

NATIONAL LABOR RELATIONS BOARD

In the Matter of:)	
)	
SEIU, LOCAL 509)	
)	
Petitioner)	
)	Case No. 1-RC-103308
and)	
)	
CLASS, INC.)	
)	
Employer)	

PETITIONER’S ANSWERING BRIEF TO EMPLOYER’S EXCEPTIONS TO HEARING OFFICER REPORT

1. SUMMARY

Here comes Petitioner Service Employees International Union Local 509 (Union) in opposition to the Respondent CLASS, Inc.’s (Employer) exceptions to the Hearing Officer’s Report and Recommendations on Objections. The Employer initially filed six objections, but withdrew two prior to the hearing and narrowed one even further. The Report recommended that the four remaining objections be overturned. The Employer excepts only to three of her recommendations, effectively conceding that Objection #3 should be overruled.

The remaining Exceptions should be dismissed for want of being properly served. The Exceptions also lack substantive merit. The Employer fails to establish that any finding was not supported by substantial evidence, any credibility determination was against the clear preponderance of the evidence and any conclusion was legal error. As such, the Board should overrule the exceptions and adopt the Recommendations of the Hearing Officer. In the event that any Exception or Objection is sustained and sufficient to set aside the election, the case should be remanded to resolve any dispositive factual dispute.

2. The Employer Failed to Serve Its Exceptions on Counsel for Petitioner And Provide An Exceptions Document.

Undersigned counsel for petitioner discovered the Employer's Exceptions only when it independently checked the NLRB web docket. See Attached Affidavit of Patrick N. Bryant. As Counsel failed to serve the Exceptions at any time, the Exceptions should be dismissed. The Board has refused to dismiss for lack of service where the party has not been prejudiced and otherwise served. See *IBT Local 509*, 349 NLRB No. 15 n.1 (2007). Here, the utter lack of service should not go unremarked or unremedied. The lack of service placed the Union in an untenable position. Had the Petitioner failed to take it upon itself to review the online docket, it would have risked an adverse judgment, and forced the Petitioner to request extraordinary relief from the Board. This case is unlike the situation in *IBT Local 509*, where the opposing party received the brief, but not a separate exceptions document. Here, Petitioner received neither.

3. The Employer's Exceptions And Objections Should Be Dismissed

a. Exceptions To Objection 1 Should Be Overruled: The Union Organizers Did Not Engage In Objectionable Conduct "At Or Near the Polls" In a Manner to Require Setting Aside the Election.

i. The Hearing Officer did Not Err When She Concluded That Union Representatives Were Not In A "No Electioneering" Zone Or Otherwise "At or Near the Polls."

The Hearing Officer concluded that the Union organizers were not present within a no electioneering zone, even if she assumed that they were one to two car lengths from the entrance to the Employer's facility where voting occurred. This conclusion is supported by substantial evidence. There is no dispute the Board agent did not establish a formal no electioneering zone. There was fleeting testimony that the Board agent, after the pre-election conference, directed employees not to stand immediately outside the North Andover building

(i.e., on the patio or steps), and that no union organizers were in that demarcated area. Any testimony about the presence of the organizers alleged that they not on the patio or steps but were instead on property that was not under the Employer's exclusive control – either a nearby karate studio or a shared parking lot. The Employer Excepts to this finding, asserting that the organizers were in a default no electioneering zone for purposes of the phrase “at or near the polls,” and that Union organizers were closer to the building entrance than two-thirds of voters. These arguments are wishful thinking, supported by neither evidence nor caselaw.¹

Cases cited by the Employer do not establish a rigid threshold of eight to ten feet outside of a polling place as being within a default no electioneering zone, and/or involved egregious objectionable conduct. *Compare Topside Const., Inc.*, 329 NLRB No. 75 (1999) (overruling objection based on union activity that occurred within 5-10 feet of entrance to polling place). The case cited by the Employer, *Claussen Baking*, 134 NLRB 111, 112 (1961), is wholly dissimilar. There, the Board set aside an election based upon electioneering that occurred within approximately 15 feet of the polls by a lead employee who, in the presence of a manager and a supervisor, urged several new employees for 15 minutes to vote against the union; the three employees remained within 15 feet for a substantial part of the voting period, involved multiple voters, and a Board agent requested that the three discontinue their presence and actions. By contrast, there is no evidence here that any Union organizer spoke to any employee *on the way to vote* (for one second let alone 15 minutes), urged any voter to vote for the Union, applied pressure to any particularly impressionable employees (such as

¹ Following the pre-election conference and during the voting period, the Board agent allegedly advised people waiting to vote not to stand “*immediately* outside the building door”. H.O. Decision at 6 (emphasis added). The only person to testify in support of this claim was Rodriguez, a witness thoroughly devoid of credibility. Even accepting this claim to be true, it established a narrow “no electioneering” that did not extend further than the steps to the building entrance.

probationary employees), engaged in such conduct within a no election zone for a substantial period, or were asked to discontinue behavior by a Board agent.

