

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
WASHINGTON, DC**

DURHAM SCHOOL SERVICES, L.P.,	)	
	)	
Employer,	)	
	)	
And	)	Case No. 05-RC-103218
	)	
	)	
TEAMSTERS LOCAL UNION NO. 570,	)	
a/w INTERNATIONAL BROTHERHOOD	)	
OF TEAMSTERS,	)	
	)	
Petitioner	)	

**EMPLOYER’S ANSWERING BRIEF TO PETITIONER’S EXCEPTIONS**

NOW COMES Durham School Services, L.P., Employer herein, and files its Answering Brief to Petitioner’s Exceptions, as follows:

**STATEMENT OF CASE**

On April 19, 2013,<sup>1</sup> Teamsters Local Union No. 570 (“Union) filed a petition with Region 5 of the National Labor Relations Board seeking to represent a unit of bus drivers and monitors employed by Durham at its Rosedale, Maryland facility (frequently referred to as the Baltimore facility). (Board Exh. 1(a)). Pursuant to a Stipulated Election Agreement, a secret-ballot election was conducted on May 31, with the following final results:

Approximate number of eligible voters	149
Void ballots	0
Votes cast for Petitioner	62
Votes cast against participating labor organization	75
Valid votes counted	137
Challenged ballots	0
Valid votes counted plus challenged ballots	137

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<sup>1</sup> All dates are 2013 unless otherwise indicated.

(Board Exh. 3).

The Union filed timely post-election objections. (Board Exh. 1(f)). Following an investigation, the Regional Director issued a Report on Objections and Notice of Hearing on June 26, which determined that all five of the Union's objections raised material issues of fact warranting a hearing. (Board Exh. 1(d)). On July 18, a hearing was conducted before Administrative Law Judge Michael A. Rosas at which the Union and the Employer both presented evidence. On September 12, ALJ Rosas issued his Recommended Decision on Objections, recommending that all of the Union's objections be overruled and that a certification of results be issued.

The Union filed Exceptions to the Administrative Law Judge's Decision on or about October 17, 2013.<sup>2</sup> The exceptions are limited to objections 2 and 3. The Employer now files this Answering Brief.

## **OBJECTION 2**

During the critical period, the Employer, by its supervisors and agents, appealed to racial prejudice in order to dissuade groups of employees from supporting the Petitioner. Specifically, on or about May 21, 2013, the Employer countenanced, through inaction, racist name-calling by employees towards other employees who supported the Union. By this conduct, the Employer improperly affected the free choice of the employees in voting for or against representation by the Petitioner.

### **A. Statement Of Facts**

The ALJ credited the testimony of Union witnesses Elabas Abdelnaby and Martin Fox. Abdelnaby testified that during a group meeting on May 21, at which the Union was being discussed, he asked some questions of Human Resource Manager John Kembrowski. According

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<sup>2</sup> These exceptions were not served on the Employer or the Regional Director until October 28, 2013.

to Abdelnaby, Kembrowski was expressing surprise and hurt feelings regarding the employees attempting to bring the Union in to solve their problems. This led Abdelnaby to question Kembrowski as to why he had not expressed similar feelings in December 2011 when employees apparently raised similar concerns. At that point, a co-worker, Frank McNeil, allegedly said, “you stupid African nigger, you speak -- you learn English or you go home.” (Tr. 127-128). Abdelnaby responded that he spoke three languages. (Tr. 133). Some laughter occurred in the audience, and the meeting then continued without Kembrowski or Eric Owings (another manager who was present) saying or doing anything regarding McNeil’s comments. Abdelnaby exited the meeting shortly thereafter. (Tr. 129-130).

Ten days later, on the afternoon of May 31 (following the election), Abdelnaby called the Employer’s hot line for reporting ethics issues and filed a complaint. In this report, Abdelnaby alluded to McNeil’s comment that Abdelnaby should learn English and go back to where he came from, but did not mention the racial slur. (Employer Exh. 5, Tr. 135).

Martin Fox testified that he was sitting in the front row during this meeting and that manager Eric Owings was sitting beside him. Following Abdelnaby’s questions to Kembrowski, McNeil, who was sitting three rows behind Fox, said in a normal conversational voice, “you ignorant African nigger,” at which point someone in the audience hollered, “speak up, we can't hear you,” and McNeil continued more loudly, “you either learn to speak English or go back home where you belong.” (Tr. 141, 142-143).

