UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SISTERS' CAMELOT and CHRISTOPHER ALLISON	Case 18-CA-100514
SISTERS' CAMELOT and IWW SISTERS' CAMELOT CANVASSERS' UNION	Case 18-CA-105462

BRIEF IN SUPPORT OF EXCEPTIONS TO THE NATIONAL LABOR RELATIONS BOARD ON BEHALF OF THE ACTING GENERAL COUNSEL

Submitted by:

Tyler J. Wiese
Counsel for the Acting General Counsel
National Labor Relations Board, Region 18
330 South Second Avenue, Suite 790
Minneapolis, Minnesota 55401

TABLE OF CONTENTS

Cases

Statutes

Other Authorities

I. STATEMENT OF THE CASE

There are several facts here which cannot be seriously disputed. First, Sisters' Camelot ("Respondent") terminated a leading union organizer, Christopher Allison, a.k.a. Shuge Mississippi, during the midst of a campaign to organize Respondent's canvassers, for engaging in union activity. Second, in response to this union campaign, Respondent told the canvassers that it was futile to form a union and, while denying recognition to their attempts to form a union, granted benefits to the canvassers. Third, as a result of these actions, the canvassers went on strike, and remain on strike to this day. The judge's underlying decision recognized these facts and, with the exception of his curious finding that Respondent's grant of benefits during the canvassers' organizing campaign *did not* violate Section 8(a)(1) of the National Labor Relations Act ("Act"), the legal conclusions properly flowing therefrom.

The judge, however, ultimately found that Respondent's otherwise unlawful actions did not violate the Act because he incorrectly concluded that the canvassers are independent contractors. This brief will focus primarily on the legal errors made by the judge in his underlying determination that the canvassers were independent contractors. First, I will lay out the factors that the National Labor Relations Board considers when determining whether individuals are independent contractors. Second, I will demonstrate that the judge ignored established Board precedent by failing to analyze whether canvassers possessed any meaningful opportunity for entrepreneurial loss or gain, and that in fact the canvassers'

complete lack of entrepreneurial opportunities dictates the opposite result reached by the judge. Third, I will focus on the other factors relied on by the Board in determining whether individuals are independent contractors, and will demonstrate how the vast majority, if not all, of those factors support a finding of independent-contractor status. Fourth, I will focus on the four facts emphasized by the judge in making his independent contractor determination—namely, that canvassers are allowed to set their own schedules, that they receive commission-based pay, that their compensation is tied to the time and effort that they put into work, and that they lack supervision while canvassing. I will then demonstrate that his myopic focus on these facts leads to the inescapable and erroneous conclusion that all commission-based salespeople are independent contractors, a conclusion that contradicts the seminal Supreme Court decision on this issue. Finally, I will address the underlying unfair labor practices at issue in this case, and in particular will show that the judge erred in finding that Respondent's grant of benefits to its canvassers during their organizing campaign violated Section 8(a)(1) of the Act.

II. ARGUMENT

A. The Administrative Law Judge Erroneously Found that Respondent Met Its Burden in Establishing that Its Canvassers Are Independent Contractors

1. General Principles

Section 2(3) of the Act provides that "the term 'employee' shall include any employee . . ., but shall not include . . . any individual having the status of an independent contractor." Consistent with well-established principles of statutory construction, the Board has held that the burden of establishing this statutory exclusion to the definition of employee falls on the party asserting that individuals who would otherwise qualify as employees are in fact independent contractors. *See, e.g., BKN, Inc.*, 333 NLRB 143, 144 n.3 (2001) (citing *Central Transport, Inc.*, 247 NLRB 1482, 1483 n.1 (1980)).

In determining whether the party asserting independent-contractor status has met its burden, the Board uses the common-law agency test. *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968); *Roadway Package Express System, Inc.*, 326 NLRB 842, 849 (1998). The Board has most recently applied the following ten-factor test, adapted from the RESTATEMENT (SECOND) OF AGENCY, § 220(2) (1958), to determine whether individuals are employees or independent contractors:

1. Whether the putative employer has the right to control the manner and means of the performance of the job;
2. Whether the individual is engaged in a distinct occupation or business;
3. Whether the individual bears the entrepreneurial risk of loss and enjoys the entrepreneurial opportunity for gain;

4. Whether the employer or the individual supplies the instrumentalities, tools, and place of work;
5. The skill required in the particular occupation;
6. Whether the parties believe they are creating an employment relationship;
7. Whether the work is part of the employer's regular business;
8. Whether the employer is a business;
9. The method of payment, whether by time or by the job;
10. The length of time the individual is employed.

Lancaster Symphony Orchestra, 357 NLRB No. 152, slip op. at 3 (Dec. 27, 2011). In applying this test, the Board has emphasized that the independent-contractor test is more than a "right-to-control" test, and that a proper examination of independent-contractor status involves a consideration of all aspects of the employment relationship, including the level of entrepreneurial opportunity provided to individual workers. *New York Party Shuttle*, 359 NLRB No. 112, slip op. at 1 n.2 (May 2, 2013). As will be discussed below, the judge ignored and misapplied several of these factors in making his erroneous determination that the canvassers here are independent contractors.

2. The Judge Incorrectly Ignored the Canvassers' Lack of Entrepreneurial Opportunity

The judge's limited analysis of the independent-contractor question ignores entirely whether canvassers enjoy entrepreneurial opportunity. *See* ALJD at 3–7.[1] This is a fatal legal error that causes him to reach the wrong result in determining that the canvassers are independent contractors.

[1] "ALJD" references are to the judge's underlying decision in this case. Where applicable, references to specific lines in the decision will be preceded by a colon. "Tr." references are to the transcript of the unfair labor practice hearing; "GCX" refers to exhibits entered at the hearing by the General Counsel; and "RX" refers to exhibits entered by Respondent.

The Board has held for many years that entrepreneurial opportunity is an integral factor in applying the common law test of agency. *See, e.g.*, *Lancaster Symphony Orchestra*, 357 NLRB No. 152, slip op. at 3–5 (Dec. 27, 2011); *Roadway Package System (Roadway II)*, 326 NLRB 842, 853–54 (1998); *Roadway Package System (Roadway I)*, 288 NLRB 196, 198 (1988) (finding employee status in all cases based in large part on lack of entrepreneurial opportunity). *Cf. Arizona Republic*, 349 NLRB 1040, 1044–45 (2007); *St. Joseph News-Press*, 345 NLRB 474, 478–80 (2005); *Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 891 (1998) (finding that individuals in question were independent contractors based in large part on entrepreneurial opportunity). As noted by the D.C. Circuit in *Corporate Express Delivery Sys. v. NLRB*, 292 F.3d 777 (D.C. Cir. 2002), entrepreneurial opportunity for gain or loss is determinative in cases where there is an ambiguous level of control exercised by the purported employer:

> Ultimately, however, we need not answer that question [of control] because we uphold as reasonable the Board's decision, at the urging of the General Counsel, to focus not upon the employer's control of the means and manner of the work but instead upon whether the putative independent contractors have a "significant entrepreneurial opportunity for gain or loss." *Id.* at 6. We agree with the Board's suggestion that the latter factor better captures the distinction between an employee and an independent contractor. For example, as the Board points out, "the full-time cook is regarded as a servant [rather than as an independent contractor] although it is understood that the employer will exercise no control over the cooking." RESTATEMENT (SECOND) OF AGENCY § 202(1) cmt. d. Similarly, a corporate executive is an employee despite enjoying substantial control over the manner in which he does his job. Conversely, a lawn-care provider who periodically services each of several sites is an independent contractor regardless how closely his clients supervise and control his work. The full-time cook and the executive are employees and the lawn-care provider is an independent contractor not

> because of the degree of supervision under which each labors but because of the degree to which each functions as an entrepreneur - that is, takes economic risk and has the corresponding opportunity to profit from working smarter, not just harder.