The Employer similarly tries to mislead the Board about the significance of *Star Expansion Industries Corp.*, 170 NLRB No. 47 (1968). The Board in that case did not find, as Employer claims, “that ‘at or near the polls’ described a 50-foot radius.” The no-electioneering zone was not a disputed issue. Rather, the Board agent simply established a “no electioneering zone” of 50 feet, which was not objected to either by any party at any time. Moreover, in that case and unlike here, the Board agent thrice reprimanded the union observer for electioneering within 15 feet. *Contrast U Haul Co. of Nevada*, 341 NLRB No. 26 (2004): “[E]ven if London was only 30 feet from the building, we agree with the hearing officer that London's presence did not run afoul of *Milchem, Inc.*, 170 NLRB 362 (1968); *Blazes Broiler*, 274 NLRB 1031, 1032 (1985) (sustained presence 30 feet away from voting area is not objectionable). *See also JP Mascaro & Sons*, 345 NLRB No. 42 (2005) (handshaking and conversations outside of voting area, but not within voting area, are not objectionable).

Third, the Employer’s newfound claim that the union organizers were closer than 2/3 of voters is unsubstantiated. The Employer did not make this allegation or argument in its objections, at the hearing, or in its post-hearing brief. As such, this claim should be considered waived. *NLRB v. Cal-Maine Farms, Inc.*, 998 F.2d 1336 (5th Cir. 1995) (employer cannot raise argument on appeal not preserved at the administrative hearing). It provided no direct or indirect evidence that any Union organizer was closer to the building where voting occurred *than a single voter waiting to vote*, let alone two-thirds of them. TR1:98/128. Had organizers actually been commiserating with, or even just standing amongst, voters waiting in line, the

Employer would not have hesitated to produce evidence in this regard. (That presumably is why the Employer designated Rodriguez, who watched all voters waiting to vote and remained in the outside the polling area for the entire voting period).² The Employer did not introduce any one to testify about this alleged mingling because, point in fact, it did not occur. As the Employer's own witnesses stated:

Q. [To Rodriguez] And did you observe these [purported union organizers] speaking to voters in line at any point?

A. Not in the line.

T1:99.

Q. [To Plaza] [A]t any time while you were waiting in line or after you came out, before you left, was there any conversation going on between the union people at B and voters in line?

A. No....

T1:128.

The Employer's fevered speculation that organizers intermingled with waiting voters also is not supported by the Employer's deductive reasoning. The Employer contends that the 30 voters took up one foot each, stood in single-file line and therefore the vote line radiated 30 feet from the building. Even assuming for argument's sake that 30 people waited to vote at one point, it does not reasonably or necessarily follow that all voters waited in a single-file line and that any such single-file line was organized, radiating straight from the transportation steps to and beyond the parking lot. There is no reason to conclude, as the now Employer speculates, that any voting line "would have to snake down the transportation steps into the parking lot." After all, neither of its witnesses alleged this. The credible evidence contradicts the Employer's and established that voters congregated in a misshapen fashion near the building. T2:200-201.

² The Employer's gross mischaracterization of facts was noted by the Hearing Officer. Hearing Officer Report at 12.

Finally, the Employer gripes, “It is thus incredible to suggest that employees in line to vote would not have...overheard comments made to voters such as ‘how did you vote?’” This idea is not *that* incredible, given that the Employer failed to introduce evidence that ANY voter waiting in line heard ANY union organizer inquire as to how ANY employee voted. Both Employer witnesses testifying in support of this objection, Plaza and Rodriguez, denied hearing, any purported exit polling or any conversation for that matter while they waited to vote. In fact, the Employer could not even elicit such self-serving testimony on direct examination.

Q. [To Plaza] Was there – did you hear any conversation by the Union group at B, not necessarily directed at people in line, but that you could hear?

A. No, I couldn’t.

T1:134.

