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QUESTIONING THE D.C. CIRCUIT; HARMONIZING BOARD PRECEDENT: WHY MERE PRESENCE OF AN ORGANIZER SHOULD NOT INVALIDATE A BOARD ELECTION

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I. INTRODUCTION

Practitioners dealing with union organizing in the vicinity of National Labor Relations Board (Board) elections need more than a basic understanding of the Board's cases covering elections. Thus, the case of *Nathan Katz Realty v. NLRB*¹ is important, regardless of the jurisdiction in which an election occurs, because all Board decisions may be appealed to the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). This Article provides an overview of the Board's electioneering precedent, discusses the case of *Nathan Katz*, and then suggests the manner by which the Board can harmonize its precedents dealing with the presence of organizers in the election vicinity, as requested by the D.C. Circuit in the *Nathan Katz* decision.

II. ANALYSIS

A. *The Board's Electioneering Rules*

A few basic rules govern electioneering. *Peerless Plywood Co.*² prohibits mandatory election speeches to massed assemblies of employees on company time within twenty-four hours of the election. *Milchem, Inc.*³

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1. *Nathan Katz Realty v. NLRB*, 251 F.3d 981 (D.C. Cir. 2001).

2. *Peerless Plywood Co.*, 107 N.L.R.B. 427 (1954). “[T]he combined circumstances of (1) the use of company time for preelection speeches and (2) the delivery of such speeches on the eve of the election tend to destroy freedom of choice and establish an atmosphere in which a free election cannot be held.” *Id.* at 429–30.

3. *Milchem, Inc.*, 170 N.L.R.B. 362 (1968).

prohibits sustained conversation with prospective voters waiting to cast their ballots, even where the topic of conversation is unrelated to the voting.⁴ Ordinarily, however, electioneering will not fall within these rules, and the Board will consider a number of factors to determine whether electioneering interfered with the free choice of the voters. The Board considers whether the conduct occurred at or near the polling place, the extent and nature of the electioneering, whether it is conducted by a party to the election or employees, and whether it is within a designated no-electioneering area or contrary to the instructions of the Board agent.⁵

The Board set forth these factors in *Boston Insulated Wire & Cable Co.*⁶ In *Boston Insulated Wire*, the election was conducted at the employer's building in a ground floor room approximately ten feet up a corridor from a set of glass-paneled doors opening to the parking lot. At the opposite end of the corridor, a stairway led to the main entrance of the building. Union agents passed out campaign leaflets and spoke to employees as they entered both entrances. Additionally, as the line of employees waiting to vote reached the closed glass-paneled doors, the agents peered through the doors and continued to talk to and hand literature to entering employees.⁷

The Board noted that it "does not apply its 'no-electioneering' rules to set aside elections whenever electioneering takes place 'at or near the polls,' regardless of the circumstances."⁸ The Board then discussed each of the factors it normally relies upon to determine whether electioneering is sufficient to interfere with an election. It stated,

[t]he Board considers not only whether the conduct occurred within or near the polling place, but also the extent and nature of the alleged electioneering, and whether it is conducted by a party to the election or by employees. The Board has also relied on whether the electioneering is conducted within a designated 'no-electioneering' area or contrary to the instructions of the Board agent.⁹

4. *Id.* at 362 ("[T]he standard here applied insures that no party gains a last minute advantage over the other, and at the same time deprives neither party of any important access to the ear of the voter."); *see also* *Bio-Medical Applications of Puerto Rico, Inc.*, 269 N.L.R.B. 827, 829-30 (1984) (arguably extending the *Milchem* rule to prohibit sustained conversation with prospective voters in the entire no-electioneering zone when one is designated).

5. *Boston Insulated Wire & Cable Co.*, 259 N.L.R.B. 1118, 1119 (1982).

6. *Id.*

7. *Id.* at 1118.

8. *Id.*

9. *Id.* at 1119 (footnotes omitted).

