UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

AMAZON.COM SERVICES LLC

Employer

and **Case 29-RC-288020**

AMAZON LABOR UNION

Petitioner

HEARING OFFICER'S REPORT ON OBJECTIONS

I. INTRODUCTION

On March 25, 26, 28, 29, and 30, 2022,[1] Region 29 of the National Labor Relations Board (the Board) conducted an election to determine whether fulfillment center employees employed by Amazon.com Services LLC (the Employer) at its JFK8 building (JFK8) in Staten Island, New York wished to be represented for purposes of collective bargaining by Amazon Labor Union (the Petitioner).

Employees casting ballots in the election voted in favor of representation by the Petitioner, by a margin of 523 votes, approximately 10.8% of the valid votes cast.

The Employer contests the results of the election, asserting that Region 29 and the Petitioner engaged in conduct warranting setting aside the election and conducting a rerun election.

Because of the objections concerning conduct by Region 29, the matter was transferred to the Board's Region 28 Office for hearing and decision by a Hearing Officer and Regional Director not belonging to Region 29.

After conducting a hearing over 24 business days via the Zoom for Government platform and carefully reviewing the evidence and arguments made by the parties, I conclude that the Employer's objections should be overruled in their entirety. The Employer has not met its burden of establishing that Region 29, the Petitioner, or any third parties have engaged in objectionable conduct affecting the results of the election.

[1] All dates are in 2022, unless otherwise specified.

II. PROCEDURAL HISTORY

Based on a petition filed on December 22, 2021, and pursuant to a Stipulated Election Agreement entered into by the Employer and the Petitioner on February 16, recommended for approval by the assigned Board agent for Region 29 (assigned Board agent), and approved by the Regional Director of Region 29 on February 17 (Stipulated Election Agreement), a manual, in-person election was conducted in a voting tent located in the parking lot in front of the main entrance to the Employer's JFK8 building from 8:00 a.m. to 1:00 p.m. and 8:00 p.m. to 1:00 a.m. on March 25, 26, 28, 29, and 30, to determine whether a unit of fulfillment center employees employed by the Employer at its JFK8 building wished to be represented for purposes of collective bargaining by the Petitioner.[2]

The tally of ballots prepared at the conclusion of the election shows the following:

Approximate number of eligible voters …….....	8325
Number of void ballots	17
Number of votes cast for Petitioner.....	2654
Number of votes cast against participating labor organization(s)...	2131
Number of valid votes counted	4785
Number of challenged ballots	67
Number of valid votes counted plus challenged ballots	4852

As reflected above, the Petitioner obtained a majority of the valid votes counted, by a margin of 523 votes. Challenges were not sufficient in number to affect the results of the election.

On April 8, the Employer timely filed objections to conduct affecting the results of the election. On April 14, the General Counsel of the Board issued an Order Transferring Case from Region 29 to Region 28.

On April 29, the Regional Director of Region 28 of the Board (the Regional Director) issued an Order Directing Hearing and Notice of Hearing on Objections (the Order Directing Hearing on Objections), ordering that a hearing be conducted to give the parties an opportunity to present evidence regarding the objections.

As the Hearing Officer designated to conduct the hearing and to recommend to the Regional Director whether the Employer's objections warrant setting aside the election, I heard testimony and received into evidence relevant documents over 24 business days between June 13 and July 18.

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[2] That voting unit consists of:

> INCLUDED: All hourly full-time and regular-part time fulfillment center associates employed at the Employer's JFK8 building located at 546 Gulf Avenue, Staten Island, New York.
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> EXCLUDED: Truck drivers, seasonal employees, temporary employees, clerical employees, professional employees, managerial employees, engineering employees, maintenance employees, robotics employees, information technology employees, delivery associates, loss prevention employees, on-site medical employees, guards and supervisors as defined by the Act.

On June 6, the Petitioner filed a Motion to Dismiss Employer Objections 1 through 9, 12, 14 through 18, 20, 21, and 23 through 25, and, on June 9, the Regional Director referred the Motion to Dismiss to me for consideration and ruling. On June 13, the objections hearing opened, and although I denied the Petitioner's Motion to Dismiss, I ruled that the Employer must make offers of proof with respect to its Objections 1 through 5, 17, 18, 20, and 21. I reserved further ruling as to whether, based on the Employer's offers of proof, the Employer would be permitted to present evidence supporting those Objections.

On June 14, the Petitioner filed with the Regional Director a Motion for Special Permission to Appeal the Hearing Officer's Ruling on the Petitioner's Motion to Dismiss (Petitioner's Motion for Special Permission to Appeal) and an Appeal of the Hearing Officer's Ruling on the Petitioner's Motion to Dismiss (Petitioner's Appeal).

On June 17, the Regional Director issued an Order (Regional Director's Appeal Order) granting the Petitioner's Motion for Special Permission to Appeal, but denying the Appeal on the merits, finding there is not a sufficient basis to overturn my rulings allowing the Employer to provide offers of proof as to why it should be permitted to introduce evidence in support of its Objections 1 through 5, 17, 18, 20, and 21, even if such objections would not normally be litigable. *See* Section 102.69(c)(1)(iii) of the Board's Rules and Regulations (Board's Rules) ("The Hearing Officer may rule on offers of proof."). The Regional Director further provided that if I find that the Employer's offers of proof are insufficient to sustain the Employer's positions, I may then determine not to receive additional evidence on the matters. *See* Section 102.66(c) of the Board's Rules ("The Hearing Officer may solicit offers of proof … as to any or all such issues [to be litigated at the hearing].") and 102.69(c)(1)(iii) of the Board's Rules.

The Regional Director's Appeal Order further concluded that the Petitioner's Motion to Dismiss was procedurally deficient as there is no mechanism for a Hearing Officer to dismiss objections which the Regional Director set for hearing, the same as a Hearing Officer could not consider new objections *sua sponte*. Section 102.69(c)(1)(ii) of the Board's Rules; *see also Precision Products Group, Inc*., 319 NLRB 640 (1995) (Hearing Officer has authority to consider only the issues that are reasonably encompassed within the scope of the specific objections set for hearing by the Regional Director); *Iowa Lamb Corp*., 275 NLRB 185 (1985) (same). The Regional Director therefore determined that any motion by the Petitioner to me to dismiss objections that the Regional Director set for hearing as set forth in his Order Directing Hearing on Objections is inappropriate. Instead, the Regional Director instructed that a request for review may be filed only after I issue my recommendations as to the whether the objections should be sustained or overruled. Section 102.69(c)(1)(iii) of the Board's Rules.

As the Zoom for Government hearing continued and the Employer provided record evidence in support of some of its objections, I additionally determined that cumulative[3] and duplicative evidence had been received regarding Objections 6 through 8, 15, and 16, and therefore requested that the Employer make offers of proof before providing further evidence in support of those objections.[4] The Zoom for Government objections hearing concluded after 24 business days, on July 18. The parties were permitted to file post-hearing briefs on August 1, and the briefs filed by the Petitioner and the Employer were fully considered.[5]

III. THE BURDEN OF PROOF AND THE BOARD'S LEGAL STANDARDS FOR SETTING ASIDE ELECTIONS

A. Burden of Proof on Parties Seeking to Have Board Election Set Aside

It is well settled that: "Representation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Lockheed Martin Skunk Works,* 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Therefore, "the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one." *Delta Brands, Inc.*, 344 NLRB 252, 253, (2005), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989).

[3] In its post-hearing brief, the Employer incorrectly states that, because my determination that evidence of media presence during the first polling session on March 25 became cumulative, "under extant Board law means the issue was decided." I note that the Employer does not cite any legal authority for this proposition, nor could it. "The hearing officer must ensure that the hearing in conducted in accord with Agency procedures and that the resulting record is free of cumulative or irrelevant testimony yet sufficient to allow for an informed determination of disputed issues by the Board or the Regional Director." See Guide for Hearing Officers in NLRB Representation and Section 10(k) Proceedings, Introduction, p. 6, 7, 37, 40, 156, 159, 166 (Sept. 2003); See also NLRB Casehandling Manual (Part Two) Representation Proceedings Sec. 11424.3(b) (Sept. 2020) (Rep. Casehandling Manual).

[4] In its post-hearing brief, the Employer misstates my ruling that evidence regarding the three-part alphabetical split of the voting lines eventually became cumulative with respect to Objections 6 through 8 as precluding the Employer "from entering in any additional evidence of voter confusion experienced on March 25." To the contrary, this three-part alphabetical split of the lines was not in dispute, and, as the record reflects, the parties had been advised of this planned three-part alphabetical split of checking tables as of February 17, the same date the Stipulated Election Agreement was approved. With respect to Objection 7 in particular, I repeatedly requested that the Employer provide evidence showing that the Region "turned away voters when they attempted to vote" or "told voters they were only being allowed to vote in alphabetical order." Despite these repeated requests, the Employer only points to one voter it contends was "turned away," Villalongo, but Villalongo admits it was her choice to voluntarily leave the voting tent without casting a ballot, and, thus, no one turned her away when she attempted to vote.

[5] In the Employer's post-hearing brief, the Employer withdraws Objection 19. Pursuant to the Employer's withdrawal request, I recommend that the Regional Director approve the withdrawal of Objection 19. Based on the Employer's withdrawal request, I will not make a substantive recommendation to the Regional Director regarding Objection 19. I will note for the record, as raised by Petitioner in its post-hearing brief, that the Employer did not present any record evidence in support of Objection 19.

B. Standards for Determining Whether Conduct by the Board, a Party, or a Non-Party Warrants Setting Aside a Board Election

1. Standard for Objections 1 through 12 Alleging Objectionable Conduct by Region 29

To meet its burden of establishing that an election should be set aside an election based on Board agent misconduct or Regional Office procedural irregularities, the objecting party must show that there is evidence that "raises a reasonable doubt as to the fairness and validity of the election." *Durham School Services, LP*, 360 NLRB 851, 853 (2014), enfd. 821 F.3d 52 (D.C. Cir. 2016), citing *Polymers, Inc*., 174 NLRB 282, 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970); see also *Physicians & Surgeons Ambulance Service*, 356 NLRB 199, 199 (2012), enfd. 477 Fed.Appx. 743 (D.C. Cir. 2012).

The Board has also stated that an election must be set aside "when the conduct of the Board election agent tends to destroy confidence in the Board's election process or could reasonably be interpreted as impairing the election standards the Board seeks to maintain." *Sonoma Health Care Center*, 342 NLRB 933, 933 (2004); see also *Athbro Precision Engineering Corp*., 166 NLRB 966, 966 (1967), vacated sub nom. *Electrical Workers v. NLRB*, 67 LRRM 2361 (D.C. Cir. 1968), acquiescing in district court's order on remand as "the law of this case," 171 NLRB 21 (1968), enfd. 423 F.2d 573 (1st Cir. 1970).

There are no absolute guidelines, however, as stated in *Polymers, Inc*., 174 NLRB at 282:

> Election procedures prescribed by the General Counsel or a Regional Director are obviously intended to indicate to field personnel those safeguards of accuracy and security thought to be optimal in typical election situations. These desired practices may not always be met to the letter, sometimes through neglect, sometimes because of the exigencies of circumstance. The question which the Board must decide in each case in which there is a challenge to conduct of the election is whether the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election.

Thus, an objection relating to the integrity of the election process requires an assessment of whether the facts indicate that "a reasonable possibility of irregularity inhered" in the conduct of the election. *Peoples Drug Stores, Inc.*, 202 NLRB 1145, 1145 (1973) Board examined the theoretical possibility as against the improbabilities of the factual circumstances).

The Board also pointed out in *Polymers, Inc*., 174 NLRB at 282–283, that, in a given case, even literal compliance with all of the rules, regulations, and guidelines would not satisfy the Board that the integrity of the election was not compromised. Conversely, the failure to achieve absolute compliance with these rules does not necessarily require that a new election be ordered, "although, of course, deviation from standards formulated by experts for the guidance of those conducting elections will be given appropriate weight in our determination." *Id.*

When a Board agent is alleged to have engaged in objectionable conduct by statements of personal feelings or other conduct purportedly favoring one party, the Board also applies the standard in *Athbro Precision Engineering*, 166 NLRB at 966. That standard is whether the conduct of the Board agent "tended to destroy confidence in the Board's election process, or . . . could reasonably be interpreted as impairing the election standards the Board seeks to maintain." *Id.*; see also, *Sonoma Health Center*, 342 NLRB at 933.

In situations in which the Board agent's conduct on the day of the election disrupts the polling hours or date of the election, the proper standard for determining whether a new election should be held is whether any employees were disenfranchised as a result and whether the number of employees possibly disenfranchised is sufficient to affect the election outcome. *Pea Ridge Iron Ore Co.,* 335 NLRB 161, 161 (2001); *Malta Construction Co.,* 276 NLRB 1494, 1510 (1985).

2. Standard for Objections 13 through 18 and 20 through 25 Alleging Objectionable Conduct by the Petitioner

To prevail based on alleged party conduct, the objecting party must establish facts raising a "reasonable doubt as to the fairness and validity of the election." *Patient Care*, 360 NLRB 637, 637 (2014), citing *Polymers, Inc*., 174 NLRB at 282. Moreover, to meet its burden the objecting party must show that the conduct in question affected employees in the voting unit. *Avante at Boca Raton*, 323 NLRB 555, 560 (1997) (overruling employer's objection where no evidence that unit employees knew of the alleged coercive conduct).

In determining whether to set aside an election, the Board applies an objective test. The test is whether the conduct of a party has "the tendency to interfere with employees' freedom of choice." *Cambridge Tool & Mfg. Co., Inc.*, 316 NLRB 716 (1995). Thus, under the Board's test the issue is not whether a party's conduct in fact coerced employees, but whether the party's misconduct reasonably tended to interfere with the employees' free and uncoerced choice in the election. *Baja's Place*, 268 NLRB 868, 868 (1984); see also, *Pearson Education, Inc.*, 336 NLRB 979, 983 (2001), citing *Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970).

In determining whether a party's conduct has the tendency to interfere with employee free choice, the Board considers a number of factors: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among employees in the voting unit; (3) the number of employees in the voting unit who were subjected to the misconduct; (4) the proximity of the misconduct to the date of the election; (5) the degree to which the misconduct persists in the minds of employees in the voting unit; (6) the extent of dissemination of the misconduct to employees who were not subjected to the misconduct but who are in the voting unit; (7) the effect (if any) of any misconduct by the non-objecting party to cancel out the effects of the misconduct alleged in the objection; (8) the closeness of the vote; and (9) the degree to which the misconduct can be attributed to the party against whom objections are filed. *Taylor Wharton Division*, 336 NLRB 157, 158 (2001), citing *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

3. Legal Standard for Alleged Third-Party Misconduct

Where misconduct is not attributed to parties but is rather attributable to third parties, the Board will overturn an election only if the misconduct is "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel,* 270 NLRB. 802, 803 (1984); (1984); *MasTec DirectTV*, 356 NLRB 809, 810 (2011); *U.S. Electrical Motors*, 261 NLRB 1343, 1344 fn. 5 (1982); *Phoenix Mechanical*, 303 NLRB 888, 888 (1991); *O'Brien Memorial*, 310 NLRB 943, 943 fn. 1 (1993); *Lamar Advertising of Janesville*, 340 NLRB 979, 980 (2003); *Duralam, Inc*., 284 NLRB 1419, 1419 (1987).

The standard for third-party conduct is more difficult to meet than the standards ordinarily applied to party conduct. In this regard, the Board has held that it "accords less weight to such [third-party] conduct than to conduct of the parties." *Orleans Mfg. Co.*, 120 NLRB 630, 633 (1958); *Dunham's Athleisure Corp.*, 315 NLRB 689 (1994). The explanation for this is that the Board believes that the conduct of third parties tends to have less effect upon the voters than similar conduct attributable to the employer who has, or the union which seeks, control over the employees' working conditions. *Orleans Mfg. Co.*, 120 NLRB 630, 633 (1958); see also *Owens- Corning Fiberglas Corp.*, 179 NLRB 219, 223 (1969); *MasTec DirectTV*, 356 NLRB at 811. Further, the Board recognizes that because unions and employers cannot control non-agents, "the equities militate against setting aside elections on the basis of conduct by third parties." *Lamar Advertising of Janesville*, 340 NLRB 979, 980 (2003).

The fact that third party conduct creates confusion is not sufficient to meet the third-party standard. See *Phoenix Mechanical*, 303 NLRB at 888 (misleading comment by employee not basis for setting election aside). Nor does mere name calling meet the standard. *Teamsters Local 299 (Overnite Transportation Co.)*, 328 NLRB 1231, 1231 fn. 1 (1999). But conduct that is boisterous, sustained, and intrusive into the election process has been found sufficient to set an election aside. *Pepsi-Cola Bottling Co.*, 291 NLRB 578, 578 (1988) (prounion employees formed "gauntlet" and forced voters to pass between two lines of chanting and cheering union supports in order to enter polling place). Compare *Cargill, Inc. v. NLRB*, 851 F.3d 841, 850–851 (8th Cir. 2017). The arrest of the union's principal organizer in the presence of a number of eligible voters only minutes before they were scheduled to vote has been found sufficient to meet the standard. *Great Atlantic & Pacific Tea Co*., 120 NLRB 765, 765 (1958). Compare *Vita Food Products, Inc.*, 116 NLRB 1215, 1219 (1957) (mere presence of police at plant during election did not warrant setting election aside).

C. The Relevant "Critical Period" for Consideration of Alleged Objectionable Conduct

As a general rule, the period during which the Board will consider conduct as objectionable— often called the "critical period"—is the period between the filing of the petition and the date of the election. *Ideal Electric Mfg. Co.*, 134 NLRB 1275, 1278 (1961); see also *Flamingo Las Vegas Operating Co.*, 360 NLRB 243, 246 fn. 13 (2014) (declining request to overrule *Ideal Electric*). It is the objecting party's burden to show that the conduct occurred during the critical period. *Accubuilt, Inc*., 340 NLRB 1337, 1338 (2003);

Gibraltar Steel Corp., 323 NLRB 601, 603 (1997); *Dollar Rent-A-Car*, 314 NLRB 1089, 1089 fn. 4 (1994).

Pre-petition conduct may be considered where it "adds meaning and dimension to related post-petition conduct." *Cedars-Sinai Medical Center*, 342 NLRB 596, 598 fn. 13 (2004); *Yuma Coca-Cola Bottling Co.*, 339 NLRB 67, 67 (2003); *Dresser Industries*, 242 NLRB 74, 74 (1979). While generally such prepetition conduct cannot, standing alone, be a basis for an objection, *Data Technology Corp.*, 281 NLRB 1005, 1007 (1986), the Board has found clearly proscribed prepetition activity likely to have a significant impact on the election. See *Royal Packaging Corp.*, 284 NLRB 317, 317 (1987). Postelection conduct will not ordinarily be grounds for valid objections. *Mountaineer Bolt*, 300 NLRB 667, 667 (1990).

D. The Role and Responsibilities of the Hearing Officer

In post-election proceedings, a hearing officer is responsible for receiving evidence on the matters set for hearing in the Regional Director's order directing hearing on objections. See Section 102.68(c)(ii) and (iii) of the Board's Rules. The hearing officer is required to limit the scope of the hearing to those matters. *Iowa Lamb Corp,* 275 NLRB 185, 185 (1985); *Precision Products Group,* 319 NLRB 640, 640-641 (1995); *FleetBoston Pavillion,* 333 NLRB 655, 656-657 (2001). The purpose of this limitation is twofold: (1) to prevent a party from using the objections process to discover or raise issues not raised in the objections or not material to the question of whether an election should be set aside, and (2) to guarantee due process for all participants by ensuring that the hearing is limited to the scope of the issues noticed in the Regional Director's order. See *id.* The hearing officer is also responsible for ensuring that the record is free of evidence not material to the question of whether an election should be set aside, including evidence that is not material because it is cumulative, and for ensuring that the hearing is not impermissibly used to probe into employees' exercise of their rights under Section 7 of the Act. *BFI Waste Services*, 343 NLRB 254, 254 (2004); Unpublished Board Order, *Trump Ruffin Commercial LLC*, Case 28-RC-153650 (Jul. 28, 2016).

The hearing officer is authorized to use offers of proof in aid of fulfilling these responsibilities. Section 102.69(c)(1)(iii) of the Board's Rules, which governs post-election hearings, states, in relevant part, that the hearing shall be conducted in accordance with the Sections 102.64, 102.65, and 102.66 of the Board's Rules, insofar as applicable, and that the hearing officer may rule on offers of proof. Section 102.66(c) of the Board's Rules states, in relevant part, that the hearing officer may solicit offers of proof from the parties or their counsel as to any or all such issues to be litigated at the hearing. Thus, pursuant to Sections 102.66(c) and 102.69(c)(1)(iii) of the Board's Rules, the Hearing Officer retains discretion regarding the receipt of such offers of proof on the record. Section 102.66(c) of the Board's Rules further provides, "Offers of proof shall take the form of a written statement or an oral statement on the record identifying each witness the party would call to testify concerning the issue and summarizing each witness's testimony." The Board will uphold Hearing Officers' determinations as to whether to allow presentation of evidence based on an offer of proof, if the evidence described in the offer of proof would "not raise material issues." *Pinkerton's National Detective Agency, Inc.*, 124 NLRB 1076, 1977 fn. 3 (1959); see also *NAPA New York Warehouse, Inc.*, 75 NLRB 1269, 1270 (1948).

E. The Role and Responsibilities of the Regional Director's Representative

The Board has a long-standing practice of permitting a Regional Director's representative to appear in post-election hearings, where appropriate, "to see that evidence adduced during the region's investigation becomes part of the record." Section 11424 of the Board's Casehandling Manual (Part Two) Representation Proceedings (Representation Case Manual). The Board's Representation Case Manual explains, at Section 11424.4(b):

> [T]he primary function of a representative of the Regional Director is to see that the relevant evidence adduced during the region's administrative review becomes part of the record. During the hearing, the file should be in his/her possession. The representative may voice objections; cross-examine, call and question witnesses; and call for and introduce appropriate documents. If the information in the representative's possession warrants it, he/she should seek to impeach the testimony of witnesses called by others or contradict evidence that has been presented.
>
> However, the representative of the Regional Director should not offer new material unless he/she is certain it will not be offered by one of the parties.
>
> If the representative finds it necessary to impeach the testimony of witnesses or contradict evidence that has been presented, the representative must exercise self-restraint and display impartiality as well as the appearance of impartiality.

The Employer objected to the participation of representatives for Region 29 in these proceedings. However, the Board found that the appearance of the representatives was in accordance with Agency practice. Unpublished Board Order, Amazon.com Services LLC, Case 29-RC-288020 (Jul. 12, 2022).

In rejecting the Employer's argument concerning the participation of the Regional Director representatives, the Board noted that certain aspects of the Regional Director of Region 28's description of the role of the Regional Director's representatives diverged from the description of that role in the Representation Case Manual. *Id.* However, the Board found that the question of whether the Regional Director's representative's participation prejudiced any party was best reserved for the conclusion of the hearing, where specific, fact-based arguments could be considered. *Id.*

Having observed the entirety of the hearing, including all actions of the representatives of the Regional Director of Region 29, I find that the Regional Director's representatives did not engage in any conduct that prejudiced any party. The Employer essentially argues that the Regional Director's representatives' conduct during the hearing prejudiced the Employer in two respects: first, the Regional Director's representatives argued that certain objections related to conduct of Region 29 concerning to the showing of interest in support of the instant petition and its processing of ancillary unfair labor practice charges were immaterial; and, second, the Regional Director's representatives concurred with the Petitioner with respect to certain evidentiary objections.

For reasons explained in detail below, I agreed with the position of the Petitioner and the Regional Director's representatives on these two points on their merits. The joinder of the Regional Director's representatives in opposing the Employer's arguments caused no prejudice because the Employer's arguments on each substantive and evidentiary issue fail on their merits, regardless of who advanced the argument or objection.

IV. AGENCY STATUS OF THE PETITIONER'S OBSERVERS, PETITIONER'S ORGANIZERS AND PRO-PETITIONER EMPLOYEES

A. Legal Standard for Agency Status

The burden of proving an agency relationship rests with the party asserting its existence, both as to the existence of the relationship and as to the nature and extent of the agent's authority. *Millard Processing Services*, 304 NLRB 770, 771 (1991); *Sunset Line &Twine Co.,* 79 NLRB 1487, 1508 (1948). The agency relationship must be established with regard to the specific conduct that is alleged to be unlawful. *Pan-Oston Co.,* 336 NLRB 305, 306 (2001). An individual can be a party's agent if the individual has either actual or apparent authority to act on behalf of the party.

Generally, the Board applies common law principles of agency, including principles of apparent and actual authority, in determining whether alleged misconduct is attributable to a party. See, e.g., *NLRB v. Downtown Bid Services Corp.*, 682 F.3d 109, 113 (D.C. Cir. 2012); *Mar-Jam Supply Co.*, 337 NLRB 337, 337 (2001); *Cooper Industries*, 328 NLRB 145, 145 (1999); *Fieldcrest Cannon, Inc*., 318 NLRB 470, 470 (1995); *Culinary Foods, Inc*., 325 NLRB 664, 664 (1998); *General Metal Products Co.*, 164 NLRB 64, 64 (1967); *Dean Industries*, 162 NLRB 1078, 1093–1094 (1967); *Colson Corp. v. NLRB*, 347 F.2d 128, 137 (8th Cir. 1965).

The test for finding apparent authority is whether, under all the circumstances, "employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management." *SAIA Motor Freight, Inc.*, 334 NLRB 979, 979 (2001) (quoting *Waterbed World*, 286 NLRB 425, 426–427 (1987), enfd. 974 F.2d 1329 (1st Cir. 1992)); *Facchina Construction Co.*, 343 NLRB 886, 887 (2004); *Ready Mix, Inc.*, 337 NLRB 1189 (2002); *Mid-South Drywall Co.*, 339 NLRB 480, 480 (2002); *D&F Industries*, 339 NLRB 618, 619 (2002); *Pratt (Corrugated Logistics), LLC*, 360 NLRB 304, 340 (2014).

Agency is not established merely on the basis that employees are engaged in "vocal and active Petitioner support." *United Builders Supply Co.*, 287 NLRB 1364, 1365 (1988); *see also Tuf-Flex Glass v. NLRB*, 715 F.2d 291, 296 (7th Cir. 1983). Attending organizing meetings or soliciting cards on behalf of a Petitioner do not, standing alone, render employees agents of a petitioner. *Health Care and Retirement Corporation of America v. NLRB*, 255 F.3d 276, 276 (6th Cir. 2000). Employee members of an in-plant organizing committee are not, simply by virtue of such membership, agents of the Petitioner. *Advance Products. Corp.*, 304 NLRB 436, 436 (1991); *Health Care and Retirement Corporation of America*, 255 F.3d at 276.

B. Agency Status of the Petitioner's Election Observers and Officers

Petitioner stipulated that from December 22, 2021 to March 31, 2022, Chris Smalls (Smalls), Connor Spence (Spence), Derrick Palmer (Palmer), Karen Ponce (Ponce), Madeline Wesley (Wesley), Angelika Maldonado (Maldonado), and Brett Daniels (Daniels) (collectively, stipulated Petitioner agents) were agents of the Petitioner. I received this stipulation and accordingly find that these stipulated Petitioner agents are agents of the Petitioner under Section 2(13) of the Act. I note that the Petitioner's Constitution and By-Laws dated 2021 (Constitution and By-Laws) were effective during the critical period and define the duties of each of the stipulated Petitioner agents as set forth below.

Spence testified that during the critical period, Smalls was the Petitioner's President; Palmer was the Petitioner's Vice President of Organizing; Spence was the Petitioner's Vice President of Membership; Ponce was the Petitioner's Secretary; Wesley was the Petitioner's Treasurer; Daniels was the Petitioner's Director of Organizing; and Maldonado was the Petitioner's Chair of the Organizing Committee (Organizing Committee or Workers' Committee). The record reflects that the Organizing Committee was the only committee of the Petitioner during the critical period.

Section 3.1 – Executive Officers of the Petitioner's Constitution and By-Laws establishes the following regarding Petitioner's Executive Board, in relevant part:

> (a). The officers of this Union shall consist of a President, Vice President of Organizing, Vice President of Membership, Treasurer, and Secretary.
>
> (b). The officers of this Union, along with the elected chairpersons of each workers' committee, shall constitute an Executive Board.
>
> (c). All elected officers shall serve for a term of two (2) years.
>
> (d). All vacancies of elective officers including but not limited to, resignation, removal, expulsion, suspension or for any other reason shall be filled by appointment by the President subject to the eligibility requirements of Article 2 and such appointed officers shall serve in the office for the balance of the unexpired term.
>
> (e). The annual salary of Executive Board members shall be no more than the average salary of the membership.

Section 3.2 of the Petitioner's Constitution and By-Laws sets forth the duties of the President, as follows, in relevant part:

> The President shall function as the chief executive officer of the Union and shall employ and direct all Union staff except as otherwise provided in this Constitution.
>
> [***]

The President of the Union shall:

(a) Preside at all regular and special meetings of the Union and its Executive Board.

(b) Preside at all regular meetings of the Workers' Committees or allow the Vice President of Membership to act in their stead.

(c) Preserve order and enforce the Constitution and By-Laws of the Union.

(d) Be an ex-officio member of all committees, but shall have no vote at the meetings at which they preside.

(e) Have the authority to appoint special committees and direct union resources therewith, subject to approval by the Executive Board.

(f) Sign checks jointly with the Treasurer.

(g) Be at all times responsible to the Executive Board.

The laws of this Union, as contained in these By-Laws, shall be interpreted by the President. Their decisions thereon shall be binding upon all individual members subject to appeal to the Union's Executive Board within seven (7) days of a determination or decision by the President.

The record reflects Smalls was elected as the Petitioner's Interim President before the critical period, around November 2021. The Leadership Provision Antecedent to Initial Representation Election in the Petitioner's Constitution and By-Laws provides:

Interim leadership shall be elected by the general membership. Executive Board positions shall be accessible to candidates, and any member elected to these positions shall hold office until the conclusion of the first Representation Election.

Section 3.3 of the Petitioner's Constitution and By-Laws sets forth the duties of the Vice President of Organizing, as follows:

The Vice-President of Organizing shall assist the President, and in their absence or when called upon, shall preside at general or special meetings. The Vice-President of Organizing shall succeed to the office of President if it becomes vacant.

The Vice-President of Organizing shall assist the President in all Union activities relating to organizing the unorganized, training and directing staff organizers, and mobilization of union membership towards service to the community.

Section 3.4 of the Petitioner's Constitution and By-Laws sets forth the duties of the Vice President of Membership, as follows:

The Vice-President of Membership shall assist the President, and in their absence or when called upon, shall preside at Workers' Committee meetings.

The Vice-President of Membership shall assist the President in all Union activities relating to engagement of rank-and-file membership, communication and interaction with organized workers, and the development of a culture of solidarity.

Section 3.5 of the Petitioner's Constitution and By-Laws sets forth the duties of the Treasurer, as follows:

The Treasurer shall be in charge of and preserve all monies, properties, securities, and other evidence of investment, books, documents, files and effects of the Union which shall at all times be subject to the inspection of the President and Executive Board and consistent with applicable law. The Treasurer shall deposit the funds of the Union in banks and institutions insured by a United States Government Agency in the name of this Union. The Treasurer may invest and expend the funds of the Union in accordance with these By-Laws and pursuant to the direction or resolution of the general membership or the Executive Board. The Treasurer shall be required to provide for an audit of all books, accounts, records, and financial transactions of the Union on an annual basis by an accredited and independent auditing firm.

Section 3.6 of the Petitioner's Constitution and By-Laws sets forth the duties of the Secretary, as follows:

The Secretary shall be responsible for all correspondence to and from the Union. The Secretary will be responsible for all recordkeeping and required filings of the Union. The Secretary shall be responsible for the keeping of minutes and attendance from any Union meeting of the rank-and-file membership, Workers' Committees, or Executive Board.

Section 4.1 of the Petitioner's Constitution and By-Laws sets forth the duties of the Workers' Committee, as follows:

Each distinct building or workforce shall form from its rank-and-file membership a committee of stewards known as the Workers' Committee. Membership on this committee should strive to represent workers from every department and shift cohort.

Duties of this committee shall include:

(a). Discussing and voting on collective bargaining policy and strategy.

(b). Developing contract demands.

(c). Voting to bring forward a strike referendum.

(d). Voting to revise any aspect of union spending.

(e). Electing a Committee Chairperson to preside over meetings and serve on the Executive Board.

(f). Electing a Negotiation Subcommittee.

A quorum of the worker's committee necessitates a majority of active Stewards.

Spence testified that the Petitioner has not designated any stewards and there has not been any election for stewards to date.

Section 4.3 of the Petitioner's Constitution and Bylaws sets forth the duties of the Workers' Committee Chairperson, as follows:

(a). A Committee Chairperson shall be elected by the Workers' Committee through a plurality vote.

(b). The Committee Chairperson is elected for a term of one (1) year.

(c). A candidate for committee chairperson must be an appointed Steward in good standing, and have at least ninety (90) days of experience in the unit their Workers' Committee represents.

(d). It is the duty of the Committee Chairperson to call to order and preside over any meetings of the Workers' Committee.

(e). The Committee Chairperson shall act as a member of the Executive Board.

Section 7.2 – Workers' Committee Meetings indicates that such meetings "should be held at least once per month at a time and place determined by the President. Fewer or more frequent meetings may be held at the discretion of the Executive Board.

The doctrine of apparent authority also applies to conduct by alleged union officers and representatives. See, e.g., *Corner Furniture Discount Center, Inc.*, 339 NLRB 1122, 1122 (2003); see also *Ashland Facility Operations, LLC v. NLRB*, 701 F.3d 983, 989–991 (4th Cir. 2012). Thus, a union may be held accountable for statements of its committee members if they are responsible representatives of the union in the plant and play a central role in the election campaign. *Vickers, Inc.*, 152 NLRB 793, 795 (1965).

It is well settled that, while serving in the limited capacity as a Petitioner election observer, the observer is acting as an agent of the Petitioner under Section 2(13) of the Act and is subject to the standard which the Board uses to evaluate allegedly objectionable conduct by parties to the election. *See Dubovsky & Sons, Inc.*, 324 NLRB 1068, 1068 (1997). The Petitioner is therefore responsible for the conduct of its election observers while acting in that capacity. According to the Designation of Observers forms provided by Petitioner to Region 29, it designated the following individuals to serve as observers before the election: Spence, Jason Anthony (Anthony), Michelle Valentin Nieves

(Nieves), Shaun Davidson, Brima Sylla (Sylla), Antonio (Cassio) Mendoza (Mendoza), Palmer, Maldonado, Daniels, Ponce, Tristan Dutchin (Dutchin), and Tristian Martinez (T. Martinez).

Based on the foregoing and the record as a whole, I will examine the alleged conduct of the Petitioner's election observers, including Anthony and Mendoza, while serving as the Petitioner's election observers, and the alleged conduct of the stipulated Petitioner agents under the standard applied to parties. *See Cambridge Tool Pearson Education, Inc.*, 316 NLRB 716 (1995).

C. Agency Status of Pro-Petitioner Employees

Conduct of union activists is not per se imputed to the union. See *Advance Products Corp.*, 304 NLRB 436, 436 fn. 3 (1991); *Crestwood Convalescent Hospital*, 316 NLRB 1057, 1057 (1995). Although the Employer contends that certain of the bargaining unit employees who supported the Petitioner were the Petitioner's agents, including but not limited to the Petitioner's supporters Justine Medina (Medina), Anthony, Mendoza, and Dutchin, while not serving as a the Petitioner' observers, as well as Pat Cioffi (Cioffi) and Jordon Flowers (Flowers), the evidence on these individuals' alleged agency status merely shows that these employees were ardent supporters of the Petitioner who, for example, voluntarily sought employees' signatures on the Petitioner's documents, distributed pro-Petitioner flyers, t-shirts, lanyards, buttons, and free food, attended the Petitioner's meetings, and volunteered to talk to employees about the Petitioner at its tables, by phone and text, and during home visits.

D. Application of the Board's Agency Standards

1. The Petitioner's Campaign at the Employer's JFK8 Building During the Critical Period

The record reflects the Petitioner gave t-shirts to eligible voters during the critical period in various colors that simply stated, "ALU" visible at the chest-level of the shirt (Petitioner t-shirt(s)). From around late February through late March 2022, the Petitioner also gave yellow lanyards to eligible voters during the critical period that included the text "ALU" and "Vote Yes" in white letters in small font (Petitioner lanyard). The Petitioner had two buttons (collectively, Petitioner buttons): 1) a white button with red and black graphics, depicting a box with three raised fists coming out of it (Petitioner button with raised fists); and 2) a little button that just said "ALU" in different colors (ALU button).

During the critical period, the terms "lead organizer" and "organizer" generally appear to be titles that the Petitioner's supporters gave themselves to indicate that they were active supporters of the Petitioner that volunteered to assist the Petitioner with its organizing activities. With respect to lead organizers, Spence testified, "Nobody designated anyone as a lead organizer. It was more of an informal title given by somebody to themselves, essentially when they saw themselves as putting in maybe more work than others and being more vocal than others."

With respect to the Petitioner's use of tables located inside the first and third floor break rooms at the Employer's JFK8 building during the critical period (Petitioner break room tables), Spence testified that the Petitioner's supporters volunteered to be present at Petitioner break room tables located in the first and third floor break rooms at the Employer's JFK8 building, based on the

individuals' availability before and after their shifts, during their breaks, and on their days off. Volunteer staffing at Petitioner break room tables was not coordinated, scheduled, or maintained by Petitioner. According to Spence, the Petitioner did not coordinate handing out or collecting authorization cards at its Petitioner break room tables during the critical period because its petition for the election had already been approved and there was no need to get authorization cards signed.

These Petitioner volunteers present at Petitioner break room tables typically wore Petitioner items such as Petitioner t-shirts, Petitioner buttons, and Petitioner lanyards. There were occasions during the critical period when the Petitioner did not have any volunteers available to be present at the Petitioner break room tables and just left its flyers and pamphlets on such tables unattended. Spence generally coordinated making and printing the Petitioner's flyers and pamphlets and coordinated ordering Petitioner t-shirts and Petitioner lanyards. Spence testified that the Petitioner's buttons were donated.

With respect to tables the Petitioner utilized outside of the Employer's JFK8 building during the critical period (Petitioner outside tables), Spence testified that from around mid-November 2021 to around mid-January 2022, the original S40 public bus stop across from the Employer's JFK8 building was no longer in use, and employees began using a bus stop at the corner of the JFK8 building by the recruitment office (corner by the Employer's recruitment office). Because of this relocation of the public bus stop, from around mid-November 2021 to mid-January 2022, the Petitioner moved the location of Petitioner outside tables from the original S40 public bus stop across from the Employer's JFK8 building to the corner by the Employer's 8 recruitment office. Spence testified that, once the S40 bus stop moved back to its original location across from the Employer's JFK8 building around mid-January 2022, the Petitioner moved the location of Petitioner outside tables back to the original S40 public bus stop location.

According to Spence, around mid-January 2022, the Petitioner shifted its strategy "from being at the bus stop in those campaign months to trying to be in the break rooms and inside the building as much as we could." An article tweeted by *The Indypendent*, a free progressive newspaper and website dated February 16, 2022 contains the following quote from Smalls:

> We've switched up our strategy," Smalls told *The Indypendent.* "We're playing the inside game. We're occupying the break rooms and have domains in the cafeterias. We are disrupting the captive audience meetings that started back up this week. We are being more militant, a lot more aggressive on the front line; showing the workers that we have collective power.

With respect to the Petitioner's text messages and phone banking, Spence testified that the Petitioner set up text banking and phone banking campaigns during which volunteer Petitioner supporter employees would reach out to eligible voters to communicate about the Petitioner and the election. The record reflects that the Petitioner's text messages, pamphlets, and flyers were approved by the Petitioner's Executive Board.

With respect to the Petitioner's home visits, Smalls testified that Petitioner only conducted home visits for around one to two days during the critical period, during which a Petitioner volunteer and a coworker visited their coworkers who were eligible to vote in the election at their homes.

Smalls said that the home visits were not effective for the Petitioner's campaign, so Petitioner transitioned to phone banking for the remainder of the Petitioner's campaign.

It is well established that evidence of this nature, such as distributing Petitioner flyers, Petitioner t-shirts, Petitioner lanyards, Petitioner buttons, serving free food, attending Petitioner meetings, and volunteering to talk to employees about the Petitioner at its tables, by phone and text, and during home visits, is insufficient to support a finding that employee advocates acted as the Petitioner's general agents for organizing purposes. See *Advance Products Corp*., 304 NLRB at 436; and *United Builders Supply*, 287 at 1364. The Board has repeatedly admonished that "[e]mployee members of an in-plant organizing committee are not, per se, agents of the union." *Foxwoods Resort Casino,* 352 NLRB 771, 772 (2008) [citing cases]. "[A]ctivities such as distributing literature, soliciting signatures on authorization cards, and talking to fellow employees about the union [are] insufficient to make employees general agents of the union." *Id.*

2. Alleged Agency Status of Anthony and Medina

With respect to other evidence the Employer seeks to rely on to support its assertion that certain employees acted as agents of the Petitioner during the critical period, I note that Anthony referred to himself as a "lead organizer," and was the "creator and one of the administrators" of a public ALU Facebook group that was created by Anthony before the critical period. This ALU Facebook group is managed under Anthony's personal Facebook profile. According to Anthony, a person would have to be admitted as a member of this ALU Facebook group, as an employee of the Employer or a Petitioner supporter. Anthony also testified that he is an administrator of the ALU Facebook page.

Medina was notified she was one of the administrators of this ALU Facebook group managed under Anthony's personal Facebook profile but testified she did not take any actions on that ALU Facebook group or any of Petitioner's other social media accounts, including, but not limited to, Twitter, Facebook, TikTok, or Instagram, on behalf of the Petitioner. Medina is a Petitioner "eager volunteer" and is a member of the Petitioner's organizing committee comprised of volunteer employees. According to Medina, during the critical period, the Petitioner's organizing committee typically had weekly meetings, at least one to three times per week; Medina volunteered her off-duty time at Petitioner break room tables to talk to employees and provide employees with Petitioner pamphlets and flyers; and Medina phone banked around twice a week before the election in March 2022.

Medina testified that when she volunteered at Petitioner break room tables, and she "usually" wore a Petitioner t-shirt, Petitioner lanyard around her neck or in her pocket, and Petitioner buttons. Medina testified that when she volunteered at Petitioner break room tables, she would "say I'm volunteering for ALU to talk about the union, the upcoming election," and if she had not met them before, she would introduce herself by name, say what department she worked in, ask what department they worked and what kinds of things they wanted the Employer to change for its workers.

3. Agency Status of Petitioner Employee Supporters

In determining whether pro-union employees are agents of a union under Section 2(13) of the Act, the Board focuses on whether the union has relied exclusively on such pro-union employees to convey its message such that the union is otherwise absent from the campaign, rendering the pro-union employees the only conduit for union communication to employees. *Id.* at 772. For example, in *Bio-Medical Applications of Puerto Rico, Inc.,* 269 NLRB 827, 827 (1984), the Board found an employee was an agent of the union when he was identified as a "representative" of the union and was directed by a union officer to stay in the waiting area near the polls where he engaged in objectionable electioneering. Similarly, in *Bristol Textile Co.,* 277 NLRB 1367, 1367 (1986), the Board found that an employee was an agent of the union because he served as the union's sole conduit to employees at the plant. There is no such record evidence establishing that Petitioner supporters Anthony, Medina, Flowers, Cioffi, or any other Petitioner supporter was the sole conduit to employees at the plant. To the contrary, the record evidence shows that the Petitioner and its stipulated Petitioner agents communicated directly to employees throughout the critical period.

Here, the record reflects that the activities engaged in by pro-Petitioner employees, including distributing Petitioner flyers, Petitioner t-shirts, Petitioner lanyards, Petitioner buttons, and free food, volunteering time to communicate with employees at Petitioner break room tables, at phone banks, and during home visits, and generally advocating in favor of the Petitioner, are the kinds of activities that the Board has found insufficient to confer agency status. Further, Petitioner's stipulated agents maintained a constant presence at the JFK8 building throughout its campaign during the critical period, including giving away free items of *de minimis* value, creating and disseminating flyers to employees, as well as conducting text and phone banking and home visits with employees. The Petitioner also held fundraisers and rallies for its campaign during the critical period, and the Petitioner's officers and stipulated agents made statements on behalf of the Petitioner. When pro-Petitioner employees such as Medina, Cioffi, and Anthony, spoke at the Petitioner's rallies during the critical period, they were identified as employees of the Employer and supporters of the Petitioner, not as officers or representatives of the Petitioner.

In addition, the Petitioner's encouraging employees to talk to its Organizing Committee members, lead organizers, or organizers, is more indicative of inviting employee support for the Petitioner and encouraging employees to speak with their coworkers than creating the appearance that its Organizing Committee members, organizers, or lead organizers had any authority to speak or act generally on behalf of the Petitioner. Although Organizing Committee members, organizers, and lead organizers occasionally coordinated communication between the Petitioner and the Employer's employees, they were not the *exclusive* conduit for such communication since the Petitioner's officers themselves, particularly the Petitioner's officers employed as employees at the Employer's JFK8 building, maintained a constant presence at the building during the critical period.

Thus, I conclude that the Employer, who bears the burden of proof, has failed to establish that employees could reasonably conclude that the pro-Petitioner employees were acting on behalf of the Petitioner when they engaged in the conduct alleged to be objectionable. Furthermore, I find that the Petitioner was not responsible for any conduct any pro-Petitioner employees within the scope of these objections. *Crestwood Hospitals, Inc.,* 316 NLRB 1057,

1057 (1995). Accordingly, the standard I will apply for the objections involving the pro-Petitioner employees, including but not limited to employees Medina, Dutchin, Flowers, and Anthony (while not serving as a Petitioner observer) will be the standard applied to third parties. *Cornell Forge Co*., 339 NLRB 733, 733 (2003).

V. THE EMPLOYER'S OBJECTIONS AND MY RECOMMENDATIONS

A. Witness Credibility

The Order Directing Hearing on Objections instructs me to resolve the credibility of witnesses testifying at the hearing and to make findings of fact. Unless otherwise specified, my summary of the record evidence is a composite of the testimony of all witnesses, including in particular testimony by witnesses that is consistent with one another, with documentary evidence, or with undisputed evidence, as well as testimony that is uncontested.

The credibility analysis may rely upon a variety of factors, including, but not limited to, the context of the witness testimony, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 303–305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Lincoln-Mercury-Mitsubishi, Inc*., 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings regarding any witness are not likely to be an all-or-nothing determination, and I may believe that a witness testified credibly regarding one fact but not on another. *Daikichi Sushi*, 335 NLRB at 622.

Credibility resolutions are based on my observations of the testimony and demeanor of witnesses and are more fully discussed within the context of the objections related to witnesses' testimony. Omitted testimony or evidence is either irrelevant or cumulative. Testimony contrary to my findings has been specifically considered and discredited.

B. Objection 1: On March 17, when Region 29 sought a 10(j) injunction in *Drew-King v. Amazon.com Services LLC*, E.D.N.Y., No. 22-01479, Region 29 failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the Petitioner.