A. [To Rodriguez]: When the voters finished voting and they will go out, they were talking to them. Yes they were.

Q. Okay. And did you hear any of that conversation?

A. I heard one guy say, like towards the end of the voting when it was almost done, that they had about 21 votes.

T1:99. And Rodriguez admitted that her signed statement claiming that she heard such conversations was, in fact, a lie. T1:110: “Q. Is this statement correct? A. No.”

In sum, the Employer failed to establish that the Hearing Officer’s erred in factual findings or legal conclusion that Union organizers were not “at or near the polls.”

1. The Hearing Officer’s Determination of “At or Near the Polls” Does Not Create Any Worrisome Policy Outcomes.

Unsupported by the facts or the law, the Employer is left to protest the purported policy consequences from the Hearing Officer’s determination that organizers were not “at or near the polls.” The Hearing Officer’s decision does not entitle representatives in future elections to electioneer within 8-10 feet of a building where voting is occurring and be closer to the polling

place than a majority of voters. The Hearing Officer did not find here that any organizer was closer than any voter, let alone two thirds of them. The Hearing Officer also did not establish a bright-line rule about what constitutes “at or near the polls.” As each case is decided on its own facts, her declination to find that any organizer here was “at or near the polls” creates no problematic consequences for future elections.

2. Objection #1 Must Be Overruled Even Assuming Union Organizers Were “At Or Near the Polls.”

In the end, the Employer’s claim that organizers were within a default no electioneering zone is without merit because it failed to establish that organizers engaged in conduct to overturn the election. The Employer failed to bring attention to a single case where the mere unobtrusive presence of union organizers in at or near the polls was a basis to overturn an election.³ In the principal case cited by the Employer, *Claussen Baking Co.*, 134 NLRB No. 10 (1961), the Board set aside an election not because the employee and two employer agents were at or near the polls. It did so because a lead employee accosted several new hires for about 15 minutes and within 15 feet of the polling building to advocate that they vote no, did so within the visible presence of a manager and a supervisor, remained in the area for half of the voting period and was asked to stop and leave by the Board agent. None of these factors are present here. *See, e.g., JP Mascaro & Sons*, 345 NLRB No. 42 (2005) (presence without more is not objectionable conduct); *See also Good Samaritan Hosp.*, 31-RD-1555 (ALJ 2009) (same); *Topside Const., Inc.*, 329 NLRB No. 75 (1999).

³ *Nathan Katz*, 251 F.3d 981 (D.C. Cir. 2001), as the Hearing Officer pointed out, involved individuals in a clearly-designated no-electioneering zone loudly motioning, gesturing and honking to voters as they passed to vote.

3. Credible Evidence Did Not Establish That Five Union Representatives Were Within Eight to Ten Feet of the Polling Area For the Entire Voting Period.

In the event that the Board concludes that 8-to-10 feet or one to two car lengths is “at or near” the polls and the presence or actions of up to five organizers constitutes objectionable conduct sufficient to call a new election, the Board should decide, or remand for the Hearing Officer to decide, whether and to what extent any organizers were there and what they did. The Hearing Officer’s Report was not dependent on definitive rulings of disputed evidence or credibility. The credible evidence established that no more than 1-to 2 organizers were closer than 30 feet from the building where voting occurred and then was present intermittently.

The only evidence in support of the claim that union organizers were 8-to-10 feet from the polling area is from non-credible witnesses of the Employer who contradicted themselves about this and other testimony. Employer witness Delilah Rodriguez claimed that she viewed organizers about nine-to-ten feet from voters. TR1:106. On cross examination, she corrected herself that the organizers actually were about 30 feet away, when this undersigned counsel personally illustrated her testimony about the distance of organizers. Undersigned counsel had to walk outside of the hearing room before representing the distance she claimed of the organizers. TR1:106. The Employer’s other witness, Roselyn Plaza, claimed that the organizers were about one-to-two car lengths away. T1:146. The Agency can take administrative notice that a car length is about 13-14 feet on average. In sum, both Employer witnesses actually alleged that organizers were actually no closer than 25-30 feet away.⁴

⁴ The Employer compares and contrasts the testimony from employer and union witnesses about the alleged no electioneering area at North Andover. Compared to Cox, “Ms. Strangie’s understanding and recollection [that no one other than voters could be on North Andover property] seems far more consonant with traditional Board

