

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
TWENTY-SEVENTH REGION**

DILLON COMPANIES D/B/A CITY MARKET, INC.

Employer

and

CHAD A. KING

Case No. 27-RD-086033

Petitioner

and

UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL 7,

Union

ERRATUM

On November 9, 2012, a Supplemental Decision on Objections and Notice of Hearing (Supplemental Decision) issued in the above-cited case. Certain corrections are made as follows:

- On page 10, the last sentence was not complete and should state: “Specifically, the Employer offers witnesses who will testify that they would lose their jobs and be outcasts if they did not vote for the Union...”;
- On page 15, the second part of footnote 13 inadvertently lists the wrong date of October 22 and should state: “The Employer also asserts that Witness 2 from its untimely October 24 supplemental position statement...”;
- On page 21, in the first full paragraph, third sentence, the word “not” was inadvertently omitted and should state: “Moreover, the hearsay testimony offered by Witness G does not specify any Union conduct...” and
- Finally, the issuance date of the Supplemental Decision erroneously listed the issuance as occurring in October and is now corrected to state: “ISSUED at Denver, Colorado this 9th day of November, 2012.”

Attached hereto is a corrected copy of the Supplemental Decision.

DATED at Denver, Colorado this 13th day of November, 2012.

/s/ Wanda Pate Jones

Wanda Pate Jones
Regional Director
National Labor Relations Board
Region 27
600 17th Street, 700 North Tower
Denver, CO 80202

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**SUPPLEMENTAL DECISION ON OBJECTIONS
AND NOTICE OF HEARING (Corrected)**

Based on a petition filed on July 25, 2012,¹ and pursuant to a Decision and Direction of Election dated September 11, an election by secret ballot was conducted on October 6 for the following unit of employees (Unit):

Included: All food clerks in the grocery and produce departments, bakery clerks, including part-time employees who work regularly one day or more at the Employer's retail stores located in Steamboat Springs, Colorado.

Excluded: All store managers, one assistant store manager, department managers, second assistant manager, management trainees, production bakers and finishers, office and clerical employees, janitors, meat department employees, delicatessen department employees, hostesses, demonstrators, watchmen, guards, parking lot attendants, wholesale branch employees, pharmacists, professional

¹ All dates hereinafter refer to calendar year 2012, unless otherwise specified.

employees, and supervisors as defined in the National Labor Relations Act, as amended.

The results of the election as disclosed by the tally of ballots served upon the parties after the ballot count on October 6 were as follows:

Approximate number of eligible voters.....	72
Number of void ballots.....	0
Number of votes cast for Union	34
Number of votes cast against participating labor organization.....	31
Number of valid votes counted.....	65
Number of challenged ballots.....	0
Number of valid votes counted plus challenged ballots.....	65

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

On October 15, the Employer filed timely objections to conduct affecting the results of the election, a copy of which was served on the Union and the Petitioner. A copy of the Employer’s objections is attached hereto.

Pursuant to Section 102.69 of the Board’s Rules and Regulations, the undersigned has caused an administrative investigation of the objections to be made during which the parties were afforded an opportunity to submit evidence bearing on the issues and having considered the results thereof, reports as follows.

TIMELY FILED EVIDENCE IN SUPPORT OF OBJECTIONS

In support of its objections, the Employer submitted evidence on October 22, the date on which such evidence was due. The Employer electronically submitted a position statement identifying eight witnesses (herein referred to as Witnesses A, B, C, D, E, F, G, and H), and generally describing the testimony that each would provide regarding the objections. The Employer’s October 22 position statement also briefly describes two CDs containing several hours of security video, recorded on the day of the election, which covered the parking lot and

sidewalk outside the Employer's store where the election was conducted. The Employer also identified the Union agents and employees purportedly shown in the security video.²

LATE FILED EVIDENCE AND OBJECTIONS

On October 24, the Employer electronically submitted a supplemental position statement naming three additional witnesses (hereinafter referred to as Witnesses 1, 2, and 3), and generally describing the testimony that each would provide.

An objecting party must furnish evidence within 7 days of filing objections. This deadline may be extended by the Regional Director, but otherwise, it is strictly enforced. *StarVideo Entertainment L.P.*, 290 NLRB 1010 (1988); *Public Storage*, 295 NLRB 1034 (1989) (Board overruled Regional Director's decision to accept late filed evidence). Evidence mailed to the Regional Office before the due date is considered timely filed. "In construing this section of the rules, the Board will accept as timely filed any document which is hand delivered to the Board on or before the official closing time of the receiving office on the due date or postmarked on the day before (or earlier than) the due date; documents which are postmarked on or after the due date are untimely." Board's Rules and Regulations Sec. 102.111(b); *Bi-Lo Foods*, 315 NLRB 695 (1994) (where evidence was placed in the mail the day before the due date the evidence was timely); *Goody's Family Clothing*, 308 NLRB 181 (1992) (where evidence was placed in the mail on the due date the evidence was untimely).

The deadline for the Employer to submit evidence in support of its objections was October 22, 2012. The Employer's supplemental position statement that was submitted electronically on October 24 is untimely. The Employer at no time asked for an extension to file evidence past the October 22 deadline. In *Burns International Security Services, Inc.*, 256 NLRB 959 (1981), the Board stated that: "The objecting party may bring to the Regional Director's attention any newly-discovered evidence that bears directly on the timely objections, for such evidence is more apt to aid than encumber him." *Id.* at 960. In that case the Board also stated that "since consideration of such matters might enlarge the scope and delay the conclusion of the investigation, they normally should be considered only upon presentation of clear and

² In response to the Region's request, the Employer identified the particular objections to which each of these witnesses' testimony purportedly relates.

convincing proof that they are not only newly discovered, but also, previously unavailable.” *Id.* The Board held that this limitation is necessary “in order to discourage both the piecemeal submission of evidence and the leisurely continuation of private investigations while the investigation should be under the control of the Regional Director.” *Id.*

Here, the Employer has not offered any explanation as to *why* the evidence proffered in its October 24 supplemental position statement was newly discovered and previously unavailable. The Employer only makes the assertion that the evidence was not discovered before the October 22 deadline. This assertion is insufficient and, therefore, the evidence will not be considered in support of the Employer’s objections. Moreover, although the Employer claims that the witness testimony described in its October 24 supplemental position statement relates to its timely filed objections, it does not. *See Id.* at 960. This additional reason for rejecting the late evidence is discussed in more detail below with regards to each particular objection that the Employer asserts is supported by the late evidence.

To the extent that any part of its October 24 supplemental position statement, naming additional witnesses and describing their predicted testimony, contains entirely new objections, these objections are untimely. The deadline for raising objections was October 15. The Regional Director is not authorized by the Board’s Rules and Regulations to extend the time for filing objections. *John I. Haas, Inc.*, 301 NLRB 300 (1991). Parties may not amend their objections or file further objections after the 7-day filing period. *Rhone-Poulenc, Inc.*, 271 NLRB 1008 (1984). For this reason, as discussed *infra*, to the extent the October 24 supplemental position statement contains new objections in addition to new evidence, the evidence identified in the Employer’s October 24 submission is rejected.