Kembrowski testified that he heard McNeil make reference to Abdelnaby learning English, but denied hearing the alleged racial slur. (Tr. 229-230). Owings testified that he heard Abdelnaby’s questions to Kembrowski and that someone behind Owings made a

comment that Owings could not hear. Owings then heard Abdelnaby reply that he spoke three or four languages. (Tr. 304-305). Kembrowski testified that he made some comment to the effect of “calm down,” and that the meeting continued without incident. Following the May 31 hot line report by Abdelnaby, the Employer issued McNeil written discipline for his comments. (Tr. 229-232, 237).

**B. Objection 2 Lacks Merit And Should Be Overruled.**

The ALJ properly recommended that Objection 2 be overruled. There is no contention that the *Employer* injected race as an issue into the campaign or made any appeal to racial prejudice. Thus, the Board’s decision in *Sewell Manufacturing Co.*, 138 NLRB 66 (1962), regarding appeals to racial prejudice is not directly applicable. Instead, this objection focuses on an alleged racial statement by an *employee*. Accordingly, this objection must be analyzed under the Board’s standard for third-party misconduct. As set forth in *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984), “the test to be applied is whether the misconduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.” On its face, the alleged comment by McNeil does not rise to this level. While the remark was a derogatory racial slur that had no place in the discussion or the workplace, there was no threat of any kind and nothing in the remark that would create a general atmosphere of fear and reprisal. Nor was any evidence presented that McNeil’s remarks engendered discussion or consternation among other employees.

In *Crosse Pointe Paper Corp.*, 330 NLRB 658 (2000), the Board declined to set aside an election based on a rumor that a manager “said something to the effect that he hoped that the ‘f—ing Mexicans’ voted against the Union.” *Id.* at 659. As the judge in that case noted, the “rumor did not involve a threat,” *Id.* at 660, was insensitive but “not inflammatory” and was not

“related to a core issue in the campaign.” *Id.* at 661. McNeil’s comment falls far short of the kind of aggravated threats by employees that the Board has on occasion found objectionable.

Compare *PPG Industries, Inc.*, 350 NLRB 225 (2007) (multiple threats of physical harm and property damage if employees crossed picket line); *Westwood Horizons, supra* (multiple threats of physical harm if employees did not vote for union as well as physical intimidation and force directed at employees seeking to vote).

The Union, citing *Technodent Corp., ( d/b/a Dentech Corp.)*, 294 NLRB 924, 926 (1989) and *Highland Yarn Mills*, 313 NLRB 193 (1993), argues that because the Employer’s representatives did not immediately repudiate McNeil’s comment, the comment must be imputed to the Employer. Neither decision, however, is applicable here. In *Dentech*, the issue involved whether the employer violated § 8(a)(1) by virtue of an employee’s statement to other employees that the employer would move to Canada if the employees did not withdraw their support from the union. The employee in question had been allowed by management to openly violate its solicitation policy in his distribution of a decertification petition, to conduct meetings with employees on work time at which he discussed the employer’s new employee handbook, and to present the anti-union petition to union representatives during work time. In these circumstances, the Board easily found employer liability based both on apparent authority and ratification. With respect to the ratification theory, the Board cited the *Restatement 2d, Agency*, § 82 (1958) definition of ratification: “the affirmance by a person of a prior act that did not bind him but *which was professedly done on his account*, whereby the act, as to some or all persons, is given effect as if originally authorized by him.” 294 NLRB at 926 (emphasis supplied). Here, unlike the employee in *Dentech*, the Employer did nothing prior to the meeting in question to suggest to employees that employee McNeil was acting with authority or on the Employer’s behalf.

Further, whereas the employee in *Dentech* purported to speak on behalf of the employer and to state what the *employer would do in the event of unionization*, McNeil’s comment during the meeting did not purport to represent the view of the Employer or to speak on behalf of the Employer. Rather, he merely voiced his own misguided racist views. In these circumstances, employees could not reasonably believe that McNeil’s comment was attributable to management, nor did the managers have any obligation to immediately disavow the remark.