Credible evidence also established that only one, maybe two, organizers ever ventured near the karate studio or shared parking lot. Organizer Baptista admitted to being in the area for a fleeting amount of time. He testified that *maybe*, though not definitively, organizer Orlando Pena was with him. T2:181. Baptista's testimony in this regard did not shift, as the Employer alleges. He testified that, prior to the vote, voters and organizers were at a café several hundred feet from the polling area. TR2: 177: When Baptista identified the presence of organizers Cox, Grossman and Pena, he clearly was referring to the café. "It was Keegan Cox, there was someone – Jo[]n Grossman was there, one of the organizers, Orlando was there. **A lot of people that I work with, they was like at the café.**" T2:181 (emphasis added). When asked about other organizers present near the karate studio, he said, "I was by myself, *maybe* Orlando was there at some point." T2:181 (emphasis added). Baptista also testified that he was not stationary outside the karate studio, as he "was just like pacing back and forth." T2:181, meaning to and from the café located several hundred feet away.

Claims that five union organizers congregated for the entirety of the voting period suffer from the utter lack of credibility of either Employer witness. At pages 21-25 of its posthearing brief, Petitioner addressed the credibility of witnesses Plaza and Rodriguez. Rodriguez signed a false statement in support of the Employer's objections about what she purportedly observed and heard. PX-3. She recanted the central premise that the statement was used to support – that she heard organizers asking everybody how they voted. (She admitted at the hearing that she heard *no one* being asked). T1:99-101/108/113/122. As such, she simply is not credible.

policy that the Union's version." Employer's Exception at 9. Cox did not participate in the pre-election conference at North Andover – Joao Baptista did. T2:177. There is no dispute that no non-electioneering zone was set, so Strangie's subjective understanding and impressions are irrelevant. And utmost, the Employer failed to credibly establish that any union organizers were ever on Employer property, as opposed to private property of an adjacent business, a shared parking lot, or within a designated no election zone.

Plaza, for her part, similarly had a financial motive to steer testimony in favor of the Employer – the Employer increased her pay by nearly 50 percent within days of the election and after she provided a statement in support of the Employer’s objections. T1:135-38. Plaza misrepresented when and how she received this pay increase. Her testimony should be disregarded.

ii. The Hearing Officer’s Analysis Of Organizer Cox’s Alleged Interaction with Voter Plaza Did Not Misconstrue Precedent or Otherwise Produce Poor Policy Outcomes.

The Hearing Officer concluded that the interaction between Voter Plaza and Organizer Cox did not constitute objectionable conduct. The Employer’s exceptions to this conclusion are partly factual and partly legal. Both bases are wrong.

1. The Hearing Officer Did Not Err When Failing to Find That Any Organizer Asked Any Employee Other Than Plaza How They Voted.

The Employer claims that Plaza heard organizers ask voters whether they voted yes. Employer’s Exceptions at 8. This is not presented as a formal exception and should be disregarded for that reason alone. This exception, even if entertained, also is unsubstantiated. The Hearing Officer did not make this finding, and her omission of this finding is supported by substantial evidence. No other person testified in support of this claim, including Rodriguez, an employer-sanctioned observer present for the entire voting period on the prowl for any misconduct. In addition, Plaza’s testimony does not support a claim that she heard other voters being interrogated as to how they voted. While she testified that after voting she heard organizers asking other voters how they voted, T1:129, this claim is not credible or consistent with her testimony. Like Rodriguez, Plaza testified that before she voted, she heard no organizer ask any employee how they voted. She testified that she voted in the middle of the

pack of 30 voters. T1:143. As for what she allegedly heard after she voted, Plaza fails to identify a single person, other than Keegan Cox, who allegedly asked a question and fails to identify any voter other than herself who allegedly was asked that question. A proper reading of testimony indicates that her testimony about she heard purported exit polling only in reference to herself, and not to other employees. Plaza states: “During the time she was in there, I then heard some of them saying *if I voted yes*” T1:130 (emphasis added). The Employer’s counsel then asks, “When you came out and heard that, while you were waiting for your mom, could you use the—.” At which point, Plaza interrupts: “When he approached me directly. He went directly to me and said if I voted yes.” *Id.* Her subsequent statements make it clear that she heard no organizer ask any other employee about voting: **“Was there – did you hear any conversation by the union group at B, not necessarily directed at people in line, but that you could hear? A. No I couldn’t.”** TR1:134. She affirmed this statement on cross-examination: **“Q. You didn’t hear any conversations that any union representatives had, during the time people were waiting outside to vote, correct?” A. I already said no.”** T1:144.

