

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

KING SOOPERS, INC.,

Case No. 27-RC-215705

Employer,

and

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 7

Union.

KING SOOPERS' REQUEST FOR REVIEW

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Comes now the Respondent, King Soopers (“King Soopers,” “Respondent,” or the “Employer”), pursuant to Section 102.69 of the National Labor Relations Board’s (“N.L.R.B.” or “Board”) Rules and Regulations, and requests review of the Regional Director’s Decision and Certification of Results (the “Decision”) in the above-referenced case, dated August 2, 2018.¹

King Soopers seeks review of the Decision to overrule its objections to conduct occurring both prior to and during the Board held election concerning twelve delicatessen employees in Store No. 89. Specifically, King Soopers is seeking review of the Decision to overrule the first four objections to the election. Contrary to the Decision, the Union’s conduct surrounding the election created overwhelming doubt as to whether voters were able to cast their votes under the laboratory conditions necessary to ensure a free and fair election. Thus, the Decision is a clear departure from reported Board precedent and is based on clearly erroneous findings of substantial fact which are prejudicial to King Soopers.

I. INTRODUCTION

Voters in a Board election must be able to cast their vote free from outside coercion, intimidation, or irregularities. Regardless of whether such coercion, intimidation, or irregularity may impact the outcome of an election, any deviation from this basic tenet would undermine voters’ trust in the outcome of elections, as well as the public’s trust in the Board’s policies and procedures, let alone its impartiality.

It is no mystery to the management labor law bar that several Regional Directors are dissatisfied in the direction of the Board.² Various Regions, including Region 27, are responding to the Board’s direction by imposing their own agenda and applying their own interpretation of the law, even if that means disregarding or misinterpreting well-established Board precedent.

¹ The Regional Director’s Decision is attached to this Request for Review as Exhibit A.

² As an example, the Regional Director Committees’ recent letter concerning the possibility of restricting the field offices.

This apparent uprising has created immense confusion and unpredictability as to the application of the law, including appropriate bargaining units,³ objectionable conduct, unfair labor practices, and other significant Board decisions and established principles. This is such a case. Employers and Unions alike must be able to rely on applicable Board law knowing that it will *not* be disregarded to fit a specific Region’s biased agenda. The Board must reverse this Decision.

King Soopers requests review of the following objections overruled by the Regional Director:

1. On or about May 9, 2018, the Union, by and through its agents and representatives, engaged in unlawful electioneering to coerce, intimidate, and unlawfully interfere with the free choice of the voting employees.
2. On or about May 11, 2018, the Union hired and paid Tiffany Seitz to serve as their observer and vote for the Union. Seitz is the deli manager and is closely identified with King Soopers management and thus, may not serve as any Party’s Observer.
3. On May 11, 2018, Seitz, while serving as the Union’s observer, made coercive comments, including a comment directed toward two voting members, by stating that “she really wanted this.” Such conduct had a coercive impact on eligible voters and destroyed the laboratory conditions required in Board elections.
4. On or about May 11, 2018, the Union paid Seitz to serve as an observer and specifically paid Seitz to “vote” for the Union.

The Decision is a substantial departure from Board precedent on several issues and betrays the Act and Board policy. The Decision fosters confusion and discord on the important legal and factual issues designed to protect a free and fair election.

The Board must grant review, reverse the Decision, and order a new election.

II. PROCEDURAL BACKGROUND

On March 1, 2018, the Union filed a petition to represent delicatessen employees at King Soopers’ Store No. 89 in an existing three-store meat bargaining unit through an *Armour-Globe*,

³ See King Soopers’ Request for Review, Case No. 27-RC-215705 (May 2, 2018).

self-determination election. (Petition, Case No. 27-RC-215705). After a pre-election hearing, the Regional Director issued her Decision and Direction of Election, finding that a unit of twelve delicatessen employees in Store No. 89 combined with meat department employees in Store No. 89, Store No. 86, and Store No. 118 was an appropriate unit for bargaining under the Act. King Soopers timely requested review of the Regional Director's Decision and Direction of Election. This Request is currently pending before the Board. (King Soopers' Request for Review, Case No. 27-RC-215705 (May 2, 2018)).

Pursuant to the Regional Director's Decision, an election was conducted on May 11, 2018 consisting of twelve delicatessen employees located in Store 89 in this unlawful, gerrymandered unit. By a vote of 10 votes in favor and two votes against, the delicatessen employees voted to be represented by United Food and Commercial Workers International Union, Local 7. King Soopers timely filed seven objections concerning conduct that occurred just prior to the election and conduct that occurred during the election. The Regional Director issued a Decision on Objections, Order Directing Hearing and Notice of Hearing on five of the seven objections. This matter came on for hearing before Hearing Officer Michelle Devitt on June 5, 2018. On June 11, 2018, the Parties submitted post-hearing briefs. On June 26, 2018, the Hearing Officer issued the Report overruling King Soopers' objections ("Hearing Officer's Report," attached as Exhibit B).

On July 10, 2018, King Soopers filed 44 Exceptions and its Brief in Support of its Exceptions to the Hearing Officer's Report (attached as Exhibit C). The Regional Director issued her Decision and Certification of Results on August 2, 2018, overruling King Soopers' objections in their entirety.

III. ARGUMENT AND AUTHORITIES

King Soopers requests review of the Decision pursuant to the Board's Rule § 102.67(c)(1) and (2).

A. The Decision Departs from Board Precedent in Overruling the Employer's Objections in Their Entirety.

The Decision contravenes and fundamentally conflicts with controlling Board precedent concerning the Union's conduct during the election process. The Regional Director's "analysis" creates meaningless criteria and disregards critical factors which allowed the Union to create an unlawfully coercive and intimidating environment during the campaign and election proceedings in order to guarantee a union victory in a preposterous unit configuration, in violation of § 9(c)(5) of the Act. This result-oriented Decision strips the free choice of all voting unit employees and irreparably taints the laboratory conditions required by the Board. Thus, the Regional Director's Decision significantly departs from Board precedent.

1. The Decision Directly Conflicts with Controlling Board Precedent Concerning King Soopers' Property Rights and the Unlawful Trespass by the Union.

The Regional Director's finding that the Union did not engage in coercive and intimidating conduct when it engaged in continued and unlawful trespass on King Soopers' property fundamentally erodes controlling Board precedent. (Decision at 3.)

The Regional Director's finding undermines well-established Board precedent and exalts Union trespass over the employer's exclusive property rights. The Regional Director cites no case law or Board law in support of her finding that the repeated trespass of two Union representatives on King Soopers' property did not "[have an] impact on the election outcome." (Decision at 3.)

When such conduct occurs by Union representatives, the Board determines if their conduct “reasonably tend[ed] to interfere with the employees’ free and uncoerced choice in the election.” *In re Baja’s Place*, 268 NLRB 868 (1984). An employer is permitted to bar nonemployee union organizers from soliciting, distributing literature, and campaigning on the employer’s private property. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 527-28 (1992). The Supreme Court explained in *Babcock* and *Lechmere* that the Act does not compel an employer to permit nonemployee union organizers from entering its private property if other channels of communication are available that allow the union to reach the employees. *Babcock & Wilcox Co.*, 351 U.S. at 113; *Lechmere, Inc.*, 502 U.S. at 527-28. This Region’s agenda to stretch union rights is in derogation of property rights and should be a matter of great concern to the Board. Indeed, the Board has recently invited interested parties to submit briefs on an employer property rights issue concerning the decision in *Purple Communications, Inc.*, 361 NLRB 1050 (2014). *See Caesars Entertainment Corp.*, Notice and Invitation to File Briefs, Case 28-CA-060841 (Aug. 1, 2018) (citing *Purple Communications, Inc.*, 361 NLRB at 1063). The Board requested input to determine if *Purple Communications* should remain in effect, be modified or be overruled in order to protect employers’ property rights. This Decision makes a mockery of the Board’s concerns.

In refusing to recognize King Soopers’ property rights, as defined in *Babcock* and *Lechmere*, the Union organizers trespassed on King Soopers’ property for hours, engaging in coercive and intimidating conduct, interfering with the employees’ free choice in the election, and disrupting King Soopers’ business operations. (Tr. 96:1-97:17, 130:17-20, 98:14-22, 97:19-98:13.) Such conduct results in overturning the election. *See Phillips Chrysler Plymouth, Inc.*,

304 NLRB 16 (1991) (union interfered with election when, in presence of employees, its two organizers repeatedly refused to heed the request of employer's president that they leave the area since their conduct reasonably tended to interfere with employees' free and uncoerced choice in election); but not in Region 27.

The Regional Director's finding that the Union's conduct did not "impact the outcome" of the election misapplies Board law. This trespassing conduct is objectionable if it "reasonably tend[ed] to interfere with the employees' free and uncoerced choice in the election." *In re Baja's Place*, 268 NLRB 868 (1984). Nowhere does the Board state that the outcome of the election must be affected. Indeed, the Board is tasked with upholding the free and uncoerced choice of the voting unit employees in order to protect the sanctity of its election process, no matter the outcome of the election. *See In re River Walk Manor, Inc.*, 269 N.L.R.B. 831 (1984) (citing *Holladay Corp.*, 266 NLRB 621 (1983) ("where an objecting party submits prima facie evidence that an election was not held under the proper laboratory conditions, the Board will not hesitate to commit the necessary investment of time and money to protect its election process.")). Thus if there is objectionable conduct that "reasonably tends" to interfere with the free choice of the voting employees, the election must be re-run.

The Decision must be overturned.

2. The Decision Directly Conflicts with and Misapplies Controlling Board Precedent in Finding that the Deli Manager Is Not a Person Closely Identified with Management.

The Decision directly conflicts with Board precedent in finding the Deli Manager was not closely identified with management. The Decision also contravenes and fundamentally misapplies the Board's test in determining whether a person is closely identified with

management. Such a person is precluded from serving as an observer to the election. Thus, the Decision defies Board precedent and must be overturned.

a. The Decision Misapplies the Board's Standard in Determining Persons Closely Identified with Management.

The Regional Director found that Tiffany Seitz, King Soopers' Deli Manager in Store 89, is not a person closely identified with management as to preclude her use as an election observer. (Decision at 4-13.) The Regional Director relied on a number of factors that are not relevant to the decision and misapplied other factors that the Board has found significant in making this determination. In addition, the Regional Director erroneously took an unsupportable "piece-meal" approach to her analysis by looking at each piece of evidence individually and deciding the evidence did not establish, by itself, that Seitz is closely identified with management.