1. Record Evidence

For Objection 1, I took judicial notice of the Civil Docket of *Drew-King v. Amazon.com Services LLC*, E.D.N.Y., No. 22-01479 (the 10(j) Petition) and all filings made during the critical period, over the relevancy objections of the Regional Director Representative and Petitioner. The Civil Docket shows that the 10(j) Petition was filed by the Agency on March 17,[6] eight days

[6] The Employer's argument regarding Region 29's alleged delay in investigating the charge underlying the 10(j) Petition, Case 29-CA-261755, filed on June 17, 2020, issuing complaint on December 22, 2020, and litigating Case 29-CA-261755 from about late March 2021 through May 27, 2021, is irrelevant to the objections before me, including Objection 1, as these events indisputably occurred before the critical period of the objections before me. The Employer admits that it was notified by Region 29 about its intent to file the 10(j) Petition on March 10, one week before Region 29 filed the 10(j) Petition on March 17.

before the election commenced on March 25. However, the Court had not made any ruling regarding whether it would grant or deny the petitioned-for relief by the end of the critical period on March 30.

According to *The Verge*,[7] as published in its article dated March 17, and other media outlets published around the same date when the 10(j) Petition was filed, the Regional Director of Region 29 made the following comment:

> We are seeking an injunction in District Court to immediately reinstate a worker that Amazon illegally fired for exercising his Section 7 rights. We are also asking the Court to order a mandatory meeting at JFK8 with all employees at which Amazon will read a notice of employees' rights under the National Labor Relations Act. No matter how large the employer, it is important for workers to know their rights—particularly during a union election—and that the NLRB will vociferously defend them.

2. Board Section 10(j) Casehandling Procedures and Board Law

Section 10(j) of the Act states, in relevant part:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) [of this section] charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

In sum, Section 10(j) authorizes the *Board* to seek injunctive relief in U.S. District Court in situations where, due to the passage of time, the normal adjudicative processes of the Board likely will be inadequate to effectively remedy the alleged violations. NLRB Section 10(j) Manual Sec. 1.1 (10(j) Manual). Such injunctive relief may be sought as soon as an unfair labor practice complaint is issued by the General Counsel and remains in effect until the Board finally adjudicates the unfair labor practice case. *Id.* It may be requested by the Charging Party or sought by the Regional Office, *sua sponte*. *Id.*

A Region's role with respect to potential Section 10(j) cases is to investigate and determine whether the underlying unfair labor practice case(s) have merit and whether Section 10(j) proceedings appear appropriate. NLRB Section 10(j) Manual Sec. 4.1. A Region makes its

[7] See Mitchell Clark, The NLRB is suing Amazon to get a fired activist his job back, THE VERGE (Mar. 17, 2022), https://www.theverge.com/2022/3/17/22983692/nlrb-amazon-labor-activism-gerald-bryson-jfk8-warehouse-injunction.

recommendation to seek Section 10(j) relief to the General Counsel, and if the General Counsel agrees that Section 10(j) relief is appropriate, the Board itself must authorize the use of Section 10(j). NLRB Section 10(j) Manual Sec. 5.2. Thus, although Regions retain some control regarding the timing of its unfair labor practice charge investigations, merit determinations, and submission of its recommendation that Section 10(j) proceedings appear warranted, Regions are *not* in control of when or whether the General Counsel agrees with a Region's Section 10(j) recommendation, *nor* when or whether the Board ultimately authorizes Section 10(j) relief. NLRB Section 10(j) Manual Sec. 5.3. If the Board does authorize Section 10(j) relief, then the recommending Region is responsible for filing the Section 10(j) petition within 48 hours (two business days), absent exigent circumstances such as imminent settlement or authorization to delay filing the petition more than 48 hours after the Board authorizes Section 10(j) proceedings. NLRB Section 10(j) Manual Sec. 5.4.

To set aside an election based on Board agent misconduct or Regional office procedural irregularities, the objecting party must show that there is evidence that "raises a reasonable doubt as to the fairness and validity of the election." *Durham School Services, LP*, 360 NLRB at 853, citing *Polymers, Inc*., 174 NLRB at 282; see also *Physicians & Surgeons Ambulance Service*, 356 NLRB at 199. The Board has also stated that an election must be set aside "when the conduct of the Board election agent tends to destroy confidence in the Board's election process or could reasonably be interpreted as impairing the election standards the Board seeks to maintain." *Sonoma Health Care Center*, 342 at 933; see also *Athbro Precision Engineering Corp*., 166 NLRB at 966.

3. Recommendation

Pursuant to the Board's authorization, Region 29 filed the 10(j) Petition on March 17, during the critical period, eight days before the election started on March 25. However, the Civil Docket confirms that the Court did not grant or deny the petitioned-for preliminary injunction at any time during the critical period. As noted above, the standard to set aside an election based on alleged Regional office procedural irregularities, the objecting party must show that there is evidence that "raises a reasonable doubt as to the fairness and validity of the election." *Durham School Services, LP*, 360 NLRB at 853, citing *Polymers, Inc*., 174 NLRB at 282.

The fact that the Board authorized Region 29 to file its 10(j) petition within the critical period, on March 17, but the Court took no affirmative action to grant or deny the 10(j) petition during the critical period provides insufficient evidence that "raises a reasonable doubt as to the fairness and validity of the election." *Id.* Contrary to the Employer's assertion that Regional Director Drew-King's attributed comment "made clear in press that Region 29's purpose in seeking injunctive relief was to impact the results of the election in support of the ALU," the plain meaning of this comment simply reflects that the Board authorized Region 29 to seek Section 10(j) remedies with the District Court and underscores the importance of employees knowing their Section 7 rights, including during elections. Other than underscoring the how pivotal it is for employees to understand their Section 7 rights during elections, Regional Director Drew-King's comment is about seeking Section 10(j) remedies, *not* the election. Moreover, the content of Regional Director Drew-King's attributed comment, in and of itself, does not raise "a reasonable doubt as to the fairness and validity of the election."

The Employer argues that the "timing and content of Region 29's filing portrayed Amazon in a negative light to voters and suggested that the Region disfavored Amazon in the coming election." However, the Employer chose not to present or proffer *any* eligible voters as witnesses to testify regarding any knowledge of 10(j) Petition or that the 10(j) Petition had any bearing on the election whatsoever. In sum, the record evidence reflects that neither the timing nor the content of the 10(j) petition, nor Regional Director Drew-King's attributed comments on March 17, during the critical period, "raises reasonable doubt as to the fairness and validity of the election," or "destroy[ed] confidence in the Board's election process or election standards." *Polymers, Inc*., 174 NLRB at 282; see also *Athbro Precision Engineering Corp*., 166 NLRB at 966.[8] Rather, both the 10(j) Petition and Regional Director Drew-King's attributed comments show that Region 29 was seeking to effectuate its statutory mandate to commence Section 10(j) proceedings when authorized by the Board. Based on the foregoing and the record as a whole, I recommend that Objection 1 be overruled.

[8] The Employer's argument that Region 29's filing of the 10(j) Petition and attributed comments from Regional Director Drew-King about the filing of the 10(j) Petition on March 17, eight days before the election commenced on March 25 are completely dissimilar to the facts of *Glacier Packing Co., Inc.,* 210 NLRB 571 (1974), where, as the Employer acknowledges, the election was set aside on the basis of two individual instances of conduct *by the Board agent conducting the election*. *Id.* at 572. The Board agent's conduct involved "yank[ing] off" campaign insignia worn by employer observers and approaching an employer official standing 200 feet from the polling place while the polls were open. The same is true for the Employer's reliance on *Hudson Aviation Servs.*, 288 NLRB 870 (1988), where, *during the election*, the Board agent got into a verbal argument with an assistant manager and threatened to stop the election if the manager stayed in the office. *Id.* at 870. No such facts are present at Objection 1, focusing on Region 29's filing of the 10(j) Petition *eight days before the election started*, regarding an underlying unfair labor practice charge investigation, unfair labor practice litigation, and 10(j) Petition filed in District Court, completely separate proceedings in different forums from the instant representation proceedings.

C. Objection 2: Region 29 failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the Petitioner when it delayed investigating numerous unmeritorious and frivolous unfair labor practice charges that were pending during the critical period rather than properly dismissing them or soliciting withdrawals.

1. Record Evidence

The crux of Objection 2[9] is that Region 29 created the impression of Board assistance or support for the Petitioner when it delayed investigating numerous unmeritorious unfair labor practice charges that were pending during the critical period rather than properly dismissing them or soliciting withdrawals. For Objection 2, I took administrative notice of the unfair labor practice charges filed and the withdrawal letters issued to the Employer on the dates as set forth in the chart below:

Charge	File Date	Withdrawal Issued
Case 29-CA-280386	07/23/2021	04/19/2022
Case 29-CA-286682	11/19/2021	02/07/2022
Case 29-CA-287940	12/16/2021	05/18/2022
Case 29-CA-289893	01/27/2022	03/25/2022
Case 29-CA-290046	02/04/2022	02/15/2022
Case 29-CA-291182	02/24/2022	04/25/2022
Case 29-CA-291424	02/28/2022	03/29/2022
Case 29-CA-292004	03/09/2022	03/29/2022
Case 29-CA-292013	03/10/2022	03/21/2022
Case 29-CA-293152	03/28/2022	04/15/2022

The highlighted dates in the chart above (first chart) represent dates that fall within the critical period to the objections before me.

[9] The Employer argues that I made erroneous evidentiary rulings regarding Objection 2 by precluding testimony from Employer witness Donaldson pertaining to "ALU's strategy in relation to Objection 2" and rejecting FOIA responses the Employer received for all of the charges set forth above in the first chart, on grounds of relevance. As noted on the record, Objection 2 asserts that *Region 29* created the impression of support for the Petitioner by *Region 29's* alleged delay disposing of charges set forth in the first chart, not the *Petitioner's* alleged strategy in filing charges, so any testimony from an *Employer management* witness regarding the *Petitioner's* alleged strategy is not relevant to Objection 2. If the Employer wished to timely file an objection against the *Petitioner* alleging that the *Petitioner* committed objectionable conduct by allegedly filing frivolous charges against the Employer during the critical period, it could have done so, but it did not. Thus, the *Petitioner's* alleged strategy in filing its unfair labor practice charges against the Employer is not relevant to Objection 2. Further, allowing the receipt of all FOIA responses the Employer received for all 10 charges included in the first chart clutters the record and is not in accordance with my duty as the hearing officer to ensure that *all* record evidence is relevant to the Objections before me, including Objection 2. Since Objection 2 is focused on *Region 29's* alleged delay in investigating and disposing of certain charges listed at the first chart, I permitted the Employer to place each charge and each dispositional document received into the record, as summarized above in the first chart. I note that I did *not* preclude any proffered testimony from any *employee* witness regarding any their knowledge of Region 29's alleged delay in investigating the charges set forth above in the first chart.

In addition, I took administrative notice of the following unfair labor practice charges that the Regional Director of Region 29 determined, warranted the issuance of unfair labor practice complaints, absent settlement, the issuance of an Administrative Law Judge's Decision (ALJD) for Case 29-CA-261755, and unfair labor practice hearings initially scheduled to commence on the following dates:

Charge	File Date	Complaint Issued	ALJD Issued/Hearing Scheduled
Case 29-CA-261755	06/17/2020	12/22/2020	04/18/2022 (ALJD)
Case 29-CA-277198	05/17/2021	02/18/2022	04/05/2022 (Hearing)
Case 29-CA-278982	06/21/2021	02/18/2022	04/05/2022 (Hearing)
Case 29-CA-277598	05/21/2021	02/18/2022	04/05/2022 (Hearing)
Case 29-CA-278701	06/21/2021	02/18/2022	04/05/2022 (Hearing)
Case 29-CA-285445	11/01/2021	02/18/2022	04/05/2022 (Hearing)
Case 29-CA-286272	12/29/2021	02/18/2022	04/05/2022 (Hearing)
Case 29-CA-280153	07/16/2021	05/31/2022	09/19/2022 (Hearing)
Case 29-CA-286577	11/19/2021	05/31/2022	09/19/2022 (Hearing)
Case 29-CA-287614	12/13/2021	05/31/2022	09/19/2022 (Hearing)
Case 29-CA-290880	02/17/2022	05/31/2022	09/19/2022 (Hearing)
Case 29-CA-292392	03/16/2022	05/31/2022	09/19/2022 (Hearing)

The highlighted dates in the chart above (second chart) represent dates that fall within the critical period to the objections before me.

2. Unfair Labor Practice Casehandling Procedures and Board Law

After the Region dockets an unfair labor practice case, it is categorized under Impact Analysis and assigned to a Board agent for investigation. NLRB Casehandling Manual (Part One) Unfair Labor Practice Proceedings, Sec. 10022 (August 2022) (ULP Casehandling Manual). The purpose of the investigation is to ascertain, analyze, and apply the relevant facts and law in order to arrive at the proper disposition of the case. *Id.* at Sec. 10050. Cases may be presented for Regional Office determination at the conclusion of an investigation either by written or oral report to the Regional Director or other Regional Office official, pursuant to Regional Office policy. *Id.* at Sec. 10068.2. The Regional Director has the final authority and responsibility to make all casehandling decisions within the Regional Office. *Id.* The Board agent normally is responsible for notifying the parties of the Regional Director's determination. *Id.* at Sec. 10068.3.

Following a Regional Office determination to not issue complaint, the Board agent gives the Charging Party the opportunity to withdraw any allegations of the charge determined to be non-meritorious. *Id.* at Sec. 10068.3(a). The Board agent typically advises the Charging Party orally or otherwise of the reasons for the Regional Office's determination in detail and that, unless the charge is withdrawn by a reasonable deadline, the charge will be dismissed. *Id.* at Sec. 10120.2. If the Charging Party declines to withdraw, the Charging Party is informed that a detailed explanation of the reasons for dismissal will be included in the dismissal letter, commonly referred to as a long-form dismissal, unless the Charging Party requests that the

detailed explanation be excluded. *Id.* The Charging Party is also informed that the charged party will receive a copy of any dismissal letter. *Id.*

Following a Regional Office determination to issue complaint, absent settlement, the Board agent should pursue settlement before issuance of complaint. *Id.* at Sec. 10126.2. The Regional Office should carefully assess the impact that issuance of complaint will have on the likelihood of achieving a settlement. *Id.* Thus, the Regional Director may choose to delay issuance of a complaint for a short period, if such would be helpful. *Id.* However, issuance of complaint should not be unreasonably delayed. *Id.* Where it is clear that settlement at this stage will not be achieved, complaint should issue immediately. *Id.*

Issuance of a complaint follows a determination by the Regional Office on behalf of the General Counsel that formal proceedings on certain matters alleged in the charge should be instituted. *Id.* at Sec. 10260. A complaint must be well founded in all respects since it constitutes the exercise of the General Counsel's final authority under Sec. 3(d) of the Act. The preparation of the complaint begins, as a practical matter, after Regional Office determination to issue complaint, absent settlement. *Id.* at Sec. 10126.2. Generally, the likelihood of settlement, the nature of the allegations and other circumstances will determine the timing of complaint issuance. *Id.* at Sec. 10260.

Pursuant to Section 3(d) of the Act, the General Counsel has "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10 [section 160 of this title], and in respect of the prosecution of such complaints before the Board…" Thus, the General Counsel has "unreviewable discretion" regarding the investigation of unfair labor practice charges and issuance and prosecution of unfair labor practice complaints. *NLRB v. United Food and Commercial Workers Union, Local 23,* 484 U.S. 112, 126, 130 (1987). The General Counsel's "prosecutorial determinations" are "to be made solely by the General Counsel" and "are not subject to review under the Act." *Id.*

3. Recommendation

On its face, the Employer's contention at Objection 2 is that Region 29 "delayed investigating numerous unmeritorious and frivolous unfair labor practice charges that were pending during the critical period." The first chart set forth above showing the filing and withdrawal dates of the charges the Employer claims the Region "delayed" investigating do not support the Employer's position. Preliminarily, it must be noted that the mere fact that Region 29 approved each Charging Party's withdrawal request for each charge set forth in the first chart above filed against the Employer does not necessarily mean that the Region actually made non-merit determinations on any of those charges. Rather, Region 29's withdrawal letters simply show that each Charging Party requested withdrawal of certain specified charges and Region 29 approved each Charging Party's withdrawal requests. *See* ULP Casehandling Manual Sec. 10120.1.

Assuming that the Employer's assertion that Region 29 actually made no merit determinations for all ten charges it cherry picked to demonstrate that Region 29 "delayed" in soliciting withdrawal from each Charging Party, four of the charges were filed and withdrawn by each Charging Party between 11 and 57 days from filing during the critical period. The

remaining two charges filed during the critical period were withdrawn by each Charging Party between 18 and 60 days after filing. Of the balance of the three charges that were filed *before* the critical period, one of the charges was withdrawn by the Charging Party 80 days after it was filed, during the critical period, and the remaining two were withdrawn by each Charging Party *after* the critical period.

Of course, the first chart does not tell the whole story, as it is only focused on those charges that were *withdrawn* by Charging Parties instead of including *all* of the related charges that were pending against the Employer during the critical period, including those that Region 29 determined to have merit, warranting the issuance of complaint, absent settlement. The second chart above shows that Region 29 determined that six charges that were pending during the critical period warranted the issuance of a consolidated complaint issued on February 18, during the critical period, with a hearing initially scheduled to commence after the critical period, on April 5. Region 29 determined that another five charges pending during the critical period also warranted the issuance of a consolidated complaint after the critical period, on May 31, with a hearing initially scheduled to commence on September 19. In sum, the first chart and the second chart, when viewed together, show that Region 29 investigated many meritorious charges and charges ultimately withdrawn by each Charging Party pending against the Employer during the critical period, and they do *not* support the Employer's assertion at Objection 2 that Region 29 allegedly "delayed" investigating "unmeritorious" charges pending during the critical period.

Moreover, even if there were truth to Employer's contention that the Region "delayed" its investigation and processing of "unmeritorious" charges filed against the Employer, such evidence does not raise "a reasonable doubt as to the fairness and validity of the election." *Durham School Services, LP*, 360 NLRB at 853, citing *Polymers, Inc*., 174 NLRB at 282. As with Objection 1, the Employer chose not to present or proffer *any* eligible voter employee witness to testify of any knowledge of *any* unfair labor practice charges filed against the Employer or that any unfair labor practice charges filed against the Employer had *any* bearing on the election whatsoever.

Regardless of how the Employer wishes to dissect the timing of Region 29's investigation and disposition of the numerous charges pending against the Employer during the critical period, it is of no consequence to the election or the objections at issue here. When Region 29 investigated and determined all of its charges against the Employer that were pending during the critical period, Region 29 was acting on behalf of the General Counsel, with "final authority, on behalf of the Board" regarding the "investigation" and "issuance of complaints" pursuant to Section 3(d) of the Act. The General Counsel has "unreviewable discretion" that "are not subject to review under the Act." *NLRB v. United Food and Commercial Workers Union, Local 23,* 484 U.S. at 126, 130. Thus, when Region 29 issued complaint and when Region 29 approved each Charging Party's withdrawal request for charges pending against the Employer during the critical period, Region 29 was acting on behalf of the General Counsel, pursuant to the General Counsel's "unreviewable discretion" and authority vested under Section 3(d) of the Act. *Id.* Based on the foregoing and the record as a whole, I recommend that Objection 2 be overruled.

D. Objection 3: Region 29 failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the Petitioner when it allowed the Petitioner's petition in Case 29-RC-288020 to proceed to election knowing that the Petitioner did not have the required 30% showing of interest in the petitioned-for unit.

Objection 4: Region 29 failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the Petitioner when it impermissibly allowed the Petitioner for more than a month (from December 22 to January 25) to continue gathering and submitting late signatures to bolster its insufficient showing of interest.

Objection 5: Region 29 failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the Petitioner when it unilaterally altered the scope and size of the petitioned-for unit for the purpose of investigating the Petitioner's showing of interest.

1. Record Evidence

As noted above, on February 16, the Employer and the Petitioner entered into the Stipulated Election Agreement approved by the Regional Director of Region 29 on February 17. Pursuant to the Stipulated Election Agreement:

> The parties waive their right to a hearing and agree that any notice of hearing previously issued in this matter is withdrawn, that the petition is amended to conform to this Agreement, and that the record of this case shall include this Agreement and be governed by the Board's Rules and Regulations.

Further, the Employer waived its right to dispute the adequacy of the showing of interest not only because it entered into the Stipulated Election Agreement, but also because the instant election has already been held. During the hearing, I rejected all of the Employer's offers of proof and proffered exhibits seeking to admit evidence into the record regarding Objections 3 through 5 relating to the showing of interest, since challenges to the adequacy of the showing of interest may not be raised after an election has been held. See *Gaylord Bag Co.*, 313 NLRB 306, 307 (1993).

2. Representation Casehandling Procedures and Board Law

An employee or group of employees, or any individual or labor organization acting in the employees' behalf, may file a representation petition under Section 9(c)(1)(A) of the Act. The Board is required to investigate any such petition which alleges that a "substantial number" of the employees desire an election, whether it is for certification or decertification. NLRB Outline of Law and Procedure in Representation Cases at Sec. 324-4020-1400 (2017 Update) (Rep. Case Outline). The Board has adopted the administrative rule that 30 percent constitutes a "substantial

number." *Id.* This 30-percent rule applies to all representation petitions filed by or on behalf of a group of employees. *Id.*

The purpose of the demonstration of an adequate showing of interest on the part of labor organizations and individual petitioners that initiate or seek to participate in a representation case is to determine whether the conduct of an election serves a useful purpose under the statute, i.e., whether there is sufficient employee interest to warrant the expenditure of the Agency's time, effort and resources in conducting an election. NLRB Casehandling Manual (Part Two) Representation Proceedings Sec. 11020 (Sept. 2020) (Rep. Casehandling Manual); *River City Elevator Co.*, 339 NLRB 616 (2003); *Pike Co*., 314 NLRB 691 (1994); *S. H. Kress & Co*., 137 NLRB 1244 (1962); *O. D. Jennings & Co.*, 68 NLRB 516 (1946). The showing-of-interest requirement is based on public policy and therefore may not be waived by the parties. *Martin-Marietta Corp*., 139 NLRB 925, 925 fn. 2 (1962). The administrative determination of a showing of interest has no bearing on the issue of whether a representation question exists. *Sheffield Corp*., 108 NLRB 349, 350 (1954).

The determination of the extent of the showing of interest is a purely administrative matter, wholly within the discretion of the Agency and is not subject to litigation. NLRB Casehandling Manual (Part Two) Representation Proceedings Sec. 11021, 11184.1, and 11028.3 (Sept. 2020) (Representation Casehandling Manual); *O. D. Jennings & Co.*, 68 NLRB 516; *River City Elevator Co*., 339 NLRB 616; *General Dynamics Corp*., 175 NLRB 1035 (1969); *Allied Chemical Corp*., 165 NLRB 235, 235 fn. 2 (1967); *NLRB v. J. I. Case Co*., 201 F.2d 597 (9th Cir. 1953); *Gaylord Bag Co.*, 313 NLRB 306, 307 (1993). While any information offered by a party bearing on the validity and authenticity of the showing should be considered, no party has a right to litigate the subject, either directly or collaterally, including during any representation hearing that may be held. Representation Casehandling Manual at Sec. 11021.

After an election has been held, the adequacy of the showing of interest is irrelevant. Representation Casehandling Manual at Sec. 11028.4, citing *Gaylord Bag Co.*, 313 NLRB at 307; *City Stationery, Inc.*, 340 NLRB 523, 525 (2003). Accordingly, challenges to the adequacy of the showing of interest may not be raised after an election has been held.[10] *Id.*

3. Recommendation

In accordance with established Board case law, I rejected the Employer's offers of proof and proffered exhibits pertaining to Objections 3 through 5 relating to the adequacy of the showing of interest, as the Board has consistently held that the showing of interest is a matter for administrative determination, is not litigable by the parties, and not subject to direct or collateral attack at hearings. See *Barnes Hospital,* 306 NLRB 201 fn. 2 (1992); *Globe Iron Foundry,* 112

[10] The Employer's reliance on *NLRB v. Savair Mfg. Co.,* 414 U.S. 270 (1973) (*Savair*) in support of its Objections 3 through 5 is misplaced. The question for review presented to the Court in *Savair* was whether, in an unfair labor practice case alleging violations of Sections 8(a)(1) and (5) of the Act, the 'Board properly concluded that a union's offer to waive initiation fees for all employees who sign union authorization cards before a Board representation election, if the union wins the election, does not tend to interfere with employee free choice in the election." *Id.* at 273. No such facts are present in this record and the majority opinion had nothing whatsoever to do with objections to a showing of interest in support of a representation petition after a Stipulated Election Agreement has been approved and the election has already been held.

NLRB 1200 (1955); *O.D. Jennings & Co.,* 68 NLRB at 518. Further, since the instant election has already been held, the adequacy of the showing of interest is irrelevant and may not properly be raised in postelection objections. See *Gaylord Bag Co.*, 313 NLRB at 307; *City Stationery, Inc.*, 340 NLRB at 525. Based on the foregoing and the record as a whole, I recommend that Objections 3 through 5 be overruled.

E. Objection 6: Region 29 failed to protect the integrity of its procedures when it deviated from the Casehandling Manual on Representation Proceedings by failing to staff the election adequately. Among other things, the Region provided an insufficient number of Board Agents for check-in and failed to provide adequate equipment for the election, supplying only three voting booths for an election with more than 8,000 potential voters.[11]

1. Record Evidence

a. Stipulated Election Agreement

The Stipulated Election Agreement required the Employer to provide "a tent located in the parking area" of the Employer's JFK8 building (voting tent) to hold the manual, in-person election. This voting tent was approximately 30 feet wide and 100 feet long with one set of doors for the entrance and another set of doors for the exit. The voting tent had an accessible ramp and was climate controlled. Before the first polling session on March 25, there was one snakelike queue set up using stanchions outside the entrance to the tent with blue stickers placed on the floor to remind voters to keep socially distanced about six feet apart. The Employer also placed an awning above the queue outside the entrance to the voting tent, to protect voters waiting in line from the weather.

Further, the Stipulated Election agreement required the Employer to comply with the following safety protocols:

> (i) Provide a spacious polling area, sufficient to accommodate six (6) foot distancing, which will be marked on the floor with tape to insure separation for observers, Board Agents and voters;

[11] The Employer elicited testimony about whether or not the Board agents designated an official watch or made an announcement about the opening of the polls prior to the first polling session on March 25 and about this first polling session allegedly starting approximately five to 12 minutes late, but I ruled that this elicited testimony was irrelevant to the objections before me, as there is *no* timely filed objection as set forth in the Order Directing Hearing on Objections pertaining to late opening of any polling sessions and such testimony is *not* sufficiently related to Objection 6 or any other objection timely filed, as set forth in the Order Directing Hearing on Objections. See *Labriola Baking Co.*, 361 NLRB 412, 412 (2014) (explaining, "the Board may consider conduct that does not exactly coincide with the precise wording of the objections where, as here, that conduct is sufficiently related to the filed objections.") (internal quotation marks omitted). If the Employer wished to timely file an objection alleging the late opening of polling sessions, it could have done so, but it did not, and therefore any alleged late opening of any polling session was *not* included in the objections set for hearing pursuant to the Order Directing Hearing on Objections.

(ii) Have separate tables spaced six (6) feet apart so Board Agent, observers, ballot booth and ballot box are at least six (6) feet apart;

(iii) Place markings on the floor to remind/enforce social distancing;

(iv) Provide sufficient disposable pencils without erasers for each voter to mark their ballot;

(v) Provide tape to seal challenge ballot envelopes;

(vi) Provide plexiglass barriers of sufficient size to protect the observers and Board Agent and to separate observers and the Board Agent from voters and each other, pre-election conference and ballot count attendees, as well as masks, hand sanitizer, gloves and wipes for observers.

(vii) Allow for an inspection of the polling area by video conference or in person, on March 22, 2022, at 11:00AM, or at least 24 hours prior to the election, so that the Board Agent and parties can view the polling area. A representative of Amazon Labor Union will be present during the walkthrough;

(viii) Ensure that, in accordance with CDC guidance, all voters, observers, party representatives, and other participants will wear CDC conforming masks in all phases of the election. The Employer will post signs in or immediately adjacent to the Notice of Election to notify voters, observers, party representatives and other participants of this requirement;

(ix) Provide the Region with required certification pre and post-vote regarding positive COVID-19 tests, if any.

(x) Prior to the date of the manual ballot election, the Regional Director may reassess the COVID-19 infection rates in Richmond County, NY. The Regional Director may, in accordance with guidance set forth in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020), determine that the scheduled, manual ballot election cannot be safely conducted and the Regional Director may cancel, postpone, or order a mail ballot election. If the election is postponed or canceled, the Regional Director, in his or her discretion, may reschedule the date, time, place of the election, or method of the election.

b. Assigned Board Agent Communication with Parties regarding Checking Tables, Voting Booths, and Three-Part Alphabetical Split of Voter List

On February 17, the same date that the Regional Director for Region 29 approved the Stipulated Election Agreement, the assigned Board agent provided Employer and Petitioner

counsel pictures and the dimensions of Board voting booths as 57 inches high, 24 inches wide, and 21 inches deep. The assigned Board agent further notified counsel for the Employer and for the Petitioner that the Board agents "will have 3 booths set up for voting at all times and a 4th booth (top portion) ready to set up for anyone who may need it," to provide voting accessibility.

On March 16, the assigned Board agent notified counsel for the Petitioner and the Employer regarding a three-part alphabetical split of the voter list totaling 491 pages, as follows (three-part alphabetical split):

1. Pages 1 – 157: Letters A through F.
2. Pages 157 – 318: Letters G through N.
3. Pages 319 – 491: Letters O through Z.

c. Onsite Inspection of Polling Area

On March 22, at 11:00 a.m., pursuant to the Stipulated Election Agreement, the parties conducted an onsite inspection of the polling area (onsite inspection). Present for the Employer were Santos, Director of Employee Relations Barbara Russell (Russell), in-house corporate counsel Sarah Kalis (Kalis), and outside counsel Amber Rogers (Rogers) and Kurt Larkin (Larkin). Present for Petitioner were its President Smalls and Petitioner counsel Eric Milner (Milner). Also present was the assigned Board agent and another Board agent.

During the onsite inspection of the voting tent interior, the Board agents checked the signage on the entrance, and the masks and sanitizer present. The Board agents checked each of the checking tables and the plexiglass between them and the supplies present such as golf pencils. The Board agents also checked the areas for the ballot booths and the ballot box. The Board agents requested that the ballot box table be moved so it was flush with the back of the voting tent. The Employer asked if there was sufficient space for the ballot booths, and the Board agents indicated that the space was sufficient. The Employer offered that it could have room for more ballot booths, and the Board agents indicated that the previously communicated number of ballot booths would be sufficient.

With respect to the exterior onsite inspection, according to Russell, the Board agents had questions about what constituted the Employer's property versus public property. The Employer explained the boundaries of its parking lot at the JFK8 building going out to Gulf Avenue. The Employer explained that there are three drive lanes parallel to the JFK8 building and the tent was erected in the middle drive lane. The Employer indicated it put barriers up to the left and the right of the tent in both the middle drive lane and in the drive lane closest to the facility so that vehicles could not travel into the area near the voting tent. The Board agents indicated that "those barriers provided a reasonable line by which we could establish the no-electioneering zone."

During the onsite inspection, the Employer also mentioned that it had started to cover up the closed circuit television cameras (CCTV cameras) on the outside of JFK8 facing the voting tent as required during the polling sessions. The Employer indicated that barriers for the queue would be put into place and had an awning on order that it would put above the queue area outside to provide shelter if it rained. At the conclusion of the onsite inspection, the Board

agents referred to a document they referred to as a checklist and confirmed that the parties had covered everything necessary for the onsite inspection. Employer witness Chaka Donaldson (Donaldson) testified that this onsite inspection lasted approximately ten minutes, whereas Russell estimated it lasted approximately 20 minutes.

d. Pre-Election Conference before Each Polling Session and Sealing of Ballot Boxes after Close of Each Polling Session

The record generally reflects that during the pre-election conference held approximately fifteen minutes to a half hour before each of the polling sessions during the election, the assigned Board agent gave the observers written and verbal instructions, with representatives from the Employer and the Petitioner present. The assigned Board agent went over the written observer instructions verbally, so all of the observers could hear them. The assigned Board agent explained to the observers that their primary functions were to monitor the election, to help identify voters when they entered the voting tent, and to check the voters off of the assigned voting list split in alphabetical order by last name. The assigned Board agent explained that the Board agents were the only ones that could touch the ballots given to each voter.[12] Further, the assigned Board agent instructed the observers about the challenged ballot procedure, including that if any eligible voter was not on the voter list, the Board agent would challenge that voter.

The assigned Board agent instructed that the Board agents will give the observers buttons to wear at all times while in the voting tent to identify them as Employer or Petitioner observers. The assigned Board agent explained that electioneering by observers was prohibited, the Board agents would respond to any questions from voters, and that if the observers saw any electioneering occurring in the voting area, to notify a Board agent. The assigned Board agent also instructed that observers were restricted from using their cell phones while the polls were open. The assigned Board agent also explained that, if observers had to leave the tent for any reason during voting, the observers needed to remove their observer buttons until they returned to serve as an observer inside the voting tent.

The record further generally reflects that the ballot box and the challenge ballot box were shown, put together, and sealed in the presence of all of the observers at the start of the first polling session on March 25 and was sealed in the presence of the observers and party representatives after the polls closed after all remaining polling sessions thereafter. The first polling session on March 25 was scheduled to end at 1:00 p.m. but did not end until approximately 2:45 to 2:50 p.m., to enable the voters waiting in line to vote at the time that the polls closed at 1:00 p.m. to vote during the first polling session. The Employer elicited testimony from numerous witnesses who voted during this first polling session on March 25 that they waited from around 20 minutes to two hours to vote.

[12] I do not credit employee Cordova's testimony that observers handed out ballots to voters at any time during the election, as it lacked specificity, is contrary to the Board agent's instructions to observers, and was not corroborated by any other witness.

e. Reorganization of Voting Queues during First Polling Session on March 25

After around the first half hour of the first polling session on March 25, the Board agents split the voting queues located outside and inside the tent into three different lines corresponding to the established three-part alphabetical split: A-F, G-N, and O-Z.[13] During the same time period, the Board agents also made signs for each of these three voting queues, to indicate the three-part alphabetical split for voters to line up to vote. See e.g. Representation Casehandling Manual Sec. 11322 ("If more than one checking table is involved, informational signs, (e.g., "Last names A-F vote here") should be displayed.)"

f. Communications regarding Board Agent Staffing and Equipment following Closing of First Polling Session on March 25

Employer witness Russell testified that after the first polling session on March 25, she had a conversation with the assigned Board agent inside the voting tent, near the back entrance and the ballot box table. Rogers, Russell, the Board agent, and perhaps Donaldson were present during this conversation. Rogers and/or Russell asked that the assigned Board agent use additional voting booths to speed up the voting times and indicated that there was sufficient space for more voting booths. The assigned Board agent declined the request and indicated that the number of voting booths was sufficient. The assigned Board agent said that the number of voting booths was not causing the voting delays.

During this conversation after the polls closed after the first polling session on March 25, Rogers asked more than once if the assigned Board agent could request additional Board agents to staff the election, to better expedite voting and monitor the no-electioneering zone from media and other interference. The assigned Board agent declined that request for additional Board agents. The assigned Board agent said that things were busy but it was fine.

According to Russell, at approximately 4:30 p.m. on March 25, a conference call was conducted with the Assistant to the Regional Director of Region 29 (ARD). Present for the Employer were Kalis, Larkin, Rogers, and Russell. Present for Petitioner was Milner. Russell testified that the Employer requested the conference call to discuss its concerns regarding eligible voter wait times and interference with eligible voters in the no electioneering zone during the first polling session on March 25. The ARD indicated that she spoke to the assigned Board agent who reported that the first polling session generally went fine; they did not need more checking tables; they did not need more voting booths; and they did not need more Board agents.

[13] One of the Employer observers for the first polling session on March 25, Antonia Famiglietti (Famiglietti), testified that it took the Board agents about five or six minutes to make three separate lines during the first polling session and no voting occurred during that time period. Famiglietti also testified that the Board agent present at her A-F checking table left during the first polling session for around five minutes and no voting occurred at the A-F checking table during that approximate five minute time period. Famiglietti testified that no voters left during the period of time that the Board agent left her A-F checking table.

g. Alterations to Voting Area Following First Polling Session on March 25

After the first polling session on March 25, the Employer supplemented with its own signs to specify the same three-part alphabetical split of the voting queue. Further, the Employer installed an approximately 1.5 foot tall chain-link fence covered with green solid mesh around the voting queue area outside the entrance to the voting tent, to limit visibility to the voters waiting in line.

On March 26, the Employer added more lights to the inside of the tent to ensure better visibility of the voter lists at the checking tables during the evening polling sessions. On March 27, the Employer added sides, lighting, and heaters to the voting queue area outside the entrance to the voting tent, due to the cold temperatures forecasted on March 28. The Employer also added an additional portable toilet because the pipes froze in the existing portable toilet and another generator to handle the extra electricity from these modifications.

h. Elicited Testimony regarding Voting Queues during the Polling Sessions

The Employer elicited testimony from witnesses regarding an estimate of the number of eligible voters in line during various polling sessions, including, but not limited to, estimates of around 30 to 50 voters in line between around 8:20 a.m. to 9:30 a.m. on March 25; and several hundred voters in line around 11:05 a.m. on March 25; around 100 voters in line around 11:05 a.m. on March 28; and around 20 voters in line around 11:30 a.m. on March 29. Witnesses also testified generally about little to no lines to vote during the morning session on March 28, the morning and evening polling sessions on March 29, the morning session on March 30, and the evening sessions from March 28 through 30.

Employee witness Mendoza served as Petitioner observer for six different polling sessions, including the evening polling sessions on March 25, 26, and 28 through 30, and the morning session on March 26. Mendoza testified that the evening polling session on March 25 was the busiest of those that he served as an observer, but "the line was moving along at a reasonable pace" was not "backed up," and the polling session ended on time. Mendoza testified there was "no line" for either of the polling sessions on March 26 and for the evening polling sessions from March 28 through 30, there "were long periods of time where there was nobody voting at all. We were just sitting there waiting. So there was no, kind of---after the first day, it was really you get a voter every like, few minutes." I credit Mendoza's testimony, as his demeanor was generally forthright, specific, and responsive to all questions asked.

i. Board Agent Equipment Utilized at All Polling Sessions

Focusing specifically on the assertions at Objection 6 regarding Board agent equipment, the record generally reflects that during the entirety of the ten polling sessions during the election, the Board agents used three checking tables and three voting booths, had a top portion of a voting booth available for accessibility to vote if needed, and a separate challenge ballot checking table and voting booth for challenged voters.

Employer witnesses Donaldson and Michael Spinella (Spinella) testified that they observed unused voting booth boxes sitting underneath a table in the tent during the dates of the election. I do not credit this testimony from Donaldson or Spinella regarding the alleged unused voting booth boxes. The picture taken by Spinella prior to the final polling session on the last date of the election on March 30 shows a total of five voting booth boxes underneath a table to the left of the photo. EMP 912. There is no record evidence from any witness that opened these voting booth boxes to determine if they were empty (because the voting booths were assembled inside the voting tent) or if the voting booth boxes contained the contents of unused, disassembled voting booths as the Employer contends.

I note that the picture Spinella took prior to the evening polling session on March 30, depicting a total of five voting booth boxes, is consistent with credited record evidence that there were a total of four assembled voting booths during all of the polling sessions as well as a top portion of a voting booth for accessibility to vote if needed. For example, Spence testified that a total of four ballot booths were in use and did not recall seeing any disassembled voting booths on the floor of the voting tent during all three polling sessions he served as a Petitioner observer. I credit Spence's testimony in this regard, as it is consistent with the assigned Board agent's communications with the parties on February 17, to "have 3 booths set up for voting at all times and a 4th booth (top portion) ready to set up for anyone who may need it."

j. Number of Board Agents Present at Each Polling Session

Turning next to the contention in Objection 6 alleging inadequate Board agent staffing during the election, while the record does not reflect an exact number of Board agents that conducted each of the ten polling sessions of the election, the record reflects generally that there was at least one Board agent assigned to each of the three checking tables, along with a Petitioner observer and an Employer observer, totaling three Board agents assigned to the three checking tables inside the voting tent during each polling session. The record also generally reflects that there were between approximately four and seven Board agents present inside the voting tent and between approximately two and five Board agents outside the voting tent during each of the polling sessions.

Employer witness Donaldson observed a total of eight Board agents who were present to conduct the election for the first polling session on March 25. Employee witness Devlin Parent (Parent) testified that there were about five Board agents outside the entrance to the voting tent during the first polling session on March 25. Employee witness Jodi Tredici (Tredici) testified that there were a total of four Board agents present inside the voting tent while she served as an Employer observer during the morning polling sessions on March 28 and 29.

Employee witness Mendoza, who served as an observer during the evening polling sessions on March 25, 26, 28 through 30, and the morning polling session on March 26, testified that he recalled seeing at least seven Board agents inside the voting tent during all six voting sessions he observed, along with two Board agents outside. During the morning session on March 26, Mendoza recalled an additional Board agent located outside the exit of the voting tent, directing voters where to go after they exited the voting tent. I credit Mendoza's testimony in

this regard, as his demeanor was generally forthright, specific, and responsive to all questions asked.

2. Board Representation Casehandling Procedures and Board Law

Representation Casehandling Manual Sec. 11316 contains the following guidance regarding the size and arrangement of the polling place, in relevant part:

> The size of a polling place depends on the nature of the election. The number of voters and the extent of the period(s) within which they may be expected to vote are controlling here.
>
> Preparations should be made for the peak load. With a well-prepared voter list (i.e., one that is prepared in such form that names can easily be found and one that contains a minimum of mistakes) and where there is a minimum of challenges, one checking table can process 250–400 voters per hour. Each checking table, under these circumstances, can accommodate voters using up to five voting booths. With these guides in mind, election needs may be scaled up or down according to the given election. In elections involving fewer than 25 voters, no more than one booth and one checking table are necessary. In large elections, a separate headquarters and/or challenge table may be necessary.
>
> A polling place should be so arranged that the voters may, with a minimum of confusion, enter, stop at the checking table, proceed to a voting booth, go next to the ballot box, and then leave.
>
> Enough space between the entrance and the checking table(s) should be provided so that a line (or lines) of voters may form without "scaring away'' newly-arriving voters. Enough space should be provided in the area traversed thereafter so that, with a minimum of cross-conversation and "usher" assistance, the voters will perceive and do what is expected of them.

A Regional Director has broad discretion in making election arrangements, and in the absence of objective evidence that this discretion has been abused, the election is upheld. See, e.g., *Milham Products Co*., 114 NLRB 1544, 1546 (1955); *Independent Rice Mill, Inc.*, 111 NLRB 536, 537 (1955); see also *Comfort Slipper Corp.*, 112 NLRB 183 (1955) (discretion to determine date of election); *New York Shipping Assn.*, 109 NLRB 310 (1954) (use of IBM voting cards as an additional means of identification of voters); *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366 (1954); *Halliburton Services*, 265 NLRB 1154 (1982); *Odebrecht Contractors of Florida, Inc.*, 326 NLRB 33 (1998); *CEVA Logistics U.S. Inc.*, 357 NLRB 628 (2011).

In *RadNet Management, Inc. v. NLRB*, 992 F.3d 1114 (D.C. Cir. 2021), the court held that the Board properly overruled an objection asserting that the Board agent conducting an election failed to maintain the security of the ballot box because the Employer had not offered any evidence that would support a reasonable inference of ballot box tampering. The court also held that the Board properly overruled an objection asserting that the Board agent failed to post

any "Voting Place" signs because Board precedent is clear that such minor deviations from guidelines do not warrant invalidating elections.

3. Recommendation

I recommend Objection 6 be overruled, as the Employer failed meet its burden to establish that Region 29 "failed to staff the election adequately," including by providing "an insufficient number of Board Agents for check-in and failed to provide adequate equipment for the election, supplying only three voting booths for an election with more than 8,000 potential voters" sufficient to raise "a reasonable doubt as to the fairness and validity of the election." *Durham School Services, LP*, 360 NLRB at 853, citing *Polymers, Inc*., 174 NLRB at 282. Rather, the evidence shows that on February 17, the same date that the Regional Director of Region 29 approved the Stipulated Election Agreement, the assigned Board agent notified counsel for the Employer and the Petitioner that the Board agent will have three voting booths set up for voting at all times and a top portion of a fourth voting booth ready to set up to provide accessibility for anyone differently abled to vote.

Thus, on February 17, approximately 36 days before the first polling session, the Employer and the Petitioner were notified that the Board agents would utilize three voting booths "at all times" and would have a top portion of a fourth voting booth available for voting accessibility as needed. Similarly, on March 16, nine days before the first polling session, using the Employer-supplied voting list of approximately 491 pages, containing approximately 8,325 eligible voters, the Employer and Petitioner were notified about the three-part alphabetical split of the voting list, assigned to three different checking tables to vote. The record further reflects that there was one Board agent assigned to each of the three checking tables, along with one observer from each party.

A Regional Director has broad discretion in making election arrangements, and in the absence of objective evidence that this discretion has been abused, the election is upheld. *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366 (1954); *Halliburton Services*, 265 NLRB 1154 (1982); *Odebrecht Contractors of Florida, Inc.*, 326 NLRB 33 (1998); *CEVA Logistics U.S. Inc.*, 357 NLRB 628 (2011). There is *no* objective evidence in the record that the Regional Director of Region 29 abused her discretion in making the election arrangements for this election. To the contrary, the assigned Board agent communicated with both parties on the same date that the Regional Director of Region 29 approved the parties' signed Stipulated Election Agreement the assigned Board agent's plan to use three ballot booths, and a fourth top portion of a ballot booth for accessibility to vote. Additionally, nine days before the election started, the assigned Board agent notified the parties about the three-part alphabetical split of the voting list, assigned to three different checking tables to vote. The record generally reflects that the Board agents did not deviate from these voting equipment arrangements during the entirety of election.

Likewise, there is insufficient evidence to show that utilizing three Board agents assigned to three checking tables, three ballot booths and one challenge ballot booth, and a total number between approximately four and seven Board agents present inside the voting tent and between approximately two and five Board agents outside the voting tent to conduct the election during the entirety of the ten polling sessions to raise a reasonable doubt as to the fairness and validity of this election. To the extent that Region 29 deviated from the Representation Casehandling

Manual with respect to the number of Board agents assigned to conduct the election and/or the equipment utilized during this election, the parties were notified well before the election about the planned number of checking tables and voting booths and raised no objections to the assigned Board agent. Moreover, the Board's Representation Casehandling manual merely provides guidance and is not binding authority. Furthermore, any minor deviations from such agency guidance do not warrant invalidating elections. See e.g. *RadNet Management, Inc. v. NLRB*, 992 F.3d 1114 (D.C. Cir. 2021). Based on the foregoing and the record as a whole, I recommend that Objection 6 be overruled.

F. Objection 7: Region 29 failed to protect the integrity of its procedures when it turned away voters when they attempted to vote during open polling sessions, and told voters they were only being allowed to vote in alphabetical order.

1. Record Evidence

The Stipulated Election Agreement contains the following regarding the employee release schedule to vote:

> Employees will be called to vote according to a Release Schedule to be approved by the Regional Director. The Employer will post the Release Schedule alongside the Notice of Election. The parties understand that the Board agent conducting the election will not police the release schedule. The Board agent will allow any voter who is in line during the polling period to vote, regardless of whether they are voting according to the release schedule.