Even if we generously interpret Plaza’s incoherent testimony as meaning she heard other voters being propositioned after they voted, such a claim is not worthy of credit. No witness corroborated such exchanges. Rodriguez denied hearing this, and admitted that her signed statement to the contrary was false. Plaza lacked any credibility as a witness – she admitted that she attempted to deceive union organizers about her sympathies, she misrepresented the date she received a promotion at work, and had an obvious bias as a result of receiving a nearly 50 percent wage increase after she reported her alleged interaction with Cox to the Employer.

2. Voter Plaza's Fleeting Exchange With Organizer Cox, Even If Found To Have Occurred, Did Not Constitute Objectionable Electioneering Or Surveillance.

The Employer complains that Plaza's momentary exchange with organizer Cox, even if we assume it happened, is sufficient grounds to set aside the election. This contention is bereft of legal support. The Employer's argument that this fleeting exchange constituted objectionable conduct under *Milchem*, 170 NLRB 362 (1968), and surveillance doctrines is deeply flawed. It does not merely err by conflating the two doctrines; the Employer misunderstands both.

The Employer cites *Milchem* in support of its contention that Cox's conduct created the impression of surveillance. Employer's Exception at 9-10. *Milchem* regulates electioneering activity; it does not concern itself with surveillance. *J.P. Mascaro & Son*, 345 NLRB 637, 639 (2005) (ALJ misapplied *Milchem* to surveillance). *Milchem* prohibits "prolonged conversations between representatives of any party to the election and voters waiting to cast ballots." *J.P. Mascaro*, supra (emphasis added). *Milchem*'s scope is specific and narrow. It "does not mean that any chance, isolated, innocuous comment or inquiry by an employer or union official to a voter will necessarily void the election. We will be guided by the maxim that 'the law does not concern itself with trifles.'" *Princeton Refinery, Inc.*, 244 NLRB 1, 2 (1979). In *U-Haul Co. of Nevada, Inc.*, 341 NLRB 195, 197 (2004), the Board found that a union representative did not violate *Milchem* because the brief conversations did not occur in the voting area, the waiting area, or near the line of voters. Here, the alleged exchange, even if we accept the Employer's biased witnesses, was neither prolonged nor involved anyone waiting in line to vote. The Employer's argument thus fails the basic tenets of *Milchem*. That voters may have witnessed this purported exchange – even though not a single person, including designated employer

observer Rodriguez, claimed to have seen or heard this exchange directly or heard of it through others— is irrelevant to *Milchem* analysis. *JP Mascaro, supra.*⁵ Mere presence of organizers near a voting area is not enough to constitute unlawful electioneering. *Sewanee Coal Operators' Assoc.*, 146 NLRB 1145 (1964) (amass of crowd & voters at polling place entrance and placard electioneering in area outside polls, standing alone, did not impair exercise of free choice)

The Employer failed to cite a single case that establishes voluntary uncoerced exchange between a voter and organizer after the former voted constituted unlawful surveillance. Unsurprisingly, the Employer again misrepresents Board law. As with *Milchem*, *Claussen Baking Co.*, 134 NLRB No. 10 (1961) is an electioneering case, not a surveillance case. In *Claussen Baking*, the Board set aside an election because an employee accosted several new hires for about 15 minutes and within 15 feet of the polling building to advocate that they vote no. This conduct occurred in the visible presence of a manager and a supervisor. All three remained in the area for half of voting period, until the Board agent asked them to stop. By contrast, the allegations here are that the conversation occurred *after employees voted*, was not prolonged, did not involve advocacy of how to vote, and did not result in admonishment by a Board agent.⁶

3. The Employer's Residual Argument About the Alleged Policy Implications of the Hearing Officer's Report is Without Merit.

⁵ Electioneering cases are properly analyzed under *Boston Insulated Wire & Cable*, 259 NLRB 1118 (1982), *enfd.* 703 F.2d 876 (5th Cir. 1983). The Employer does not acknowledge this case or doctrine. Application of this standard demonstrates that the Union did not engage in objectionable conduct: 1) the Employer alleges only post-voting discussions, not electioneering; 2) while conducted by organizer(s); 3) did not occur in a *designated* no electioneering area; and 4) did not contravene Board agent instructions.