"[T]he Board has adopted a *per se* rule that individuals closely identified with management may not serve as observers." *Longwood Security Services, Inc.*, 364 NLRB No. 50 (2016); *BCW, Inc.*, 304 NLRB 780 (1991) (the Board has held that a party may not select a statutory supervisor or other individual who is "closely identified with management" as its election supervisor).⁴ In *VJNH, Inc.*, 328 NLRB 87, 167 (1999), the Board set forth several relevant factors in making this determination, including:

- whether the individual was considered management by other employees;
- the location of the individual's office and its proximity to management personnel;
- whether the individual reported directly to management;

⁴ The Hearing Officer originally found that the Board's *per se* rule against the use of observers that are closely identified with management did not apply to the Union's observer. (Hearing Officer Report at 13.) King Soopers took exception to this holding because the Board's rule was not limited to a specific party's use of such an observer but was intended to apply broadly. *See Longwood Security Services, Inc.*, 364 NLRB No. 50 (2016). The Regional Director accepted King Soopers' application of this important Board law and applied the standard to the Union's use of Seitz in her Decision. (Decision at 4-13.)

- whether the person acted as a conduit of information to management;
- whether the individual ever assumed supervisory functions or responsibilities, albeit only as a substitute for an absent supervisor;
- whether the employer expressed the limitations on the individual’s authority to the employees;
- the manner in which the employee is listed in the employee manual;
- whether the individual performs the same functions as unit members; and
- whether the individual wears attire or insignia which are identified with supervisory or managerial attire.

See also First Student, Inc., 355 NLRB 410, 410 (2010) (the Board performs a factual analysis using the above listed factors). In spite of these well-established factors, the Regional Director analyzed erroneous and irrelevant factors in support of her Decision that Seitz is not a person closely identified with management.

The Regional Director relied on the “fact” that Ms. Seitz was an eligible voter who was included in the petitioned-for unit. (Decision at 8.) The Regional Director cited *Liquid Transporters, Inc.*, 336 NLRB 420 (2001) to support the contention that this is a relevant factor in the determination of whether a person is closely identified with management. This is a clear departure from Board precedent. *Liquid Transporters, Inc.* held that an employer could not raise an objection that the union’s observer was a “statutory supervisor” because they raised the issue for the first time in their post-election objections. *Id.* The Board went on to further state that the observer was an eligible voter and the employer did not challenge his vote. *Id.* This case is inapplicable because a statutory supervisor is strictly prohibited from being an eligible voter as defined by Section 2(11) of the Act. Contrary to the Regional Director’s application of *Liquid Transporters, Inc.*, neither the Board nor the Act places the same prohibition on an employee closely identified with management. Thus, the Regional Director misapplied Board law.

The Regional Director found that by serving as an observer for the Union, Seitz demonstrated her support for the Union. (Decision at 8-9.) The Regional Director ironically reasoned that because of Seitz's support for the Union, it cannot be concluded that she was closely identified with management. *Id.* This flawed reasoning is a tautology that undermines the importance of preserving the laboratory conditions of an election. *First Student, Inc.*, 355 NLRB 410 (2010). More importantly, the Regional Director offered no Board precedent to support this position, nor has the Board ever found this to be a relevant factor in determining whether a person is closely identified with management. The reason the Regional Director has not done so is obvious; the precedent does not exist and the fact that Seitz was a supporter of the Union and was closely identified with management is the exact reason for King Soopers' objection to her service as the Union's observer. *Id.* "In pursuing that goal, the Board considers, among other things, the employees' awareness that the employer wields substantial and direct control over their livelihoods and day-to-day working conditions." *Id.* Thus, the Regional Director misapplied Board law.

The Regional Director attempts to defend this wrong-headed analysis by observing that Seitz's job title of Deli Manager is "not controlling." (Decision at 9 *citing NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290 fn. 19 (1974) and *Oakwood Healthcare, Inc.*, 348 NLRB 686, 690 fn. 24 (2006)). The Regional Director improperly relies on these two cases that apply specifically to supervisory and management employees *as defined by the Act*. *Id.* Indeed, this appears to be a source of constant confusion for the Regional Director and the Hearing Officer, as they consistently confused the Board's test under Section 2(11) of the Act with the Board's test for persons closely identified with management. (Decision at 11; Hearing Officer's Report at 4-7.) King Soopers does not disagree that Seitz's job title is not *per se* "controlling," however,

it is a relevant inquiry that must be analyzed to determine if the other voting unit employees reasonably viewed Seitz as closely identified with management. *See VJNH, Inc.*, 328 NLRB 87, 167 (1999); *First Student, Inc.*, 355 NLRB 410, 410 (2010); *BCW, Inc.*, 304 NLRB 780 (1991). The Regional Director's misapplication of the cited cases and refusal to consider Seitz's job title as Deli Manager are clear departures from Board precedent.

The Regional Director's analysis of the record evidence also departs from well-established Board precedent because the Regional Director does not analyze the factors in totality, but only in isolation. (Decision at 9-13.) Whether a person is closely identified with management requires an analysis of all of the factors and circumstances. *See VJNH, Inc.*, 328 NLRB 87, 167 (1999); *First Student, Inc.*, 355 NLRB 410, 410 (2010); *BCW, Inc.*, 304 NLRB 780 (1991) ("we agree with the hearing officer that, *under all the circumstances*, the Employer had placed Vivian in a position in which he could reasonably be viewed by employees as closely identified with management.") (emphasis added). The Regional Director looked at each piece of record evidence in isolation to determine that each was not sufficient to establish Seitz as a person closely identified with management, rather than whether in totality a "reasonable" person would view her as closely identified with management. (Decision at 9-13.) The Regional Director made the following piecemeal findings:

- "[H]er job title does not establish that she was closely identified with management." (Decision at 9) (emphasis added.)
- "I find that this evidence about the Deli Manager's uniform and badge with her name and job title does not prove that the Deli Manager was closely identified with management." (Decision at 9) (emphasis added.)
- "[J]ust as the Deli Manager's job title in and of itself does not show that she was closely identified with management, the clothing and badge do not demonstrate that she was closely aligned with management." (Decision at 9-10) (emphasis added.)
- "The mere fact that an employee performs what the routine and circumscribed duties on the employer's behalf - such as completing time and production reports,

assigning work, training employees, and generally providing routine direction of employees – does not establish that the employee is closely identified with management.” (Decision at 10) (emphasis added.)

- “Merely completing reports to higher management about possible employee infractions is not a sufficient basis for finding close identification with management.” (Decision at 11) (emphasis added.)
- “I find that the Associate Relations Specialist testimony is not sufficient to establish that the Deli Manager was closely aligned with management.” (Decision at 12) (emphasis added.)
- “I find that this evidence also was insufficient to establish that the Deli Manager was closely aligned with management.” (Decision at 13) (emphasis added.)
- “[The voting unit employees’] descriptions, which matched up with the Deli Manager’s job title, are not sufficient to establish that she was closely identified with management.” (Decision at 13) (emphasis added.)

The Regional Director’s piecemeal analysis of the Board’s adopted standards is a clear departure from established Board precedent.

b. The Regional Director Contradicts Board Precedent in Finding Seitz Is Not Closely Identified with Management and Failing to Apply Her Own Cited Board Law.

The Regional Director’s finding that Seitz is not a person closely identified with management directly contradicts Board precedent and fails to apply the Board’s “reasonableness” standard. First, the Regional Director ignores the relevant Board law in making her determination that the Deli Manager’s scheduling and training of her employees does not help establish that Seitz is a person closely identified with management. However, relevant Board law explicitly finds that the scheduling and training of employees is a substantial factor in determining whether a person is closely identified with management. *See First Student, Inc.*, 355 N.L.R.B. at 410 (“the Employer has placed its election observer, *trainer*, and substitute bus driver ... in a position in which she could reasonably be viewed by employees as closely identified with management” because in part, “she conducts the training in the classroom and on buses.”) (emphasis added); *BCW, Inc.*, 304 N.L.R.B. at 780 (“[the observer] is also responsible

for training new employees on the operation of various equipment and making sure the employees wear the proper safety equipment.”)

The Regional Director further found that King Soopers’ argument regarding Seitz’s duties as a manager and her ability to promote, discipline, and evaluate the voting employees only goes to an evaluation as to whether Seitz was a statutory supervisor under Section 2(11) of the Act. (Decision at 11-12.) This finding is a misapplication of Board law and lacks any support from relevant Board precedent. As the Regional Director stated, “[a] person can be closely identified with management if he or she has been placed by management in a strategic position where employees could reasonably believe that the employee speaks on its behalf and, therefore, is its agent.” (Decision at 7 (*citing Southland Frozen Foods*, 282 NLRB 769, 770 (1987) (emphasis added))). Thus, the Regional Director contradicts her own statement of the law by finding that a person’s ability to promote, discipline, and evaluate her subordinate employees has no relevance in determining whether employees would tend to believe that person speaks on behalf of management. These two contradicting points of view cannot be reconciled.

The Regional Director cited to established Board precedent that places a significant amount of weight on a person’s job duties and the amount of power over their subordinate employees in determining whether that person is closely identified with management; however, the Regional Director ignored the very holdings of these cases. (Decision at 7-8 (*citing First Student, Inc.*, 355 NLRB 410, 410 (2010) (trainer/bus driver found to be closely identified with management where she ran an employer training program and administered CDL requirements, and she was the only employee who sat in an enclosed office that she shared with a supervisor)); *Sunward Materials*, 304 NLRB 780, 780-781 (1991) (compliance/training specialist found to be closely identified with management where he conducted monthly safety and training sessions for

management, trained new employees and held orientation meetings with them, monitored employees' safety records and performance on the job along with a foreman, was "very active and visible" in the hiring process, was paid much more than other employees, sat with management at election campaign meetings and wore a "Vote No" button as did other managers, had his own office at the employer's headquarters building, and drove a company-owned truck); *Mid-Continent Spring Co.*, 273 NLRB 884, 884 (1985) (personnel manager found to be closely identified with management where employees understood her to be the personnel manager, she was a member of the employer's negotiating team, she attended management meetings, and she represented the employer in the grievance procedure). The Regional Director fails to apply the Board precedent cited in her own Decision and thus, her finding on this issue is contrary to well-established Board law.

Finally, the Regional Director's Decision directly conflicts with Board precedent in finding that the voting unit employees' beliefs as to Seitz's position as the Deli Manager were not relevant to the determination of whether Seitz was a person closely identified with management. (Decision at 13.) Again, the Regional Director ignores her own statement of law that "[a] person can be closely identified with management if he or she has been placed by management in a strategic position where employees could reasonably believe that the employee speaks on its behalf and, therefore, is its agent." (Decision at 7) (emphasis added.) The record evidence demonstrated that both the deli clerk and the deli chef viewed Seitz as the "manager" or as the "boss." (Decision at 13; Tr. 232:11-14, 249:14-18). The Regional Director found this direct evidence irrelevant because they simply "matched up with the Deli Manager's job title." (Decision at 13.) Thus, the Regional Director's finding that the reasonable beliefs of the voting unit employees are not relevant is contrary to well-established Board precedent.