As to the nature and extent of electioneering, the Board noted that even the strict *Milchem* rule does not apply to a “chance, isolated, innocuous comment or inquiry” between a party and a voter.¹⁰ The Board also discussed how it has long distinguished between the conduct of parties to the election and that of employees, which must be more disruptive in order to constitute objectionable conduct.¹¹

The Board held that the union agents’ conduct was not objectionable.¹² It reasoned that the electioneering was conducted away from the polling places, was not directed at employees waiting in line, was not in a designated no-electioneering zone, and did not violate any instructions by the Board agent. The Board further reasoned that the most significant consideration was that the voters waiting in line were separated from the electioneering by the closed glass-paneled doors. It concluded that once in the building corridor, the voters were insulated from electioneering.¹³

Considering all the applicable factors, the Board has found that electioneering was not objectionable in several additional cases. In *Alson Manufacturing*,¹⁴ three employees’ testimony was credited as follows. One witness saw two union representatives standing in the parking lot outside the warehouse approximately one hundred feet away from the voting booth speaking with some other employees. The second witness testified that he saw the remaining union representative talking to a group of employees approximately one hundred feet away from the voting booth and that he saw one of the employees in the group later vote. The third witness saw the same union representative standing twenty-five feet from the voter check-in table while the election was ongoing but voting had finished. He did not see the representative speak to any employee.¹⁵

The Board held that the union representative’s conduct was not objectionable.¹⁶ The Administrative Law Judge (ALJ) reasoned that while the conversation occurred near the polling area, the conduct was *de minimis* in nature. The representative spoke with a group of employees, only one of which had not voted. That vote could not have affected the outcome of the election. The ALJ further reasoned that the representative’s mere presence approximately twenty-five feet from the voting booth after voting had been completed could not affect the outcome of the election.¹⁷

In *Sterling Faucet Co.*,¹⁸ four employees were campaigning for a

10. *Id.* at 1119 n.10.

11. *Id.* at 1119 n.11.

12. *Id.* at 1119.

13. *Id.*

14. 230 N.L.R.B. 735, 740 (1977), *enforced at* 599 F.2d 1057 (9th Cir. 1979).

15. *Id.*

16. *Id.* at 741.

17. *Id.*

18. *Sterling Faucet Co.*, 203 N.L.R.B. 1031 (1973).

union for approximately twenty minutes outside the cafeteria where the election was held. The employees distributed union literature while wearing union buttons and hats. Two employees stood by the time clock; the third was approximately forty feet from the cafeteria door; and the fourth was approximately six feet from the door. All stood in the main aisle which the employees normally followed from the entrance, at the time clock, to the cafeteria.¹⁹ The Board held that the employees' electioneering did not constitute objectionable conduct. The ALJ reasoned that the electioneering did not occur in a no-electioneering area.²⁰ Rather, the nearest electioneer stood approximately six feet from the door of the cafeteria and could not be seen from within the polling place.²¹ The ALJ further reasoned that at no time were any employees waiting in line outside of the cafeteria to vote.²²

In *Harold W. Moore*,²³ the election was conducted at a warehouse. The voting area was about thirty feet from the entrance to the warehouse. Three union representatives stood in the parking lot outside the warehouse approximately thirty feet from the entrance. They spoke with approximately six to eight employees. The conversations lasted from ten to fifteen minutes and occurred while the polls were open.²⁴ The Board held that the conversations, even if deemed to be electioneering, were not objectionable. The Board reasoned that the electioneering was not substantial and did not take place in a no-electioneering area. The Board held that the electioneering was not so near the polls, under the circumstances, as to be objectionable.²⁵

The D.C. Circuit has also applied these factors to find electioneering unobjectionable. In *Overnite Transportation Co. v. NLRB*,²⁶ the union held a "raucous" rally near the polling center.²⁷ It was attended by an international organizer, the international president, and the president of the local union. Approximately one hundred employees gathered, held a cookout, and dispensed free food and drink. The crowd constantly hooted, hollered, and chanted slogans. Passing truckers honked their horns as they drove by the gathering. The Board held there was no unlawful electioneering.²⁸

19. *Id.* at 1037.