⁶ *Nathan Katz*, 251 F.3d 981 (D.C. Cir. 2001), for the reasons identified by the Hearing Officer, also provides no support for the Employer's Exception. In *Nathan Katz*, two union agents sat in a parked car within a designated no-electioneering zone and motioned, honked, and gestured to employees arriving at the polling place to vote – all actions contrary to the instructions of the Board Agent. In this case, the organizers were not in a no-electioneering zone, did not loudly interact with persons waiting to vote, did not contravene Board agent instructions, and voters did not have to pass them in order to vote. See also *U-Haul Co. of Nevada v. NLRB*, 490 F.3d 957 (D.C. Cir. 2007).

Again devoid of fact or law to support its Objection, the Employer's warns of dire consequences as a result of the Hearing Officer's Report. It claims that her Report creates an entitlement for parties to conduct sustained exit polling within 8-10 feet of the polling area.⁷ The Report creates no basis to support this intellectual trolling. She did not find the facts underlying the Employer's apocalyptic rhetoric. The Hearing Officer did not find that five organizers were present, that they were within 8-10 feet of the polling place for the entirety of the voting period, or that they inquired of every voter how they voted. *Compare Good Samaritan Hospital*, 2009 WL 981075 (ALJ 2009). This argument is based upon the facts as found or even alleged, but as the Employer imagines them to have been.

4. If the Board Finds Merit in the Exception Based Upon the Purported Exchange Between Plaza and Cox, the Hearing Officer Should Be Directed To Make Findings About This Allegation.

The Hearing Officer decided this objection assuming the Employer's testimony to be true. If her legal analysis was incorrect, then the appropriate step is to direct her to issue findings and credibility determinations underlying this part of this objection. Plaza's claim that she was propositioned by Cox about her vote is not credible. For the reasons aforesaid, her testimony is not credible. This exchange was not corroborated or confirmed by any other witness, including Rodriguez, who vigilantly monitored the area for improper activity. Hearing Officer Report at 12. Cox credibly denied asking any employee how they voted. *Id.*

iii. The Employer's Unlawful Conduct Mitigated Any Objectionable Conduct By the Union.

⁷ The absurdity of the Employer's crocodile tears for hostility of representation elections is simultaneously unworthy of comment and too incredulous to ignore. The Employer's action in this campaign single-handedly increased, unnecessarily so, the hostility in the workplace. Such purported concern for employee stress has not prevented the employer from engaging in unprecedented terminations.

The Employer engaged in rampant misconduct during the election period. The Hearing Officer denied testimony in this regard, to which the Union duly objected. T2:166-67. The Union sought to introduce evidence regarding unlawful promises, threats, discipline and changes to working conditions during the critical period.⁸ Hence, if the Board finds sufficient merit in any objection or exception, the case should be remanded and consolidated to take evidence about the Employer's misconduct, if not consolidated the unfair labor practice charge.

Even if the Board limits consideration of the Employer's misconduct to the evidentiary record, the Employer's misconduct canceled out any objectionable behavior. Organizer Baptista testified that the Employer engaged in unlawful photographic surveillance during the voting period. T2:175.⁹ Additionally, an Employer-designated observer, but who was not at the time actually serving as the official observer, monitored employees waiting in line to vote. Rodriguez admitted that she was a known union opponent and, as an observer who participated in the pre-election conference, an effective agent of the Employer. This conduct renders the Employer's objections insignificant by comparison.

b. Exception to Objection 2 Should Be Overruled

Originally, the Employer objected to two Tweets posted by the Union allegedly prior to the vote count: the Banner Tweet and the Tally Tweet. The Hearing Officer overruled the objection for both. The Employer now excepts only to the Hearing Officer's analysis of the Tally Tweet. Employer Exceptions at 11. This lingering exception, based upon the unproven assertion that the Union prematurely declared victory via Twitter, is completely without merit.

⁸ This conduct is the subject of the first of four unfair labor practice charges filed by the Union against the Employer. See 1-CA-104048.

⁹ Organizer Cox attempted to testify in this regard. T2:189.

i. The Hearing Officer’s Finding that The Union Did Not Declare Victory Via Twitter Is Supported By Substantial Evidence.