FIRST OBJECTION (PARAGRAPH 3)³

The Employer’s first objection is found in paragraph three of its October 15 submission and states:

On or about October 5, 2012 and October 6, 2012, or any date immediately preceding the election, the Union by and through its agents and representatives

³ The Employer’s timely objections submitted on October 15 are contained in numbered paragraphs. Paragraphs one and two of the submission contain information about the date and times of the election and the tally of ballots. The Employer has confirmed that these paragraphs do not contain any allegations of objectionable conduct. The Employer’s objections start in paragraph three and continue through paragraph ten.

engaged in unlawful electioneering. The Union representatives approached employees, engaged in conversations with the employees, and coerced employees by providing free food and drinks prior to voting. Atlantic Limousine, Inc., 331 NLRB 1025, 1029-1039 (2000) (holding that B & D Plastics, Inc., 302 NLRB 245 (1991), provides the test for "campaign devices as providing free food, drink. . ."); B & D Plastics, Inc., 302 NLRB 245, 245 (1991) (holding that "benefits granted during the critical period are coercive."). Specifically, several Union agents and representatives congregated at the in-store Starbucks during the week of the election, engaged in conversations with the employees and bought employees drinks and food. On the day of the election, Union representatives and agents entered the Employer's premises prior to the election, congregated in the Starbucks and engaged in numerous conversations with employees while buying the employees food and drinks. Several Union representatives and agents remained on the Employer's premises throughout the election, and conversed with employees as the employees were heading to vote. Milchem, Inc., 170 NLRB 362, 362 (1968) ("The final minutes before an employee casts his vote should be his own, as free from interference as possible. Furthermore, the standard here applied [no electioneering during the voting period] insures that no party gains a last minute advantage over the other, and at the same time deprives neither party of any important access to the ear of the voter."). Likewise, Union representatives and agents congregated in the Employer's parking lot to threaten and coerce employees into voting for the Union as the employees arrived at the Employer's premises to vote. Star Expansion Indus. Corp., 170 NLRB 364, 365 (1968) (setting aside the election because a business agent engaged in electioneering by talking to employees prior to voting).

This objection appears to raise the following three issues with the Union's alleged conduct: (1) Union agents congregating at the in-store Starbucks and buying employees food and drinks during the week leading up to, and just before, the election; (2) Union agents remaining on the store premises throughout the election and conversing with employees who were heading to vote; and (3) Union agents congregating in the store parking lot to "threaten and coerce employees" into voting for the Union as they arrived at the premises to vote.

The election in this matter was conducted on Saturday, October 6, in the Employee Lounge at the Employer's store, during three polling periods from 7:00 a.m. to 8:00 a.m., 12:00 p.m. to 1:00 p.m., and 5:00 p.m. to 6:00 p.m. The preelection conference with the parties was scheduled for October 6, at 6:30 a.m., and was also held in the Employee Lounge.

In support of this objection, the Employer offers that several witnesses discussed in its timely October 22 position statement will testify regarding the Union's conduct before and on the day of the election. According to the Employer, Witness A will testify, among other things, that prior to the election the witness was "approached and confronted by Union representatives while at the store on [the witness's] days off and became irritated by this coercive behavior."⁴ The Employer offers that Witness C will testify that "as [the witness] was preparing to vote, [the witness] was confronted by a Union steward." After voting, the witness walked out of the store and Union Director Lorenzo Sanchez thanked the witness for "practicing my rights."⁵ The Employer offers that Witness D will testify that "[a]bout a week prior to the election, Union representatives started to congregate at the Starbucks, meeting with employees and buying them drinks." Witness D will also testify that on the day of the election, Union representatives engaged in electioneering at the in-store Starbucks by "buying drinks for employees and the wife of one of the employees." Additionally, Witness D will testify that Union representatives were at the Starbucks and spoke to employees "as the employees prepared to vote."⁶

The Employer also identified Witness E who would purportedly testify that "[the witness] was pressured into talking to Union representatives prior to the election."⁷ According to the Employer, another witness, Witness G, would testify that "an agent of the Union stated that 'whoever votes against the Union will have to answer to me.'" This witness would also testify that "a West African employee told [the witness] that he felt intimidated, threatened and feared the Union's response if the Union lost the election." Finally, Witness G purportedly saw Union representatives "confront West African employees as they walked to the nearby Wal-Mart."⁸

⁴ This and other portions of Witness A's proffered testimony are also considered in support of the Employer's Second, Third, Fifth, and Seventh Objections.

⁵ This testimony will also be considered in support of the Employer's Seventh Objection.

⁶ Other portions of Witness D's predicted testimony will be considered in support of the Employer's Eighth Objection.

⁷ This and other portions of Witness E's described testimony are considered in support of the Employer's Third, Fourth, Fifth, and Seventh Objections.

⁸ The Employer did not offer how Witness G's proffered testimony relates to its First Objection, and the testimony appears to relate more closely to the Employer's Fourth and Sixth Objection, for which it will be considered. However, the proffered testimony is still noted in support of this First Objection.

Finally, the Employer asserts that Witness H will testify in support of this objection about being “approached on numerous occasions prior to the election and told, *inter alia*, that [the witness] could lose [the witness’s] job if [the witness] did not vote for the Union.” According to the Employer, in response to these threatening statements, Witness H suffered anxiety on the day of the election.^{9 10}

Issue 1 – The Union Purchasing Food and Drinks

With regards to the first issue raised in the First Objection – the issue of the Union allegedly buying employees food and drinks in the week before the election and on the day of the election – the Union contends that on occasion a meal was purchased and Union offered refreshments to employees. It also asserts that on the day of the election, prior to the election, three Union representatives went to the in-store Starbucks to wait for the Board Agent conducting the election to arrive. The Union denies that such conduct interfered with the election.

After considering the Employer’s evidence and Union’s position in regards to this portion of the First Objection, the undersigned concludes that this portion of the objection and the raises substantial and material questions of fact regarding the Union providing food and drinks to employees leading up to the election, which can best be resolved by a hearing.

⁹ This testimony will also be considered in support of the Employer’s Second, Fourth, Fifth, Seventh, and Eighth Objections, for which it was proffered.

¹⁰ The Employer also offers that two of the witnesses named in its untimely October 24 supplemental position statement would testify in regards to this objection. The Employer asserts that Witness 2 would testify that the Union’s Secretary-Treasurer promised the witness “that if [the witness] changed [the witness’s] his mind and voted for the Union, the Union would offer [the witness] paid time off so that [the witness] could see ‘how things really worked.’” There is nothing in the description of this testimony to link the predicted testimony to any of the Union’s alleged conduct described in the Employer’s First Objection, namely, providing food and drinks to employees, conversing with employees as they prepared to vote, or threatening and coercing employees in the parking lot as they arrived on the premises to vote. Nor does the evidence relate to any other objection. For this additional reason, the evidence is rejected.

The Employer also offers that Witness 3, named in its untimely submission, would testify that the witness was “intimidated by the Union and voted with fear.” This proffered testimony does not describe any Union conduct. It merely describes the employee’s subjective feelings about the Union without even describing the basis for those feelings. There is no tenable connection between this testimony and the Employer’s First Objection. Moreover, the witness’s testimony, even if true, would not establish any objectionable conduct. For these additional reasons, the evidence is rejected.

Issue 2 – The Union Approaching Employees Preparing to Vote

With regards to the second issue raised by the Employer’s First Objection – the issue of Union agents conversing with employees as they “headed to vote” – the Union asserts that Union stewards, who are paid by the Employer to do regular unit work, and who are not paid by the Union, are not *per se* Union agents. The Union also denies that Union agents engaged in electioneering at the polling place.

