

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

UNIFIRST CORPORATION

Employer

and

Case 06-RD-097418

ROBERT A FUSILLO, AN INDIVIDUAL

Petitioner

and

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE WORKERS
INTERNATIONAL UNION, AFL-CIO, CLC,
LOCAL 1324-15

Union

Peter R. Kraft, Esquire
for the Employer

Howard Grossinger, Esquire
of Grossinger, Gordon, Vatz, LLP, for the Union

Robert A. Fusillo, An Individual
Petitioner

Before: Virginia L. Scott, Hearing Officer

HEARING OFFICER'S REPORT ON CHALLENGED BALLOT AND OBJECTIONS

I. STATEMENT OF THE CASE

This petition was filed on January 31, 2013, by Robert A. Fusillo, An Individual, the Petitioner. Pursuant to a Stipulated Election Agreement among Fusillo, UniFirst Corporation (the Employer), and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC, Local 1324-15 (the Union),

approved by the Regional Director on May 17, 2013, an election by secret ballot was conducted on June 13, 2013, among employees in the unit heretofore found appropriate.¹ The results of the election are set forth below:

1. Approximate number of eligible voters..... 149
2. Number of void ballots..... 0
3. Number of votes cast for Petitioner 69
4. Number of votes cast against participating labor organization 70
5. Number of valid votes counted 139
6. Number of challenged ballots 3
7. Number of valid votes counted plus challenged ballots..... 142
8. Challenges are sufficient in number to affect the results of the election.

As noted above, there were three determinative challenged ballots in the election. The Employer challenged the ballot of William Shaner, Jr. on the grounds that he was not employed on the election date. The Petitioner challenged the ballot of Andy Mohammed on the grounds that he was not employed on the election date. The Union challenged the ballot of Michael Koscianski on the grounds that he is a supervisor within the meaning of Section 2(11) of the Act.

On June 19, 2013, the Union filed timely Objections to conduct affecting the results of the election, a copy of which was duly served upon the Employer and the Petitioner. The Objections allege as follows:

1. During the critical period before the election, the Employer, by and through its agents, unlawfully promised a 401(k) plan if the employees voted out the Union thereby interfering with their rights to a fair and uncoerced election.
2. During the critical period before the election, the Employer, by and through its agents, unlawfully promised a profit-sharing plan if employees voted out the Union thereby interfering with their rights to a fair uncoerced election.
3. During the critical period before the election, the Employer, by and through its agents, unlawfully provided employees with free meals for attending anti-union meetings thereby interfering with their rights to a fair and uncoerced election.

¹ The appropriate unit is: All full-time and regular part-time employees employed by the Employer at its New Kensington, Pennsylvania, facility; excluding all office clerical employees, managerial employees, professional sales representatives, administrative employees and guards, professional employees and supervisors as defined in the Act.

4. During the critical period before the election, the Employer, by and through its agents, provided employees with free meals as a gift thereby interfering with their rights to a fair and uncoerced election.

In accordance with Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, an investigation of the Challenged Ballots and Objections was made during which the parties were afforded an opportunity to submit evidence bearing on the issues. On July 1, 2013, the Regional Director issued an Order Directing Hearing on Challenged Ballots and Objections and Notice of Hearing. The Regional Director determined that, consistent with American Safety Equipment Corp., 234 NLRB 501 (1978) and White Plains Lincoln Mercury, 288 NLRB 1133 (1988), the Hearing Officer would not take evidence at hearing on the substantive issue of whether the terminations of William Shaner, Jr. and Andy Mohammed were in violation of any contractual just-cause provision. On July 10, 2013, all parties entered into a Stipulation providing that Shaner and Mohammed each were employed in the bargaining unit on the payroll period eligibility date and discharged on June 10, 2013; that the election was held on June 13, 2013; that grievances concerning the terminations of Shaner and Mohammed were filed and are pending; and that the parties will notify the Hearing Officer of the resolution of the grievances within three days of the resolution.

The Regional Director further concluded that the Objections raised substantial and material issues of fact which could best be resolved on the basis of a full record developed at a formal hearing. The Regional Director also determined that to be included for consideration by the Hearing Officer is the following Objection which, although not specifically alleged in the Objections filed by the Union, was discovered in the post-election investigation and is arguably encompassed by Objection No. 3. This Objection will be referenced in this Report as Objection No. 5.

5. During the critical period before the election, the Employer, by and through its agents, paid employees to attend anti-union meetings and provided a monetary gift for attending anti-union meetings thereby interfering with their rights to a fair and uncoerced election.

Pursuant to the aforementioned Order and Notice of Hearing and pursuant Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, a hearing was held before the undersigned in Room 904 of the William S. Moorhead Federal Building, 1000 Liberty Avenue, Pittsburgh, Pennsylvania, on July 10, 11 and 22, 2013. The Employer and Union were represented by counsel. The Petitioner represented himself. All parties were afforded full opportunity to be heard, to call, examine and cross-examine witnesses, to introduce relevant evidence, to argue orally, and to file briefs with the undersigned after the close of the hearing. The Employer and Union filed timely briefs which have been duly considered. The Employer and Union also submitted business records and other documents into evidence. The Petitioner did not argue orally or file a brief and he did not submit any documentary evidence.

Upon the entire record in this case and from my careful observation of the witnesses and their demeanor and an analysis of their testimony, I make the following findings, conclusions and recommendations with respect to the issues involved herein.² To provide a context for my discussion of the issues, I will first provide a general overview of the Employer's operations. Then, I will present in detail the facts and reasoning that support my conclusions regarding the supervisory status of Michael Koscianski and regarding the Union's Objections.

II. FINDINGS OF FACT AND CONCLUSIONS

A. Background

The Employer is engaged in the sale, rental and cleaning of work garments

² The facts herein are based on the record as a whole and my careful observation of the witnesses throughout their testimony. In resolving any conflicts in testimony, I have taken into consideration the interests of the witnesses, the inherent probabilities in light of other events, corroboration or lack thereof, and consistencies or inconsistencies with each witness' testimony and between the testimonies of witnesses. In evaluating the testimony of each witness, I have relied specifically on his or her demeanor and made my findings accordingly. I note that apart from considerations of demeanor, I have taken into account the above-noted credibility considerations in all cases and my failure to detail each of these is not to be deemed a failure on my part to have fully considered them. Bishop and Malco, Inc., d/b/a Walter's, 159 NLRB 1159, 1161 (1966).

(uniforms) and industrial textile products such as shop towels, floor mats, dust mops and aprons. Solely involved herein is the Employer's New Kensington, Pennsylvania, facility, which is also known as the Employer's Pittsburgh, Pennsylvania, facility.

The Union represents the Employer's approximately 145 production and maintenance employees, garage mechanics and route delivery employees at the New Kensington, PA, facility. The route delivery employees are referred to as Route Salespersons and consist of Industrial Salespersons, who handle uniform rental operations and who are referred to as Division 074 drivers, and Dust Driver Route Salespersons, who handle all items other than uniforms and who are referred to as Division 075 drivers. The current collective-bargaining agreement between the Employer and Union is effective by its terms from February 2, 2013 to February 1, 2018.

B. The Challenged Ballot

1. The Union's Evidence

In support of its assertion that Michael Koscianski is a supervisor within the meaning of Section 2(11) of the Act, the Union presented the testimony of employee Marsha Crytzer, a production employee who has been employed by the Employer for about 28 years and who is the Unit President of the Union. (The Local Union number is 1324 and the Local Unit number is 1324-15). Crytzer was the Union's observer at the June 13, 2013, election in this matter, and she challenged the vote of Michael Koscianski at the election.

Crytzer testified that "as far as she knows", the Employer and Union follow the provisions of Articles 14 and 22 of the collective-bargaining agreement (Union exhibit 1), when filling vacancies at the Employer's New Kensington, PA, facility. Both Articles state, in pertinent part, "When a permanent vacancy occurs, the notice shall be posted on the bulletin board for a period of three (3) working days. Any employee wishing to apply for the vacancy shall make application on the form provided." Crytzer denied that the Union was made aware of any bid for an Industrial Route Salesperson or a Dust Driver Route Salesman as of April 22, 2013, the date when the Employer says that Koscianski became a member of the bargaining unit, or that the

Union was notified in late April 2013 that Koscianski had been placed into, hired into or transferred over to a driver position.