Employees have a right to voice their own views and opinions—no matter how misguided or opprobrious—on unions, politics, race relations, and any number of subjects. Those views and opinions do not become those of their employer simply because they are made in the employer’s presence and are not disputed or rebutted. Nor do the views and comments of union supporters become attributable to the union if the union knows of them but does not rebut them. It is only when the employee is held out as speaking for, or purports to be speaking for, an employer or union that any possible obligation to rebut arises.

Similarly, in *Highland Yarn*, pro-company employees were allowed to run rampant through the plant in their efforts to decertify the union. Indeed, when the issue was brought to the attention of management, they either ignored the issue or disavowed any ability to stop the activities. Against this background, a supervisor did not disavow the statement of one of the decertification proponents that “the Union was preventing the Company from giving employees a raise.” 313 NLRB at 207. Not surprisingly—given that management had created the perception that the employee was acting with at least the tacit consent of the employer and the employee purported to represent what the employer could or could not do—the Board found that the supervisor’s failure to disavow rendered the threat attributable to the employer.

Clearly, no basis exists for attributing McNeil’s racist remark to the Employer. But even if McNeil’s comment could be attributed to the Employer under some theory of adoption by failure to repudiate, the judge correctly held that these remarks, coming ten days before the election, would not warrant setting aside the election. The Union acknowledges that McNeil’s comment was “isolated,” (Union Exceptions Brief at 4), but seems to argue that because it was not immediately repudiated by the Company, the remark is automatically transformed from “isolated” into an “atmosphere of fear and reprisal such that it rendered impossible the employees’ free choice in the election.” The alleged failure to repudiate, however, is material only to the issue of responsibility; it has no significance in evaluating whether the requisite atmosphere of fear and reprisal was present. In *Shawnee Manor*, 321 NLRB 1320 (1996), the Board concluded that even assuming, *arguendo*, the applicability of *Sewell* to third-party racial remarks (the Regional Director had declined to apply *Sewell*), isolated racial remarks by a pro-union employee did not warrant setting aside the election since they “did not so inflame and taint the atmosphere in which the election was held that ‘a reasoned basis for choosing or rejecting a bargaining representative was an impossibility.’” *Id.* at 1320-21 (quoting *Sewell*). In *Catherine’s, Inc.*, 316 NLRB 186 (1995), the Board, in refusing to set aside an election, held that a union’s references to the employer’s “Jewish law firm,” while irrelevant to the campaign, “were not of an inflammatory nature and did not occur on the election eve, they were not part of a recurrent or persistent campaign appeal to the religious or racial prejudice of the eligible voters, and the Union did not reiterate the subject in campaign literature.”

Finally, the Union, while not disputing that “no evidence was presented that McNeil’s remarks engendered discussion or consternation among other employees,” (Union Exceptions Brief at 5), faults the judge for applying a subjective, rather than objective, standard. This

argument misconstrues the difference between an unfair labor practice proceeding—where the issue is the objective tendency of the conduct to restrain or coerce employees in the exercise of their Section 7 rights—and a representation proceeding—where there must be an affirmative showing of impact on the election. “The party challenging the election [h]as the formidable burden of demonstrating that the election is invalid.” *NLRB v. Erie Brush & Mfg. Corp.*, 406 F.3d 795, 801 (7th Cir. 2005). This burden has been characterized as a “heavy” one, and there “is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees.” *Crown Bolt, Inc.*, 343 NLRB 776, 777 (2004). In assessing the impact of alleged misconduct on an election, the Board does not consider “subjective” opinions, but it does require objective evidence of impact. Such “objective” evidence includes whether the misconduct “engendered discussion or consternation among other employees.” Here, there was no sustained appeal to racial prejudice and no objective evidence of actual impact on the election. The judge properly recommended that Objection 2 be overruled.

### **OBJECTION 3**

During the critical period, the Employer, by its supervisors and agents, granted employees benefits in order to dissuade them from supporting the Petitioner. Specifically, on or about May 24, 2013, Employer supervisors and agents provided supplemental cash payments to selected employees. By this conduct, the Employer improperly affected the free choice of the employees in voting for or against representation by the Petitioner.