With respect to this portion of the Employer’s First Objection, concerning approaching employees as they were preparing to vote, the undersigned concludes that this portion of the objection raises substantial and material questions of fact regarding electioneering, which can best be resolved by a hearing.

Issue 3 – The Union Approaching Employees In the Parking Lot

Finally, regarding the third issue raised by the Employer’s First Objection – the issue of the Union congregating in the parking lot to threaten and coerce employees as they arrived on the premises – the Union asserts that a Union steward greeted several employees in the parking of the store as they came to work. For the reasons set forth below, the Employer’s evidence in support of issue 3 of its first objection does not raise substantial and material questions of fact to warrant a hearing.

A hearing should not be held regarding this issue unless the Employer “has established that it could produce at a hearing evidence that, if credited, would warrant setting aside the election.” *Transcare New York, Inc.*, 355 NLRB No. 56, 2 (2010). “Presence [of a union representative in the vicinity of the polls] alone, in the absence of evidence of coercion or other objectionable conduct, is insufficient to warrant setting aside an election.” *C & G Heating and Air Conditioning, Inc.*, 356 NLRB No. 133, 2 (2011) (quoting *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 121 (6th Cir. 1974), *cert. denied* 416 U.S. 986 (1974)); *Houston Shell and Concrete Division, McDonough Co.*, 118 NLRB 1511, 1515-1516 (1957);

The Employer asserts that Witness C will testify that *after* voting, the witness walked out of the store and Union Director, Lorenzo Sanchez, “approached [the witness], gave [the witness] his card, and thanked [the witness] for ‘practicing my rights.’” Here, not only did the Union’s

alleged conduct take place after the witness apparently voted, rather than as the witness arrived to vote, but the Union agent's statement itself would not reasonably tend to interfere with an employee's free choice. Even if credited, the witness would testify that the Union agent merely thanked the witness and did not say anything objectively threatening or coercive.

The Employer did not offer any other witnesses to testify directly about being approached in the Employer's parking lot as they arrived on the premises to vote. The Employer did offer another witness, Witness A, to testify with regards to this objection that prior to the election the witness was approached and confronted by Union representatives on the witness's days off and that the witness was "irritated." There is nothing in this witness's proffered testimony linking the alleged Union conduct of approaching and confronting the witness to the day of the election or to the Employer's parking lot, i.e., as the witness was arriving on the premises to vote. Even if the Union had attempted to speak to the witness at such a time and location, there is nothing in the description of the witness' testimony to indicate threats or coercion. According to the Employer, Witness E will testify about being pressured to talk to the Union and Witness H will testify about being approached by the Union on numerous occasions and threatened with job loss. However, the Employer has not described any facts linking these witnesses' proffered testimony about the Union's conduct to taking place in the parking lot on the day of the election. By the same token, nothing in the Employer's description of Witness G's testimony links that testimony to Union conduct on the day of the election in the parking lot.

The Employer's evidence is insufficient to sustain this portion of this objection regarding the Union congregating in the parking lot and approaching employees arriving on the premises to vote in order to threaten and coerce them. While the witness testimony offered in this regard suggests that there was at least one Union agent in the parking lot on the day of the election, one of whom spoke to an employee after that employee voted, that evidence does not establish any threatening, coercive, or other objectionable conduct committed by the Union as employees arrived to vote. Moreover, while the Board enunciated a rule in *Milchem, Inc.*, 170 NLRB 362 (1968) that it is objectionable for parties to engage in prolonged conversations with voters waiting to cast ballots, nothing in the description of the evidence in support of this portion of the objections indicates that occurred. Insofar as the Employer's proffered evidence suggests that the Union made threats at other times and locations, that evidence is considered in support of the Employer's Second Objection, which alleges particular threats and to which the evidence also

relates. Additionally, to the extent that the Employer has proffered evidence of other Union conduct in the parking lot, such as list-keeping, that evidence is considered with regards to the Employer's Seventh Objection, which specifically alleges that the Union kept a prohibited list of voters while stationed in the parking lot. But here, with regards to the First Objection, the Employer has not proffered sufficient evidence to show that the Union threatened and coerced employees as they arrived on the premises to vote. Thus, it cannot be found that the Union's action of merely being in the Employer's parking and speaking to one employee after voting is objectionable. Accordingly, the third portion of the First Objection is overruled.

SECOND OBJECTION (PARAGRAPH 4)

The Employer's second objection is found in paragraph four, which asserts:

On or about October 5, 2012 and October 6, 2012, or any date immediately preceding the election, the Union by and through its agents and representatives made threats and coerced the employees, which "inhibit[ed] the free choice of the voters." Claussen Baking Co., 134 NLRB 111, 112 (1961). Specifically, the Union threatened to retaliate against those who did not vote for the Union by causing the loss of their jobs, ruining their lives, and being "outcasted." The Union also threatened the employees by informing them that they would have to answer to the Union after the election. United Broad. Co. of NY, 248 NLRB 403, 403-404 (1980) (directing a second election where the Union threatened and coerced employees by stating that the union would retaliate against the employees and blacklist them).

This objection raises issues with the Union allegedly making various threats to employees.

In support of this objection, the Employer offers that witnesses from its timely October 22 position statement will testify regarding the Union's conduct. Specifically, the Employer offers witnesses who will testify that they would lose their jobs and be outcasts if they did not vote for the Union.¹¹

¹¹ The Employer also offers that one of the witnesses named in its untimely October 24 supplemental position statement would testify in regards to this objection. The Employer asserts that Witness 3 would testify that the

The Union denies that it made any of the threats raised in this objection.

The undersigned concludes that these allegations raise substantial and material questions of fact regarding alleged threats, which can best be resolved by a hearing.

THIRD OBJECTION (PARAGRAPH 5)

The Employer's third objection is found in paragraph five and states:

On or about October 5, 2012, or any date immediately preceding the election, the Union by and through its agents and representatives threatened employees which resulted in several employees choosing not to vote. Graham Eng'g, 164 NLRB 679, 694-695 (1967) (affirming the trial examiner's finding that the union violated 8(b)(1) of the Act by threatening reprisals if employees failed to support the Union.). The Union expressed that it would take the non-Union supporters and see them "laying on the floor." The Union also stopped at least one employee's parent while shopping and told the parent to make her daughter vote for the Union.

This objection appears to raise two issues: (1) a Union agent, or agents, threatening employees that "it would take non-Union supporters and see them laying on the floor"; and (2) a Union agent, or agents, stopping one or more employees' parents while shopping and telling them to make their child vote for the Union.

In support of this objection, the Employer offers that several witnesses from its timely October 22 position statement will testify regarding the Union's conduct. The Employer offers that Witness B would testify that "[the witness] chose not to vote because [the witness] felt threatened and intimidated by the Union's aggressive and coercive campaigning." The Employer offers that Witness E would testify that "she was pressured into talking to Union representatives prior to the election."¹² Finally, although the Employer did not draw any

witness "was intimidated by the Union and voted with fear." In addition to the fact that this submission was late, this witness's proffered testimony does not describe any Union conduct. It merely describes the witness's subjective feelings of intimidation and fear, which is insufficient to establish any objectionable conduct. Thus, even if the evidence was received as timely, it would not be sufficient to arguably establish objectionable conduct.