Crytzer testified that on the day of the election, Employer Attorney Peter Kraft told her that Koscianski is a route driver who is in the Union. I find that Kraft, who did not testify at the hearing, is an agent of the Employer.³

Crytzer stated that the practice has been that after 30 days of being put into a job, an employee must pay Union dues at a percentage rate, and that monthly she receives a copy from the International Union of the names of the employees who have paid dues and the amount that they have paid. Crytzer stated that, to date, she has not seen Koscianski's name on any such documentation or on the initiation card that an employee fills out to pay his Union initiation fee, and that, to date, Koscianski has not paid the Union initiation fee or Union dues.

Crytzer testified that prior to the election, she would see Koscianski in the plant and that he always wore a white shirt, the uniform worn only by supervision.

Crytzer acknowledged that since 1986, the parties' collective-bargaining agreement has contained a provision requiring that the Employer post the first vacancy of a job and that any succeeding openings will be filled by the Company. Crytzer admitted that she does not know whether Koscianski was awarded a position based on a non-bid.

Crytzer testified that she saw Koscianski four or five times throughout the years; that she has no idea when he started working at the Employer; that she has no idea when was the last time that she saw Koscianski wearing a white shirt; and that she doesn't know whether or not Koscianski was still wearing a white shirt in April 2013. She further testified that she has no personal knowledge of exactly what job duties Koscianski performed during the months of April, May or June of 2013.

³ The evidence indicates that Kraft spoke for the Employer at a series of election campaign meetings and I find that Kraft, who did not testify at the hearing, is an agent of the Employer.

2. The Employer's Evidence

In support of its position that while Koscianski had been a supervisor within the meaning of the Act, on April 22, 2013 and thus prior to the payroll period ending eligibility date of May 11, 2013, Koscianski reverted back to the unit position of Route Service Salesperson, and that Koscianski does not possess any indicia of supervisory authority, the Employer presented the testimonies of General Manager James Lang, Service Manager Charles Mathews, and Michael Koscianski.

James Lang has been the Employer's General Manager for a little more than 10 years. He testified that one of his job responsibilities is to sign personnel documents. In that regard, Lang testified that he recalled signing a Payroll Adjustment Form for Koscianski dated August 2, 2012; an Employee Change Form for Koscianski dated April 22, 2013; and a second, undated Payroll Adjustment Form for Koscianski. The August 2, 2012, Payroll Adjustment Form shows by the Pay Group and Job Code that August 2, 2012, was the date when Koscianski became a District Service Supervisor at the Employer's New Kensington, PA., facility. The Employee Change Form dated April 22, 2013, under the section titled "Comments", evidences that on April 22, 2013, Koscianski was changed from a District Service Supervisor to a Route Salesperson; that he began receiving seven percent commission on O route the week ending April 27, 2013; and that he became a Union member. Lang testified that the "Comments" section was on the form when he signed it. The undated Payroll Adjustment Form shows that Koscianski used Union sick hours and was paid \$100 Union sick pay for his absence from work on April 30, 2013.

Lang testified that when an employee becomes a new member of the bargaining unit, his seniority date is the date when he first becomes a member of the unit rather than the first date that he was employed by the Company. Lang stated that on the Employer's seniority list dated May 9, 2013, Koscianski's seniority date is listed as February 18, 2008. When questioned as to why the Employer misrepresented to the Union (per the May 9, 2013, seniority list) that Koscianski had been in the bargaining unit since February 13, 2008, Lang replied "I don't

know”). Lang later testified, however, that he did not prepare the May 9, 2013, seniority list - that it is his understanding that Patty Coulter, the Employer’s Office Administrator at the New Kensington, PA, facility, did so. Coulter did not testify at the hearing.

Mathews has been employed by the Employer for 15 years. He is currently the Employer’s Service Manager.

Mathews testified that when a position becomes open, the Employer posts a route bid for that position for three days, one route bid on a bulletin board in the Service Department, one route bid on the first floor of the Employer, and one route bid on the second floor of the Employer. Mathews stated that a bid for B route came open when then incumbent Alex Krzwinski was suspended pending termination and then terminated from that route. The Employer gave the B route job to former O route salesman Christopher Isett and put Koscianski on O route in mid-April 2013, at which time Koscianski was a District Service Supervisor filling in on Isett’s job. According to Mathews, after Isett was awarded B route, Isett twice expressed an interest in O route and the Employer gave him O route as his own around April 1, 2013.

Mathews further testified that since the payroll period ending May 11, 2013, Koscianski has worked in a bargaining unit position and has performed the same job duties as the other Route Salespersons.

Michael Koscianski testified that he began working for the Employer in the winter of 2008 as a District Service Supervisor at the Employer’s New Kensington, PA, facility. In about May 2009, he became a New Account Salesman at that location. In the middle or end of 2010, Koscianski became a Sales Manager at the Employer’s Louisville, Kentucky, location, and in about August 2011, Koscianski became a New Account Sales Representative at the Employer’s Chicago, Illinois, facility. In August 2012, Koscianski became a District Service Supervisor at the New Kensington, PA, location and he began working as a Route Sales Serviceperson at that location the week of April 22, 2013.

According to Kocianski, Union dues were taken out of his pay beginning in June 2013 even though he did not sign a dues deduction authorization. He believes that he did not pay a

Union initiation fee, unless it was included with his Union dues. Koscianski went to one Union meeting which he learned about through a flyer that was placed in his route box and from being told by someone who stopped at his home. Koscianski testified that he has continued as a Route Salesperson on the same route from April 22, 2013, to the present.

3. Legal Standards and Analysis

Supervisors are specifically excluded from the Act's definition of "employee" by Section 2(11) of the Act, which defines a "supervisor" as follows:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet the definition of "supervisor" in Section 2(11), a person need possess only one of the 12 specific criteria listed, or the authority to effectively recommend such action. Ohio Power Co. v. NLRB, 176 F.2d 385 (6th Cir., 1949), cert. denied 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. Harborside Healthcare, Inc., 330 NLRB 1334 (2000).

The burden of proving supervisory status lies with the party asserting that such status exists. NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 711-712 (2001); Michigan Masonic Home, 332 NLRB 1409 (2000). The Board has frequently warned against construing supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See, e.g., Vencor Hospital – Los Angeles, 328 NLRB 1136, 1138 (1999); Bozeman Deaconess Hospital, 322 NLRB 1107, 1114 (1997). Lack of evidence is construed against the party asserting supervisory status. Michigan Masonic Home, supra, at 1409. Mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisory authority. Sears, Roebuck & Co., 304 NLRB 193 (1991).

As noted above, the Union, contrary to the Employer, contends that Michael Koscianski is a supervisor and that he was a supervisor as of the payroll period ending date for eligibility, May 11, 2013, and on the date of the election, June 13, 2013. Therefore, it is the Union's burden to establish the supervisory status of Koscianski, and lack of evidence in this regard is to be construed against the Union.

In support of its position, the Union relies upon the following testimony of witness Marsha Crytzer: (1) the representation to Crytzer by Employer Attorney Kraft on the day of the election that Koscianski was a Location 075 Dust Driver; (2) the Union's failure to receive any bids from the Employer for either a Location 074 or Location 075 driver or any notification from the Employer as of April 2013 that Koscianski was made a member of the bargaining unit; (3) the Union's failure to receive a Union initiation fee or dues from Koscianski or any documentation from the Employer evidencing such payments; and (4) Crytzer seeing Koscianski, prior to the date of the election, wearing a white shirt, when white shirts are only worn by Employer supervisors.