20. *Id.*

21. *Id.* at 1038.

22. *Id.*

23. *Harold W. Moore*, 173 N.L.R.B. 1258 (1968).

24. *Id.* at 1258.

25. *Id.*

26. *Overnite Transportation Co. v. NLRB*, 140 F.3d 259 (D.C. Cir. 1998).

27. *Id.* at 269.

28. *Id.*

The D.C. Circuit upheld the Board's decision.²⁹ The D.C. Circuit stated that

[t]he Board generally considers the nature and extent of the electioneering, whether it happened within a designated 'no electioneering' area, whether it was contrary to the instructions of the Board's election agent, whether a party to the election objected to it, and whether a party to the election engaged in it.³⁰

The D.C. Circuit then applied the factors and found that the employer had failed to demonstrate that there was a no-electioneering area, that any instructions were issued by the Board agent, that any party had objected to the union rally, or that the union was responsible for directing or participating in any objectionable conduct.³¹

III. THE *NATHAN KATZ* CASE

A. *The Region's Decision*

In *Nathan Katz*, the Regional Director dismissed an objection that the union violated the designated no-electioneering area by stationing representatives therein.³² The Regional Director assumed the facts, as presented by the employer, were true and found there was insufficient evidence to go to hearing on the objection.³³

The assumed facts were the following: the polling place was at a church, not a workplace,³⁴ and the Board agent established a no-electioneering zone of twenty-five yards outside the entrance to the church.³⁵ Also, two union agents were parked in a car within twenty feet of the church's door for one hour and forty minutes during the election.³⁶ From this location, the union agents could easily watch the entrance to the church.³⁷ They motioned at one employee and honked at two others as the two walked towards the church to vote.³⁸

The Regional Director cited the *Boston Insulated* factors, stating that

29. *Id.* at 270.

30. *Id.*

31. *Id.*

32. *Nathan Katz Realty, LLC*, No. 29-RC-9265, slip op. at *10 (Sept. 8, 1999) (hereinafter "Supplemental Decision").

33. *Id.*

34. *Id.* at *4.

35. *Id.* at *5.

36. *Id.* at *9.

37. *Id.*

38. *Id.* at *7.

“[w]hen faced with evidence of impermissible electioneering, the Board evaluates the probable impact of electioneering on the free choice of voters by considering multiple factors.”³⁹ The Regional Director proceeded to apply the factors set forth in *Boston Insulated* to determine whether electioneering interfered with the exercise of the employees’ free choice.

The Regional Director first conceded that party representatives were stationed in a no-electioneering zone for a portion of the polling period.⁴⁰ He proceeded to explain why, nevertheless, the other factors outweighed those factors. First, the Regional Director found that the union agents did not actually engage in any electioneering. Rather, they made several innocuous gestures and the Regional Director reasoned that they merely motioned to an employee and honked the horn at two others; there was no evidence that the union agents spoke to any employees as they were on the way to vote.⁴¹ Second, the Regional Director noted the considerable distance of the agents from the actual voting place, “through a gate, a door and a stairwell leading to the basement voting place.”⁴² Thus, the Regional Director concluded that these two factors, whether the conduct was near the polling place and the extent and nature of the activity, outweighed the other two factors, party conduct within a no electioneering area. The Regional Director found that “the [union’s] conduct does not support a conclusion that they engaged in objectionable conduct sufficient to set aside the election, despite their presence in the broad no-electioneering zone.”⁴³

The Regional Director attempted to distinguish two cases that held objectionable a supervisor’s presence in a place employees were required to pass to get to the polling location, *Electric Hose and Rubber Co.*⁴⁴ and *Performance Measurements Co.*,⁴⁵ on the basis that those cases involved conduct inside the facilities.⁴⁶ A brief synopsis of these two cases is warranted, in order to fully understand the *Nathan Katz* decision.