Id. at 780; *see also Lancaster Symphony Orchestra*, 357 NLRB No. 152, slip op. at 3. Thus, in cases like the instant case, where there are arguably contrary signals regarding an employer's control of its purported employees' duties, an examination of an individual's entrepreneurial opportunity is key.[2]

The judge's legal analysis on this issue is frankly inexplicable in light of the three decisions that he cites at the beginning of his independent-contractor analysis. (ALJD at 3:4–7). In all three decisions cited by the judge, the Board emphasizes entrepreneurial opportunity as an important factor in determining whether individuals are either independent contractors or employees. *BKN, Inc.*, 333 NLRB 143, 145 (2001); *Roadway II*, 326 NLRB at 853–54; *Dial-A-Mattress Operating Corp.*, 326 NLRB at 891. For example, in *BKN*, the Board specifically distinguished its earlier decision in *DIC Animation City*, 295 NLRB 989 (1989), on the basis that the writers in that case "bore some of the risks and enjoyed some of the opportunities for gain associated with an entrepreneurial enterprise," whereas the writers in *BKN* "had no significant entrepreneurial opportunity for gain or loss." 343 NLRB at 145. In *Roadway II*, the Board took pains to explain how the presence of company controls and cushioning mechanisms made the entrepreneurial

[2] Indeed, the complete absence of entrepreneurial opportunity has been emphasized by both the Board and the courts as determinative in establishing employee status. *Roadway II*, 326 NLRB at 853–54 (noting that even though employer exercised less control than in previous cases, absence of true entrepreneurial opportunities mandated finding of employee status); *Corporate Express Delivery Systems*, 292 F.3d at 780 (finding that close question of whether employer exercised control was not necessary to answer given absence of meaningful entrepreneurial opportunities).

opportunity for gain or loss illusory. 326 NLRB at 853–54. And, in *Dial-A-Mattress Operating Corp.*, the first factor that the Board emphasized in determining that the owner-operators in that case were independent contractors was that the purported employer had "structured its relationship with the owner-operators to allow them (with very little external controls) to make an entrepreneurial profit beyond a return on their labor and their capital investment." 326 NLRB at 891. Yet, despite this clear precedent, *cited by the judge*, there is no mention of entrepreneurial opportunity at any point in his cursory decision.

Admittedly, the 10 factors listed in *BKN*, included verbatim by the judge in his underlying decision, do not explicitly include entrepreneurial opportunity. With that being said, the analysis in *BKN* and the other decisions cited by the judge clearly places a heavy emphasis on this factor—one that is entirely absent in the underlying decision. Moreover, in a more recent decision listing the ten factors to be considered in determining independent contractor status, the Board explicitly listed entrepreneurial opportunity as one of the factors to be considered. *Lancaster Symphony Orchestra*, 357 NLRB No. 152, slip op. at 3. Therefore, it is clear that, under existing precedent entrepreneurial opportunity plays a key role in determining whether individuals are covered by the Act.

A careful examination of the facts here illustrates that canvassers do not possess meaningful entrepreneurial opportunity. As an initial matter, there can be no serious dispute that canvassers are not exposed to the typical entrepreneurial risk of loss. They are not required to make any financial investment to begin

canvassing. (Tr. 120.) In contrast to other independent contractors, who oftentimes are required to invest in the equipment or training required in their profession, canvassers are allowed to show up without tools or experience and begin canvassing. (JD 6:4–10; Tr. 105.) Further, even when a specific investment is required for an individual to canvass—for example, when cities require individual canvassers to obtain permits—Respondent pays the costs of the investment. (RX 9 at 10, 25.)

Canvassers also are given no proprietary interest in their canvassing territory. (Tr. 109–10.) The Board has noted for many years that the absence of a proprietary interest supports a finding of employee status. *See, e.g., Standard Oil Co.*, 230 NLRB 967, 970–71 (1977); *Prime Time Shuttle International, Inc.*, 314 NLRB 838, 841 (1994). Here, it is undisputed that Respondent assigns territories, randomly and on a daily basis. (Tr. 109.) These assignments are temporary and last only for the duration of the shift. (*Id.*) There is no evidence that canvassers are allowed to trade or sell their assigned turf. After the shift, canvassers do not retain an interest in their territory. Thus, as is the case with a typical employee, canvassers possess no ownership interest in the work that they perform.

Canvassers are also denied a proprietary interest in the canvassing materials. Respondent provides these materials, and canvassers are required to leave them in Respondent's offices at the end of a shift unless they receive special permission. (Tr. 104–06.) Canvassers are allowed to use other canvassers' materials and are prohibited from creating their own canvassing materials. (*Id.*)

As in a traditional employer-employee relationship, canvassers utilize Respondent's tools and property and obtain no proprietary interest in these matters.

Moreover, in contrast to a typical entrepreneur, a canvasser's skill does not truly impact a canvasser's compensation. As Respondent's own records indicate, it is the amount of time worked—not one's skill as a canvasser—that determines the amount of money that a canvasser makes. Those canvassers who worked more shifts made more money. Those canvassers who worked fewer shifts made less money. (*See* RX 9.) In contrast to the typical independent contractor, Respondent's own financial records show that canvassers are not allowed to "take[ ] economic risk and ha[ve] the corresponding opportunity to profit from working smarter, not just harder." *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002).

The canvassers' lack of entrepreneurial opportunity is further indicated by their uniform pay rate. The Board has held in the past that uniform pay rates support a finding of employee status. *See, e.g.*, *Slay Transportation Co.*, 331 NLRB 1292, 1294 (2000) (drivers' inability to negotiate individual pay rates supported finding of employee status); *Adderley Industries, Inc.*, 322 NLRB 1016, 1023 (1997) (same); *see also NLRB v. United Insurance Co.*, 390 U.S. at 257. *Cf. Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 893 (1998) (freedom to negotiate individual "special deals" with employer supports finding of independent contractor). Here, all canvassers are compensated on the same pay structure: 40% base commission, with the chance to receive a 5% bonus if they raise over $500 and another 5% bonus if

they are members of the Collective. (Tr. 117; GCX 17, GCX 23.) Attempts to negotiate differences in their pay with the Collective in recent years have been wholly unsuccessful. [3] (Tr. 118.)

Another important factor, discussed by the judge (ALJD at 4 n.3) but improperly ignored, is that Respondent completely denies its canvassers any ability to subcontract. (Tr. 120.) Specifically, the judge found the fact that the canvassers are not allowed to subcontract "is irrelevant to this case." The judge cites no authority for this finding, however, and established Board precedent is clearly to the contrary. In this regard, the cases are legion where the Board has found that the ability or inability to subcontract one's work duties is an important factor in determining independent-contractor status. *See, e.g., Arizona Republic*, 349 NLRB 1040, 1044 (2007); *St. Joseph's News Press*, 345 NLRB 474, 479 (2005); *Dial-A-Mattress*, 326 NLRB at 891; *Roadway II*, 326 NLRB at 853; *see also* RESTATEMENT (SECOND) OF AGENCY, § 220(2), cmt. h ("The relation of master and servant is indicated by the following factors . . . an agreement that the work cannot be delegated."). For example, in the companion cases of *Dial-A-Mattress* and *Roadway Express*, the Board examined whether owner-operators in factually similar circumstances were independent contractors and came to opposite results based in large part on the fact that drivers in *Dial-A-Mattress* could subcontract virtually without restriction, while those in *Roadway Express* could not. *Dial-A-Mattress*, 326 NLRB at 893; *Roadway II*, 326 NLRB at 853. Thus, the judge's

[3] In fact, Respondent has terminated at least one employee in the past for being too aggressive in seeking individual deals. (Tr. 178.) (terminating employee for continually requesting more than one day of turf).

characterization of the fact that Respondent banned subcontracting by canvassers as "irrelevant" is plain legal error.