I have given due consideration to the four foregoing factors. I find it unnecessary to make credibility resolutions in regard to the testimony of the parties' witnesses concerning these factors when determining whether or not the Union has met its burden of proof that Koscianski is a 2(11) supervisor. Rather, in making my determination, I have relied upon the fact that there is no evidence or contention in the record that, from the relevant time period of May 11, 2013 (the payroll period ending eligibility date) to the present, Koscianski possessed or exercised any Section 2(11) indicia. Specifically, there is no evidence or contention in the record that since May 11, 2013, Koscianski has had the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action. St. Francis Medical Center – West, 323 NLRB 1046 (1997); Esco Corporation, 298 NLRB 837 at 839 (1990); G.E.S., Inc., d/b/a Big Star No. 185, 258 NLRB 300 (1981). As noted above, these are the indicia upon which the Board relies in determining an individual's supervisory status.

Accordingly, based on the above, I find that the Union has not met its burden of proof that Koscianski is a supervisor within the meaning of Section 2(11) of the Act.

C. The Alleged Objectionable Conduct

Objections 1 and 2 allege promises of benefits (a 401(k) plan and a profit-sharing plan, respectively) by the Employer if the employees vote out the Union. Objections 3, 4 and what has been designated for the purposes of this Report as Objection 5, allege the granting of benefits (free meals for attending anti-union meetings and as a gift in objections 3 and 4, and free meals and a monetary gift for attending anti-union meetings in objection 5) by the Employer. The Objections will be treated in two parts, the first part addressing the alleged promises of benefits and the second part addressing the alleged granting of benefits.

1. Objections Nos. 1 and 2 – The Alleged Promises of Benefits

a. The Union's Evidence

In support of Objections 1 and 2, the Union presented the testimonies of employees Melissa Brumbaugh, Val Jean Barnett, George Bowman, Denise Waterloo, Beverly Hugley and Gregory Beighley. The Union also called Employer Production Plant Manager Kevin Stover, a witness presented by the Employer, as an adverse witness.

It is undisputed that the alleged promises of benefits which form the basis for Objections 1 and 2 occurred at a series of non-mandatory meetings conducted by the Employer during the period from April 2013 to June 2013. Employer Attorney Peter Kraft, Employer General Manager James Lang and Employer Senior Vice President Michael Croatti spoke to production and maintenance employees and mechanics at a series of meetings during the above period, and with Route Salespersons on May 18 and June 8, 2013. The meetings with the production and maintenance employees were held during the workday in the Conference Room at the Employer's New Kensington,

PA, facility, and were attended by between 4 and approximately 20 employees. The meetings with the Route Salespersons were held on Saturday, May 18, 2013, and on Saturday, June 8, 2013 (Saturday is not a regular workday for Route Salespersons) in the Conference Room at the Employer's New Kensington, Pa., facility, and at the VFW in Lower Burrell, PA., and were attended by between 10 and 40 employees. All employees were paid for their attendance at these meetings. Payment to the Route Salespersons for their attendance at the May 18 and June 8, 2013, meetings is part of the basis for Objection No. 5, to be discussed later in this Report.

Union witness Melissa Brumbaugh is a production employee who has been employed by the Employer for 2-1/2 years. She testified that the meetings she attended were attended by Kraft, Croatti, Lang and Production Plant Manager Kevin Stover. Brumbaugh testified that at these meetings, Croatti told the employees to vote no and to take their Union dues money and put it into a 401(k) and that the Company would match what the employees put in. She stated that she thought it was Lang who told the employees that the Employer's match would be some percentage, she thought four percent. She further stated that Lang told the employees that employees can get in on the profit sharing too by "voting no basically." Brumbaugh further testified that "management" stated that if the Union left, then the employees' pensions would be frozen.

Brumbaugh testified that she did not recall Kraft saying at a May 2013 meeting what will be referred to in this Report as "disclaimers," those being that he was going to describe the Company's corporate-wide national program and that he was not saying that these benefits are only available to employees if they decertify. Brumbaugh stated that she did recall Kraft stating that it's important to know that the Company's benefits are not contractually guaranteed and that the (Employer's) Handbook says that, and that she thought she remembered Kraft stating that employees should not ask him what the

Company is offering them; that he can't make any promises or guarantees – that that's against the law. Brumbaugh denied that at the meetings where Croatti spoke about 401(k), he said that this wasn't something that he could either promise or guarantee and she testified that she did not recall Croatti stating that these are benefits that could be negotiated into the Union contract.

Brumbaugh also testified that she could not recall Lang stating that he couldn't make any promises about employees and the profit sharing plan.

Brumbaugh testified that, in response to employee comments that they don't make enough money to contribute to a 401(k), Croatti told the employees to trust him, to vote no, and to take their Union money and put it into a 401(k).

Union witness Val Jean Barnett is a production employee who has been employed by the Employer for 26-1/2 years. Barnett testified that she attended four meetings and that present at those meetings at various times were Employer officials Kraft, Lang, Stover and Employer Stockroom Supervisor Diane Rigatti. Barnett testified that at the first meeting she attended, "management" said that if employees would vote the Union out, the employees would get profit-sharing and a 401(k) plan, and that at the first and second meetings she attended, "management" said that employees could put their Union dues into the 401(k) plan.

According to Barnett, at a meeting on June 7, 2013, Croatti stated that employees could put their Union dues into the 401(k) plan. Barnett testified that Croatti asked her if the employees wanted free money. She responded that everybody wants free money and she asked Croatti to explain what he was talking about and he said profit sharing. According to Barnett, Croatti compared profit sharing to a big bowl of spaghetti and everybody getting a share. Barnett states that Croatti said that because she makes between \$20,000 and \$21,000 a year, she would get \$600 every year with profit sharing. According to Barnett, Croatti also said that employees had to work two

years to become vested in the plan and that if they did not work for two years, their money went back into the pot and it was distributed among the rest of the people who worked there.

Barnett testified that at the June 7, 2013, meeting, Croatti explained that workers who are without a union get a 401(k) plan, that it is their retirement program, and that it was something that it was possible for the Union to bargain into the Company's benefits. Barnett replied "yes" when asked if she was saying that she made an assumption that if the Union wasn't there she was going to get the non-Union benefits.

Barnett denied that at the June 7, 2013, meeting Croatti said that he was not promising or guaranteeing her anything. She stated that Croatti ". . . never . . . no . . ." said that he couldn't make promises to the employees. Barnett further denied that Lang said that he was not able to make promises. Additionally, Barnett denied that Kraft compared Union and Company benefits.

Barnett testified that she recalled Kraft stating that he was not saying that employees can't get benefits through Union negotiations and that the Handbook says that; that he couldn't promise employees anything or make any guarantees; and that he was not offering them anything. According to Barnett, Lang said these same things, but she did not recall Croatti saying them.

Union witness George Bowman is a driver salesperson who has been employed by the Employer for 28 years. He testified that he attended two meetings conducted by the Employer, one on May 18, 2013, and one on June 8, 2013, attendance at both of which was voluntary, and that the meetings were also attended by other drivers from both the Uniform Side and the Dust Side. Both meetings were held on a Saturday, not a normal workday for Route Salespersons.

Bowman testified that at the May 18, 2013, meeting which was attended by 10-15 drivers, Kraft stated that employees could get into a 401(k) and profit sharing; that if

they got three years with the Company, they were fully vested; and that if they wanted to get into the 401(k) plan, they could put between two and eight percent into it.

At the June 8, 2013, meeting, according to Bowman, Croatti said that if there was no union at the Employer, employees' pensions would be frozen and then they would have the 401(k) and profit sharing available to them. Bowman further testified that Croatti said that if an employee got into the 401(k) and profit sharing and he was fully vested, he would get 50 cents on the dollar as the Company's contribution.

Bowman testified that he remembered Kraft stating at the May 18, 2013, meeting, that even though he was about to talk about the Company's corporate-wide national benefits program, that that didn't mean that employees couldn't get those benefits through the bargaining process; that the Company's benefits were not guaranteed – that it says that in the Handbook; that he was not allowed to and couldn't make any promises to the employees; and that he was not offering the employees anything.

Union witness Denise Waterloo is a sewing machine operator who has been employed by the Employer for 30 years. Waterloo testified that in mid-May 2013, she attended a meeting called by management and attended by about six other employees, at which Kraft and Croatti spoke. Waterloo stated that they said that employees could get a 401(k) and profit sharing if they were non-union. According to Waterloo, she asked why employees couldn't have 401(k) and stay Union, and Croatti answered that no companies will offer both packages.