In *Electric Hose and Rubber Co.*, the Board found three instances of objectionable surveillance by supervisors.⁴⁷ One supervisor was “stationed” within ten to fifteen feet of the entrance to the voting area. The supervisor did not testify to explain his presence there. The employer argued that the supervisor stood in a section of the plant where his usual responsibilities were carried out. The ALJ reasoned that proximity to the location of the supervisor’s usual work area did not justify his presence

39. *Id.* at *8.

40. *Id.* at *9.

41. *Id.* at *9–10.

42. *Id.* at *10.

43. *Id.*

44. *Electric Hose and Rubber Co.*, 262 N.L.R.B. 186 (1982).

45. *Performance Measurements Co.*, 148 N.L.R.B. 1657 (1964).

46. Supplemental Decision at *10 n.12.

47. *Electric Hose*, 262 N.L.R.B. at 216.

during the voting. The ALJ further reasoned that, because the employer did not provide a sufficient explanation for stationing the supervisor outside the voting area, “it can only be concluded that his purpose in observing the event was to effectively survey the union activities of the employees and to convey to these employees the impression that they were being watched.”⁴⁸ The ALJ found the supervisor’s conduct destroyed the requisite laboratory conditions for a free and fair election.⁴⁹ Additionally, in order to reach the voting area from their workstations, employees had to pass an area in which either of two supervisors was standing. One of the supervisors did not testify, and the other did not explain his presence in the area. As in the case of the first supervisor, the ALJ held objectionable the unexplained presence of these other supervisors at points where employees had to pass in order to vote.⁵⁰

In *Performance Measurements Co.*,⁵¹ the election took place at two plants. At each plant, the employer’s president alternately stood near the door employees used to enter the polling place or sat at a table approximately six feet from the doorway. Part of this time, he was instructing supervisors in regard to the release of employees from work for voting purposes. The president also entered the first polling place and left when the Board agent informed him that the polls were still open. He additionally entered the second polling place as the ballot box was being sealed.⁵² The Board held that “the continued presence of the Employer’s president at a location where employees were required to pass in order to enter the polling place was improper conduct”⁵³ It mentioned that the acting regional director had found no evidence that the employer’s president engaged in electioneering. Nevertheless, the Board reasoned that the president’s continuous presence at or near the polling place was inappropriate, even though part of that time was spent instructing the supervisors. The Board held that such presence, without justification, interfered with the employees’ freedom of choice in the election.⁵⁴

B. The D.C. Circuit’s Decision

After Nathan Katz refused to bargain, the case ended up before the D.C. Circuit. The D.C. Circuit relied on the facts as assumed by the Regional Director.⁵⁵ It also relied on an additional fact, alleged in Nathan

48. *Id.*

49. *Id.*

50. *Id.*

51. *Performance Measurements Co.*, 148 N.L.R.B. 1657, 1659 (1964).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Nathan Katz Realty v. NLRB*, 251 F.3d 981, 991 (2001).

Katz's objection, but contrary to the facts relied upon by the Regional Director.⁵⁶ This crucial additional fact was that "[a] voter approaching the Church entrance on the sidewalk (the only means of access) would have to walk within a few feet of the car."⁵⁷

The Court recognized the standard factors which apply to determine whether electioneering is objectionable. The D.C. Circuit held that "(1) the Union agents' conduct occurred in a no-electioneering zone; (2) their presence and actions were contrary to the instructions of the Board Agent; (3) Katz objected to the Union agent's conduct; and (4) the people who engaged in the conduct were agents of a party to the election."⁵⁸

The D.C. Circuit, however, did not base its decision on weighing all of the factors, including the key factor—the nature and extent of the electioneering. Rather, the D.C. Circuit turned to *Electric Hose* and *Performance Measurement* to argue that "a party's mere presence may be sufficient to justify setting aside an election."⁵⁹ The Court explained that in *Electric Hose*, the Board held objectionable the unexplained presence of two supervisors in a place where employees had to pass in order to vote.⁶⁰ The D.C. Circuit discussed that in *Performance Measurement*, the company president standing by the door to the election area was found to be improper conduct, despite the lack of a no-electioneering zone.⁶¹ The D.C. Circuit concluded that "[t]ogether, *Electric Hose* and *Performance Measurements* seem to stand for the proposition that a party engages in objectionable conduct sufficient to set aside an election if one of its agents is continually present in a place where employees have to pass in order to vote."⁶² The D.C. Circuit remanded the case for the Board to hold further proceedings and harmonize its precedent.⁶³