In support of his erroneous conclusion, the judge reasoned that because Respondent generally does not turn away potential canvassers, "[t]here is no need for a prospective canvasser to subcontract from another canvasser." (ALJD at 4 n.3.) This reasoning is unsupported and flawed. First, Counsel for the Acting General Counsel is aware of no extant principle in the law that supports such a finding. Second, and more importantly, the judge's proposed finding entirely discounts the entrepreneurial opportunity that would be provided to canvassers if they were allowed to subcontract. For example, a canvasser could attempt to create a canvass subcontracting business and offer his employees a set paycheck in return for all donations, with the hope that commissions would cover the difference. The fact that Respondent does not allow for this type of an alternative arrangement *greatly* limits the entrepreneurial opportunity of these employees and is a very important factor—neglected by the judge in his underlying decision—in determining whether the canvassers are independent contractors.

In short, after considering all aspects of the relationship between Respondent and its canvassers—including their uniform compensation structure, their lack of proprietary interest in their canvassing turf and materials, and their inability to subcontract—"it is clear that, unlike the genuinely independent businessman, the [canvassers'] earnings do not depend largely on their ability to exercise good business judgment, to follow sound management practices, and to be able to take

financial risks in order to increase their profits." *Standard Oil Co.*, 230 NLRB at 972.

3. In Addition to the Canvassers' Lack of Entrepreneurial Opportunity, the Other Factors Considered By the Board in Determining Independent Contractor Status Also Support a Finding that the Canvassers Are Employees

Beyond the judge's error in ignoring the canvassers' entrepreneurial opportunity, an examination of the other nine factors applied relevant to determining independent contractor status reveals that the judge either found or suggested that many of these factors support a finding of independent contractor status, in contradiction to established Board precedent and the record evidence. Although it is difficult to determine the judge's exact findings for many of these factors, I will first address those factors where the judge appeared to suggest that the evidence supported a finding of independent-contractor status, and address why the judge's findings are incorrect. I will then discuss the factors where the judge made the correct findings regarding independent contractor status.

a. The judge improperly ignored and discounted Respondent's significant control over its canvassers

Although the judge considered the level of control exercised by Respondent over its canvassers (ALJD at 3–5), the judge curiously failed to even discuss several pieces of key evidence that indicate a level of control far beyond that suggested by his decision. His failure to consider this evidence of control led him to reach the wrong result.

First, the judge completely failed to discuss the mandatory training that Respondent requires its canvassers to undergo before they are allowed to begin canvassing. In contrast to the typical independent contractor, who is expected to come in with the skills necessary to do the job right away and is allowed to work at his or her discretion, Respondent requires new canvassers to undergo training during their first shift—even when canvassers have prior canvassing experience. (Tr. 102, 259.) If a trainer is unavailable, they will not be allowed to work. (Tr. 103, 259.) Respondent's training consists of ensuring that canvassers are able to follow Respondent's expectations with respect to their sales pitches, their ability to stay within assigned turf, and their ability to keep records in accordance with Respondent's standards. (Tr. 102–03, 260.) Respondent further supports the training by providing a $40 stipend to experienced canvassers during the shift in which they train new canvassers.[4] (GCX 17.) Respondent's required training program strongly supports a finding of employee status, yet was plainly ignored by the judge. *See, e.g., Slay Transportation Co.*, 331 NLRB at 1293 (emphasizing fact that employer required all drivers to undergo its training before working strongly supported employee status); *Roadway II*, 326 NLRB at 851; *Adderley Industries, Inc.*, 322 NLRB at 1023.

[4] Although the judge is correct to point out that there is no direct testimony in the record to support that canvassers actually received this stipend, his suggestion that this money was never actually paid to canvassers is frankly absurd. The training stipend is clearly laid out in Respondent's written canvass policies. (GCX 17.) Further, the canvassers' bargaining demands presume the existence of paid training, as they are asking for *more* paid training, not the bare existence of paid training. (GCX 10 at item 15.)

Second, the judge wholly ignored the code of conduct that Respondent has established for its canvassers. This code of conduct contained the following five items:

1. Each canvasser shall show the utmost respect and act in a professional manner towards their fellow canvassers and canvass director
2. Under no circumstance shall a canvasser be under the influence of alcohol while they are working
3. No canvasser shall threaten or use any physical/verbal violence against any other fellow canvasser
4. Discrimination or harassment against any other fellow canvasser is completely unacceptable and will not be tolerated. This includes but is not limited to discrimination/harassment of one[']s sexual orientation, gender, age, religion, spiritual beliefs, and lifestyle.
5. Failure to meet the above expectations may result in a suspension from work or termination of contract. (GCX 18.)

Interestingly, this code of conduct does *not* focus on production quotas or the type of work that is required in order to satisfy Respondent. Rather, and more akin to a traditional employee handbook, Respondent's code of conduct focuses on the interactions between canvassers and maintaining respect in the workplace. This type of control illustrates more than merely giving an assignment to an independent contractor and setting expectations for the finished product; rather, it illustrates a desire to control both the means and manner in which canvassers complete their duties and interact with one another.

Further, and contrary to the suggestion of Respondent's witnesses (Tr. 68, 399), this code of conduct was clearly adopted and imposed upon canvassers by Respondent's managing Collective. In Respondent's December 10 Collective meeting notes, the Collective explicitly discusses that the canvass coordinators are

writing a new canvassing policy. (GCX 25.) And the December 31 Collective notes show that this policy was presented and formally approved by the Collective. (GCX 26.) Thus, not only did the Collective formally approve this policy, they did so only months before Allison was terminated, demonstrating an increasing level of control and frankly a desire to turn its canvass into a more traditional employment situation.

Moreover, this level of increasing control extended right up to the moment that Allison was terminated and the canvassers went on strike. Pursuant to the General Counsel's subpoena, Respondent produced an extensive policy manual that was in the process of being implemented in the spring of 2013. (GCX 19.) This manual contained, *inter alia*, policies dictating offenses that can lead to termination, a grievance policy, and a conflict-of-interest policy. This extensive manual, although not implemented by the time Allison was terminated, was in the planning stages when the canvassers went on strike, (Tr. 376–77), and clearly illustrates that Respondent believed it possessed the authority to control and dictate its canvassers in a way that is inconsistent with independent-contractor status. The judge's decision simply ignores this probative evidence.