#### **A. Statement Of Facts**

The facts regarding Objection 3 are largely undisputed. The most complete version of the events is found in the testimony of Gayle Gray, Assistant General Counsel – Labor Relations for the Employer’s parent company, National Express Corporation. Gray was on-site in Rosedale on May 24 and personally participated in the decision to distribute cash and in the actual

distribution process. Gray testified that the Rosedale facility had been experiencing frequent and recurring problems with the accuracy of its payroll, and that in the spring, a class action wage and hour lawsuit had been filed against the Company with respect to the Rosedale facility. As a result of these problems, the payroll administrator had been terminated, and a temporary assistant from a different facility of the Employer was filling in. (Tr. 319-320).

On the morning of May 24, as employees were returning from their morning routes, Gray began hearing employees commenting loudly about mistakes on their paychecks, as well as the printout they received reflecting their hours for the week in progress. The complaints centered around missing hours from Friday May 17. Employees were quite upset and vocal, and Gray heard Martin Fox exclaim that this had occurred because of the Union activity. Some employees had already proceeded to Eric Owings' office to address their problems, while others were milling about in the hallway outside the dispatch office. To assist in addressing the problem, Gray, along with the Employer's outside counsel (Dean Kpere-Daibo), began making photocopies of paychecks that employees brought to their attention as containing shortages. Gray initially advised employees that the Company would overnight checks to them or would deposit the money as quickly as possible if they had direct deposit and preferred that to having a check sent overnight to them. (Tr. 320-324).

After copying the employees' paychecks and noting their preferences, Gray and Owings began investigating how the problem had occurred. They eventually determined that the issue had arisen because of a companywide payroll mistake that had been found and corrected in advance in other locations, but had been missed in Rosedale because of a failure to conduct the audit that normally occurred on Tuesday of each week. Given the

size of the problem and the fact that employees were set to embark on a three-day holiday for Memorial Day, Gray began discussing with other corporate officials the idea of making up the shortfall in cash. By late morning, the decision had been made to pay in cash, but because the process was somewhat difficult and uncertain, nothing was said to employees at the time. A detailed examination of payroll was undertaken by both the Rosedale payroll office and the corporate payroll office in Warrenville, Illinois, to determine each employee's missing hours and the amount that was owed. Eventually, the Employer identified 92 employees for whom it could verify the missing hours. The corporate payroll office emailed copies of voided paychecks for these 92 employees to Rosedale to serve as documentation, and Owings used a corporate credit card to obtain \$10,000 in cash. (Tr. 324-327).

In the late afternoon, as employees began returning from their afternoon routes, the Employer set up a table in an empty office to use for the distribution of cash. Gray, Owings, and the Employer's Regional Safety Manager, Pat Healy, handled the distribution of the cash. As each employee came into the office, the managers located the employee's pay statement, pointed out the number of hours the Employer had identified as being owed, reviewed the required deductions and the final amount due, double counted the cash, requested the employee sign a copy of the paycheck, and placed the cash into an envelope along with an apology letter. (Tr. 327-330; Employer Exh. 6). The apology letter was signed by Owings and stated:

Please allow me to personally apologize for the error on your paycheck, today. It is totally frustrating for you, and I understand that. Trust me, it is totally frustrating to me, too. You work hard for your pay and we should have gotten it right.

Durham is trying to correct this error today, by determining how much you are owed and issuing cash payments for the amount missing in this paycheck, only, to as many folks as we can.

I'm sincerely sorry for this error.

Best safe regards for the Memorial Day weekend.

(Union Exh. 1).

The testimony of the Union's witnesses was consistent with that of Gray. Stephanie Urosa testified that she noticed the pay shortage when she picked up her paycheck after returning from her morning route. Urosa observed other employees waiting to get their check and heard various employees complaining about shortages. Urosa was initially informed that she would have a make-up check within 24 hours. Urosa then left the facility. Later in the day around 5:45 p.m., however, she received a call from a co-worker, Vicki Anthony, who advised her that Owings was distributing cash to employees whose checks were shorted. Urosa then called the facility and was advised by the dispatcher that she could return to the facility to resolve the issue if she wished. Urosa, who lived 15 miles from the facility, chose not to come back that night. Instead, when she returned to work the following Tuesday, she spoke to Owings, who advised her that the shortage would be on her next paycheck. Urosa did receive the shortfall in her following paycheck. (Tr. 60-62, 72-76).