C. The Remand and the ALJ's Decision

The Board interpreted the remand as "for further consideration of the Respondent's arguments that . . . the presence and actions of union agents in the no-electioneering zone outside the election polling site interfered

56. *Id.* at 992–93. It is possible that Nathan Katz's offer of proof to the Regional Director did not support this allegation, and this is the reason that the Regional Director stated that "there is no evidence to suggest that employees were required to pass the [union's] representatives in order to enter the building." Supplemental Decision at *10 n.12. The decisions, however, are unclear as to the reason for the factual difference between the Regional Director and the D.C. Circuit.

57. *Id.* at 992.

58. *Id.* at 991.

59. *Id.* at 992.

60. *Id.*

61. *Id.*

62. *Id.* at 993.

63. *Id.*

with the employees' exercise of free choice in the election"⁶⁴ The Board remanded to Region 29 for a hearing.⁶⁵

A hearing was held and a decision issued by an ALJ.⁶⁶ In dicta, the ALJ disagreed with the statement of law as expressed by the D.C. Circuit, *i.e.*, that mere presence of a union agent is sufficient to set aside an election.⁶⁷ The ALJ reasoned that *Milchem* and its progeny are concerned with electioneering, and there was no evidence of electioneering in this case.⁶⁸

The ALJ further asserted that *Performance Measurement* and *Electric Hose* were not based on presence of a party near the polls or on electioneering. Rather, those cases held that supervisors were engaged in objectionable surveillance because there was no other possible reason for the supervisors' presence near the polling area.⁶⁹ The ALJ then asserted, in reliance on cases dealing with photographing employees, that different standards are used to evaluate surveillance by unions than are used to evaluate surveillance by employers. Presence by supervisors is deemed coercive because an employer has virtually absolute control over employees' terms and conditions of employment. In contrast, union observation of employees is not necessarily coercive, and should not be so presumed.⁷⁰ The ALJ found, in this case, that there was no evidence that the union agents' conduct would have caused employees to fear reprisal.⁷¹

After the hearing, the parties settled. Thus, the case never reached the Board, and the decision of the ALJ cannot be relied upon as Board precedent. The lack of a Board decision leaves untouched the holding of the D.C. Circuit and the larger issue raised by *Nathan Katz* about whether electioneering in a place employees have to pass is appropriate.

IV. SUBSEQUENT AUTHORITY ADDRESSING *NATHAN KATZ*

The only published decision to subsequently address the D.C. Circuit's decision in *Nathan Katz* fails to resolve the issue of whether presence at a place which employees must pass is objectionable electioneering conduct.⁷² In *U-Haul*, the election took place at the

64. Order Remanding Proceeding to Regional Director for Further Hearing, Case 29-CA-23280 *2 (N.L.R.B. Dec. 17, 2001).

65. *Id.* at *3.

66. *Nathan Katz Realty, LLC*, No. 29-CA-23280, 2002 NLRB LEXIS 367 (Aug. 12, 2002).

67. *Id.* at *35.

68. *Id.* at *37.

69. *Id.* at *39-40.

70. *Id.* at 40-41.

71. *Id.* at *43.

72. *U-Haul Co. of Nevada, Inc.*, 341 N.L.R.B. No. 26, No. 28-RC-6519, 2004 NLRB

employer's facility in an upstairs break room.⁷³ A union representative arrived in the parking lot of the facility after the election started and remained there for thirty-five minutes. The Board held that the case was distinguishable from *Nathan Katz* because the representative was not in a location every eligible voter would have to pass in order to vote. The Board found that "all but a handful of eligible voters" were already inside the building by the time the representative arrived.⁷⁴ The Board also distinguished *Nathan Katz* because there was no evidence that the union representative was in an established no-electioneering zone.⁷⁵ The Board further held that, although the representative "spoke to a handful of voters," the conduct did not violate *Milchem*.⁷⁶ It reasoned, "these conversations did not take place in the polling area, the waiting area, or near the line of voters. Thus, they were not objectionable."⁷⁷

Thus, the Board indicated that it will not apply *Nathan Katz* when the evidence fails to show that a union representative is present in a place that many voters must pass.⁷⁸ The case, however, fails to clarify whether presence in such a location constitutes appropriate conduct.