The Stipulated Election Agreement also contained the parties' agreement that voters were required to show identification, or voters will vote subject to challenge:

> **12. SHOWING OF IDENTIFICATION.** The parties have agreed that voters will be required to show identification, employer or government issued (i.e. driver's license) or any identification showing a picture and the full name of the individual, upon voting. If a voter fails to present identification, they will vote subject to challenge.

Despite my request to Employer counsel multiple times on the record seeking evidence in support of Objection 7 to show that Board agents "turned away voters when they attempted to vote during open polling sessions" and "told voters that they were only being allowed to vote in alphabetical order," no such record evidence was provided by the Employer. To be clear, the record contains *no* evidence of a Board agent turning away *any* voters when they attempted to vote or telling any voters that they were *only* allowed to vote in alphabetical order.

For example, employee witness Amarilis Villalongo (Villalongo) testified that she went to vote at about 10:00 a.m. on Tuesday, March 29, and there was no line to vote. Villalongo testified that two people were seated at her checking table and that a Board agent asked for Villalongo's last name. Villalongo did not see a third person present at her checking table. Villalongo did not give the Board agent her last name or any identification and accordingly did

not receive a ballot. Villalongo testified she decided not to give the Board agent her last name because she felt like the Board agent was giving her an attitude and found it discouraging. Villalongo testified she decided "never mind and left," without identifying herself or receiving a ballot. Villalongo testified that it was her *choice* not to vote, nobody told her she could not vote, she *voluntarily* left the voting tent, and she chose not to return to vote at a later time. I do not credit Villalongo's testimony due to the lack of detail and inherent improbability about going to the checking table on March 29, only seeing two persons present rather than the two observers and the Board agent, and the alleged "attitude" from the Board agent that caused Villalongo to *choose* not to vote and not to return to vote at a later time.

Employee witness Lisa Laporta (Laporta) testified that she was approximately seventh or eighth in line during the first polling session on March 25, and the Board agent decided that they were going to call eligible voters to vote "by last names," and approximately "four to six" voters went ahead of her to vote at other checking tables, and she went to the G-N checking table. The fact that "four to six" eligible voters went ahead of Laporta in line to vote because of the three-part alphabetical split of the voting lines and the "four to six" eligible voters went to different checking tables for those who had last names that started with A-F or O-Z does *not* amount to evidence of "turn[ing] away voters when they attempted to vote" or "tell[ing] voters that they are only allowed to vote in alphabetical order." This is highlighted by the fact that Laporta's entire voting experience lasted only approximately 15 to 20 minutes. Laporta testified that she got to the voting line outside around 8:10 a.m. to 8:15 a.m. and cast her ballot around 8:30 a.m.

The testimony of employee witness Rachel Jaramillo (Jaramillo) did not support the Employer's assertions in its Objection 7. Jaramillo testified that she got in line to vote around 9:00 a.m. on March 25, the Board agent called "people by letters from their last name" "for a group of letters" in groups of "maybe three or four people," causing people to "start walking towards the front of the line." Jaramillo testified that, as a result of the Board agent calling eligible voters by alphabetical groups based on their last names, people who were behind her in line got to go in front of her in line to vote. Jaramillo testified that once she got inside the tent, eligible voters would just "move up" based on the letters of their last names. Jaramillo admitted she was *not* turned away from voting; in fact, like Laporta, Jaramillo voted in the election on March 25, and did not see *any* voters who were turned away by Board agents.

Similarly, employee witness Robert Nicoletti (Nicoletti) testified that his team's "scheduled time to go down" to vote pursuant to the Release Schedule was around 9:45 a.m. to 10:00 a.m. on March 25. Nicolleti said that he waited in line outside and two Board agents called eligible voters with last names A-F to come forward to vote. Nicolleti testified that after about 20 minutes, he saw approximately five voters *choose* to leave the line, but there is no record evidence to support that they were *turned away* from voting by anyone; Nicoletti knew that one of the eligible voters returned to vote the next day but did not know if the remaining four eligible voters returned to vote at a later time. Nicoletti testified that the Board agents did *not* tell anyone to get out of line if they did not have a last name beginning with a certain alphabetical letter and did *not* tell any voter to leave the line. Nicoletti knew that he could wait in the line as long as needed to vote and did not need to return to work until he was done voting.

Likewise, employee witness Gopi Vaidya (Vaidya) testified that she started her shift at 7:15 a.m. on the first day of the election on Friday, March 25. According to Vaidya, at 8:00 a.m., the Employer closed down her entire floor pursuant to the Release Schedule to enable the eligible employees to go outside and vote. Employee witness Laporta corroborated that the Employer used the Release Schedule to shut down entire departments and release them to vote, testifying that at 8:00 a.m. on March 25, the Employer stopped her section and said, "form a line, we're going to vote."

According to Laporta, the Employer instructed eligible voters that when they were done voting, they were required to return to work. Likewise, Vaidya testified that the eligible voters "had to be back by 9:00 [a.m.] because they had a specific time frame from 8:00 to 9:00 [a.m.], and everybody would return whether they vote or no, they would come back to their stations." Vaidya confirmed that pursuant to the Release Schedule, her manager told eligible voters in her department that they had to return to work at 9:00 a.m. on March 25 even if they were still in line to vote.

As noted above regarding employee Nicoletti's testimony, the record does contain some evidence of some eligible voters *choosing* not to vote due to long lines to vote, particularly during the first polling session on the first day of the election starting at 8:00 a.m. on Friday, March 25. For example, employee Gopi Vaidya (Vaidya) testified that she observed 10 to 15 eligible voters *voluntarily* leaving the voting line around 8:00 a.m. on March 25 and about five or six voters *voluntarily* leaving the voting line around 8:05 a.m. on March 28. However, there is *no* record evidence of anyone *turning away* any voters at any voting session during this election. For example, Spence, who served as an observer for three polling sessions, testified he *never* saw any voter turned away from the voting tent.

Generally, the record reflects that most, if not all, of those eligible voters that initially chose not to wait in line to vote during a particular polling session returned to vote during other polling sessions and voted without incident. For example, Vaidya testified that she saw the employees from her floor who left the voting line on March 25 voted the next day and heard that at least one or two of the five or six voters who left the line on March 28 voted as well.

With respect to voting in alphabetical order, as set forth at Objection 6, the record reflects that on March 16, nine days before the election, the assigned Board Agent notified Employer counsel and Petitioner counsel that Board agents would utilize three checking tables based on a three-part alphabetical split of the voter list by last name: A-F, G-N, and O-Z. This evidence of a three-part alphabetical split of the eligible voters by last name does *not* establish that any Board agent "told voters that they were only allowed to vote in alphabetical order." Even if the three-part alphabetical split of the eligible voters by last name somehow did amount to instructing voters "they were only allowed to vote in alphabetical order," the record evidence shows that eligible voters followed the Board agent's instructions, based on the three-part alphabetical split of the voter list by last names, to direct voters to the appropriate checking tables to receive their ballots and proceed to a voting booth to cast their ballots.

2. Board Representation Casehandling Procedures and Board Law

The Board's representation casehandling procedures provide that all in the voting line at the time scheduled for closing of the polls should be permitted to vote, even though the election is prolonged thereby. Representation Casehandling Manual Sec. 11324. For those who arrive and attempt to join the line thereafter, the Board agent should follow the same procedure as for voters who arrive after the polls have been declared closed. *Id.* and Sec. 11324.1.

With respect to late-arriving voters, in *Monte Vista Disposal Co.*, 307 NLRB 531, 533–534 (1992), the Board held that "an employee who arrives at the polling place after the designated polling period ends shall not be entitled to have his or her vote counted, in the absence of extraordinary circumstances, unless the parties agree not to challenge the ballot." See also *Consumers Energy Co.*, 337 NLRB 752 (2002); *Taylor Cadillac, Inc.*, 310 NLRB 639 (1993). The Board has indicated that a late voter arriving at the facility in a timely manner but being locked out could constitute "extraordinary circumstances" under this standard. See *Pruner Health Services*, 307 NLRB 529, 529–530 (1992). Compare *Visiting Nurses Assn*., 314 NLRB 404, 404–405 (1994) (employee's voluntary choice not to proceed directly to polling area not extraordinary circumstances).

It is the Board agent's responsibility to challenge the ballot of a late arriving voter in the absence of agreement of the parties that the individual can vote, and an election may be set aside if the Board agent fails to do so and the vote may have been determinative. See *Laidlaw Transit, Inc*., 327 NLRB 315 (1998). Compare *Argus-Press Co.*, 311 NLRB 24 (1993) (declining to set aside election where Board agent allowed three employees to vote after close but their votes could not have affected outcome of election).

3. Recommendation

Consistent with established agency election procedure, the Stipulated Election Agreement states, "The Board agent will allow any voter who is in line during the polling period to vote." There is *no* record evidence establishing otherwise during the entirety of this election. Contrary to Objection 7, the record contains *no* evidence of any Board agent turning away any voters when they attempted to vote or telling *any* voters that they were only allowed to vote in alphabetical order. Thus, the Employer has failed to meet its burden of proof for Objection 7 sufficient to raise "a reasonable doubt as to the fairness and validity of the election." *Durham School Services, LP*, 360 NLRB at 853, citing *Polymers, Inc*., 174 NLRB at 282.[14] Based on the foregoing and the record as a whole, I recommend that Objection 7 be overruled.

[14] The Employer cites *Fresenius USA Mfg. Inc.,* 352 NLRB 679, 680 (2008) (*Fresenius*) (second election directed because procedural irregularities "raise[d] a reasonable doubt as to the fairness and validity of the election"). However, *Fresenius* is clearly distinguishable, as the Board agent in *Fresenius* "improperly denied the Employer an opportunity to monitor the ballot count and, based on his confusion in differentiating between ballot colors, may have incorrectly distributed ballots to voters." *Id.* at 679. The Board agent in *Fresnius* was color blind and unable to distinguish between the green ballots to be distributed to unit A voters and yellow ballots to be distributed to unit B voters and also prevented the Employer from verifying the accuracy of the ballot count. *Id.* at 679-80. No such similar facts are present in this election, applicable to Objection 7 or any other objection set forth in the Order Directing Hearing on Objections.

G. Objection 8: Region 29 failed to protect the integrity of its procedures when it failed to control media presence in and around the voting area.

1. Record Evidence

a. The Employer's Plan to Use its Public Relations Team to Ask the Media to Leave its Property while the Polls are Open

On March 24, the day before the election started, Employer counsel Larkin informed Region 29 and Petitioner counsel regarding its plan for media presence during the election:

> We know the Board shares our concerns about media members attempting to access or film the polling area during the election. There have been past occasions in which certain media outlets have tried to access Amazon's property despite requests from the Company that they refrain from doing so. If this happens while the polls are open, Amazon plans to have members of its Public Relations team on site to engage with those press members to ask them to leave the property. We will not send members of the JFK8 management, HR or ER teams out to engage with press given that these engagements could occur near the polling place (I am assuming that a media member aggressive enough to disregard a request not to enter private property may also attempt to approach the polling location to film, interview, etc. employees in line to vote). We thought that the Company's PR team, which has no managerial relationship whatsoever with JFK8 or employees in the bargaining unit, would be the most appropriate way to handle these incidents if they arise. We can also let [the assigned Board agent] know in real time since we will have her number. Please let us know if anyone has any concerns with this approach.

Employer witness Russell admitted that as of March 24, it was her understanding that the Employer wanted to send its Public Relations Department representatives to interface with any members of the media who were present on the Employer's property solely to instruct them to leave the Employer's property. Russell likewise admitted that it was her understanding that the Employer's management team was not to go anywhere near the voting tent or to go outside and interact with the media. Joe Troy (Troy), the Employer's Regional Loss Prevention Manager for its North America Customer Fulfillment, which includes the Employer's JFK8 building, testified that he did not understand that it was the Employer's responsibility to police the voting area during the election.

Troy further testified that the JFK8 building maintains CCTV cameras throughout the perimeter of the building's exterior and throughout each of the floors of the building in different locations, including workstations and main traffic areas. There are approximately 25 to 30 CCTV cameras on the exterior of the building, located about 10 feet off the roof line of the north-facing side of the building, north of where the voting tent was erected in the parking lot. These north-facing CCTV cameras were covered during the duration of the election from March

25 through 30, resulting in a lack of Employer visibility of the north side of the parking lot during the election.

b. The No-Electioneering Zone Established at the Pre-Election Conference before the First Polling Session on March 25

According to Employer witness Russell, during the pre-election conference before the first polling session on March 25, a Board agent, Russell, Milner, Smalls, and Rogers went outside to inspect the exterior of the voting tent. According to Russell, the Board agent stood with her back to the front entrance of the JFK8 Building, and indicated that the electioneering zone to prevent electioneering was established by the barricades the Employer placed in the drive lanes perpendicular to the building and to the left and right of the voting tent.

Russell testified that during the pre-election conference on March 25, the Employer expressed concern about media presence coming into the parking lot, near the voting tent, interfering with voters. According to Russell, the Board agent said that she understood the concern about media presence, and it was physically impossible for the Board agents to police the entire parking lot, but the Board agents could reasonably see and police the conduct between the barricades and the left and right of the tent and the two drive lanes the Employer blocked. The Board agent indicated that those would be considered the no-electioneering zone and the Board agents would do their best to police that area. According to Russell, there was no signage designating the area as a "no-electioneering zone" or anything else, such as "no media beyond this point."

c. Director of Employee Relations Russell Engages with the Media before the First Polling Session on March 25

Russell testified she stepped away from the pre-election conference on March 25 because she saw what appeared to be a media person carrying a camera walking very close to the voting tent and approaching them. Between 7:30 a.m. and 8:00 a.m. on March 25, Russell stepped away and introduced herself to the camera person and asked that he stand to the side while Russell called a member of the Employer's Public Relations department to speak with him. According to Russell, the person identified himself as a documentary filmmaker making a documentary about Petitioner President Smalls. Russell testified that she saw Smalls speaking with the camera person after she confronted him. Russell testified that Verena Gross (V. Gross), a member of the Employer's Public Relations team responsible for New York and the Northeast, spoke with this media person pursuant to Russell's request.

d. Employer's Regional Loss Prevention Manager Troy and its Public Relations Department Member V. Gross Ask Media to Leave the Employer's JFK8 Property during the First Polling Session on March 25 and then Conduct Regular Walk Throughs Every Two Hours While Polls Are Open

Another Regional Manager, Troy, testified that the Employer received permission from the Board agents running the election inside the voting tent for its Public Relations team to engage the members of the media on the Employer's property and ask them to go to a public space. Troy admitted that he is not a member of the Employer's Public Relations team, but nevertheless, he accompanied Public Relations Department member V. Gross when she engaged with the media present on JFK8 property on March 25. According to Troy, his "job was to witness these conversations and be there as an escalation point if somebody either did not want to comply or become agitated." Russell testified that Troy was sent with V. Gross for her security, pursuant to V. Gross's request and was not in management at JFK8 as of March 25.

Troy testified that he and V. Gross were present at JFK8 during the first and second polling sessions on March 25. According to Troy, at about 11:00 a.m., while the polls were open during the first polling session on March 25, Troy and Gross exited the JFK8 building through the workforce staffing exit on the Northeast corner of the JFK8 building and walked toward the main entrance of the building where the voting tent was erected outside, in the parking lot.

As Troy and V. Gross walked outside toward the voting tent, they saw three apparent media persons. First, they saw Courtney Gross, a media person from New York 1 (C. Gross), who was positioned with her back facing the entrance of the JFK8 building with a cameraman pointing his lens toward her. Troy estimated that C. Gross was located approximately 25 yards away from the exit of the voting tent. Troy did not observe C. Gross interacting with any eligible voters. Troy estimated their interaction with C. Gross was less than two minutes. Troy testified that C. Gross left the Employer's JFK8 property upon their request.

Second, they saw another person Troy had observed on more than five occasions at the Employer's JFK8 property covering activities of the Petitioner, who appeared to be interviewing eligible voters in line to vote, located inside the fire line in the front row of the JFK8 parking lot. Troy estimated that he and V. Gross were approximately 10 feet from the voting line when they approached the second media person. This second media person also eventually left upon their request.

Third, they saw an apparent media person located in the pedestrian walkway located directly in front of the main entrance to the JFK8 building who appeared to be interviewing eligible voters in line to vote. At the time Troy and V. Gross engaged with the media and asked them to leave the Employer's property, around approximately 11:00 a.m., Troy estimated that there were approximately over 200 voters in line, and they were within five or six feet away from the voting line. The third individual also eventually left upon their request. Troy estimated that they interacted about 2.5 to 3 minutes with this third media person.

Troy testified that around 11:00 a.m. on March 25, he observed one tall white male Board agent with longer dark hair talking to eligible voters waiting in line to vote outside of the voting tent. Troy testified that no Board agent notified the Employer about the three media persons present near the voting area at around 11:00 a.m. on March 25. Troy admitted that he did not know whether the male Board agent he observed discussed the media presence outside the voting tent with any other Board agents.

Troy testified that after 11:00 a.m. on March 25, he and V. Gross did regular walk throughs of the parking lot, every two hours. Troy admitted that each time Troy and V. Gross walked through the parking lot, they saw eligible voters lined up, waiting to vote.

e. Employer Counsel Expresses Concern to Region 29 about Media Presence During First Polling Session on March 25

On March 25, during the first polling session, Employer counsel Rogers informed Region 29 and Petitioner counsel that the Employer's Public Relations team attempted at least five times to tell various media outlets, including Reuters, to leave the Employer's private property, but the media is generally refusing to leave or is leaving and then returning. Rogers reported that the media is standing next to the voting line and is taking pictures of employees and interviewing them.[15] Rogers requested that Region 29 take a firmer stance in monitoring the media, particularly in the voting line. Rogers requested to discuss this media presence issue at the closing of the polls during the first polling session on March 25 and prior to the opening of the next polling session at 8:00 p.m. on March 25.

f. Employee Testimony about Media Presence During First Polling Session on March 25 and the Morning Polling Session on March 30

Employee witness Parent testified that he saw three individuals with cameras present to the left of the voting tent in the parking lot during the morning of Friday, March 25, about a car length away from the voting line. Another person with a camera was around three car lengths away, to the right of the voting line. The third person with a camera was on the sidewalk of the JFK8 Building, between the main entrance of the building and the cafeteria, about three car lengths away from the exit to the voting tent.

Employee witness Natasha Grajeda (Grajeda) testified that she voted during the first polling session during the morning of Friday, March 25, when her work area stopped working

[15] Due to concerns with disclosing the identity of secret ballot voters in line to vote, I requested that all admitted media pictures of voters in line be redacted to protect employees' engaging in Section 7 activity, specifically participating in the "sacrosanct" "secret ballot vote," including eligible voters' queuing up to vote when the polls are open. The fact that I requested that the Employer redact its exhibits depicting its employees waiting in line to participate in a secret ballot vote does *not* equate to evidence that *Region 29* "failed to protect the integrity of its procedures when it failed to control media presence in and around the voting area" as the Employer contends at Objection 8, nor did it obstruct the Employer's ability to prove Objection 8, at the expense of its case, as the Employer argues in its brief.

and was released to vote pursuant to the Release Schedule. According to Grajeda, while she was waiting outside the entrance of the tent to vote from around 8:30 a.m. to around 10:00 a.m. on Friday, March 25, she saw two or three people from the media with big, professional cameras with long lenses, about three or four meters away from where she was standing in line to vote. Grajeda also saw a media person present at a bus-stop like enclosure less than ten feet away from where she was standing in line to vote. Grajeda testified that these media persons were still present when she exited the voting tent around 11:30 a.m. Grajeda did not see any Board agents or anyone from the Employer approaching the media persons. Grajeda testified that when she went on break between 2:30 p.m. and 3:00 p.m. on March 25, she looked at her social media accounts and saw messages from coworkers who did not know she was pregnant congratulating her on her pregnancy, attaching a picture that was taken of her waiting in line to vote that morning.

Employee witness Noemi Abreu (Abreu) went to vote during the first polling session at around 8:20 a.m. on March 25. She testified she saw media present about two or three cars' distance from where she was waiting in line outside of the entrance of the tent to vote. The media took Abreu's picture while she was waiting in line because she saw her pictures in media coverage that same day, on March 25, first around 4:00 p.m. and then later on March 25.

Employee witness Matthew Cordova (Cordova) testified that he saw one apparent media person present with a long lens when he went to vote at around 9:00 a.m. on Monday, March 28, approximately 15 to 20 feet away from the tent and about 25 feet away from the entrance of the voting tent. According to Cordova, a female from the Employer walked out of the JFK8 building and asked the media person who he was, the media person said the media, and the female from the Employer said that he is not supposed to be on the Employer's property. Cordova testified that the media person said okay, stepped back a little bit, and remained there on the Employer's property using his camera. The female from the Employer reiterated to the media person that if he is not supposed to be on the Employer's property, and he needed to leave. Cordova then saw the media person walk away. Cordova did not see any of the Board agents approach the media person.

Employee witness Villalongo testified that she saw Petitioner stipulated agent Daniels with a news camera on his shoulder video recording the voting queue while she was outside for around five minutes at approximately 10:00 a.m. on March 25. Villalongo testified that she also live videoed the voting queue on Instagram Live at the same time as she allegedly observed Daniels video recording using a news camera but testified her Instagram Live video story was automatically deleted after 24 hours. Villalongo acknowledged that no one from the Employer told Villalongo to stop recording or to leave. Villalongo admitted that she did not speak to Daniels, hear what Daniels was saying, or even know if Daniels had the news camera on, but she saw Daniels allegedly moving around with the news camera on his shoulder. No other witness testified about seeing Daniels or any other stipulated Petitioner agent with an alleged news camera present "in and around the voting area" while the polls were open, nor did the sole video Villalongo produce of the voting queue corroborate her testimony about Daniels. I do not find Villalongo to be a credible witness based on her overall demeanor, as well as the inherent improbability and lack of detail and corroboration about seeing employee and Petitioner supporter Daniels with a news camera during the first polling session on March 25.

Employee witness Mian Asad (Asad) testified that during the first polling session on March 25, at around 11:00 a.m., while he was waiting outside the entrance of the tent to vote for around an hour and a half, he saw at least two individuals who appeared to be in the media, one with a big camera on his shoulder and the other with a microphone and they posted a video on YouTube identifying it as an Associated Press video. Asad testified that the media person was interviewing voters waiting in line to vote outside the entrance to the tent about voting. At no time did Asad see anyone from the Employer approach the media to request they move away or leave the Employer's property.

Asad chose to be interviewed by the media and told the interviewer that he was voting no and that promises had been made by the Petitioner and he was not sure the promises would be fulfilled. Asad estimated that he was interviewed about 30 or 40 feet away from the voting tent. Asad saw his interview posted on YouTube. Asad remained in line after he was interviewed and voted. Asad did not see anyone leave the line at the time the interviewer was interviewing voters waiting in line to vote.

Employee witness Patrick Delancey[16] (Delancey) testified that he went to vote between 11:00 am and noon during the first polling session on March 25, and during the approximately two hours he waited outside, he saw at least three members of the media who identified themselves as from The Post and News Twelve. Delancey was interviewed by a media person from The Post about 20 or 30 feet away from the voting tent. Delancey was interviewed by a media person from News Twelve in an enclosure he referred to as a smoke shack before he voted. The third media person Delancey saw was approximately 60 feet away from the exit of the tent. Delancey testified that he saw three Board agents outside the entrance of the tent while he was waiting to vote. These two media interviews in which Delancey chose to participate did not prevent Delancey from voting on March 25. Delancey did not see anyone from the Employer asking the media to leave its property.

Employee witness Stephanie Lopez (Lopez) testified that she voted around noon on March 30 and exited the voting tent around 10 minutes later, around 12:10 p.m. According to Lopez, she saw a guy with a video camera who seemed like he was recording near the exit of the voting tent. Lopez admitted she did not know if he was recording, did not know if the camera was on or off, and did not speak to the person. Lopez admitted she did not see any pictures of herself associated with voting on March 30 online.

g. Employer Expresses Concern to Region 29 about Media Presence while Polls are Open after First Polling Session on March 25

Employer witness Russell testified that after the first polling session on March 25 ended, she had a conversation with the assigned Board agent inside the voting tent, near the back entrance and the ballot box table. Rogers, Russell, the assigned Board agent, and perhaps Donaldson were present during this conversation. Russell expressed concern with the media

[16] The transcript incorrectly misspells Delancey's last name as "Delancy."

presence around the voting tent during the first polling session, as news coverage online had already depicted news personnel coming inside the no electioneering zone near the queue area outside the voting tent, in close proximity to eligible voters in line to vote, to take pictures of eligible voters. According to Russell, the assigned Board agent said something to the effect of, "we can't see everything but we're doing the best we can." Russell testified that Rogers told the Board agent that the media was visible to the Board agents because in at least one photo, a Board agent was present in the photo outside of the voting tent. According to Russell, Rogers asked that the Board agents more effectively police the no electioneering zone to keep the media out. Russell testified that the assigned Board agent reiterated that the Board agents were doing the best that they could.

According to Russell, at approximately 4:30 p.m. on March 25, a conference call was conducted with the ARD. Present for the Employer was Kalis, Larkin, Rogers, and Russell. Milner was present on behalf of the Petitioner. With respect to the media, Russell testified that the ARD stated that the Board agents were doing the best they could to police the no electioneering zone and would not agree to take any additional steps to do so. During this conference call, Rogers reported it was going to put sides on the outside awning over the queue area and to send a member of its Public Relations department to greet any media the Employer became aware was on its property, to have the Public Relations department direct the media off of its property. The ARD said that those proposals sounded reasonable but the Employer should not construe her comments as the Board's agreement that the Employer had permission to take those steps, as such steps could potentially be considered objectionable conduct.

Employer witness Donaldson admitted that despite the Employer's purported concern about media presence during the first polling session on March 25th, she did not contact the Employer's Public Relations team "to engage with those press members to ask them to leave the property" as the Employer's counsel represented the Employer would do the day before, on March 24. Donaldson also admitted that no one informed her that Region 29 was going to police the media present at the polls.

2. Board Law

"It is the Board's province and duty to safeguard its electoral processes from conduct which inhibits the free exercise of employee choice." *Boston Insulated Wire Co.*, 259 NLRB 1118 (1982). As "the Board is especially zealous in preventing intrusions upon the actual conduct of its elections," it accordingly prohibits electioneering "at or near the polls." *Claussen Baking Co.*, 134 NLRB 111, 112 (1964).

In some exceptional situations, it may be desirable for the Board agent, before the polls open, to determine an area surrounding the polling place in which all electioneering is forbidden. See Representation Casehandling Manual Sec. 11318 and 11326. The Board agent periodically should check the voting area and booths for electioneering material, including defaced notices of election. *Id.* The Board agent should advise the parties of the area, but should not undertake to set up an area that cannot be policed. *Id.* In no event should the area be beyond the agent's view. *Id. Boston Insulated Wire & Cable Co.*, 259 NLRB 1118 (1982).

The Board does not, however, set aside elections based on electioneering "at or near the polls" regardless of the circumstances, as "it is unrealistic to expect parties or employees to refrain totally from any and all types of electioneering in the vicinity of the polls." *Boston Insulated Wire*, 259 NLRB at 1118. In determining whether electioneering warrants an inference that it interfered with employee's free choice, the Board considers: (1) the nature and extent of electioneering, (2) whether it was conducted by a party or employees, (3) whether the conduct occurred in a designated no electioneering area, and (4) whether the conduct contravened instructions of a Board agent. See id. at 1119; see also *J. P. Mascaro & Sons*, 345 NLRB 637, 638 (2005). In the event there is no designated no electioneering area, the Board will treat the area "at or near the polls" as equivalent for the purposes of this standard. See *Pearson Education, Inc.*, 336 NLRB 979, 979–980 (2001) (citing *Bally's Park Place, Inc.*, 265 NLRB 703 (1982)).

Although the factors set forth in *Boston Insulated Wire* clearly contemplate that conduct may be engaged in by a nonparty, the Board has also stated that in evaluating electioneering by nonparties, the standard is "whether the conduct at issue so substantially impaired the employees' exercise of free choice as to require that the election be set aside." *Rheem Mfg. Co.*, 309 NLRB 459, 463 (1992); *Southeastern Mills*, 227 NLRB 57, 58 (1976); see also *Hollingsworth Management Service*, 342 NLRB 556, 558 (2004).

3. Recommendation

At the outset, I note that there is *no* evidence that any of the media present while the polls were open during the morning sessions on March 25 and 30 engaged in any "electioneering" that would be prohibited within the alleged "no-electioneering zone." Rather, the evidence generally reflects that during the first polling session on March 25, approximately three members of the media were present, and, during the morning session on March 30, approximately one member of the media was present, on the Employer's JFK8 property, apparently within the designated "no-electioneering zone" based on the testimony of Employer witness Russell. According to the employee testimony, the media present at the JFK8 property while the polls were open on the mornings of March 25 and 30 were taking pictures, video, and interviewing eligible voters and other employees near the outside of the voting tent located in the parking lot immediately in front of the main entrance. However, there is no record evidence that the media was engaging in any "electioneering" seeking to influence eligible voters to vote in any particular way.

Based on this record evidence, it appears disingenuous for the Employer, who is the only entity with actual authority to enforce its own property rights to tell the media to leave its property, to allege that *Region 29* "failed to control" *media presence* "in and around the voting area," when *Region 29's* responsibility, at most, was to police *electioneering* that occurred in a *no-electioneering zone* while the polls were open. To the contrary, the evidence reflects that at least as of the day before the election, on March 24, Employer counsel Larkin recognized that Region 29 and the Employer were concerned about the media "film[ing] the polling area during the election," and because the media has ignored the Employer's requests to leave its property in the past, the Employer "plans to have members of its Public Relations team on site to engage with those press members to ask them to leave the property." On March 24, Larkin also told the assigned Board agent and Milner that the Employer would "also let [the assigned Board agent] know in real time" about any media filming the polling area during the election. Larkin's March 24th email communicated to the Petitioner and to the assigned Board agent that the *Employer*

planned to handle the media presence "in and around the voting area," rather than, through its Objection 8, improperly shifting the responsibility and blame about the media presence on its property onto Region 29.

Further, as noted above, there is no timely filed objection set forth in the Order Directing Hearing on Objections alleging that any party, either the Employer, the Petitioner, or their agents, "failed to control media presence in and around the voting area." Thus, the appropriate standard to evaluate the media presence during the polling sessions on the morning sessions on March 25 and 30 is the Board's standard in evaluating electioneering by nonparties "whether the conduct at issue so substantially impaired the employees' exercise of free choice as to require that the election be set aside." *Rheem Mfg. Co.*, 309 NLRB 459, 463 (1992); *Southeastern Mills*, 227 NLRB 57, 58 (1976); see also *Hollingsworth Management Service*, 342 NLRB 556, 558 (2004).

The Employer failed to meet its burden to establish that the media presence during the morning polling sessions on March 25 and 30 "so substantially impaired the employees' exercise of free choice as to require that the election be set aside." *Id.* Despite the fact that Grajeda suspected she was being photographed while she waited in line to vote, she remained in line, and cast her ballot. Grajeda did not learn that she had been photographed until after she voted. Likewise, Delancey and Asad testified they voluntarily spoke with the media and still voted in the election afterwards. Similarly, employee witness Adina Goriva (Goriva) testified that she voted on March 29 even though she had previously seen pictures of voters waiting in line while the polls were open. Parent also testified he was not pleased about the media, but he remained in line and voted.

In sum, the Employer did not present or proffer *any* employee witness that testified that the media presence caused them to decline to vote in the election. Based on the foregoing and the record as a whole, I recommend that Objection 8 be overruled, as the Employer failed to meet its burden to establish that the media presence during the morning polling sessions on March 25 and 30 "so substantially impaired the employees' exercise of free choice as to require that the election be set aside." *Id.* To the contrary, the record reflects that the media presence during the morning polling sessions on March 25 and 30 did not impair employees' free choice, as all of the employee witnesses who testified about the media presence on those dates nevertheless exercised their free choice to vote in the election.

H. Objection 9: Region 29 failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the Petitioner when it allowed non-employee Petitioner President Smalls to loiter around the polling location and within the "no-electioneering zone" established by the Region on multiple occasions during polling times, where he was able to observe who participated in the election.

Objection 23: On March 25, Petitioner's President Christian Smalls posted to his social media accounts a video of himself standing outside the voting area over 20 minutes after voting began and after he had told certain employees that the Petitioner would know how they voted. Employees viewing a video of the Petitioner's President appearing to stand outside the polling area while the polls were open reasonably tended to coerce and intimidate voters and potential voters and lead them to believe that the Petitioner and Mr. Smalls was or would surveil them. Mr. Smalls' social media post also reasonably tended to create the impression with voters that the Board supported Petitioner in the election, as it failed to properly police and/or took no actions to remove him from the "no-electioneering zone" established by the Board.

Objection 24: The Petitioner engaged a camera/documentary crew that maintained a consistent presence in the polling place. Despite being directed to leave the area by the Employer in front of the Board Agent and Petitioner President Smalls, the crew returned several times and filmed employees in line waiting to vote, and employees entering and exiting the voting tent. These actions reasonably tended to coerce and intimidate voters and potential voters and lead them to believe that Mr. Smalls and the Petitioner would know if or how they voted, and created the impression of surveillance.

Objection 25: Petitioner's officials, agents, and supporters, including but not limited to non-employee Petitioner President Smalls and non-employee Gerald Bryson, engaged in objectionable conduct, including loitering in the "no-electioneering zone" established by the Board and/or within view of the polling area while polls were open, creating the impression among employees that the Petitioner was surveilling the polling area, and otherwise engaging in electioneering. This conduct reasonably tended to coerce and intimidate voters and potential voters.

1. Record Evidence

a. Smalls Was Present at Pre-Election Conference prior to First Polling Session on March 25 and Was Observed in JFK8 Parking Lot during First Polling Session on March 25

It is undisputed that Smalls was present at the Employer's JFK8 property at the pre-election conference that occurred inside and outside the voting tent prior to the opening of the polls scheduled at 8:00 a.m. on Friday, March 25 and was also present after the first polling session closed on March 25, at approximately 2:45 p.m.

As noted above at Objection 6, Russell testified that between 7:30 a.m. and 8:00 a.m. on March 25, Russell stepped away from the pre-election conference and introduced herself to a person who identified himself as a documentary filmmaker making a documentary about Smalls. Russell testified she saw Smalls speaking to the camera person after she confronted him and asked that he stand to the side while Russell called the Employer's Public Relations Department team member V. Gross to speak with this media person pursuant to Russell's request.

At approximately 8:21 a.m. on March 25, Smalls tweeted from his personal Twitter account, "Day 1 @amazonlabor Vote Yes!!," with a video including the caption, "Let's go JFK8 Vote Yes." Smalls' personal tweet was retweeted by Petitioner's Twitter account soon thereafter. The tweeted video shows Smalls standing outside of the voting tent at an unspecified time before 8:21 a.m., with *no voters* waiting in line to vote, entering the tent, or exiting the tent. Since there were no voters shown in Smalls' picture posted at 8:21 a.m., the Employer has not established that the picture was taken while the first polling session was open on March 25. Further, the Employer did not present or proffer any witness to testify that seeing Smalls' social media post had any effect on eligible voters exercising their free choice in the election.

Employee witness Karen Martinez (K. Martinez) testified that between around 9:30 and 10:00 a.m. on Friday, March 25, she waited in line outside the voting tent for approximately 30 to 45 minutes. Between around 9:45 and 10:00 a.m., for a total of around two to three minutes, K. Martinez saw Smalls approximately 15 to 20 feet away from the entrance to the tent. K. Martinez testified that Smalls was wearing a Yankees cap with a red ALU shirt. This testimony was corroborated by a video Smalls posted on Twitter on the same day K. Martinez testified she saw Smalls. K. Martinez testified that she did not see the video before her testimony.[17] K. Martinez testified that she did not speak with Smalls and that he was standing outside of the tent on his own, not doing anything. Despite seeing Smalls while K. Martinez was in line to vote on March 25, K. Martinez voted. K. Martinez testified that seeing Smalls "actually didn't bother me at all" and did not tell anyone that she saw Smalls while she was waiting to vote.

Employee witness Villalongo testified that she went outside the main entrance of the JFK8 building during her regular break around 10:00 a.m. on March 25 and for approximately five or six minutes while she was walking to her car, she saw five individuals she believed to be

[17] I noted on the record that I admitted this video to corroborate K. Martinez' testimony, as K. Martinez admitted that the video did not depict where or how she observed Smalls on March 25.

affiliated with Petitioner at the main entrance, including T. Martinez, Smalls, Flowers, Daniels, and Anthony.[18] Villalongo testified she was about 25 feet away from this group when she saw them and could not hear what they were saying. Based on Villalongo's testimony, the group of five individuals Villalongo believed to be affiliated with Petitioner were about 25 feet from the voting tent and outside of a no electioneering zone. Villalongo did not speak to the group, nor did the group speak to Villalongo. Villalongo did not know if the group was planning to vote at that time. As noted with respect to other portions of Villalongo's testimony, I do not find Villalongo to be a credible witness based on her overall demeanor, including her lack of detail about this alleged incident, and thus do not credit Villalongo's testimony about allegedly seeing these five individuals around 10:00 a.m. on March 25 at the main entrance of the JFK8 building.[19]

Employee witness Jean Kanzler (Kanzler)[20] testified that before around 11:00 a.m. during the first polling session on March 25, she left to vote, and waited for a total of approximately 11.5 minutes. While Kanzler was waiting in line to vote, she saw Petitioner President Smalls "next to a man with a camera," "closer to the entrance of the tent" "on the left-hand side." Kanzler observed Smalls at this location for around five minutes, until she got inside the voting tent, talking to the cameraman, but he did not talk to her nor could she hear what he was saying. Kanzler testified that when Smalls was not talking to the cameraman he was looking at the eligible voters waiting in line to vote.

According to Kanzler, the cameraman next to Smalls was "taking our picture" about 20 feet away from her. Kanzler did not know whether the cameraman was recording. The closest that Kanzler estimated she was next to Smalls was approximately five feet away as she was approximately five feet from the entrance of the voting tent. Kanzler estimated there were approximately 200 eligible voters in line to vote at the time she saw Smalls. Kanzler testified she did not see any voters leave the line while they were waiting to vote.

Kanzler did not see anyone from the Employer's Public Relations or loss prevention departments approach the media or Smalls. Despite seeing Smalls while she was in line to vote, Kanzler cast her ballot. I do not credit Kanzler's testimony regarding seeing Smalls with a cameraman around 11:00 a.m. on March 25, as it was often nonresponsive and lacked consistency and specificity, as Kanzler was unable to describe what Smalls was wearing or what the "cameraman" looked like during the five minutes she testified seeing them. Further, when Kanzler marked the area she saw Smalls, the area depicted was behind the voting tent rather than near the entrance of the voting tent as she testified, which would be outside a no electioneering zone, showing a lack of reliability. Additionally, I note that Kanzler's demeanor displayed disrespect to the hearing officer, as she rolled her eyes and became frustrated each time it became necessary for the hearing officer to instruct her to elicit responsive testimony.

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[18] I note that T. Martinez, Flowers, and Anthony are Petitioner supporters and are not stipulated agents of Petitioner under Section 2(13) of the Act.

[19] Because I discredit Villalongo's testimony that she observed T. Martinez, Smalls, Flowers, Daniels, and Anthony about 10:00 a.m. on March 25, outside the main entrance, I disregard this testimony to support Objection 25 or any other objection before me, as set forth in the Order Directing Hearing on Objections.

[20] Kanzler is incorrectly spelled in the transcripts as "Cancellor."

Employer witness Troy testified that at around 11:00 a.m. on March 25, he and V. Gross observed a media person bent over the passenger side of a vehicle, and asked the media person to leave the Employer's property. The vehicle was located on the Employer's property, next to a weather shelter located across from the parking garage and employee pick-up and drop-off area. Troy testified he observed Petitioner President Smalls and former employee Gerald Bryson (Bryson) inside of the vehicle. Troy asked the media person once again to leave the Employer's property and go to a public space.

Employee witness Kevin Chu (Chu) testified that he saw Petitioner President Smalls in the parking lot between around 11:05 am to 11:10 am on Friday, March 25. Chu testified that Smalls was "not near" or "in immediate proximity" of the voting tent and he had no idea whether Smalls could see anyone going to vote. According to Chu, while he was facing the front entrance of the JFK8 building, behind where the voting tent was located, Chu saw Smalls at the left corner of the building. Chu acknowledged that he did not know if Smalls saw him and did not think that Smalls was attempting to watch him.

Employee witness Taheera Aluqdah (Aluqdah) testified that between around 2:30 and 3:00 p.m. on March 25, at the end of her break from 2:00 to 2:30 p.m., she saw Smalls parked in a "four door, black truck," like a "black Yukon or Suburban" parked in the fire zone outside of the Employer's JFK8 building, near the windows of the main employee break room. Aluqdah saw a male in the passenger side of the vehicle, appearing to be filming and having a conversation with Smalls, with his back towards the passenger door. Aluqdah did not see Smalls exit his vehicle. Aluqdah did not remember a voting line outside at the time she saw Smalls in the vehicle between around 2:30 to 3:00 p.m. on March 25. Despite seeing Smalls in the parking lot on March 25, Aluqdah cast her ballot on March 28.

Aluqdah testified she observed Smalls in his vehicle approximately less than 1,000 feet from the entrance to the voting tent for around five minutes and then he pulled off and circled the JFK8 building. Based on Aluqdah's testimony that Smalls was in his vehicle approximately 1,000 feet away from the entrance of the voting tent, Smalls was not within a no electioneering zone when Aluqdah saw him. However, when Aluqdah was asked to mark the area she observed Smalls in his vehicle on a Google Earth picture of the JFK8 building, she placed Smalls inside an area that was blocked off by orange barriers, appearing to be inside the voting line. I do not credit Aluqdah's testimony regarding Smalls' presence at the JFK8 building around 2:30 p.m. to 3:00 p.m. on March 25 due to this inconsistency between Aluqdah's testimony and her own depiction of where the voting tent, Smalls, and the voting line were located on the picture of the JFK8 building, showing a lack of reliability.

To the extent that the Employer is relying on Kanzler's, Aluqdah's, Russell's, and Troy's testimony to support Objection 24, alleging that "Petitioner engaged a camera/documentary crew," I note that neither Kanzler, Aluqdah, Russell, Troy, nor any other record evidence established that "Petitioner engaged a camera/documentary crew." Rather, the record generally reflects, consistent with Russell's testimony and as acknowledged by Petitioner in its post-hearing brief, that there were film crews and an independent documentary film crew that had been following the Petitioner both before and during the critical period relevant to these objections. According to Monarrez who stopped supporting Petitioner around January 26, "a

couple of cameramen would come by the JFK8 building every single day and follow us to some of our events away from Amazon whenever we did rallies."

Moreover, with respect to Objection 24, the fact that one or more camera crews were following Petitioner, and in particular, Smalls, both before and during the critical period, does not establish that "Petitioner engaged a camera crew" sufficient to confer agency status pursuant onto such camera crew(s) to Section 2(13) of the Act during the critical period. To be clear, there is *no* record evidence to establish that "Petitioner engaged a camera/documentary crew." Therefore, the appropriate standard applicable the "camera/documentary crew" as referenced at Objection 24 is the third party standard, *not* the party standard applied to Petitioner.

b. Petitioner Observer Mendoza's Hand Gestures and Facial Expressions

According to employee Charlene Novoa (Novoa), who served as the Employer's observer at all three evening polling sessions on March 28 through 30, during the polling sessions on March 28 and 29, she saw Petitioner observers having interactions with voters inside the polling tent. With respect to March 28, Novoa testified that Petitioner observer Mendoza did not say anything but he used "a lot of facial expressions and hand movements" that she described as "thumbs up and big smiles." Novoa testified that while seated, Mendoza did the "thumbs up and big smiles" together, with his thumb about the height of his chest. Novoa estimated that Mendoza did the "thumbs up and big smiles" approximately three or four times, "usually directed towards people who were wearing the lanyards." Novoa did not see a Board agent to tell Mendoza to stop doing the "thumbs up and big smiles," nor did Novoa report seeing Mendoza do the "thumbs up and big smiles" to any Board agent. On cross examination, Novoa admitted that she also "waved" voters to the table while serving as an observer from March 28 through 30 and said "badge" or "ID" to voters.

Further, Novoa testified that while serving as the Employer observer on March 29, she saw Petitioner observer Mendoza with "facial expressions such as big smiles and general over happiness," a "certain enthusiasm" or "certain friendliness" with eligible voters wearing Petitioner lanyards. Although Novoa acknowledged that masks were required inside the voting tent, she testified that Mendoza's mask "was never fully on his face," and "was on his chin" so his "whole mouth and nose" was visible for a part of the two evening polling sessions on March 28 and 29. Novoa admitted she did not say anything about Mendoza allegedly failing to wear his mask to fully cover his nose and his mouth as an observer inside the voting tent to any Board agent, nor did any Board agent say anything to him about it.

As noted above, Mendoza served as a Petitioner observer on the evening sessions of March 25, 26, and 28 through 30 as well as the morning session of March 26. Mendoza testified that when voters "would not know where to go" and were "wandering" inside the voter tent when he served as an observer, he would "beckon them over" and be like, "Yeah, right here." According to Mendoza, "if a voter looked confused, and then I would beckon them over, so I would, like, wave my hand towards myself, and then when they realized what was happening, I would put a thumbs up so they understood they're in the right place." Mendoza testified that over the course of all six polling sessions he observed, "there was a good amount of others who were confused about where to go," so he used these hand gestures to more than one eligible voter

"to keep things moving." Mendoza acknowledged that no Board agent instructed him as an observer to give or to stop giving such hand gestures to eligible voters.

Mendoza also testified that he wore a mask over his nose and mouth during all six sessions that he served as Petitioner observer, other than when he was actively eating or drinking, when he would "pull it down and then drink and put it back up." I credit Mendoza's testimony over Novoa's that he wore a mask during all of the polling sessions that he served as Petitioner's observer, except when he was eating or drinking, as his testimony generally was forthright, responsive, and earnest. For the same reasons, I also credit Mendoza's testimony regarding his waving over and thumbs up hand gestures, and find that Mendoza was seeking to assist seemingly confused eligible voters in a nonverbal way about *where* to go to vote and was not engaging in electioneering with any eligible voters about *how* to vote in any way in using these directional-type hand gestures. I further find that even if Mendoza smiled at eligible voters inside the voting tent while he was eating or drinking with his mask lowered from his nose and mouth, that does not, in and of itself, rise to the level of improper electioneering.

c. Maldonado and Smalls Observed in Parking Lot during Evening Polling Session on March 28, after Midnight on March 29

Employer witness Spinella testified that at around 12:20 a.m. on March 29, he was notified that the generator powering the voting tent had shut down and all of the lights had shut down. Spinella was responsible for turning the generator back on. According to Spinella, he was outside for approximately 10 minutes to get the generator restarted. Spinella saw "people that had just voted who were leaving." During the period Spinella was present at the generators, he saw Maldonado "outside the voting area," "by the generators by the restroom area," by the "exit of the tent" "towards the entrance of JFK8."