¹² The remaining portion of Witness E's testimony does not appear to relate to this objection. To the extent that a witness would testify regarding specific Union statements about reduced pay and hours and drug testing, this

connection between Witness A's testimony and this objection, the undersigned notes that a portion of Witness A's predicted testimony seems to relate to this objection, in that Witness A would purportedly testify that "[the witness's] mother, a City Market customer, was harassed while shopping at the store."

The Union denies the allegations in the Third Objection, paragraph 5.

As the objecting party in this case, the Employer has the burden of furnishing evidence sufficient to justify setting the objections for hearing. Board's Rules and Regulations Sec. 102.69(a). A hearing should be held if the Employer "has established that it could produce at a hearing evidence that, if credited, would warrant setting aside the election." *Transcare New York, Inc.*, 355 NLRB No. 56, 2 (2010). In order to meet this initial burden, the Board requires an objecting party to providing specific affidavit testimony and other specific evidence, or, at a minimum, to identify witnesses by name who would be able to provide direct rather than hearsay testimony. *Heartland of Martinsburg*, 313 NLRB 655, 655 (1994); *The Holladay Corporation*, 266 NLRB 621 (1983). As noted by the Board in *Heartland of Martinsburg*, "the critical prerequisite to a full investigation of specific allegations in objections is the submission of names of witnesses who can provide direct relevant testimony." *Id.* at 655. Thus, hearsay evidence in support of objections is only acceptable if that evidence specifically identifies by name additional witnesses who would be able to provide direct evidence in support of a party's objections.

Here, the Third Objection alleges that the Union threatened employees, and particularly, that an unspecified Union agent expressed that it would "take the non-Union supporters and see them 'laying on the floor.'" The Employer did not name any witnesses to testify directly regarding this particular threat, therefore, the Employer has failed to satisfy its burden of producing evidence with regard to this portion of the Third Objection.

testimony will be considered with regards to the Employer's Fifth Objection, to which it appears to more closely relate. Insofar as a witness will testify that Union representatives threatened the witness' job if the witness voted non-union, told them they would be outcasts and campaigned with fear, that testimony is already being considered in relation to the Employer's Second Objection, to which it seems to more closely relate. Insofar as a witness will testify that the Union stated that whoever votes against the Union will have to answer to the Union, that testimony is already being considered in relation to the Second Objection, to which it seems to more closely relate. Insofar as a witness will also testify that an unspecified West African employee "told [the witness] that he felt intimidated [sic], threatened and feared the Union's response if the Union lost the election," such evidence is hearsay and the Employer failed to identify a witness in its October 22 submission who would provide direct testimony. Accordingly, such evidence is not sufficient to constitute arguable objectionable conduct.

To the extent that the Third Objection alleges other Union threats, without specifying where they were made, who made them, or what was said, the Employer's evidence is also insufficient. The Employer named Witness B to testify that the witness chose not to vote because the witness felt threatened and intimidated by the Union's campaigning. This proffered testimony does not include any information about the Union's conduct and merely states an employee's subjective feelings about unspecified Union campaigning. "The test for whether objectionable conduct occurred is an objective one, and the subjective reactions of employees are irrelevant to that issue." *Local 299, International Brotherhood of Teamsters (Overnite Transportation Company)*, 238 NLRB 1231, fn. 2 (1999) (internal citations omitted); *Corner Furniture Discount Center, Inc.*, 339 NLRB 1122, 1123 (2003). To the extent that Witness E would also testify about being "pressured into talking to the Union," this witness also does not offer testimony on particular Union conduct amounting to a threat.

Finally, with regards to the particular allegation in this objection that an unspecified Union agent stopped an employee's parent and told the parent to make her daughter vote for the Union, the Employer has also provided insufficient evidence. While the Employer did not name any witnesses to testify about this particular portion of the Third Objection, it is noted that a portion of Witness A's proffered testimony appears to directly relate. Witness A would testify that the witness's mother was harassed while shopping at the store. This evidence is insufficient for several reasons. First, the Employer did not name Witness A's mother or any witnesses to testify directly about the Union's conduct in this regard. Witness A would only be able to provide hearsay testimony that the witness's mother, who is unnamed, was harassed. Without naming any witnesses to testify directly regarding the Union's conduct, the Employer has not met its burden. Moreover, the hearsay testimony offered by Witness A is only a conclusion that the witness's mother was harassed while shopping. The proffered hearsay testimony does not point to any particular Union conduct that would amount to harassment.

For the foregoing reasons, the evidence is insufficient to sustain any portion of the Third Objection. Accordingly, the objection is overruled in its entirety.

FOURTH OBJECTION (PARAGRAPH 6)

The Employer's fourth objection is found in paragraph six and reads as follows:

On October 5, 2012 and October 6, 2012, or any date immediately preceding the election, the Union by and through its agents and representatives made material, gross and deceptive misrepresentations of the benefits that the employees would obtain if they voted for the Union. In particular, the Union made misrepresentations about the employees' health care benefits provided by the Union and juxtaposed these benefits with those offered by the employer while making intentional misrepresentations of the Employer's health benefits. St. Francis Healthcare Ctr., 336 NLRB 678, 678 (2001) (setting aside the election where the union sent a letter misrepresenting wages. Among the facts that the Board considered in determining that a new election was required were the close timing of the misrepresentation to the election and the lack of opportunity for the employer to respond.).

This objection raises issues of the Union misrepresenting health benefits, or making a promise of health benefits, if employees voted for the Union.

In support of this objection, the Employer offers that several witnesses from its timely October 22 position statement will testify regarding the Union's conduct. The Employer offers that Witness E will testify that "[t]he Union [] assured [the witness] that [the witness] would receive better insurance benefits with the Union and that the costs to employees would not increase." The Employer also asserts that Witness H's testimony relates to this objection. Witness H will apparently testify about being "approached on numerous occasions prior to the election and told, *inter alia*, that [the witness] could lose [the witness's] job if [the witness] did not vote for the Union." It is unclear how Witness H's testimony about job loss relates to a misrepresentation over health benefits. Moreover, Witness H's testimony in this regard has already been considered in regards to the Second Objection.¹³

¹³ The Employer also offers that two of the witnesses named in its untimely October 24 supplemental position statement would testify in regards to this objection. The Employer asserts that Witness 1 would testify that "[he/she] and other West African employees were told that if they voted for the Union, the Union would give them three

The Union denies any misrepresentation of health benefits. The Union asserts that Union representatives compared the Employer's non-union health plan to the plan offered under the current collective bargaining agreement. The Union denies that any promises were made.

In *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), the Board announced that it "will no longer probe into the truth or falsity of the parties' campaign statements, and that it will not set aside an election on the basis of misleading campaign statements." *Id.* at 133. The Board will intervene only where "a party has used forged documents which render the voters unable to recognize propaganda for what it is." *Midland National Life* at 133. Thus, the Board will not set aside an election based on the substance of a misrepresentation, but only based on "the deceptive manner in which it was made, a manner which renders employees unable to evaluate the forgery for what it is." *Midland National Life* at 133. The Board has since upheld this principle. See *The Permanente Medical Group, Inc.*, 358 NLRB 1, 3 (2012).