The Decision must be overturned.

3. The Decision Directly Conflicts with and Misapplies Controlling Board Precedent in Finding That Seitz's Conduct During the Election Process Was Not Objectable.

The Regional Director's Decision contravenes and fundamentally misapplies the Board's precedent concerning conduct by an election observer prior to and during the election. Thus, the Decision significantly departs from Board precedent.

a. *The Decision is Contrary to the Board's Precedent in Finding That Coercive Conduct by Seitz Was Not Reasonably Encompassed Within the Scope of King Soopers' Objections.*

The Regional Director's finding that the record evidence of Seitz's text message to every voting member the night prior to the election is outside the scope of the election proceedings is directly contrary to Board precedent. (Decision at 14.) In making this finding, the Regional Director relied on *Precision Products Group*, 319 NLRB 640 (1995), which holds that a *hearing officer* lacks the authority to consider issues that are not reasonably encompassed within the objections set for hearing. (Decision at 14-15.) This finding is contrary to well-established Board Precedent.

In *Precision Products Group*, 319 NLRB 640 (1995), the Board recognized a unique factual scenario in that the evidence at issue was directly related to a previously withdrawn objection. *Id.* The Board relied on this important fact when distinguishing the case from *American Safety Equipment Corp.*, 234 NLRB 501, 501 (1978). This distinction is erroneous. *American Safety* holds that if the Regional Director "receives or discovers evidence during his investigation that shows that the election has been tainted, he has no discretion to ignore such evidence and it is reversible error if he fails to set aside the election." *Nelson Tree Service, Inc.*, 361 NLRB 1485 (2014) (citing *American Safety Equipment Corp.*, 234 NLRB 501, 501 (1978)).

American Safety is more akin to the facts in this case where *the Union* elicited the evidence that Seitz sent a coercive and intimidating text message to the voting unit employees the night prior to the election. (Tr. 272:6-9.) Neither the Employer, the Union nor the Hearing Officer objected to the inclusion of this evidence during the hearing. This is the purpose of an objections hearing, to gather all the evidence available to determine if the voters' free and uncoerced choice in the election was tainted by the conduct of the Parties. *See Baja's Place, Inc.*, 268 NLRB 868 (1984). The Regional Directors' decision to ignore this relevant evidence is a misapplication of Board law and is contrary to the holding of *American Safety Equipment Corp.*

b. The Decision Misapplies the Board's Precedent in Finding That Seitz Was Not an Agent of the Union When She Engaged in Coercive Conduct.

The Regional Director's finding that Seitz was not an agent of the Union when she sent the text message to the voting group employees is a clear misapplication of Board law. In making this finding, the Regional Director relied solely on the Hearing Officer's Report. (*See* Decision at 15; Hearing Officer's Report at 7-9.) The Hearing Officer erroneously found "there was no evidence that the Petitioner designated or identified Seitz as having authority to act or speak on their behalf throughout the campaign, or in any specific situations, other than to appoint her as an election observer." (Hearing Officer's Report at 8.) This is a clear misapplication of Board law.

Section 2(13) of the Act provides that, "[I]n determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." 29 U.S.C. § 152; *see also In re Bio-Medical Applications of Puerto Rico, Inc.*, 269 NLRB 827 (1984). The Union is "responsible for its agent's conduct if such

action is done in furtherance of the principal's interest and is within the general scope of authority attributed to the agent," meaning that "it is enough if the principal empowered the agent to represent the principal within the general area in which the agent has acted." *United Builders Supply Co., Inc.*, 287 NLRB 1364 (1988). In *Bristol Textile Co.*, 277 NLRB 1637 (1986), the Board found that an employee was the agent of the Union because the employee acted as the contact for the Union and he was asked questions about the Union by other employees. Even though the employee was never paid or specifically designated as an agent, the Board still found that the employee was an agent of the Union. *Id.* The Hearing Officer's finding, and the finding adopted by the Regional Director, erroneously relied on the fact that the Union did not specifically authorize Seitz to act on their behalf. (Decision at 15.) The reliance on this evidence is contrary to Board precedent and is contrary to Section 2(13) of the Act. Thus, the Hearing Officer and the Regional Director's finding is contrary to this well-established Board law and contrary to the Act.

c. The Decision Misapplies Board Precedent in Finding That Seitz Did Not Engage in Coercive and Intimidating Conversations with the Voting Group Before and During the Election Period.

The Regional Director's finding that Seitz did not engage in coercive and intimidating conduct at the election is a clear misapplication of Board law. In making this finding, the Regional Director primarily relied on the Hearing Officer's examination of the issue. (Decision at 13.) However, the Hearing Officer applied the incorrect standard to Seitz's conduct during the election.⁵ (Hearing Officer's Report at 14.) The Hearing Officer stated, "I do not find that either

⁵ Seitz's conduct consisted of: the text message to "basically" all of the deli employees which stated: "if you're not going to stay with the Company or stay with us ... very long, then it would be appreciated if you voted yes." (Tr. 272:6-9.) Seitz's statement to voting employees that, "I really want this," in reference to wanting Union representation. (Tr. 39:12-19; 262:9-11; 202:21-25.) Seitz's conversation with Ms. Darrin Harper, who offered to carry out a personal favor for

comment is coercive in any regard, let alone severe enough to create a general atmosphere of fear and reprisal.” *Id.* This is the standard for third-party actors, not Union agents. *Sub-Zero Freezer Company, Inc.*, 265 NLRB 1521 (1982). The Board is clear that an employee acting as the Union’s observer is an agent of the Union while acting as its observer. *Brinks, Inc.*, 331 NLRB 46 (2000). Thus, the Hearing Officer erred when applying the third-party standard to Seitz’s actions during the election and the Regional Director erred in adopting this standard. (Hearing Officer’s Report at 14; Decision at 13; King Soopers’ Brief in Support of its Exceptions at 12-13.) Instead, “the proper test is whether the conduct reasonably tends to interfere with the employees’ free and uncoerced choice in the election.” *Baja’s Place, Inc.*, 268 NLRB 868 (1984).

Although the Hearing Officer eventually addressed the correct standard after she misapplied the third-party test, she again misapplied the Board’s standard as articulated in *Baja’s Place*. (Hearing Officer’s Report at 14-15.) The Hearing Officer strapped King Soopers to an untenable standard not articulated in *Baja’s Place* by finding that the evidence did not establish Seitz’s remarks as having “any effect on the outcome of the election.” *Id.* However, this is not the standard. Seitz’s conduct at the election must “reasonably tend to interfere with the employees’ free and uncoerced choice in the election.” *Baja’s Place, Inc.*, 268 NLRB 868. Thus, the Hearing Officer and the Regional Director applied a higher standard to Seitz’s conduct than that required under governing Board law.

Seitz by offering to babysit her son. (Tr. 38:9-13; 244: 16-25.) Seitz’s conversation with Kay (Alfredo) McCrorie, who apologized to Seitz for being “late.” (Tr. 40:7-41:3.)

4. The Decision Directly Conflicts with and Misapplies Controlling Board Precedent Concerning the Union's Payment of Seitz to Serve as Its Observer and Vote in Favor of the Union.

- a. *The Decision Directly Conflicts with Board Precedent in Finding the Union's Payment to Seitz to Serve as Its Observer and Vote in Favor of the Union Was Not an Enhanced and Unlawful Benefit in Violation of Board Law.*

The Regional Director found that the Union did not engage in objectionable conduct when it paid for Seitz to serve as their observer and inexplicably paid Seitz to vote in favor of the Union. (Decision at 16-19.) In making this finding, the Regional Director does not cite any Board law to support her position that the Union has not engaged in objectionable conduct. *Id.* Contrary to the Regional Director's finding, the Board does not permit Unions to pay excessive economic inducements to its observers. *See Novotel New York*, 321 NLRB 624, 633-636 (1996). The Supreme Court has held that the Board has a wide discretion to "ensure the fair and free choice" of bargaining representatives by employees. *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 276-77 (1973). The Court interpreted this duty as including a prohibition on campaign tactics that induce workers to cast their votes on grounds other than the advantages and disadvantages of union representation. *Id.* ("We do not believe that the statutory policy of fair elections ... permits endorsements, whether for or against the union, to be bought and sold.") Thus, a union is barred from blatantly giving something of value to an employee in exchange for his vote. *Freund Banking Co. v. NLRB*, 165 F.3d 928, 931 (D.C. Cir. 1999). The Board prohibits payments in excess of an employee's typical hourly rate, or for excess hours not actually worked, as having a tendency to influence the election results. *See, e.g., Collins & Aikman Corp. v. NLRB*, 383 F.2d 722 (4th Cir. 1967) (union compensated employee observer for four hours of work, despite the fact that the employee only spent one hour and 30 minutes observing the election); *Plastic Masters, Inc. v. NLRB*, 512 F.2d 449 (6th Cir. 1975) (union compensated

employee attendees for eight hours of their hourly rate, despite the fact that the meeting lasted only three hours). Even in the absence of improper intent, payment by the union creates an opportunity to “buy” ballot box support, and may instill in employees a sense of obligation to vote for the union. *Easco Tools*, 248 NLRB 700, 700 (1980). The Board will order new elections where a union grants benefits to employees that could have the effect of creating a sense of obligation to vote for the union and thereby affect the outcome of the election. *Id.* at 701.

The Regional Director further ignored well-established Board precedent prohibiting the Union from paying voting unit employees for their vote. “Under established precedent, it is, of course, clearly objectionable for a union to buy votes by giving employees cash payments. Such a conferral of benefits is totally unrelated to any effort to improve employee conditions of employment and constitutes nothing less than an attempt to corrupt the election process.” *52nd Street Hotel Assoc.*, 321 NLRB 624 (1996). The Union’s payments to Seitz to serve as an observer and to “vote” in the election in an attempt to corrupt the election process require the Board to set aside the election. (E. Ex. 2; Tr. 208:7-8; 178:14-15; 244:16-25.)

The Regional Director rejected this well-established Board precedent in finding the Union’s payments to Seitz were not objectionable conduct.

b. The Decision’s Reliance on Evidence and Assumptions Outside of the Record in Finding Seitz Worked Eight Hours on the Election Day Directly Conflicts with Board Precedent.

The Regional Director’s reliance on facts outside of the record directly conflicts with applicable Board law. (Decision at 18.) The Regional Director’s acceptance of the Hearing Officer’s finding that there were two voting sessions on the election day “which would have required travel to and from the polling location” is not supported by any record evidence.