Union witness Beverly Hugley is a production employee who works in the stockroom at the Employer and who has been employed by the Employer for almost one year.

Hugley said that she attended three meetings conducted by management within two months prior to the June 13, 2013, election. She stated that maybe 20 employees

attended the first meeting, 15-20 employees attended the second meeting and maybe 11-13 employees attended the third meeting.

Hugley testified that at one of the meetings she attended, Croatti said instead of paying Union dues, why not invest that money into a 401 plan where it could be matched, and that the Company would match it with, "I think it was, like, two or three percent." Hugley stated that "offhand", \$600 was mentioned by Croatti as the amount of money that would be put into a 401(k). Hugley said that it was explained that if she (Hugley) became corporate or Company, 401(k) or profit sharing would become available and that, without a union she would be able to get into the 401(k) plan or the profit sharing. Hugley further testified that Croatti asked the employees to give the Company a chance for at least a year and that, after that year, if the employees didn't like it, then they could always go back to a union.

Hugley did not recall Kraft making any disclaimers. Specifically, Hugley testified that she did not recall Kraft saying words to the effect that just because he (Kraft) was explaining the Company's corporate benefits does not mean employees can't obtain them through the Union negotiations or if employees decertify. Hugley did not remember Kraft saying that the Company's benefits are not contractually guaranteed or that employees should not ask Kraft what the Company is offering them – that he can't make promises to them in exchange for having them vote to decertify

Hugley also did not remember Croatti saying that the benefits he was talking about are negotiable in the Union contract. Hugley testified that while she could not remember whether such disclaimers were made, it "might be possible" that they were made by management.

Union witness Gregory Beighley testified pursuant to a subpoena. He is a route salesman in the Industrial Division who has been employed by the Employer for 26 years.

Beighley testified that he and between 30 and 40 Industrial and Dust Drivers attended the Saturday, June 8, 2013, meeting conducted by the Employer at the VFW in Lower Burrell, PA. Beighley stated that at that meeting, Croatti said that the rest of the Company got 401(k) and profit sharing and that, without the Union, that's what the drivers would get. Beighley testified that Croatti said that if the employees would put \$20 into the 401(k), the Company would put in \$20, but that if the employee put in \$25, the Company would still only put in \$20.

According to Beighley, Croatti used a bowl of spaghetti analogy with respect to profit sharing. Beighley testified that Croatti said that everybody takes a share; that employees are not getting any of it but that, without the Union, the employees would be getting their share of it.

Beighley testified that he could not recall anyone saying at the meeting that he attended that I need everybody to understand that if we talk about benefits it doesn't mean that you can't obtain them through negotiations. He did not remember anyone saying that the employees weren't being promised or offered anything or that the Company's benefits were contractually guaranteed.

Employer witness Production Plant Manager Kevin Stover was called by the Union to testify as an adverse witness. He testified that at a meeting he attended in mid-May or mid-June 2013 where Croatti was the spokesperson, Croatti told the employees to just give the Company or him a chance for a year and that if they weren't happy, they could vote the Union back in. Stover said that Croatti advocated that the employees choose to get rid of the Union and that, if they wanted to, they could vote the Union back in. While Stover said that this statement was made at some of the meetings, he would not agree that the meetings were held as part of a concerted Company plan to try to urge employees to vote to decertify the Steelworkers at the June 13 election.

b. The Employer's Evidence

The Employer presented General Manager James Lang, Senior Vice President Michael Croatti and Production Plant Manager Kevin Stover.

Employer witness James Lang has been the Employer's General Manager for a little more than 10 years. Lang testified that at a meeting he attended in early May 2013, and again at the May 18, 2013, meeting, Kraft did most of the talking, generally addressing employees' questions. Lang testified that Kraft said that nothing about the Company benefits was guaranteed and that it said as much in the Handbook; that all of the benefits that they would speak of are available through the collective-bargaining process; and that they would not be promising, guaranteeing or offering anything because that would be illegal. According to Lang, Kraft stated that 401(K) and profit sharing are part of the non-Union benefit package and they are available through the bargaining process, but they are not guaranteed.

Lang testified that at the second management meeting he attended, a question was raised about what would happen to an employee's pension (if the Union was voted out). Lang testified that Kraft answered that the pension was protected as part of the law. Lang further stated that Kraft said that an employee was not able to have a pension and a 401(k) at the same time.

According to Lang, at one of the meetings that he (Lang) attended, Croatti said that profit sharing was a family-style pasta where all the employees had an opportunity to get a piece and that it was different from the 401(k) in that the 401(k) is an elective portion. Lang said that Croatti explained that profit sharing was something that you didn't have to elect; that it was there for all employees.

Lang testified that on June 7, 2013, he attended a meeting requested of Croatti by a handful of stockroom employees regarding complaints that the employees had about their immediate supervisor. During that meeting, according to Lang, Croatti

described the profit sharing plan as a family-style pasta of which employees outside of the bargaining unit, non-Union employees get a piece.

Employer witness Michael Croatti has been employed by the Employer for 10 years. For the past year, he has held the position of Senior Vice President.

Croatti testified that during the last week of May, the first week of June and on Saturday, June 8, 2013, he met with the Employer's production employees, maintenance employees and mechanics. Croatti stated that there were approximately 10 to 15 employees per meeting at the May 2013 meetings and that, in response to employee questions as to what is 401(k) and what is profit sharing, he told the employees that these benefits can be gotten through the collective-bargaining process; that he was not promising, guaranteeing or offering them these benefits, but that he was there to explain them and how they work. Croatti testified that he told the employees that 401(k) is an elective benefit and that each time you get paid you can put money into an account and the Company matches the first 3 percent dollar for dollar. He further explained to the employees that if they put in 2 percent more, the Company would match that.

Croatti stated that he told the employees that profit sharing is based on the profits from what the Company does each year; that it can range from 0 percent up to 3 percent of their gross pay; and that it goes into their account at the end of the year.

Croatti testified that, in response to an employee's statement about not making enough money to contribute to a 401(k) plan, he said that currently the employees are paying about \$40 a month in Union dues and that if the Union wasn't at the Employer, they could use some of their Union dues to put toward their 401(k). Croatti denied ever saying that in order to get these benefits, employees had to decertify.

Croatti testified that on June 7, 2013, he met with four stockroom employees of the Employer, at their request, to discuss their feeling that they weren't being treated right by the stockroom supervisor. Toward the end of that meeting, according to Croatti,

employee Val Jean Barnett asked him to explain profit sharing and before he did so, he stated that profit sharing can be received through the collective-bargaining process, but that it has never been requested. Croatti testified that he then said that profit sharing is like family-style pasta, where all year the employees work hard, help build the ingredients to put into the sauce and at the end of the year, the employees get to partake in a meal. Croatti went on to state that he tried to explain profit sharing another way to Barnett by noting that Barnett makes approximately \$20,000 a year and that in 2012, she would have earned \$600 because the Employer gave 3 percent in profit sharing to the employees. When Barnett responded that that's not really a lot of money and that she would rather have her pension, according to Croatti, he said that that was fine and the conversation ended.

Croatti testified that on Saturday, June 8, 2013, he met with the Employer's drivers. Croatti stated that before he (Croatti) said anything, Employer Attorney Kraft gave the disclaimers, stating that these benefits can be obtained through the collective-bargaining agreement and that they were not promising, guaranteeing or offering employees anything. Croatti stated that he (Croatti) told the employees that 401(k) is an elective; that employees can put money into their account and that the first 3 percent is matched dollar for dollar, but that if the employee put in 5 percent, the Company would match 4 percent.

Croatti testified that he represented to employees at the above-mentioned meetings when profit sharing was discussed, that nonunion employees of the Employer at other facilities had profit sharing. Croatti testified that he told employees that he hoped they would vote no, but that he ended all meetings with you do what's best for you and your family; you have a choice here.

Employer witness Kevin Stover has been employed by the Employer since November 2002. He has been the Production Plant Manager since November 2011.

