-5081, a commerce questionnaire that you should complete and return to this office as soon as possible.

**FILING DOCUMENTS WITH REGIONAL OFFICES: The Agency is moving toward a fully electronic records system. To facilitate this important initiative, the Agency strongly urges all parties to submit documents and other materials (except unfair labor practice charges and representation petitions) to Regional Offices through the Agency's E-Filing system on its website: http://www.nlrb.gov (See Attachment to this letter for instructions). Of course, the Agency will continue to accept timely filed paper documents.**

Attention is called to your right, and the right of any party, to be represented by counsel or other representative in any proceeding before the National Labor Relations Board. See Form NLRB-4701.

All communications and submissions should be made to Board Agent Patrick E. Daly (Patrick.Daly@nlrb.gov), Telephone No.(860)240-3527, to whom this case has been assigned for investigation. Your full and complete cooperation with this office is requested so that all relevant facts and positions may be considered. Accordingly, we would appreciate your prompt submission of a detailed written account of the facts and a statement of your position with respect to the allegations in the charge. The Board agent

assigned to this case will contact you shortly to arrange for a personal meeting with you and your witnesses. We anticipate that such a meeting will be held during the week commencing January 19, 2010. Full and complete cooperation includes, where appropriate, timely providing to the Board agent all requested documentary evidence and all material witnesses under your control, so that their statements can be reduced to affidavit form. Failure or refusal to cooperate fully and completely during the investigation might cause a case to be litigated unnecessarily. In this regard, please note that the submission of a position letter, unaccompanied by affidavits taken by a Board agent, although helpful and appreciated, may not constitute full and complete cooperation. Further, please be advised that we cannot accept any limitations on the use of any evidence or position statements that are provided to the Agency. Thus, any claim of confidentiality cannot be granted except as provided by Exemption 4 of the Freedom of Information Act, and any material submitted may be introduced as evidence at any formal proceeding. Moreover, we are required by the Federal Records Act to keep copies of documents used in furtherance of our investigation for a specified period after a case closes. Accordingly, any request to place limitations on our use of position statements or evidence beyond those prescribed by the law, regulation and policy, will not be honored.

All parties are encouraged to submit letters, position statements, and documentary evidence in electronic form. A list of all documents that may be filed electronically can be found on the Agency's website at www.nlrb.gov by clicking on E-gov, then E-file, then "File Documents" under Regional Offices.

Finally, please be advised that under the Freedom of Information Act, unfair labor practice charges and representation petitions are subject to prompt disclosure to members of the public upon request. In this regard, you may have received a solicitation by organizations or persons who have obtained public information concerning this matter and who seek to represent you before our Agency. You may be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the National Labor Relations Board; their information regarding this matter is only that which must be made available to any member of the public.

Very truly yours,

*Jonathan B. Kreisberg*

Jonathan B. Kreisberg
Regional Director

JBK:lc

Enclosures: Charge and Forms NLRB-4541 and 5081

cc: Michael R. Hekle, Esq.
Franklin H. Goldberger, Esq.

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 34**

| | |
|---|---|
| NEW COUNTRY AUDI, INC.<br><br>and<br><br>INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 26 | Case No. 34-CA-12563 |

## COMPLAINT AND NOTICE OF HEARING

International Association of Machinists & Aerospace Workers, AFL-CIO, District Lodge 26, herein called the Union, has charged that New Country Audi, Inc., herein called Respondent, has been engaging in unfair labor practices as set forth in the National Labor Relations Act, 29 U.S.C Sec. 151, et seq., herein called the Act. Based thereon, the General Counsel, by the undersigned, pursuant to Section 10(b) of the Act and Section 102.15 of the Rules and Regulations of the National Labor Relations Board, herein called the Board, issues this Complaint and Notice of Hearing and alleges as follows:

1. The charge in this proceeding was filed by the Union on January 4, 2010, and a copy was served on Respondent by facsimile transmission and regular mail on January 5, 2010.

2. At all material times, Respondent, a Connecticut corporation with a facility located in Greenwich, Connecticut, herein called the Greenwich facility, has been engaged in the retail sale and service of automobiles.