Most importantly, perhaps as a product of his ignorance of this paid training and Respondent's written code of conduct, the judge ignored the fact that Respondent exercises significant supervision over its canvassers. In his decision, the judge incorrectly states that "[t]here is no evidence . . . that Respondent monitors [canvassers'] job performance in any way other than paying them 40% of

the donations they receive." (ALJD at 5:9–10.) This is absolutely contradicted by the record. For example, at the December 3, 2012, Collective meeting—approximately three months before Allison was terminated—Respondent engaged in an extensive review of its canvassers. (GCX 24.) This review went well beyond simply ensuring that the canvassers received their commissions. Rather, this review focused on, *inter alia*, "mediating conflict between canvassers"; "seeking out common good of canvass"; changing the "climate" for new canvassers; the fact that certain canvassers were driving the canvass van; directing canvass coordinators to "fire people who don't fit in but keep people around who are part of good old boy club"; etc. Perhaps most importantly, the Collective discusses that the canvass is "doing [a] great job all round, making money..." but in the next breath discusses that they should "fire people who don't fit in." These suggested changes culminated in the Collective's decision at this meeting to eliminate the field manager position—a decision that precipitated the canvassers' decision to form a union. (Tr. 82.) Clearly, these notes illustrate a level of control well beyond simply ensuring that the canvass provided financial support for Respondent's other activities. Rather, these notes show that Respondent exercised an extensive level of control over canvassers.

That Respondent would exercise such supervision over its canvassers is only natural. The canvassers serve as the public face of the organization and play an essential role in publicizing its mission. For much of the public, these canvassers are the only contact that they have with Respondent. They do business in

Respondent's name, using Respondent's materials, and are required to talk about Respondent's mission. To suggest, as the judge does, that Respondent would only be concerned about the money raised by the canvassers is to ignore the essential role that they play in furthering Respondent's business.

Moreover, to the extent that the judge believes that an extensive level of supervision over the details of the canvassers' job is necessary to find employee status under the Act, such a finding is inconsistent with established Board precedent. As the Board explained in *BKN*, it is often necessary to consider the specific realities of a job in determining employee status:

> We agree with the Regional Director that the animation industry's irregular patterns of employment must be taken into account in determining the writers' status under the Act. The fact that the writers are hired and work on a script-by-script basis explains the absence of some of the usual indicia of employee status here, but this industry's working arrangements do not diminish the central fact that the record establishes that the Employer closely directs the writers' work performance. 333 NLRB at 145.

See also Kansas City Repertory Theatre, 356 NLRB No. 28, slip op. at 1 (Nov. 16, 2010) ("Although the employees in the petitioned-for unit work intermittently, in many industries employees with little or no expectation of continued employment with a particular employer engage in stable and successful collective bargaining . . . . We believe the Act vests in such employees, rather than in the Board, the decision whether they will benefit from collective bargaining.")

Here, canvassers' work precludes them from being supervised during their shift. Canvassers, by the nature of their work, cannot operate from a centralized shop or warehouse—they are required to work in the field. In order to provide

detailed supervision of the type suggested by the judge's decision, Respondent would need to provide a separate supervisor for each and every canvasser—a totally untenable arrangement and one that does not appreciate the realities of canvassing work. Further, to the extent that Respondent can provide supervision over its canvassers given the nature of their work, it does so by requiring them to meet at its offices before and after their shifts and by requiring them to keep detailed records of their transactions. Indeed, to hold that a level of supervision beyond that provided by Respondent in this case is necessary in order to establish employee status would be contrary to established Board precedent finding employees in a variety of industries where one-to-one supervision is impossible. *See, e.g., Roadway II*, 326 NLRB 842 (1998) (truck drivers); *Metro Taxicab*, 341 NLRB 722 (2004) (taxi drivers); *NLRB v. United Insurance Co.*, 390 U.S. 254 (debit agents).

Further, for the factors that the judge did discuss, he did not properly weigh their significance in determining the level of control exercised by Respondent. For example, the judge failed to appreciate the significance of Respondent's temporary and strict canvassing turf assignments. (ALJD at 3:21–27). These assignments are more than mere "regional" territories given to typical salesmen or owner-operators. Rather, Respondent assigns specific streets and blocks that canvassers are required to solicit.[5] (Tr. 269; GCX 21, GCX 22.) If they solicit outside these areas,

[5] These strict, one-day assignments of canvassing turf distinguish the instant case from the Board's decision in *Joyce Sportswear Co.*, 226 NLRB 1231, 1234 (1976), where salespeople were given permanent (or at least long-term) assignments to large geographic territories that, in some cases, encompassed more than one state. Additionally, although the Board has not explicitly overruled *Joyce Sportswear Co.*, the analysis contained in that decision is of questionable validity. The Board's analysis in *Joyce Sportswear Co.* focused almost exclusively on the level of control that the purported employer exercised over its salespeople (*see* 226 NLRB at 1233–34), which runs contrary to the

canvassers will be disciplined[6] and required to turn in the commission from the donations that they solicit to the canvasser to whom the territory was assigned. (Tr. 110–11.) This strict assignment of territory, and the discipline for soliciting outside assigned territories, strongly supports a finding of employee status.[7] *See, e.g., New York Party Shuttle*, 359 NLRB No. 112, slip op. at 1 n.2, 3–4 (assignment of set routes by employer strongly supported employee status); *Community Bus Lines*, 341 NLRB 474, 474 (2005).

The judge also failed to recognize the control that Respondent exercises over canvassers' work shifts. Although the judge noted that Respondent maintains set finishing times for canvassing shifts (ALJD at 4:22–23), he failed to note that Respondent also maintains even stricter requirements on starting times. All canvassers who wish to solicit on a given day are generally required to meet at Respondent's warehouse by 3:30 p.m. (Tr. 103–04.) If a canvasser is not available

---

Board's more recent trend of focusing on *all* aspects of an individual's work in determining whether an individual is an independent contractor. *See, e.g., Roadway II*, 326 NLRB at 850 ("[T]he common-law agency test encompasses a careful examination of all factors and not just those that involve a right to control.") (citations omitted); *see also New York Party Shuttle*, 359 NLRB No. 112, slip op. at 1 n.1 (correcting administrative law judge's characterization of independent contractor test as a "right-to-control" test.) In addition, and in contrast to the canvassers here, the salespeople in *Joyce Sportswear* were allowed to subcontract and many operated independent businesses in the same industry. 226 NLRB at 1233.

[6] The judge's finding that canvassers are only required to return their donations, and are not in fact disciplined, is contradicted by the record evidence. (Tr. 110–11.) In this record, Allison's credited and unrebutted testimony was that Respondent not only required employees to return their donations, but also that they are disciplined. (Tr. 110, 172–73.)

[7] The judge discounted this factor by pointing out that canvassers are "also given the opportunity to select the area in which they canvass in" during callback shifts. (ALJD at 3:29.) In the Acting General Counsel's view, however, the ability of canvassers to ask for permission for callback shifts does not appreciably lessen the control exercised by Respondent over canvassers. After all, as recognized by the judge, these callback shifts are only available to canvassers *with the permission of Respondent's canvass coordinators*.

at that time, they will not be allowed to canvass that day. (Tr. 104, 261.) If a canvasser wishes to solicit at a different time, the canvasser is not allowed to do so unless given specific permission by a canvass coordinator. (Tr. 265.) They are required to finish soliciting at a time set by their supervisor—either 8:00 or 9:00 p.m. (Tr. 114.) Further, although the judge is correct in noting that some of these finishing times are set by local ordinance, many starting times are not and remain within the control of Respondent. This control, above and beyond that set by law, supports a finding of employee status. *See, e.g., Metro Cab Co.*, 341 NLRB at 725 (employer control beyond that mandated by government regulations supported finding of employee status); *Time Auto Transportation, Inc.*, 338 NLRB 626, 626 n.1, 639 (2002).