(Decision at 18; Hearing Officer’s Report at 17.) In support of this statement, the Regional Director found that the Hearing Officer “is allowed to make reasonable inferences.” (Decision at 18.) However, the Board is “constrained to decide [each] case within the confines of the pleadings and the record made at the hearing and not upon speculations as to what the true state of facts may be.” *Keller Industries, Inc.*, 170 NLRB 1715 (1968). Indeed, it is curious that the Hearing Officer rejected the Employer’s contention that it was reasonable for voting unit employees to converse with each other after voting because of the alleged lack of record evidence, but the Hearing Officer herself relied on an assumption not supported by any record evidence. (Hearing Officer’s Report at 15 (“[h]owever, the record does not demonstrate that any employees who had yet to vote overheard this comment, or heard it secondhand. I cannot presume, in the absence of any evidence, that this remark was disseminated to the remaining voters.”)) Thus, the Regional Director’s reliance on “evidence” not in the record is contrary to well-established Board precedent.

B. The Regional Director’s Decision Is Clearly Erroneous on the Record Regarding Substantial Factual Issues.

1. The Regional Director’s Fact Findings Concerning the Second Objection Are Clearly Erroneous.

a. The Regional Director’s Finding That King Soopers Did Not Properly Object to Seitz’s Service as the Union’s Observer Is Clearly Erroneous.

The Regional Director erroneously found that King Soopers did not properly object to Seitz’s service as an observer at the pre-election hearing. (Decision at 6.) In making this finding, the Regional Director observed that King Soopers objected to Seitz because she was a statutory supervisor, but did not object on the basis that she was closely identified with management. The Regional Director’s finding was not presented at the Hearing, was not

presented in the Hearing Officer's Report, was not objected to by the Hearing Officer, has never been challenged by the Union,⁶ and is contrary to the record evidence. This finding is clearly erroneous.

The Regional Director supports this finding by stating King Soopers "objected to the Deli Manager serving as an observer on the grounds that she was a supervisor of the employees who were about to vote." (Decision at 6; Tr. 35:1-9.) The Regional Director interpreted this testimony to mean that King Soopers only objected to Seitz's service because she was a statutory supervisor. (Decision at 7.) However, King Soopers has never argued, either at the pre-election conference or since, that Seitz was a statutory supervisor. Indeed, Ms. Klein's statement regarding the objection at the pre-election hearing was simply that Seitz supervised the voting unit employees as the Deli Manager, not that she was a "statutory supervisor" as defined under Section 2(11) of the act.⁷ (Tr. 35:1-9).

Moreover, the Regional Director's finding that "the Employer did not put the Petitioner on notice that there was an additional issue – different from the supervisory issue – relating to qualification to serve as the observer," is also clearly erroneous and contrary to the record evidence. (Decision at 7.) The Union admitted in their Brief Opposing the Employer's Exceptions that "[t]he employer specifically raised the issue of whether Ms. Seitz was a manager (although not a statutory supervisor), or that she was closely identified with management, at both the polling place and the objections hearing." (Petitioner's Brief at 4.) No party has ever

⁶ Indeed, the Union expressly confirms in its Brief Opposing the Employer's Exceptions that "[t]he employer specifically raised the issue of whether Ms. Seitz was a manager (although not a statutory supervisor), or that she was closely identified with management, at both the polling place and the objections hearing." (Petitioner's Brief at 4.)

⁷ Ms. Klein is not an attorney and is not tasked with dissecting the language of the Act and the various terms of art that are used throughout labor law. Indeed, Klein testified that she is not familiar with Section 2(11) of the Act. (Tr. 54:7-9.)

disputed that King Soopers made a proper objection to Seitz serving as the Union's observer because she was closely identified with management, and all parties have been on notice since the pre-election conference of King Soopers' objection to her service as an observer. Thus, the Regional Director's parsing of words and her ultimate finding that King Soopers did not properly object to Seitz's service as an observer is clearly erroneous.

b. The Regional Director's Finding That the Deli Manager Performs Only Routine Tasks Is Clearly Erroneous.

The Regional Director's finding that the Deli Manager only performed "routine and circumscribed duties on the employer's behalf" is clearly erroneous and contrary to the record evidence. (Decision at 10.) The record evidence shows that scheduling, shift management, completing time reports, training employees, and managing the deli department as a whole are not routine or circumscribed duties.

The record evidence is clear that Seitz is responsible for making the weekly schedules for the deli department. (Tr. 73:12-23.) Seitz has various job responsibilities as the deli manager, including writing the department schedules, collaborating with store management to determine hours and sales of their department, recommendations on hiring and terminations, and conducting evaluations or "PEDs." (Tr. 69: 9-20, 232:11-25.) Seitz has the ability to change the schedule to accommodate employees' requests for days off, to assign shifts based on preferences from her employees, to assign training shifts, and punitively to schedule undesirable shifts to any employee in her department. (*Id.*; Tr. 78:20-79:7, 218:24-219:2.) In the deli, Seitz schedules the various trainings that are required and can either train the employees herself or schedule other employees to carry out the training. (Tr. 216: 16-20.) No other deli employee is tasked with the breadth of duties that Seitz is required to perform. The record evidence is clear that Seitz has almost unfettered control over her department. (Tr. 69: 9-20, 232:11-25; 78:20-79:7, 218:24-

219:2; 73:12-23; 216: 16-20.) Thus, the Regional Director’s finding that Seitz engaged in “routine” tasks is clearly erroneous.

c. The Regional Director’s Finding That the Deli Manager Was Not Involved in Promotions, Discipline, and Evaluations Is Clearly Erroneous.

The Regional Director’s finding that it cannot be determined whether the Deli Manager was involved in promotions, discipline, and evaluations of the deli employees is clearly erroneous and contrary to the record evidence. (Decision at 10-11.) The record evidence shows the Deli Manager is responsible for recommending promotions, is directly involved in disciplining employees, and is tasked with evaluating the deli employees.

The record evidence is clear that Seitz’s responsibilities include recommending promotions, disciplining employees, and evaluating employees. (Tr. 216:10-13.) Indeed, Seitz has the independent authority to discipline, suspend, and recommend termination for any employee in her department. (Tr. 62:18-63:1.) For example, Seitz issues “write-ups” to employees who violate the code dating policies, the temperature log policies, or the discrimination and harassment policies. (Tr. 71:2-13, 62:2-13; 191:5-9.) Seitz also has the independent authority to suspend an employee for code dating violations or temperature violations. (Tr. 62:18-63:1.) Seitz can even recommend termination of an employee to the Store Manager, and together they will collaborate to determine if termination is appropriate. (Tr. 63:4-10.) In addition, Seitz is tasked with conducting performance evaluations for long-term employees at least annually. (Tr. 79:8-20.) Typically this is done independently from store management. (*Id.*) Seitz also conducts evaluations for new employees at the 30 day, 60 day, and 90 day marks, during the employee’s probationary period. (Tr. 193:17-21.)

Thus the Regional Director’s finding is clearly erroneous.

d. The Regional Director's Finding That Record Evidence Did Not Illuminate the Deli Manager's Close Relationship to Management Is Clearly Erroneous.

The Regional Director's finding that the Deli Manager did not have a close relationship with management is clearly erroneous and is contrary to the record evidence. (Decision at 10-11.) The record evidence shows the Deli Manager regularly attends management meetings, works closely with store management in implementing and maintaining King Soopers' policies and procedures, and is tasked with relaying information from store management to the deli employees. (Tr. 70:8-13, 233:3-6.)

Seitz participates in store management meetings with the Store Manager and the Assistant Store Managers to review sales, review results, make plans on how to improve sales, discuss the store's successes, discuss personnel situations, and various other topics to improve the store's overall success. (Tr. 69:21-70:4.) Seitz then takes this information and relays it to her subordinate employees in what are typically called "team huddles." (Tr. 70:8-13, 233:3-6.) In addition, department managers, including the Deli Manager, may also temporarily serve in a supervisory role when the Store Manager or Assistant Store Managers are not available or are absent. (Tr. 71:16-72:3.)

Moreover, Store Management and the Deli Manager are required to collaborate together in making personnel decisions. (Tr. 69:21-70:4.) The Deli Manager is able to recommend termination of an employee to the Store Manager, and together they will collaborate to determine if termination is appropriate. (Tr. 63:4-10.) The Store Manager and the Deli Manager also collaborate to determine any deli employees who need additional training. (Tr. 192:1-193:6.)

Thus, the Regional Director's finding is clearly erroneous.

2. The Regional Director's Fact Findings Concerning the Seitz's Coercive and Intimidating Conduct During the Election Process Are Clearly Erroneous.

a. *The Regional Director's Finding That the Deli Manager's Conduct During the Election Was Not Objectionable Is Clearly Erroneous.*

The Regional Director's finding that the Deli Manager's conduct directed towards her subordinate employees prior to and during the election was not coercive, intimidating, threatening, or created an atmosphere of fear and reprisal is clearly erroneous. In support of this erroneous finding, the Regional Director relied primarily on the Hearing Officer's findings. (Decision at 13.) The Hearing Officer found that the Deli Manager's comments did not have any effect on the election. (Hearing Officer's Report at 14.) The Hearing Officer further found that Seitz's text message contained "no threats or other coercive statements that would impact the election, let alone create an atmosphere of fear and reprisal." (*Id.* at 13, fn. 3.) These findings are clearly erroneous and contrary to the record evidence.

Seitz exerted her influence as the Deli Manager over her subordinate employees to such an extent as to interfere with their free choice in the election. The night prior to the election Seitz sent a text message to "basically" all of the deli employees which stated: "if you're not going to stay with the Company or stay with us ... very long, then it would be appreciated if you voted yes." (Tr. 272:6-9.) Less than 24 hours later, during the election, Seitz specifically told two voting unit employees, Stephanie Segura and Morgan Neely, "I really want this," in reference to wanting Union representation. (Tr. 39:12-19; 262:9-11; 202:21-25.) Seitz immediately recognized that she should not have made this coercive comment in front of the Board Agent and two employees and apologized. (Tr. 39:21, 203:3-5.) The Board Agent told the two employees to leave immediately. (*Id.*) Further, Seitz engaged in conversations with nearly all of her subordinate employees in the polling area. (Tr. 39:8-11.) During the morning

voting period, Seitz engaged in a conversation with Ms. Darrin Harper, who offered to carry out a personal favor for Seitz by offering to babysit her son. (Tr. 38:9-13; 244: 16-25.) And during the second voting period, the last employee to vote, Kay (Alfredo) McCrorie, apologized to Seitz for being “late” even though the polls were open for another hour and a half. (Tr. 40:7-41:3.) However, McCrorie was “late” pursuant to Seitz’s statements to her employees the night prior. The text message, viewed in conjunction with the comments made during the election and the Deli Manager control over her subordinate employees as their manager, shows that the Regional Director’s finding is clearly erroneous and contrary to the record evidence.