The Hearing Officer found that the Union did not prematurely post a Tweet claiming victory prior to the close of voting. The Employer introduced two versions of the Tally Tweet – one showing a timestamp of 2:01 p.m., and one showing a timestamp of 5:01 p.m. The Hearing Officer found that the Union did not post a Tally Tweet at 2:01 p.m. Hearing Officer Report at 17. Her finding is supported by substantial evidence. She cited two Union witnesses who testified that the photo was taken and posted after the votes were tallied. The Hearing Officer expressly credited their testimony. *Id.* (“I credit the testimony of the Union witnesses as to the timing of the Tally tweet.”). The Employer does not challenge this credibility determination. It presents no claim or suggestion how this credibility determination is against the clear preponderance of all the relevant evidence. *Champion Rivet Co.*, 314 NLRB No. 178 n.3 (1994). Thus, the Board’s analysis of this Exception *must assume* the credibility of the Union witnesses.

The Hearing Officer correctly reasoned that in order to find that the Tally Tweet was posted early, she must find that the Union fabricated this Tweet and the tally sheet displayed in the accompanying photo, and photographed Shalim Ramos while he was indisposed with election-related duties as an observer. HO at 17. She appropriately declined to find that such fabrication occurred.¹⁰

The Employer essentially argues that its production of a Tweet with a purported timestamp of 2:01 p.m., without more, creates rebuttable, if not irrefutable, presumption of

¹⁰ The Hearing Officer’s reference to the “overall probabilities” of the situation is not problematic. This phrase clearly refers to the standard of “more likely than not” based upon the plausibility of various statements and allegations, including the notion that the Union would go so far as to fabricate a tally and a Tweet. The use of the overall probabilities to make findings and credibility determinations is not unknown to the Board or its finders of fact. *See Saga Food Service of Hawaii*, 265 NLRB No. 122 (1982) (citing overall probabilities in making credibility determination); *Washington Beef Producers, Inc.*, 264 NLRB No. 155 n.10 (1982) (same).

that it was posted 2:01 p.m. Eastern Standard Time. This argument is mistaken. As the proponent of the Objection and of the exhibit purportedly showing a 2:01 p.m. Tally Tweet, the Employer maintained the ultimate burden to persuade the Hearing Officer that the Union prematurely declared victory on Twitter.

The Employer's refusal to acknowledge this burden is encapsulated by this statement: "The plain fact is that the Union controls its own Twitter feed and had a 2:01 posting announcing before the victory was over." Employer's Exception at 12. While the Union never denied controlling its Twitter feed, the issue of whether the Union actually declared victory at 2:01 p.m. Eastern Standard Time was not a plain fact. It was a factual dispute, as shown by the Employer's own evidence. The Employer introduced several versions of the Tally Tweet – one exhibit showing a 2:01 p.m. timestamp and another exhibit showing 5:01 p.m. timestamp. The Employer never showed or claimed that both Tweets existed simultaneously, but instead the timestamp reflects different times viewing the same Tweet.¹¹ The idea that Employer's contradictory evidence compelled the Union to disprove the purported veracity of the 2:01 p.m. Tweet (or "explain away the 2:01 p.m. posting," Employer Exception at 13) is without merit¹². The Employer could not corroborate the premature posting of the Tally Tweet – no one viewed it prior to the close of voting, and no computer forensic analyst or tech expert testified

¹¹ The Employer impermissibly cites to evidence outside of the record in the form of the Union's current Twitter feed. Employer Exceptions at 12. Such reference is highly inappropriate as it is not accompanied by a Motion to Expand the Record and was clearly regarded as irrelevant by the Hearing Officer. Hearing Officer Report at n.4.

¹² Although unnecessary for Board resolution, the Union did, in fact, "explain away" the 2:01 p.m. Tally Tweet. For one, the Union credibly denied that it ever posted the Tweet. Jason Stephany also testified that a Tweet's time stamp reflects the time zone of where the tweet is viewed or the time zone settings on device that is viewing the tweet. T2:216. Stephany testified that one can manually change the setting on a computer to reflect Pacific Standard Time, rather than Eastern Standard Time. T2:218. The 2:01 p.m. Tweet, not without coincidence, reflects a three-hour difference from the time it was actually posted. In addition, everyone has experienced quizzical interactions with computers that reflect dates, times or other information inconsistent when an email was sent or received, or when a document was created. Nothing compels a finder of fact to accept that the information posted on a computer printout is conclusively what it purports to be.

in support of the Employer to that the exhibit reflect 2:01 p.m. Eastern Standard Time. Because the Employer did not attack the Hearing Officer's credibility determination and therefore cannot allege that the Union's witnesses lied about photographing and posting the Tweet at 5:01 p.m., the Employer's argument is based on the claim that that its exhibit of 2:01 p.m. Tweet is irrefutable proof that it was posted at 2:01 p.m. Eastern Standard Time.¹³

ii. A Union's Premature Claim Of Victory That Is Not Viewed Or Heard By Any Voter Is Not *Per Se* Objectionable.