While canvassers are soliciting in their assigned territories, Respondent maintains several requirements on their pitches. As discussed by the judge, these requirements include that canvassers remain truthful, that they state they are affiliated with Respondent, and that they provide a description of Respondent's operations. (ALJD at 4:15–20.) In addition, if a potential donor states even once that they are unwilling to donate, canvassers are required to respect those wishes and leave the door. (Tr. 112, 223–24.) This control over the manner in which canvassers are allowed to solicit further supports a finding of employee status. *Cf. New York Party Shuttle*, 359 NLRB No. 112, slip op. at 1 n.2, 3–4 (even where individual maintained some discretion over pitch to customers, still found to be employee where employer controlled routes and provided tools necessary for trade).

The judge also recognized that Respondent requires canvassers to note the following information for every house that they canvass: the address; whether anyone answered the door; whether a flyer was left at the door; if someone did answer the door, whether they donated money; and, if someone did donate money, the form and amount of the donation. In addition, canvassers are required to keep track of the total doors visited, the total contacts made, and the total amount solicited in donations (either via cash or check). (ALJD at 3:35–39.) The judge did not, however, discuss the fact that, as with the code of conduct, Respondent has been *increasing* its level of control over canvassers by adopting a more detailed record-keeping system. (*Compare* GCX 21 *with* GCX 22; Tr. 381–83.)

Finally, although the judge recognized that Respondent disciplines canvassers, his decision implies that this discipline is irrelevant or should not be heavily weighted because it occurred infrequently. (ALJD at 4–5.) This is incorrect, both as a matter of fact and law. As a matter of fact, canvass coordinators issued informal discipline several times per week, in the form of verbal reprimands, for such varied offenses as not being in the correct pick-up location, using crude language, or throwing temper tantrums.[8] (Tr. 99–100, 125, 266.) In addition to this frequent, informal discipline, Respondent also issued more severe discipline, in the form of suspensions and terminations, to canvassers for the following offenses:

[8] To the extent that Respondent contends that the canvass coordinators themselves are independent contractors, these contentions should be summarily dismissed. Respondent, *inter alia*, requires that these canvass coordinators be members of Respondent's managing Collective, conducts extensive reviews of canvass coordinators' performance, and maintains a comprehensive code of conduct for canvass coordinators. (GCX 23, GCX 24.)

- Sexual harassment (Tr. 123.)
- Abusive language towards canvass coordinators and canvassers (Tr. 123.)
- Threatening canvassers with physical violence (Tr. 123.)
- Pocketing donations (Tr. 124.)
- Not showing up at the end of a canvass shift and not admitting fault at the next shift (Tr. 124.)
- Complaints from donors (Tr. 124.)
- Racist language (Tr. 125.)
- Disparaging co-workers (Tr. 125.)
- Misusing Respondent's property (specifically, sleeping in the van owned by Respondent) (Tr. 267–68.)

This discipline occurred throughout Respondent's history, with the most recent incident (before Shuge's unlawful termination) occurring around the fall of 2012. (Tr. 267–68.) This type of discipline and control provides further support for the notion that the canvassers are employees and not independent contractors. *See, e.g.*, *Community Bus Lines*, 341 NLRB at 475 (discipline 9 months before events at issue supported finding of employee status); *Time Auto Transportation Inc.*, 338 NLRB at 626 n.1 (threat of discipline established level of employer control that tipped balance towards employee status where other factors were close); *cf.* *Pennsylvania Academy of the Fine Arts*, 343 NLRB 846, 846–47 (2004) (noting that models were not subject to discipline outside of having their contracts cancelled and that this evidence supported finding of independent-contractor status).

The judge, in finding that the canvassers are independent contractors, appears to rely on the fact that canvassers are not required to work any specific shifts and are allowed to take breaks at their discretion during shifts. (ALJD at 4: 6–13.) These factors, however, are not determinative, and are outweighed by the extensive control exercised by Respondent discussed above: namely, Respondent's strict control of canvassing territory and the duration of canvassing shifts; mandatory training program; requirements on what canvassers say and do while soliciting donations; code of conduct; and extensive history of canvasser discipline. *See, e.g., NLRB v. United Insurance Co. of America*, 390 U.S. at 258 (finding employee status despite fact that agents "fix their own hours and work days"); *Friendly Cab Co.*, 341 NLRB 722, 724 (2005) (despite fact that drivers did not work set or minimal hours, still found to be employees), *enforced*, 512 F.3d 1090 (9th Cir. 2008) (unpublished); *C.C. Eastern*, 309 NLRB 1070, 1070–71 (1992), *enforcement denied*, 60 F.3d 855 (D.C. Cir. 1995).[9]

b. The judge incorrectly found that a commission-based compensation system "strongly indicates independent contractor status" when in fact it supports employee status

The judge committed further error in his analysis of the pay structure for the canvassers. Although the judge correctly noted that canvassers are paid primarily based on commission, he drew precisely the wrong conclusion from this fact, finding,

[9] In denying enforcement, the Court emphasized several factors that are not present in the instant case, including the fact that each driver owned and operated his own vehicle and that drivers bore the cost of maintenance and repair work. This type of capital investment and entrepreneurial risk clearly distinguishes the canvassers in this case from the owner-operators in *C.C. Eastern*. *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 858–59 (D.C. Cir. 1995).

without any supporting precedent, that the commission-based pay "strongly indicates" that the canvassers are independent contractors. (ALJD at 6:20–25.) This is clearly incorrect. The Board has noted in several decisions that a commission-based payment structure actually supports a finding of employee status. *Stamford Taxi, Inc.*, 332 NLRB 1372, 1373 (2000); *see also United Insurance Co. of America*, 390 U.S. at 257 (finding employee status for debit agents who were paid solely based on commission); *Time Auto Transportation*, 338 NLRB at 637, and cases cited therein. As the Board explained in *Stamford Taxi*, a commission-based pay structure supports a finding of employee status because the employer's "income is directly correlated to the amount of fares collected by the drivers." 332 NLRB at 1373. Similarly, the commission-based pay structure at issue here means that Respondent's income is tied directly to the canvassers' income (in contrast to a typical independent-contractor arrangement, whereby the payments to the independent contractor for doing a job come at the expense of the principal).

The judge committed further error by claiming, again without support, that the fact that a canvasser's earnings are tied to "how often he or she chooses to canvass and how hard and how efficiently they work while canvassing" supports a finding of independent-contractor status. (ALJD at 6:23–25.) This is again incorrect. As explained by the D.C. Circuit, one of the key distinctions between an independent contractor and an employee is the ability of the former to impact his or her compensation by working "smarter, not just harder." *Corporate Express Delivery Sys. v. NLRB*, 292 F.3d at 780. That the canvassers' income here is

primarily related to "how often he or she chooses to canvass," and not the ingenuity utilized during canvassing, supports employee status. Thus, the canvassers' compensation, far from "strongly" supporting a finding of independent-contractor status, actually supports a finding that these individuals are employees.

c. The judge erred in finding that canvassing is not a regular part of Respondent's business

The judge additionally erred in finding that canvassing is not a regular part of Respondent's business. (ALJD at 6:27–32.) This is clearly contradicted by the record evidence. Respondent has operated its canvass since at least 2001. (Tr. 71.) It forms one of the five main functions of Respondent's operations (along with the food share, kitchen bus, community garden, and office operations). (*Id.*) In fact, the vast majority of individuals who work for Respondent do so as canvassers. (*See* RX 9.) The canvass runs every day of the week, and Respondent derives over 90% of its operating income from its canvassers. (*Id.*) In addition to their fundraising contributions, canvassers also provide essential publicity in the community for the organization by distributing Respondent's flyers and talking about the organization and its mission while canvassing. (Tr. 112, 223–24.) Based on these considerations, it is beyond dispute that the canvassers here, like the insurance salespeople in *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968), "perform functions that are an essential part of the company's normal operations." *Id.* at 258–59.