Spinella also testified that between approximately 12:20 a.m. to 12:30 a.m. on March 29, he saw a "black SUV" he believed was a "Chevy Suburban" he had seen Smalls park for the "post-voting period" "to sign the boxes" at the conclusion of prior polling sessions. Spinella saw this vehicle he believed to be driven by Smalls for approximately four minutes, parked right outside the "orange barrier with the cones." On cross examination, Spinella admitted he did not see Smalls in the black SUV.

d. Petitioner Supporter Flowers Allegedly Observed inside Voting Tent during Morning Polling Session on March 29

Villalongo testified that she went to vote at about 10:00 a.m. on Tuesday, March 29, and there was no line to vote. When Villalongo got inside the tent, she saw a person she identified as Petitioner supporter Flowers who she "thought was security" "inside the voting tent." According to Villalongo, Flowers asked if she was coming to vote, asked her last name, and said that voting was occurring based on eligible voters' last names. Villalongo said that Flowers "was explaining to me what I would have to do when I go inside." Due to the lack of corroboration and detail, as well as the inherent improbability of Villalongo's testimony, I do not credit Villalongo's testimony that during the morning polling session on March 29, Petitioner supporter Flowers was

standing inside the voting tent and instructed her what she would have to do to vote, as it is more likely that a Board agent provided Villalongo with such directions about where to go to vote than Flowers, an employee and Petitioner supporter who was not even serving as an observer during that polling session.

e. Spence Allegedly Observed outside Exit of Voting Tent during Morning Polling Session on March 28 and March 30

Employee witness Cordova testified that at around 9:00 a.m. on March 28, he saw Spence outside the exit of the voting tent, by himself, on his phone.[21] Taking Cordova's testimony at face value, that he saw Spence by himself, on his phone, at around 9:00 a.m. on March 28. This testimony does not show that Spence engaged in any electioneering by himself, on the phone, outside the exit of the voting tent which the record establishes is near the main entrance of the Employer's JFK8 building.

Employee witness Sophia Campbell (Campbell) testified that she served as an Employer observer for the morning polling sessions on March 26 and 30. Campbell testified that Spence served as Petitioner observer at her checking table on March 30. According to Campbell, when Spence was serving as Petitioner observer on March 30, about four or five times Campbell observed Spence "leave the [checking] table and go talk to [eligible voters]" both inside and outside the voting tent, after the eligible voters placed their ballots in the ballot boxes.[22] Campbell admitted that she was "not sure" about her estimate that she "could have" observed Spence having these interactions with voters "four or five times." Campbell estimated these interactions between Spence and voters lasted "up to a minute or less." Campbell did not see any Board agents approach Spence during these interactions with voters after they cast their ballots.

Employee witness Lopez testified that she went to vote around noon on Wednesday, March 30. According to Lopez, when she was inside the voting tent, she observed a Caucasian male seated at a table with two other people that she thought was affiliated with the Petitioner. Lopez did not see the three people seated at the table wearing any observer buttons. After Lopez voted, as she exited the tent, she glimpsed at Spence, standing casually, alone, about ten feet away from the exit of the voting tent. Lopez did not know what Spence was doing there and believed it was possible he had just finished voting.

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[21] I do not find Cordova to be a credible witness, as Cordova's testimony lacked specificity on key details (such as his inability to narrow the timeframe during the critical period he testified he saw a sign that stated free weed and pizza, but could only remember that it was dark and cold outside).

[22] Campbell testified to the substance of what is summarized above during the hearing, then the Petitioner objected to the relevance of the elicited testimony for Objections 6 and 25. I ruled that I did not find the testimony to be relevant to Objections 6 and 25 but include it in the summarized record evidence for Objection 25 since Campbell's testimony was already elicited on the record prior to my ruling. I found the elicited testimony irrelevant based on the wording of Objection 25 alleging "loitering in the no-electioneering zone" "and/or within view of the polling area while polls were open," as Campbell's testimony did not reflect that Spence was "loitering" by serving as the Petitioner's observer during the morning polling session on March 30 and allegedly having alleged minute-long interactions with voters who had already voted in the election about four or five times inside and outside the voting tent.

Spence testified that when he served as a Petitioner observer, he never walked out immediately after a voter or spoke to any voters in the immediate timeframe after they voted. I credit Spence's denial that he walked out immediately after a voter or spoke to voters immediately after they voted over Campbell's testimony, since Campbell admitted she was "not sure" about her estimate of the number of times Spence allegedly had minute-long interactions with voters after they voted while he served as a Petitioner observer during the morning session on March 30. Campbell's testimony lacked specificity and detail regarding these interactions with voters who had already cast their ballots, whereas Spence's demeanor during his testimony as a whole was responsive, straightforward, and he was unequivocal that he had not engaged in such interactions with voters while serving as an observer.

I further credit Spence's testimony over Lopez's based on Spence's demeanor during his testimony, as consistent, forthright, and detailed, whereas Lopez's testimony lacked such consistency, detail, and specificity. For example, Lopez testified that she thought that there were two people seated at the checking table inside the voting tent affiliated with Petitioner, when it was more likely that who was present at the voting table was a Board agent, a Petitioner observer, and an Employer observer. Further, Lopez's testimony about Spence outside the voting tent during the morning polling session on March 30 is that she "glimpsed" at Spence outside the exit of the voting tent after she voted and had no idea why he was there. Even if Lopez had "glimpsed" at Spence outside the exit of the voting tent, Lopez had already voted, so there is no record evidence that any "glimpse" Lopez had of Spence outside the voting tent exit impacted the election whatsoever.[23]

2. Board Law

Section 11326 of the Representation Casehandling Manual provides Board agents guidance on electioneering at elections, in relevant part:

> No electioneering will be permitted at or near the polling place during the hours of voting, nor should any conversation be allowed between an agent of the parties and the voters in the polling area or in the line of employees waiting to vote. Indeed, agents of the parties (other than observers) should not be allowed in the polling area during the election hours.
>
> During the pre-election period, if not earlier, representatives of the parties should be permitted to inspect the polling place. Such representatives may be present during the preparation of the ballot box. Before the polls are opened, party representatives should be asked to leave the polling place.

"It is the Board's province and duty to safeguard its electoral processes from conduct which inhibits the free exercise of employee choice." *Boston Insulated Wire Co.*, 259 NLRB 1118 (1982). As "the Board is especially zealous in preventing intrusions upon the

[23] Because I discredit the testimony of Cordova, Campbell, and Lopez regarding seeing Spence outside of the voting tent during the morning polling sessions on March 28 and March 30, I do not consider this testimony in support of Objection 25 or any other objection before me set forth in the Order Directing Hearing on Objections.

actual conduct of its elections," it accordingly prohibits electioneering "at or near the polls." *Claussen Baking Co.*, 134 NLRB 111, 112 (1964).

The Board does not, however, set aside elections based on electioneering "at or near the polls" regardless of the circumstances, as "it is unrealistic to expect parties or employees to refrain totally from any and all types of electioneering in the vicinity of the polls." *Boston Insulated Wire*, 259 NLRB at 1118. In determining whether electioneering warrants an inference that it interfered with employee's free choice, the Board considers: (1) the nature and extent of electioneering, (2) whether it was conducted by a party or employees, (3) whether the conduct occurred in a designated no electioneering area, and (4) whether the conduct contravened instructions of a Board agent. *Id.* See also *J. P. Mascaro & Sons*, 345 NLRB 637, 638 (2005). In the event there is not a designated no electioneering area, the Board will treat the area "at or near the polls" as equivalent for the purposes of this standard. See *Pearson Education, Inc*., 336 NLRB 979, 979–980 (2001) (citing *Bally's Park Place, Inc*., 265 NLRB 703 (1982)).

In determining whether a party's conduct is objectionable surveillance, case law considers the duration of the party's presence, the location of the party agent, and the conduct of the party. The continual presence of party representatives in or near the polling area may be objectionable surveillance sufficient to overturn the results of the election. See *ITT Automotive*, 324 NLRB 609 (1997), enfd. in part 188 F.3d 375 (6th Cir. 1999); *Electric Hose & Rubber Co.*, 262 NLRB 186 (1982); and *Performance Measurements*, 148 NLRB 1657 (1964). The Board has made clear that the mere presence of union representatives in the vicinity of the polling area, without more, is not objectionable. *See Station Operators*, 307 NLRB 263 (1992); *see also C & G Heating & Air Conditioning, Inc.*, 365 NLRB at 1054. The Board has affirmed that both union and employer representatives may observe election proceedings. *See Breman Steel Co.*, 115 NLRB 247 (1956).

In the absence of a valid explanation conveyed to employees in a timely manner, photographing employees engaged in Section 7 activity constitutes objectionable conduct whether engaged in by a union or an employer." *Randell Warehouse of Arizona*, 347 NLRB 591 (2006) (*Randell II*); see also *Sprain Brook Manor Nursing Home*, 348 NLRB 851 (2006) (distinguishing *Randell II* as identity of photographer was unclear and union obtained signed consent forms prior to using the photographs in campaign materials); *Enterprise Leasing Co.–Southeast LLC*, 357 NLRB 1799 (2011) (distinguishing *Randell II* as photography was not of protected activity, there was no evidence photographer failed to explain purpose of photographing, and employer's objection was not to the taking of the photograph, but to its allegedly unauthorized use).

In *Blazes Broiler*, 274 NLRB 1031, 1032 (1985), the Board found no objectionable conduct in a union agent's sitting in a restaurant approximately 30 feet from the polling area because the agent had no direct view of the entrance to the voting area. The absence of knowledge was established because while the union's agent "could see who entered the hallway leading to banquet room. . . [h]e had no way of knowing who was entering the hallway to vote . . . ." *Id.* In another case, the Board found no objectionable conduct when three supervisors stood 25 feet from the polling location, because the supervisors were in an area where they regularly

stood as part of their duties, didn't approach, or speak with voters. *Roney Plaza Mgmt., Corp.*, 310 NLRB 441, 447 (1993); *Cf. Red Lion*, 301 NLRB 33 (1991) (Board reversed hearing officer's impression-of-surveillance finding where employer's conduct was justified by valid business reason of which employees were aware), see also, *Patrick Industries, Inc.*, 318 NLRB 245, 256 (1995).

On the other hand, in *Performance Measurements Co., Inc.*, 148 NLRB 1657, 1659 (1964), the Board stated that the employer engaged in objectionable surveillance by the president's "continued presence" near the polling area. In that case, the president was seated at a table approximately six feet from the polling room's door and, at times, stood by the door to the election area so that it was necessary for each voter to pass within two feet of him to gain access to the polls. *Id.* Similarly, the Board found objectionable a supervisor's standing ten to fifteen feet from the entrance of the voting area, and two other supervisors' extended presence in the area voters had to pass to access the poll. *Electric Hose & Rubber Co.*, 262 NLRB 186, 216 (1982). In *Electric Hose & Rubber,* the Board reasoned that the only plausible explanation for the supervisors' conduct was to convey to employees that they were being watched. *Id.*; See also, *ITT Automotive*, 324 NLRB 609 (1997), enfd. in part 188 F.3d 375 (6th Cir. 1999) (objectionable surveillance based on "continued presence" of managers in an area where employees had to pass to vote and where managers could observe employees waiting in line to vote).

In *Baker DC, LLC*, 05-RC-135621, decision on review November 2, 2017, the Board majority rejected an argument that the mere presence of union agents in the lobby of an office building where the employer's headquarters were located, without proof of electioneering or other improper conduct, warranted overturning the election; in so finding, the majority distinguished *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 931 (D.C. Cir. 2001) (*Nathan Katz Realty*). In *Nathan Katz Realty*, two union agents, sitting in a car within the area designated as a no-electioneering zone, motioned, honked, and gestured to employees arriving at the polling location. That conduct was found to be contrary to the instructions of the Board agent overseeing the election. The Board declined to set aside the election, but the District of Columbia Circuit reversed, reading two Board decisions involving employer agents as "seem[ing] to stand for the proposition that a party engages in objectionable conduct if one of its agents is continually present in a place where employees have to pass in order to vote." 251 F.3d at 993.

In *RadNet Management, Inc. v. NLRB*, 992 F.3d 1114 (D.C. Cir. 2021), the court held that the Board properly overruled an objection alleging that the Board agent permitted a prounion employee to loiter in the polling area and to attempt to engage the Petitioner's observer in two minutes of conversation about workplace subjects; the court rejected the Employer's contention that this constituted a *Milchem* violation because this was not a conversation with prospective voters and it was merely a chance, isolated, innocuous comment or inquiry exempt from the *Milchem* rule. See also *Able Rolling Steel Door, Inc.*, 22-RC-265289, rev. denied April 15, 2021 (The Board noted that the Employer misapplied *Milchem* by arguing that a union agent's single conversation with an employee during the 3-week mail-ballot period per se warranted a second election, as this allegation did not involve a voter in the polling area waiting to vote).

3. Recommendation

a. Objection 9

Objection 9 contends that *Region 29* allowed Smalls "to loiter around the polling location and within a "no-electioneering zone" established by Region 29 on several occasions during polling times, where he was able to observe who participated in the election." First, as Petitioner notes in its post-hearing brief, "loitering," without more, does not constitute objectionable conduct. *See Station Operators*, 307 NLRB at 263; *see also C & G Heating & Air Conditioning, Inc.*, 365 NLRB 1054, 1054 (2011).

Second, as noted above at Objection 8, based on the uncontroverted testimony of Employer witness Russell, Region 29 established a no-electioneering zone consisting only of the two closest driving lanes that ran parallel to the JFK8 building bounded on either side by the closest driving lanes running perpendicular to the main entrance of the building. At most, Region 29 would be responsible for policing electioneering within this zone.

In its post-hearing brief, the Employer contends that witnesses Villalongo, Chu, Kanzler, Troy, Spinella, K. Martinez, and Aluqdah testified that they observed Smalls within an established no-electioneering zone during the first polling session and other polling sessions. As noted above, I do not credit the testimony of Villalongo, Kanzler, and Aluqdah for the reasons explained at Section 1a. above.

With respect to witnesses Chu, Troy, Spinella, and K. Martinez, their testimony placed Smalls *outside* the no-electioneering zone during polling times. Employee witness Chu testified that he saw Smalls in the parking lot between around 11:05 a.m. to 11:10 a.m. on Friday, March 25. Employer witness Troy testified that at around 11:00 a.m. on March 25, he observed Smalls inside a vehicle located on the Employer's property, next to a weather shelter located across from the parking garage and employee pick-up and drop-off area. Spinella testified that between approximately 12:20 a.m. to 12:30 a.m. on March 29, he saw a "black SUV" he believed was driven by Smalls but did not actually see Smalls inside the vehicle, for approximately four minutes, parked right *outside* the "orange barrier with the cones," outside the no-electioneering zone. Employee witness K. Martinez testified that between around 9:30 a.m. and 10:00 a.m. on Friday, March 25, for a total of around two to three minutes, K. Martinez saw Smalls approximately 15 to 20 feet away from the entrance to the tent, standing on his own, not doing anything.

Thus, the Employer did not present any credited witness that testified about Smalls being present *within* a no-electioneering zone during polling times. Further, as summarized above at Section 1a., the Employer did not present or proffer any witness that testified that Smalls engaged in any *electioneering* within a no electioneering zone during any open polling sessions. Since the record evidence fails to establish that Smalls was present within a no-electioneering zone during polling times or that Smalls engaged in any electioneering, the Employer's argument that Board agents failed to stop Smalls' conduct and allowed it to continue, giving tacit approval of Smalls' presence is misplaced. The purpose of Board agents establishing a no-electioneering zone is to set the parameters of an area that Board agents may reasonably police while the polls were open. If Smalls was present *outside* a no electioneering zone during polling times, the

Board agents would not have any responsibility or obligation to police Smalls' conduct or presence, as the mere presence of union representatives in the vicinity of the polling area, without more, is not objectionable. *See Station Operators*, 307 NLRB at 263; *see also C & G Heating & Air Conditioning, Inc.*, 365 NLRB at 1054. Based on the foregoing and the record as a whole, I recommend that Objection 9 be overruled.

b. Objection 23

Objection 23 contends that Smalls posted "a video of himself standing outside the voting area over 20 minutes after voting began" "to his social media accounts," "after he had told certain employees that Petitioner would know how they voted." As noted above, the Employer did not present evidence that Smalls' tweeted video posted at around 8:21 a.m. on March 25 showed a time when the polls were *actually* open during the first polling session on March 25. The tweeted video does not show a single voter in line to vote or entering or exiting the voting tent.

The Employer's contention that Smalls' tweeted video and message clearly conveyed to the voters that "he would watch the voters and they would be required to pass him in order to exercise their Section 7 right to vote"[24] and that "[a] reasonable voter would believe that their activity would be under surveillance when they went to vote" is not supported by the record evidence as a whole or the best evidence, the tweeted video itself, that indisputably does not show a *single* voter present when the video was recorded. Further, the Employer never presented or proffered any witness to testify that Smalls "told certain employees that Petitioner would know how they voted" as expressly represented at Objection 23. Additionally, the Employer did not present or proffer any witness to testify that Smalls' tweeted video of himself outside the voting area at around 8:21 a.m. on March 25 had any impact on any eligible voters' free choice in the election.

Moreover, even if Smalls' tweeted video and message at around 8:23 a.m. on March 25 did cause eligible voters to believe that Smalls was standing outside the entrance to the voting tent while polls were open during the first polling session on March 25, Smalls' mere presence outside the voting tent, without more, is *not* objectionable. See *Station Operator*s, 307 NLRB 263 (1992); See also, *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 121 (6th Cir. 1974); *C & G Heating & Air Conditioning, Inc*., 356 NLRB at 1054 (upholding election after union representative sat in his truck and observed entrance to polling area for half the time polls were open); *Lowe's HIW, Inc*., 349 NLRB 478, 478-79 (2007) (upholding election after employer's agent held the door open for voters entering the polling area for at least twenty minutes and later waited outside the office where voting was taking place). Based on the foregoing and the record as a whole, I recommend that Objection 23 be overruled.

[24] For this reason, the Employer's reliance on *Nathan Katz Realty, LLC v. NLRB,* ("[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.") is not supported by the record evidence. 251 F.3d 981, 993 (D.C. Cir. 2001). Likewise, there is no record evidence of Smalls or any other stipulated Petitioner agent "stationed" outside of the voting area like the supervisor in *Elec. Hose & Rubber Co.,* 262 NLRB 186, 216 (1982).

c. Objection 24

Objection 24 asserts that "Petitioner engaged a camera/documentary crew that maintained a consistent presence in the polling place," and that "[d]espite being directed to leave," the crew returned several times and filmed employees in line waiting to vote, and employees entering and exiting the voting tent." Objection 24 asserts that this conduct "reasonably tended to coerce and intimidate voters and potential voters and lead them to believe that Mr. Smalls and the Petitioner would know if or how they voted, and created the impression of surveillance."

As noted above, there is *no* record evidence to establish that "Petitioner engaged a camera/documentary crew," as alleged at Objection 24. Accordingly, the appropriate standard to apply to the record evidence is the third party standard. Conduct by third parties, such as the media, is only objectionable if it "creates a general atmosphere of fear and reprisal that renders a fair election impossible." *Accubuilt, Inc.* 340 NLRB 1337, 1337 (2003). See also *Millard Processing Services v. NLRB*, 2 F.3d 258, 261 (8th Cir. 1993); *Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 265-268 (D.C. Cir. 1998) (applying third-party standards to objections based on video-taping by union supporters on the day of election).

For the reasons described above, I discredited the testimony of employees Kanzler and Aluqdah regarding Smalls' presence near the polling tent with a cameraman during the morning of March 25. Russell testified that between 7:30 a.m. and 8:00 a.m. on March 25, Russell stepped away from the pre-election conference and introduced herself to a person who identified himself as a documentary filmmaker making a documentary about Petitioner President Smalls and later saw Smalls speaking to the camera person after she confronted him. As cited above at Objection 23, the mere presence of Smalls or other stipulated Petitioner agents at the JFK8 property talking to a cameraman, without more, does not establish objectionable conduct. See *Station Operator*s, 307 NLRB at 263; See also, *Harlan #4 Coal Co. v. NLRB*, 490 F.2d at 121; *C & G Heating & Air Conditioning, Inc*., 356 NLRB at 1054.

The fact that Smalls and/or other stipulated Petitioner agents spoke with a cameraman that had been following the Petitioner near the voting tent during the first polling period on March 25th is insufficient evidence to establish "a general atmosphere of fear and reprisal that renders a fair election impossible." *Accubuilt, Inc.* 340 NLRB at 1337. There is no credited employee witness testimony in support of Objection 24. Employer witness Russell's testimony establishes that she saw the cameraman talking to Smalls *before* the first polling session, between around 7:30 a.m. and 8:00 a.m. Thus, there is *no* record evidence to establish that the cameraman's alleged "consistent presence in the polling place" created "a general atmosphere of fear and reprisal that renders a fair election impossible." Based on the foregoing and the record as a whole, I recommend that Objection 24 be overruled.

d. Objection 25

Objection 25 asserts that the Petitioner, including but not limited to Smalls and Bryson, loitered in a no electioneering zone and/or "within view of the polling area while polls were open, creating the impression of surveillance or otherwise engaging in electioneering." As noted above, contrary to Objection 25, based on the testimony of K. Martinez, Villalongo, Kanzler,

Troy, Chu, and Aluqdah, Smalls was *not* located in a no-electioneering zone. For the reasons noted above at Section 1a., I do not credit the testimony of Villalongo, Kanzler, or Aluqdah. At most, witnesses K. Martinez, Troy, and Chu established that Smalls was potentially "within view of the polling area" during the first polling session on March 25.

At noted above, even if Aluqdah's evidence was credited, both K. Martinez and Aluqdah testified that seeing Smalls had no impact on their ability to vote as both cast their ballot. K. Martinez testified seeing Smalls "didn't bother me at all" and Aluqdah said that she did not even see Smalls leave his vehicle. Likewise, Chu testified he saw Smalls in the parking lot "not near" the voting tent between around 11:05 a.m. and 11:10 a.m. and Troy testified he saw Smalls in a vehicle across from the parking garage at around 11:00 a.m. Chu did not know whether Smalls could see him or the voting queue and he did not feel intimidated or coerced by Smalls' presence. As cited above, the mere presence of Smalls at the Employer's JFK8 property, without more, does not establish objectionable conduct. See *Station Operator*s, 307 NLRB 263 (1992); See also, *Harlan #4 Coal Co. v. NLRB*, 490 F.2d at 121; *C & G Heating & Air Conditioning, Inc*., 356 NLRB at 1054.

(1) Antonio "Cassio" Mendoza

As indicated above, I credit Mendoza's testimony that he wore a mask at all times he served as an observer, unless he was eating or drinking. Thus, if he was giving any eligible voters "big smiles," such smiles would only be visible during the periods of time Mendoza was actively eating or drinking while serving as an observer. I further credit Mendoza's testimony that "if a voter looked confused, and then I would beckon them over, so I would, like, wave my hand towards myself, and then when they realized what was happening, I would put a thumbs up so they understood they're in the right place." I also credit Mendoza's testimony that over the course of all six polling sessions he observed, "there was a good amount of others who were confused about where to go," so he used these hand gestures to more than one eligible voter "to keep things moving."

Applying the general electioneering standard, the Board has found objectionable a union observer who, in the polling place and acting contrary to the Board agent's instructions, told four employees how to vote and gave others a "thumbs up." *Brinks Inc.*, 331 NLRB 46 (2000) (*Brinks*). Additionally, in *Brinks,* at least one of the four employees told other employees that the union observer told the employee to vote for the union. There is *no* record evidence to establish that Mendoza told *any* eligible voter how to vote, that any eligible voter interpreted Mendoza's waving his hands and giving thumbs up as telling voters *how* to vote, or that any eligible voter *told* coworkers that Mendoza waved his hands and gave thumbs up gestures to orient confused eligible voters to the checking tables to get their ballots. It is undisputed that Mendoza did not say anything to voters when he used hand gestures to point eligible voters in the right direction, to keep things moving.

Mendoza's credited testimony about his hand gestures is more akin to the union observer in *U-Haul Co. of Nevada, Inc.*, 341 NLRB 195 (2004), enfd. 490 F.3d. 957 (D.C. Cir. 2007) (*U-Haul*), where the union observer was giving "thumbs up" and "smiles" to voters unaccompanied by any verbal exchange, the observer was not admonished by a Board Agent concerning this

conduct, and no one reported this conduct to a Board Agent. Based on those fact, the Board in *U-Haul* found that the election should not be overturned. Similarly, in *Downtown Bid Services Corp.,* 2010 NLRB LEXIS 89 (2010), the Board affirmed the determination to overrule of an employer objection when a union observer made facial gestures at voters and attempted to embrace one voter who elected not to vote as a result.

(2) Maldonado and a Smalls' Black Suburban Observed in JFK8 Parking Lot after Midnight on March 29

Spinella's testimony is merely that between around 12:20 a.m. to 12:30 a.m. on March 29, he saw Maldonado "outside the voting area," "by the generators by the restroom area," by the "exit of the tent" "towards the entrance of JFK8." Spinella also testified he saw a "black SUV" he believed was a "Chevy Suburban" that appeared to be driven by Smalls around the same time for approximately four minutes, parked right outside the "orange barrier with the cones." Spinella admitted he did not see Smalls inside the vehicle.

With respect to Maldonado, Spinella's testimony cannot amount to objectionable electioneering because at most, it establishes that Maldonado was present between around 12:20 a.m. and 12:30 a.m. by the exit of the tent during the evening polling session that started on March 28. However, as cited above, the mere presence of Maldonado at JFK8, without more, does not establish objectionable conduct. See *Station Operator*s, 307 NLRB 263 (1992); See also, *Harlan #4 Coal Co. v. NLRB*, 490 F.2d at 121; *C & G Heating & Air Conditioning, Inc*., 356 NLRB at 1054.

With respect to Smalls, Spinella's testimony again fails to establish objectionable electioneering because, first, Spinella admits he did not even see Smalls driving the vehicle he thought appeared to be Smalls' black SUV. Second, Spinella's testimony shows that the black SUV he believed to be driven by Smalls was parked outside the "orange barrier with the cones," outside a no electioneering zone based on the uncontroverted testimony of Russell. Spinella's testimony did not establish that Smalls' black SUV was parked "within view of the polling area" between around 12:20 a.m. to 12:30 a.m. on March 29, but even if it had, once again, Smalls' mere presence, without more, does not in and of itself amount to objectionable electioneering. *Id.*

Based on the foregoing and the record as a whole, I recommend that Objections 9, 23, and 25 be overruled, as the Employer failed to meet its burden to establish objectionable electioneering sufficient to overturn this election.

I. Objection 10: Region 29 failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the Petitioner when it directed voters to cover up "Vote NO" shirts, but allowed other voters to wear Petitioner shirts and other Petitioner paraphernalia in the polling area.

1. Record Evidence

Employee witness Laporta testified that she was one of the first voters who entered the voting tent during the first polling session on March 25, approximately seventh or eighth in line, and was wearing a blue "Vote No" t-shirt. According to Laporta, before she voted, the Board agent told her to "zipper up" and cover her shirt with her jacket. Laporta complied, zipped up her shirt, and cast her ballot. Laporta testified that during the time she was standing in line, she saw eligible voters wearing Petitioner t-shirts in line, both outside and inside the voting tent, and did not observe any Board agents telling them to cover up Petitioner t-shirts before they could vote.

Employee witness Grajeda testified that when she voted during the first polling session on March 25, she wore a "Vote No" t-shirt, but she had gotten cold and zipped up her sweater to cover the t-shirt before she approached the entrance to the voting tent.

Employee witness Alice Mohapeloa (Mohapeloa) voted during the first polling session on March 25. While waiting in line outside the voting tent, Mohapeloa saw an eligible voter in line wearing a pink Petitioner t-shirt that stated, "ALU" on the top of the shirt. Mohapeloa did not observer any Board agent instructing the eligible voter to cover up her Petitioner t-shirt. Mohapeloa testified that she also saw eligible voters in line wearing "Vote No" t-shirts and the Board agents asked them to cover up the "Vote No" t-shirts inside the voting tent. Mohapeloa testified that approximately six of them waited in line together outside and inside the voting tent.

Employee witness Monarrez testified she voted during the first polling session on March 25. When Monarrez went to vote, she was carrying a sign. The front of Monarrez's sign stated, "I joined ALU, I left ALU, I'm voting no." The back of the sign said, "We need a national union, not the ALU." When Monarrez was waiting in line, walking toward the voting tent, a Board agent told the group waiting in line that any signs needed to be put away and t-shirts needed to be removed "that had anything to do with the election." Mendoza similarly testified that when he was waiting in line to vote, the Board agent instructed him that eligible voters "cannot electioneer in the tent, and we cannot wear any pro or anti-Union paraphernalia."

Monarrez testified that at the time of the Board agent's instruction, she saw a few people wearing Petitioner t-shirts and a few people wearing "Vote No" shirts, and they covered, removed, or put the items away as instructed. Monarrez put her sign in her backpack after the Board agent's instruction. The Board agent further instructed that anyone with items related to the election "had to stand on the other side of those orange cones where the reporters and journalists were" in the JFK8 parking lot. According to Monarrez, she went to the other side of the orange cones and voluntarily held up her sign for the media to take her picture and provide her interview about the election. Employee witness Mendoza testified that he observed

Monarrez "talking to the media in front of the tent." Mendoza waited for Monarrez to finish the interview and told her that she should not be electioneering outside the tent and to get farther away in accordance with the no electioneering rules for the election.

Employer witness Spinella testified that he was present both before and after the closing of the polls for each evening session of the election. According to Spinella, prior to the opening of the polls during each evening session, he saw the three Petitioner observers present wearing Petitioner buttons with raised fists. However, Spinella was not present during the polling times to testify about whether or not the Petitioner observers wore the Petitioner buttons with raised fists *during* the evening polling sessions, while they were serving as Petitioner observers.

Employee witness Megan Matos (Matos) was the Employer observer for the evening polling session on Saturday, March 26, assigned to the O-Z checking table, along with a male Board agent and Petitioner observer Sylla. Matos estimated that approximately 200-400 eligible voters cast ballots when she was serving as an observer for that evening polling session. Matos testified that she observed approximately 10 eligible voters wearing the Petitioner lanyard inside the voting tent while she was an observer.

Matos testified no Board agent asked any voter to take off the Petitioner lanyard before they voted. Matos did not see any eligible voters with "Vote No" shirts when she served as an observer. I note that on cross examination, Matos changed her testimony to reflect that she saw approximately 10 eligible voters wearing "Vote No" lanyards and then corrected her testimony to reflect that the Petitioner lanyards she saw as the observer on March 26 stated "Vote Yes" and "Amazon Labor Union." Matos voted in the election and did not see anyone decide not to vote and leave the tent when she was serving as an observer.

Employee witness Tredici testified that she started the "Vote No" campaign at JFK8, made her own "Vote No" t-shirt with a marker, and wore it to work. According to Tredici, someone named Louise Barnes from Alabama sent Tredici approximately 1,000 "Vote No" t-shirts that Tredici gave out to employees starting on approximately from March 17. Tredici did not know who paid for those "Vote No" t-shirts. Tredici told her manager that she wanted to pass out the "Vote No" t-shirts and her manager told Tredici that she could not pass out the t-shirts at her station, and that she would have to leave them in the lunchroom. Tredici testified she passed out all approximately 1,000 "Vote No" t-shirts between March 17 and the start of the election on March 25.

Employee witness Catherine Litto (Litto) testified that about a week before the election, she got a "Vote No" t-shirt from Tredici and passed out a couple of the shirts she got from Tredici for around ten minutes inside the front of JFK8. Litto voted on Saturday, March 26, when there was no line to vote. Litto testified that while she was in the voting tent, she saw three to four eligible voters wearing Petitioner lanyards. Litto did not observe anyone instructing the eligible voters that they were prohibited from wearing Petitioner lanyards while voting. Litto did not see any other voters wearing any kinds of items that said "Vote Yes" inside the voting tent.

Tredici further testified that while she was an observer on Tuesday, March 29, a female voter was wearing a "Vote No" t-shirt, and the Board agent told the voter that she needed to

cover her shirt, could not be in the voting tent with that shirt, and she cannot vote until she covers it up. Tredici recalled around five voters in line behind the voter with the "Vote No" t-shirt at the time the Board agent instructed the voter to cover up her t-shirt. Tredici did not see any voters leave the tent after this exchange.

Tredici testified she also saw one voter wearing Petitioner lanyard, but the Board agent did not ask the voter to remove the Petitioner lanyard before voting. Tredici testified that the Petitioner lanyard she saw did not say "Vote Yes." Tredici did not see any voters leave the tent after this exchange.

Employee witness Cordova testified that while he was waiting inside the tent to vote during the morning of Monday, March 28, he saw around five eligible voters wearing Petitioner lanyards that said "Vote Yes." Cordova did not see any Board agents saying anything to the eligible voters wearing the Petitioner yellow lanyards. Cordova also testified that Petitioner observer Daniels was at the A-F checking table where Cordova went to vote and was wearing a pink Petitioner t-shirt with a scarf on his neck, but Cordova was still able to see that the Petitioner t-shirt had "ALU" on it. Cordova did not hear any Board agents say anything to Daniels about wearing the pink Petitioner t-shirt while serving as a Petitioner observer.

Employee witness Rosado testified that she waited two hours to vote during the evening polling session on March 29 with about 1.5 hours outside, and about 30 minutes inside the voting tent. During the 30 minutes Rosado was inside the voting tent, at approximately 11:00 p.m., Rosado saw approximately 25 eligible voters wearing Petitioner lanyards with "Vote Yes" and "ALU" and Petitioner t-shirts that said "ALU" across the chest. Rosado did not see anyone approach the approximately 25 eligible voters wearing the Petitioner lanyards to remove them inside the voting tent or the approximately 25 eligible voters wearing the Petitioner t-shirt cover up their t-shirts before they voted. During cross examination, Rosado admitted it was "freezing" the night of March 29 and eligible voters were wearing jackets and sweaters and not just t-shirts inside the voting tent but testified she could still clearly see the Petitioner lanyards and t-shirts. Rosado voted during the evening polling session on March 29.

As noted above, employee witness Novoa testified that she was an Employer observer during the evening polling sessions from Monday, March 28 through Wednesday, March 30. Novoa testified that during all three evening polling sessions, she saw persons wearing pro-Petitioner items. Novoa testified that during the Monday evening polling session, she saw all three Petitioner observers wearing the Petitioner lanyards as well as the Petitioner buttons with raised fists around their clavicle areas during the entirety of that polling session. Novoa estimated that approximately 45% of the approximately 200 voters that she observed come on Monday night, March 28, were wearing Petitioner lanyards. According to Novoa, she did not observe any Board agent tell any individuals to take off the Petitioner lanyards or Petitioner buttons with raised fists.

According to Novoa, during the duration of the evening polling session on Tuesday, March 29, all four Petitioner observers wore the same Petitioner buttons with raised fists near their clavicles. Novoa did not observe any Board agent tell any individuals to take off the Petitioner buttons with raised fists. Novoa also saw approximately 15 to 20 voters of the

approximately 40 voters wearing Petitioner lanyards during the evening polling session on March 29. Novoa testified she saw a Board agent to tell an eligible voter to remove the Petitioner lanyard once, asking the eligible voter to put it away, and the eligible voter put it in his back pocket, with the string hanging down.

During the evening polling session on March 30, Novoa did not see any Petitioner observers wearing Petitioner items. Novoa estimated that approximately 10 voters she observed during the evening polling session on March 30 were wearing yellow Petitioner lanyards. According to Novoa, she did not observe any Board agent tell any individuals to take off the Petitioner lanyards, nor did she report any Petitioner lanyards to any Board agents. Novoa reported seeing eligible voters inside the voting tent wearing Petitioner lanyards to the Employer attorneys after the closing of the evening polling session on March 28, but she did not recall the Employer attorneys telling her to report it to the Board agent if she saw the same thing in subsequent polling sessions. Novoa did not tell anyone else about seeing voters wearing the Petitioner lanyards during the March 28 polling session except for the Employer's attorneys.

On cross examination, Novoa admitted that a lot of people took Petitioner lanyards, put their work IDs in the Petitioner lanyards, and wore the Petitioner lanyards around their necks at work. Novoa testified she saw Petitioner lanyards "all the time" at work. Novoa also acknowledged that the Employer gives away lanyards in different colors to acknowledge years of service and that she saw voters with Employer lanyards while she was serving as an observers and no one made the voters remove the Employer lanyards. According to Novoa, none of the Employer lanyards are yellow, and the Petitioner lanyards are yellow with "letters that say ALU in bright white." Novoa did not testify that the Petitioner lanyards said "Vote Yes."

Mendoza testified he served as a Petitioner observer for a total of six polling sessions: during the evening polling session on March 25, both polling sessions on March 26, and the evening polling sessions on March 28 through March 30. Mendoza testified that when he was serving as a Petitioner observer, he saw the Employer observers wearing Amazon clothing but did not see any Employer observers wearing "Vote No" items. Mendoza also testified that when he served as an observer, he saw the assigned Board agent instruct voters to put their Petitioner lanyards in their pockets at least seven or eight times. When Mendoza served as an observer, he notified the Board agent that there were a couple of voters waiting in line inside the voting tent wearing "Vote No" t-shirts and that those voters appeared to vote without covering up the "Vote No" t-shirts.

Employee witness Campbell served as an Employer observer for the morning polling sessions on March 26 and 30. Campbell first testified that during these two polling sessions she served as an observer that she did not see any eligible voters inside the voting tent wearing Petitioner paraphernalia but she "might see" eligible voters wearing "orange" Petitioner lanyards that said "ALU." Campbell also testified that she "maybe" saw one eligible voter inside the voting tent wearing a blue "Vote No" shirt.[25]

[25] As noted elsewhere, I do not credit Campbell's testimony here, as it again lacked specificity and detail, mistakenly referred to the Petitioner lanyard as orange when it is yellow, and exhibited uncertainty by qualifying her testimony with words such as "might" and "maybe."

Employee witness Adenkunle Oyalaja (Oyalaja) testified he went to vote at approximately 10:00 p.m. on Monday, March 28. According to Oyalaja, for approximately five minutes between when he got his ballot and went to the ballot booth to vote, he saw Petitioner observer Daniels wearing a Petitioner lanyard that said "ALU" but did not say "Vote Yes." Oyalaja voted on March 28 despite seeing Daniels wearing the Petitioner lanyard. Daniels was not the observer at the checking table Oyalaja went in to vote.

Employee witness Gregory Purpora (Purpora) testified that when he went to vote in the morning on Tuesday, March 29, he wore three Petitioner buttons with raised fists with specific messages on each in black marker, including: 1) Vote No!, 2) Fuck No, and 3) No! The third "No!" button also had a red circle around it with a diagonal line across, crossing out the Petitioner logo. When Purpora approached the tent to vote, the Board agent asked him to close his flannel shirt up to cover up the three buttons because there is no politicking or something to that effect permitted within the tent. Purpora testified he did not see any eligible voters wearing Petitioner items inside the voting tent.

Employee witness Goriva testified that she voted between 9:00 pm and 9:10 pm on March 29 and she saw one person wearing a Petitioner lanyard and button directing the voters to the checking tables to vote. According to Goriva, the button said "ALU" and the lanyard was yellow and said "Amazon Labor Union" with their logo and "ALU" in a pattern. Goriva estimated that she was only inside the tent for around two to three minutes.

Employee witness Robert M. Castellano, Jr. (Castellano) testified that when he voted at around 8:00 a.m. on Wednesday, March 30, during the minute or two he was inside the tent, he saw observer and stipulated Petitioner agent Brett Daniels (Daniels) wearing Petitioner buttons with raised fists on his white turtleneck sweater. Castellano did not hear any Board agent ask Daniels to remove his Petitioner pins. Daniels was not wearing a "Vote Yes" t-shirt. Daniel's Petitioner buttons did not stop Castellano from voting.

Employee witness Kevin Menelas (Menelas) testified that he voted between 8:00 a.m. and 10:00 a.m. on Wednesday, March 30. According to Menelas, while he was inside the voting tent for approximately five to ten minutes, he saw someone wearing either a Petitioner shirt or a Petitioner pin that was "noticeable" with the letters "ALU" behind the checking table with the Board agent. Menelas did not remember the color of the item that said "ALU." The Petitioner item did not cause Menelas to leave the voting tent and he did not see any other eligible voter leave the voting tent either because he was the only eligible voter inside the tent at the time he voted.

Employee witness Jasmine Gordon (Gordon) testified that when she voted between around 10:30 am and 11:00 am on March 30, she was wearing a blue "Vote No" t-shirt. Gordon testified that one of the Board agents instructed her that she could not vote unless she covered up her t-shirt. Gordon said that one of the observers asked her to cover up her t-shirt and she did so. Gordon did not see anyone wearing Petitioner items during the time she was inside the voting tent. Gordon voted in the election and did not notice any voters turn around and leave the voting tent after she was instructed to cover up her "Vote No" t-shirt.

Employee witness John Christie (Christie) testified that he voted during a morning session on a date he could not recall that the outbound ship dock was shut down and released to vote pursuant to the Release Schedule. According to Christie, when he went to vote, he wore a "Vote No" t-shirt with a button up shirt over it that was unbuttoned. Before Christie entered the voting tent, a Board agent said that "nobody going in the tent was allowed to wear any shirt stating pro or con." Christie covered up his "Vote No" shirt before he entered the tent. According to Christie, he was one of the first in line and there were other eligible voters from his department behind him. Christie voted notwithstanding the Board Agent's instruction and did not see any eligible voters turned away from voting.

Many employee witnesses generally testified that the Employer provides Employer items of clothing and lanyards (referred to as "swag") to its employees. This Employer swag generally displays the Amazon "smile" logo. The Employer lanyards are many different colors, and some are certain colors designated to correspond with employees' years of service. Many JFK8 employees wear Employer "swag" including these lanyards of various colors at work to hold their Employer photo identification. The record contains an estimate that approximately 70% of the JFK8 employees wear lanyards to hold their employee IDs at work at JFK8.

2. Board Law

The Board has consistently held that wearing stickers, buttons, and similar campaign insignia by participants as well as observers at an election is, without more, not prejudicial. *R. H Osbrink Mfg. Co*., 114 NLRB 940, 942 (1955); see also *Furniture City Upholstery Co*., 115 NLRB 1433, 1434–1435 (1956). The Board discourages observers from wearing insignia, but does not prohibit such conduct. *U-Haul Co. of Nevada, Inc.*, 341 NLRB 195, 196 (2004). Section 11310.4 of the Representation Casehandling Manual provides guidance that "voters need not remove insignia, even though they constitute electioneering material," and that "it is preferred, but not required, that [observers] wear no other insignia."

Thus, Board precedent is clear that the wearing at the polls by observers of buttons or other insignia merely bearing the name of their union is not prejudicial to the fair conduct of an election. *Electric Wheel Co*., 120 NLRB 1644, 1646 (1958). And viewing the identity and special interests of employer observers as not reasonably presumed to be less well known than that of union observers, the Board holds that the impact on voters is not materially different "whether the observers wear prounion or antiunion insignia of this kind." *Larkwood Farms*, 178 NLRB 226 (1969) (observer wearing "Vote No" hat not objectionable).; see also *Fiber Industries*, 267 NLRB 840, 850 (1983) (appearance of words "yes" or "no" in polling area, without more, not grounds to set aside election); *Delaware Mills, Inc.*, 123 NLRB 943, 946 (1959) (overruling objection based on employee—who, because her vote was challenged, was required to sit at polling place—wearing union t-shirt and "Vote Yes" button and allegedly waving and smiling at other voters).

The display of insignia outside the polling area just before or during the polling period similarly has been found unobjectionable. Thus, in *Mar-Jac Poultry Co*., 123 NLRB 1571, 1572– 1573 (1959), the Board overruled an objection where, during the half-hour before voting (during which the employer's operations were shut down), some employees walked around the plant at such time wearing handmade paper hats lettered with words

"Vote No." Similarly, in *Chrill Care, Inc.*, 340 NLRB 1016 (2003), the presence of picketers displaying union signs and insignia outside the voting area was not objectionable.

3. Recommendation

The employee testimony summarized above generally establishes that, while inside the voting tent, some eligible voters wore items containing logos from both parties (including Petitioner t-shirts containing its logo "ALU;" Petitioner buttons with raised fists; as well as the Amazon "smile"), "Vote No" t-shirts, and Petitioner lanyards while in the voting area. Objection 10 asserts that Board agents directed eligible voters to cover up their "Vote No" items but allowed eligible voters to wear Petitioner lanyards and Petitioner t-shirts. As summarized above, the record evidence does *not* generally establish that Board agents treated "Vote No" items less favorably than "Vote Yes" items in the voting area.

For example, employee witness Monarrez who had a sign containing the language "Voting No" with her when she voted during the first polling session on March 25 testified that the Board agent outside the entrance of the tent instructed *all* eligible voters that they were required to put away any items that said anything about the election, and that she observed eligible voters complying with the Board agent's instructions. Similarly, Mendoza, who served as a Petitioner observer for six polling sessions, testified that he saw the assigned Board agent instruct several voters to put away Petitioner "Vote Yes" "ALU" lanyards inside the voting tent, and he observed that voters complied with the assigned Board agent's instructions. Additionally, employee witnesses Monarrez, Purpora, and Gordon all testified that they did not observe *any* eligible voters wearing any Petitioner items inside the voting tent.

Some employee witnesses testified that voters were permitted to wear pro-Petitioner or pro-Employer items inside the voting tent, but there is insufficient evidence to establish that Board agents disparately enforced their instructions in favor of pro-Petitioner items rather than "Vote No" items as alleged in Objection 10. For example, Campbell served as an Employer observer for two polling sessions and testified she saw an eligible voter wearing a blue "Vote No" t-shirt inside the voting tent. Employee witness Gordon wore a blue "Vote No" t-shirt inside the voting tent until she got to the checking table, when the Board agent instructed her to cover her shirt. Petitioner observer Mendoza also testified that he saw a couple voters wear "Vote No" t-shirts inside the voting tent and while they voted when he served as a Petitioner observer.

There is also employee testimony that some voters were permitted to vote wearing their Petitioner lanyards inside of the voting tent. However, most of the employee witnesses who testified about the Petitioner lanyards were unaware that Petitioner lanyards also stated "Vote Yes," because the size of the white letters stating "Vote Yes" on the lanyard string was much smaller and harder to see than the "Vote No" clearly legible on the chest area of the "Vote No" t-shirts. Further, there was testimony to establish that the weather was consistently cold during the polling sessions, so many eligible voters were wearing multiple layers, jackets, and winter weather gear that would make it difficult to see all Petitioner lanyards as well as "Vote No" or Petitioner t-shirts if they were covered up when eligible voters came inside of the voting tent.

Additionally, the record evidence generally reflects that Board agents permitted observers or eligible voters to wear insignia inside the voting tent as long as such items did not visibly specifically state, "Vote Yes" or "Vote No." For example, employee witness Goriva testified that she saw all of the Petitioner observers wearing the Petitioner buttons with raised fists for all three evening polling sessions she served as an Employer observer. However, it is undisputed that Petitioner's buttons with raised fists does *not* state "ALU" or "Vote Yes," unlike the Amazon "smile" logo that contains the word "Amazon" and its "smile" logo. Similarly, Petitioner's t-shirts simply displayed, "ALU," whereas the pro-Employer t-shirts visibly contained the clear message, "Vote No." The record contains an estimate that approximately 70% of employees employed at JFK8 wear lanyards at work to carry their work IDs, and reflects that the Employer itself gives lanyards to employees in various colors to represent employee years of service.