The Employer's objection and evidence amount to an assertion that unspecified Union representatives orally misrepresented health care benefits. Even if true, this misrepresentation does not amount to objectionable conduct warranting setting aside an election under the Board's clear policy in *Midland National Life*. The Employer's reliance on *St. Francis Healthcare Centre*, 336 NLRB 678 (2001) in support of this objection is misplaced. In that case, on remand from the Sixth Circuit, the Board applied a broader standard set out by the Sixth Circuit in *Van Dorn Plastic Machinery Co. v. NLRB*, 736 F.2d 343 (6th Cir. 1984) to find that a written document circulated by the union, which purported to be from an employee and made false claims that the employer provided wage increases to managers, was objectionable conduct warranting setting aside the election. *St. Francis Healthcare Centre* at fn. 1. The facts of this case are materially distinguishable. Here, the Employer merely claims that the Union made oral misrepresentations about health benefits. The Employer did not assert in its objection, or proffer evidence, that the Union used any written material to deceive employees or misrepresent information, concealed or misrepresented its identity in providing the offending oral

months of personal leave of absence instead of two months they are currently entitled to." In addition to the fact that this submission was late, this witness's proffered testimony does not apparently relate to a misrepresentation of health benefits. It appears to involve some sort of promise of more leave. Even if the evidence had been timely submitted, it does not appear to relate to any objection.

The Employer also asserts that Witness 2 from its untimely October 24 supplemental position statement will testify that "Cindy Lucero (Secretary-Treasurer) promised him that if he changed his mind and voted for the Union, the Union would offer him paid time off so that he could see 'how things really worked.'" In addition to being late, this proffer of evidence does not apparently relate to any misrepresentation of health benefits. Even if the evidence had been timely submitted, it does not appear to relate to any objection.

representations to employees, or in any other way misrepresented to employees the source of the information it was providing. For those reasons, the facts of *St. Francis Healthcare Centre* are distinguishable and the holding is inapplicable. Moreover, even the Sixth Circuit has agreed with the Board that an election should not be set aside based on the substance of a representation alone. *Van Dorn Plastic Machinery Co.* at 348 (“the Board should not set aside an election on the basis of the substance of representations alone, but only on the deceptive manner in which representations are made.”). Therefore, even if the conduct complained of in the Fourth Objection is true, it is not objectionable conduct warranting setting aside an election, because it does not involve any allegations of deception in the manner in which the Union made representations to employees.

The Employer’s objection and evidence with regard to the Fourth Objection do not raise any issue of objectionable conduct. Accordingly, the Fourth Objection is overruled.

FIFTH OBJECTION (PARAGRAPH 7)

The Employer’s fifth objection, which is found in paragraph seven of its objections, states:

On October 5, 2012 and October 6, 2012, or any date immediately preceding the election, the Union by and through its agents and representatives informed several employees, including an employee with disabilities, that if the Union lost the election, the Employer would not provide-the employees with any health benefit information, including information related to the employees' disabilities, that the Employer would cut the employees' rate of pay, reduce employees' hours, and impose drug testing requirements. Midland Nat. Life. Ins. Co., 263 NLRB 127 (1982) (holding that where the party has engaged in deceptive written misrepresentations, the Board will set aside the election); United Steel Service, 340 NLRB 199, 200 (2003) (applying Midland Nat. Life Ins. Co. to oral misrepresentations made by the Union and citing to Von Dom Plastic Mach. Co. v. NLRB, 736 F.2d 343 (6th Cir. 1984), cert. denied 469 U.S. 1208 (1985). The Board noted that Von Dom Plastic Machinery set forth the factors to consider when determining whether a misrepresentation is objectionable: 1) the timing of

the misrepresentation; 2) whether the other party had an opportunity to respond; 3) the nature of the misrepresentation; 4) whether the source of the misrepresentation is known; and 5) whether there is evidence that the employees were affected by the misrepresentation).

This objection raises an issue with misrepresentations or threats by the Union that if the Union lost the election, the Employer would not provide health benefit information. This objection also alleges that the Union threatened employees that the Employer would cut pay, reduce hours, and impose drug testing if the Union lost the election.

In support of this objection, the Employer offers that several witnesses from its timely October 22 position statement will testify regarding the Union's conduct. First, the Employer offers Witness A, who will testify that "Union representatives made gross misrepresentations by telling [the witness] that if the Union lost the election, [the witness's] wages were going to be reduced, and that [the witness] was not going to be able to obtain medical assistance, including receiving medical information." The Employer also offers Witness E to testify that "Union representatives told [the witness] that without the Union, [the witness's] pay would be reduced; employees would be forced to undergo random drug testing; and would be fired for 'no reason.'" Finally, the Employer asserts that Witness H's testimony relates to this objection. Witness H will apparently testify about being "approached on numerous occasions prior to the election and told, *inter alia*, that [the witness] could lose [the witness's] job if [the witness] did not vote for the Union." It is unclear how Witness H's testimony about a threat of job loss relates to a misrepresentation over health benefits information, reductions in pay, hours, or drug testing. Moreover, Witness H's testimony in this regard has already been considered in regards to the Second Objection, to which it appears to more closely relate.

The Union denies that it told any employees that the Employer would not provide health benefit information if it lost the election. The Union asserts that Union representatives did tell employees that without any agreement, the Employer would be free to change wages and benefits consistent with existing law. According to the Union, Union representatives also showed employees documents demonstrating what had happened at some of the Employer's other non-union stores in Colorado. However, the Union asserts that there were no conversations with employees that specific benefits would change.

Like the Employer's Fourth Objection, this objection and the Employer's evidence in support thereof raise only the issue of oral misrepresentations. In *Midland National Life*, the Board was clear that it will not set aside an election based on the substance of misrepresentations. *Id.* at 133. Only where a document has been forged and where employees cannot tell the source of the information will the Board set aside an election. *Id.* In this objection, the Employer misstates the holding of *Midland National Life*. The Employer represents that the holding of that case was that where a party engages in "deceptive written misrepresentations" the Board will set aside an election. The holding of *Midland National Life* was quite narrower than that. The Board stated that it will set aside an election based on "the deceptive manner" in which a representation is made, particularly "a manner which renders employees unable to evaluate the forgery for what it is." *Id.* at 133. Again, the Board will not probe into the truth or falsity of the substance of a party's misrepresentation, regardless of whether that misrepresentation is oral or written. In any event, the Employer's objection here only raises issues as to oral misrepresentations. There is no allegation or evidence that the Union forged any document or deceptively misrepresented the source of the information in any other manner. Therefore, the substance of the oral misrepresentations regarding disability information, pay rates, hours, and drug testing, even if true, is insufficient to warrant setting aside an election. *See The Permanente Medical Group, Inc.*, 358 NLRB 1, 3 (2012) (citing *Midland National Life* and holding that to the extent the union's "statements suggest a loss of terms and conditions of employment, they constitute mere misrepresentations that do not warrant setting aside the election.").

The Employer's citation to *United Steel Service*, 340 NLRB 199, 200 (2003) is also misplaced and its holding is misstated. First, that case arose in the Sixth Circuit, where the Circuit Court has modified the Board's standard in *Midland National Life*. *See Van Dorn Plastic Machinery Co. v. NLRB*, 736 F.2d 343 (6th Cir. 1984). Despite this, in *United Steel Service*, the Board adhered to the *Midland National Life* standard regarding campaign representations, and found that even *if* the Sixth Circuit standard were applied, the alleged misrepresentation of law in the union's distributed campaign literature did "not constitute a misrepresentation so pervasive or a deception so artful as to affect employee free choice in the election." *Id.* at 199. That case did not involve mere oral misrepresentations, as the Employer suggests in its statement of the holding, but involved union misrepresentations made "both at union meetings *and* in a flyer

distributed to employees.” *Id.* at 199 (emphasis added). For this reason, the facts of the case are distinguishable. Here, the Employer alleges mere oral misrepresentations of various terms and conditions of employment. There is no allegation or evidence that the Union distributed literature containing these representations. Moreover, in *United Steel Service*, the Board found that the source of the union’s misrepresentations was clear. In that case, the representation was set forth in a union flyer and reiterated at union meetings, so the union was readily identifiable to employees as the source of the information. For that reason, the Board found that the Regional Director properly overruled the objections, even applying the *Van Dorn* standard. *Id.* at 200. Because this objection does not contain any allegations that the Union’s misrepresentations were made in a deceptive manner, and rests solely on the substance of the representations, the Employer has not raised an issue of objectionable conduct.