Vicki Anthony testified that she too observed that her check was short and she lined up with other employees outside the dispatch office. Gray was making copies of paychecks and telling employees that they would be paid either on Saturday or Tuesday when they returned to work. Anthony advised Gray that she had direct deposit, to which Gray responded that she would get the shortage deposited ASAP. Later in the day, when Anthony returned from her afternoon run, she noticed employees standing in the hallway. She questioned the

dispatcher, who stated that cash was being distributed to those whose paycheck was short. Anthony proceeded down the hallway to an office where other employees were waiting and the cash was being distributed. Anthony signed a copy of the voided paycheck, which indicated how much Anthony was owed, and was given an envelope with the cash and an apology letter. (Tr. 85-85, 95-96).

Michael Flint testified that his paycheck was also short and that he spoke to Gray, who asked if he had direct deposit, to which Flint responded that he did not have direct deposit. Gray made a copy of the check and asked if he could wait until Tuesday to receive a make-up check. Flint responded that that would be fine. When he returned from his afternoon route, Flint was advised by another employee that he could get his money in cash. Flint proceeded to the office where the cash was being distributed and was advised that he was owed 8.25 hours of pay. He was then handed cash, minus taxes, in the amount of \$90.52. (Tr. 104-106; Employer Exh. 6, p. 27).

Several employees testified that in the past shortfalls had been made up in the following week's paycheck. (Tr. 57, 83, 102). Gray testified that each of the Employer's facilities has a dollar amount cut-off (e.g. \$25, \$50), and if the shortfall is below this amount, it will typically be made up in the following week's paycheck, unless the employee states that he/she needs the money immediately, in which case the check will be sent overnight to the employee (or deposited immediately for direct deposit). For amounts above the cut-off figure, the protocol is to overnight (or deposit) the check. (Tr. 336-338).

It is undisputed that this was the first time that the Rosedale facility had made up paycheck shortages with cash distributions. No employee testified that he/she received more pay than he/she was legally entitled to or had actually earned.

**B. Objection 3 Lacks Merit And Should Be Overruled.**

The ALJ correctly held that Objection 3 is effectively precluded by the Board’s decision in *Kalin Construction Co.*, 321 NLRB 649 (1996). In *Kalin*, the Board concluded that it would eschew its prior practice of addressing pre-election changes in payroll practices on a case-by-case basis in favor of a “clear, realistic rule of easy application which lends itself to definite, predictable, and speedy results.” *Id.* at 653. This rule “prohibits changes in the paycheck process, for the purpose of influencing the employees’ vote in the election, during a period beginning 24 hours before the scheduled opening of the polls and ending with the closing of the polls.” *Id.* at 652. The “paycheck process” includes the time, location, and method of distribution, as well as the paycheck itself. *Id.* A change in any one of these elements during the prescribed period will result in the election being set aside “absent a showing that the change was motivated by a legitimate business reason unrelated to the election.” *Id.*

The Board was clear in *Kalin* “to stress the limits of this rule,” which “does not even prohibit changes in the paycheck process for campaign purposes prior to the proscribed period.” *Id.* The Board expressly validated any changes in the payroll process, even if intended to influence the vote, prior to the proscribed period:

Indeed, the employer may even employ the use of dual or split paychecks without engaging in objectionable conduct at any time during the critical period *except the 24 hours immediately preceding the election and throughout the duration of the polling itself.*

*Id.* (Emphasis included)

Under *Kalin*, the Employer—without engaging in any objectionable conduct—could have paid employees entirely in cash on May 24 for whatever campaign purposes it deemed appropriate and could have included some campaign message in the envelope with the cash. It surely follows that it did not engage in objectionable conduct by issuing cash, without any

reference to the campaign or the election and for reasons wholly unrelated to the election, to correct a widespread and significant payroll error, occurring on the brink of an extended holiday weekend and involving for many employees a whole day of pay. That it had never in the past made up shortfalls with cash is wholly immaterial under *Kalin*. Indeed, the entire premise of *Kalin* is that the employer has changed some aspect of the payroll process from its prior practice.