Even assuming *arguendo* the Union posted a celebratory Tweet hours before the polls closed, this act is not a basis to overturn the election. There is no evidence that any voter viewed the Tweet or was dissuaded directly or indirectly from voting as a result. One cannot rely upon mere speculation that it must have been viewed. Given the Employer's vigorous campaign against the Union and constant outreach to voters about its challenge to the election, it is safe to assume that a union opponent discouraged from so voting by the Tally Tweet would have presented him or herself to the Employer.

The Employer's argument for a *per se* rule regardless of any actual discouragement is not based on any authority, or even any analogy to existing authority. The Employer may believe it "would seem axiomatic" that a premature victory Tweet is *per se* objectionable, but that is not a compelling basis for the Board to fashion such a new rule. The use of social media to communicate here also is not a basis to forgo traditional analysis of objectionable conduct based on electioneering, false campaign statements, or objectionable conduct. Under the

¹³ In an example of the pot calling the kettle *noir*, the Employer claims that the Union "fails to explain away" the 2:01 p.m. Tally Tweet, but it cannot account for the 5:01 p.m. Tally Tweet. The Employer has not denied that a Tally Tweet was posted at 5:01 p.m. There, how the Employer provides no explanation for how Tweet was posted at 2:01 p.m. AND 5:01 p.m., where both timestamps never appeared in the same Twitter feed.

Employer's rationale, any premature victory posting in any public setting is *per se* objectionable, regardless of whether it was viewed by any voter, and any forum is public, so far as anyone can access it, even if no one ever does. (This would mean that posting of premature victory tweet in a break room that no one visited before the election also is *per se* objectionable). If a Tweet is posted and nobody reads it, it cannot be considered "public." This exception

c. Other Relevant Considerations By the Board In Evaluating Exceptions to Objections 1 & 2.

In the event that the Board finds merit in any exception or objection and finds that such provides sufficient basis to warrant a re-run election, the Board should remand the case to the Hearing Officer for a thorough application of the factors applying to election objections under *Taylor Wharton Div., Harsco Corp.*, 336 NLRB No. 9 (2001). The Employer engaged in rampant unlawful practices during the critical period that mitigate, if not domineer, any allegedly objectionable behavior by the Union.

d. Exception To Objection 6 Should Be Overruled:.

The Hearing Officer's analysis of the Employer's Objection based upon *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) is sound and speaks for itself. (The cases relied upon by her do so as well). The Employer's exception seizes upon a scrivener's error that the Hearing Officer mischaracterized the decision as a "claim," rather than a "decision." This is a thoroughly trivial distinction, especially considering that the Employer mischaracterized *Noel Canning* as a "Federal District Court[] decision" and the Hearing Officer's substantive analysis respectfully acknowledged the argument as based upon a federal appellate decision and not a mere "claim." See Hearing Officer Report at 19-20.

4. CONCLUSION

For the foregoing reasons and for the reasons stated in the Petitioner's post-hearing brief, the Exceptions and the Objections should be overruled.

Respectfully Submitted,

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 509

By Its Attorney,
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Dated: August 16, 2013

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above document was filed this date through the National Labor Relations Board's Electronic Filing System and that a copy was served upon counsel for the Employer by electronic mail to gwermuth@mhtl.com and to the Regional Director.

/s/ Patrick N. Bryant
Patrick N. Bryant

NATIONAL LABOR RELATIONS BOARD

In the Matter of:)
SEIU, LOCAL 509)
Petitioner)
and) Case No. 1-RC-103308
CLASS, INC.)
Employer)

AFFIDAVIT OF PATRICK N. BRYANT

1. I am a partner with Pyle Rome Ehrenberg, PC, 18 Tremont Street, Suite 500, Boston, MA 02108. The firm is labor counsel to Petitioner.
2. I am the attorney of record for the Petitioner in this and related matters involving the Employer before the National Labor Relations Board.
3. To date, I have not received an electronic or physical copy of the Employer's Exceptions from the Employer's counsel.
4. I learned of the Exceptions only when I searched this matter at NLRB.gov to determine whether the Employer, in fact, filed Exceptions.

The foregoing is true to the best of my knowledge.

Signed and sworn under pains and penalty of perjury, this 16th day of August 2013.

/s/Patrick N. Bryant
Patrick N. Bryant