This Decision begs the question that if the facts surrounding Seitz’s support for the Union were reversed and she instead was staunchly *against* union representation and served as the Employer’s observer, would the parties expect the same outcome? The likely answer is no. Seitz is the deli manager and has immense control over the day-to-day operations of her subordinate employees, evidenced by her position as Deli Manager and her close proximity to management. (Tr. 69:9-20, 232:11-25.) She texted her employees to vote exactly how she wanted them to vote. She reiterated this fact by telling two employees that she “really wanted this” during the election period. An employee offered to babysit her child and another employee apologized for being late when she was actually early. There is no question that the Union would have objected to this conduct and the Regional Director would have likely agreed and overturned the election. This hypothetical illuminates the fact that the standards applied by the Regional Director in this Decision are not applied equally to the Parties and are clearly erroneous.

Thus, the Decision must be overturned.

3. The Regional Director's Fact Findings Concerning the Union's Payments to Seitz to Serve as Its Observer and to Vote in Favor of the Union Are Clearly Erroneous.

a. *The Regional Director's Finding Concerning the Amount Seitz Was Paid Is Clearly Erroneous.*

The Regional Director's finding that the Union paid Seitz \$138.06 or \$18.77 per hour for eight hours is clearly erroneous. (Decision at 16.) Seitz was paid for eight hours at a rate of \$20.73 per hour (her customary hourly rate), even though the voting period and the pre-election conference lasted only four and a half hours. (E. Ex. 2; Tr. 46:21-22.) The Regional Director failed to consider that the amount listed on Seitz's check was less all federal and state taxes. (See Ex. 2.) Therefore, Seitz was paid \$165.84 for eight hours of work even though the voting period was only four hours and the pre-election conference was 30 minutes. (E. Ex. 2; Tr. 46:21-22.) This amounts to \$36.85 per hour, \$16.12 more than her usual hourly rate; thus, Seitz was paid an unreasonably excessive rate above her normal hourly rate to serve as the Union's observer.

Further, the Regional Director's finding that the Union's payment to Seitz would not have reasonably affected the other nine voters who voted in favor of the Union is clearly erroneous. The Regional Director failed to consider that Seitz told every one of her employees that the Union was paying her. (Tr. 204 16-17, 208:17:24, 239:3-7, 250:12:18.) Moreover, Seitz is not the only deli employee to be paid by the Union.⁸ Therefore, the Regional Director's findings are clearly erroneous.

⁸ At least two other employees were paid to testify on behalf of the Union. (Tr. 171:16-172:1, 240:17-18.)

b. The Regional Director's Finding That the Deli Manager Did Not Admit to Being Paid by the Union to Vote in Favor of the Union Is Clearly Erroneous.

The Regional Director's adoption of the Hearing Officer's finding that "Seitz[']s] hesitant 'I guess, yes'" to a question regarding whether the Union paid her to vote "is hardly acknowledgement of receiving a bribe, especially in light of consistent and more specific testimony, which I credit, that she was paid for the time she was spending as an observer," is clearly erroneous. (Decision at 17; Hearing Officer's Report at 16, fn. 5.) The Regional Director inexplicably refuses to consider a direct admission by Seitz that she was paid to vote in favor of the Union. (Decision at 17-18; Tr. 208:7-8.) In further defiance of the record evidence, the Regional Director adopts the Hearing Officer's finding that the handwritten note on the W-4 form signed by Seitz and two Union representatives stating "KS 89 vote deli 5/11/18" was not evidence that Seitz was paid to vote in favor of the Union. (Decision at 18; Hearing Officer's Report at 16, fn. 5; E. Ex. 2; Tr. 178:14-15.) The Hearing Officer defends these findings by stating that she does not find support that the payment was intended as a "bribe for [Seitz's] vote or that [Seitz] understood it that way." (Hearing Officer's Report at 16.) The record evidence is in direct contradiction to these findings and thus, the Regional Director's finding and adoption of the Hearing Officer's findings are clearly erroneous.

c. The Regional Director's Finding That Seitz Served as an Observer for Over Eight Hours is Clearly Erroneous.

The Regional Director's finding that Seitz served as an Observer for over eight hours is contrary to the record evidence and clearly erroneous. (Decision at 16.) The pre-election conference was not scheduled until 7:00 a.m. (*See* NLRB Notice of Election, attached as Exhibit D.) The only evidence in the record concerning the time Seitz spent at the election shows that she spent no more than four and half hours serving as an observer. (Tr. 46:21-22.)

The pre-election conference occurred from 7:00 a.m. - 7:30 a.m. (*See* NLRB Notice of Election, attached as Exhibit D.) Each voting period last two hours, for a total of four hours. (*Id.*; Decision at 16.) There is no evidence in the record to suggest that Seitz spent eight hours. Thus, the Hearing Officer's finding must be disregarded as contrary to the record evidence.

IV. CONCLUSION

For all of the reasons set forth above, King Soopers requests review of the Regional Director's Decision dated August 2, 2018. Because this Request presents substantial and numerous issues impacting fundamental Board principles and because the Regional Director's Decision obliterates these principles, King Soopers requests oral argument before the Board on the matters raised in its Request for Review. King Soopers requests that the Regional Director's Decision overruling its four objections be reversed.

Respectfully submitted this 16th day of August, 2018.



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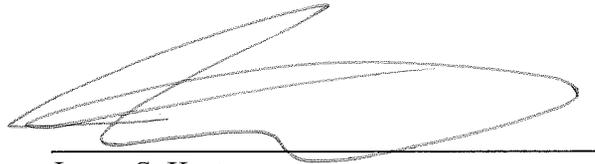
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CERTIFICATE OF MAILING

I hereby certify that on August 16, 2018, a true and correct copy of the foregoing **KING SOOPERS' REQUEST FOR REVIEW** was e-filed with the National Labor Relations Board, e-filed with the Regional Director, and was served upon the following:

Todd McNamara, Esq. (Via E-mail)
General Counsel
Raja Raghunath, Esq. (Via E-mail)
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A handwritten signature in black ink, appearing to read "James S. Korte", is written over a horizontal line.

James S. Korte

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

KING SOOPERS, INC.

Employer

And

Case 27-RC-215705

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

Petitioner

**DECISION AND
CERTIFICATION OF RESULTS**

Pursuant to a Decision and Direction of Election,¹ an election was conducted on May 11, 2018, in a voting group of the King Sooper's (Employer) delicatessen (deli) department employees at its Store No. 89 located in Broomfield, Colorado, to determine whether such employees wished to be represented by United Food and Commercial Workers International Union, Local 7 (Petitioner) in an existing multi-store unit of meat department employees. The tally of ballots showed that of the approximately 12 eligible voters, 10 cast ballots for the Petitioner, and 2 cast ballots against representation. There were 0 challenged ballots. Therefore, Petitioner received a majority of the votes.

The Employer timely filed seven objections, and in my Decision on Objections, Order Directing Hearing and Notice of Hearing I ordered that a hearing be conducted regarding five of those objections.² On June 26, 2018, the hearing officer issued a report in which she recommended overruling the five objections in their entirety. The Employer filed 44 numbered exceptions to the hearing officer's recommendations.

In its exceptions, the Employer contends that the hearing officer erred in ruling that: (1) the Deli Manager was not a manager, and not considering whether the Deli Manager was closely identified with management; (2) the Deli Manager was not an agent of the Petitioner; (3) Petitioner did not engage in objectionable electioneering and trespass on the Employer's property on about May 9, 2018; (4) Petitioner properly used the Deli Manager as its election observer; (5) Petitioner's observer did not engage in coercive conversations with voters at the polls; (6) Petitioner did not improperly compensate its observer for serving at the election; and (7) Petitioner did not make

¹ The Employer filed a request for review of the preelection Decision and Direction of Election, which is currently pending with the Board.

² In my Decision, I overruled the Employer's objection that the Petitioner engaged in threatening and coercive behavior by bringing four union representatives to the preelection conference, and its objection concerning the Notice of Election.

**EXHIBIT
A**

objectionable misrepresentations about the benefits that employees would obtain if they voted for representation.³

The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. I have considered the evidence and the arguments presented by the parties and, as discussed below, I agree with the hearing officer that all of the Employer's objections should be overruled. Accordingly, I am issuing a Certification of Results that Petitioner may bargain for the employees in the deli department as part of its existing unit of meat department employees in the multi-store unit described below.

I. THE OBJECTIONS

Objection 1: The Petitioner Engaged in Unlawful Electioneering and Trespass on the Employer's Property Shortly Before the Election

The Employer objected that the Petitioner engaged in unlawful electioneering and trespass on the Employer's property on about May 9, 2018, which was shortly before the election on May 11, 2018. The objection stated that on or about May 9, 2018, Petitioner agents trespassed onto the store property at Store No. 89 in violation of the terms of an existing collective-bargaining agreement for an existing bargaining unit (meat and seafood) that UFCW Local 7 already represents at that store. The objection stated that the Petitioner's agents approached eligible voters on the sales floor and engaged them in coercive conversations to get them to vote for the Petitioner. According to the objection, the Employer made numerous attempts to get these Petitioner agents to leave the premises and that, when they refused to leave, the Employer was forced to call law enforcement.

The hearing officer found that two Petitioner organizers were on the store premises on or about May 9, 2018, and that they talked to employees during that visit.

³ In its brief in support of its exceptions, the Employer cites the following specific findings by the Hearing Officer:

- The Hearing Officer erroneously supplements the record by analyzing whether [the Deli Manager] is a management employee as defined by the Act. (Report at 3-7.)
- The Hearing Officer ignored key facts and misapplied Board law in finding [the Deli Manager] was not an agent of the Union. (Report at 7-9.)
- The Hearing Officer ignored key facts and misapplied Board law in finding the Union representatives' conduct did not reasonably tend to interfere with the employees' free and uncoerced choice in the election. (Report at 9-12.)
- The Hearing Officer misapplied governing Board law in finding that a person closely identified with management can serve as the Union's observer. (Report at 12-13.)
- The Hearing Officer refused to consider un rebutted record evidence and misapplied governing law in finding the Union did not make coercive and unlawful payments to [the Deli Manager]. (Report at 13-15.)
- The Hearing Officer discredited key record evidence, refused to consider highly relevant evidence elicited during the hearing, and misapplied Board law in finding [the Deli Manager's] comments before and during the election did not reasonably tend to interfere with the employees' free and uncoerced choice in the election. (Report at 15-18.)

The hearing officer concluded that the organizers did not engage in any coercive or objectionable conversations with eligible voters, on or off the premises. The hearing officer found that one Petitioner agent was in the deli seating area and others were at a nearby Starbucks coffee stand. She further concluded that they spoke to employees about dues and what benefits might be negotiated with the Employer, and that there was no record evidence of threats or unlawful promises made by Petitioner.