The Employer’s objection and evidence with regard to the Fifth Objection do not raise any issue of objectionable conduct. Accordingly, the Fifth Objection is overruled.

SIXTH OBJECTION (PARAGRAPH 8)

The Employer’s sixth objection is found in paragraph eight of its objections submission and alleges the following:

On October 5, 2012 and October 6, 2012, or any date immediately preceding the election, the Union by and through its agents and representatives targeted employees from West Africa, who only speak Fulani, followed the employees from the City Market to the Wal-Mart located near the City Market, and provided them with erroneous and misleading information, which was not translated either in written or oral form. These employees were also coerced and threatened, causing at least two employees not to vote while others believed that if they did not vote for the Union, they would lose their job and risk other forms of retaliation. United Broad. Co. of NY, 248 NLRB 403, 403-404 (1980) (“The proper test is whether the conduct involved reasonably tends to interfere with the free and uncoerced choice by the employees.”).

This objection raises an issue with the Union allegedly following certain employees and making misrepresentations of unspecified information to them. The objection also alleges unspecified threats and coercion against these same employees.

In support of this objection, the Employer offers that one witness from its timely October 22 position statement will testify regarding the Union's conduct. The Employer offers that Witness G will testify that "an agent of the Union stated that 'whoever votes against the Union will have to answer to me.'" This portion of the testimony has already been considered in relation to the Second Objection, to which it appears to more closely relate. The same witness would also testify that "a West African employee told [the witness] that he felt intimidated, threatened and feared the Union's response if the Union lost the election." The evidence did not specify the name of the affected employee. Finally, Witness G purportedly "observed Union representatives confront West African employees as they walked to the nearby Wal-Mart." The Employer did not timely name any other witnesses to testify regarding this objection.¹⁴

The Union asserts that it spoke to certain West African employees with the help of a bilingual employee. The Employer denies that there was any coercion, intimidation, or threats in these conversations.

As the objecting party in this case, the Employer has the burden of furnishing evidence sufficient to justify setting the objections for hearing. Board's Rules and Regulations Sec. 102.69(a). A hearing should be held if the Employer "has established that it could produce at a hearing evidence that, if credited, would warrant setting aside the election." *Transcare New York, Inc.*, 355 NLRB No. 56, 2 (2010). In order to meet this initial burden, the Board requires an objecting party to providing specific affidavit testimony and other specific evidence, or, at a minimum, to identify witnesses by name who would be able to provide direct rather than hearsay

¹⁴ The Employer also offers that two of the witnesses named in its untimely October 24 supplemental position statement would testify in regards to this objection. The Employer asserts that Witness 1 would testify that "[he/she] and other West African employees were told that if they voted for the Union, the Union would give them three months of personal leave of absence instead of two months they are currently entitled to." In addition to the fact that this submission was late, this witness's proffered testimony does not apparently relate to the misrepresentation of unspecified information or unspecified threats and coercion alleged in this objection. It appears to involve some sort of promise of additional leave. Thus, even if the evidence were timely submitted, I find that it is not encompassed by any objection.

The Employer also offers that Witness 3, named in its untimely submission, will testify that "he was intimidated by the Union and voted with fear." This proffered testimony does not describe any Union conduct. It merely describes the employee's subjective feelings about the Union, without even described the basis for that feeling. Thus, the witness's testimony, if it were timely submitted, would not establish *any* objectionable conduct.

testimony. *Heartland of Martinsburg*, 313 NLRB 655, 655 (1994); *The Holladay Corporation*, 266 NLRB 621 (1983). As noted by the Board in *Heartland of Martinsburg*, “the critical prerequisite to a full investigation of specific allegations in objections is the submission of names of witnesses who can provide direct relevant testimony.” *Id.* at 655. Thus, hearsay evidence in support of objections is only acceptable if that evidence specifically identifies by name additional witnesses who would be able to provide direct evidence in support of a party’s objections.

Here, in support of the Sixth Objection, with regards to unspecified Union agents threatening and coercing unspecified West African employees, or making misrepresentations to those employees, the Employer has only named one witness, Witness G, to provide hearsay testimony. The Employer failed to meet its burden by failing to name this West African employee, or any other witnesses, to provide direct evidence in support of this objection. Moreover, the hearsay testimony offered by Witness G does not specify any particular Union conduct that could amount to objectionable threats, coercion, or misrepresentation. The witness would merely testify about how another employee *felt*, without even providing information regarding the basis for that feeling. “The test for whether objectionable conduct occurred is an objective one, and the subjective reactions of employees are irrelevant to that issue.” *Local 299, International Brotherhood of Teamsters (Overnite Transportation Company)*, 238 NLRB 1231, fn. 2 (1999) (internal citations omitted); *Corner Furniture Discount Center, Inc.*, 339 NLRB 1122, 1123 (2003).

Moreover, to the extent that Witness G can provide direct testimony in support of this objection in that the witness purportedly witnessed unspecified Union agents “confront” several other employees as they walked to a nearby Wal-Mart, this evidence is insufficient. The predicted testimony from Witness G is a conclusion that employees were “confronted” and does not include any information about specific Union agent conduct that amounts to any objectionable activity.

For the foregoing reasons, the evidence is insufficient to sustain any portion of the Sixth Objection. Accordingly, the the Sixth Objection is overruled.

SEVENTH OBJECTION (PARAGRAPH 9)

The Employer's seventh objection is found in paragraph nine and states the following:

On October 6, 2012, the Union by and through its agents and representatives engaged in surveillance, or gave the impression of surveillance, and maintained, or gave the impression of maintaining, a prohibited list of the employees who entered the store to vote. Specifically, the Union remained on the Employer's parking lot during the voting periods while holding and reviewing a sheet or sheets of paper in full view of the employees who entered the Employer's premises to vote. Piggly-Wiggly #011 and #228 Eagle Food Ctr., Inc., 168 NLRB 792, 792-793 (1967) (the Board set aside the election where union representatives stood outside of the employer's stores during the voting periods while maintaining a list of the employees who entered the stores); International Stamping, Inc., 97 NLRB 921, 922 (1951) (Noting that it is "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 check off the voters as they receive their ballots.").

This objection raises an issue with the Union purportedly maintaining a prohibited list of voters.