Stover testified that he attended several rounds of meetings conducted by the Employer in mid-May 2013 at which Kraft iterated his statements that Company benefits could be obtained through bargaining and that they are outlined in the Company Handbook and that nothing would be promised or guaranteed at these meetings. Stover stated that Kraft told those present that the Company has two different parts to its retirement package – 401(k) and profit sharing – and that Kraft explained that profit sharing is an account, that monies get contributed into an employee's account on a yearly basis anywhere from 1 to 3 percent, and that the employees do not have to contribute to profit sharing. However, the 401(k) is an elective and it is the employee's choice of whether to invest anything into that account.

Stover testified that in response to a question as to whether employees can keep their Union pension and the Company's retirement benefits as well, Kraft stated that it was unlikely that the employees would have availability to two full retirement packages since no other location in the Company has two retirement plans, but that that was something that could be obtained through bargaining. Stover stated that in response to a question as to whether employees can keep their pension and participate in 401(k), Kraft answered that that's an option that could be obtained through bargaining, but that it hasn't been done yet.

2. Objections Nos. 3, 4 and 5 – The Alleged Grant of Benefits

a. The Union's Evidence

Union Objections Nos. 3 and 4 and what has been identified as Objection No. 5, allege that during the critical period before the election, the Employer provided employees with free meals for attending anti-Union meetings and as a gift, and paid employees to attend anti-Union meetings and provided them with a monetary gift for

doing so.⁴ As with the alleged promises of benefits addressed in Objections 1 and 2, Objections 3, 4 and 5 will be grouped for discussion purposes. The Union and the Employer each presented the same witnesses to testify in regard to Objections 3, 4 and 5 as they had presented to testify in regard to Objections 1 and 2.

Union witness Melissa Brumbaugh testified that on June 12, 2013, the day before the election, she attended a barbecue in the garage area of the Employer, at which attendance was voluntary. She said that she has attended a barbecue at the Employer annually on Founders Day, but that the June 12, 2013, barbecue was different because it was a really good lunch (as compared with the hot dogs, pizza and hamburgers that were served on Founders Day, at the June 12, 2013, barbecue the Employer served pulled pork and chicken).

Union witness Val Jean Barnett testified that on June 12, 2013, she attended what she referred to as a picnic, and that she had attended Founders Day picnics at the Employer in the past. According to Barnett, on Founders Day the Company has hot dogs and hamburgers and sometimes salads and, while the food at the June 12 picnic was different, she thought that both picnics had good food.

Barnett stated that the Company has a Christmas meal and that last year at that meal, the Employer served ham, red potatoes, green beans, salad, a cupcake, pop and water.

Union witness George Bowman testified that he attended both the May 18 and June 8 voluntary meetings conducted by the Employer. According to Bowman, Kraft said that the Employer was going to pay employees because they took the time to come to the meeting and "someone" said the amount to be paid would be \$100. At the June 8,

⁴ There was no evidence presented at hearing with regard to the Employer providing employees with a monetary gift for attending anti-Union meetings.

2103, meeting, according to Bowman, employees were told that they would be paid for their attendance, but no amount was mentioned to Bowman's recollection.

Bowman testified that drivers are paid by the Employer to attend mandatory service meetings that are held at the Employer twice a year on the weekend. At these service meetings, according to Bowman, the Employer usually gives the employees bagels, chips, coffee and pop. At the May 18 and June 8, 2013, meetings, the employees got served breakfast consisting of scrambled eggs, sausage, bacon, home fries, juice, milk, and coffee.

Bowman stated that he has never been paid less than \$100 for attending a Saturday sales conference at the Employer and that he was compensated for attending a meeting at the Clarion Hotel on a Saturday.

Bowman testified that the contractual provision regarding weekend sales conference meetings refers to conference times of six hours and that these meetings typically last about 4 to 4-1/2 hours. Bowman testified that he was paid \$100 for each of the meetings that he attended on May 18 and June 8, 2013, each of which lasted between 2 and 3 hours.

Union witness Denise Waterloo testified that she attended a voluntary luncheon in the Employer's garage on June 12, 2013, and that in the 30 years that she has been at the Employer, "I've never seen a luncheon like that." She stated that the Employer had everything you wanted in terms of food – pulled pork, hot dogs, hamburgers, cake, fruit, and that it was a very nice luncheon.

Union witness Beverly Hugley testified that she attended the June 12, 2013, function, at which chicken, pulled pork and broccoli were served, and that attendance was voluntary. She further testified that she attended a Christmas meal at the Employer at which ham and red potatoes were served.

Union witness Gregory Beighley testified that he attended the Saturday, June 8, 2013, meeting, and that while he did not recall who said it, he remembers hearing that employees were getting paid \$100 for attending the meeting which lasted roughly two hours. Beighley testified that he has attended the sales conference meetings held twice a year at the Employer and that they usually last about 5 or 6 hours and employees are paid \$100 for their attendance at those meetings.

b. The Employer's Evidence

Employer witness James Lang testified that attendance at the ISO (International Standards of Organization) certification picnic on June 12, 2013, was voluntary and that no one was paid to attend. Lang testified that ISO means that the Employer puts standards into place that allow it to ensure quality and a level of service to its customers. Lang initially stated that the Company received notification in the mail on June 4, 2013, that it had passed its audit for ISO certification and that it received the actual ISO certificate that date. Lang later testified that the Company found out at the end of April 2013 that it had accomplished its goals to obtain ISO certification. Lang called the ISO certification a "significant accomplishment."

Lang testified that the luncheon was held on June 12, 2013, because Croatti was in town, the Employer did not know when he would be back in town again and the Employer wanted him to speak at the luncheon. Lang further stated that there was not a lot else going on that day.

Lang testified that Croatti was at the plant for numerous meetings on several days throughout May 2013 and that the Employer was aware at that time that it had satisfied the ISO standards for certification. Lang denied that the luncheon could have been scheduled any time after the end of April because the Employer did not have the certificate and it felt that the certificate was an important part of the process. According to Lang, he has no idea why the certificate didn't come to the Company until early June

2013. Lang said that there were several days between the end of April and June 12, 2013, that were open, but he denied that the Company could have scheduled the June 12, 2013, barbecue until after it found out that the certificate was going to be issued because “it was very important for Mr. Croatti to be a part of the celebration and once the actual certificate was issued, the next logical time to hold the celebration was on the date we had it.”

According to Lang, the June 12, 2013, luncheon cost the Employer approximately \$9.00 per person. Lang stated that the Employer has an annual Christmas gathering at which the Employer has served ham, dinner rolls, potatoes and cupcakes, and the cost of that gathering was about the same as the cost for the June 12, 2013, luncheon. Lang further testified that the Employer has had other gatherings at which it has served food to the employees; for example, Customers for Life (a corporate measurement of customer retention), and Founders Day. Lang stated that the paragraph entitled “Discretionary Benefits” in Article 20 of the parties’ collective-bargaining agreement allows the Employer to hold these types of events without having to check with the Union.⁵

Lang testified that \$100 is the established rate for Saturday meetings. He testified that in 2007 the Employer was holding a series of monthly meetings during the work week during the day. Route salesmen were not paid for their attendance at those meetings. There was a grievance filed and arbitrated and the Company was mandated

⁵ The actual wording of the relevant section of Article 20 of the contract is as follows: “The COMPANY routinely provides employees with fringe benefits which are unplanned and made available on a routine basis (t-shirts, coffee, doughnuts, pizza). Occasionally Company products are either given out or sold at a discount. At present there is an annual Founder’s Day banquet (usually the second Friday of July of each year) with various prizes and awards. The Company regularly holds contests for safety, sales, and quality, among other activities. Such benefits are discretionary, and while offered with some frequency, are not contractually required.”

to pay \$50 to each route salesman for every meeting that he attended (\$50 was what the Employer paid at that time for route salesmen to attend Saturday meetings).

In 2009, according to Lang, the Employer was initiating training for the route salesmen and the Union grieved because of its belief that the route salesmen were spending a lot of their own time for this training without being paid. That grievance was arbitrated and denied.

Lang testified that there was no arbitrator's mandate that employees be paid for coming in voluntarily to meetings held on their days off and that there was no arbitration award requiring the Company to pay the drivers for their attendance at the May 18 and June 8, 2013, meetings. He testified that the Company paid the route salesmen for their attendance at the May 18 and June 8, 2013, meetings because it felt that it had to. Lang testified that it was Kraft who made the decision to pay the route salespersons for their attendance at the May 18 and June 8, 2013, meetings.