The hearing officer also found that management informed the Petitioner organizers that their activities inside the store violated the visitation clause of the existing collective-bargaining agreement for the currently represented meat/seafood unit, but that the Petitioner's agents disagreed with management's interpretation of that clause. The hearing officer further found that eventually the Employer's Associate Relations Manager directed the organizers to leave the sales floor or he would have to notify the authorities. The hearing officer found that the organizers left the store around that time, and that police never arrived.

With respect to the interaction inside the store between the managers and the organizers, the hearing officer concluded that although the encounters became tense, the parties attempted to be discreet and calm. In that regard, the record established that Petitioner's agents did not speak loudly, curse, or become physical. She concluded that while the interactions were in view of the deli, there was insufficient evidence to show that employees in the deli "saw or overheard" the conversations or that they were aware that the police had been contacted. Based on these findings, the hearing officer concluded that the evidence did not establish that these encounters between management and the Petitioner "were coercive in nature, affected any eligible voters, or would have otherwise interfered with employees' free and uncoerced choice in the election."

The Employer contends that the hearing officer erred in some factual findings, including her findings about what the managers specifically said to the organizers about needing to leave the sales floor and when and how many times they made such statements to the organizers. In that regard, the record reflects that the Union agents were initially asked on several occasions to go to the smoker's area outside or to the break room. Eventually, the Union agents were asked to leave or the police would be called.

I find that the hearing officer did not err in overruling this objection. Even crediting the Employer's managers' testimony about what they said to the organizers about their being on the sales floor, the evidence does not establish that these interactions between the managers and the organizers had an impact on the election outcome, where 10 employees voted for the Petitioner and 2 voted against. The Associate Relations Manager testified that he did not know of any employee who actually saw or heard any of the interactions between him and the Petitioner agents, and the evidence does not reflect that anyone witnessed or overheard those interactions. Moreover, the testimony of the Associate Relations Manager indicates that the request for the police to come to the store was cancelled once Petitioner's agents

left the store. Thus, there is no evidence that employees saw police arriving to the store.

Therefore, I find that the Employer has not met its burden of proof with respect to Objection 1, and it is overruled.

Objection 2: The Petitioner Selected as Its Election Observer an Individual Who Was Closely Aligned With Management

The Employer objected that the Petitioner selected as its election observer an individual – the Deli Manager – who was, as a so-called manager, closely aligned with management. The Employer asserted that, as a manager, she had immense influence over her subordinates, and that she created schedules and performed yearly evaluations of deli employees.⁴

The Employer contends that the hearing officer erroneously analyzed whether or not the Deli Manager was a managerial employee, because neither the Employer nor the Petitioner ever contended that she was a manager. Moreover, the Employer contends that the hearing officer failed to decide the issue that it actually raised – that is, whether the Deli Manager was closely identified with management even if she was not a manager, a supervisor, or an Employer agent. Board policy restricts those who are closely identified with management from serving at least as employer observers because of “employees’ awareness that the employer wields substantial and direct control over their livelihoods and day-to-day working conditions.” *First Student, Inc.*, 355 NLRB 410, 410 (2010).

The record reflects that, at the objections hearing, the Employer expressly stated that it did not contend that the Deli Manager was a statutory supervisor, but that it did contend that she was a manager. Consequently, there was some reason for the hearing officer to consider whether the Deli Manager was a managerial employee as a basis for the argument that she was closely aligned with management.

In any event, given that the Employer does not seek to challenge the hearing officer’s conclusion that Deli Manager was not a manager and the Employer now clearly is disavowing any claim that the Deli Manager was a managerial employee, there is no reason to discuss the managerial issue here.

⁴ The evidence reflects that the Employer used its Associate Relations Specialist as its election observer. She testified that she works out of the Employer’s general office in Denver, Colorado, which is the location of the Employer’s corporate headquarters. She reports to the Associate Relations Manager. No objection was filed as to the Association Relations Specialist serving as the Employer’s observer.

Although the hearing officer made detailed findings and conclusions about whether the deli manager had managerial status, was a supervisor, and/or was an agent of the Employer, the hearing officer did not determine whether the Deli Manager was closely identified with management. The hearing officer acknowledged that Board law (*Family Service Agency, San Francisco*, 331 NLRB 850 (2000)) prohibits any party to an election from using a statutory supervisor as an observer. In that case, the Board announced a change to its former policy of allowing unions to use statutory supervisors as observers, and it made clear that its new rule was that no party to an election could use a supervisor as an observer. As the Board stated, “to avoid the possibility that voters may perceive the participation of a statutory supervisor in the actual balloting process, even in the limited role of an observer, as calling into question the integrity of the election process, we have decided to eliminate this exception and announce a rule prohibiting the use of supervisors as observer.” *Id.* at 851. However, in the absence of direct Board law expressly extending *Family Service Agency* to individuals who are not supervisors and who are only closely identified with management, the hearing officer concluded that the Petitioner did not engage in objectionable conduct by using the Deli Manager as its observer. In light of her conclusion that the Board has not expressly extended *Family Service Agency* to those closely identified with management, the hearing officer deemed it unnecessary to decide whether the Deli Manager was so closely identified with the Employer that she was prohibited from serving as the Petitioner’s observer. The Employer contends that the hearing officer erred by declining to extend the policy expressed in *Family Service Agency* to the Deli Manager, as an individual who was closely aligned with management.

The Board law is not clear whether or not the holding in *Family Service Agency* is limited only to statutory supervisors, or if that holding also extends to individuals who are closely identified with management. The hearing officer correctly observed that the new rule that the Board stated in *Family Service Agency* expressly referred only to supervisors. The hearing officer also correctly determined that there is not any Board case that applies *Family Service Agency* to a union’s use of an individual who was closely identified with management. However, the Board has recognized that the use as observers of persons who are closely associated with management can present some of the same issues of coercion and interference with laboratory conditions as when supervisors serve as observers. See *Mid-Continent Spring Co.*, 273 NLRB 884, 884 (1985); *First Student, Inc.*, 355 NLRB 410, 410 (2010). Moreover, after *Family Service Agency*, the Board stated that it “prohibits individuals closely identified with management from serving as observers, without imposing a parallel prohibition on individuals identified with a petitioning union.” See *First Student, Inc.*, 355 NLRB at 410. See also *Longwood Security Services, Inc.*, 364 NLRB No. 50, slip op. at 2 (July 19, 2016) (“the Board has adopted a per se rule that individuals closely identified with management may not serve as observers, without imposing a parallel prohibition on individuals closely identified with a petitioning union”). In this statement of the law, the Board did not limit the prohibition against individuals who are closely identified with management from serving only as employer observers. The Board phrased the prohibition as applying to “observers” generally, thereby suggesting that those who are

closely identified with management may not be eligible to serve as observers for any party. Thus, there is some uncertainty about the scope of the holding in *Family Service Agency*.

Given the uncertainty in the Board's case law on this issue, I will address the Employer's contention that the Petitioner engaged in objectionable conduct by using the Deli Manager as its observer, on the grounds that she was closely identified with management. I conclude that, even assuming that *Family Service Agency* applies to individuals who are closely identified with management, the Employer has not established that the Deli Manager was so closely identified with management that the Petitioner could not use her as its observer.

First, there is a question regarding whether or not the Employer followed the proper procedure to challenge the Deli Manager's qualification to serve as an election observer. A party that seeks to object to an observer's ability to serve must raise the issue at the time of the preelection conference and, if the party does not do so, any such objection is precluded and the party may not raise the issue for the first time in its post-election objections. See *Liquid Transporters, Inc.*, 336 NLRB 420, 420 (2001); *Monarch Building Supply*, 276 NLRB 116, 116 (1985); *Howard Cooper Corp.*, 121 NLRB 950, 951 (1958); *Westinghouse Electric Corporation*, 118 NLRB 1625, 1626 (1957); *Northrup Aircraft, Inc.*, 106 NLRB 23, 26 (1953). If a party does not timely raise an issue at the preelection conference about an observer's qualifications to serve, then the party waives the issue. See *Monarch Building Supply*, 276 NLRB at 116.

The record evidence reflects that at the preelection conference the Employer's representative objected to the Deli Manager serving as an observer on the grounds that she was a supervisor of the employees who were about to vote. The Petitioner's election representative disagreed, stating that this supervisory status issue already had been cleared up at the preelection hearing and that the Deli Manager was included on the list of eligible voters. In that regard, in the preelection hearing that had been conducted in this matter on March 12 and 13, 2018, the parties stipulated that the Deli Manager was not a statutory supervisor. Based on that stipulation, the Decision and Direction of Election that issued on May 1, 2018, expressly stated (page 1, footnote 2) that the position of the deli manager is not supervisory. At the post-election hearing on the objections, the parties again stipulated that the Deli Manager was not a statutory supervisor. Thus, the Employer's objection that the Deli Manager could not serve as an observer because she was a supervisor clearly was not a reasonable basis for such an objection, because by that time the parties had stipulated that she was not a supervisor and the Decision and Direction of Election incorporated that stipulation. Consequently, given that there was no basis for the Employer's claim that the Deli Manager was a supervisor, the Petitioner decided to continue to use her as its observer.

The record does not reflect that, at the preelection conference, the Employer specifically contended that the Deli Manager was ineligible to serve as the Petitioner's observer because she was closely aligned with management. Absent a clear statement that the Deli Manager could not serve as an observer because she was closely

identified with management, the Employer did not put the Petitioner on notice that there was an additional issue – different from the supervisory issue – relating to her qualification to serve as observer. Consequently, the Employer's failure to raise that issue at the proper time at the preelection conference deprived the Petitioner of the opportunity to consider whether this additional issue warranted withdrawing the Deli Manager as its observer. Therefore, the Employer cannot now, through its post-election objections, raise the issue of the Deli Manager's alleged close alignment with management.

To the extent that the Employer may assert that it preserved the issue of Deli Manager's close identification with management by stating at the preelection conference that she was a supervisor, that assertion is not persuasive. This objection does not assert that the Deli Manager is a supervisor. Supervisory status and close alignment with management are distinct concepts. See, e.g., *B-P Custom Building Products*, 251 NLRB 1337, 1337-1338, 1347 (1980) (concluding that an employer's observer was not a supervisor, but that he was closely identified with management based on his enhanced responsibilities on behalf of the employer, management referred to him as a supervisor, and he spoke on behalf of management at meetings with employees). Under Section 2(11) of the Act, a supervisor is an individual who uses independent judgment, in the interest of the employer, regarding one or more of the types of authorities set forth in that section. In contrast (and as discussed further below), close alignment with management does not require managerial or supervisory status, and it involves examination of different considerations relating to the nature of the connection between the individual and the employer. Thus, a claim of supervisory status is not the same as a claim of close alignment with management. The Employer implicitly acknowledges this difference, given that its contention that the hearing officer addressed whether the Deli Manager was a manager, supervisor, or Employer agent, without properly addressing whether she was closely identified with management. Given the difference between supervisory status and close identification with management, to preserve the allegation that Deli Manager was closely identified with management the Employer was obligated to raise it expressly at the preelection conference, but it did not do so.