The judge discounted these facts by claiming that "Respondent's regular business is distributing free food" and that "canvassers do not participate in obtaining the food to donate or in its distribution." (ALJD at 6:29–32.) The judge's

conclusion on this front is myopic and misses out on how canvassers further this necessary mission. First, as Respondent's own financial records indicate, distributing free food is not free. A cursory review of these records shows that Respondent has to pay for fuel, insurance, vehicle maintenance, permits, rent, and electricity costs. (RX 9.) The money for these necessary expenses comes directly from canvassing. In this sense, raising money is a precondition to actually being able to accomplish the delivery of free food. Second, and perhaps equally as important, the canvassers serve as more than mere fundraisers for the organization. As admitted by Respondent's witnesses, one of the key goals for Respondent is distributing free food throughout the Minneapolis and St. Paul area. (Tr. 42.) Canvassers serve a key role in fulfilling this mission, as they provide publicity for the organization, and indeed are required to discuss the organization's mission as part of their fundraising rap.[10] In this regard, canvassing is clearly an essential part of Respondent's mission of delivering food, and the judge's failure to recognize this fact contributes to his erroneous conclusion that the canvassers are independent contractors.

d. Contrary to the judge's finding, the record evidence establishes that Respondent is "in the business"

The judge also erred in finding that Respondent is not "in the business." In this regard, it is clear Respondent operates as a legal corporation. It makes its

[10] That the parties refer to these individuals as "canvassers" and not merely fundraisers provides further support for this conclusion. In contrast to a mere fundraiser, a canvasser is "a person who goes around and approaches people with a request for opinions or information," and is not simply responsible for raising money. *Definition of Canvasser*, MERRIAM WEBSTER, http://www.merriam-webster.com/thesaurus/canvasser.

required filings with the State of Minnesota and has a board of directors. (Tr. 28, 74, 105.) Respondent also maintains detailed financial records of its operations. (RX 9.) In short, it functions as a non-profit corporation, and thus is in business—as opposed to an individual hiring a contractor to do a discrete job. Further, as discussed above, the canvassers serve an essential role in ensuring that Respondent's business of delivering free food can function—akin to the role that the debit agents who collected premiums played in *United Insurance Co.* in ensuring that the insurance company there had sufficient funds to function. *See* 390 U.S. at 257–58.

The judge's conclusion to the contrary on this point focuses on the fact that Respondent does not have "employees whose sole function it is to canvass." (ALJD at 6:38–40.) This, however, begs the question posed by the "in the business" factor. Following the judge's analysis to its logical conclusion, Respondent is not a business because its canvassers are not employees, and its canvassers are not employees because Respondent is not a business. Clearly, this circular line of reasoning leads to nowhere, and does nothing to further the judge's point that Respondent does not operate as a business.[11] The evidence shows otherwise and supports a finding that the canvassers are employees.

[11] The judge also curiously claims that Dave Senn is an "employee" who works in the community garden and is paid a "wage"—presumably in contrast to the canvassers, who the judge finds are independent contractors. (ALJD at 6:39–41.) The finding, however, that Dave Senn is an employee is simply ridiculous. The record evidence is uncontroverted that Dave Senn is a member of the managing Collective—in fact, he testified directly to this fact. (Tr. 413.) The judge's finding in this regard frankly reflects a carelessness that casts doubt on his entire analysis of the independent-contractor question.

e. The judge erred by suggesting that canvassers operate as a distinct business or occupation

The record evidence also demonstrates, contrary to the judge's conclusion (ALJD at 5:12–21), that the canvassers are not engaged in a distinct business or occupation. The canvass itself functions on a group level, whereby canvassers are required, unless given special permission, to meet at Respondent's offices before their shift, utilize Respondent's materials and transportation during their shift, solicit in pairs during their shift, and meet back at Respondent's offices after the shift. (Tr. 103–04, 108, 110, 115.) In contrast, there is nothing independent or distinct about how the canvassers operate. None of the canvassers runs their own canvassing business. They work for Respondent and, while working for Respondent, do work solely for that organization. (Tr. 119.) *Slay Transportation Co.*, 331 NLRB at 1294 (although drivers owned vehicles, not engaged in distinct business where they were required to do business in name of their employer). In contrast to the typical independent contractor running an independent business, they canvass in Respondent's name and use materials that clearly label them as working for Respondent. (Tr. 105–06.) *Cf. AmeriHealth Inc.*, 329 NLRB 870, 884 (1999) (doing business in one's own name and engaging in independent advertising provide evidence of independent contractor status).

The judge, in reaching a contrary conclusion, relies on the fact that canvassers are allowed to canvass for different canvassing organizations. (ALJD at 5:16–21.) This conclusion ignores recent Board precedent to the contrary. In this regard, the Board recently noted that "little weight" should be given to the fact that

casual and part-time employees work more than one job, even if that job is in the same occupation. *Lancaster Symphony Orchestra*, 357 NLRB No. 152, slip op. at 5; *KCAL-TV*, 331 NLRB 323, 323 (2000). Further, the record demonstrates that most of the canvassers did, in fact, work solely for Respondent. (Tr. 120.) Thus, this factor also supports a finding of employee status.

f. The judge incorrectly failed to interrogate the parties' nominal designation of their relationship

As recognized by the judge, it is undisputed that the parties nominally designated the canvassers as independent contractors. (ALJD at 6:34–36.) The judge, however, gives too much weight to the nominal definition, and improperly fails to evaluate the underlying reality of that relationship. A proper examination of the parties' true understanding of their relationship shows that Respondent believed that it could exercise a level of control over the canvassers that is more consistent with employees than with independent contractors.

In this regard, the Restatement (Second) of Agency makes clear that "[i]t is not determinative that the parties believe or disbelieve that the relation of master and servant exists, except insofar as such belief indicates an assumption of control by the one and submission to control by the other." RESTATEMENT (SECOND) OF AGENCY, § 220(2) cmt m. As discussed above, Respondent's actions demonstrate a level of control consistent with employee status, and do not reflect the entrepreneurial opportunities available to an independent contractor paid to do a specific job. The fact that Respondent submits Form 1099's and makes canvassers responsible for appropriate taxes merely shows that Respondent has "simply shifted

certain capital costs to the drivers without providing them with the independence to engage in entrepreneurial opportunities." *Roadway II*, 326 NLRB at 851; *see also J. Huizenga Cartage Co. v. NLRB*, 941 F.2d 616, 620 (7th Cir. 1991) ("[I]f an employer could confer independent contractor status through the absence of payroll deductions there would be few employees falling under the protection of the Act."), *enforcing* 298 NLRB 965 (1990); *Igramo Enterprises*, 351 NLRB 1337, 1345 (2007) ("To the extent that the Respondent has failed to make deductions . . . it merely demonstrates that the Respondent is probably violating a substantial number of other Federal and State laws."). Therefore, Respondent's nominal designation of these individuals as independent contractors is definitively outweighed by the realities of the relationship between the parties.

g. The judge correctly found that Respondent provides the tools and instrumentalities of work for canvassers, that canvassing is a low-skilled occupation, and that canvassers are employed for an indefinite term