Lang testified that the food served at the May 18 and June 8, 2013, meetings with the route salesmen was consistent with that which was served at the Saturday sales conferences, and consisted of eggs, bacon, sausage, hash browns and juice. He further stated that several years ago Saturday meetings were held at the Clarion Hotel, which did not allow the Employer to bring in its own food but, rather, provided the food.

Employer witness Michael Croatti testified that the route salesmen were paid \$100 for attending the June 8, 2013 meeting per Article 22 of the Union contract, and that he couldn't have held that meeting at any other time because Article 22 states that the Company can have brief meetings with the route men during the week, and that meeting lasted almost 3 hours.⁶

⁶ The actual wording of the relevant section of Article 22 of the contract is as follows: "Weekday morning or afternoons the Company may occasionally require Route Salespersons to attend brief, large group or small group meetings . . ."

Croatti testified that there is no time to really sit and talk with the route salesmen during the week because they leave the building at 4:00 or 5:00 a.m. and are back by 6:00 p.m. Croatti denied that he could have made the meetings mandatory because Article 22 of the contract states that mandatory Saturday meetings have to be posted before January 30 or 8 weeks' notice must be given.⁷

Croatti stated that he thought the Company had to pay the route men to attend voluntary meetings because the Company paid production employees to attend a series of meetings, and the route salesmen had given up their Saturdays to come in and Croatti thought that their time was worth something.

Croatti testified that Lang told him in the beginning of June that an ISO certificate had been received at the New Kensington location of the Employer, and that the June 12, 2013, luncheon was held to celebrate the employees' hard work to achieve that certification. Croatti asserted that he attends the celebrations held by other Employer locations when those locations become ISO-certified and that those celebrations are no different than the June 12, 2013, celebration. Croatti stated that none of the other Employer locations has held a celebratory event prior to the Employer receiving the ISO certificate.

Croatti testified that the provisions of Article 20 deal with route salespersons being required to attend two route sales conferences a year; that whether the Company holds those meetings or not, the drivers get paid \$100 each for the two meetings; and that there is nothing in the contract that requires the Company to pay anything for any voluntary meetings that the drivers attend on a weekend day. Croatti agreed that the Company could have not paid the drivers anything for their voluntary attendance at the

⁷ The actual wording of the relevant section of Article 22 of the contract is as follows: “. . . The COMPANY will attempt to post the Weekend Sales Conference dates in January of each year or as soon as the Company knows when a Weekend Sales Conference will be held; however, eight weeks' advance notice of a Weekend Sales Conference will suffice . . .”

Saturday meetings, but he stated that “It wouldn’t have been right.” Croatti elaborated on this statement by saying that he didn’t think it was right that the route men would come in on a Saturday and not get paid and that he didn’t want to get a grievance from it. He explained that he went through two arbitrations and a grievance about payment to route salesmen for coming to meetings and over the Employer’s failure to timely post a mandatory meeting, and that, as a result, the Employer paid employees \$100 each for a meeting that was never held.

Later, Croatti testified that all of the grievance and arbitration matters that he testified about pertain to attendance by the drivers at mandatory meetings.

Croatti stated that while he did not know, others in management above Lang knew before the beginning of June 2013 that the ISO certification would be issued. Croatti testified that he found out in the first week of June 2013 that the Employer’s Pittsburgh location was made aware that it would be ISO-certified.

Croatti testified that he didn’t know if he would have come to the New Kensington location of the Employer if the celebration of ISO certification was held in August because he doesn’t know his schedule.

c. Legal Standards – Objections 1 and 2

As a general rule, the period during which the Board will consider conduct as objectionable – the “critical period” – is the period between the filing of the petition and the date of the election. Ideal Electric Manufacturing Co., 134 NLRB 1275 (1961).⁸

The party who files Objections to an election bears the burden of proof to establish that the conduct by the other party’s agents had an undue and adverse impact on the election and that the conduct occurred within that time period (Ideal Electric, supra). Moreover, the burden is on the objecting party to provide evidence that the

⁸ In this case, the “critical period” is particularly lengthy due to the fact that there was an unfair labor practice charge that blocked the processing of the petition and therefore delayed the date of the election.

election should be set aside. Daylight Grocery Co. v. NLRB, 678 F.2d 905, 909 (11th Cir., 1982); Lamar Advertising of Janesville, 340 NLRB 979 (2003); and Consumers Energy Co., 337 NLRB 752 (2002).

In Taylor-Wharton Division Harsco Corporation, 336 NLRB 157 (2001), the Board stated:

The proper test for evaluating conduct of a party is an objective one –whether it has ‘the tendency to interfere with the employees’ freedom of choice.’ Cambridge Tool & Mfg. Co., 316 NLRB 716 (1995). In determining whether a party’s misconduct has the tendency to interfere with employees’ freedom of choice, the Board considers: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. See, e.g., Cedars-Sinai Medical Center, 342 NLRB 596 (2004).

With respect to the promise of benefits by an employer during the critical period, an employer may lawfully inform employees of the wages and benefits its nonunion employees receive and respond to requests for information from employees about such benefits. G & K Services, Inc., 357 NLRB No. 109 (2011); Suburban Journals of Greater St. Louis, LLC, 343 NLRB 157, 159 (2004). An employer may make truthful statements to employees concerning benefits available to represented and unrepresented employees and may compare wages and benefits at their unionized and nonunionized facilities. An employer may also offer an opinion, based on such comparisons, that employees would be better off without a union. TCI Cablevision, 329 NLRB 700 (1999).

It is unlawful, however, for an employer to state that employees can only obtain particular benefits by decertifying a union. Such promises made in the course of urging employees to reject unionization are unlawful because they link improved conditions to

defeat of the union. Reliance Electric Co., 191 NLRB 44, 46 (1971), enfd. 457 F.2d 503 (6th Cir. 1973). An employer also may not impliedly promise employees benefits and the Board will set aside an election in which this occurs. Etna Equipment & Supply Co., 243 NLRB 596 (1979). Determination of whether a statement is an implied promise of benefit involves consideration of the surrounding circumstances and whether, in light of those circumstances, employees would reasonably interpret the statement as a promise. Viacom Cablevision, 267 NLRB at 1141 (1983).

d. Analysis and Recommendation With Respect to Objections 1 and 2

In assessing whether the statements to employees regarding the 401(k) and profit sharing plans attributed to Employer Senior Vice President Michael Croatti, Employer General Manager James Lang and Employer Attorney Peter Kraft constitute objectionable conduct, I note the following. There was only a one-vote difference in the election results in this case with three challenged ballots, any or all of which may or may not be counted. The Board has held that it cannot ignore the fact that an election is extremely close. Lake Mary Health Care Associates, LLC, 345 NLRB 544 (2005); Cedars-Sinai Medical Center, supra; Cambridge Tool & Mfg., supra. The Board has further held that objections must be more carefully scrutinized in close elections. Robert Orr-Sysco Food Services, 338 NLRB 614 (2002); Cambridge Tool, supra.

The Employer conducted a series of meetings which, while not mandatory, consisted of a large complement of the Employer's unionized workforce. Thus, the Employer's messages at these meetings were widely-disseminated. The Employer officials who spoke at these meetings are upper management officials with the authority and ability to implement that which they allegedly promised to the employees. The meetings were conducted over a three-month period within the critical period prior to the election, with the last meeting being held within merely five days of the election.

The Union witnesses' testimony varied slightly as to what the Employer officials said at these meetings, but I find that that variance lent credibility to their testimony. Identical recall by the witnesses would make me question the veracity of their testimony and whether perhaps their testimony was staged or prepared for self-serving purposes.

The Union witnesses' testimony was consistent to the extent that they all heard and understood the Employer's message to be that the employees should get rid of the Union, put their Union dues money into a 401(k) plan, and reap the monetary benefits of 401(k) and profit sharing plans, benefits currently being enjoyed by the non-union employees of the Employer and only available to them if they became non-Union. Moreover, several Union witnesses testified that the Employer promised to contribute to the employees' 401(k), either by matching the amount that the employee contributed or by contributing some set percentage, and to freeze the employees' pensions if they voted out the Union.