The record evidence summarized above does *not* generally establish that Board agents disparately enforced their instructions to allow eligible voters to wear pro-Petitioner items but not wear pro-Employer inside the voting tent as alleged in Objection 10. For this reason, the Employer's reliance on *Glacier Packing*, where that employer's "Vote Neither" campaign message was prohibited by the Board agent as akin to the Board agents' alleged exclusive targeting of the Employer's "Vote No" campaign message in this election is inapposite. *Glacier Packing Co., Inc.,* 210 NLRB 571, 573 (1974) (Board agents must take care that their actions do not tend to foster in the minds of the voters the impression that the Board is not neutral with regard to the choices on the ballot). To the contrary, the record evidence generally shows that the Board agents endeavored to be impartial, neutral, and consistent in their instructions to eligible voters that items that visibly displayed "Vote Yes" and "Vote No" would *not* be permitted inside the voting tent. Accordingly, there is insufficient record evidence to establish that the Board agents' instructions regarding such campaign insignia "raises a reasonable doubt as to the fairness or validity of the election." *See, e.g., Polymers, Inc.*, 174 NLRB 282 (1969), enf'd 414 F.2d. 999 (2d. Cir. 1969. Based on the foregoing and the record as a whole, I recommend that Objection 10 be overruled.

J. Objection 11: Region 29 failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the Petitioner when it repeatedly allowed a Petitioner's observer to audio/video record the check-in tables and voting area on his mobile phone while serving as an observer during multiple voting sessions.

1. Record Evidence

As noted above, the written and verbal Board agent instructions provided to observers during the pre-election conferences prior to each polling session included instructions that observers were not permitted to use their cell phones during the polling times and that all questions were to be directed to the Board agents.

Employee witness Emmanuel DeLeon (DeLeon) served as an observer during the first polling session on March 25. DeLeon testified that *before the first polling session opened*, Petitioner observer [later identified as Anthony], who sat next to him at the O–Z checking table,

had a cell phone present with him, on his belt clip, flashing white light. DeLeon notified the Board agent about Anthony's flashing cell phone, and the Board agent instructed Anthony to turn his cell phone off and put it away. DeLeon did not observe Anthony using his cell phone other than to turn it off as instructed by the Board agent. DeLeon observed that Anthony had his cell phone on his belt clip the entire time he served as an observer. DeLeon did not observe the Petitioner's cell phone present on the checking table.

Employee witness Anthony Momodu (Momodu) served as an Employer observer during the evening polling session on March 25, assigned to the O–Z checking table with a female Board agent and Petitioner observer Anthony. According to Momodu, Anthony had his cell phone out on the table or in his hand for approximately 20 minutes. Momodu testified that the Board agent asked Anthony to put his cell phone away about three times, and eventually, Anthony put it away. Momodu admitted he did not see Anthony "actually recording" and did not know if Anthony's phone was recording but "he was pressing the phone while it was on his table and in his hand." Momodu admitted he did not see Anthony aiming the phone around the tent at other voters and that he did not see any voters turn around and leave the voting tent.

Anthony testified that while he served as a Petitioner observer during the March 25 morning and evening polling sessions, he saw that a couple of eligible voters inside the tent were using their mobile devices and the assigned Board agent did not do anything about it but the assigned Board agent targeted Anthony because he had his cell phone on a holster on his waist and on the table where he was acting as an observer "because I wanted to take notes of what was going on" as a "personal reference." Anthony denied taking any pictures or audio or video recording while serving as a Petitioner observer at any time because in Anthony's view, doing so "would constitute a federal crime."

According to Anthony, during the March 25th evening session, the assigned Board agent told him that he was prohibited from using his cell phone and to put it in his pocket. The assigned Board agent also informed Anthony that he could no longer serve as Petitioner's observer after the evening session on March 25. However, Anthony returned as Petitioner observer on March 29, because Anthony testified he apologized to the assigned Board agent for using his cell phone and committed to not use his cell phone during the March 29th polling session while serving as a Petitioner observer. Anthony confirmed that his cell phone remained in his pocket for the entire time he served as a Petitioner observer on March 29.

Employee witness Novoa testified that while she served as an observer during the evening session on Tuesday, March 29, on one occasion "somewhere in the middle" of the polling session at a time she could not recall, when it was not busy but she could not recall if any voters were present, Novoa saw Petitioner observer Mendoza "pull out a cell phone," "glance at it," and then put it back in his pocket. Novoa estimated that there were only approximately 40 voters during the entirety of the evening polling session on March 29. Novoa did not tell any Board agent about seeing Mendoza glance at his phone, nor did she see any Board agent tell Mendoza to put his cell phone away. Novoa recalled an instruction to observers that they were prohibited from using cell phones while serving as observers.

To be clear, there is *no* record evidence to support that any Petitioner observer audio or video recorded the check-in tables and voting areas by cell phone while serving as an observer during multiple polling sessions as specifically asserted in Objection 11.

2. Board Law

Observers should not ordinarily be permitted to use or display their cell phones during the election. Rep. Casehandling Manual Sec. 11326.2. In *RadNet Management, Inc. v. NLRB*, 992 F.3d 1114 (D.C. Cir. 2021), the court held that the Board properly overruled an objection asserting that the Petitioner's observer used her cell phone during the election in violation of the Board agent's instructions and in view of eligible voters—with the apparent implication that the observer was using her cell phone to keep a list of voters—because no evidence was offered of actual or perceived list keeping.

3. Recommendation

The Employer failed to meet its burden of proof to establish that Region 29 "repeatedly allowed a Petitioner's observer to audio/video record the check-in tables and voting area on his mobile phone while serving as an observer during multiple voting sessions" as expressly alleged at Objection 11. To the contrary, as summarized above, the record evidence establishes that each time Board agents were made aware that an observer had a cell phone visibly present while the polling sessions were open, the Board agents instructed the observer to put his cell phone away.

To the extent that Mendoza "glanced" at his cell phone once when only approximately 40 voters during the entirety of the slow polling session, with no record evidence to support that *any* Board agent or voter saw Mendoza "glance" at his cell phone, there is *no* record evidence to show Mendoza's "glance" had any impact on the election whatsoever. Moreover, as indicated above, there is *no* record evidence to support that any observer audio or video recorded at any time during any polling session for the entirety of the election. Based on the foregoing and the record as a whole, I recommend that Objection 11 be overruled, as the Employer failed to meet its burden of proof to establish that the conduct of the Board election agent tended to destroy confidence in the Board's election process or could reasonably be interpreted as impairing the election standards the Board seeks to maintain. *Athbro Precision Engineering Corp.,* 166 NLRB 966 (1967), vacated sub nom. *Electrical Workers v. NLRB*, 67 LRRM 2361 (D.D.C. 1968), acquiesced in 171 NLRB 21 (1968), enfd. 423 F.2d 573 (1st Cir. 1970).

K. Objection 12: Region 29 failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the Petitioner when it solicited unfair labor practice charges against the Employer in the presence of voters in the polling area while the polls were open.

1. Record Evidence[26]

Employee witness Nicoletti testified he was an Employer observer for the morning polling session on March 28, sitting at the O-Z checking table. Maldonado was the assigned Petitioner observer with Nicoletti at the O-Z checking table that morning. Nicoletti estimated that at around 10:30 or 11:00 a.m., during a "lull part" in that polling session, a male eligible voter approached his checking table and started asking questions. Nicoletti testified that there was "about four to five people at most in the tent that were ready to vote at that time."

Nicoletti testified that the eligible voter asked questions about whether the Employer has a right to hold mandatory meetings telling employees to vote no, and the Board agent said that the Employer has a right to hold such meetings with its employees and if the employee wants "to file a complaint with the NLRB, feel free to do so." The Board agent did not tell the eligible voter that he would help him file a charge with the NLRB during the polling session and did not tell the eligible voter whether or not he should file an NLRB charge. According to Nicoletti, the Board agent was simply trying to control the situation, to maintain order and control during the election.

2. Board Law

The Board prefers that, where practicable, regional offices should keep the conduct of elections completely separate from the investigation or trial of contemporaneous unfair labor practice charges involving the same parties; thus, where feasible, the better course is to the election agent to be someone other than a trial attorney representing the Board in a related unfair labor practice case. *Kimco Auto Products of Mississippi, Inc.*, 184 NLRB 599, 599 fn. 1 (1970). Even so, the Board has rejected objections made on this or similar bases. *Id*. (Board agent was co-counsel for the General Counsel at an unfair labor practice proceeding held more than 2 weeks prior to the election 30 miles from plant and only 2 eligible voters were present as witnesses); *Amax Aluminum Extrusion Products*, 172 NLRB 1401, 1401 fn. 1 (1968) (Board agent investigated unfair labor practice charges against employer in between voting sessions by interviewing 3 employees away from employer's premises); *McCarty-Holman Co*., 114 NLRB 1554 (1955) (Board agent previously investigated unfair labor practice

[26] While the Employer did not identify this testimony as supporting Objection 12, employee witness Tredici testified that while she was an observer during the morning polling session on March 29, a person Tredici identified as a male "ALU member" came into the tent and the Board agent said something to the effect of, "We're not ready for you yet, I'm going to call Chris [Smalls] in 5 minutes." Tredici thought that "Chris" referred to Petitioner President Smalls. Tredici admitted she did not know what the Board agent and the male "ALU member" were discussing. Tredici did not see anyone who was prevented from voting due to this conversation. I do not find this elicited testimony relevant to Objection 12, as there was no record evidence to establish that this purported comment Tredici thought referred to Smalls was pertaining to "solicit[ing] unfair labor practice charges" as expressly asserted at Objection 12.

charges); *Sparta Health Care Center*, 323 NLRB 526 (1997) (hearing officer in representation case subsequently served as counsel for the General Counsel in a Section 8(a)(5) "test of certification" proceeding); see also *S. Lichtenberg & Co*., 296 NLRB 1302 (1989) (Board agent quote to newspaper concerning a pending unfair labor practice complaint was not a basis for setting the election aside).

3. Recommendation

The Employer failed to meet its burden to establish that Region 29 "solicited unfair labor practice charges against the Employer in the presence of voters in the polling area while the polls were open" as expressly alleged at Objection 12. To the contrary, the record evidence establishes that when an eligible voter was vociferous at the checking table inside the voting tent, asking the Board agent questions about the propriety of Employer holding captive audience meetings during its campaign, the Board agent accurately responded with content neutral information that current Board precedent holds that Employers may lawfully hold captive audience meetings, but if the employee wanted to file an unfair labor practice charge, he was free to do so.

Providing accurate, complete, and concise information to an eligible voter during an election about the agency and the Act, akin to what NLRB Regional information officers provide to *all* members of the public, does not constitute "soliciting" a Board charge, nor does it "lend perceived validity" to any Board charge the questioner voluntarily chooses to file.[27] Further, the record reflects that the Board agent provided this accurate information in *response* to vocal questioning by an eligible voter at the checking table, to de-escalate any disruption during the polling session. To be clear, there is *no* record evidence to support that any Board agent "solicited unfair labor practice charges" during *any* polling session during the entirety of the election.

Moreover, according to Nicoletti, the lone witness the Employer provided in support of Objection 12, there were only "about four to five" eligible voters present inside the voting tent at the time of this exchange between the eligible voter and the Board agent at the O-Z checking table. Based on the foregoing and the record as a whole, I recommend that Objection 12 be overruled, as the Employer failed to meet its burden of proof to establish that the conduct of the Board election agent tended to destroy confidence in the Board's election process or could reasonably be interpreted as impairing the election standards the Board seeks to maintain. *Athbro Precision Engineering Corp.,* 166 NLRB 966 (1967), vacated sub nom. *Electrical*

[27] See ULP Casehandling Manual Sec. 10010, 10012. I note the Employer argues that "[a]dvising a voter that they can file *during an active election* is not appropriate," and "[t]he Board agent's advice to an openly pro-ALU voter to file a complaint against *Amazon* while in line to vote clearly impugns the Board's neutrality and integrity of its election procedures," but fails to cite any legal authority for its propositions. The cases cited by the Employer for Objection 12 are distinguishable because the Board agents in those cases communicated comments indicating preference for one party, unlike the Board agent here, that simply provided content neutral, accurate information in response to an eligible voter's questions, to de-escalate the exchange and exhibit control during the election. Compare, e.g. *Hudson Aviation Servs.,* 288 NLRB at 870; *Glacier Packing*, 210 NLRB at 573; *Renco Elecs., Inc.,* 330 NLRB 368, 368 (1999).

Workers v. NLRB, 67 LRRM 2361 (D.D.C. 1968), acquiesced in 171 NLRB 21 (1968), enfd. 423 F.2d 573 (1st Cir. 1970).

L. Objection 13: During the critical period and while the polls were open, the Petitioner's members and agents harassed and threatened physical violence and other reprisals against employees who were not supportive of the Petitioner's cause.

1. Record Evidence[28]

a. Alleged Threat by Anthony and Daniels against General Manager Santos

Employee witness Lori'l Adenji (Adenji) testified that on a date she could not recall during the critical period, in the employee break room, she observed Anthony and Daniels on the phone and they made a comment about needing to "get [Employer General Manager] Felipe" [Santos] or had to "do something with Felipe [Santos]." Adenji verbally reported the comment to Santos but never submitted a written report to the Employer nor reported the incident to the police.

b. Alleged Harassment by Spence

Employee witness Nakeesha Fray (Fray) testified that on a date she could not recall during the critical period, between January 1 and March 30, before she voted, in the morning while she was working in One East at JFK8, she was wearing a red Petitioner t-shirt with the white Petitioner logo covered up with red tape. Petitioner Vice President Spence approached Fray with an African American male wearing a Petitioner t-shirt whom Fray could not identify by name or as having any particular role with Petitioner. Fray estimated approximately 30 to 50 employees were present in One East at the time of their interaction.

Fray testified that Spence asked her why the Petitioner logo was covered up on her Petitioner t-shirt. Fray said she just covered it. Spence asked Fray if it was her choice. Fray said yes. Spence told Fray that if a manager told her to cover up the Petitioner logo on the

[28] During the hearing, I admitted a number of written employee complaints the Employer offered as business records under the FRE 803(6) hearsay exception, that its witness testified were routine records kept in the ordinary course of business by the Employer. I invited the parties to brief the issue of whether these written employee complaints were properly admitted as business records under FRE 803(6). Petitioner contends that the admitted employee complaints are hearsay and that they were deprived of the opportunity to cross examine the employees that submitted these complaints by admitting them as business records. The Employer contends that the employee complaints are business records maintained by the Employer in its ordinary course of business. Since Monarrez, Anthony, and Lopez testified about their written complaints, I address them above at Objection 13. Regardless of whether the other employee complaints were properly admitted as business records under FRE 803(6), taken as a whole, I find that none of them contain sufficient evidence of harassment and threats of physical violence and other reprisals as expressly alleged at Objection 13. Specifically, none of the written employee complaints submitted by Dana Miller, whom the Employer chose not to call as a witness, Tredici regarding Smalls, or Anthony regarding Monarrez, contain sufficient evidence that a reasonable employee would objectively view as harassing and threatening physical violence and other reprisals as the Employer contends at Objection 13.

Petitioner t-shirt, "it could be a lawsuit." Fray responded that it was not a manager; it was her, because she no longer supported Petitioner. On direct, Fray described Spence's tone as "upset, angry," but also specifically referred to this exchange with Spence as a "meaningless conversation going back and forth a little bit." Fray estimated her conversation with Spence lasted around seven to ten minutes.

On cross examination, Fray testified that she tried to avoid Spence after this interaction but admitted that she continued to go to the Petitioner break room tables for free food and that a few days before the election, Spence gave her his telephone number and said she could call him anytime for more information about Petitioner.

Spence testified that the reason that he spoke with Fray was because based on information he received from a coworker, a manager told Fray to cover up her Petitioner t-shirt, which he believed to be a violation of her Section 7 rights, and Spence wanted to make sure that her right to express her pro-union sentiment was protected. Therefore, Spence asked Fray if a manager told her to cover up her Petitioner t-shirt. Fray responded that nobody told her to do it; she just did it. Spence was confused by Fray's response because Fray had asked him for Petitioner t-shirts in various colors and had voluntarily completed Petitioner surveys, so Spence asked Fray again if someone told her to cover up her Petitioner t-shirt.

Then, Fray told Spence that she no longer supports Petitioner. After that, Fray and Spence had a conversation about why she changed her mind and Spence explained that employees had Section 7 rights protected by law. Spence told Fray that for example, if a manager told her to cover up her Petitioner t-shirt, that would be illegal. Spence closed the conversation that if Fray had any questions or concerns about Petitioner, she could ask him, as he is frequently present at Petitioner break room tables. Spence denied threatening Fray in any way. In fact, Fray admitted she approached Spence *after* their interaction, either immediately before the election or during the election, in the break room, and asked him a few clarifying questions about Petitioner, and Spence gave her his phone number to call or text him anytime.

Employee witness Tredici testified that a few weeks before the election that started on March 25, inside the second or third floor on the East side of JFK8, about two or three feet away from a station where Tredici was working, employee Fray had on a red Petitioner t-shirt that she covered with red tape because she changed her mind about supporting Petitioner. According to Tredici, one white [Spence], and one black, male "ALU members" came to Fray and angrily asked her why she covered up the ALU on her t-shirt and if the Employer made her cover up the ALU on her t-shirt. Tredici estimated that this exchange lasted around seven to eight minutes total. Tredici did not report this conversation to the Employer but approximately three or four other employees were present about one foot away during this conversation.

c. Alleged Threat by Palmer During February 7th Small Group Meeting

On February 7, employee witness Castellano was scheduled to attend the 11:00 a.m. small group meeting in the Day 1 Room. Castellano observed a group of Petitioner supporters enter the Day 1 Room during this small group meeting. Castellano audibly called the group "a

bunch of thugs" because "of what they were expressing that they are a bunch of thugs" that "just want a handout."

According to Castellano, Palmer and another African American employee whose name he did not know then approached him. Castellano said, "Vote No." Castellano did not remember Palmer's response to him calling the group "a bunch of thugs" was to come over to him and say, "Excuse me, what did you say?" According to Castellano, Palmer got in his face, pointed his finger at him, and said something like, "I know you; I trained you; you're just a PA; you don't know anything." Castellano admitted that he was not scared for his physical safety or his life by Palmer's comments.

Castellano testified that he held out his lanyard with his work identification showing his photo with his name and login ID to Palmer and said, "I'm not hiding from you." According to Castellano, Anthony appeared to be recording this exchange and at least two other individuals present in the meeting on his cell phone. About a week after this incident, Castellano filled out a witness form with the Employer's human resources department. According to Castellano, neither he nor the human resources department followed up regarding this incident. Castellano did not know if the Employer investigated his witness form.

d. Alleged Harassment by Petitioner Supporter Home Visit

Employee witness Gopi Vaidya (Vaidya) testified that during the weekend before the election, four individuals who identified themselves as from the Petitioner visited her home. Vaidya specified three individuals were at her front door, including one female who spoke to her, and one male was near the bushes. According to Vaidya, an individual she identified as Petitioner supporter Medina reminded her about the upcoming election and asked if she was going to vote yes or no. Vaidya responded, "I'd rather not answer that. I don't want to discuss that with you." Medina responded that she understood that and handed her a paper that said something about voting yes. Vaidya took the paper from Medina.

Medina asked if she had any questions about Petitioner, and Vaidya responded that she wanted to know how much employees would be paying in union dues from each paycheck. According to Vaidya, Medina did not have a specific answer but responded about one to two percent after the negotiations are over. Vaidya saw an individual she identified as Petitioner supporter Flowers who appeared to be recording the conversation. Vaidya reported the home visit the next day to the Employer's human resources department, to find out how Petitioner got her home address. Afterwards, the Employer sent a text to eligible voters notifying them that it was required to provide a voter list with their contact information to Petitioner that the Petitioner may use to conduct home visits.

e. Alleged Harassment by Palmer and Threat by Petitioner Supporter Bowman

Employee witness Andrea Baltazar (Baltazar) testified that on approximately March 23, Baltazar received a pink "Vote No" t-shirt from a female employee when she entered work at JFK8, and she wore the t-shirt at work after her first break. Baltazar passed by Palmer for

approximately two to three seconds and Palmer laughed at her. No words were exchanged between Baltazar and Palmer. Baltazar told one friend about this interaction with Palmer.

Baltazar further testified that on the same day, March 23, an employee and Petitioner supporter named Sam Bowman (Bowman) was wearing a Petitioner t-shirt and was passing out yellow Petitioner lanyards. When Baltazar declined to receive a lanyard, Bowman said something to the effect of, "Who will protect you?" Baltazar told one friend about this interaction with Bowman. On cross, Baltazar admitted that she understood that Bowman's comment was asking her who would protect her from the Employer.

f. Alleged Threat and Harassment toward Employee Monarrez

Baltazar testified that during the week of the election, on a date she could not recall, at approximately 5:45 p.m., she observed a female employee she identified as Monarrez holding a sign in the middle of the main employee break room that said, "Vote No," without saying anything. Baltazar saw Maldonado and Petitioner supporter Anthony were standing next to a table that Petitioner maintained in the main employee break room to give employees information about Petitioner. Baltazar observed Maldonado and Anthony walk up to Monarrez, approximately one to two feet away from her. Baltazar heard Maldonado call Monarrez stupid in Spanish and English. Baltazar did not hear Anthony say anything to Monarrez but observed that he was trying to cover up Monarrez's sign with his hands but did not touch Monarrez. Baltazar estimated she observed this exchange for around ten seconds. Baltazar did not report this incident to the Employer. Baltazar admitted that she was aware of the Employer's harassment policy, encouraging employees to report incidents of harassment to the Employer.

Monarrez testified that after she voted on March 25, she ran into Petitioner supporter Mendoza outside JFK8 and hugged him. Later that afternoon, Monarrez ran into Mendoza again in the first floor employee break room, and they discussed an unrelated issue involving an employee's disability leave. Petitioner supporters Anthony and Nieves were also present in the break room.

According to Monarrez, she said hello to Anthony, told him not to be a stranger, that she did not have any problems with him, and tried to pat him on the back. Anthony was very upset and began yelling and cursing at her, calling her a fucking bitch, a fucking traitor, and asking how can she fucking turn her back on Petitioner and Smalls. Monarrez testified that Anthony also asked her how could she tell people to vote no. Monarrez responded that she told people *she* was voting no and she would never tell another worker how to vote, as that is up to the worker. Monarrez testified that Anthony "continued screaming and cursing and took a step forward towards me and started putting his fingers in my face, yelling and screaming that I was a traitor and that I turned my back on the ALU. I turned my back on Chris [Smalls]." Monarrez testified she had to take a step back to avoid contact with Anthony.

According to Monarrez, Mendoza whispered for Anthony to back up and calm down and Nieves just stared forward and did not say a word. Monarrez testified, "I knew it was pointless

to try to reason with [Anthony,] because he has the mind of a child. It would have been pointless for me to say anything to him. He didn't understand."

With respect to this interaction between Monarrez and Anthony, Anthony testified that about March 25, in the first floor employee break room at JFK8, Monarrez had a sign that said something to the effect of "I joined the ALU, I left the ALU, and I voted no." Anthony testified that he told Monarrez that "she betrayed the Union." According to Anthony, Monarrez responded in a "demeaning way," telling him that he "wasn't worth nothing," and made comments about his sexual orientation and his known mental illness.

Mendoza also testified about the interaction between Monarrez and Anthony on March 25.[29] According to Mendoza, Monarrez tried to hug Anthony, Anthony refused to acknowledge her, and Monarrez asked him what was wrong. Anthony said he heard Monarrez was carrying a "Vote No" sign and Monarrez replied she was not and "you cannot believe everything Chris [Smalls] tells you." Then, they got in a dispute about whether Monarrez was carrying a vote no sign, and Monarrez asked Mendoza to intervene. Mendoza told Monarrez to show Anthony her sign, and Anthony called Monarrez a traitor. Mendoza testified that then Monarrez "really exploded" and started screaming, "Screw you, Jason. Screw you. You're a child. Screw you," and stormed out of the break room.

Monarrez testified that after her interaction with Mendoza and Anthony in the breakroom during the afternoon of March 25, she went to the Employer's HR office and mentioned the interaction she had with Anthony. Monarrez also made posts on the VOA Board and discussed her interaction with Anthony with the Loss Prevention Manager that day.

Later on March 25, after the end of Monarrez's shift at about 5:45 p.m., Monarrez went back to the employee breakroom on the first floor at JFK8 and silently held up her sign indicating that she was voting no in the middle of the break room, next to Petitioner's table. Petitioner supporter Mendoza was serving food at the time at the Petitioner break room tables. According to Mendoza, Monarrez "stood right next to the table where [Petitioner volunteers

[29] I admitted text message exchanges between Monarrez and Mendoza and Monarrez and Wesley from March 25, but do not consider them as relevant to Objection 13, as there are no comments contained in these text messages that a reasonable employee could objectively interpret to be harassment or threats of physical violence and other reprisals as expressly alleged at Objection 13. Further, unless allegations are sufficiently related to timely filed objections, I do not have the authority to consider any allegations beyond set forth in the Order Directing Hearing on Objections. *See, e.g.*, *Labriola Baking Co.*, 361 NLRB at 412; *Fred Meyer Stores*, 355 NLRB 541, 543 fn. 7 (2010); *Fiber Indus.*, 267 NLRB 840, 840 fn. 2 (1983). I disagree with the Employer's assertion that the text messages between Monarrez and Mendoza on March 25 "evidences that the ALU threatened to blackmail, and in fact blackmailed, Ms. Monarrez for opposing the ALU" as sufficiently related to Objection 13, 24, 25, or any other objection set forth in the Order Directing Hearing on Objections. The record reflects that during the critical period, Mendoza was a Petitioner supporter. However, Mendoza is not a stipulated Petitioner agent and there is insufficient record evidence to establish that during the critical period, other than when Mendoza was serving as a Petitioner observer, that Mendoza was an agent of Petitioner under Section 2(13) of the Act. Based on the foregoing and the record as a whole, I decline to consider these text messages between Monarrez and Mendoza and Monarrez and Wesley from March 25 as relevant to Objection 13 or any other objection set forth in the Order Directing Hearing on Objections.

were] serving food and held up her sign and started to talk to workers as they got food. For about an hour." Monarrez estimated that about a dozen employees approached her in the break room to ask her about her sign.

Palmer, Maldonado, and Daniels all came into the first floor break room together and when they saw her sign, "they immediately ran up to me and started screaming and cursing at me, trying to grab my sign, telling me that I needed to put it away, telling me that I needed to leave the break room. And I just stood there and continued to hold my sign." Monarrez testified that Palmer, Daniels and Maldonado said that she had "no fucking right to hold the sign," called her a bitch and Daniels called her a traitor. Monarrez testified she was "waiting for security to come in because security was right outside the break room by the main entrance," but in spite of it being loud, "security did not show up."[30] According to Monarrez, employee bystanders she did not know stood between her and Palmer, Maldonado, and Daniels and tried to get them to back up and leave her alone.

Monarrez testified that Maldonado pulled up pictures of Monarrez on her phone supporting Petitioner, to show employees present that Monarrez used to be a Petitioner supporter and "had no right to vote no." Maldonado called Smalls on her phone and then took pictures and videos of Monarrez while she was holding her sign. Daniels left and then Palmer left and Maldonado said that Monarrez "didn't know who I was dealing with because she was the head of the Workers' Committee, she was in the ALU. I didn't know who I was messing with. She was going to kick my ass in the parking lot. She was going to take me outside. She was going to beat me up." Monarrez testified she kept waiting for security to come in because Maldonado was screaming so loud but security never showed up. Monarrez estimated the interaction between she and Palmer, Daniels, and Maldonado lasted approximately 10 minutes, and the portion just between Monarrez and Maldonado lasted around 5 minutes. Monarrez admitted that Maldonado did not assault or do anything else to Monarrez in the JFK8 parking lot.

According to Maldonado, in the afternoon of March 25, she was sitting at the Petitioner break room table on the first floor, along with a coworker. When she saw Monarrez holding her I am voting no sign over her head, Maldonado kindly asked her if she could respect Petitioner's space and move to a different location away from Petitioner's break room tables. According to

[30] Petitioner requested that I draw an adverse inference against the Employer for failing to produce security personnel as witnesses or any CCTV recordings of Monarrez's exchanges in the first floor break room with Anthony and later with Palmer, Daniels, and Maldonado on March 25. I decline to draw an adverse inference against the Employer for failing to call as witnesses its security personnel or its other employees who were present and intervened based on Monarrez's testimony. Bystander employees are not presumed to be favorably disposed toward any party and no adverse inference is drawn against a party for not calling them. *JAM Productions, Ltd.,* 371 NLRB No. 26, slip op. at 16 n. 53 (2021); *Pacific Green Trucking, Inc.*, 368 NLRB No. 14, slip op. at 4 (2019); *Daikichi Sushi*, 335 NLRB 622 n. 4 (2001), enfd. per curiam 56 Fed. Appx. 516 (D.C. Cir. 2003); and *Torbitt & Castleman, Inc.*, 320 NLRB 907, 910 n. 6 (1996), affd. on point, 123 F.3d 899, 907 (6th Cir. 1997). The CCTV recordings would clearly constitute the best evidence of what transpired in the first floor breakroom on March 25 when Monarrez was present. The Employer maintains its CCTV recordings in the regular course of its business and produced these CCTV recordings showing the interior of JFK8 for evidence in support of Objection 15 as well as in the exterior of JFK8 for evidence in support of Objection 16. However, absent any record evidence that Petitioner subpoenaed the CCTV recordings inside the first floor employee breakroom from March 25 showing when Monarrez was present, I decline to draw an adverse inference for the Employer's failure to present such CCTV recordings as relevant evidence to Objection 13.

Maldonado, Monarrez was chanting, I was in the ALU and I'm voting no. Maldonado testified that Monarrez called her a liar and said to her, "Angie, I have no fucking respect for you. I don't have to say anything to you. You just started. You put in no work." Maldonado denied threatening Monarrez but admitted that she raised her voice toward Monarrez, called Monarrez a racist, and used profanity when things became heated. Maldonado testified the exchange between her and Monarrez lasted approximately four to five minutes.

Monarrez made a VOA post at 5:24 pm on March 25, starting with, "ATTENTION LADIES, I was an organizer with the ALU, since May 2021. Misogyny, chauvinism & constant disrespect are just some of the reasons why I resigned in January 2022, referring to "3 ALU boys" "laughing at me, giving me attitude, & yelling at me," stating that these same "boys" "want to represent all of you." Monarrez closed this VOA post with, "I AM VOTING "NO" TO THE ALU."

On March 25, Anthony submitted a VOA post, noting that Petitioner set up a GoFundMe page for Monarrez when she was homeless and now she was against Petitioner, asserting she was racist and that Anthony will never "betray my ALU family." On March 26, Anthony submitted another VOA post, commenting why Monarrez was "putting everyone against ALU," contending that she was being "ungrateful" for the things Petitioner did for her.

On March 26, Monarrez made a VOA post that began, "CORRECTION: An Alu rep, Jason, lied on VOA board," about her, claiming it was "another example of how the ALU boys treat women." Monarrez also stated, "Jason, screamed & lunged at me, in the break room yesterday, in camera view, because I voted "no", which is my right to do so. 3 more young ALU reps screamed at me later in the day, in camera view."

On March 26, Monarrez made another VOA post, referring to "multiple ALU members" slandering or defaming her on social media, insulting and screaming at her, closing with, "WHERE IS SECURITY ON THE MAIN FLOOR & 3RD FLOOR BREAK ROOMS??? I voted "NO" because that was my right. STOP THE BULLYING."

On March 27 (incorrectly dated March 26), Monarrez filled out a handwritten Witness Statement Form, referring the events that occurred during the afternoon of March 25, after she voted, as summarized above, and turned it into the Employer's HR office and spoke with the Loss Prevention Manager.

g. Alleged Harassment by Petitioner Supporter Anthony

Employee witness Goriva testified that on one occasion, on a date she could not recall, during the voting period, in the center of the first floor employee break room at JFK8, Petitioner supporter Anthony called Goriva a bitch "under his breath" when she declined to take a flyer. Goriva estimated approximately 25 to 50 employees were present in the break room at the time. Goriva did not report this incident to the Employer.

Employee witness Lopez testified on cross examination that although she asserted in a Voice of Associates[31] (VOA) post dated March 26 that the Petitioner had bullied her, no such bullying had occurred "in person," but she interpreted Petitioner supporter Anthony's comments on a Facebook page for Amazon, a private group page for "Amazon everywhere" to be bullying. Lopez testified that Anthony's few comments on social media about Lopez's Facebook posts were "talking negatively" and "pushy," saying what Lopez posted "was ridiculous" and that he would use profanity such as "shit or crap." Regardless of how Lopez interpreted Anthony's comments on social media, Lopez admitted that she voted on March 30, four days after her VOA post.

2. Board Law

The Board's test regarding threats is whether a remark can reasonably be interpreted by an employee as a threat. In assessing union statements the subjective reactions of employees are not relevant. *Van Leer Containers*, 298 NLRB 600, 600 fn. 2 (1990).

Although third-party threats are governed by the usual third-party standard, the Board applies a particular test to assess the seriousness of such threats, considering "(1) the nature of the threat itself; (2) whether the threat encompassed the entire bargaining unit; (3) whether reports of the threat were widely disseminated within the unit; (4) whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and (5) whether the threat was "rejuvenated" at or near the time of the election." *PPG Industries*, 350 NLRB 225, 226 (2007); see also *Bell Security*, 308 NLRB 80, 81 (1992). Under these factors, the Board has set elections aside based on multiple threats of harm, physical injury, and property damage against pro-employer employees or employees who crossed a picket line.[32] *Id*.

In *Deep Distributors of Greater NY*, 365 NLRB No. 95 (2017), the Board stated that a confrontation between the union president and two of the employer's agents—which involved an exchange of words and brief physical contact when the union president attempted to exit the election area to verify that the employer's video surveillance cameras were shut down before

[31] The Employer refers to its employees, including the unit employees in this election, as "Associates."

[32] See also *Robert Orr-Sysco Food Services*, 338 NLRB 614, 615–616 (2002), enfd. mem. 184 Fed. Appx. 476 (2006); *Picoma Industries*, 296 NLRB 498, 500 (1989). Cf. *Al Long, Inc.*, 173 NLRB 447, 448 (1969) (election set aside based on repeated anonymous threats against 2 employees who crossed picket line, as well as several instances of property destruction and other threatening and unruly conduct on the picket line). Compare *Manorcare of Kingston PA, LLC*, 360 NLRB 719 (2014), enf. denied 823 F.3d 81 (D.C. Cir. 2016) (employee comments she would punch people in the face or cause property damage or bodily harm if union lost unobjectionable as made in joking manner); *Cal-West Periodicals*, 330 NLRB 599, 600 (2000) (single conversation containing 2 allegedly threatening statements overheard by one individual did not meet standard); *Bell Trans*, 297 NLRB 280 (1989) (isolated statement directed at only one individual and overheard by small number of voters did not meet standard); *Cross Baking Co. v. NLRB*, 453 F.2d 1346, 1348–1349 (1st Cir. 1971), enfg. 191 NLRB 27 (1971) (assault by prounion employee on two employees who refused to support union not objectionable where assault took place 2 months before election, assailant was discharged shortly thereafter and did not return, and there were no further incidents); *Foremost Dairies of the South*, 172 NLRB 1242, 1246–1247 (1968) (several threats made to one employee 6 weeks before election, only one of which was known to only two other employees, did not warrant setting election aside).

voting began—would not tend to affect the election results, particularly in the absence of evidence any employee other than the union's observer was aware of it before voting. In *GADecatur SNF LLC v. NLRB*, No. 20-1435 (D.C. Cir. Nov. 11, 2021), the court upheld the Board's overruling of an objection that concerned a brief, loud argument that took place *outside* the polling place, observing that this situation was readily distinguishable from the sustained presence of party agents.

3. Recommendation

a. Alleged Threats

First, with respect to the alleged threat Adenji testified Anthony and Daniels allegedly made about Santos, a reasonable employee would not objectively find that Anthony and Daniels' comments about needing to "get [Employer General Manager] Felipe" [Santos] or had to "do something with Felipe [Santos]" as a threat of "physical violence and other reprisals against *employees* who were not supportive of the Petitioner's cause" as expressly alleged in Objection 13. As the General Manager of JFK8, it is highly likely that Santos is a Section 2(11) supervisor and a manager and therefore is not an "employee" within the meaning of Section 2(3) of the Act.

Further, the alleged statements of needing to "get" Santos or "do something with Santos" cannot reasonably be interpreted by an employee objectively as a threat of violence against Santos. This reasonable interpretation is underscored by the fact that Adenji reported the alleged threat directly to Santos and there is no record evidence to support that the Employer did anything in response to the alleged threat, such as investigate, discipline, or discharge Anthony and Daniels for allegedly threatening General Manager Santos with physical violence. Additionally, I do not credit Adenji's testimony about this alleged threat by Anthony and Daniels against Santos, as Adenji was equivocal and uncertain in her testimony about whether the comments she attributed to Daniels and Anthony were to "get" Santos or whether it was about needing to "do something with" Santos. As such, I do not find that Adenji's testimony credibly supports a finding that Anthony and Daniels comments can reasonably be interpreted by an employee as a threat of violence.

Even if Adenji's testimony regarding comments by Daniels and Anthony could reasonably be interpreted as threats, the standard applicable to stipulated agent Daniels is whether it "reasonably tends to interfere with the employees' free and uncoerced choice in the election." *Baja's Place*, 268 NLRB 868 (1984). There is no record evidence to support that these comment Adenji attributed to Daniels reasonably tended to interfere with employees' free and uncoerced choice in the election. Further, the standard applicable to Petitioner supporter Anthony is the third party standard, whether "the misconduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). Again, there is no record evidence to show that these alleged comments Adenji claims Anthony made was "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible."

Second, with respect to Palmer's alleged threats to Castellano in the February 7th small group meeting, a reasonable employee would not objectively interpret the comment that Castellano attributes to Palmer, "I know you; I trained you; you're just a PA; you don't know

anything" as a threat. Castellano admitted that *before* Palmer's alleged comment, Castellano called the group of Petitioner supporters that entered the small group meeting "a bunch of thugs" and that he was not scared of physical violence by this comment. In fact, Castellano held out his lanyard showing his name and login ID to Palmer and said, "I'm not hiding from you."

Even if Palmer's statement could reasonably be interpreted as an objective threat of physical violence, the standard applied to Petitioner stipulated agent Palmer is whether it "reasonably tends to interfere with the employees' free and uncoerced choice in the election." *Baja's Place*, 268 NLRB 868 (1984). There was no record evidence reflecting that Palmer's comments to Castellano reasonably tended to interfere with *any* employees' free and uncoerced choice in this election, as this interaction occurred approximately *46 days before* the election started and no employee witness testified that Palmer's comments to Castellano interfered with their choice in the election.

Third, Baltazar testified that Petitioner supporter Bowman asked her something to the effect of, "Who will protect you?" Once again, this alleged comment cannot reasonably be interpreted by an employee as an objective threat of violence against Baltazar. This reasonable interpretation is supported by the fact that Baltazar only told *one friend* about this interaction with Bowman. Further, Baltazar admitted that she understood that Bowman's comment was asking her who would protect her *from the Employer*. Based on this evidence, I do not find that Petitioner supporter Bowman's question can reasonably be interpreted by an employee as a threat of "physical violence" as expressly alleged at Objection 13.

Even if Bowman's question could reasonably be interpreted as an object threat of physical violence, the standard applied to Petitioner Bowman's alleged comment is the third party standard, "the misconduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). Once again, there is no record evidence supporting that Bowman's single question to Baltazar, that Baltazar repeated to only one employee, that Baltazar herself understood was indeed not a threat of physical violence was "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible."

Fourth, I credit Monarrez's testimony that Maldonado threatened to "kick [Monarrez's] ass in the parking lot," as it is undisputed that this statement was preceded by Monarrez holding her anti-Petitioner sign in the middle of the first floor break room, right next to Petitioner's break room tables serving food to employees. Monarrez's holding up her anti-Petitioner sign right next to Petitioner's break room tables prompted a heated, loud, vocal disagreement between former Petitioner supporter Monarrez and Petitioner agents Palmer, Daniels, and Maldonado, in close proximity to each other. The Board has that found that statements to "kick ass" are not, in fact, bona fide threats of physical violence. See *Lamar Co*., 340 NLRB 979, 981 (2003) ("Viewed objectively, a threat by one employee to another to "kick ass," without more, is mere bravado that is unlikely to intimidate the listener."); *Leasco, Inc*., 289 NLRB 549, 549 n.1 (1988) (phrase "constitutes a colloquialism that standing alone does not convey a threat of actual physical harm"). Further, Monarrez admitted that Maldonado did *not* engage in any physical violence toward her and there is no record evidence suggesting otherwise. Based on this evidence, I do not find that Maldonado's stray comment to "kick [Monarrez's] ass in the parking lot," without

more, *after* Monarrez had already cast her ballot, can reasonably be interpreted as an actual threat of "physical violence."

Even if Maldonado's threat to "kick [Monarrez's] ass in the parking lot" could reasonably be interpreted as an objective threat of physical violence, the standard applied to Petitioner stipulated agent Maldonado is whether it "reasonably tends to interfere with the employees' free and uncoerced choice in the election." *Baja's Place*, 268 NLRB 868 (1984). There was no record evidence reflecting that Maldonado's comment to Monarrez reasonably tended to interfere with employees' free and uncoerced choice in this election. Monarrez had already voted at the time of her interaction with Maldonado and no employee witness testified that their interaction had any impact on their free choice in the election.[33]

b. Alleged Harassment

First, I credit Spence's testimony over Fray's and Tredici's regarding Spence's interaction with Fray about Fray covering up the letters "ALU" on her Petitioner "ALU" t-shirt with red tape, based on Spence's demeanor during his testimony, as consistent, forthright, and detailed. The fact that that Fray admittedly approached Spence *after* their interaction about Fray's taped-up Petitioner t-shirt lends credence that the interaction between Fray and Spence cannot reasonably be interpreted by an employee as a threat.

Further, even if Spence's interaction with Fray could reasonably be interpreted by an employee as an objective threat, the standard applied to Petitioner stipulated agent Spence is whether Spence's statements "reasonably tend[ed] to interfere with the employees' free and uncoerced choice in the election." *Baja's Place*, 268 NLRB 868 (1984). There was no record evidence reflecting that Spence's comments to Fray about her taped up Petitioner "ALU" t-shirt reasonably tended to interfere with employees' free and uncoerced choice in the election. Fray estimated that there were approximately 30 to 50 employees, whereas Tredici testified that about three or four were around a foot away during this exchange between Spence and Fray. Even if 50 eligible voters overheard this comment, that is not sufficient evidence to show that this exchange "reasonably tended to interfere with employees' free and uncoerced choice" in an election with over 8,000 employees, and an election resulting in a 523 vote margin in favor of Petitioner.

[33] I disagree with the Employer's contention that on March 25, Petitioner agent Maldonado's alleged recording of Monarrez holding up her anti-Petitioner sign right next to Petitioner's breakroom tables constitutes objectionable conduct under *Randel II* sufficiently related to Objections 13, 24, and 25 to be considered by me. See *Randell Warehouse of Arizona*, 347 NLRB 591, 591 (2006) (*Randell II*) ("In the absence of a valid explanation conveyed to employees in a timely manner, photographing employees engaged in Section 7 activity constitutes objectionable conduct whether engaged in by a union or an employer."). Unless new allegations are sufficiently related to timely filed objections, I do not have the authority to consider any allegations beyond set forth in the Order Directing Hearing on Objections. *See, e.g.*, *Labriola Baking Co.*, 361 NLRB at 412; *Fred Meyer Stores*, 355 NLRB 541, 543 fn. 7 (2010); *Fiber Indus.*, 267 NLRB 840, 840 fn. 2 (1983). Neither Objections 13, 24, 25, or any other objection timely filed by the Employer set forth in the Order Directing Hearing on Objections alleges that Petitioner and/or its agents engaged in "illicit recording of employees engaged in Section 7 activity" or anything similar. Accordingly, based on the foregoing and the record as a whole, I find the evidence that on March 25, stipulated Petitioner agent Maldonado allegedly recorded Monarrez holding up her anti-Petitioner sign right next to Petitioner breakroom tables as irrelevant to any of the objections set forth in the Order Directing Hearing on Objections.

Second, with respect to the home visit testified by employee Vaidya, home visits by a union, without threats, do not constitute objectionable conduct. *See, Randell Warehouse of Arizona*, 328 NLRB 1034 (1999). Further, Vaidya testified that one of the Petitioner supporters who conducted the home visit was videoing the exchange. Videotaping by a union, even if employees are engaged in protected activity, unaccompanied by threats or other coercive conduct, does not constitute objectionable conduct. *Id.*; *Cf., Mike Yurosek & Son, Inc.*, 292 NLRB 1074 (1989) (Election overturned where Union representative that was filming told anti-union activist that "we've got it on film… we know who you guys are… after the Union wins the election some of you may not be here…"). There is no record evidence to support that the four Petitioner supporters who visited Vaidya's house threatened or harassed Vaidya in any way other than lawfully videotaping her and visiting her home to encourage her to support Petitioner.

Even if there were evidence that could reasonably be interpreted by an employee as harassment, the standard applicable to the home visit conducted by four Petitioner supporters, as there is no record evidence reflecting that any Petitioner stipulated agents were present during Vaidya's home visit, is the third party standard, whether "the misconduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). There is no record evidence to support that the conduct of the four Petitioner supporters during Vaidya's home visit was so aggravated to create a general atmosphere of fear and reprisal rendering a free election impossible.

Third, with respect to Baltazar's testimony that Palmer laughed at her on March 23 "for a couple of seconds," there is insufficient evidence to establish that Palmer's laughing constituted harassment. Baltazar admitted she did not report Palmer's laughing even though she was aware of the Employer's harassment policy. Even if Palmer's alleged laughing at Baltazar did constitute harassment, the standard applicable to Petitioner stipulated agent Palmer is whether Palmer's laughing "reasonably tend[ed] to interfere with the employees' free and uncoerced choice in the election." *Baja's Place*, 268 NLRB 868 (1984). There is no record evidence to support that Palmer's laughing reasonably tended to interfere with any employees' free and uncoerced choice in the election.

Fourth, as for Monarrez's assertion that Anthony harassed her after she voted on March 25 because she had an anti-Petitioner sign, based on Monarrez's testimony, Anthony was screaming and cursing, came close to her and put his fingers in her face, and accused her of being a "traitor" who "turned her back on the ALU." I credit Monarrez's testimony that Anthony made these comments toward her because she made and was displaying an anti-Petitioner sign during the first polling session of the election on March 25, as Anthony admitted and Mendoza confirmed that Anthony referred to Monarrez as a "traitor" due to her anti-Petitioner sign. Monarrez did not testify that Anthony touched her, and employee witness Baltazar confirmed that Anthony did *not* touch Monarrez.

I credit Mendoza's testimony that after Anthony admittedly told Monarrez that she was a "traitor" to Petitioner, "[Monarrez] really exploded and started screaming screw you, Jason, screw you. You're a child, screw you and stormed out of the break room." I credit Mendoza's testimony not only because his demeanor was calm, consistent, forthcoming, and helpful, but

also because Monarrez herself testified that Anthony "has the mind of a child." Further, Monarrez's demeanor during her testimony on occasion displayed disrespect to the forum, for example, by rolling her eyes when she got frustrated when asked to identify managers who told her it was okay to hold up her anti-Petitioner sign inside the JFK8 building.

Based on the credited testimony from Monarrez and Mendoza, I do not find that a reasonable employee would objectively interpret Anthony's comments as harassment. Rather, I think a reasonable employee would objectively interpret the credited comments from Anthony and Monarrez as evidence of a heated exchange and disagreement between a former active supporter of Petitioner who openly showed that she no longer supports Petitioner through her anti-Petitioner sign she displayed at JFK8 during the first polling session of the election and an ardent supporter of Petitioner who viewed Monarrez's actions as betraying Petitioner. I further note that the credited comments Monarrez made about Anthony having "the mind of a child" could arguably objectively be viewed by a reasonable employee as harassment, based on Anthony's known mental disability.