The judge correctly analyzed three of the ten factors in examining whether the canvassers are independent contractors, but apparently gave these factors insufficient weight. First, the judge recognized that Respondent clearly provides the tools and instrumentalities that canvassers use, and that this supports a finding of employee status. (ALJD at 6:4–11.) The judge apparently failed to recognize, however, that the Board has often weighed this factor heavily in determining whether workers are employees or independent contractors. *Compare Slay Transportation Co.*, 331 NLRB at 1293–94 (distinguishing earlier decision on basis of lack of meaningful ownership interest in trucks), *and NLRB v. Friendly Cab Co.*,

512 F.3d 1090, 1999 (9th Cir. 2008) (employer's requirement that drivers lease vehicles from company supports employee status), *enforcing*, 344 NLRB 528 (2005), *with American Publishing Group*, 308 NLRB 563, 564 (1992) (finding independent-contractor status based in part on fact that drivers owned their own vehicles and that these vehicles did not display company logo), *and Pennsylvania Academy of the Fine Arts*, 343 NLRB 846, 847 (2004) (independent-contractor status found where, *inter alia*, models have to supply the materials for their work—costumes, robes, and slippers—and engage in highly skilled work). Here, the fact that Respondent owns and provides virtually all of the tools that the canvassers utilize in canvassing strongly supports their employee status.

Second, the judge recognized that the indefinite nature of the canvassers' employment also supports a finding of employee status. (ALJD at 6:13–18.) In contrast to an independent contractor hired for a specific duration to do a specific job, the canvassers here are allowed to continue working indefinitely and perform the essential fundraising work that is necessary in order for Respondent to function. *Igramo Enterprise*, 351 NLRB at 1344.

Finally, the judge correctly recognized that canvassing is a low-skilled occupation, and that this supports a finding of employee status. (ALJD at 5:30–35.) In this regard, it should be noted that Respondent will hire canvassers without any prior experience, and that its mandatory training program takes at most one shift. The low-skilled nature of the occupation strongly supports a finding of employee status. *St. Joseph News Press*, 345 NLRB 474, 479 (2005).

h. A review of the ten-factor independent contractor test conclusively demonstrates that the canvassers are employees protected by the Act

As the above analysis reveals, all ten of the factors considered by the Board support a finding of employee status in this case. The record evidence overwhelmingly shows that canvassers do not have any entrepreneurial opportunity; that Respondent exercises significant control over the work that canvassers perform; that Respondent provides the tools that canvassers use for working; that canvassers payment structure is uniform; that canvassers do not operate independent businesses; that Respondent operates as a business and that the canvassers form an integral part of that business; that canvassing is a low-skilled occupation; that canvassers are hired for an indefinite duration; and that the nominal designation of the canvassers as independent contractors is belied by Respondent's treatment of these individuals. Given this evidence, it is clear that these canvassers are statutory employees covered by the Act.

4. The Judge's Misguided Analysis Incorrectly Leads to the Conclusion that All Commissioned Salespeople Are Independent Contractors

In making his incorrect conclusion that Respondent's canvassers are independent contractors, the judge specifically emphasizes the following four facts: canvassers' freedom to establish which shifts they will work, the commission-based nature of their compensation, that their compensation depends largely on the time and effort put into their work, and the lack of supervision while canvassing. (ALJD at 7:1–3.) Even assuming, for sake of argument, that all four of these findings are supported by record evidence (which they are not—particularly the lack of

supervision while canvassing), these four factors are present in basically any commissioned sales force that is allowed to set its own schedule. Thus, according to the judge's analysis, all commissioned salespeople fall outside the protection of the Act.

This conclusion would perhaps be acceptable, *except for the presence of binding Supreme Court precedent to the contrary*. In this regard, all four factors applied to the debit agents in *United Insurance Co.*, and yet the Court found that they were employees. The debit agents in that case were not required to work any shift. 390 U.S. at 258. Their payment was based on commission and rested on the amount of time and effort they put into collecting premiums. *Id.* The agents also had no supervision while they were doing their work. *Id.* Despite these facts, however, the Supreme Court reached the exact opposite result as the judge in this case—that the debit agents were employees, and not independent contractors.

Consistent with this binding precedent, the canvassers here, like the debit agents in *NLRB v. United Insurance Co. of America*, 390 U.S. 254, are employees and not independent contractors. The similarities between the two cases are striking; in fact, the Court's analysis of the important factors in that case closely resemble the factors present in the instant case:

> When this is done, the decisive factors in these cases become the following: the agents do not operate their own independent businesses, but perform functions that are an essential part of the company's normal operations; they need not have any prior training or experience, but are trained by company supervisory personnel; they do business in the company's name with considerable assistance and guidance from the company and its managerial personnel and ordinarily sell only the company's policies; the 'Agent's Commission

> Plan' that contains the terms and conditions under which they operate is promulgated and changed unilaterally by the company; the agents account to the company for the funds they collect under an elaborate and regular reporting procedure; the agents receive the benefits of the company's vacation plan and group insurance and pension fund; and the agents have a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory.

Id. at 258–59. All of the factors relied on by the Court in that case are present here: canvassers do not operate independent businesses; their work is essential to Respondent's business; they are hired without prior training or experience, and receive training from Respondent (in some cases, Respondent's management); canvassers do business in the name of Respondent and receive support from Respondent during their work; while working for Respondent, they are only allowed to solicit funds for Respondent; they operate under a code of conduct that is promulgated and unilaterally changed by Respondent[12]; canvassers account for their funds on a regular basis under a detailed reporting procedure; canvassers receive benefits from Respondent that extend beyond wages; and canvassers are in an indefinite, at-will employment relationship. In sum, Respondent is unable to satisfy its burden that the canvassers are independent contractors and not employees within the meaning of Section 2(3) of the Act.

B. Respondent Committed Numerous Violations of Section 8(a)(3) and (1) of the Act

1. *The Judge Correctly Found that Allison's Termination and Respondent's Statements of Futility Violated Section 8(a)(3) and (1) of the Act*

[12] In fact, although it was not in effect at the time of these discharges, Respondent was in the process of unilaterally implementing a more extensive code of conduct. (Tr. 377–78; GCX 19.)

As found by the judge in his underlying decision, Respondent's decision to terminate Allison was clearly based on unlawful considerations under the Act.. (ALJD at 9:25–28.) In this regard, Respondent terminated Allison only days after it became aware of his union activity. Respondent's justification for terminating Allison revolved primarily around misconduct that occurred years prior to his termination during a prior tenure working for Respondent. In light of this overwhelming evidence, the judge properly found that Respondent terminated Allison because of his union activities.[13]

The judge also correctly found that Respondent's statements regarding the futility of the canvassers' attempts to form a union would ordinarily constitute violations of the Act. In this regard, Respondent made clear during the organizing campaign that it was not recognizing the Union, and that it would not recognize the Union going forward because it was incompatible with Respondent's business vision. As aptly noted by the judge, Respondent's statements amounted to a statement that "organizing would be futile because Respondent would never

[13] Although not determinative to the outcome of the case, the judge committed another error by mischaracterizing Allison's discharge as not requiring a *Wright Line* analysis. (ALJD at 9 n.15.) Although the Acting General Counsel is in obvious agreement with the judge regarding the outcome of his analysis, the substance of his analysis—and in particular his contention that *Wright Line* does not apply in this case—is misguided. As the Board has made clear, a *Wright Line* analysis applies where an employer posits a reason that is distinct from an employee's protected activity as the justification for a discharge. Here, as the judge admits in the body of his decision, Respondent purportedly had concerns about Allison's "disruptive and manipulative behavior" that were separate from his union activity. (ALJD at 9.) Although these concerns were clearly pretextual, they were separate from Allison's protected conduct. As such, a *Wright Line* analysis is appropriate.

bargain with the Union as the representative of the canvassers." (ALJD at 9:40–41.)