In any event, aside from whether the Employer preserved the issue of the Deli Manager's alleged close identification with management, I conclude that the evidence does not establish that the Deli Manager had such status.

The determination whether an individual is closely identified with management turns on the nature of the connection between the individual and the employer, notwithstanding the absence of managerial or supervisory status. A person can be closely identified with management if he or she has been placed by management in a strategic position where employees could reasonably believe that the employee speaks on its behalf and, therefore, is its agent. See *Southland Frozen Foods*, 282 NLRB 769, 770 (1987). In some cases the Board has found individuals to have been so closely identified with management as to be precluded from serving as an observer. See, e.g.,

First Student, Inc., 355 NLRB 410, 410 (2010) (trainer/bus driver found to be closely identified with management where she ran an employer training program and administered CDL requirements, and she was the only employee who sat in an enclosed office that she shared with a supervisor); *Sunward Materials*, 304 NLRB 780, 780-781 (1991) (compliance/training specialist found to be closely identified with management where he conducted monthly safety and training sessions for management, trained new employees and held orientation meetings with them, monitored employees' safety records and performance on the job along with a foreman, was "very active and visible" in the hiring process, was paid much more than other employees, sat with management at election campaign meetings and wore a "Vote No" button as did other managers, had his own office at the employer's headquarters building, and drove a company-owned truck); *Mid-Continent Spring Co.*, 273 NLRB 884, 884 (1985) (personnel manager found to be closely identified with management where employees understood her to be the personnel manager, she was a member of the employer's negotiating team, she attended management meetings, and she represented the employer in the grievance procedure). In other cases, the Board has concluded that the involved individuals could serve as observer because they were not closely identified with management. See, e.g., *Southland Frozen Foods*, 282 NLRB at 769-770 (employee deemed not to be closely identified with management where she spent 75 percent of her time performing production work, punched a time clock, was paid hourly, did not receive benefits that admitted supervisors received, did not attend management meetings and did not authorize overtime, lacked authority to adjust grievances, and performed "routine" and "circumscribed" duties on the employer's behalf such as completing time and production reports, assigning work, training employees, and generally providing routine direction of employees).

In concluding that the record does not establish that the Deli Manager was not closely identified with management, I rely on that fact, which the hearing officer recognized, that the Deli Manager was an eligible voter who was included in the petitioned-for unit. The Employer included the Deli Manager on the list of eligible voters and she voted at the election without challenge from the Employer. Employees who are eligible voters generally are able to serve as election observers. See *NLRB Casehandling Manual, Part Two, Representation Proceedings*, Section 11310.2 (January 2017) (stating that observers should be employees of the employer). The fact that the Deli Manager was included in the petitioned-for voting unit and was an eligible voter undermines the Employer's contention that she was closely aligned with management. See, e.g., *Liquid Transporters, Inc.*, 336 NLRB 420, 420 (2001) (in a case decided after *Family Service Agency*, rejecting employer's contention that a petitioning union improperly used an alleged statutory supervisor as its election observer, in part on the grounds that the employer had included this individual as an eligible voter on its voter list and did not challenge his vote in the election).

Similarly, by serving as an observer for the Petitioner in the election in which she was an eligible voter, the record shows that the Deli Manager demonstrated that she supported the Petitioner. That public demonstration of her support for the Petitioner

communicated that her interest in the election outcome differed from the Employer's interest. The Deli Manager's open display that her stance on the union question was contrary to her Employer's position demonstrated the absence of close alignment with management. On the specific issue of unionization, it cannot be concluded that management placed the Deli Manager in a strategic position where employees could reasonably believe that she spoke on management's behalf.

Additionally, the evidence about the Deli Manager's duties and responsibilities does not establish that she was closely identified with management. As described below, the evidence is conflicting, disputed, and general, and does not clearly illuminate the key issue of the nature of the Deli Manager's relationship with management.

At the objections hearing, each party presented evidence about the Deli Manager's duties and responsibilities. The Employer presented two witnesses on that issue: the Employer's Associate Relations Specialist and the Associate Relations Manager. The Petitioner called the Deli Manager as its witness and she testified about her functions. As discussed in more detail below, these witnesses' testimony was consistent on some points, but otherwise their testimony largely differed.

First, there is no doubt that the Deli Manager's job title was Deli Manager. However, her job title does not establish that she was closely identified with management. On issues relating to managerial or supervisory status, job titles are not controlling and the Board looks to authority actually possessed. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290 n.19 (1974) (in determining whether a position is managerial, "the specific job title of the employees involved is not in itself controlling. Rather, the question whether particular employees are 'managerial' must be answered in terms of the employees' actual job responsibilities, authority, and relationship to management"); *Oakwood Healthcare, Inc.*, 348 NLRB 686, 690 n.24 (2006) (on supervisory status issues, "the Board has long held that job titles and descriptions prepared by employers are not controlling; rather the Board looks to the authority actually possessed and the work actually performed by the alleged supervisor").

Additionally, all of these witnesses agreed that, the Deli Manager wore clothing and badging that identified her as a head of a department. The Deli Manager acknowledged that she wore a uniform that designated her as a deli manager. The Associate Relations Specialist testified that the Deli Manager wore a black apron, as did other so-called managers such as head clerks or assistants and the other department managers. She further testified that managers wear a name badge that "in most cases" states what the person's job title is, such "deli manager" or "head clerk." The Associate Relations Manager Woodward similarly testified that each deli manager and deli head clerk wears a black vest that shows that they are department managers, and that each of them also wears a name badge that designates their job title. I find that this evidence about the Deli Manager's uniform and badge with her name and job title does not prove that the Deli Manager was closely identified with management. The clothing and badge arguably identified her as being the top-ranked person in the deli. However, just as the Deli Manager's job title in and of itself does not show that she was closely identified with

management, the clothing and badge do not demonstrate that she was closely aligned with management. A uniform does not necessarily confer any more authority on the wearer than does a job title that contains the word “manager.” Moreover, the evidence shows that deli head clerks (who also were eligible voters who the Employer included on the list of eligible voters) wear the same sort of apron or vest. The evidence does not establish, and the Employer does not claim, that the deli head clerks meet the standard of being closely identified with management. *See, e.g., Vestal Nursing Center*, 328 NLRB 87, 102 (1999) (observer found not to be closely identified with management, in part because she wore a uniform that also was worn by employees other than managers and supervisors).

Two of the witnesses – the Deli Manager and the Associate Relations Manager – gave similar testimony about deli managers’ role in shift scheduling. The Deli Manager testified that, under the Employer’s “select-a-shift” scheduling system, the computer pulls up the available shifts and the Deli Manager prints out a copy of the computer-generated shifts. Each employee then signs up for their preferred shifts. After employees make their shift selections, the Deli Manager then enter their selections onto the schedules. The Deli Manager testified that if employees wanted to change shifts, she had them work it out with each other and let her know what they decided. The Associate Relations Manager similarly described the select-a-shift system. According to the Associate Relations Manager, the store manager or assistant store manager reviews work schedules after the select-a-shift process before the schedules are put into place. The Associate Relations Manager testified that if a deli employee needs time off he or she would submit the request to the Deli Manager. The Employer has given guidance that department managers generally are to honor time-off requests by seniority if there are multiple requests. Deli managers’ involvement in coordinating the select-a-shift scheduling system is not sufficient to establish close identification with management. The mere fact that an employee performs what the routine and circumscribed duties on the employer’s behalf - such as completing time and production reports, assigning work, training employees, and generally providing routine direction of employees – does not establish that the employee is closely identified with management. *See, e.g., Southland Frozen Foods*, 282 NLRB 769, 769-770 (1987). The record does not demonstrate that these functions by the Deli Manager are more than routine and circumscribed.

In her testimony, the Deli Manager stated that she never fired, promoted, demoted, or been involved in evaluating any deli employees. The Employer, however, relies on one particular exchange to support its claim that she did have such authority, notwithstanding its position that she is not a statutory supervisor. On cross-examination, the Employer’s attorney asked the Deli Manager if she understood that as a manager she had responsibility for promotions, demotions, discipline, temperature logs, evaluation, and “the rest.” To that compound question – which referred to multiple subjects and issues all in a single question – the Deli Manager answered “yes, but not demotions.” There was no follow-up about the scope of her authority or responsibility in these areas. Given that there was not any further development regarding the specifics,

the import of this question and answer is unclear, and it cannot be determined in any meaningful way what the Deli Manager meant by answering “yes, but not demotions.” Additionally, the attorney’s question covered promoting, disciplining, and rewarding employees, which are subjects that fall under Section 2(11)’s definition of supervisor. The Employer stipulated the Deli Manager was not a statutory supervisor. The burden lies with the parties asserting such status and such a conclusory answer to a compound question, without more, is insufficient to establish supervisory status in this instance. The fact that the Employer’s position has been that the Deli Manager is not a statutory supervisor provides an additional basis for my decision not to place significant weight on the question and answer described above.

The Deli Manager also testified that, approximately ten times during the year that she has been deli manager, she wrote up employees for tardiness and not recording entries in the temperature log. The Deli Manager testified that she had to go to store management or to her HR assistant manager to discipline anyone for a temperature log violation. The record does not describe in more detail what these write-ups entailed, or what specific consequences employees may have suffered. Merely completing reports to higher management about possible employee infractions is not a sufficient basis for finding close identification with management. *See, e.g., Southland Frozen Foods*, 282 NLRB at 769-770 (employer’s observer deemed not to be closely identified with management even though she reported employee absences and overstays of breaks and otherwise acted as a conduit of information).