Even if Anthony's comments toward Monarrez could objectively be viewed by a reasonable employee as harassment, the standard applicable to Petitioner supporter Anthony is the third party standard, whether "the misconduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). There is no record evidence to support that Anthony's conduct toward Monarrez on March 25, after Monarrez had already voted, was so aggravated to create a general atmosphere of fear and reprisal rendering a free election impossible. No employee witness testified that Anthony's interaction with Monarrez on March 25 had any bearing on the election whatsoever.

Fifth, with respect to Monarrez's testimony that Palmer, Daniels, and Maldonado harassed her after she voted on March 25 because she had and displayed an anti-Petitioner sign during the first polling session on March 25, Monarrez testified that Palmer, Maldonado, and Daniels yelled at Monarrez in the employee break room, called Monarrez names, cursed at Monarrez, and told her to leave the breakroom. I credit Mendoza's testimony that Monarrez "stood right next to the table where [Petitioner was] serving food and held up her sign and started to talk to workers as they got food. For about an hour."

Like the comments Anthony made to Monarrez, I find that a reasonable employee would objectively view the comments that Palmer, Maldonado, and Daniels made toward Monarrez as a heated, vocal disagreement between a former active supporter of Petitioner and Petitioner agents, right next to Petitioner's break room tables, on March 25, the first day of the election. Even if the conduct of Palmer, Daniels, and Maldonado did constitute harassment toward Monarrez, the standard applicable to these three Petitioner stipulated agents is whether their conduct "reasonably tend[ed] to interfere with the employees' free and uncoerced choice in the election." *Baja's Place*, 268 NLRB 868 (1984). There is *no* record evidence to support that their conduct reasonably tended to interfere with employees' free and uncoerced choice in the election, as Monarrez had already voted in the election and no other eligible voters testified that this conduct reasonably tended to interfere with employees' free and uncoerced choice in the election.

Sixth, as for the alleged harassment by Petitioner supporter Anthony toward Goriva and Lopez, Goriva testified that Anthony called her a "bitch" "under his breath" when she refused to take a Petitioner flyer in the break room. Similarly, Lopez's testimony that when she submitted a VOA post about Petitioner members bullying, she clarified that "the ALU was never bullying" her. Rather, Lopez testified she was referring to when Petitioner supporter Anthony replied to her social media posts using words such as "crap or shit." However, Lopez admitted that she never complained to the Employer about Anthony's alleged bullying comments on social media. Further, Lopez voted four days after she submitted this VOA post. A reasonable employee would not objectively interpret calling the employee a "bitch" "under his breath" or replying to a coworker's social media using words such as "crap or shit" as harassment.

Even if Anthony's calling Goriva a "bitch" "under his breath" or using words like "crap or shit" to reply to Lopez's social media posts could objectively be viewed by a reasonable employee as harassment, the standard applicable to Petitioner supporter Anthony is the third party standard, whether "the misconduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). There is no record evidence to support that Anthony's conduct toward Goriva or Lopez was so aggravated to create a general atmosphere of fear and reprisal rendering a free election impossible, particularly when both Goriva and Lopez both voted in the election.

Based on the foregoing and the record as a whole, the Employer has failed to meet its burden to establish that "Petitioner's members and agents harassed and threatened physical violence and other reprisals against employees who were not supportive of the Petitioner's cause" as expressly alleged at Objection 13. Accordingly, I recommend that Objection 13 be overruled.

M. Objection 14: The Petitioner improperly promised employees in the final days of the campaign that it would not charge them dues unless and until the Petitioner secured a raise for employees during collective bargaining. Prior to and during the critical period, the Petitioner was clear that it would charge employees dues immediately following a successful vote. After employees expressed reluctance to pay dues, the Petitioner directly contradicted its earlier statements and asserted for the first time, late in the campaign, that it would not charge dues unless and until it secured higher wages in contract negotiations with the Employer.

1. Record Evidence

The Union's Constitution and By-Laws in effect during the critical period has the following provision regarding union dues:

> **Section 8.1 – Dues**
>
> Dues amounts and payment frequency will be democratically voted upon by the membership.

(a) In the period preceding the initial election, dues will amount to five (5) dollars every two (2) weeks.

(b) Within sixty (60) days following a successful election, the President will appoint a committee to reassess the dues structure and propose a new amount and frequency to be voted upon by the membership.

Around approximately late January or February 2022, the Petitioner's website stated the following regarding union dues:

After a successful vote, every worker in the facility becomes a member of the bargaining unit. Union dues will be taken from each paycheck, the cost of which will be decided democratically by union members, but will roughly equal a few dollars each week. Union dues are the membership fees of the union, and the cost is offset by the wage increases and other benefits that our union negotiates for us workers. Dues are crucial to keep the union strong and well-funded, so we can have the resources to give ourselves the fair working conditions we deserve.

Employee witness Rosado testified that while she was eating lunch outside JFK8 on a date she could not recall around January 2022, Petitioner stipulated agent Daniels walked up to her and others eating lunch with her to talk about Petitioner. Rosado said that she and her coworkers asked Daniels about union dues and he was not giving them specific details about union dues and was just mentioning things like dues could be 3, 5, or 10% from employees' paychecks. This was the only conversation Rosado had with anyone associated with Petitioner regarding union dues. Rosado testified that she attended around eight small group meetings held by the Employer and the Employer did not answer the question regarding the amount of union dues.

On or before January 23, one of the table toppers the Employer used in the employee break rooms at JFK8 stated the following:

A UNION AND THE REALITY OF DUES

A UNION IS A BUSINESS, AND EVERY BUSINESS NEEDS MONEY.
That's why they typically charge members dues, which means part of your paycheck could wind up going to the union.

DUES ARE TYPICALLY MANDATORY IN NEW YORK.
In New York, unions typically demand that dues be mandatory for everyone whose workplace is represented by a union – whether or not you voted for one or whether you're happy with their work.

ASK THE ALU ABOUT DUES.
The ALU has said it will charge all its members dues 'roughly equal to a few dollars each week,' and that it intends to take that from each paycheck after the

election. It hasn't said exactly how much, how it will be used, or what happens if you refuse to pay.

GET THE FACTS

On January 23, Petitioner President Smalls tweeted a picture of the above-quoted Employer table topper on his personal Twitter account, with the following Tweet:

> Dues dues dues typically in New York really? @amazon at this point you guys just making shit up what is roughly equal to a few dollars? also thanks for acknowledging you WILL lose the Election. For clarity dues will be democratically decided by the workers @amazonlabor

On the same date, on January 23, Smalls replied to his Tweet:

> I know @amazon doesn't want to admit that The #ALU is their actual workers but sorry to break it to you. Workers will literally be paying themselves dues there is no party or separation @amazonlabor. Most importantly we will not collect a single penny until we're paid more!

Around late January, early February 2022, the Petitioner had a two-page flyer present in a clear napkin holder in the lunchroom at JFK8 along with Petitioner lanyards and Petitioner buttons, stating the following on the first page:

$5 PER WEEK

PROPOSED DUES FOR FULL-TIME TIER 1 ASSOCIATES.

$2.50 PER WEEK FOR PART-TIME ASSOCIATES.
$6.50 PER WEEK FOR TIER 3s.

PENDING VOTING, APPROVAL, AND AUTHORIZATION OF ALL MEMBERS.

amazon LABOR UNION

Page two of this flyer states the following:

WHAT DOES $5 GET YOU?

1. The right to **collective bargaining** which allows us to negotiate our pay, hours, and working conditions for the first time.
2. The right to a legally-binding **union contract** that Amazon must negotiate with its workers.

3. The right to **Just Cause** terminations so that Amazon can only fire us when we violate specific policies instead of the current "at-will" employment where Amazon can terminate us for anything they want.
4. An **experienced legal team** to help us out with everything from Labor Law to Immigration Services.
5. A **Shop Steward system** where every shift and department will elect Tier 1-3 leaders to enforce our union contract.
6. **Office space** and staff to plan, organize, and build our union.
7. An experienced **Union Negotiator** to help us make sure we secure a fair contract for ourselves.
8. A **union** that will fight for you and alongside you until we get everything that we need and deserve for our contributions to the company.

amazon LABOR UNION

Employee witness Damion Parker (Parker) testified that he understood this flyer.

During at least the Employer's 11:00 a.m. small group meeting conducted on February 7, Miller confirmed that at least one of the slides presented to eligible voters was as follows:

Every Organization Needs Money to Operate…Including Unions.

If elected to represent you, unions require members to pay them dues or another representation fee, whether you want their representation or not.

In New York, unions typically require dues to be mandatory for everyone whose workplace is represented by a union.

That's hard-earned money out of your paycheck, with no guarantee they can fulfill their promises.

According to Miller, during this 11:00 a.m. small group meeting, one of the Petitioner supporters present said something in response like dues are not going to be charged until there was a contract. Miller did not recall any response to that comment during the 11:00 a.m. small group meeting.

Employee witness Kathleen Friscia (Friscia) testified that about one to two weeks prior to the election that started on March 25, she had two conversations about union dues with Petitioner supporter Medina. The first conversation occurred in pack flow at JFK8. Friscia asked Medina how she knew that it was only going to be $2.50 per week in union dues for part-time employees, because Friscia was a part-time employee at that time, and $5 per week in union dues for a full-time employee. Medina said that those amounts were what Petitioner was "going to be asking" but "not to worry, because we weren't going to have to pay anything until we get our raises."

Later that same afternoon, about one to two weeks prior to the election, Friscia went to the third floor breakroom at JFK8 with a full-time coworker and saw Medina at a double table, "to answer any questions regarding the ALU," with "a whole bunch of paperwork on the table" "about the ALU." Friscia wanted to see what the paperwork was on the table and said hello to Medina. Friscia said there was paperwork "if we wanted to list from 1 to 10 our top priorities of what they would like the ALU to fight for us for, and put them in order as what was important to each individual" and then Petitioner "would fight for" the priorities, based on what "the majority" of employees responded as their top priorities.

Friscia said that Medina "was telling people in the break room that dues were only going to be $2.50 per week for part-time employees, $5 per week for full-time employees." Friscia asked Medina, "how are you telling these people [union dues are going to be these specified amounts] when it could be a larger amount?" According to Friscia, Medina repeated that those amounts are what Petitioner is "going to be asking for" and "not to worry because nothing is going to be collected until we get our raise." Friscia understood that Petitioner was seeking to get employees raises in the collective bargaining agreement.

Medina testified that when she discussed the topic of union dues with her coworkers, she explained "that the amount of dues would be decided democratically after the contract was signed" along with the "proposed dues amount once that happened." With respect to Petitioner's proposed union dues amounts, Medina testified she discussed with coworkers $5 per paycheck for a full-time employee and $2.50 per paycheck for a part-time employee. No Petitioner officer ever told Medina not to discuss union dues with employees or the Petitioner's proposed amounts.

About March 15, Petitioner had approximately 12 to 15 copies of the following flyer on the Petitioner table set up in the lunchroom at JFK8, folded, and put some copies on the lunchroom tables as well, with the first page stating as follows:

10 DAYS

UNTIL OUR UNION ELECTION.

FACT: NO DUES UNTIL CONTRACT.

WE DON'T PAY A DOLLAR IN DUES UNTIL WE VOTE TO APPROVE A CONTRACT.

AMAZONLABORUNION.ORG

Parker testified that he saw and read the first page of this flyer, understood the content, and nothing about this flyer confused him. Parker also testified that the subject of union dues was discussed in the Employer's small group meetings, that Petitioner was going to charge union dues, and he understood the message the Employer was giving about union dues in its small group meetings.

Page two of this flyer Petitioner distributed about ten days before the election states as follows:

FACT: NO DUES UNTIL CONTRACT.

WE WILL NOT START CHARGING DUES OF $5/WEEK UNTIL WE HAVE VOTED TO APPROVE A UNION CONTRACT. OUR CONTRACT WILL INCLUDE OUR RAISES, OUR WORKING CONDITIONS, AND A "JUST CAUSE" TERMINATION POLICY WHICH WILL GIVE US MORE JOB SECURITY.

Employee witness Vaidya testified that during the weekend before the election, around March 19 or 20, at Vaidya's home, four individuals visited who identified themselves as from the Petitioner. According to Vaidya, an individual she identified as Petitioner supporter Medina asked if she had any questions about Petitioner, and Vaidya responded that she wanted to know how much employees would be paying in union dues from each paycheck. According to Vaidya, Medina did not have a specific answer but responded about one to two percent after contract negotiations conclude.

On March 21, Petitioner sent an email to eligible voters with subject "3 Facts Amazon Doesn't Want You To Know." The third "fact" refers to union dues, as follows:

> **3. WE DON'T PAY UNION DUES ($5/PAYCHECK) UNTIL WE ALL VOTE TO APPROVE OUR FIRST UNION CONTRACT**
> *Amazon wants you to think that the ALU is being unclear about the dues amount that we need to fund our union and make it strong. In reality, from Day 1,* ***the dues have always been $5/paycheck but we only start paying dues once we have voted to APPROVE a new union contract.*** *When we win our union, we still will not pay a dollar in dues until we have settled on an approved Union Contract. It is* ***one-worker, one-vote*** *and you would never vote to approve a contract that didn't have what you need.*
>
> *We need higher wages to account for the high cost-of-living in New York City, Real Time Off for Vacation and Personal time so that our bodies can recover properly, Sick Days so that we don't have to VTO every time we get sick, and Job Security so that Amazon can't just hire-and-fire us like they do. We also need to keep our phones, remove the cap on raises after 3 years, and force Amazon to get us a shuttle service to help us get to work. Amazon wants you to believe that our union is somehow trying to steal our money. In reality,* ***union dues are a small investment in yourself to protect and improve your job****. When we all contribute a small amount, we can build a strong organization that will fight for us to make our lives much better than they are now.*

Employee Eustaquio Viernes (Viernes) testified that he received this March 21st email and that he understood that no union dues would be paid until a contract was negotiated and the amount of dues would be democratically decided. Viernes testified that the Employer's messaging in its small group meetings about the timing and amount of dues caused him more confusion than

Petitioner's communication about union dues. Viernes confirmed that he has not paid any union dues.

On March 22, Petitioner emailed and/or texted a letter from Smalls to eligible voters with subject "A Letter from the President" containing the following language regarding union dues:

> Many of you may have questions about dues. Let me clear that up: as Interim President and a former Amazon employee, I promise not one single payment of dues will be taken until we have a contract with higher wages signed.

Employee witness Litto testified that she saw copies of Smalls' March 22nd letter on at least every table in the employee break room and discussed the letter with at least ten other employees. However, on cross examination, Litto admitted, "I don't remember anything about dues in the letter." On the same date, on March 22, Smalls tweeted, "Today I wrote my letter to the workers of JFK8 to express the importance of this Election. I'm sharing my story from Day 1 with Amazon until now with the belief that History will be made on March 30th 2022 @amazonlabor.

Around March 23, Petitioner had the following language on its website pertaining to union dues:

> **How much will dues be if the workers win the election?**
>
> The proposed dues are: $2.50 per paycheck for Part-Time Associates, $5.00 for Full-Time, and $6.50 for Tier 3s – this is less than 1% of our weekly paychecks. No worker will contribute any dues from their paychecks without first voting on dues and signing a Dues Authorization Form.
>
> **What do dues pay for?**
>
> Dues are how every union is funded. Dues cover the cost of our union, so that all the services the ALU offers are free to members. We can hire a legal team to defend us, negotiator to win a strong contract, union staff to help us fight, shop stewards in the warehouses, strike funds, and more.

Around March 23, employee witness Andy Martinez (A. Martinez) received a text message from an individual identifying himself as from Petitioner asking, "Can I tell you about how dues will work? Text stop to opt out." A. Martinez replied, "Sure, i'll entertain the idea." A. Martinez received the following response:

> So, here's the deal:
> 1. Every union has dues.
> 2. We propose $5/paycheck, which will go to legal fees and staff to defend you if Amazon violates your rights in any way so that you don't have to pay out of pocket for a lawyer. For less than a pack of cigarettes, we can cover the entire cost of running a union.

> 3. When we win our union, we will NOT pay a dollar in dues until we vote to approve a contract. A contract puts our wages, benefits, and working conditions into a legal document so that Amazon can't just decide one day to cut our breaks again or take away our cellphones. We will all get a voice in the process, and will fight for things like better pay, real sick time, abolishing MET, and a "Just Cause" rule in the contract so Amazon MUST present hard evidence if they try to fire you.
> 4. There are strict legal requirements for how union funds can be spent and every dollar must be reported to the US Government. A union accounting firm will handle the expenses and books of the union.
>
> And remember: NO DUES UNTIL CONTRACT. We will only agree to a contract where we are better off, and if we never settle on a contract with Amazon, you will have never paid a dollar in dues.

Employee witness Melissa Martinez (M. Martinez) testified that she received emails, text messages, and phone calls from individuals identifying themselves as "from the Amazon Labor Union." On March 24, Martinez sent the following text message to an individual identifying himself from the Petitioner as follows:

> I saw in the letter Christian Smalls saying that dues will not be taken until we get a pay increase. Does this mean that if amazon does not agree on giving us a pay increase that we will not get union dues taken or they will be taken but less than $5 a week?

The text message response from the individual identifying himself as from the Petitioner on the same date was, "Yes if we can't win an increase in our wages no dues will be taken from us."

On Monday, March 28, A. Martinez texted the person who identified himself as "Mitch from the ALU," asking him to confirm that employees would not have to pay any dues or back dues if it took "over a year" to reach a contract. On March 29, A. Martinez got a text reply confirming that "no dues would be charged" and "there would not be any back payments!"

Smalls testified that Petitioner's message about union dues during the critical period was that "no worker pays dues until we get a contract." All employee witnesses consistently testified that no unit employee has paid any union dues to date and that they understood that dues would not be owed until a contract was signed.

2. Board Law

With respect to alleged misrepresentations by a union during organizing campaigns, the Board has consistently held that party campaign misrepresentations are not objectionable. *See, Midland National Life Ins. Co.,* 263 NLRB 127 (1982).

As for a union's promise to waive dues, the Board considers whether a union's contract or constitution provides for an obligation to pay dues, or whether it has been the union's practice to collect dues. *Mcallister Towing & Transp. Co., Inc.*, 341 NLRB 394, 418-19 (2004) (a waiver of union dues will constitute an objectionable financial benefit if the employees already have an

enforceable obligation to pay dues); *Andal Shoe, Inc*., 197 NLRB 1183, 1183 (1972) (the question is whether the union's constitution or bylaws require the collection of dues, or whether it has been the union's practice to collect them).

With respect to alleged union promises of benefit, the Board has held that "[e]mployees are generally able to understand that a union cannot obtain benefits automatically by winning an election but must seek to achieve them through collective bargaining. Union promises are easily recognized by employees to be dependent on contingencies beyond the union's control and do not carry with them the same degree of finality as if uttered by an employer who has it within his power to implement promises of benefits. *Smith Co.*, 192 NLRB 1098, 1101 (1971); see also *Lalique N.A., Inc*., 338 NLRB 986 (2003).

3. Recommendation

The crux of Objection 14 is that "Petitioner improperly promised employees in the final days of the campaign that it would not charge them dues unless and until the Petitioner secured a raise for employees during collective bargaining." With respect to the Employer's contention that Petitioner misrepresented its union dues structure during the critical period, as noted above, the Board has consistently held that party campaign misrepresentations are not objectionable. *See, Midland National Life Ins. Co.,* 263 NLRB 127 (1982).

As for the Employer's contention that Petitioner made an objectionable promise of benefit to tell eligible voters during the "final days of the campaign that it would not charge them union dues unless and until the Petitioner secured a raise for employees during collective bargaining," Petitioner's Constitution & Bylaws in effect during the critical period initially states at Section 8.1, "Dues amounts and payment frequency will be democratically voted upon by the membership." Similarly, Petitioner's website during around the late January or early February 2022 timeframe stated, "After a successful vote, every worker in the facility becomes a member of the bargaining unit. Union dues will be taken from each paycheck, the cost of which will be decided democratically by union members, but will roughly equal a few dollars each week." The Employer's table toppers from around the same timeframe was similar, stating Petitioner would charge its members roughly equal to a few dollars each week from each paycheck after the election. I note that there is no record evidence reflecting that dues amounts and payment frequency *was* "democratically voted upon by the membership" during the critical period.

Section 8.1(a) of Petitioner's Constitution & Bylaws contains a fixed amount of union dues prior to the election, as follows: "In the period preceding the initial election, dues will amount to five (5) dollars every two (2) weeks." However, the record reflects that *no* employees paid any union dues during the critical period. Section 8.1(b) of Petitioner's Constitution & Bylaws states, "Within sixty (60) days following a successful election, the President will appoint a committee to reassess the dues structure and propose a new amount and frequency to be voted upon by the membership." While not directly relevant to the objections before me since it involves a time period after the election ended on March 30, after the critical period, the record contains no evidence of any Petitioner committee assessment of its dues structure or any union dues proposals following end of the election.

With respect to Petitioner's communication with eligible voters in late March, before the election started on March 25, the record generally reflects that Petitioner was consistent in its message to eligible voters that no union dues will be paid unless a contract is reached. I note that there is also some Petitioner communication with eligible voters during this late March timeframe, including Smalls' March 22nd letter, reflecting that no "dues will be taken until we have a contract with higher wages signed." At the hearing, employees consistently testified that they understood that they would not have to pay union dues until a contract was reached.

The Employer argues that since Petitioner's Constitution and Bylaws required it to collect dues and to refrain from changing its dues structure absent a committee recommendation and democratic vote of its membership and the record reflects that Petitioner communicated to its employees that no union dues would be charged until a contract including Petitioner's proposal for wage increases was reached, Petitioner "unlawfully conferred a financial benefit to which eligible voters were not otherwise entitled," citing *Mailing Servs., Inc.*, 293 NLRB 565, 565-66 (1989). As noted by Petitioner in its brief, such a ban on a union conferral of a tangible benefit to eligible voters applies *only during the critical period*. *Id.* at 565 (Board holds union is "barred in the critical period…from conferring on potential voters a financial benefit.")

Accordingly, the appropriate analysis is whether Petitioner conferred a tangible benefit to eligible voters by no collecting any union dues *during the critical period* to this *representation* election. The cases cited by the Employer in support of Objection 14 are all factually distinguishable. For example, in *Mailing Servs., Inc.*, the Board set aside a representation election because it found a union announcing, "FIRST UNION BENEFIT!" *three days before the election* and then giving *free medical screenings* to eligible voters *two days before the election* would likely have caused employees to feel obligated to vote for the union. *Id.* at 565-66. In *Go Ahead N. Am., LLC*, 357 NLRB 77, 78 (2011), the Board found objectionable a union's offer to waive *back dues* for a *decertification* election. In *McCarty Processors*, 286 NLRB 703, 703 (1987), the Board found that the union's waiver of the collection of *dues already incurred* by union members constituted the granting of a financial benefit and warranted setting aside a *decertification* election. In *Loubella Extendables, Inc.*, 206 NLRB 183, 183-84 (1973), the Board found the union's promise to forgive the obligation to pay the *initiation fee or back dues* if the union won the *decertification* election constituted an objectionable grant of financial benefit.

Even if employees interpreted Petitioner's statements that they would not have to pay union dues unless they received a raise, the Board has held that union promises are recognized by employees as dependent on contingencies during collective bargaining beyond a union's control. *Smith Co.*, 192 NLRB 1098, 1101 (1971); see also *Lalique N.A., Inc*., 338 NLRB 986 (2003). Further, the Board has long held that in a representational petition, it is permissible for a union to offer to waive dues or initiation fees to an entire bargaining unit until a first contract is approved. See, *L.D. McFarland Co*., 219 NLRB 575 (1975), aff'd. 572 F.2d. 256 (9th Cir. 1978) (approving a waiver of initiation fees and dues for all employees in the plant); See also *NLRB v. River City Elevator*, 289 F.3d. 1029, 1032 (7th Cir. 2002); U-Haul of Nev. Inc. v. NLRB, 490 F.3d 957, 961-62 (D.C. Cir. 2007*); Cf. NLRB v. Savair Mfg. Co*., 414 U.S. 270 (1973) (holding that waiver of initiation fees conditioned upon the signing of union authorization cards prior to a representation election was improper and should result in the setting aside of the election).

Based on the foregoing and the record as a whole, I recommend that Objection 14 be overruled.

N. Objection 15: The Petitioner engaged in repeated and deliberate attempts to interfere with and "shut down" the Employer's small group meetings, solicited employees during the Employer's educational meetings in violation of the Employer's policies, and destroyed the Employer's campaign materials.

1. Record Evidence

The Employer deployed a robust informational campaign during the critical period to encourage eligible voters to vote against representation by Petitioner, including the following:

- Small group meetings or informational sessions held daily, starting at 8:00 a.m. on February 7, through March 23;
- One on one meetings with employees; and
- A plethora of written communications, including:
    - approximately 50 to 100 posters posted at JFK8;
    - approximately 300 to 400 table toppers placed on top of a majority of the break room tables with different messages every week;
    - approximately five to ten Text-Em-Alls, text messages sent to eligible voters approximately once or twice per week;
    - approximately 25 to 40 push notifications to between 6,000 and 7,000 eligible voters through AtoZ, an Employer app;
    - an unspecified number of employees who accessed the Employer website accessible at unpackjfk8.com;
    - approximately a dozen televisions throughout the entryway into JFK8 (referred to as "the Green Mile") that the Employer used to display its two to three messages per week;
    - postcards mailed to all eligible voters; and
    - vinyl banners placed throughout JFK8, including by the Green Mile of varying lengths, the longest approximately 10 feet long.

With respect to Employer posters, during the critical period, the Employer posted approximately 50 to 100 posters on the walls at its JFK8 facilities about Employer benefits, about unions, and about the Petitioner. Shortly thereafter, the Employer learned that some of the

posters were torn down. The Employer's loss prevention team obtained four videos from the Employer's CCTV cameras inside JFK8 showing certain employees tearing down the Employer's posters from the walls. These videos showed stipulated Petitioner agents Palmer, Spence, and Daniels as well as Petitioner supporter Medina tearing down the Employer posters. All four employees were disciplined by the Employer for tearing down the posters and did not tear down any more Employer posters thereafter. Employer witness Donaldson indicated the Employer was unaware of any other employees who tore down posters except for these four employees. After each poster was torn down, the Employer replaced the posters.

According to employee witness Monarrez, during the time period during the critical period that she supported Petitioner, from December 22, 2021, until she resigned around January 26, Petitioner supporters frequently removed Employer written communications located primarily in the breakrooms and bathrooms and put them in the trash. Petitioner supporters who engaged in this activity during this time period would often make comments, posts, and videos in the Telegram group messaging app that Petitioner then utilized for communications among Petitioner supporters. Spence testified that the group channel Petitioner was using to communicate during its campaign on the Telegram app was deleted sometime in early April 2022, so Petitioner, its officers, and supporters no longer had access to the Telegram app thereafter.

Monarrez testified that Smalls, Palmer, and Spence would respond to such comments, posts, and videos posted on the Telegram app to encourage employees to engage in such activities and would use these social media postings to communicate with the media about Petitioner's campaign. Monarrez testified that she believed she would have been on the Employer's CCTV cameras when she was in the employee break rooms at JFK8, because the Employer has CCTV cameras "every 10 feet everywhere you go throughout the warehouse." Monarrez testified that before she stopped supporting Petitioner around January 26, she routinely tore down Employer posters. Monarrez was not disciplined for removing the Employer's campaign materials.

With respect to the Employer's small group meetings, approximately 20 or 30 eligible voters attended each of these mandatory, paid meetings in training rooms inside JFK8, conducted by two of the Employer's Employee Relations professionals (ER professional) or jumpers. One ER professional or jumper would present and one would proctor each small group meeting. Each small group meeting lasted approximately 30 to 45 minutes and was conducted either in the Career Choice Room or the Day 1 Room (collectively, training rooms) at JFK8. The Employer used six slide presentations with different content for these small group meetings. The Day 1 Room seats approximately 30 to 40 people socially distanced, has two doors, and approximately 38 chairs.

The Employer small group meetings began on February 7, starting at 8:00 a.m., and continued until about March 23. Approximately 25 meetings were scheduled simultaneously in the two training rooms on February 7, at 45 minute intervals. Each eligible voter was mandated to attend between approximately two to six of these small group meetings.

At approximately 11:05 a.m. to 11:10 a.m. on February 7, Spence came into General Manager Santos' office with Donaldson present and said there was an emergency in the Day 1 Room and needed Santos to go there. Senior Operations Manager Will Thurmand (Thurmand) and Human Resources Business Partner Ally Miller (Miller) were presiding over this meeting in the Day 1 Room. Thurmand was presenting and Miller was proctoring during this meeting. Approximately 20 people were in the meeting when it started. Only one of the entrances was being monitored during this 11:00 a.m. small group meeting.

After Thurmand presented several slides, a group of approximately seven individuals came in to the Day 1 Room through the unmonitored entrance, including five stipulated Petitioner agents: 1) Spence, 2) Palmer, 3) Daniels, 4) Ponce, 5) Maldonado. Also present were two pro-Petitioner supporters and lead organizers 6) Anthony, and 7) Medina (collectively, seven Petitioner supporters). Anthony testified that the seven Petitioner supporters decided as a group to go into the small group meetings to present Petitioner's message to employees, because the Employer did not give Petitioner the opportunity to do so.

With respect to whether the seven Petitioner supporters planned to "shut down" the small group meetings, Anthony testified, "First of all, Kurt, we wasn't going to shut down anything. The only purpose here was that we wanted transparency. That's the number one thing that we wanted for public record." Similarly, Medina testified, "People were all sort of motivated by the same desire, to speak truth to power. And so just the fact that other people wanted to do it as well, that gave me confidence and also made it a legally protected union activity because there are a number of us."

Anthony took two videos of this February 7th 11:00 a.m. group meeting, and texted the video to Smalls on either February 7 or 8. Smalls never told Anthony to record the small group meetings or that he should not have recorded the small group meetings. Anthony testified, "It was my decision. [Smalls] never intervened, whatever I did, Kurt." Likewise, on February 7, Medina tweeted on her own personal Twitter account that the Petitioner "shut down captive audience meetings today. Management tried to stop us, the GM threatened us, one union-buster even pushed an ALU worker. But if they refuse to give us equal time to speak, we'll shut them down every day." Medina testified that she did not have any conversations with Smalls about social media and Smalls as well as all of the other Petitioner officers "did not object to us trying to talk in meetings that Amazon was giving to us and our coworkers." Medina's use of the words "shut down" "was meant to be sort of excited and fired up," "sort of a flourish," and "hyperbolic," as the seven Petitioner supporters did not shut down the meetings on February 7, as the 11:00 a.m. meeting finished and the Employer itself decided to end the following meeting at 11:45 a.m.

On February 7, Daniels replied to a tweet from Medina and three others, stating, in relevant part, "We shut it down today and we're not going to put up with their union-busting tactics."

According to Miller, the seven Petitioner supporters were singing and chanting for around 30 to 45 seconds, including "everywhere we go people want to know who we are, so we tell them we are the union. The mighty, mighty union," and passing out pamphlets to the eligible

voters scheduled to attend the 11:00 a.m. meeting. Thurmand asked everyone to sit down and be respectful of everybody's time. Miller admitted that Thurmand "continued presenting the next few slides to finish up the presentation." Miller estimated that the meeting ended around eight to ten minutes after the seven Petitioner supporters entered the Day 1 Room through the unmonitored door.

Miller testified that when Thurmand was presenting, "he received many questions and some pushback from the organizers that had entered the room, sort of engaging in debate about the content." Examples of "pushback" Miller provided included asking questions like, how do you know, distinguishing that Petitioner is not a third party when it is comprised of employees, as well as comments about employee wages, management, the local HR team at JFK8, collective bargaining, and union dues. Miller testified that this meeting was "interrupted" by the seven Petitioner supporters who "were not invited to the meeting" coming into the meeting, interrupting the presentation with signing, chanting, and distributing materials, and then engaging in "continuous dialogue," "challenging the content of the presentation" "not related to the content being presented," making it impossible for Thurmand to continue presenting. Miller clarified on cross examination that "the content of the question is not what determines whether it's an interruption. It becomes an interruption when it's asked multiple times after it's already been answered, and when it's asked as someone is actively speaking and they're not able to finish their sentence." Miller estimated that in addition to the initial interruption when the seven Petitioner supporters entered the 11:00 a.m. small group meeting, there were over five other interruptions during the course of that meeting.

Donaldson testified that she went to the Day 1 Room at approximately 11:15 a.m. Miller testified that Donaldson entered the 11:00 a.m. meeting "when the meeting ended," and the scheduled attendees left the room but the seven Petitioner supporters did not leave the room. According to Donaldson, there was a lot of "cross-talk" disrupting the Employer's small group meeting presentation when she arrived.

According to employee witness Castellano who was scheduled to attend the 11:00 a.m. small group meeting in the Day 1 Room, he observed a group of individuals yelling outside of the room something to the effect of "we are the union" and "let us in," the group entered the Day 1 Room, and started chanting something to the effect of "if we don't have a voice, shut it down," and handed out literature. According to Castellano, the presenters at the meeting politely asked that if individuals were not scheduled to attend the 11:00 a.m. meeting, to leave the room. On cross examination, Castellano admitted that once the group of Petitioner had entered the small group meeting, Castellano called the group "a bunch of thugs" because "of what they were expressing that they are a bunch of thugs" that "just want a handout."

Employee witness Chevalli Facey (Facey) was also present during this 11:00 am mandatory small group meeting. Facey testified that about ten minutes after the meeting started, a group of about six to ten people entered the meeting and chanted "vote for the ALU," "union busters are getting paid $2,000 a day," handed out pamphlets, and disrupted the meeting by not permitting the presenters to finish their presentation. Employee witness Adenji corroborated that the group entered the mandatory small group meeting about ten minutes after the meeting started.

Facey testified that when the group came into the room, her response was, "Oh, hell no," and she heard [Castellano] call the group "a bunch of thugs," Facey testified that she agreed that the group was "obviously a bunch of thugs" because "they just barged in" and "disrupted the meeting." Facey testified that she attended the small group meetings because they were mandatory but otherwise did not pay attention to any of the communications pertaining to the Petitioner, whether to vote yes or vote no. Facey saw Anthony with his cell phone up, turning the phone from left to right, videoing the entire room. After Facey left the meeting, she reported what transpired to her manager. Facey testified that she chose not to vote in the election.

To try to enable the presenters to continue their presentation, Donaldson told the seven Petitioner supporters that she respected their right to have an opinion and they would be given a chance to ask questions at the end of the meeting. Donaldson said that the Employer wanted the presenters to finish their presentation; it was a work meeting; the information was for everybody; and everyone should be respected.

According to Donaldson, Medina stated that Petitioner deserved equal time during the small group meetings, and Palmer stated that the group wanted to stay for the next meeting. Donaldson told Palmer that she respected their right to organize but it was a work meeting and the group could ask questions but did not have the right to interrupt. Donaldson gestured for the group to return to work or to the break room if they were not scheduled to work because the Employer had another small group meeting in the Day 1 Room scheduled to start at 11:45 am. Miller was assigned to present and Thurmand was assigned to present at the 11:45 a.m. meeting. The 11:00 am small group meeting concluded before the next small group meeting scheduled at 11:45 am.

According to Miller, the 11:45 a.m. small group meeting scheduled in the Day 1 Room started "roughly" on time, but "may have started 5 minutes late." Santos arrived in the Day 1 Room after around 11:50 am with Spinella and said that all of the employees would get a chance to come to the meeting and all of the employees who were not scheduled to attend that 11:45 am meeting should leave the room. Santos said that those who did not leave the room would be considered insubordinate and may be subject to discipline. According to Miller, some of the seven Petitioner supporters were still in the Day 1 Room at the time of Santos' announcement and remained in the Day 1 Room thereafter.

According to Donaldson, the Employer's 11:45 a.m. small group meeting did not start until around noon and ended about five minutes later, around 12:05 pm. Miller testified that she "got maybe three or four slides" into the presentation when Spinella announced that the 11:45 a.m. meeting was canceled and apologized for the inconvenience. Donaldson testified she decided to end the 11:45 am meeting early because the group present during the 11:00 am meeting were still present and refused to leave and she was concerned about the disruption to the meeting. Donaldson chose to cancel the next five scheduled small group meetings as well, for a total of six canceled small group meetings, due to Donaldson's concerns about potential disruption. The Employer's small group meetings resumed at around 4:00 pm on February 7, and continued every day thereafter until March 23.

Donaldson testified that the only three meetings where disruptions occurred was the 11:00 am and 11:45 am small group meetings on February 7 and a meeting at an unspecified time on February 8 when Palmer and another unidentified employee distributed flyers.

2. Board Law

In *Station Operators, Inc.*, 307 NLRB 263 (1992) (*Station Operators*), the Board dismissed an objection based on similar conduct when "the Petitioner's representatives' confrontations with the Employer's officials during the employee meeting occurred 2 weeks before the election, and the results of the election were not close." *Id.* at 263. In *Station Operators,* the Board, in overruling an objection involving similar conduct, stated: "When considering the actions of union agents in these matters, the test to be applied is whether their conduct "reasonably tend[ed] to interfere with the employees' free and uncoerced choice in the election." *Baja Place,* 268 NLRB 868 (1984). In *Station Operators,* the incidents in dispute were relatively mild and occurred two weeks prior to the election. There was no evidence that any of the employees who witnessed the incidents were threatened by Petitioner's conduct… Even assuming, arguendo, other unit employees became aware of the incidents, the hearing officer noted that they were not proximate in time to the election and that the election was determined by a wide margin."

3. Recommendation

Objection 15 contends that Petitioner "engaged in repeated and deliberate attempts to interfere with and "shut down" the Employer's small group meetings, solicited employees during such small group meetings in violation of the Employer's policies, and destroyed its campaign materials. The seven Petitioner supporters' conduct during the 11:00 a.m. February 7th small group meeting was similar to the conduct addressed in *Station Operators*, as there was no evidence presented that any employees were threatened by Petitioner's conduct (see, e.g. Objection 13 above regarding alleged threat to employee Castellano). *Id.* Further, whereas the alleged conduct at issue in *Station Operators* occurred around two weeks before the election, Petitioner's alleged conduct on February 7 occurred at least *six weeks* before the election. Finally, the election at issue here was determined by 523 votes, approximately 10.8% of the valid votes cast, similar to the election in *Station Operators* which was also determined by a wide margin.

Moreover, given the predominance of the Employer's campaign materials throughout JFK8 as well as the virtually constant number of small group meetings that it continued to hold with eligible voters every single day from February 7 through March 23, there is insufficient evidence to show that the "interruption" and "disruption" caused by seven Petitioner supporters joining the Employer's 11:00 a.m. small group meeting on February 7th meaningfully interfered with the Employer's ability to communicate its campaign message to its employees. Focusing just on the number of small group meetings that the Employer held at JFK8 and that its employees were mandated to attend, approximately 25 meetings were scheduled simultaneously in two different training rooms, at 45 minute intervals, from February 7 through March 23. Each eligible voter was mandated to attend between approximately two to six of these small group meetings before the March 25 election.

Similarly, with respect to the fact that three stipulated Petitioner agents and one Petitioner supporter each tore down one Employer poster on one occasion, the record reflects all four employees were disciplined and did not tear down any more Employer posters thereafter. Additionally, the Employer immediately replaced the four posters that the Petitioner agents did tear down, reflecting that any detrimental impact to the Employer's campaign was minimal and fleeting.

Finally, since the record evidence reflects that three of the four individuals that were disciplined for tearing down Employer posters were stipulated Petitioner agents and that five of the seven individuals that joined the 11:00 a.m. Employer small group meeting on February 7th, the appropriate standard to apply to is whether their conduct "reasonably tend[ed] to interfere with the employees' free and uncoerced choice in the election." *Baja Place*, 268 NLRB 868 (1984). The Employer did not present sufficient evidence to establish that this conduct by Petitioner agents reasonably tended to interfere with employees' free and uncoerced choice in the election, as no employee witness testified that the "interruption" and "disruption" to the February 7th small group meeting or the tearing down of any Employer poster had any impact on their choice in the election, as these events occurred at least six weeks prior to the start of the election on March 23, and Petitioner obtained a majority of the valid votes cast by a wide margin of 523 votes, approximately 10.8% of the valid votes cast. Based on the foregoing and the record as a whole, I recommend that Objection 15 be overruled.

O. Objection 16: Non-employee Petitioner organizers repeatedly trespassed on the Employer's property.

1. Record Evidence

Employer witness Troy testified that the Employer has a third party security service called Metro One to assist in its investigations, to walk the interior and exterior of JFK8, to maintain security at JFK8, to maintain appropriate access levels for employees and vendors at JFK8, and to grant access to JFK8 for approved visitors through the Employer's visitor system.

The Employer has a corporate solicitation policy that is posted on its internet site that is applicable to JFK8. The introduction to this solicitation policy states:

> If you are coordinating events for employees and using company resources such as meeting space and communication tools (e.g. email, bulletin boards, posters etc.), follow the solicitation policy below.

This solicitation policy continues:

> The orderly and efficient operations of Amazon's business requires certain restrictions on solicitation of associates and the distribution of materials or information on company property. This includes solicitation via company bulletin boards or email or through other electronic communication media.

This solicitation policy prohibits:

- Solicitation of any kind by associates on company property during working time;
- Distribution of literature or materials of any type or description (other than as necessary in the course of our job) by associates in working areas at any time; and
- Solicitation of any type on company premises at any time by non-associates.

Examples of prohibited solicitation include the sale, advertising or marketing of merchandise, products, or services, soliciting for financial or other contributions, memberships, subscriptions, and signatures on petitions, or distributing advertisements or other commercial materials.

This solicitation policy makes exceptions for "company-sponsored activities or benefits, or for company-approved charitable causes, or other specific exceptions formally approved by the company." This policy concludes, "All communications under these exceptions must also have prior approval of Human Resources. Violation of this policy may result in immediate disciplinary action, up to and including termination of employment."

However, there is *nothing* in the Employer's solicitation policy that prohibits trespass on the Employer's property, and Troy admitted that the Employer does not have a trespass policy. The Employer relies on the prohibition in this solicitation policy that prohibits solicitation of any type on company premises at any time by non-employees. However, Troy and Employer's Assistant General Manager Zach Marc (Marc) testified that the Employer permits non-employees to access JFK8's property to drop off visitors, employees, and/or to deliver food to employees. Troy admitted that visitors are permitted to be on the Employer's property for specific purposes but the Employer reserves the right to ask visitors to leave if they do not comply with the Employer's instructions.

By letter dated December 15, 2021, before the critical period,[34] from Employer counsel to Petitioner counsel, the Employer asserts that "one or more individuals affiliated with the ALU who are not currently employed by Amazon recently entered onto Amazon's leased property outside of the JFK8 fulfillment center, set up folding tables in an area immediately adjacent to the east end of the building, and engaged in solicitation efforts on behalf of the ALU." This letter refers to President Smalls engaging in this solicitation and admitting in the text of video posed on Petitioner's TikTok account, managed by Spence, "we just set up in their parking lot." This letter requests that Petitioner counsel "immediately notify the ALU that any non-employee members are to immediately cease and desist from entering onto or soliciting on Amazon's property." The letter concludes, "Amazon reserves all its legal rights and remedies should non-employee ALU members continue to access Amazon's property for the purpose of engaging in solicitation."

[34] I admitted certain documentary evidence prior to the filing of the petition on December 22, 2021, before the critical period commenced, showing communication between the parties about alleged Petitioner physical presence at the Employer's property outside JFK8, contrary to the Employer's requests, to add meaning and context to Objection 16 alleging that "[n]on-employee Petitioner organizers repeatedly trespassed on the Employer's property."

On December 15, 2021, before the critical period, Status Coup News broadcast a live stream of Jordan Chariton, the anchor for Status Coup News on JFK8 property, with Smalls as well as former employee Bryson present, located at the corner of the Northeast part of the JFK8 building on the sidewalk outside of JFK8's property. On cross examination, Troy admitted that Metro One was working on December 15, 2021 and did not ask Smalls, Bryson, or any other individuals present with them to leave the Employer's property. Troy was inside the JFK8 building at the time of this incident and did not ask the individuals to leave the Employer's property. Troy testified that he believed that Smalls posed a safety risk to the Employer's employees on this occasion because employees had "to come off of the sidewalk and into the fire lane and where cars were coming down" and "the solicitation efforts of the Union at that point and them being on our property showed an escalation that they were taking liberties of being on our property" that "could have posed a safety risk."

On December 16, 2021, before the critical period, Petitioner President Smalls tweeted about the Employer re-routing public buses to its property for the last week which makes the public bus stop fair grounds for Petitioner to set up its tables per usual signing workers. This December 16th tweet attaches a portion of Employer counsel's December 15, 2021 letter to Petitioner counsel, as summarized above.

On December 16, 2021, before the critical period, Employer counsel sent another letter to Petitioner counsel to follow up on Petitioner's non-employee organizers accessing the Employer's private property, referencing the Status Coup News broadcast on YouTube Live the night before. This letter also disputes that Petitioner has the right to solicit on the Employer's private property because the MTA has temporarily rerouted its bus service to a small weather enclosure located at the outer edge of the JFK8 parking lot, located on the Employer's private property. This letter similarly states, "Please convey to your client that if non-employee ALU organizers attempt to access Amazon's private property in the future, Amazon will take legal steps to protect its property rights."

On January 17, Petitioner held a Martin Luther King Day rally at JFK8, which Smalls attended. Videos of this rally was posted on Petitioner's TikTok account around January 17 and 18.

On some date prior to January 20, on a date that Spence did not know, Smalls was present outside the workforce staffing office at JFK8 to distribute Petitioner t-shirts. The video posted on the Petitioner's TikTok on January 20 and on Smalls' personal Twitter account on January 21 appears to show that Petitioner volunteers were collecting authorization cards on clipboards during the unknown date the video depicts occurring prior to January 20. The January 20th tweet from Petitioner's TikTok states, "another day, another 200 shirts given out to our coworkers." Small's January 21st tweet is similar: "TGIF new shirt drop for our fellow coworkers." Another TikTok video posted by Petitioner on January 24 depicts Smalls present when Petitioner was giving out t-shirts and flyers at JFK8.

According to Employer witness Troy, Smalls entered the JFK8 property to solicit on either January 31 or February 1, on February 9, February 11, and February 23.[35] On either January 31 or February 1, Smalls entered the Employer's property and set up a table on the front sidewalk outside of JFK8 containing Union literature. Troy admitted that he was not present on the Employer's property when Smalls was present on either January 31 or February 1, but Metro One security was present and did not ask Smalls or others present to leave the Employer's property. Troy admitted that Smalls did not cause a safety risk to the Employer's employees on either January 31 or February 1.

By letter from Employer counsel to Petitioner counsel dated February 2, Employer counsel stated, in relevant part:

> Simply put, your client's non-employee agents have no remotely plausible legal excuse for entering Amazon's private property. Non-employee members of the ALU who are engaged in solicitation mere steps from the front entrances to Amazon's facilities are in clear violation of Amazon's solicitation policy, and they are trespassing.

Employer counsel's February 2nd letter concludes:

> We again request you immediately notify the ALU that any non-employee members are to immediately cease and desist from entering onto or soliciting on Amazon's property. Please convey to your client that if such conduct continues, Amazon will take legal steps to protect its property rights.