3(a). During the 12-month period ending December 31, 2009, Respondent, in conducting its business operations described above in paragraph 2, has derived gross revenues in excess of $500,000.

(b). During the 12-month period ending December 31, 2009, Respondent, in conducting its business operations described above in paragraph 2, purchased and

received at the Greenwich facility goods valued in excess of $50,000 directly from points outside the State of Connecticut.

4. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

5. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

6. At all material times, John Vitro has been Respondent's General Manager, and has been a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

7. The following employees of Respondent, herein called the Unit, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time service technicians employed by the Respondent at its Greenwich Connecticut Audi facility; but excluding all other employees, office clerical employees, and guards, professional employees, and supervisors as defined in the Act.

8. On November 18, 2009, the Union was certified as the exclusive collective-bargaining representative of the Unit.

9. At all times since November 18, 2009, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

10. By letter dated December 14, 2009, attached hereto as Exhibit A, the Union requested that Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit.

11. By letter dated December 24, 2009, attached hereto as Exhibit B, Respondent refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

12. By the conduct described above in paragraph 11, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

13. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

## ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before January 22, 2010, or postmarked on or before January 21, 2010**. Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically by using the E-Filing system on the Agency's website. In order to file an answer electronically, access the Agency's website at http://www.nlrb.gov, click on **E-Gov**, then click on the **E-Filing** link on the pull-down menu. Click on the "File Documents" button under "Regional, Subregional and Resident Offices" and then follow the directions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. A failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Sections 102.21. If an answer being filed electronically is a **pdf** document containing the required signature, no paper copies of the answer needs to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a **pdf** file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

## NOTICE OF HEARING

**PLEASE TAKE NOTICE THAT** commencing on a date and time to be determined, and on consecutive days thereafter, a hearing will be conducted at 280 Trumbull Street, 21st Floor, Hartford, Connecticut, before an administrative law judge of the Board on the allegations in this complaint. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated at Hartford, Connecticut this 8th day of January, 2010.

Jonathan B. Kreisberg, Regional Director
National Labor Relations Board
Region 34
Hartford, Connecticut

Attachments

# DISTRICT LODGE 26

*International Association of Machinists and Aerospace Workers, AFL-CIO*

**365 New Britain Road, Kensington, Connecticut 06037 / Telephone (660) 828-0359 / Fax (860) 828-9542**

762 Atwood Avenue, Cranston, Rhode Island 02920 / Telephone (401) 943-8331 / Fax (401) 943-9867


Certified Mail -Return Receipt Requested 7009-2820-0003-6225-1140
December 14, 2009

Mr. John Vitro
General Manager
New Country Audi
181 West Putnam Avenue
Greenwich, CT 06830

Dear Mr. Vitro:

For the purpose of negotiating a Collective Bargaining Agreement between the I.A.M. represented employees of New Country Audi and District Lodge 26, please call me so that we can set up mutually agreed to dates, times and meeting places for negotiations. I look forward to working with you and the Company's Negotiating Committee to achieve a mutually successful agreement.

If you have any questions, please feel free to call me.

Sincerely,

Everett Corey
Directing Business Representative

EC/am

EXHIBIT A




01/06/2010 12:40 8608289542 DISTRICT:26 PAGE 02

Representing Management Exclusively in Workplace Law and Related Litigation

jackson | lewis
Attorneys at Law

Jackson Lewis LLP
18 Corporate Woods Boulevard
Third Floor
Albany, New York 12211
Tel 518 434-1300
Fax 518 427-5956
www.jacksonlewis.com

| | | |
|---|---|---|
| ALBANY, NY | JACKSONVILLE, FL | PHOENIX, AZ |
| ALBUQUERQUE, NM | LAS VEGAS, NV | PITTSBURGH, PA |
| ATLANTA, GA | LONG ISLAND, NY | PORTLAND, OR |
| BIRMINGHAM, AL | LOS ANGELES, CA | PORTSMOUTH, NH |
| BOSTON, MA | MEMPHIS, TN | PROVIDENCE, RI |
| CHICAGO, IL | MIAMI, FL | RALEIGH-DURHAM, NC |
| CLEVELAND, OH | MINNEAPOLIS, MN | RICHMOND, VA |
| DALLAS, TX | MORRISTOWN, NJ | SACRAMENTO, CA |
| DENVER, CO | NEW ORLEANS, LA | SAN FRANCISCO, CA |
| DETROIT, MI | NEW YORK, NY | SEATTLE, WA |
| GREENVILLE, SC | ORANGE COUNTY, CA | STAMFORD, CT |
| HARTFORD, CT | ORLANDO, FL | WASHINGTON, DC REGION |
| HOUSTON, TX | PHILADELPHIA, PA | WHITE PLAINS, NY |