In support of the objection, the Employer did not identify witnesses, but in its October 22 position statement it described a security video that purportedly shows that the Union kept a prohibited list of voters, or gave the impression of keeping a prohibited list of voters. In its description of the video, the Employer points out specific Union representatives shown standing in the parking lot outside the Employer's store at various times on the day of the election. The Employer did not describe any particular conduct relating to its objection that the Union kept a prohibited list of voters, aside from the Union agents' mere presence. The Employer also submitted two CDs of the security video containing the footage it described. In brief, the security video provided shows an individual, and at times, several individuals, presumably who the Employer purports to be Union agents, standing out front of the Employer's store during the election periods. The video shows these individuals greeting other individuals as they walk in or

out of the store. Finally, at various times, at least one of the alleged Union agents may be holding a piece or pieces of paper as others walk by.

The Union denies that it kept, or gave the impression of maintaining, a list of employees who entered the store to vote. Rather, while Union representatives had a list of eligible voters, Union representatives did not make notations of who was coming and had no way of knowing whether an individual was voting because the Union representatives were not close enough to see the polling place. Finally, the Union asserts that there is no evidence that employees even suspected their names were being recorded.

The undersigned concludes that this allegation and raises substantial and material questions of fact which can best be resolved by a hearing.

EIGHTH OBJECTION (PARAGRAPH 10)

The Employer's eighth and final objection is found in paragraph ten of its objections submission and reads as follows:

On October 6, 2012, or any date immediately preceding the election, the Union by its agents and representatives coerced and threatened employees by interrogating employees about how they were going to vote in the election. Fessler & Bowman, Inc., 341 NLRB 932, 934 (2004) ("the secrecy of balloting-be it manual or mail ballot-is a hallmark of our election procedures"); Hollingsworth Mgmt. Serv., 342 NLRB 556, 558 (2004) (setting aside the election because, inter alia, the Union asked employees how they were going to vote).

This objection appears to raise an issue with the Union asking employees how the intended to vote in the election.

In support of this objection, the Employer asserts that two witnesses named in its timely October 22 position statement will testify regarding the Union's conduct. The Employer asserts that Witness D will testify that prior to the election the witness was approached by one of the Union representatives who "asked who [the witness] was going to vote for." According to the Employer, Witness H would testify that "[the witness] was approached on numerous occasions

prior to the election and told, *inter alia*, that [the witness] could lose [the witness's] job if [the witness] did not vote for the Union” and “[i]n response to these threatening statements, [the witness] suffered anxiety on the day of the election.” The Employer did not describe Witness H as providing any testimony about the Union asking the witness about voting intentions, and this witness's testimony has already been considered in regards to the Second Objection. Finally, although the Employer did not draw a link between Witness E's testimony and this objection, the undersigned notes that Witness E's predicted testimony - that “a Union representative called [the witness] the night before the election and asked that [the witness] reconsider [the witness's] choice” - appears to most closely relate to this objection.

The Union asserts that prior to the day of the election Union representatives did discuss voting intentions with employees, but on the day of the election, no employee was asked how they voted or how they intended to vote.

Under well-established Board law, union conduct that causes an employee to signal his favor or disfavor of the union does not, standing alone, constitute objectionable conduct. A union can ask employees if they support the union so long as it is not otherwise coercive. *See Kusan Mfg. Co.*, 267 NLRB 740, 746 (1983), *enfd.* 749 F.2d 362 (6th Cir. 1984); *Fessler & Bowman, Inc.*, 341 NLRB 932 (2004).

Here, the Employer has proffered two witnesses who will testify that they were asked how they would vote or to reconsider their choice. Even if this is true, in the absence of any evidence of threatening or coercive behavior, the conduct is not objectionable conduct sufficient to set aside an election. The Employer has not proffered any evidence about the time, place, or manner in which these employees were asked about their vote to suggest that the Union engaged in threatening or coercive activity along with its inquiry.

For the foregoing reasons, the evidence is insufficient to sustain any portion of the Eighth Objection. Accordingly, the Eighth Objection be overruled.

CONCLUSION

In summary, I am overruling the third portion of the First Objection and the Third Objection, the Fourth Objection, the Fifth Objection, the Sixth Objection and the Eighth

Objection in their entirety.¹⁵ I am setting for hearing the first and second portions of the First Objection, the Second Objection and the Seventh Objection.

ORDER DIRECTING HEARING AND NOTICE OF HEARING

For the reasons discussed above, **IT IS ORDERED** that a hearing be held to resolve the issues of fact and credibility raised by the first and second portions of the Employer's First Objection, the Second Objection and the Seventh Objection.

IT IS FURTHER ORDERED that the Hearing Officer designated for the purpose of conducting the hearing shall prepare and cause to be served upon the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of said issues. Within fourteen (14) days from the issuances of said report, any party may file with the Board and original and one (1) copy of exceptions to such report, with supporting brief if desired. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof, together with a copy of any brief filed, on the other party to the proceeding and with the undersigned. If no exceptions are filed to such report, the Board, upon the expiration of the period for filing exceptions, may decide the matter forthwith upon the record or may take other disposition of the case.

YOU ARE HEREBY NOTIFIED THAT commencing at 9 a.m. (MST) on the 19th day of November, 2012, and consecutive days thereafter until concluded, a hearing will be conducted at the Routt County Justice Center, ADR Meeting Room, 1955 Shield Drive, Steamboat Springs, Colorado, before a duly designated Hearing Officer of the National Labor Relations Board on the

¹⁵ Under the provisions of Sections 102.67 and 102.69 of the Board's Rules and Regulations, a request for review of this Supplemental Decision may be filed with the Board in Washington, D.C. The request for review must be received by the Board in Washington by November 23, 2012.

issues of fact and credibility raised by the Employer's Objections as discussed above, at which time and place you will have the right to appear in person or otherwise and give testimony.

ISSUED AT Denver, Colorado this 9th day of November, 2012.

/s/Kelly A. Selvidge
Kelly A. Selvidge
Acting Regional Director
National Labor Relations Board
Region 27
600 17th Street, 700 N
Denver, CO 80202

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

**DILLON COMPANIES,
D/B/A CITY MARKET, INC.,**

Employer,

Case 27-RD-086033

and

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 7**

Union,

and

CHAD A. KING,

Petitioner.

EMPLOYER'S OBJECTIONS TO THE ELECTION

Dillon Companies, d/b/a City Market, Inc. ("Employer" or "City Market") by and through its attorneys and pursuant to Rule 102.69, hereby files objections to the election, contends that the election must be set aside, and requests a new election, or to the extent that it is necessary, requests a hearing in the above-captioned matter. In support of the Employer's objections to the election, City Market states as follows:

1. Pursuant to a decertification petition filed by Chad A. King ("Petitioner") on October 6, 2012, a decertification election was held at the employees' lounge of the City Market located at 1825 Central Park Plaza, Steamboat Springs, Colorado 80488. The election was held from 7 a.m. to 8 a.m., 12 p.m. to 1 p.m., and 5 p.m. to 6 p.m.

2. The tally of the vote resulted in 34 for and 31 against representation by the United Food and Commercial Workers Union, Local 7 (“Union”).