On February 9, in the early afternoon, Smalls was with one camera person outside the main employee breakroom at JFK8, located on the first floor, on the North side, the same side as the main entrance to JFK8. Employer witness Marc estimated that the capacity of this main employee break room is approximately 200 people. According to Marc, the camera person did not have prior authorization from Amazon to film Smalls on the Employer's property.

Assistant General Manager Marc and Senior Operations Manager Mohit Mengale (Mengale) approached Smalls standing directly on the sidewalk outside of the main employee breakroom. Marc told Smalls that he was on private property and he respected Smalls' right to solicit, but he needed to leave the Employer's property. Marc told him he could go to the bus stop across the street on public property but needed to leave the Employer's property.

[35] Focusing on the time period between January and March 2022, Troy first testified that he personally observed Petitioner President Smalls soliciting on the Employer's property four times outside the Northeast corner of the JFK8 building on the sidewalk outside the workforce staffing office and his interviewing activity occurred outside the breakroom on one of the picnic benches on the front sidewalk outside the entrance of JFK8. I gave Troy repeated instructions that his testimony "must be based on your personal knowledge, things you know firsthand." I note that contrary to these repeated instructions, Troy admitted that he was *never* outside to personally observe Smalls soliciting at JFK8 on these four occasions. Rather, Troy admitted his testimony about Smalls' alleged solicitation was solely based on reviewing videos and social media posts pertaining to those four instances.

Marc testified that Smalls told him that he was filming an interview and would leave when he was finished. Marc told Smalls to leave the Employer's property. Smalls said he would leave when he was finished and Marc could "go ahead and call the cops." Marc said that he did not want it to come to that and reiterated that he needed Smalls to leave the Employer's property. Smalls told Marc to go ahead and call the cops and to do what he needed to do. Marc told Smalls that if he refused to leave the Employer's property, he would contact the authorities and headed back inside JFK8. Marc estimated this conversation lasted around two minutes and that Smalls left "a few minutes" after their conversation ended.

According to Troy, Smalls remained on the JFK8 property for more than 45 minutes total on February 9. The Employer did not contact the police. Troy admitted that Smalls did not cause a safety risk to the Employer's employees on February 9. There is no record evidence of Smalls engaging in any solicitation as defined in the Employer's solicitation policy on February 9, but Marc testified that he "would classify what he was doing as solicitation, and he was on private property without permission."

Spence testified that Smalls was present in the JFK8 parking lot on February 9 to drop off food for a luncheon that Petitioner was hosting in the main employee break room. On February 9, Smalls tweeted from his personal Twitter account, "So we've been delivering pizza to workers for the last 6 months including today at Break." Small's tweet states that he delivered "36 pies" and then the Employer ordered pizza for JFK8 employees as well.

On February 11, Smalls was again outside the main employee breakroom at JFK8 with a camera person. There is no record evidence of Smalls engaging in any solicitation as defined in the Employer's solicitation policy on February 11. Smalls remained on the Employer's property for more than 45 minutes. Neither Troy nor Metro One security approached Smalls on February 11 and asked him to leave the Employer's property. Troy admitted that Smalls did not cause an imminent safety risk or threat to the Employer's employees on February 11.

On February 23, in the early afternoon, Smalls drove onto the JFK8 property and parked his vehicle outside of the fire line in the front entrance of the JFK8 building, exited his vehicle and sat on one of the picnic benches located outside the main employee breakroom at JFK8. About two or three people with cameras were present with Smalls, appearing to conduct an interview. According to Marc, the camera persons did not have prior authorization from Amazon to film Smalls on the Employer's property.

There is no record evidence of Smalls engaging in any solicitation as defined in the Employer's solicitation policy on February 23. However, on cross examination, when asked how is filming somebody solicitation, Marc responded, "When you film the leadership of the Amazon Labor Union and he was wearing all Amazon Labor Union clothing, it seemed to me like he was soliciting."

Troy admitted that on February 23, for approximately five minutes, Smalls stopped out front of the main entrance of JFK8 and dropped off food in metal tins to employees to take into the employee breakroom. On February 23, Smalls remained on the Employer's property for over 1.5 hours. According to Spence, Smalls was present in the JFK8 parking lot between around

1:30 p.m. to 2:00 p.m. to around 3:00 p.m. on February 23 to drop off food for another Petitioner luncheon in the main employee break room.

With respect to Petitioner serving lunch in the first floor employee break room, Mendoza testified that there are two lunches, the inbound lunch and the outbound lunch for 30 minutes each and the time to prepare to serve and clean up after the lunches, totaling around two hours. According to Mendoza, Smalls delivered the food for Petitioner-provided lunches "almost every time." Mendoza described the process as Petitioner supporters meeting Smalls in the parking lot, getting the food trays for the first lunch, serving them at Petitioner break room tables in the main employee break room, and then meeting Smalls again in the parking lot after 30 or 40 minutes to get the food trays for the second lunch and then them again at Petitioner break room tables in the main employee break room. According to Mendoza, Smalls typically waited in the JFK8 parking lot for the entirety of Petitioner's lunch service, totaling around two hours.

On February 23, about 27 to 30 minutes after Smalls finished delivering food for employees to take into the employee breakroom, Marc and Loss Prevention Manager Henry Carbajal (Carbajal) went out to the front sidewalk and asked Smalls to leave the property, but if there were any employees present they were free to stay. Marc testified that he asked Smalls to leave the property because Smalls, along with his camera crew, "were filming with a direct line of sight into our main break room where, as we established earlier, hundreds of associates take their break." On cross, Marc admitted he did not know whether the camera could capture the inside of the break room.

In response to Marc asking "any non-Amazonian" to "leave the property," Smalls told Marc he was filming an interview and would leave when he was done. Smalls did not initially say anything to Marc about visiting anyone or delivering food to anyone. Marc requested Smalls leave two more times, and Smalls said he would leave when he was ready and to call the cops if necessary. Marc estimated that this conversation lasted around one minute.

Marc and Carbajal returned inside the Employer's JFK8 building and in consultation with the Employer's employee relations team and its legal counsel, determined that the Employer would contact the police.

Troy testified that he called the police after Smalls was present on the Employer's property for more than 40 minutes, sometime after 1:30 p.m. on February 23. Troy contacted the Deputy Inspector of the 121st Precinct for the New York Police Department (NYPD) Bruce Ceparano (Ceparano) directly because "although we were contacting the NYPD to help us enforce our property rights, we did want this situation to be handled with discretion and not to turn into a scene," "without it becoming contentious." Ceparano asked Troy if the Employer "would support trespass charges" "if [Smalls and the camera person] did not comply with the request," and Troy responded in the affirmative. However, Troy admitted that the Employer did not file a police report and was not asked to sign a supporting deposition for criminal charges. During Troy's telephone call with Ceparano, Troy told Ceparano that the Employer was asking "for the NYPD's assistance in getting somebody to leave our property that we had asked on multiple occasions that day and previous to leave our property."

Approximately 30 minutes after Marc's conversation with Smalls, Ceparano and approximately seven or eight NYPD officers arrived at the Employer's property, Marc briefed the officers regarding what had transpired that day with Smalls, requesting assistance to have the trespassers removed from the Employer's property. According to Marc, he made it clear to the officers that any employees were free to stay on the Employer's property.

Ceparano and the NYPD officers approached Smalls, the approximately three camera persons. Present with Smalls were Spence, Anthony, Daniels, and one or two other employees Marc recognized but could not identify by name. Ceparano asked Marc to repeat his instruction to Smalls to leave the Employer's property, and Marc said any employees were free to stay. Smalls said that he was just visiting. Marc instructed Smalls to leave the property. Smalls repeated he was just visiting.

Ceparano told Smalls he needed to leave as Marc had asked him to leave and he was trespassing. Smalls pointed to a sign that said "Visitors." Smalls said he was a visitor and was there visiting employee Spence. Smalls said he would leave when Spence left. Spence said he was there for his shift and had a right to be there. Smalls asked Spence if he wanted to leave, Spence said yes, and Smalls then said, all right, let's leave. Ceparano asked Smalls if he was going to leave, Smalls said yes, and the discussion between the group continued about why the police was asserting that Smalls was a trespasser when he said he was just visiting Spence, an employee at JFK8. Ceparano asked Smalls to leave the Employer's property again and gave him two minutes to leave the Employer's property. Smalls said he was going to leave and went to the interior of the passenger side of the vehicle and Spence went to the driver's side of the vehicle, appearing to get ready to leave.

Daniels asked the police if they were going to arrest every visitor the Employer had on its property. Anthony took out his phone and started recording and yelled at the police about committing "a violation of the national agreement with the NLRB." Anthony testified that he provided a copy of his video to Status Coup News, who posted the video, adding its own text. Portion of Anthony's video were also posted on the Petitioner's TikTok account.

Initially, Daniels and Anthony were several feet away from the NYPD officers, but, as the interaction continued, they got closer until Marc observed Anthony position himself between Smalls and the NYPD officers, making physical contact with one or two of the NYPD officers. Marc saw Daniels with his hands in an officer's face but did not see Daniels physically contacting any officers. Shortly thereafter, the NYPD officers arrested Smalls, Anthony, and Daniels. Marc admitted that neither Anthony nor Daniels were trespassing at the time of their arrests and he did not take any steps to stop the police from arresting them.

Smalls' NYPD arrest record indicates that he was arrested on February 23 based on charges of 1) resisting arrest, 2) obstructing governmental administration, and 3) trespass. Troy testified that Smalls' presence on the Employer's property on this occasion created a safety risk to the Employer's employees due to "the lack of compliance with the NYPD that led to the arrest of himself and other members of the ALU."

On February 23, Petitioner's Twitter account, managed by Spence and Daniels, posted, "BREAKING: [Employer] managers called NYPD to arrest ALU worker organizers for "trespassing" as we held a union luncheon in the break room as part of organizing efforts for the upcoming election. This was a backfired attempt to intimidate workers & interfere with their rights." On February 24, Petitioner's Twitter account and Daniel's personal Twitter account each posted, "Despite having the right to be a visitor, Union President [Smalls] complied w/ the NYPD, then an officer put hands on an ALU organizer, used excessive force to arrest all 3 [Petitioner] organizers and charged them w/ "trespassing" & "obstructing governmental administration." On February 24, Petitioner posted TikTok videos of the Employer arresting Smalls "for "trespassing" while handing out free food to workers at lunch" and arresting "worker-organizers at Amazon."

On February 24, Smalls tweeted from his personal Twitter account related to his arrest on February 23, asserting that he was present at JFK8 as a visitor to deliver food to employees while they are on break, as there were no food vendors in the main breakroom at JFK8 to feed the employees. Smalls tweeted that when he was released on February 23, he "rushed back to feed Nightshift" and the "Venders were Back" in the employee breakroom. On February 24, Smalls tweeted a TikTok video posted by Petitioner relating to his February 23rd arrest, with the post, "[Employer] and the NYPD Union Busting at its finest," positing if he was UberEats dropping off food to workers whether the Employer would consider that trespass.

Petitioner supporter Pat Cioffi testified that he knew that Smalls "was arrested for being on the [Employer's] property and he was dropping off food. That I know for sure. Again, like everybody else does." However, Cioffi testified that he was a Petitioner supporter about four to seven days before Smalls got arrested, and Small's arrest was the "icing on the cake." Cioffi testified that he had placed an "ALU logo" on the back of his vest when he worked at JFK8 about a week before Smalls was arrested on February 23.

With respect to statements made that Cioffi "flipped 400-500 votes during the election," Cioffi admitted making those statements. When explaining what Cioffi meant when he used the word "flipped," Cioffi testified as follows:

> So at Amazon, the Union busters, they were going around. It wasn't about the Union; they were making it about Chris Smalls. So Chris Smalls was a thug. Chris Smalls is going to buy a Lamborghini with your tuition money. And Chris Smalls was this, Chris Smalls was that. All kinds of accusations against Chris Smalls. So all I did to the people that were---I wouldn't say no, a lot of no's because of that fact and a lot of maybe because they weren't too familiar with the aspect of the Union. I made it about===the Union is not about Chris Smalls. It's not about me. It 's not about any other person. It's about the workers. This is what I explained to the people. So being that I have a lot of trust in that building, I've been there for two years, and I got along, with every associate in there, as well as senior level management. And once I had a conversation with them, I made them understand that it wasn't about Chris Smalls. And it wasn't about Amazon or Chris Smalls. It was about them. It was about their job security and

> better wages for them. And that's how you could say, I flipped them from a yes to a no. Or for a maybe to a yes. I mean, to a no to a yes. I'm sorry.

Cioffi also testified that the video of the February 23rd arrests was "all over Amazon," "management was watching it," and in fact, a "manager showed it to me" and "told me that, Chris Smalls got arrested with a bunch of other clowns." The manager told Cioffi, "you see, your clown friends, they got your Union buddies, they got arrested. Be careful. Now you're a target."

Smalls admitted that he returned to JFK8 after his arrest on February 23, including to provide free food to JFK8 employees, as follows:

> I did more than that. Sometimes hand out food. Sometimes I picked up some workers. Sometimes I dropped them off at work. Sometimes I dropped off some of the equipment that they use. Sometimes I dropped off some of the literature they used. I usually picked it up and stored it in the truck. So yeah, I visited a couple of times.

Smalls did not recall personally handing out t-shirts or free food to employees at JFK8 after he was arrested on February 23. On February 25, Smalls tweeted a picture that included him, Daniels, Anthony, Spence, and Palmer, with the following post: "Why I love this Union [Petitioner] waited over 6 hours for us to get out and we went right back to JFK8 to feed the night shift!"

2. Board Law

In *GADecatur SNF LLC v. NLRB*, No. 20-1435 (D.C. Cir. Nov. 11, 2021), the court upheld the Board's overruling of an objection that concerned a loud argument that took place outside the polling place when the Employer attempted to prevent an eligible voter from accessing its property. The court noted that the dispute was of limited duration, involved only one voter's eligibility, did not involve unlawful action by the Petitioner, involved potentially disruptive behavior by both parties, and that a small-if-unknown number of unit employees were aware of or affected by the argument. In light of these considerations, although the election was close and the incident took place during the election, the court concluded that the Board reasonably held that the conduct did not reasonably tend to interfere with the voters' free choice.

In *NLRB v. Springfield Hosp*.,899 F.2d 1305, 1310-12 (2d Cir. 1990), the Court rejected the Employer's claim that the union had invited the arrests of its leaders, finding no wrongdoing by arrested union members, and finding that the arrest at the direction of the Employer constituted an unfair labor practice entitling the union to a re-run election. The Court found that the Hospital was solely responsible for the arrests of union members. In that case, off-duty pro-union employees came to the Hospital when they were not scheduled to work and sought to talk to employees who were being called into small group meetings about the union. The Hospital Administrator falsely told the Police Captain "that a group of off-duty employees were roaming in "non-designated" areas of the hospital, distributing leaflets in the intensive care unit, disturbing visitors and interfering with patient care and hospital operations." The Board found that these were misrepresentations which the police relied on which led to the arrests.

3. Recommendation

Objection 16 simply states, "Non-employee Petitioner organizers repeatedly trespassed on the Employer's property."

a. Smalls and Bryson are Employees within the Meaning of Section 2(3) of the Act.

Preliminarily, I must address the Employer's use of the term "non-employee" at Objection 16. The Board, and the Supreme Court, have historically interpreted the definition of "employee" in Section 2(3) of the Act very broadly, as encompassing "'members of the working class generally,' including former employees of a particular employer." See *Little Rock Crate & Basket Co.*, 227 NLRB 1406, 1406 (1977), quoting *Briggs Manufacturing Co.*, 75 NLRB 569, 570. See also the Supreme Court's decisions endorsing the Board's broad construction of the Act's definition of "employee" in *NLRB v. Town Country Electric, Inc.*, 516 U.S. 85 (1995), and *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). I note that distinction because discharged employees of the Employer have a different standing from true "non-employees" and have Section 7 interests that are protected by the Act.

It is undisputed that Smalls and Bryson are both former employees of the Employer, discharged by the Employer, and were both last employed at JFK8 when they were discharged. Therefore, it appears that Smalls and Bryson are both "employees" within the meaning of Section 2(3) of the Act, including during the critical period relevant to the Employer's Objections.[36] Accordingly, I find that during the critical period relevant to the Employer's Objections, as set forth in the Order Directing Hearing on Objections, Smalls and Bryson were "employees" within the meaning of Section 2(3) of the Act.

Based on this finding that Smalls and Bryson were "employees" within the meaning of Section 2(3) of the Act, I find that the express language of Objection 16, limited to "non-employee Petitioner organizers," does *not* apply to "employees" Smalls and Bryson.

b. The Employer's Solicitation Policy Does Not Include Trespass, and the Employer Has No Trespass Policy.

As Employer counsel Larkin conceded during the hearing, the Employer's solicitation policy contains no reference whatsoever to trespass. Further, it is undisputed that the Employer does not have a trespass policy. To the extent that the Employer seeks to apply its solicitation policy to the record evidence alleging trespass by "non-employee Petitioner organizers," as noted above, this solicitation policy prohibits:

[36] I note that on July 5, in the separate subpoena record for this case, I raised this legal issue that Smalls and Bryson could be considered employees under Section 2(3) of the Act based on the caselaw cited above. In Petitioner's post-hearing brief, it argued that Smalls was an employee under Section 2(3) of the Act, citing the caselaw I provided in the separate subpoena record on July 5. The Employer repeatedly referred to Smalls and Bryson "non-employees" throughout its post-hearing brief, did not address the issue of whether Smalls and Bryson are employees under Section 2(3) of the Act, and did not cite, address, or distinguish the caselaw I previously provided the parties on July 5, as set forth above.

- Solicitation of any kind *by associates* on company property during working time;

- Distribution of literature or materials of any type or description (other than as necessary in the course of our job) *by associates* in working areas at any time; and

- Solicitation of any type on company premises at any time *by non-associates*.

Focusing first on Smalls and Bryson, since I find that Smalls and Bryson are "employees" under Section 2(3) of the, the solicitation policy prohibits Smalls and Bryson from engaging in solicitation at JFK8 "during working time" and from distributing "literature or materials of any type" "in working areas at any time." It is undisputed that Smalls and Bryson, as former employees of the Employer, did not have *any* "working time" during the critical period, nor is there record evidence that establishes that Smalls or Bryson were present "in working areas" inside of JFK8 at *any* time during the critical period. Therefore, the Employer's solicitation policy does not apply to the presence of Smalls and/or Bryson on JFK8 property during the critical period, nor is there any record evidence to support that Smalls or Bryson violated the Employer's solicitation policy during the critical period.

Even if Smalls and Bryson *were* considered to be "[n]on-employee organizers" as alleged at Objection 16, there is insufficient evidence to show that Smalls or Bryson engaged in "solicitation" as defined in the Employer's solicitation policy on JFK8 property during the critical period. The record evidence generally shows that on certain dates during the critical period, the primary activities that Smalls engaged in included being present at or near Petitioner outside tables located on the exterior of the JFK8 property, inside a vehicle in various locations on the exterior of the JFK8 property,[37] engaging in activity such as conducting rallies, giving out free t-shirts and flyers, dancing, speaking to individuals holding video cameras, using a megaphone, and dropping off food for Petitioner volunteers employed by the Employer to serve to employees during their break periods inside the Employer's break rooms. These activities Smalls engaged in during the critical period do *not* fit within the plain meaning of "solicitation" as set forth in the Employer's solicitation policy.

Specifically, as summarized above, the Employer's solicitation policy, on its face, imposes "certain restrictions on solicitation of associates and the distribution of materials or information on company property." Examples of prohibited solicitation in the Employer's solicitation policy include the "sale, advertising or marketing of merchandise, products, or services, soliciting for financial or other contributions, memberships, subscriptions, and signatures on petitions, or distributing advertisements or other commercial materials." Based on this context and express language of the Employer's solicitation policy, the record evidence of

[37] The only testimony regarding Bryson's presence at JFK8 property during the critical period was Troy's testimony that at around 11:00 a.m. on March 25, Troy and V. Gross saw Smalls and Bryson inside a vehicle and a cameraman outside of the vehicle, located next to a weather shelter located across from the parking garage and employee pick-up and drop-off area at JFK8. Since this is the only testimony about Bryson's presence at JFK8 during the critical period, even if Bryson were considered a "[n]on-employee Petitioner organizer," there is insufficient record evidence to show that Bryson "repeatedly trespassed on the Employer's property" as alleged at Objection 16.

Smalls' conduct that occurred during the critical period, as summarized above, would not reasonably constitute "solicitation" as defined by the Employer's solicitation policy.[38]

c. Even if Smalls is Considered a "Non-Employee Petitioner Organizer," There is Insufficient Evidence to Establish Smalls "Repeatedly Trespassed" on the Employer's Property.

The record reflects that on January 17, Petitioner held a Martin Luther King Day rally at JFK8, which Smalls attended. Videos of this rally was posted on Petitioner's TikTok account around January 17 and 18. The videos do not depict Smalls engaging in any activity that would be prohibited by the Employer's solicitation policy. Since there is no record evidence to establish that the Employer asked Smalls to leave the Employer's property while he was on the Employer's property on January 17, I do not find that Smalls trespassed on the Employer's property on January 17.

On some date prior to January 20, on a date that Spence did not know, Smalls was present outside the workforce staffing office at JFK8 to distribute Petitioner t-shirts. Another TikTok video posted by Petitioner on January 24 depicts Smalls present when Petitioner was giving out t-shirts and flyers at JFK8. The fact that Smalls was present on JFK8 property on date(s) prior to January 20 and/or 24 to distribute flyers and t-shirts does not constitute activity prohibited by the Employer's solicitation policy. Since there is no record evidence to establish that the Employer asked Smalls to leave the Employer's property while he was on the Employer's property on date(s) prior to January 20 and/or 24, I do not find that Smalls trespassed on the Employer's property on date(s) prior to January 20 and/or 24.

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[38] As noted above, one video posted on the Petitioner's TikTok on January 20 and on Smalls' personal Twitter account on January 21 appears to show that Petitioner volunteers were collecting authorization cards on clipboards during the unknown date the video depicts at some time prior to January 20. To be clear, this one video depicting a date prior to January 20 does not show Petitioner volunteers or Smalls actually collecting any authorization cards, but it shows an unidentified person who appears to be female holding a clipboard containing a Petitioner authorization card that appears to be filled out in handwriting. The person holding the clipboard in the video is not Smalls, nor any other stipulated Petitioner agent, and there does not appear to be any other videos contained in the record showing Smalls or any other stipulated Petitioner agent with authorization cards. The record does not reflect whether the person holding the clipboard was an employee of the Employer on the unknown date the video was recorded prior to January 20. The record reflects generally that Petitioner continued to collect authorization cards until approximately January 26.

Arguably, Petitioner volunteers collecting authorization cards on the exterior of JFK8 property could constitute seeking "signatures on petitions" prohibited by the Employer's solicitation policy. However, there is insufficient record evidence to determine whether the individual with the clipboard is an employee or a "[n]on-employee" of the Employer. If the person holding the clipboard is an employee, the person would *not* be prohibited under the Employer's solicitation policy to collect authorization cards because the video depicts a location on the exterior of the JFK8 property, on non-working time, in a non-working area. If the person who collected the authorization cards in the video is a "[n]on-employee," then the Employer's solicitation policy would arguably prohibit the non-employee from getting "signatures on petitions" by collecting authorization cards from employees on a date prior to January 20. In any event, the video does *not* depict Smalls, Bryson, or any stipulated Petitioner agent collecting authorization cards on an unknown date prior to January 20.

According to Employer witnesses, Smalls was also present on JFK8 property on either January 31 or February 1, on February 9, February 11, and February 23. On either January 31 or February 1, Smalls entered the Employer's property and set up a table on the front sidewalk outside of JFK8 containing Petitioner literature. The fact that Smalls was present on JFK8 property on either January 31 or February 1 to distribute Petitioner literature does not constitute activity prohibited by the Employer's solicitation policy. Since Troy admitted Metro One security was present and did not ask Smalls or others present to leave the Employer's property, I do not find that Smalls trespassed on the Employer's property on date(s) prior to January 20 and/or 24.

On February 9, in the early afternoon, Smalls was outside the main employee breakroom at JFK8 with one person with a camera. Mengale and Marc approached Smalls standing directly on the sidewalk outside of the main employee breakroom. Marc told Smalls that he was on private property and he needed to leave the Employer's property. Smalls said he would leave when he was finished and Marc could "go ahead and call the cops." Troy admitted that Smalls did not cause a safety risk to the Employer's employees on February 9. There is no record evidence of Smalls engaging in any solicitation as defined in the Employer's solicitation policy on February 9.

Arguably, assuming Smalls did not constitute an "employee" under Section 2(3) of the Act, Smalls engaged in trespass on February 9 by remaining on the Employer's property for a certain period of time after Marc asked him to leave the property. However, I credit Spence's testimony, corroborated by Smalls' February 9th tweet that Smalls was present at break time in the JFK8 parking lot on February 9 to drop off "36 pies" and therefore was a visitor permitted to be on the Employer's property, consistent with testimony from both Troy and Marc that visitors were permitted to drop off food at the JFK8 property.

On February 11, Smalls was again outside the main employee breakroom at JFK8 with a camera person. There is no record evidence of Smalls engaging in any solicitation as defined in the Employer's solicitation policy on February 11. Troy admitted that Smalls did not cause an imminent safety risk or threat to the Employer's employees on February 11. Since neither Troy nor Metro One security approached Smalls on February 11 and asked him to leave the Employer's property, I do not find that Smalls trespassed on the Employer's property on February 11.

On February 23, in the early afternoon, Smalls drove onto the JFK8 property and parked his vehicle outside of the fire line in the front entrance of the JFK8 building, exited his vehicle and sat on one of the picnic benches located outside the main employee breakroom at JFK8. About two or three people with cameras were present with Smalls, appearing to conduct an interview. There is no record evidence of Smalls engaging in any solicitation as defined in the Employer's solicitation policy on February 23.

Troy admitted that on February 23, for approximately five minutes, Smalls stopped out front of the main entrance of JFK8 and dropped off food in metal tins to employees to take into the employee breakroom. On February 23, Smalls remained on the Employer's property for over 1.5 hours. According to Spence, Smalls was present in the JFK8 parking lot between around

1:30 p.m. to 2:00 p.m. to around 3:00 p.m. on February 23 to drop off food for another Petitioner luncheon in the employee break room.

On February 23, about 27 to 30 minutes after Smalls finished delivering food for employees to take into the employee breakroom, Marc and Carbajal asked Smalls to leave the property, but if there were any employees present they were free to stay. In response to Marc asking "any non-Amazonian" to "leave the property," Marc requested Smalls leave two more times, and Smalls said he would leave when he was ready and to call the cops if necessary.

Troy called the police after Smalls was present on the Employer's property for more than 40 minutes, sometime after 1:30 p.m. on February 23. Approximately 30 minutes after Marc's conversation with Smalls, Ceparano and approximately seven or eight NYPD officers arrived at the Employer's property. Present with Smalls were Spence, Anthony, Daniels, and one or two other employees Marc recognized but could not identify by name. Ceparano asked Marc to repeat his instruction to Smalls to leave the Employer's property, and Marc said any employees were free to stay. Smalls said that he was just visiting. Marc instructed Smalls to leave the property. Smalls repeated he was just visiting.

Ceparano told Smalls he needed to leave as Marc had asked him to leave and he was trespassing. Smalls pointed to a sign that said "Visitors." Smalls said he was a visitor and was there visiting employee Spence. Smalls said he would leave when Spence left. Spence said he was there for his shift and had a right to be there. Ceparano asked Smalls to leave the Employer's property again and gave him two minutes to leave the Employer's property. Smalls said he was going to leave and went to the passenger side of the vehicle and Spence went to the driver's side of the vehicle. Shortly thereafter, the NYPD officers arrested Smalls, Anthony, and Daniels. Marc admitted that neither Anthony nor Daniels were trespassing at the time of their arrests and he did not take any steps to stop the police from arresting them.

Based on all of the record evidence presented regarding Smalls' arrest on February 23 as a whole, including Employer CCTV video corroborating that Smalls delivered food at JFK8 on February 23, Troy's admission that he called the NYPD to enforce trespass charges against Smalls, record evidence that Smalls pointed to the "Visitors" sign and JFK8 and told NYPD officers that he was a visitor and then proceeded to head to the inside of the passenger side of the vehicle appearing to get ready to leave the JFK8 property, as well as Smalls' February 24th tweet that he was present at JFK8 as a visitor to deliver food to employees while they are on break, as there were no food vendors in the main breakroom at JFK8 to feed the employees, and when he was released on February 23, he "rushed back to feed Nightshift," I do *not* find that Smalls was trespassing on the Employer's property on February 23. Rather, I find that Smalls was present at JFK8 on February 23 as a permitted visitor dropping off food for employees for the typical approximately two hour duration of both employee lunch breaks.[39]

[39] With respect to the fact that Smalls was present on JFK8 property for about 27 to 30 minutes *after* he delivered food for employees in the break room, I credit Mendoza's testimony that Smalls delivered food for employee lunches "almost every time" and because there are two lunches, the inbound lunch and the outbound lunch for 30 minutes each and the time to prepare to serve and clean up after the lunches, Smalls' presence in the JFK8 parking lot to deliver food could reasonably total around two hours.

As Petitioner argues in its post-hearing brief, Smalls' arrest appears similar the *Springfield Hospital* case, during which police relied on Employer misrepresentations to make off-duty employee arrests. According to Marc, he was unaware that Smalls was delivering food, and admitted that if Smalls was at JFK8 delivering food, Smalls should properly have been deemed a visitor rather than a trespasser. However, Troy, who contacted Ceparano directly at the NYPD, *was* aware that Smalls was delivering food and yet nonetheless omitted to Ceparano that Smalls was present at JFK8 as a visitor to deliver food to employees in the employee breakroom *and* misrepresented that Smalls was a repeat trespasser. The record evidence reflects that both instances when Marc asked Smalls to leave JFK8 property, on February 9 and 23, Smalls was delivering food to employees at JFK8 and was therefore a visitor while present on JFK8 property on both February 9 and 23.

Based on Troy's omission and affirmation that the Employer would support trespass charges against Smalls, the NYPD gave Smalls two minutes to leave the property. Despite the fact that video footage shows Smalls repeatedly telling the NYPD officers that he was a visitor, visiting JFK8 employee Spence, and Smalls walking toward the interior of the passenger side and Spence walking toward the driver side of the vehicle, appearing to be getting ready to leave the JFK8 property as instructed, the police nevertheless arrested Smalls, Daniels and Anthony. In similar circumstances, the Board in *Springfield Hospital* found that the off-duty employees were engaging in protected conduct and were cited and arrested in areas that they had a right to be present, finding that the employer was solely responsible for the arrests. The record reflects that despite Troy's testimony that he contacted Ceparano directly because he wanted the police visit to be handled with "discretion," instead, by Troy contacting the police, the Employer escalated Smalls' February 23rd visit unnecessarily, resulting in not only Smalls' arrest, but also the arrest of two of its employees, Daniels and Anthony, who indisputably were *not* trespassing when they were arrested.

Smalls admitted that he returned "a couple of times" to the exterior of JFK8 property after his arrest on February 23, to deliver food, or to pick up or drop off employees, equipment, or literature. Smalls did not recall personally handing out t-shirts or free food to employees at JFK8 after he was arrested on February 23. In sum, based on the foregoing and the record as a whole, I find that even if Smalls were determined to be a "[n]on-employee Petitioner organizer" as framed in Objection 16 in the Order Directing Hearing on Objections, there is insufficient record evidence to find that Smalls "repeatedly trespassed on the Employer's property" during the critical period.

d. The Employer Has Failed to Meet its Burden of Proof for Objection 16.

The record contains *no* evidence to support that "[n]on-employee Petitioner organizers repeatedly trespassed on the Employer's property" as Objection 16 expressly alleges. The record contains evidence that on February 23, the NYPD arrested Smalls, Daniels, and Anthony, including charging Smalls with "trespass." It is undisputed that as of February 23 and for the entirety of the critical period, both Daniels and Anthony were "employees" within the meaning of Section 2(3) of the Act. Further, as stated above, I find that during the critical period, Smalls was also an "employee" within the meaning of Section 2(3) of the Act. Therefore, the NYPD's

February 23rd arrest of Smalls, Daniels, and Anthony, including a charge of "trespass" against Smalls, cannot constitute evidence of "[n]on-employee Petitioner organizers repeatedly trespass[ing] on the Employer's property" in support of Objection 16.

Further, even if Smalls was considered a "[n]on-employee Petitioner organizer" and his February 23rd arrest, including a charge of "trespass," was considered to be "repeated trespass" on JFK8 property because the Employer also asked Smalls to leave its property on February 9, the Employer failed to meet its burden to establish how Smalls' alleged "repeated trespass" on February 9 and 23, more than a month before the election that started on March 25, amounts to objectionable conduct by Petitioner sufficient to warrant overturning this election that the Union prevailed by a margin of 523 votes, 10.8% of the valid votes cast.

Since the Employer's argument largely focuses on Smalls' alleged "repeated trespass" during the critical period, Smalls is a stipulated Petitioner agent. Therefore, the proper standard is whether Smalls' conduct on February 9 and 23 "reasonably tend[ed] to interfere with the employees' free and uncoerced choice in the election.'' *Baja's Place*, 268 NLRB 868 (1984). In deciding whether employees could freely and fairly exercise their choice in the election, the Board evaluates the following nine factors (*Avis* factors): (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party in canceling out the effect of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. *Avis Rent-A-Car System*, 280 NLRB 580, 581 (1986).

Contrary to the Employer's analysis of these nine *Avis* factors, arguing that seven out of the nine *Avis* factors weigh in favor of finding that "non-employee Petitioner organizers repeatedly trespassed on the Employer's property," I find that *none* of the *Avis* factors weigh in favor of finding Smalls' conduct at JFK8 on February 9 and 23 reasonably tended to interfere with employees' free choice in the election. First, with respect to the number of incidents of misconduct, again, the Employer has not established that Smalls engaged in *any* incidents of misconduct on February 9, 23, or any other date it asserts Smalls was present at JFK8 during the critical period. Second, the Employer did not present or proffer a single witness that testified that Smalls' presence at JFK8 during the critical period, or, even Smalls' arrest on February 23, caused "fear among the employees in the bargaining unit." Third, there is *no* evidence to support that *any* bargaining unit employees were "subjected" or impacted in any way by Smalls' presence at JFK8 during the critical period, except for employees Anthony and Daniels who were also arrested on February 23. Neither Anthony nor Daniels would have been arrested at JFK8 on February 23 had the Employer not contacted the NYPD and told the NYPD it would support trespass charges against Smalls.

Fourth, again, even if Smalls was considered a "[n]on-employee Petitioner organizer" and his presence at JFK 8 on certain dates during the critical period could constitute "repeated trespass," as framed at Objection 16, the only dates during the critical period that the Employer

established that it asked Smalls to leave its property were February 9 and 23, more than one month before the election started on March 25. With respect to the fifth and sixth factor, the persistence of these events and dissemination of these events to bargaining unit employees, while both the February 9 and 23 events were disseminated by Petitioner through its social media and the February 23rd arrests were disseminated by Petitioner, the Employer, and the media, *no* witness testified that Smalls' presence on February 8 and 23 impacted their free choice in the election. With respect to Cioffi's testimony that he "flipped 400 to 500 votes," To the extent that Cioffi actually flipped *any* votes since all voters in the election cast their votes by secret ballot, I credit Cioffi's testimony that what he actually "flipped" was the Employer's campaign targeted on accusations against Smalls to vilify Petitioner, to tell eligible voters "that the Union is not about Chris Smalls. It's not about me. It's not about any other person. It's about the workers. This is what I explained to the people."

Seventh, there is *no* record evidence to support that the Employer took *any* actions "canceling out the effects" of Smalls' presence at JFK8 during the critical period and in particular, the only two instances in the record that the Employer asked Smalls to leave its property, on February 9 and 23. To the contrary, the record reflect that the Employer escalated the February 23rd incident by admittedly contacting the NYPD and telling the NYPD it would support trespass charges against Smalls and admittedly did *nothing* to stop the arrests of its own two employees, Daniels and Anthony, who unquestionably were *not* trespassing at JFK8 on February 23rd at the time of their arrests. Further, crediting Cioffi's testimony, the Employer itself used the video of the February 23rd arrests with Cioffi to further vilify Smalls, Daniels, Anthony as "clowns," telling Cioffi to be careful, that the NYPD arrested his "Union buddies" and that now Cioffi is a target. Based on this evidence and the record as a whole, as discussed herein, in analyzing the ninth factor, I find that all three February 23rd arrests can largely be attributed to the Employer.

Finally, with respect to the eighth factor, the closeness of the vote, it is undisputed that the Petitioner obtained a majority of the valid votes cast in the election by a margin of 523 votes, approximately 10.8% of the valid votes cast. Thus, I find that *none* of the *Avis* factors weigh in favor of finding that Smalls' presence at JFK 8 on February 9, 23, or any other date established in the record during the critical period reasonably tend[ed] to interfere with the employees' free and uncoerced choice in the election. In sum, there is no record evidence to support that any "non-employee Petitioner organizers repeatedly trespassed on the Employer's property" as

Objection 16 claims.[40] Based on the foregoing and the record as a whole, I recommend that Objection 16 be overruled.[41]

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[40] The Employer relies on *Phillips Chrysler Plymouth, Inc.*, 304 NLRB 16 (1991) (*Phillips*). I find *Phillips* distinguishable, since that trespass occurred on the same day as the election, only 75 minutes before the polls opened, resulting in management calling the police after a "shouting match" between management and organizers in front of all 10 unit employees because the organizers refused to leave, and the election was decided by one vote. The Employer established none of these facts from *Phillips* in this record. Further, as Petitioner notes, the Board has distinguished *Phillips Chrysler* on these grounds, which has been affirmed by the appellate courts. See *NLRB v. Earle Industries, Inc*., 999 F.2d 1268, 1274 (8th Cir. 1993); *Family Services Agency San Francisco v. NLRB*, 163 F.3d 1369, 1383 (D.C. Cir. 1999).

The Employer also relies on *N. of Mkt. Senior Servs., Inc. v. NLRB*, 204 F.3d 1163 (D.C. Cir. 2000), but it is similarly factually distinguishable. In that case, during the pre-election conference about 30 minutes before polls were scheduled to open, when a union agent informed the Board agent that supervisors told employees they could only vote during their lunch hour, the Board agent made a poor judgment call to instruct two union agents to inform employees working inside the employer's facility that they could vote at any time the polls were open. *Id.* at 1168. On the day of the election, about 30 minutes before the polls were scheduled to open, the union agents went "tromping through the employer's facility," including in patient care areas while patients were being treated without the employer's permission, giving the impression that the Board had ceded authority to the union over the conduct of the election on the day of the election. *Id.* at 1168-69. None of these facts are present in this record either. In fact, the D.C. Circuit specifically stated in that case, "**we scrutinize this misconduct more closely both because it took place on the day of the election**, *see Family Serv. Agency,* 163 F.3d at 1383 (noting that argument between employer and union did not necessitate invalidating the election in part because election was at least a month away from the time the argument occurred); *NLRB v. Earle Indus., Inc.,* 999 F.2d 1268, 1274 (8th Cir.1993) (holding that conduct did not violate *Phillips Chrysler,* in part because it took place weeks before the election), **and because the Union's margin of victory was narrow**, *see C.J. Krehbiel Co. v. NLRB,* 844 F.2d 880, 884 (D.C.Cir.1988) (carefully scrutinizing the election, because the vote was close); *United Steelworkers v. NLRB,* 496 F.2d 1342, 1347 n. 11 (5th Cir.1974) ("If the vote margin in a representational election is very narrow, minor violations should be more closely scrutinized.")." *Id.* at 1169-70 (emphasis added).

[41] I find no merit in the Employer's assertion that Smalls orchestrated his own arrest on February 23 to bolster Petitioner's organizing campaign. First, I find that this argument was not timely raised in any objections before me, including at Objection 16, and that this argument is not "sufficiently related" to Objection 16 or any other objections before me as framed by the Order Directing Hearing on Objections to warrant proper consideration. See, e.g. *Labriola Baking Co.*, 361 NLRB 412, 412 (2014). Second, even if this argument first raised by the Employer during the hearing is sufficiently related to Objection 16 to warrant consideration, as noted above, I find that Smalls was an "employee" under Section 2(3) of the Act during the critical period and therefore Objection 16 is inapplicable to Smalls, since Smalls was not a "[n]on-employee Petitioner organizer." Third, it is undisputed that the Employer, by its manager Troy, contacted the NYPD on February 23 and told the NYPD it would support trespass charges against Smalls, and characterized Smalls as a repeat trespasser when the record evidence as a whole reflects that on both February 9 and 23, when the Employer requested that Smalls leave its property, Smalls present on JFK8 property to deliver food to JFK8 employees for the duration of their break times. Thus, despite Smalls' presence at JFK8 on both February 9 and 23 as a lawful visitor, the Employer caused the police to be present at JFK8 to support Smalls' arrest for trespass on February 23rd. Fourth, I credit Cioffi's straightforward, earnest, and responsive testimony that the Employer's campaign was largely based on "[a]ll kinds of accusations against Chris Smalls" and that the video of the February 23rd arrests was "all over Amazon," "management was watching it," and in fact, a "manager showed it to me" and "told me that, Chris Smalls got arrested with a bunch of other clowns." Cioffi credibly testified that he already supported Petitioner at the time of the February 23rd arrests. According to Cioffi, when the manager showed him the video of the February 23rd arrests, the manager told Cioffi, "you see, your clown friends, they got your Union buddies, they got arrested. Be careful. Now you're a target." In sum, not only does the record reflect that the Employer was responsible for contacting the police to support trespass charges as Troy testified, but, when combined with Cioffi's testimony, the record evidence shows that the Employer was using the February 23rd arrests to further its campaign against Petitioner. Based on this evidence and the record as a whole, I find that there is insufficient record evidence to show that Smalls sought to be arrested on February 23rd to support Petitioner's campaign, regardless of whether Petitioner understandably referred to the February 23rd arrests in its organizational campaign.

Objection 17: The Petitioner unlawfully polled employee support, engaged in unlawful interrogation, and created the impression of surveillance during the critical period.

1. Record Evidence

The record reflects that about a week before the election began on March 25, Petitioner distributed a flyer containing a header stating, "Amazon Labor Union," with the following language, "Together, we will fight for better working conditions, higher wages, longer break times, and the respect we deserve. This election is our chance to tell Amazon that we demand better!" Below this language on the left side is the following statement, in bold and underlined, "**I will vote YES for the Amazon Labor Union in the election on**" followed by boxes for the eligible voter to select which election date the voter plans to vote and a line for the eligible voter to write in the time the voter plans to vote. The flyer also contains language reminding eligible voters of the polling times, "Voting is open from 8:00 AM to 1:00 PM and 8:00 PM to 1:00 AM." The Flyer also reminds voters that the voting location is a tent in the JFK8 parking lot, "Look for a tent located in the parking lot of JFK8!" Finally, the flyer has a place where the eligible voter may place a telephone number and an address. Petitioner supporter Anthony testified that Petitioner provided this flyer to eligible voters "to remind them to vote" and for Petitioner to provide eligible voters transportation to vote, if needed.

On March 21, employee witness Melissa Martinez (M. Martinez) received a text message from an individual identifying himself as an employee and an organizer with Petitioner reminding her about the dates of the election and concluding, "Can I count on you to vote yes? (p.s. reply "stop" if you don't wanna chat)." M. Martinez did not respond by text to indicate whether or not she was going to vote yes. Employee witness Andy Martinez (A. Martinez) received this same text message on March 22.

2. Board Law

Unions may legitimately measure support among employees. See *Longwood Security Services*, 364 NLRB No. 50, slip op. at 2 (2016). A union is permitted to poll employees and ask them about their support for the union, including how and when they plan to vote. *See Springfield Discount*, 195 NLRB 921, enfd, 82 LRRM 2173 (7th Cir. 1972); K*eeler Die Cast v. NLRB*, 185 F.3d 535, 539 (6th Cir. 1999), cert. denied, 529 U.S. 1018 (2000); *Maremont Corp. v. NLRB*, 177 F.2d 573, 578 (6th Cir. 1999).[42]

3. Recommendation

Objection 17 asserts that the Petitioner "unlawfully polled employee support, engaged in unlawful interrogation, and created the impression of surveillance during the critical period. The record reflects that about a week before the election starting on March 25, the Petitioner

[42] See also, e.g. *1621 Route 22 West Operating Co. v. NLRB*, 725 Fed. Appx. 129 (3d Cir. 2018) (the court upheld the Board's finding that the union's distribution of a flyer featuring employee statements obtained without the employees' permission, and which the employees did not actually make, was merely unobjectionable campaign propaganda); *St. Luke's Hospital*, 368 NLRB No. 49 (2019) (Board denied the employer's request for review of the Acting Regional Director's decision to overrule an objection that alleged that a flyer purporting to display signatures of employees who were supporting the union warranted setting the election aside).

distributed a flyer that includes, "I will vote YES for the Amazon Labor Union," requesting the particular polling session that responding employees intend to vote as well as contact information the voter may choose to provide. Anthony testified that if eligible voters provided their addresses, the Petitioner would seek to provide transportation to vote, if needed. The record evidence also indicates that individuals identifying themselves as employees and organizers from the Petitioner did text employees around March 21 and 22, "Can I count on you to vote yes? (p.s. reply "stop" if you don't wanna chat)."

In sum, the record evidence reflects that the Petitioner lawfully polled employees and asked them for their support for the Petitioner, including how and when they plan to vote. *Id.* The case cited by the Employer*, Kusan Mfg. Co. v. NLRB*, 749 F.2d 362, 365 (6th Cir. 1984) (*Kusan*), is contrary to Objection 17's assertions, by holding, "pre-election polling by the union is not inherently coercive." *Id*. at 364. *Kusan* further states that "an employer may successfully challenge a representation election if he shows that pre-election polling by the union in fact was coercive and in fact influenced the result of the election." *Id*. at 365. There is no record evidence to establish that the text messages and the flyer the Petitioner utilized to measure employee support around a week before the election and around March 21 and 22 "in fact was coercive and in fact influenced the result of the election." Based on the foregoing and the record as a whole, I recommend that Objection 17 be overruled.[43]

[43] I find no merit to the Employer's contention that the record evidence establishes that the Petitioner's "collection of pledge forms served as a *de facto Piggly-Wiggly* list and created an objective impression of surveillance in the mind of voters." The *Piggly-Wiggly* rule refers to "the policy of the Board to prohibit anyone from keeping any list of persons who have voted, aside from the official eligibility list used to checkoff voters as they receive their ballots." *Piggly-Wiggly*, 168 NLRB 792, 793 (1967). There is no record evidence to support that Petitioner kept any list of voters as they received their ballots. The flyer Petitioner distributed asking employees how and when they planned to vote was not distributed during the election; rather, this flyer was distributed about a week *before* the election began on March 25. Thus, the Employer's reliance on *Piggly-Wiggly* is misplaced.

Further, the Employer's assertion that Petitioner's offer of transportation to those who completed and filled out the form is "in and of itself, objectionable conduct as the ALU did not offer transportation to all Associates" does not accurately characterize the record evidence. While the flyer does state, "I will vote yes" and request that an eligible voter select when the voter intends to vote, there is nothing in the form itself that would prohibit a person who did not wish to "vote yes" to nevertheless choose to fill out whatever portion(s) of the form the person wished, including contact information to obtain transportation to vote from Petitioner, if needed. There is no record evidence to support that Petitioner was *only* handing out the flyer to employees who affirmatively told Petitioner that they were voting yes that Petitioner told any eligible voters that it would *only* provide them transportation if they voted yes, or anything similar.