V. HARMONIZING THE BOARD'S PRECEDENTS

It is unfortunate that the Board did not have the opportunity to harmonize its precedents, in the *Nathan Katz* case, as directed. It could have done so in the following manner.

In *Nathan Katz*, the D.C. Circuit confused a line of cases that deal with surveillance as objectionable conduct, with the line of cases that determines when electioneering is objectionable conduct. Employer conduct that interferes with employees' protected section 7 rights to join or refrain from joining a union violates section 8(a)(1) of the National Labor Relations Act.⁷⁹ Employer surveillance has long been held to be such an

LEXIS 55 (Feb. 9, 2004).

73. *Id.* at *9.

74. *Id.*

75. *Id.*

76. *Id.* at *10.

77. *Id.* An unpublished decision of an ALJ in *Berkshire Nursing Home* also distinguishes *Nathan Katz*. *Berkshire Nursing Home LLC*, No. 29-RC-10113, 2004 NLRB LEXIS 81 (Feb. 27, 2004). In this case, ten to twenty individuals, including union officials were on the street in front of the facility, approaching or calling to employees arriving to work. The ALJ distinguished *Nathan Katz* on the grounds that the representatives were "clearly outside of any no-electioneering area." *Id.* at *9.

78. It further seems plausible to infer from *U-Haul* that the Board will not apply *Nathan Katz* to cases where the union representative is present in an area not designated as within a no-electioneering zone.

79. National Labor Relations Act, Sections 7 & 8, 29 U.S.C. §§ 157, 158 (2000).

unfair labor practice.⁸⁰ This is because surveillance interferes with employees' protected rights and tends to inhibit employees' future union activities.⁸¹ Violations of section 8(a)(1) often amount to objectionable election activity.⁸² In addition, conduct that does not independently constitute an unfair labor practice can be found to constitute objectionable activity.⁸³ Electioneering is one such type of conduct.⁸⁴ The Board prohibits electioneering at or near the polls in order to "safeguard its electoral process from conduct which inhibits the free exercise of employee choice."⁸⁵

As recognized by the ALJ, *Electric Hose and Performance Measurement* are not electioneering cases, they are surveillance cases. *Electric Hose* is clearly a surveillance case on its face.⁸⁶ The ALJ's holding was based on the rationale that the supervisor's implicit purpose in observing the voting was to let the employees know they were being watched.⁸⁷

Also, *Performance Measurement* has correctly been interpreted as a surveillance case by the majority of cases to rely upon it. In *Eagle-Picher Industries, Inc.*, two supervisors briefly stood in the aisle leading to the voting area while voting was ongoing.⁸⁸ The union alleged in its objection that the supervisors had engaged in improper electioneering. The ALJ found that this allegation was not supported by the evidence. The ALJ further discussed how, by claiming that the supervisors' presence in the aisle "would have made the employees feel 'under the glass' of the employer,"⁸⁹ the union was actually claiming improper surveillance, not improper electioneering. Moreover, the ALJ held, in reliance on *Performance Measurement*, that the supervisors' conduct "could not have given any employees the impression that their voting was under surveillance."⁹⁰

The holding of *Performance Measurement* was applied to another case, *ITT Automotive*,⁹¹ which featured extensive testimony regarding alleged surveillance. Several employees testified that managers and a supervisor were continuously standing in a circle in an area where

80. THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 162, (Patrick Hardin ed., 4th ed. 2001).

81. *Id.* at 163.

82. *Id.* at 93.

83. *Id.* at 445.

84. *Id.* at 465.