I credit the testimony of all of the Union's witnesses with regard to the Employer's statements regarding a 401(k) and profit-sharing plan. Specifically, I find Brumbaugh's testimony, while not as strong as that of some of the Union's other witnesses, to be credible, noting that she took her time in responding to the questions posed to her and she appeared to want to answer the questions truthfully

I find employee Barnett to be the most credible of the Union's witnesses. She was direct and strong in her responses and she did not get flustered or alter her testimony when pressed by the Employer's attorney on cross-examination.

I also find employee Bowman to be a very credible witness. His answers were direct and responsive and I note that on cross-examination he clarified a statement by the Employer's attorney, to which clarification the attorney responded, "I stand corrected."

Employee Waterloo appeared to be a very honest witness who, like employee Brumbaugh, took her time in answering the questions asked of her and who, like employee Bowman, was candid and deliberate in replying to a question posed to her on cross-examination. Moreover, Waterloo testified in a forthright manner that when she asked Croatti specifically why the employees could not get a 401(k) and stay Union, Croatti replied that no companies will offer both packages.

I find it noteworthy that employee Hugley has been employed by the Employer for less than one year, yet she was willing to testify without the need for a subpoena about information adverse to the Employer's position. I believe that she did so frankly and openly.

Employee Beighley was extremely comfortable and relaxed while testifying, and he impressed me as being forthright and credible.

All of the Employer's witnesses denied that they made any promises to employees, specifically a promise of a 401(k) and/or a profit sharing plan and that employees' pensions would be frozen, if the employees decertified the Union. Rather, Employer witnesses Croatti, Lang and Stover testified that they and Kraft gave the employees the disclaimers. Specifically, they testified that they told employees that all Company benefits were obtainable through collective-bargaining; that the Company's retirement benefits could not be guaranteed and that that was stated in the Company's Handbook; and that they could not make any promises or offers to the employees. The Employer relied to a great extent upon these alleged disclaimers in responding to the Union's Objections. As noted, Kraft, who reportedly gave the alleged disclaimers to employees most often, did not testify at the hearing.

I note that two Union witnesses recall at least some portion of the Employer's disclaimers having been made and therefore, I credit the Employer's witnesses that such disclaimers were made.

Although I credit the Employer's witnesses that they made the cited disclaimers, I find those disclaimers to be inadequate to overcome the Employer's statements regarding 401(k) and profit sharing, noting that I previously credited the testimony of all of the Union's witnesses with regard to those statements. The Board has found such disclaimers to be "immaterial . . . if in fact (an employer) expressly or impliedly indicates specific benefits will be granted. Michigan Products, 236 NLRB 1143, 1146 (1978); Lutheran Retirement Village, 315 NLRB 103 (1994); Bakersfield Memorial Hospital, 315 NLRB 596 (1994). An employer cannot have it both ways. It cannot tell employees that it cannot make any promises to them while at the same time it is doing just that.

Herein, the credited testimony of all the Union's witnesses is that the Employer expressly promised bargaining unit employees a 401(k) plan and profit sharing and that their pensions would be frozen if the Union was decertified. I find the Employer's attempts to rebut its promises through the cited disclaimers to be immaterial, and I further find that the Employer's statements planted the seed in the minds of the employees that their attainment of a 401(k) plan, profit sharing and frozen pensions was directly and solely based upon their rejection of the Union. Accordingly, I recommend that Objections 1 and 2 be sustained.

e. Legal Standards – Objections 3, 4 and 5

With regard to the granting of benefits by an employer during the critical period, the Board explained in United Airlines Services Corp., 290 NLRB 954 (1988): "It is well established that the mere grant of benefits during the critical period is not, per se, grounds for setting aside the election. Rather, the critical inquiry is whether the benefits were granted for the purpose of influencing the employees' vote in the election and were of a type reasonably calculated to have that effect." NLRB v. Exchange Parts Co., 375 U.S. 405 (1964).

In B & D Plastics, 302 NLRB 245 (1991), the Board summarized its tests for determining whether benefits or gifts amount to objectionable conduct: Gulf States Cannery, 242 NLRB 1326 (1979): “To determine whether granting the benefit would tend to unlawfully influence the outcome of the election, we examine a number of factors, including: (1) the size of the benefit conferred in relation to the stated purpose of granting it; (2) the number of employees receiving it; (3) how employees reasonably would view the purpose of the benefit; (4) the timing of the benefit.” In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits granted during the critical period are coercive. It has, however, permitted the employer to rebut the inference by coming forward with an explanation, other than the pending election, for the timing of the grant or announcement of such benefits. E.L.C. Electric, Inc., 344 NLRB 1200 (2005); Speco Corp., 298 NLRB 439, fn. 2 (1990); United Airlines Services Corp., 290 NLRB 954 (1988); May Department Stores Co., 191 NLRB 928 (1971); Uarco, Inc., 216 NLRB 1, 2 (1974).

f. Analysis and Recommendation With Respect to Objections 3, 4 and 5

Turning to the question of whether the alleged grant of benefits covered by Union Objections 3, 4 and 5 constitutes objectionable conduct, I will first address the timing of the June 12, 2013, picnic (the day before the election); the type of food provided to employees at that picnic; and the food provided to employees at the May 18 and June 8, 2013, meetings. I will then address the Employer’s payment to employees to attend what the Union asserts were anti-Union meetings.

I find that the June 12 picnic held by the Employer did not rise to the level of objectionable conduct that would unlawfully influence the outcome of the election. It is undisputed that, in the past and on a regular basis (for example, annually on Founders Day), the Employer has held functions at which it has provided food for employees. The

testimony of the Union's witnesses as to the quality and type of food at the June 12 picnic varied from better than that served on Founders Day, to the best food one of the witnesses had seen at an Employer function in her 30 years of employment with the Employer, to the food being good at both the Founders Day event and the June 12 picnic. Regardless of the witnesses' feelings about the type and quality of food served on June 12, their testimony indicates that the only different or additional food served on June 12 than was served on Founders Day was chicken and pulled pork, hardly what one would consider to be of a much higher quality and cost than what was served on Founders Day.

The Employer cited the attainment of ISO certification at its New Kensington location as the reason for the June 12 picnic. The record evidence establishes that the certification is dated April 2013. Crediting Lang that the certificate was not received at the New Kensington location until June 4, 2013, Lang nevertheless testified that he learned in late April 2013 that the certificate would be issued. I find it disingenuous on Lang's part to suggest that he did not tell Croatti of the impending certification, if not immediately upon learning of the same, certainly sooner than two months later. I also find it difficult to accept that Croatti did not learn of the certificate until it was received on June 4, 2013. I note in this regard the testimony of the Employer's witnesses as to the extreme importance of the attainment of the certification in view of the time and effort expended to achieve it, and the fact that the New Kensington location was the only non-certified location prior to April 2013.

However, while I find the timing of the June 12 picnic at which food was provided by the Employer to be suspicious, I do not believe that the Employer's holding of the picnic and its providing of food at that picnic rises to the level of objectionable conduct under the criteria set forth in B & D Plastics, supra. The Employer held similar functions in the past at several of its locations to celebrate the achievement of ISO certification,

the reason proffered for the June 12 picnic. The Employer also has held similar functions annually to celebrate Founders Day and other holidays. The food provided on June 12 was comparable in quality and cost to that provided at the prior events held by the Employer. Attendance at the picnic was voluntary and therefore only those employees who chose to attend the picnic received the “benefit” of free food. The Union does not allege and the record does not disclose evidence of anti-Union speeches having been given at the June 12 picnic.