2. Contrary to Well-Established Supreme Court Precedent, the Judge Incorrectly Found that Respondent's Grant of Benefits During an Organizing Campaign Did Not Violate Section 8(a)(1) of the Act

Although the judge correctly found that Respondent's termination of Allison and its statements of futility would violate the Act if the canvassers were employees rather than independent contractors, he committed further error in finding that Respondent's grant of benefits during the organizing campaign somehow not similarly violate the Act. (ALJD 10:2–3.) In this regard, it is well established under the Act that a grant of benefits during an organizing campaign can, and often will, violate Section 8(a)(1). The basis for this rule was adroitly explained by Justice Harlan in *NLRB v. Exchange Parts*, 375 U.S. 405, 410 (1964):

> The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

Consistent with this well-established precedent, the Board has established that it will "draw an inference of improper motivation and interference with employee free choice from all the evidence presented and from the [employer's] failure to establish a legitimate reason for the timing of the increase." *Holly Farms Corp.*, 311 NLRB 273, 274 (1993). In considering whether there is a "legitimate reason" for the increase, the Board will consider, *inter alia*, whether an employer has a past practice of giving such a benefit and whether an employer made the decision to offer

the benefits prior to gaining knowledge of the union activity. *Id*. at 274–75; *Register Guard*, 344 NLRB 1142, 1142, 1155–56 (2005) (rejecting judge's presumption of unlawfulness but finding that timing of benefit, coupled with employer's failure to provide neutral explanation, supported finding of unlawful motivation).

Here, it is undisputed that, shortly after discovering that its canvassers were attempting to form a union, Respondent granted unprecedented and previously unplanned benefits, including easier access to management positions and more paid training. (ALJD at 8:9–15; 8 n.12.) The judge recognized this fact in his underlying decision, but concluded, *without* supporting precedent, that this benefit was not unlawful because "the benefits were offered in direct response to requests from the Union and [a canvasser's] requests for such action." (ALJD at 10:1–3.) This conclusion is directly contrary to established Board precedent. For example, in *McAllister Towing & Transportation Co.*, 341 NLRB 394 (2004), employees sent a letter to their employer during a union campaign that included demands for a wage increase, a 401(k) plan and paid holidays. *Id.* at 413. After an election petition was filed, the employer granted these benefits. *Id.* at 422–23. Despite the fact that these benefits had been specifically demanded by employees, and granted by the employer pursuant to this demand, the Board found that the grant of benefits was unlawful. *Id*. at 400, 422–24.

The same result naturally should follow in the circumstances of this case. Respondent granted unplanned benefits to employees during an organizing campaign while simultaneously denying recognition to their chosen bargaining

representative. Indeed, under the logic of *Exchange Parts*, the fact that the employer is specifically listening to and granting demands should be considered especially coercive, as the employer is demonstrating to employees that it has the power to remedy their grievances without the presence of a union. Accordingly, the Board should find that Respondent's grant of benefits to employees violated the Act.

III. CONCLUSION

Counsel for the Acting General Counsel respectfully submits that the record evidence and the law establish that Respondent's canvassers are employees and not independent contractors, and that Respondent violated the National Labor Relations Act as alleged in the Complaint. Accordingly, Counsel for the Acting General Counsel requests that the National Labor Relations Board issue a Recommended Order to reinstate Christopher Allison and make him whole. Counsel for the Acting General Counsel further requests that the National Labor Relations Board issue an appropriate Notice to Employees to remedy Respondent's violations of the Act.[14]

Dated: September 18, 2013

Respectfully submitted,

/s/ Tyler J. Wiese

Tyler J. Wiese
Counsel for the Acting General Counsel
National Labor Relations Board, Region 18
330 South Second Avenue, Suite 790
Minneapolis, MN 55401

[14] Attached as Appendix A is a proposed Notice to Employees. Additionally, Appendix B contains proposed conclusions of law.

Appendix A
Proposed Notice to Employees

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT offer employees management positions in order to discourage them from engaging in union or other protected concerted activities.

WE WILL NOT offer employees benefits during union organizing campaigns in order to discourage them from supporting a union or engaging in other protected concerted activities.

WE WILL NOT insist that employees negotiate through the Collective instead of negotiating through any self-determined bargaining representatives.

WE WILL NOT terminate any employee for engaging in activities on behalf of any union, including the IWW Sisters' Camelot Canvassers Union, or for engaging in other concerted activities protected under Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed to employees by Section 7 of the Act.

WE WILL make Christopher Allison, a.k.a. Shuge Mississippi, whole for any loss of earnings and other benefits suffered by him as a result of his discharge, together with interest compounded daily.

WE WILL offer Christopher Allison, a.k.a. Shuge Mississippi, his job back with his seniority and all other rights and privileges.

WE WILL remove from our files any reference to the terminations of Christopher Allison, a.k.a. Shuge Mississippi, on March 4, 2013, and notify the employee in writing that this action has been taken and that any evidence of his termination will not be used against him in the future in any way.

SISTERS' CAMELOT

_____

(Name)

Appendix B
PROPOSED CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. IWW Sisters' Camelot Canvassers Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By granting employees benefits during the course of union organizing, including a system for taking credit card donations; professional van maintenance; payment for medical bills resulting from work-related injuries; and an increase, up to three days, of paid training on about March 6, 2013 in order to dissuade them from organizing, Respondent violated Section 8(a)(1) of the Act.

4. By promising employees that it would convey immediate membership in the Collective to one employee and loosen requirements for membership in the Collective on about March 4, 2013 and on about March 6, 2013 in order to dissuade them from organizing, Respondent violated Section 8(a)(1) of the Act.

5. By insisting that employees negotiate through the Collective rather than the union concerning changes in employees' terms and conditions of employment, thereby implying that forming a union was futile, Respondent violated Section 8(a)(1) of the Act.

6. By discharging Christopher Allison, a.k.a. Shuge Mississippi, because he engaged in union and other protected concerted activities, Respondent violated Section 8(a)(1) and (3) of the Act.

7. The unfair labor practices stated in conclusions of law 3–6 above are unfair labor practices that affect commerce within the meaning of Section 2(6) and (7) of the Act.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Brief to the National Labor Relations Board on behalf of the Acting General Counsel was filed via e-filing and served on September 18, 2013, by the methods indicated on the parties whose names and addresses appear below.

Served via E-mail

John C. Hauge
Ford Harrison LLP
225 South Sixth Street, Suite 3150
Minneapolis, Minnesota 55402
jhauge@fordharrison.com

Christopher Allison
3729 5th Avenue South
Minneapolis, MN 55409
entropy@riseup.net

Sisters' Camelot
2701 36th Ave. S., Ste. A
Minneapolis, MN 55406
postmaster@sisterscamelot.org

Travis Erickson
Industrial Workers of the World
3019 Minnehaha Ave., Ste. 50
Minneapolis, MN 55406
travis.girard.erickson@gmail.com

/s/ Rachel A. Centinario

Rachel A. Centinario
Field Attorney
National Labor Relations Board Region 18