85. Boston Insulated Wire & Cable Co., 259 N.L.R.B. 1118, 1118 (1982).

86. Electric Hose and Rubber Co., 262 N.L.R.B. 186 (1982).

87. *Id.* at 216.

88. Eagle-Picher Industries, Inc., 331 N.L.R.B. 169, 185 (2000).

89. *Id.*

90. *Id.*

91. ITT Automotive, 324 N.L.R.B. 609, 623 (1997).

employees had to pass through to vote and where the managers and supervisor could watch the employees waiting in line to vote.⁹² Relying on *Performance Measurement*, the ALJ found that the continued presence of the managers and supervisor at a location employees were required to pass, “from where they observed the employees while waiting . . . outside the door to the polling place” interfered with the election.⁹³

In *Blazes Broiler*,⁹⁴ a union agent sat in the employer restaurant in a section open to the public, during the second voting session. He was approximately twenty to thirty feet from the door to the banquet room where the voting occurred. While sitting, his view of the entrance to the banquet room was blocked by a five-foot wall. He only occasionally stood up. Employees entering and leaving the corridor leading to the banquet room passed within a few feet of the union agent.⁹⁵ The employer argued, in reliance on *Performance Measurement*, that the union agent’s presence was objectionable. The hearing officer interpreted *Performance Measurement* as a “nonelectioneering case.”⁹⁶ The hearing officer focused on the alleged surveillance stating that *Performance Measurement* involves “an Employer’s President who stationed himself by the door to the voting area where he could observe exactly who went in to vote.”⁹⁷ The hearing officer distinguished *Performance Measurement* because, in the instant case, the union agent had no direct view of the entrance to the banquet room. The hearing officer held that although the union agent “could see who entered the hallway leading to the banquet room . . . [h]e had no way of knowing who was entering the hallway to vote”⁹⁸ Thus, the Board held that the union agent’s conduct was not objectionable.⁹⁹

Member Hunter concurred, but suggested that he would overrule *Performance Measurement*.¹⁰⁰ He disagreed with *Performance Measurement* to the extent it “established a per se rule that the mere presence of a party to an election outside the polling area constitutes objectionable conduct.”¹⁰¹ Instead, he recommended following *Boston Insulated Wire* by examining the conduct of a party that stays outside the polling area during an election under the totality of the circumstances.¹⁰²

Unfortunately, there have been other cases, besides *Nathan Katz*,

92. *Id.* at 623–24.

93. *Id.* at 625.

94. 274 N.L.R.B. 1031 (1985).

95. *Id.* at 1032.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 1031–32.

100. *Id.* at 1031 n.3.

101. *Id.*

102. *Id.*

where the courts and even the Board have treated *Performance Measurement* as an electioneering, rather than a surveillance, case. For instance, the United States Court of Appeals for the Ninth Circuit has interpreted *Performance Measurement* to stand for the principle that “[i]t might be possible to find that areas some distance from the polls should be closed to campaigning because they had to be passed through in order to vote.”¹⁰³ The Board in *Herb A. Cook* interpreted *Performance Measurement* to support the *Milchem* principle requiring that “interested parties refrain from electioneering or even talking to employees in the polling area waiting to vote.”¹⁰⁴

If the Board is to harmonize its precedent, it must clarify the distinction between electioneering and surveillance cases. Consistent with precedent, it should find mere presence objectionable only when the sole possible purpose of the presence is surveillance. *Patrick Industries*,¹⁰⁵ like *Blazes Broiler* and *Electric Hose and Rubber Company*, makes clear that presence is objectionable only when it is without a justification other than observation of employees.¹⁰⁶ In *Patrick Industries*, two managers and a supervisor were gathered “at a location within a few feet of the route taken by most . . . employees as they went to vote, thirty-five feet from the [polling room], and seventy-two feet from the voting booth.”¹⁰⁷ The managers and supervisor stood there because a machine located there was operating erratically. They remained there for at least twenty minutes, discussing the machine, its production output, and also a broken air compressor.¹⁰⁸ The Board held that the conduct was not objectionable. The ALJ reasoned that “if the supervisors’ purpose in standing near the [machine] was to convey to the employees that they were being watched . . . [the] objection might well be a valid one.”¹⁰⁹ However, the