P. Objection 18: After disparaging—and celebrating its independence from—established, institutional unions for months leading up to the vote, the Petitioner's President and attorney asserted in 11th hour communications to voters that the Petitioner was backed by established unions with millions of union members, that those more-established unions were actively involved in the Petitioner's campaign, were providing funding and other services to the Petitioner, and would also be involved in contract negotiations if the Petitioner was elected. These misrepresentations are objectionable conduct because, under the circumstances, employees were unable to discern the truth of these statements regarding which labor organization would be representing them.

Objection 21: The Petitioner failed to file forms required by the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA"). The LMRDA requires all unions purporting to represent private sector employees to file, among other things, detailed financial reports. To date, the Petitioner has not filed any financial or other reports required by the LMRDA despite being under a legal obligation to do so. The Petitioner's failure to comply with the LMRDA deprived employees from access to critical financial information about the Petitioner's operations during a critical time period (i.e., whether to vote for them as their bargaining representative).

1. Record Evidence

During the beginning of the critical period, on date(s) that Spence could not recall, Petitioner distributed the following flyer identifying and depicting the logos of the following organizations:

UNIONS AND SOCIAL MOVEMENTS SUPPORTING THE ALU:

UNITED FOOD AND COMMERICAL WORKERS LOCAL 342

UNITEHERE! LOCAL 100

MAKE THE ROAD NY

COALITION OF BLACK TRADE UNIONISTS

Around March 14, Petitioner distributed a flyer stating the following on the first page, in relevant part:

> FACT: THE ALU IS BACKED BY ESTABLISHED UNIONS WITH MILLIONS OF UNION MEMBERS.
>
> THE AMAZON LABOR UNION IS BACKED BY ESTABLISHED UNIONS SUCH AS THE UFCW(1.3 MILLION MEMBERS) AND UNITE HERE (300,000 MEMBERS). THEY HELP US WITH LAWYERS, ADVISORS, AND EXPERTISE.

The second page states, in relevant part:

> 11 DAYS UNTIL OUR UNION ELECTION.
>
> FACT: THE ALU IS BACKED BY ESTABLISHED UNIONS WITH MILLIONS OF UNION MEMBERS.
>
> WE ARE NOT ALONE, WE HAVE ALL THE SUPPORT WE NEED TO WIN A FAIR UNION CONTRACT.
>
> AMAZONLABORUNION.ORG

On March 21, Petitioner sent an email to eligible voters with subject, "3 Facts Amazon Doesn't Want You to Know." The second item pertains to Petitioner being supported by established unions, as follows:

> **2. THE ALU IS SUPPORTED BY ESTABLISHED UNIONS WITH DECADES OF COLLECTIVE BARGAINING EXPERIENCE.**
> *Unite Here (300,00 members) lends us office space in Manhattan, organizers, and advisors like President José Moldonado. The United Food and Commercial Workers (1.2 million members) support us with lawyers like Eric Milner who have successfully filed for two union elections against Amazon despite all of their attempts to crush our right to vote. They've also supplied us with office space in Staten Island and advisors like Gene Bruskin who have won hundreds of strong union contracts across decades of organizing in the labor movement. The OPEIU has supplied us with another attorney Seth Goldstein who has successfully filed over 20 Unfair Labor Practices against Amazon for their illegal union-busting. He has already won us the largest labor settlement in American history against Amazon which affirms our right as employees to organize a union without retaliation. The point is that* ***Amazon workers will always be in the driver's seat when it comes to making decisions about our union, but we have all the support we need to win a fair union contract for ourselves.***

Employee witness Moises Martinez (M. Martinez) testified that on March 30, Petitioner supporter Cioffi and he had a one on one conversation right in front of the main entrance of the

JFK8 building about voting in the election. Cioffi asked M. Martinez if he was going to vote in the election, and M. Martinez said yes. Cioffi asked M. Martinez if he was going to vote yes or no. M. Martinez said that he was "not actually going to support the ALU because I didn't really know who they really were, I didn't know too much information on them." Cioffi encouraged M. Martinez to vote yes because the Teamsters had the intentions "to basically vote Mr. Chris Smalls out once they basically gained a foothold in JFK8." M. Martinez testified he did not know that Cioffi was involved with Petitioner until that conversation.

2. Board Law

In *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), the Board abandoned its policy of regulating misrepresentations in election campaigns. However, *Midland National* does not apply and the Board will set aside an election upon a showing that the employees did not know the identity of the organization that they were voting for or against. See *Humane Society for Seattle/King County*, 356 NLRB 32, 34–35 (2010); *Pacific Southwest Container*, 83 NLRB 79, 80 fn. 2 (1987). Compare *Nevada Security Innovations*, 337 NLRB 1108 (2002).

In *Radnet Management, Inc. d/b/a San Fernando Valley Interventional Radiology and Imaging Center*, 31-RM-209388, rev. denied 7/25/18, and *Radnet Management, Inc. d/b/a San Fernando Valley Advanced Imaging Center*, 31-RM-209424, rev. denied 7/26/18, the Board agreed with the Regional Director that the petitioner's failure to disclose an alleged affiliation with another union is *not* a misrepresentation that warranted setting aside the election (and further noted that the employer had stipulated to the name of the union as it would appear on the ballot, *sans* affiliation). In *RadNet Management, Inc. v. NLRB*, 992 F.3d 1114 (D.C. Cir. 2021), the court *rejected* the Employer's argument that the elections at issue had to be set aside because the Petitioner failed to disclose to employees its alleged affiliation with another union, because even if there was such an affiliation there was no evidence the Petitioner had affirmatively misrepresented its affiliation or that the affiliation was material to the campaign, nor was there any indication the voters were confused as to the identity of their prospective bargaining representative.

Violations of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) do not affect Board policy, since Section 603(b) of the LMRDA explicitly provides: "nor shall anything contained in [Titles I through VI] . . . of this Act be construed . . . to impair or otherwise affect the rights of any person under the National Labor Relations Act, as amended." An organization's (or its agent's) possible failure to comply with the LMRDA should be litigated in the appropriate forum under [the LMRDA], and not by the indirect and potentially duplicative means of the Board's consideration in the course of determining the union's status under Section 2(5) of the Act. *Caesar's Palace*, 194 NLRB 818, 818 fn. 5 (1972); see *Meijer Supermarkets, Inc.*, 142 NLRB 513, 513 fn. 3 (1963); *Harlem River Consumers Cooperative*, 191 NLRB 314, 316 (1971).

3. Recommendation

a. Objection 18

Objection 18 essentially contends that Petitioner misrepresented that it "was backed by established unions" that "were actively involved in Petitioner's campaign, were providing funding and other services to the Petitioner, and would also be involved in contract negotiations in the Petitioner was elected," resulting in employees being "unable to discern" "which labor organizations would be representing them." The record evidence summarized above indicates that through Petitioner's written communication to eligible voters, Petitioner indicated that it was an independent union "backed by established unions" and other organizations that would continue to provide support for Petitioner "to win a fair union contract." Based on M. Martinez's testimony, Petitioner supporter Cioffi told him that if Petitioner prevailed at the election, Petitioner's plan was to vote Smalls out as President. There is no record evidence that Cioffi had such a conversation with any other eligible voter or that M. Martinez or any other eligible voter was "unable to discern" "which labor organizations would be representing them" based on such conversations with Cioffi as Objection 18 contends.

In sum, there is *no* record evidence of *any* eligible voters confused or "unable to discern" that Petitioner would be representing them if Petitioner prevailed in the election.[44] The Stipulated Election Agreement agreed upon by the Employer and the Petitioner on February 16th and the Regional Director of Region 29 approved on February 17th explicitly states that Petitioner was the one and only labor organization within the meaning of Section 2(5) of the Act appearing on the ballot. Pursuant to the approved Stipulated Election Agreement, the question on the ballot was, "Do you wish to be represented for purposes of collective bargaining by Amazon Labor Union?" The choices on the ballot will be "Yes" or "No."

Even if there were sufficient record evidence to support that Petitioner made misrepresentations as alleged at Objection 18, it would not constitute objectionable conduct warranting setting aside the election. See, e.g. *Midland National Life Insurance Co.*, 263 NLRB 127 (1982); *RadNet Management, Inc. v. NLRB*, 992 F.3d 1114 (D.C. Cir. 2021). Based on the foregoing and the record as a whole, I recommend Objection 18 be overruled.

b. Objection 21

As referenced above, Section 603(b) of the LMDRA explicitly provides: "nor shall anything contained in [Titles I through VI] . . . of this Act be construed . . . to impair or

[44] The cases the Employer relies on in support of Objection 18 are all inapposite. First, in *Humane Soc'y for Seattle/King Cnty.*, 356 NLRB 32 (2010), the Board set aside an election where the petitioning union assured employees that they would be represented by their own independent union, but the ballot and the Board's notice of election identified a separate, already-established union. *Id.* at 34-35. In *Woods Quality Cabinetry Co*., 340 NLRB 1355 (2003), the notice of election and sample ballot incorrectly stated that the petitioner was affiliated with the AFL-CIO. *Id.* at 1355. In *Pac. Sw. Container*, 283 NLRB 79 (1987), the Board vacated an election where the petitioner union failed to adequately inform all bargaining unit employees that a merger with a larger union was complete. *Id.* at 80. No record evidence of such confusion during the critical period regarding the identity of the Petitioner is present here, either before the election or on the ballot itself.

otherwise affect the rights of any person under the National Labor Relations Act, as amended." I precluded the Employer from presenting evidence in support of Objection 21, as contrary to the Employer's assertions, the Board is not the appropriate forum to determine whether or not Petitioner complied with the requirements of the LMRDA, not by the indirect and potentially duplicative means of the Board's consideration in the course of determining the union's status under Section 2(5) of the Act. *Caesar's Palace*, 194 NLRB 818, 818 fn. 5 (1972); see *Meijer Supermarkets, Inc.*, 142 NLRB 513, 513 fn. 3 (1963); *Harlem River Consumers Cooperative*, 191 NLRB 314, 316 (1971).

Further, failure to file reports required by the LMRDA as alleged at Objection 21, is not objectionable conduct under the Act. As noted by Petitioner, the Board rejected a similar objection, affirmed by the D.C. Circuit in *Family Services Agency San Francisco v. NLRB*, 163 F.3d 1369, 1383-84 (D.C. Cir. 1999) (*Family Services*). In *Family Services*, as here, the employer argued, "the union's refusal to file was a violation of employees' Section 7 rights to know about union finances and other matters in order to make an informed election choice." *Id*. at 1383. However, the Board and appellate court held that the LMRDA has its own enforcement mechanisms and is enforced by the Department of Labor, not the Board. *Id*., at 1383-84. The Act gives the Board no authority to enforce the LMRDA through the objection procedure. See also *Desert Palace, Inc. v. Local 711 Union of Gaming*, 194 N.L.R.B. 818, 818 n. 5 (1972) ("The NLRB is not entrusted with the administration of the [LMRDA]. An organization's possible failure to comply with that statute should be litigated in the appropriate forum under that act, and not by the indirect and potential duplicative means of our consideration). Based on the foregoing and the record as a whole, I recommend that Objection 21 be overruled.

Q. Objection 20: The Petitioner deployed a light projector outside the JFK8 facility that projected mass messaging on the façade of the JFK8 building immediately prior to the election. Late at night on March 23, 2022, and through the early morning hours, after the voting tent was in place, the ALU projected messaging on the front of JFK8 immediately over the polling area which read: "Amazon Labor Union"; "VOTE YES"; "VOTE YES! TO KEEP YOUR PHONES"; "BE THE FIRST IN HISTORY"; "THEY FIRED SOMEONE YOU KNOW"; "THEY ARRESTED YOUR COWORKERS"; and "ALU FOR THE WIN". The Petitioner's light projections are also objectionable misrepresentations inasmuch as they caused confusion about the identity of the messenger, suggested that Amazon supported the messaging, and misrepresented the purpose and consequences of the vote. The Petitioner's light projections also reiterated the Petitioner's false campaign narrative that the Employer sought the arrest of employees.

1. Record Evidence

The record reflects that on March 23, between around 8:00 p.m. and 10:00 p.m., Petitioner projected several different pro-Petitioner messages on the front façade of the main entrance of the JFK8 building, directly below the Amazon logo. These messages rotated approximately every 30 seconds and were displayed using projection equipment from a company

called The Illuminator loaded onto a rental truck located on the public road outside of the JFK8 property. The projected messages could be seen from outside of JFK8 but not inside of JFK8. Anthony estimated that these messages were displayed from 30 minutes to an hour. These messages included:

- BE THE FIRST IN HISTORY
- THEY FIRED SOMEONE YOU KNOW
- VOTE YES!
- THEY ARRESTED YOUR COWORKERS
- BEZOS FLEW TO SPACE OFF YOUR LABOR
- VOTE YES! FOR THE ALU
- VOTE FOR JOB SECURITY
- AMAZON LABOR UNION
- ALU FOR THE WIN
- VOTE YES! TO KEEP YOUR PHONES

On March 24, Petitioner posted a video depicting several of these images on its TikTok account managed by Spence. On March 24, Petitioner posted on its Instagram account, managed by Daniels, and Daniels posted on his personal Instagram account, the above-quoted pictures of the projections on the front façade of JFK8 with the following post, in relevant part, "Voting begins tomorrow," and "We'd like to give a huge thanks to The Illuminator (NYC-based Political Projection Collective) and everyone else who has supported the labor movement in general and during our union drive the last eleven months!" Spence testified that Smalls coordinated the March 23rd projections with The Illuminator.

2. Board Law

The *Peerless Plywood* rule, applicable to employers and unions alike, forbids election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for an election. Violation of this prohibition is a ground for setting aside the election whenever valid objections are filed. *Peerless Plywood Co*., 107 NLRB 427, 429 (1954). "Such a speech," said the Board in its rationale, "because of its timing, tends to create a mass psychology which overrides arguments made through other campaign media and gives an unfair advantage to the party, whether employer or union, who in this manner obtains the last most telling word."

Where there was no evidence of any speech made to employees at one site within 24 hours of the scheduled polling time for the employees at that site, the election was upheld. *Shop Rite Foods, Inc.*, 195 NLRB 133 (1972);see also *Dixie Drive-It-Yourself System Nashville Co*., 120 NLRB 1608 (1958). The rule does not interfere with the rights of unions and employers to circulate campaign literature on or off the premises at any time prior to an election. See *General Electric Co*., 161 NLRB 618 (1966); *Andel Jewelry Corp.*, 326 NLRB 507 (1998); see also *Virginia Concrete Corp.*, 338 NLRB 1182, 1187 (2003) (analogizing text message sent to drivers in their trucks within 24 hours of election to campaign literature).

Nor does *Peerless Plywood* prohibit the use of any other legitimate campaign propaganda or media. See, e.g., *Conroe Creosoting Co.*, 149 NLRB 1174, 1182 (1964) (rule does not prohibit distribution of propaganda with paychecks immediately before the election); *American Medical Response*, 339 NLRB 23, 23 fn. 1 (2003) (affixing pro-union poster on election day to tree on employer property not visible from polling room did not violate rule); *Capay, Inc. v. NLRB*, __Fed. Appx. __ (unpublished), 2017 WL 5035327 (9th Cir. 2017), enfg. 363 NLRB No. 142 (2016), the court noted that an objection alleging home visits, telephone calls, and electioneering within 24 hours of election did *not* implicate the *Peerless* rule as no captive audience speeches by the union on company time were alleged.

3. Recommendation

Objection 20 essentially asserts that "Petitioner deployed a light projector outside the JFK8 facility that projected mass messaging on the façade of the JFK8 building" "[l]ate at night on March 23, 2022, and through the early morning hours," containing light projections that were "misrepresentations" that "caused confusion about the identity" of the entity projecting the light projections.

First, even if the light projections were "misrepresentations" as alleged at Objection 20, as noted above, misrepresentations do not constitute objectionable conduct warranting setting aside the election. See, e.g. *Midland National Life Insurance Co.*, 263 NLRB 127. Second, contrary to Objection 20's assertion, given the plain meaning of the light projections themselves, there is no record evidence to support that any eligible voter was confused about the identity of the entity projecting the light projections as Petitioner.

Third, to the extent that the Employer is asserting that Petitioner violated the 24-hour *Peerless Plywood* rule, the Employer's Objection 20 itself expressly limits the time period to "[l]ate at night on March 23, 2022, and through the early morning hours" on March 24. The first polling session was scheduled to start at 8:00 a.m. on March 25. Any alleged violation of the 24-hour *Peerless Plywood* rule would be required to have occurred at or after 8:00 a.m. on March 24. There is no record evidence to support that these light projections occurred at 8:00 a.m. or after on March 24.[45] Rather, the record evidence generally reflects that these light projections occurred on between around 8:00 p.m. and 10:00 p.m. on March 23. This timing of the display of the light projections on the façade of JFK8 is corroborated by Petitioner's Instagram post showing the projections on March 24, showing that the projections had to have occurred *on or*

[45] Contrary to the Employer's questioning my motivation behind rejecting the Employer's proffered testimony and exhibit about light projections occurring at approximately 1:00 a.m. on March 25 as it is not sufficiently related to Objection 20, as I indicated on the record, as framed in the Order Directing Hearing on Objections, the time period for Objection 20 is expressly limited to "[l]ate at night on March 23, 2022, and through the early morning hours." As noted repeatedly on the record and herein, I am limited to the timely filed objections before me as set forth in the Order Directing Hearing on Objections and I have no authority to consider evidence not sufficiently related to these objections. See *Labriola Baking Co.*, 361 NLRB 412, 412 (2014).

before March 24. Based on the express time limitation in Objection 20, there is no record evidence to establish a temporal *Peerless Plywood* violation.[46]

Fourth, even if there was evidence to support that there was light projections at 8:00 a.m. or after on March 24 (which there is clearly not based on the express time limitation stated at Objection 20), the record evidence is that there were simply light projections placed on the façade of the Employer's JFK8 building that rotated approximately 30 seconds. There is no record evidence reflecting that there was *any* sound or speech of any kind made with these light projections.[47] Rather, the evidence reflects that each message on the light projections simply rotated every 30 seconds for a total of a maximum of two hours, between approximately 8:00 p.m. and 10:00 p.m. on March 23. Since there is no record evidence of any "speech" made to employees within 24 hours of the scheduled polling time for the employees at that site, there is no record evidence to support a *Peerless Plywood* violation to set aside the election.[48] *Shop Rite Foods, Inc.*, 195 NLRB 133 (1972);see also *Dixie Drive-It-Yourself System Nashville Co*., 120 NLRB 1608 (1958).

Fifth, again, assuming there was record evidence to show that there was some kind of "speech" associated with these light projections and record evidence to show a temporal violation of the 24-hour *Peerless Plywood* rule (which there is not), the record contains no evidence of any "speech" made "on company time" to "massed assemblies of employees." Rather, the evidence reflects it was a rainy night at the Employer's JFK8 building between around 8:00 p.m. and 10:00 p.m. on March 23 and there is no evidence that shows any groups of employees gathered around the light projections in front of the building. Further, there is no record evidence showing any speeches "on company time" as it is undisputed that the light projections occurred on the front façade of the exterior of the building and could not be seen from the interior of the building when at least some employees were likely working "on company time." In sum, there is no record evidence to support that there was any violation of the *Peerless Plywood* rule. Based on the foregoing and the record as a whole, I recommend that Objection 20 be overruled.

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[46] The Employer's assertion that "[t]he fact that the projection occurred within 36 hours of the election, as opposed to 24 hours" blindly ignores what is commonly referred to in Board parlance as the "24-hour *Peerless Plywood* rule," forbidding election speeches on company time to massed assemblies of employees within *24 hours* before the scheduled time for an election. *Peerless Plywood Co*., 107 NLRB 427, 429 (1954).

[47] Because there is no record evidence showing any sound or speech associated with the projections here, the Employer's reliance on *Bro-Tech Corp.,* 330 NLRB 37, 39-40 (1999) is misplaced (holding union's use of sound truck broadcasting pro-union music constituted objectionable conduct).

[48] The Employer's reliance on *Texas v. Johnson,* 491 U.S. 397, 404 to support the proposition that written word has long been considered "speech" also misses the mark as "speech" within the meaning of *Peerless Plywood* is different than "speech" associated with the First Amendment.

R. Objection 22: The Petitioner distributed marijuana to employees in return for their support in the election. The Petitioner's distribution of marijuana was an impermissible grant of benefit and interfered with employees' free choice in the election.

1. Record Evidence

Employee witness Cordova testified that sometime between December 22, 2021 and March 30, at a time he could not specifically identify other than it was still dark and cold outside, he saw the Petitioner set up a table at the Employer's JFK8 property and give away free things. Cordova admitted on cross examination that in November it is also dark and cold outside. Cordova knew it was the Petitioner because the individuals were wearing ALU shirts and he had seen Petitioner President Smalls by the table. Cordova testified that he saw the Petitioner give away free weed on one occasion during the critical period, because he saw a sign that said, "Free Weed and Pizza." Cordova described the sign as a pink board with writing in markers, "Free Weed and Pizza" right next to the Petitioner table. On the one occasion Cordova testified he saw Petitioner giving away free weed during the critical period, Cordova allegedly saw Petitioner supporters Dutchin and T. Martinez, and stipulated Petitioner agents Smalls and Palmer. At the time Cordova saw the Petitioner giving away free weed, Cordova saw between six to ten employees around the Petitioner's table. Cordova did not see any employees take weed, but he knew the Petitioner was giving out free weed because the sign said, "Free Weed and Pizza."[49]

Similarly, employee witness Goriva testified that starting around December 2021, she saw a table set up outside the Employer's JFK8 property, on the left corner to the left of the recruitment office entrance, with a chalkboard sign that said "ALU" and "free" followed by a different thing each day, such as t-shirts and food. According to Goriva, about three or four weeks before the election, she saw Petitioner giving marijuana to employees at the table located in the same location in the left corner outside the Employer's JFK8 building. Goriva said on that occasion, there was a tiny chalkboard that said "ALU" and "free weed" and a table nearby with employees gathered around it. Goriva did not see any marijuana being given from the table because there were employees blocking her view around the table.[50] Goriva did not complain to the Employer about seeing the Petitioner give away free weed.

Employee witness Delancey testified that on two occasions, in January 2022 and in the first week of March 2022, he saw Petitioner give out free items, including weed. Delancey testified that the Petitioner announced themselves as ALU, typically stood at the S40/S90 bus stop at the Employer's JFK8 property during certain times, and say that they are the ALU and are there to represent Amazon workers. According to Delancey, Smalls was present nearby, in a vehicle at the bus stop across from the Employer's JFK8 property, in the first week of March 2022, when he saw the Petitioner hand out free weed. Delancey knew that the Petitioner was

[49] I do not credit Cordova's testimony that because he saw the sign, "Free Weed and Pizza" on one time he could not specifically identify during the critical period and did not see any employees take weed, that Cordova's testimony supports that "Petitioner distributed marijuana to employees in return for their support in the election."

[50] I do not credit Goriva's testimony that because she saw the chalkboard that said, "ALU" and "free weed" about three or four weeks before the election but did not see any marijuana being given to employees, that Goriva's testimony supports that "Petitioner distributed marijuana to employees in return for their support in the election."

handing out weed in January 2022 because one of his coworkers got some of the weed and said it smelled really good and in March 2022, Delancey saw the Petitioner handing out weed at a table by the bus stop and went over to inspect it, to see if the Petitioner was really giving out weed. Delancey took a small glass container from an African American male employee with dreadlocks whom he identified by photo as Dutchin who approached him wearing an ALU shirt, who told Delancey, "we're giving out samples for the ALU." Delancey opened the glass container, smelled the contents, and it smelled like "Gorilla Glue." Delancey took the container and gave it to his ex-wife.

Employee witness Monarrez testified that from around December 22, 2021 through around January 26, the Petitioner gave out free t-shirts and food inside the JFK8 building and free t-shirts and pizza outside of the JFK8 building, and "Chris [Smalls] gave out marijuana to workers in exchange for signatures." Monarrez testified that during that time period, "Chris [Smalls] always had a Ziploc bag full of marijuana with him." According to Monarrez, during that time period she observed Smalls "almost every day" with marijuana "normally in the left corner of the building" "right next to the parking lot" at the Employer's JFK8 property. During that time period, Monarrez worked Monday, Tuesday, Thursday, and Friday and lived in the parking lot at the property. Monarrez specifically testified that she did not observe Smalls with marijuana after around January 26.

Employee witness Rosado testified that in February 2022, on a date she could not recall, on one occasion in the evening, at either around 9:00 p.m. or 3:00 a.m., she saw Petitioner President Smalls give away weed or marijuana to an employee who appeared to be in his 20's that she referred to as a "kid." Rosado testified that she recognized Smalls because a few weeks after this incident, she saw Smalls serve food inside the employee breakroom a the Employer's t JFK8 property.[51] Rosado recalled that she observed this on an unspecified date in February 2022 because it was freezing a raining and a month before she did the "rock team" "being cross-trained in the pick department" and voted in March 2022. According to Rosado, on this one occasion in February 2022, she was smoking a cigarette in a smoke break room located outside of the Employer's JFK8 building and saw Smalls give weed to a "kid" whose name she did not know. Rosado testified that Smalls handed "the kid the green, the weed" and then handed him "a little index card." Rosado testified she did not know what was on the index card but she saw the "kid" sign the index card and give it back to Smalls. Rosado could not verify that the index card was an authorization card.

Employee witness M. Martinez testified that during the month of February 2022, he noticed foldable banquet tables at the corner outside the recruiting office of the Employer's JFK8 building with a banner underneath it offering free weed if employees sign up for the ALU. M. Martinez testified that he saw these folding banquet tables in that location outside the corner of the JFK8 building "for a week and never again" in February 2022, during dates he could not recall. With respect to an estimate of the number of individuals at or near the table during that weeklong timeframe M. Martinez testified he saw these tables, he testified that on one occasion,

[51] I do not credit Rosado's testimony about Smalls giving a "kid" marijuana in exchange for his signature on an index card on an unspecified date in February 2022, as it is unreliable, since there is no evidence to support Rosado's testimony that Smalls ever was permitted to be present inside the JFK8 building to serve food to employees in the employee break room during the critical period.

he saw approximately five individuals nearby the table but could not estimate the number of individuals present at the table on any other occasions during that week.[52] M. Martinez acknowledged that there are CCTV cameras "all over the building" at the property, including at the corner outside of the recruiting office.

Employee witness K. Martinez testified that she saw Petitioner supporters at around 5:50 p.m., at a table by the recruiting office at the end of the JFK8 building during the week prior to the first week of March. K. Martinez testified that she did not look at who was at the table but they were wearing ALU shirts.. K. Martinez saw t-shirts and pizza on the table but no weed or signs up near the table. K. Martinez further testified that on one night, at approximately 5:50 p.m., approximately two weeks before the election, in March 2022, when she was leaving work, she saw Petitioner supporters again, standing outside at a table, with a megaphone saying, "free food, free t-shirts, free weed." K. Martinez knew that it was before the election because she did not see the Petitioner supporters present outside during the election. K. Martinez saw Petitioner supporters at the end of the walkway going towards the garage by the recruiting office at the end of the JFK8 building. With respect to this alleged instance approximately two weeks before the election, K. Martinez admitted that she was not really paying attention to who was at the table but knew that it was Petitioner giving out the free items because all of the individuals present had ALU shirts on and recognized Petitioner supporter T. Martinez as the individual on the megaphone. K. Martinez only saw t-shirts and pizza on the table.[53]

Employee witness Yuddelka Rosario (Rosario) testified that on one occasion, about two weeks before the election, Petitioner offered her free weed. According to Rosario, during her break at around 5:45 p.m., she walked out to the parking lot at the JFK8 building and at the corner outside of the recruiting office, there was a table where Petitioner was giving out free pizza, t-shirts and stuff like that, but they had run out of free pizza and t-shirts. Rosario testified that the approximately five or six individuals were present at the table, and one of those individuals wearing a Petitioner shirt asked her if she signed a card already, referring to a Petitioner authorization card. Rosario said no, and they responded, "if you sign, I give you a little bag," because they were celebrating the legalization of marijuana in New York State. Rosario described the bag as a "little square bag" that was larger than half of the size of her palm. Rosario did not recall the date that marijuana was legalized in New York State, but thought they were celebrating the legalization because the individual told her, "it's legal."

[52] I do not credit M. Martinez's testimony to support that "Petitioner distributed marijuana to employees in return for their support in the election," has he did *not* testify that he personally observed Petitioner distribute marijuana or that he heard Petitioner and/or its agents state that they were giving such marijuana "to employees in return for their support in the election."

[53] I do not credit K. Martinez's testimony to support that "Petitioner distributed marijuana to employees in return for their support in the election," has she did *not* testify that she personally observed Petitioner distribute marijuana or that she heard Petitioner and/or its agents state that they were giving such marijuana "to employees in return for their support in the election."

Rosario replied, "What, weed?" and "I don't use that."[54] Rosario acknowledged that the Employer has CCTV cameras outside of JFK8, including at the corner outside of its recruiting office.

In sum, there is *no* record evidence to support that, during the critical period, the Petitioner and/or its agents distributed marijuana to eligible voters in exchange for voting yes for the Petitioner in the election. To the contrary, Petitioner witnesses Anthony, Spence, Maldonado, Medina, and Mendoza all consistently testified that the Petitioner did *not* give away free weed during the critical period, from December 22, 2021, through March 30. Anthony testified that when the Petitioner did give out free marijuana *before* the critical period, each amount given was "less than an ounce." Spence testified that the Petitioner did *not* give out free weed during the critical period because when it had done so before the critical period, the Petitioner "found that the response from the workers was polarizing" and "wasn't well-received going into the election," so Petitioner stopped giving away free weed during the critical period, as it "wasn't necessary."

Similarly, Smalls specifically testified that the Petitioner gave away free weed "before the critical period," explaining that the "election date is the timeframe of when we stopped out giving free stuff," as "there was no need for us to continue distributing free anything because we already had an election date." Smalls categorically denied that anyone acting on behalf of the Petitioner gave out or offered free marijuana to employees during the critical period: "There was no passing out the weed, to my knowledge, during the critical period." Smalls denied that he or "anyone" gave out 'Gorilla Glue" marijuana during the critical period and stated that he does not know "what Gorilla Glue marijuana is."

2. Board Law

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

[54] I do not credit Rosario's testimony that "they" gave away free marijuana about two weeks before the election. First, Rosario did not explain that by "they," she meant Petitioner and/or Petitioner's agents. Second, I take administrative notice that the Marihuana Regulation and Taxation Act (MRTA) was signed into law on March 31, 2021, legalizing adult-use cannabis (also known as marijuana or recreational marijuana). See, e.g. https://cannabis.ny.gov/adult-use-information. Pursuant to the MRTA, adults 21 years or older can possess or "share" with an adult 21 years or older up to 3 ounces of cannabis "without compensation." *Id.*; See also NY Penal Law § 222.05(1)(b). Third, I do not credit Rosario's testimony that "they" told her "if you sign, I give you a little bag," to "get a signature no matter what" to establish that Petitioner gave away free marijuana to employees about two weeks before the election, as the record generally reflects that Petitioner stopped collecting authorization cards as of approximately January 26.

critical period. *Mailing Servs., Inc.*, 293 NLRB 565, 565 (1989) (Board holds union is "barred in the critical period…from conferring on potential voters a financial benefit.")

Gifts may not be given to employees as an inducement to secure employee support of a Board election. *General Cable Corp*., 170 NLRB 1682 (1968). The Board applies the same standard for determining whether benefits or gifts amount to objectionable conduct:

> To determine whether granting the benefit would tend unlawfully to influence the outcome of the election, we examine a number of factors, including: (1) the size of the benefit conferred in relation to the stated purpose for granting it; (2) the number of employees receiving it; (3) how employees reasonably would view the purpose of the benefit; and (4) the timing of the benefit. In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits granted during the critical period are coercive. It has, however, permitted the employer to rebut the inference by coming forward with an explanation, other than the pending election, for the timing of the grant of announcement of such benefits.

B & D Plastics, 302 NLRB 245, 245 (1991) (citing *Speco Corp.*, 298 NLRB 439, 439 fn. 2 (1990); *United Airlines Services Corp.*, 290 NLRB 954 (1988); *May Department Stores Co.*, 191 NLRB 928 (1971)). This test is objective. *Gulf States Canners, Inc.*, 242 NLRB 1326, 1327 (1979), enfd. 634 F.2d 215 (5th Cir. 1981), cert. denied 452 U.S. 906 (1981).

If a gift's value is so minimal that it would not reasonably interfere with free choice, the Board will not find the gift objectionable. *Go Ahead North America, LLC*, 357 NLRB 77, 78 fn. 6 (2011). Generally speaking, gifts of minimal value include items such as buttons, stickers, t-shirts, and similar types of campaign propaganda. See *R. L. White Co.*, 262 NLRB 575, 576 (1982); see also *Nu Skin International, Inc.*, 307 NLRB 223 (1992) (t-shirts not objectionable); *Jacqueline Cochran, Inc.*, 177 NLRB 837 (1969) (union giveaway of turkeys not objectionable). Provision of free food and drink, even on election day, is not necessarily objectionable. See *Lach-Simkins Dental Laboratories*, 186 NLRB 671, 672 (1970) (union-provided sandwiches and soft drinks).

Absent special circumstances, campaign parties are legitimate campaign devices. *L. M. Berry & Co.*, 266 NLRB 47, 51 (1983) (Christmas party held 8 days before election at which union was not mentioned found lawful). Thus, a union or employer party providing free food and drink to employees is not, by itself, reason to set aside an election. *Chicagoland Television News, Inc.*, 328 NLRB 367 (1999). But the Board "will examine whether particular events constitute or involve benefits sufficiently large to interfere with laboratory conditions for a fair election, which can result in setting aside the election." *Bernalillo Academy*, 361 NLRB No. 127, slip op. at 2 (2014). Thus, in determining whether the objecting party has established "special circumstances," the Board will apply the test set forth in *B & D Plastics*, 302 NLRB 245 (1991). See also *Atlantic Limousine*, 331 NLRB 1025, 1029–1030 (2000).

3. Recommendation

Objection 22 alleges specifically that "Petitioner distributed marijuana to employees in return for their support in the election," constituting "an impermissible grant of benefit" that "interfered with employees' free choice in the election." Petitioner does not dispute that it gave away small amounts of marijuana to employees *before* the critical period began on December 22, 2021, but that fact is *not* relevant to Objection 22. What *is* relevant is whether or not Petitioner gave away marijuana to eligible voters *during* the critical period between December 22, 2021, and March 30 *and* specifically, whether free marijuana given to eligible voters was "an impermissible grant of benefit" given to eligible voters "in return for their support in the election."

First, with respect to the *timing* of the Petitioner giving away free marijuana to eligible voters, I credit the consistent testimony from Petitioner witnesses Spence, Smalls, Anthony, and Medina that Petitioner did not give away free marijuana *during* the critical period. Specifically, I credit Spence's testimony that the Petitioner decided no longer to give away free marijuana during the critical period because it was polarizing and was not well received by some eligible voters. Such difference of opinion regarding the Petitioner giving away free marijuana is evident in the record. Some employees testified that they did not think it was right for the Petitioner to give away free marijuana because they did not use marijuana and/or generally that they viewed the Petitioner giving away free marijuana differently than the Petitioner giving away other items of *de minimis* value such as free food, t-shirts, buttons, or lanyards.

Further, I credit Petitioner supporter Medina's testimony that when the Petitioner gave away marijuana, it prompted a great deal of discussion among employees, and she was unaware of any such discussions among employees during the critical period. I also note that the record evidence reflects that there are CCTV cameras present on the exterior of the Employer's JFK8 building that face the corner outside of the recruitment office at the building, and the Employer did not present or proffer any CCTV video footage to establish that the Petitioner gave away free marijuana to its employees at any time during the critical period.

"As a general rule, the period during which the Board will consider conduct as objectionable is the period between the filing of the petition and the date of the election." *Dolgencorp, LLC v. NLRB* 950 F.3d 540, 545 (8th Cir. 2020) (citing *Cedars-Sinai Med. Ct. & Cal. Nurses Assoc.*, 342 NLRB 596, 598 n. 13 (2004)). The Board "will not consider instances of prepetition conduct as a basis upon which to set aside an election," *Ashland Facility Operations, LLC v. NLRB*, 701 F.3d 983, 993 (4th Cir. 2012), citing *Dresser Indus. Inc.,* 242 NLRB 74, 74 (1979), and events occurring prior to the filing of the petition are assumed not to affect the outcome of an election. *NLRB v. Blades Mfg. Corp.*, 344 F.2d 998 (8th Cir. 1965). For example, in *Werthan Packaging, Inc. v. NLRB*, 64 Fed.Appx. 476 (6th Cir. 2003), the Sixth Circuit held that a union's giving, before the critical period, of jackets, football tickets, pizza, and beer to employees at a facility it was attempting to organize "were of no moment because they did not occur during the critical period." *Id*. at 486. Based on this consistent, credited testimony from Petitioner witnesses confirming that the Petitioner did *not* give away marijuana to eligible voters during the critical period, I find that the Employer has not met its burden of proof to establish that the Petitioner distributed marijuana to employees *during* the critical period.

Second, even if the Employer had established that the Petitioner gave away marijuana to employees *during* the critical period, it failed to establish that the Petitioner gave away marijuana to employees "in return for their support in the election," as an "impermissible grant of benefit" that "interfered with employees' free choice in the election." "A union cannot make, or promise to make, a gift of tangible economic value as an inducement to win support in a representation election." *Jam Productions, Ltd.*, 371 NLRB No. 26, sl. op. 9 (2021). But "[n]ot every grant during an election campaign requires a '*per se* finding' of objectionable conduct." *Id*. To determine whether a grant is objectionable, the Board applies an objective standard, and determines whether "the donor's conduct would reasonably have a 'tendency to influence' the outcome of the election." *Id*., *citing Gulf States Canners, Inc.*, 242 NLRB 1326, 1327 (1979). To evaluate whether a gift would have a tendency to influence the outcome of the election, the Board examines a number of factors, including: "1) the size of the benefit conferred in relation to the stated purpose for granting it; 2) the number of employees receiving it; 3) how employees reasonably would view the purpose of the benefit; and 4) the timing of the benefit." *B&D Plastics, Inc.*, 302 NLRB 245, 245 (1991) (*B&D Plastics*).

Evaluating these *B&D Plastics* factors based on the record evidence, the first factor is the size of the benefit in relation to the stated purpose for granting the benefit. With respect to the "size of the benefit," other than Anthony's testimony about the Petitioner giving "less than an ounce" of marijuana to employees *before* the critical period, the record does not specify the *amount* of marijuana that the Petitioner allegedly gave to employees during the critical period, other than to describe the free marijuana being given inside "a little bag" or "a small glass container." There is also no record evidence to establish the *economic value* of the marijuana that the Petitioner allegedly gave to eligible voters during the critical period, to determine if the free marijuana was of *de minimis* value akin to the Petitioner giving away free t-shirts, lanyards, buttons, or food, or if the free marijuana somehow had a larger intrinsic value to employees. See, e.g. *See R. L. White Co.*, 262 NLRB 575, 576 (1982); *Chicagoland Television News, Inc.*, 328 NLRB 367 (2000); and *Jacqueline Cochran, Inc.*, 177 NLRB 837, 839 (1969).

As for the stated purpose for the Petitioner allegedly giving employees free marijuana during the critical period, employee witness Monarrez testified that from around December 22, 2021, through around January 26, "Chris [Smalls] gave out marijuana to workers in exchange for signatures." Monarrez testified that during that time period, she observed Smalls "almost every day" with marijuana "normally in the left corner of the building" "right next to the parking lot" at the Employer's JFK8 building. Monarrez specifically testified that she did *not* observe Smalls with marijuana after around January 26. However, Monarrez's testimony does not establish the size of the benefit of marijuana given "in exchange for signatures," nor does it establish that "Petitioner distributed marijuana to employees in return for their support in the election" as Objection 22 contends. To be clear, there is *no* record evidence to support that the Petitioner and/or its agents distributed marijuana to eligible voters in exchange for voting yes for the Petitioner in the election.

Likewise, employee Delancey testified that around the first week of March 2022, he observed Smalls present at the Petitioner's table outside the Employer's JFK8 building and

received free marijuana in a "small glass container" from Petitioner supporter Dutchin.[55] According to Delancey, when Petitioner supporter Dutchin gave him the free marijuana, Dutchin said, "we're giving out samples for the ALU." Taking Delancey's testimony at face value, there is insufficient record evidence to establish that Dutchin was acting as an agent of the Petitioner when it gave Delancey the free marijuana. Further, even if there was sufficient record evidence to establish that Dutchin was an agent under Section 2(13) of the Act when he gave Delancey the free marijuana, perhaps by relying on Delancey's testimony that Dutchin's actions were somehow ratified or condoned by Petitioner by Smalls' alleged presence nearby, in a vehicle at the bus stop across from JFK8, at the time Delancey took the free marijuana from Dutchin, Dutchin merely told Delancey that he was "giving out samples for the ALU." Dutchin's alleged statement does not expressly or even impliedly establish a *quid quo pro* that Dutchin was giving Delancey the free marijuana *in exchange for* Delancey agreeing to support the Petitioner or vote yes for the Petitioner in the election.

Similarly, for reasons specified above, I do not credit the testimony from employees Rosario or Rosado that during the critical period, the Petitioner allegedly distributed marijuana to employees in exchange for getting signatures in support of the election. Even if Rosario's and Rosado's testimony were credited, their testimony does *not* establish that the Petitioner's alleged distribution of marijuana to employees was "in return for their support in the election." To the contrary, *at most* (if credited, which it is not), their testimony establishes that the Petitioner gave eligible voters free marijuana in exchange for signing the Petitioner's authorization cards, *not* in exchange for voting yes in the election.

With respect to the second *B&D Plastics* factor, the record does *not* specify the number of employees that allegedly received free marijuana from the Petitioner during the critical period. The number of employees receiving a benefit must be sufficient to affect the results of the election. *Owens-Illinois, Inc*., 271 NLRB 1235, 1235 (1984) ("While only five or six employees received jackets before voting, the vote tally and our disposition of the challenged ballots show that five or six votes could have determined the election's results."); see also *Gulf States Canners*, 242 NLRB at 1326 (examining whether union's purchase of gas for two employees who accepted its offer to pay for gas to attend union meeting was objectionable where vote tally was 20 to 16 in favor of the union); *Revco D.S., Inc. v. NLRB*, 830 F.2d 70 (6th Cir. 1987) (finding union's offer to pay anti-union employee $100 to vote for the union objectionable because election was decided by one vote). Since the record evidence does *not* establish the number of employees that allegedly received free marijuana from Petitioner during the critical period, the record is insufficient to show that the number of employees receiving marijuana during the critical period is sufficient to affect the 523 vote margin in favor of the Petitioner, approximately 10.8% of the valid votes cast.

As for the third *B&D Plastics* factor, how employees reasonably would view the Petitioner allegedly giving employees free marijuana during the critical period, there is *no* record evidence to establish that *any* eligible voters reasonably viewed receiving free marijuana from the Petitioner "in return for their support in the election." As stated above, *at most*, employees

[55] Petitioner supporter Dutchin is not a stipulated agent of Petitioner. The Employer did not present Dutchin as a witness and there is insufficient record evidence to establish that Dutchin is an agent of Petitioner under Section 2(13) of the Act.

testified that the Petitioner gave away marijuana in exchange for signatures in support of Petitioner, not in return for votes in support of the Petitioner at the election.

Finally, the fourth *B&D Plastics* factor is the timing of the benefit. Here, of the three witnesses who testified based on their own firsthand observations of the Petitioner actually offering and/or giving employees free marijuana, Monarrez testified she observed this occur between December 22, 2021, and January 26; Delancey testified he received free marijuana around the first week of March 2022; and Rosado testified she was offered free marijuana about two weeks before the election.

The Board is more inclined to find gifts objectionable the closer to the election they are given. For example, in *Gulf States Canners*, the Board weighed the fact that the purchase of gas for the two employees took place several weeks before the election against finding the conduct objectionable. 242 NLRB at 1328. In *Jacqueline Cochran*, the Board weighed the fact that the election was held 25 days after the provision of free turkeys to employees against finding the union's conduct objectionable. 177 NLRB at 839. In contrast, in *Owens-Illinois*, the Board found objectionable the union's distribution of jackets on election day, between voting sessions. 271 NLRB at 1235; *see also NLRB v. Labor Servs., Inc.*, 721 F.2d 13 (1st Cir. 1983) (finding objectionable the union's purchase of free drinks on election day, between voting session), *adopted by* 274 NLRB 479 (1985). Thus, "little" or "small" amounts of marijuana, allegedly provided to an unspecified number of employees between approximately two months to two weeks before the election, does *not* establish that employees would reasonably view this free marijuana as "in return for their support in the election."

Based on the foregoing and the record as a whole, I recommend that Objection 22 be overruled.[56]

VI. CONCLUSION

I recommend that the Employer's objections be overruled in their entirety. With respect to objections 1 – 12 alleging misconduct by Region 29, the Employer has failed to meet the *Polymers* standard and therefore has not provided evidence that raises a reasonable doubt as to the fairness and validity of the election. With respect to objections 13-18 and 20-25 alleging misconduct by the Petitioner, the Employer has failed to establish that its objections to the election held on March 25, 26, 28, 29, and 30 reasonably tended to interfere with employee free choice. As there is insufficient evidence to set aside the election, I recommend that an appropriate certification issue.

[56] I reject the Employer's argument as irrelevant to any of the objections before me, including Objection 22, that "the Board should not, as a federal agency and regulator, condone the distribution of an illegal narcotic under the CSA [Controlled Substances Act] as a legitimate method of obtaining support for a labor organization." 21 U.S.C. § 801(2); 21 U.S.C. § 841(a)(1); 21 U.S.C. § 844(a); 21 U.S.C. § 812; 21 C.F.R. § 1308.11. *See e.g., Stand Up for California!*, 959 F.3d at 1165 (citing *Epic Sys. Corp. v. Lewis*, 138 S. Ct. at 1624) (noting "[w]e will not presume that Congress would enact a statute that requires a federal agency to violate federal law."). As noted above, the credited record evidence reflects that Petitioner did not give away free marijuana to employees during the critical period, therefore this argument has no bearing on any of the objections before me, including Objection 22, as set forth in the Order Directing Hearing on Objections.

VII. APPEAL PROCEDURE

Pursuant to Section 102.69(c)(1)(iii) of the Board's Rules and Regulations, any party may file exceptions to this Report, with a supporting brief if desired, with the Regional Director of Region 28 by **September 16, 2022**. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Pursuant to Section 102.5 of the Board's Rules and Regulations, exceptions must be filed by electronically submitting (E-Filing) through the Agency's website (www.nlrb.gov), unless the party filing exceptions does not have access to the means for filing electronically or filing electronically would impose an undue burden. Exceptions filed by means other than E-Filing must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Section 102.5(e) of the Board's Rules do not permit a request for review to be filed by facsimile transmission.

Pursuant to Sections 102.111 – 102.114 of the Board's Rules, exceptions and any supporting brief must be received by the Regional Director by close of business of 4:45 p.m. (local time) on the due date. If filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date.

Within 5 business days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Dated at Phoenix, Arizona, on the 1st day of September 2022.

/s/ Lisa J. Dunn

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