MY DIRECT DIAL IS: 914-514-6151
MY EMAIL ADDRESS IS: GOLDBERF@JACKSONLEWIS.COM

December 24, 2009

**VIA CERTIFIED MAIL**
**RETURN RECEIPT REQUESTED**

Everett Corey
Directing Business Representative
District Lodge 26
International Association of Machinists
365 New Britain Road
Kensington, CT 06037

Re: New Country Audi

Dear Mr. Corey:

Your December 14th, 2009, letter to John Vitro has been referred to this office for reply.

Please be advised that the Employer contends that the NLRB Regional Office erred in not granting New Country a hearing on its election objections, and further, that the certification issued on November 18th, 2009, by a two member panel of the National Labor Relations Board, was not only erroneous on the facts and the law, but also constituted an improper delegation of authority and was therefore without legal effect.

Accordingly, New Country is unwilling to bargain with your union unless, and until, we are directed to do so following judicial review of the propriety of the certification.

Very truly yours,
JACKSON LEWIS LLP

Franklin H. Goldberger

FHG/deo

EXHIBIT B

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 34**

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| NEW COUNTRY AUDI<br><br>and<br><br>INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 26 | Case 34-CA-12563<br><br>DATE OF MAILING January 8, 2010 |

**AFFIDAVIT OF SERVICE OF copies of COMPLAINT AND NOTICE OF HEARING with NLRB Forms 4338 and 4668 attached**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by certified and regular mail upon the following persons, addressed to them at the following addresses:

John Vitro, General Manager
New Country Audi
181 W. Putnam Avenue
Greenwich, CT 06830
Certified No. 7005 0390 0006 0087 6832

James D. Smith, Grand Lodge Representative
Int'l Assoc. of Machinists & Aeorspace
Workers, AFL-CIO
Executive Plaza III
135 Merchant Street, Suite 265
Cincinnati, OH 45246
Regular Mail

Michael R. Hekle, Esq.
Jackson Lewis LLP
One North Broadway
White Plains, NY 10801
Regular Mail

Everett Corey, Directing Business Rep.
Local Lodge 700, District Lodge 26, IAMAW
365 New Britain Road
Kensington, CT 06037
Regular Mail

Franklin H. Goldberger, Esq.
Jackson Lewis LLP
18 Corporate Woods Boulevard
Albany, NY 12211
Regular Mail

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| Subscribed and sworn to before me this 8th day<br><br>of January, 2010 | DESIGNATED AGENT Loida Caro<br>Loida Caro<br>NATIONAL LABOR RELATIONS BOARD |

Exhibit K

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 34**

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| **NEW COUNTRY AUDI, INC.,** | : | |
| | : | **CASE NO.: 34-CA-12563** |
| **-and-** | : | |
| **INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 26,** | : | |

Pursuant to Sections 102.20, 102.21 and 102.23 of the Rules and Regulations of the National Labor Relations Board, Respondent, New Country Audi, Inc. (the "Respondent"), by its attorneys Jackson Lewis LLP, hereby answers the Complaint as follows:

1. Respondent denies knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 1 of the Complaint, except admits that it received a copy of the charge in the instant matter on January 7, 2010.

2. Respondent admits the allegations contained in Paragraph 2 of the Complaint, except that Respondent is a New York State corporation and the "facility located in Greenwich, Connecticut" can only refer to Respondent's New Country Audi, Inc. facility located at 181 West Putnam Avenue, Greenwich, Connecticut 06830.

3. (a) Respondent admits the allegations contained in Paragraph 3(a) of the Complaint.