103. *Robert’s Tours, Inc. v. NLRB*, 578 F.2d 242, 244 (9th Cir. 1978). The conclusion of law itself is not in error, because, in certain circumstances, weighing the *Boston Insulated* factors may lead to the conclusion that campaigning in an area voters must pass is objectionable. The difficulty is in interpreting *Performance Measurement*, in which there was no evidence of campaigning by the company president, as supporting such a conclusion.

104. *Herb A. Cook*, 182 NLRB 796, 810 (1970). This principle accurately reflects *Milchem*. In *Performance Measurement*, however, there was no evidence of the company president conversing with employees, and, thus, no support for such an interpretation of the case.

105. *Patrick Industries*, 318 N.L.R.B. 245 (1995).

106. *Blazes Broiler*, 274 N.L.R.B. 1031 (1985) (holding that a union representative seated in a restaurant approximately thirty feet from the entrance to the voting room was not objectionable because he could not observe employees entering the voting room from his vantage point); *Electric Hose and Rubber Co.*, 262 N.L.R.B. 186, 216 (1982).

107. *Patrick Industries*, 318 N.L.R.B. at 256.

108. *Id.* at 256.

109. *Id.*

ALJ concluded that the supervisors were at the location for work-related reasons.¹¹⁰

The Board should follow the suggestion of Member Hunter in *Blazes Broiler*,¹¹¹ and explicitly overrule *Performance Measurement* to the extent it appears to set forth a per se rule prohibiting presence in areas where employees pass to get to the polls. Indeed, to the extent *Performance Measurement* can be interpreted as an electioneering case, it has been implicitly overruled. It is pre-*Milchem*, pre-*Boston Insulated Wire*, and has been implicitly overruled to the extent it contradicts those cases. *Milchem* intended to set forth a clear standard, which had not been enunciated in prior decisions, for dealing with the effect of conversations between parties to the election and employees preparing to vote.¹¹² And, *Boston Insulated Wire* made absolutely clear that no per se rule governs electioneering; rather, the Board considers a number of factors to find impermissible electioneering.¹¹³

It makes little sense to have a rule stricter than *Milchem's*, which applies to those standing in line to vote, applicable at a spot far removed from the polling place. Yet, the D.C. Circuit's interpretation of *Electric Hose* and *Performance Measurement* in *Nathan Katz* arguably leads to exactly this result. *Milchem* prohibits only sustained conversation with employees waiting to vote.¹¹⁴ Thus, if the D.C. Circuit's interpretation is correct, a union agent can be present in the polling place and engage in limited conversation with employees without objection; but, if she is present outside the polling place in an area which employees pass to vote, even with substantial justification, the conduct is objectionable.

VI. CONCLUSION

The D.C. Circuit has posited that mere presence of a union agent near a polling place is objectionable conduct. In *Nathan Katz*, the D.C. Circuit offered the Board the opportunity to harmonize conflicting precedent, which arguably leads to this proposition. The Board was unfortunately unable to do so. Now, the Board should take the first opportunity to clarify that mere presence is objectionable only when the sole possible purpose of the presence is surveillance. It should explicitly overrule all arguably contrary precedent. Today, more than ever, the fairness of Board elections

110. *Id.*

111. 274 N.L.R.B. 1031, 1031 n.3 (1985).

112. *Milchem, Inc.*, 170 N.L.R.B. 362, 362 (1968).

113. *Boston Insulated Wire*, 259 N.L.R.B. 1118, 1118 (1982). This case followed *Star Expansion Industries*, 170 N.L.R.B. 364 (1968), which was decided the same day as *Milchem* and addressed electioneering outside, but in close proximity to, the polling place.

114. *Milchem*, 170 N.L.R.B. at 363.

is being called into question; it is of utmost importance that the law governing elections be predictable and just.