The Union also failed to establish objectionable conduct under the general “laboratory conditions” standard. As the ALJ recognized, this case is unlike *Fred Meyer Stores, Inc.*, 355 NLRB 541 (2010), where in the context of a decertification election, the employer corrected payroll errors from previous weeks by doubling up on deductions for union dues and medical coverage, causing employees to blame the union for substantially smaller paychecks on election day and on the Friday preceding the election. Although the Board found that the employer had legitimate business reasons unrelated to the election and thus did not violate *Kalin*, it agreed with the union “that the Employer’s large and unexplained payroll deductions on the day of the election and the week before were ‘so extraordinary and mistakenly believed to be attributable to the Union that there is no way a free and fair election could have occurred.’” *Id.* at \* 3.

The unique circumstances in *Fred Meyer* are not present here. The errors in the paychecks were clearly those of the Employer and had nothing to do with union dues and medical contributions negotiated by the Union. It was the Employer (rightfully so)—not the Union—who employees blamed for the shortfall. The shortfall that occurred on May 24 came after the Union had conducted rallies proclaiming that the Employer was stealing wages and after many employees had joined in a class action lawsuit against the Employer. (Tr. 78, 145-146, 319-320). The Union presented no evidence tending to show that there was any impact on the

election. Thus, this is not “one of those rare cases where the ‘requisite laboratory conditions’ were so disturbed that the election must be set aside and a new election held.” *Id.* at \* 4.

The Union’s challenge to the ALJ’s recommended overruling of Objection 3 is premised entirely on the proposition that the Employer’s actions constituted the grant of a “benefit” to employees, rather than simply the modification of a “payroll practice.” This argument is without merit. The cash payments issued on May 24 merely supplemented the paychecks that had been issued earlier that morning and that everyone acknowledges were “short” of what was due and owing to the employees. Thus, the employees received nothing more than what they were legally owed and they received it no earlier than when they were legally entitled to receive it. That they received it in two separate forms and transactions rather than a single paycheck does not transform a lawful payment of wages into a “benefit.” Indeed, the Board’s prohibition is against “conferring on potential voters a financial benefit to which they would otherwise not be entitled.” *Mailing Services*, 293 NLRB 565, 565 (1989). In a different context, the Board has recognized that a union’s waiver of union dues constitutes objectionable conduct “only if the employees already have an enforceable legal obligation to pay the dues.” *Community Options NY, Inc.*, 360 NLRB No. 3 (2013). Thus, a party to an election grants an improper benefit by waiving “an enforceable legal obligation.” It surely follows that a party does not grant a benefit by paying “an enforceable legal obligation.”

The only “benefit” that the Union even claims is that the shortfall was made up in cash rather than by paycheck and earlier than was the prior practice. The Board historically has required that the thing in issue have some “tangible economic value” before it will be considered an objectionable benefit. *Go Ahead North America, LLC*, 357 NLRB No. 18 (2011). “Where the value of the gift is so minimal that it would not reasonably interfere with employee free choice,

however, the Board has found such a gift unobjectionable.” *Id.* at n. 6. While employees presumably prefer to receive their pay sooner rather than later, the fact remains that the employees received their pay no sooner than when they were legally entitled to receive it. Insofar as the shortfall was reimbursed sooner than had been the case at times in the past, we are dealing only with a matter of days. Indeed, when the shortage exceeded a certain dollar amount or when an employee indicated a pressing need for the money, the Employer’s past practice was to overnight the checks to the employee. The alleged “benefit” simply has no tangible economic value.

Finally, it is important to note that while paycheck shortages had been an ongoing problem at the facility, the situation that occurred on May 24 was of unprecedented scope (such that it affected almost every employee and involved an entire day of missing pay) and of inauspicious timing (employees were set to embark on a three-day holiday). The Employer made no mention at all of the Union or the upcoming election, and contrary to the Union’s contention, no reasonable employee would receive the message: “do what we want (vote no) and we will continue to fix problems like short paychecks in better ways than we have before.” (Union Exceptions Brief at 7). The judge properly recommended that Objection 3 be overruled.

## CONCLUSION

The Union's exceptions are without merit. The Employer respectfully requests that the Board adopt the ALJ's decision as its own, that all Union objections be overruled, and that the election results be certified.

Dated this 4<sup>th</sup> day of November 2013.

/s/ Charles P. Roberts III

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**CERTIFICATE OF SERVICE**

I, Charles P. Roberts III, certify that the attached brief has this day been served by electronic mail on the following persons:

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Dated this 4<sup>th</sup> day of November, 2013.

/s/ Charles P. Roberts III