3. On or about October 5, 2012 and October 6, 2012, or any date immediately preceding the election, the Union by and through its agents and representatives engaged in unlawful electioneering. The Union representatives approached employees, engaged in conversations with the employees, and coerced employees by providing free food and drinks prior to voting. Atlantic Limousine, Inc., 331 NLRB 1025, 1029-1039 (2000) (holding that B & D Plastics, Inc., 302 NLRB 245 (1991), provides the test for “campaign devices as providing free food, drink . . .”); B & D Plastics, Inc., 302 NLRB 245, 245 (1991) (holding that “benefits granted during the critical period are coercive.”). Specifically, several Union agents and representatives congregated at the in-store Starbucks during the week of the election, engaged in conversations with the employees and bought employees drinks and food. On the day of the election, Union representatives and agents entered the Employer’s premises prior to the election, congregated in the Starbucks and engaged in numerous conversations with employees while buying the employees food and drinks. Several Union representatives and agents remained on the Employer’s premises throughout the election, and conversed with employees as the employees were heading to vote. Milchem, Inc., 170 NLRB 362, 362 (1968) (“The final minutes before an employee casts his vote should be his own, as free from interference as possible. Furthermore, the standard here applied [no electioneering during the voting period] insures that no party gains a last minute advantage over the other, and at the same time deprives neither party of any important access to the ear of the voter.”). Likewise, Union representatives and agents congregated in the Employer’s parking lot to threaten and coerce employees into voting for the

Union as the employees arrived at the Employer's premises to vote. Star Expansion Indus. Corp., 170 NLRB 364, 365 (1968) (setting aside the election because a business agent engaged in electioneering by talking to employees prior to voting).

4. On or about October 5, 2012 and October 6, 2012, or any date immediately preceding the election, the Union by and through its agents and representatives made threats and coerced the employees, which "inhibit[ed] the free choice of the voters." Claussen Baking Co., 134 NLRB 111, 112 (1961). Specifically, the Union threatened to retaliate against those who did not vote for the Union by causing the loss of their jobs, ruining their lives, and being "outcasted." The Union also threatened the employees by informing them that they would have to answer to the Union after the election. United Broad. Co. of NY, 248 NLRB 403, 403-404 (1980) (directing a second election where the Union threatened and coerced employees by stating that the union would retaliate against the employees and blacklist them).

5. On or about October 5, 2012, or any date immediately preceding the election, the Union by and through its agents and representatives threatened employees which resulted in several employees choosing not to vote. Graham Eng'g, 164 NLRB 679, 694-695 (1967) (affirming the trial examiner's finding that the union violated 8(b)(1) of the Act by threatening reprisals if employees failed to support the Union.). The Union expressed that it would take the non-Union supporters and see them "laying on the floor." The Union also stopped at least one employee's parent while shopping and told the parent to make her daughter vote for the Union.

6. On October 5, 2012 and October 6, 2012, or any date immediately preceding the election, the Union by and through its agents and representatives made material, gross and deceptive misrepresentations of the benefits that the employees would obtain if they voted for the

Union. In particular, the Union made misrepresentations about the employees' health care benefits provided by the Union and juxtaposed these benefits with those offered by the employer while making intentional misrepresentations of the Employer's health benefits. St. Francis Healthcare Ctr., 336 NLRB 678, 678 (2001) (setting aside the election where the union sent a letter misrepresenting wages. Among the facts that the Board considered in determining that a new election was required were the close timing of the misrepresentation to the election and the lack of opportunity for the employer to respond.).

7. On October 5, 2012 and October 6, 2012, or any date immediately preceding the election, the Union by and through its agents and representatives informed several employees, including an employee with disabilities, that if the Union lost the election, the Employer would not provide the employees with any health benefit information, including information related to the employees' disabilities, that the Employer would cut the employees' rate of pay, reduce employees' hours, and impose drug testing requirements. Midland Nat. Life. Ins. Co., 263 NLRB 127 (1982) (holding that where the party has engaged in deceptive written misrepresentations, the Board will set aside the election); United Steel Service, 340 NLRB 199, 200 (2003) (applying Midland Nat. Life Ins. Co. to oral misrepresentations made by the Union and citing to Von Dorn Plastic Mach. Co. v. NLRB, 736 F.2d 343 (6th Cir. 1984), cert. denied 469 U.S. 1208 (1985). The Board noted that Von Dorn Plastic Machinery set forth the factors to consider when determining whether a misrepresentation is objectionable: 1) the timing of the misrepresentation; 2) whether the other party had an opportunity to respond; 3) the nature of the misrepresentation; 4) whether the source of the misrepresentation is known; and 5) whether there is evidence that the employees were affected by the misrepresentation).

8. On October 5, 2012 and October 6, 2012, or any date immediately preceding the election, the Union by and through its agents and representatives targeted employees from West Africa, who only speak Fulani, followed the employees from the City Market to the Wal-Mart located near the City Market, and provided them with erroneous and misleading information, which was not translated either in written or oral form. These employees were also coerced and threatened, causing at least two employees not to vote while others believed that if they did not vote for the Union, they would lose their job and risk other forms of retaliation. United Broad. Co. of NY, 248 NLRB 403, 403-404 (1980) (“The proper test is whether the conduct involved reasonably tends to interfere with the free and uncoerced choice by the employees.”).

9. On October 6, 2012, the Union by and through its agents and representatives engaged in surveillance, or gave the impression of surveillance, and maintained, or gave the impression of maintaining, a prohibited list of the employees who entered the store to vote. Specifically, the Union remained on the Employer’s parking lot during the voting periods while holding and reviewing a sheet or sheets of paper in full view of the employees who entered the Employer’s premises to vote. Piggly-Wiggly #011 and #228 Eagle Food Ctr., Inc., 168 NLRB 792, 792-793 (1967) (the Board set aside the election where union representatives stood outside of the employer’s stores during the voting periods while maintaining a list of the employees who entered the stores); International Stamping, Inc., 97 NLRB 921, 922 (1951) (Noting that it is “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 check off the voters as they receive their ballots.”).

10. On October 6, 2012, or any date immediately preceding the election, the Union by its agents and representatives coerced and threatened employees by interrogating employees

about how they were going to vote in the election. Fessler & Bowman, Inc., 341 NLRB 932, 934 (2004) (“the secrecy of balloting—be it manual or mail ballot—is a hallmark of our election procedures”); Hollingsworth Mgmt. Serv., 342 NLRB 556, 558 (2004) (setting aside the election because, *inter alia*, the Union asked employees how they were going to vote).

WHEREFORE, City Market respectfully requests a full and fair investigation of the above-listed objections and a new election. City Market respectfully requests the opportunity to provide supporting evidence to substantiate City Market’s objections. In the event that there are disputed facts, City Market requests a hearing.

Respectfully submitted this 15th day of October, 2012.

 For Ray Deeny

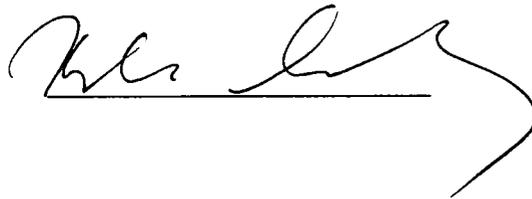
Raymond M. Deeny, Esq.
SHERMAN & HOWARD L.L.C.
90 South Cascade, Suite 1500
Colorado Springs, CO 80903
(719) 475-2440

Attorneys for Respondent

CERTIFICATE OF MAILING

I hereby certify that on October 15th, 2012, a true and correct copy of the foregoing EMPLOYER'S OBJECTIONS TO THE ELECTION was served via hand-delivery, upon the following:

Wanda P. Jones (Original and 5 copies)
Regional Director, Region 27
National Labor Relations Board
600 17th Street
North Tower, 7th Floor
Denver, CO 80202

A handwritten signature in black ink, appearing to be "Wanda P. Jones", written over a horizontal line. The signature is cursive and extends to the right with a long, sweeping tail.

RECEIVED

OCT 15 2012