(b) Respondent admits the allegations contained in Paragraph 3(b) of the Complaint.

4. Respondent admits the allegations contained in Paragraph 4 of the Complaint.

5. Respondent admits the allegations contained in Paragraph 5 of the Complaint.

6. Respondent admits the allegations contained in Paragraph 6 of the Complaint.

7. Respondent admits the allegations contained in Paragraph 7 of the Complaint.

8. Respondent admits the allegations contained in Paragraph 8 of the Complaint, except that it avers the Board improperly certified the International Association of Machinists & Aerospace Workers, AFL-CIO, District Lodge 26 (the "Union"), because the Union engaged in conduct that interfered with the results of the July 17, 2009 election and because the Board was not properly constituted under Section 3(b) of the Act, thus, the Board did not have authority to schedule and conduct the July 17, 2009 election, deny Respondent's Exceptions to the Regional Director's Report on Objections, or issue its November 18, 2009 Decision and Certification of Representative.

9. Respondent denies each and every allegation contained in Paragraph 9 of the Complaint, as the Union was never properly certified as the exclusive bargaining representative of the petitioned for unit.

10. Respondent admits the allegations contained in Paragraph 10 of the Complaint.

11. Respondent admits the allegations contained in Paragraph 11 of the Complaint, but denies the Union is properly certified as the exclusive bargaining representative of the employees in question.

12. Respondent denies each and every allegation contained in Paragraph 12 of the Complaint.

13. Respondent denies each and every allegation contained in Paragraph 13 of the Complaint.

## ADDITIONAL DEFENSES

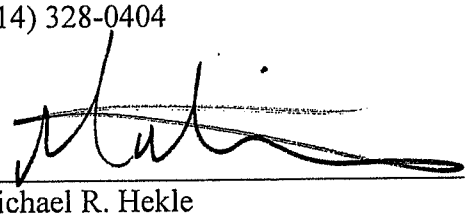
14. The Union was improperly certified because it engaged in objectionable conduct that destroyed the laboratory conditions necessary to conduct a Board election. Additionally, at all times relevant to the instant matter, the Board was not properly constituted under Section 3(b) of the Act and, thus, did not have the authority to schedule or conduct the July 17, 2009 election, deny Respondent's Exceptions to the Regional Director's Report on Objections, or issue its November 18, 2009 Decision and Certification of Representative.

However, even assuming *arguendo*, that the Board acted within its statutory authority under Section 3(b) of the Act, it clearly erred as a matter of law where the Board failed to conduct an evidentiary hearing to fully assess all relevant evidence in a matter involving: 1) the Union's impermissible use of government bias to encourage employees support of the Union; 2) unlawful surveillance and reporting of employees' voting status to the Union election observer during the polling period; and 3) Union representatives threat to be stationed in Respondent's parking lot, in full view of the voting area, throughout the course of the election.

WHEREFORE, having fully answered all courts of this Complaint, Respondent, New Country Audi, Inc., respectfully moves that it be dismissed in its entirety.

Respectfully submitted,

JACKSON LEWIS LLP
One North Broadway, 15th Floor
White Plains, New York
(914) 328-0404

By: 

Michael R. Hekle
Counsel for Respondent

Dated: January 21, 2010
White Plains, New York

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 34**

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| **NEW COUNTRY AUDI, INC.,** | : | |
| | : | **CASE NO.: 34-CA-12563** |
| **-and-** | : | |
| **INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 26,** | : | |

## CERTIFICATE OF SERVICE

In addition to filing by overnight Federal Express, an original and four (4) copies of this Answer with Additional Defenses to the Complaint in the above captioned matter, we hereby certify that copies have been served this 21st day of January 2010, by standard Federal Express, upon:

James D. Smith
Grand Lodge Representative
Int'l Assoc. of Machinists & Aerospace Workers, AFL-CIO
Executive Plaza III
135 Merchant Street, Suite 265
Cincinnati, Ohio 45246

Everett Corey
Business Rep., Local Lodge 700, District Lodge 26
Int'l Assoc. of Machinists & Aerospace Workers, AFL-CIO
365 New Britain Road
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Michael R. Hekle