I also find that the food provided to the employees who attended the voluntary meetings conducted by the Employer on May 18 and June 8 was not of such a substantial difference in type or cost from that provided at weekend sales conference meetings as to be viewed as an attempt to influence employees’ votes and therefore, objectionable. I note that the Board has consistently held that it is not unlawful for an employer to offer inducements to employees (e.g., free food, drinks, prizes) in order to induce them to come to campaign meetings, so long as the monetary value thereof is reasonable. Far West Fibers, Inc., d/b/a E-Z Recycling, 331 NLRB 950 (2000); Waste Management of Palm Beach, 329 NLRB 198 (1999), citing L. M. Berry & Co., 266 NLRB 47, 51 (1983). These cases hold that lunches, parties, etc. are legitimate campaign devices, “absent special circumstances.” There are no “special circumstances” in this case and I find the monetary value of the food provided by the Employer to the employees at the May 18 and June 8 meetings to be reasonable. See Chicagoland Televisions News, Inc., 328 NLRB 367 (1999), in which the Board found that the Employer’s holding of a 12-hour party on the day before the election, at which it provided free alcoholic and nonalcoholic beverages, food and entertainment, and that employees were told to attend on work time, was not objectionable. Cf. Rivers Parish Maintenance, Inc., 325 NLRB 815 (1998), where the Board, noting the employer’s absence of a business justification unrelated to the election for its actions, found the payment of one

extra hour's pay to employees for their mandatory attendance at an offsite employer campaign meeting followed by a "crab boil" two days before the election to be objectionable.

With regard to the fact that the drivers were paid for their attendance at the May 18 and June 8 meetings, I believe that the Employer has met its burden of establishing legitimate reasons unrelated to the election for doing so and of rebutting the Union's contention that such payment was an attempt on the Employer's part to influence employees' votes.

Employee attendance at the May 18 and June 8 meetings was voluntary and the contractually-required 8 weeks' advance notice by the Employer to the Union for the holding of a mandatory Saturday meeting with the route drivers explains the reason why the May 18 and June 8 meetings could not have been made mandatory. Route drivers are normally paid for their attendance at meetings conducted by the Employer. The hours worked by the route drivers do not allow for meetings of any duration during the work week and the collective-bargaining agreement allows only "brief" weekday meetings. The fact that the Employer adheres to this provision can be seen in the testimony of Union witness Bowman that the longest weekday meeting that he attended lasted about one-half hour and occurred approximately three to five years ago.

Perhaps most telling in support of the Employer's payment to the route drivers for their attendance at the May 8 and June 8 meetings is the history of grievances filed by the Union concerning payment to route drivers. Two of the three grievances were meritorious and resulted in the Employer having to compensate route drivers for the Employer's alleged violations of Article 20 dealing with payment for attendance at weekend sales conferences. While the grievances concerned payment for weekend sales conferences, it is logical to think that the Employer would have a concern about a possible grievance if it failed to pay the route drivers for their attendance at the May 18

and June 8 meetings. While the employees were paid \$100 for their attendance at these meetings, which lasted a much shorter time than do the weekend sales conferences, the dollar amount paid was based upon the fact that that is the amount that has routinely been paid to employees for their attendance at Saturday meetings and that is the amount contractually-required to be paid for their attendance at Saturday meetings. Arguably, the Employer's concern about a grievance being filed for non-payment would be applicable also to a scenario in which the Employer paid the employees a lesser amount for attendance at the May 18 and June 8 meetings.

While the Board infers that both announcements and actual grants of benefits during the critical period are coercive, an employer can rebut that inference by clearly establishing an explanation other than the pending election for the timing of the announcement or the bestowal of the benefit. E.L.C. Electric, Inc., supra. I find that the Employer has met its burden of rebutting the inference that the June 12 picnic and the May 18 and June 8 meetings at which it provided food, and its payment to employees for their attendance at the May 18 and June 8 meetings were coercive.

With regard to the cases cited by the Union in support of its Objection regarding the payment to the employees to attend the May 18 and June 8 meetings, I find those cases to be distinguishable from this case. In Action Carting Environmental Services, Inc., 354 NLRB 732 (2009), the Board found that the Employer paid each employee a safety bonus of at least \$400 when it had never regularly paid such bonuses to employees, and that it did not provide a legitimate business reason for doing so within the week before the election. The Board found that the grant of this benefit had a tendency to interfere with employees' free choice in the election. In this case, the Employer paid the employees who attended the May 18 and June 8, 2013, meetings the amount that it regularly paid to employees and the amount required by the contract to be paid to employees for attending Saturday meetings with the Employer.

In Vasaturo Brothers, Inc., d/b/a Vesuvio Foods Co., 321 NLRB 328 (1996), the Board found that the Employer granted bribes to employees in the form of cash supplements and an increase in their weekly pay in order to discourage their support of the union. In this case, the Employer merely continued its past, contractually-mandated practice of paying employees \$100 for their attendance at Saturday meetings with the Employer. It did not offer the employees any money in addition to that which they normally received for their attendance at Saturday meetings with the Employer. For these reasons, I conclude that the Employer's payment to the employees was predicated upon legitimate considerations.

In view of the above, I find that the conduct alleged in Objections 3, 4 and 5 does not rise to the level of objectionable conduct and, therefore, I recommend that Objections 3, 4 and 5 be overruled.

III. RECOMMENDATIONS

In summary, after a full and complete evidentiary hearing and considering all of the evidence and arguments in this proceeding, I make the following recommendations:

I find that that Union Objections 3, 4 and 5 are nonmeritorious and I recommend that they be overruled. I find that Union Objections 1 and 2 are meritorious and I recommend that they be upheld. Accordingly, I recommend that the results of the June 13, 2013, election be set aside and that a second election be directed, to be conducted on some date after the resolution in the grievance procedure of the status of William Shaner, Jr. and Andy Mohammed. If the Board agrees that a second election is appropriate in this case, I further recommend that the challenge to the ballot of Michael Koscianski be overruled and that Koscianski be permitted to vote in the second election.

In the event that the Board determines that a second election is not appropriate in this case, I recommend that the challenge to the ballot of Michael Koscianski be overruled and that, upon the resolution in the grievance procedure of the status of William Shaner, Jr. and Andy

Mohammed, Koscianski's ballot be opened and counted together with those of William Shaner, Jr. and Andy Mohammed, if appropriate, and that an appropriate revised Tally of Ballots be prepared and served upon the parties.

Under the provisions of Section 102.69 of the Board's Rules and Regulations and in accordance with the Order Directing Hearing on Challenged Ballots and Objections and Notice of Hearing, any party may file with the Board in Washington, DC, an original and seven (7) copies of exceptions to this Report. Exceptions must be received by the Board in Washington, DC, by the close of business at 5:00 p.m. EST (EDT), on.⁹ Immediately upon the filing of such exceptions, the party filing the same shall promptly serve a copy upon the other parties and should file a copy with the Regional Director for Region Six in Pittsburgh, Pennsylvania. If no exceptions are filed to this Report, the Board may adopt the recommendations of the Hearing Officer.

Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8 as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570-0001. Under the provisions of Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Report, is not part of the record before the Board unless appended to the exceptions or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely

⁹ Exceptions may be filed electronically with the Board in Washington, D.C. The requirements and guidelines concerning such electronic filings may be found in the related attachment supplied with the Regional Office's initial correspondence and at the National Labor Relations Board's website, www.nlr.gov, under "E-Gov." On the home page of the website, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-Filing instructions explaining how to file the documents electronically will be displayed.

submitted to the Regional Director and not included in the Report shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

Procedures for Filing Exceptions: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Regional Director, Region 6 by close of business on September 11, 2013, at 5 p.m.(EST), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically.** If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. in the time zone of the receiving office** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Regional Director may grant special permission for a longer period within which to file.¹⁰ A copy of the exceptions must be served on each of the other parties to the proceeding in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select the E-Gov tab, click on E-Filing, and follow the detailed instructions. The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's

¹⁰ A request for extension of time, which may also be filed electronically, should be submitted to the Regional Director and a copy of such request for extension of time should be provided to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on each of the other parties in the proceeding in the same manner or a faster manner as that utilized in filing the request with the Regional Director.

website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated at Pittsburgh, Pennsylvania, this 28th day of August 2013.

Virginia L. Scott, Hearing Officer

NATIONAL LABOR RELATIONS BOARD, Region 6
William S. Moorhead Federal Building
1000 Liberty Avenue, Room 904
Pittsburgh, Pennsylvania 15222-4111