The Employer’s Associate Relations Specialist testified about the Deli Manager’s claimed authority in the areas of scheduling, assigning, and disciplining. The Associate Relations Specialist’s knowledge about the Deli Manager was limited, at best. She testified that she had not even met the Deli Manager until the day of the election. Further, the Associate Relations Specialist testified that she had worked for the Employer from September 2007 to September 2016, then left the Employer, and then returned to the Employer shortly before the objections hearing in this case. The evidence shows that the Deli Manager had been a deli manager only for about a year, during which time the Associate Relations Specialist was not even employed with the Employer. Notwithstanding the witness’ lack of familiarity with the Deli Manager, on direct examination the Employer’s attorney asked her if the Deli Manager was “the one that schedules [deli employees] for work,” if the Deli Manager “gives them work assignments,” and “if she [has] authority to discipline them. The witness answered “yes” to each of these three questions, without examples or elaboration. On redirect examination, the attorney asked if the Deli Manager has authority to discipline and administer policies and procedures about discipline (such as code dating policies, which apparently involve product expiration dates). The Associate Relations Associate answered “yes” to those questions as well, without providing more specifics or details. On redirect, the attorney also asked the witness if a deli manager needs store management approval to suspend an employee for a code dating violation, and the witness answered “no.” The attorney asked the witness if a deli manager needs to get authority from a store manager to discipline or suspend for temperature log violations,

and the witness similarly answered “no.” On redirect, the witness reiterated that the ultimate decision-maker on termination is the store manager, and that a deli manager can only recommend termination. On cross-examination, the Associate Relations Specialist testified that the Deli Manager did not have independent authority to terminate an employee and that she would have to work with store management regarding any termination. The witness testified, without providing any specific details or examples that the deli manager could suspend with the input of store management if they were available. The witness further testified that the deli manager did not have the independent authority to give an employee a raise or promotion, and that personnel decisions generally needed to be run by store management and often also by Human Resources or Labor Relations.

I find that the Associate Relations Specialist testimony is not sufficient to establish that the Deli Manager was closely aligned with management. She did not have any familiarity with the Deli Manager and, in any event, her testimony was too vague and general and lacking in detail to establish that the Deli Manager had a close connection to management. Also, that vague and general testimony ran contrary to the Employer’s stipulation that the Deli Manager was not a supervisor.

In his testimony, the Associate Relations Manager discussed the types of authority of retail department managers in general, without focusing on deli managers in particular or the Deli Manager specifically. According to the Associate Relations Manager, retail department managers have a variety of responsibilities, including writing schedules, collaborating with store management to determine hours and sales for their departments, having an impact on hiring, providing input or information about employee performance to higher store management for employee annual “performance excellence discussions” (PEDs), assigning job duties, helping with training, and monitoring “different areas” such as night crew sweep logs or deli temperature logs. According to this witness, retail department managers participate in department management meetings where there is discussion of sales, personnel situations, and hours. The witness further testified that the Employer encourages and requests the retail department managers to share information from these department meetings with their team members, in meetings that he called “team huddles.” The Associate Relations Manager also testified that the department managers administer the Employer’s policy and procedure manual, which includes information on attendance, food handling and safety, job performance, anti-discrimination and anti-harassment. The witness testified that department managers are authorized to discipline employees for violating those policies, without needing store management’s approval to do so. He also testified that, at times, department managers are given authority over the entire store, when placed in assistant store manager roles to fill in during vacations. The Associate Relations Manager clarified that he could not say that the Deli Manager ever had filled in as store manager or assistant store manager. The testimony in this regard was non-specific and lacking any examples. Because the Associate Relations Manager’s testimony did not focus on the Deli Manager, and therefore did not illuminate the Deli Manager’s specific

relationship with management, I find that this evidence also was insufficient to establish that the Deli Manager was closely aligned with management.

Additionally, other deli employees testified at the hearing about the Deli Manager. In her testimony, a deli clerk did refer to the Deli Manager as her “manager.” In his testimony, a deli chef referred to the Deli Manager as the “boss.” These deli employees’ description of the Deli Manager, without more, merely reflects that she was the deli manager. Their descriptions, which matched up with the Deli Manager’s job title, are not sufficient to establish that she was closely identified with management.

Under the circumstances here, I find that the Employer has not met its burden of establishing objectionable conduct. Accordingly, Objection 2 is overruled.

Objection 3: The Petitioner’s Observer Engaged in Coercive Conversations With Voters at the Polls

The Employer objected that the Petitioner’s observer, the Deli Manager, impermissibly stated to two voters in the immediate polling area that “she really wanted this.” The Decision on Objections, Order Directing Hearing and Notice of Hearing in this matter directed that the objections hearing include the Employer’s objection that, during the election, the Petitioner’s observer told two employees that “she really wanted this.” In setting that issue for hearing, I stated the following:

Such conduct is alleged to have had a coercive impact on eligible voters and destroyed laboratory conditions required in Board elections. The Employer further alleges that this was improper electioneering. The Employer’s offer of proof contends that witness testimony will establish that the comment was directed at voting employees.

At the objections hearing, the hearing officer heard evidence about the specific statement that I set for hearing. The hearing officer concluded that this statement did not have any effect on the election outcome because it was made in the presence of only two voters after they had cast their ballots and there was no evidence of dissemination to other voters. The Employer excepted to the hearing officer’s resolution of this issue, but in its brief the Employer did not state any grounds for ascribing error to the hearing officer. I affirm the hearing officer’s findings and conclusions regarding this statement.

Additionally, the hearing officer heard evidence about other alleged conversations that the Deli Manager had with voters at the polls during voting periods (including one employee apologizing to the Deli Manager for being late during the polling hours and the Deli Manager responding “it’s okay,” another employee talking to the Deli Manager about picking up the Deli Manager’s son, and the Deli Manager asking some employees about who was on the work schedule or what the employees had done that day). Even though the Employer did not raise these other alleged conversations in its objections and I did not specifically set these other statements for

hearing, the hearing officer concluded that these other statements of alleged objectionable conduct were reasonably encompassed within the scope of the objections that I did set for hearing. See *Precision Products Group*, 319 NLRB 640, 641 (1995) (hearing officer can consider issues that are reasonably encompassed within the scope of the objections that the regional director set for hearing). The hearing officer concluded that these other conversations at the polls did not amount to objectionable conduct. The Employer excepted to the hearing officer's findings regarding Deli Manager's response "it's okay," but the Employer did not except to the hearing officer's findings on the other statements made in the polling area. In its brief, the Employer did not discuss any of these other statements, and it did not state any particular grounds for ascribing error to the hearing officer. I affirm the hearing officer's findings and conclusions regarding each of these statements.

The hearing officer concluded that another issue that the Employer advanced at the hearing – involving the Deli Manager sending a text the night before the election to deli employees, urging them to vote for the Petitioner – was not reasonably encompassed within the objection. The hearing officer concluded that this alleged objectionable conduct was unrelated to the objection that I had set for hearing because this situation involved conduct by the Deli Manager that took place the day before the election and away from the polls. The hearing officer also concluded that this issue about the text message was not "newly discovered but also previously unavailable" and, therefore, that the Employer was not excused from failing to include this issue in its objections filing. In support of that conclusion, the hearing officer cited *Rhone-Poulenc, Inc.*, 271 NLRB 1008, 1008 (1984), which holds that "the Board will consider evidence of misconduct unrelated to the timely filed objections, but only when the objecting party demonstrates by clear and convincing proof that the evidence is not only newly discovered but was also previously unavailable." In any event, the hearing officer stated that, even if the text message was reasonably encompassed in the objection that was set for hearing, she would "not find [it] objectionable insofar as [it] contained no threats or other coercive statements that would impact the election, let alone create an "atmosphere of fear and reprisal.""

The Employer contends that the hearing officer erred in concluding that the issue of the Deli Manager's text message was not reasonably encompassed within the objection that the Employer filed in which it alleged that the Petitioner's observer impermissibly stated to two voters in the immediate polling area that "she really wanted this." I affirm the hearing officer's decision that the issue about the text message was not reasonably encompassed within the Employer's objection about the Deli Manager's conduct during the polling. As set forth above, my direction about the scope of the hearing on this objection was limited to the Employer's claim that, *during the election*, the Petitioner's observer told two employees that "she really wanted this." (Emphasis added.) This direction expressly related to comments that were directed at voting employees, not to conduct directed to employees away from the polls. Given that the Employer's evidence was that the Deli Manager sent the text message the night before the election, the hearing officer properly concluded that it was beyond the scope of the

issues. See *Precision Products Group*, 319 NLRB at 641 (although a hearing officer can consider issues that are reasonably encompassed within the scope of the objections that the regional director set for hearing, a hearing officer lacks the authority to consider issues that are not reasonably encompassed within those objections).

The Employer contends that the hearing officer improperly relied on *Rhone-Poulenc, Inc.*, 271 NLRB at 1008, because at the objections hearing the Petitioner itself elicited the evidence about the Deli Manager's text message to eligible voters, without objection from either the Employer or the hearing officer. The Employer is correct that the Petitioner elicited the evidence about the text message, but that is immaterial. The fact remains that this issue was not reasonably encompassed with the objection that I set for hearing.

In any event, notwithstanding that this issue was not reasonably encompassed within the objection that I set for hearing, the hearing officer determined that the text message was not objectionable. The hearing officer concluded that the Deli Manager was not an agent of the Petitioner and therefore that "her conduct as an employee will only be grounds for overturning an election if it creates a general atmosphere of fear and reprisal rendering a free and fair election impossible." The hearing officer relied on *Westwood Horizon*, 270 NLRB 802, 803 (1984), which held that the test applicable to alleged election misconduct by individuals other than the parties to the election is whether the misconduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible. The hearing officer determined that the Deli Manager's text message did not contain any threats or other coercive statements that would have impacted the election or otherwise create an atmosphere of fear and reprisal. I affirm the hearing officer's determination. The text message sent the night before the election merely was a legitimate communication from one eligible voter to other eligible voters, urging them to vote for the Petitioner.

The Employer asserts that the hearing officer improperly concluded that the Deli Manager was not an agent of the Petitioner and that consequently she incorrectly analyzed the text message under the Board's test for third-party misconduct rather than the test for party agents. The hearing officer carefully examined the Employer's claim that the Deli Manager was an agent of the Petitioner. She determined that the Deli Manager was an agent of the Petitioner only with respect to her service as an observer at the election (citing *Brinks, Inc.*, 331 NLRB 46, 46 (2000)), and that the evidence did not establish that the Deli Manager was a general agent of the Petitioner regarding any of her activities or conduct not directly connected to her service as an observer. I affirm the hearing officer.

The Employer contends that the Deli Manager was an agent of the Petitioner because the Petitioner compensated her for her service as its observer and issued her a W-4 form in connection with that payment. The hearing officer expressly addressed that Employer contention. The hearing officer properly concluded that this compensation for the Deli Manager's services as an election observer did not make the Deli Manager a general agent of the Petitioner. Consequently, the hearing officer did

not err by declining to analyze the issue of the Deli Manager's text message to other deli employees under the test applicable to party agents.

The Employer also contends that the content of the text message itself shows that the Deli Manager was a Petitioner agent, because in that text message the Deli Manager urges employees to vote for the Petitioner. The hearing office correctly cited Board cases holding that an employee's support for a union does not establish general union agency.

Therefore, I find that the Employer has not met its burden of proof with respect to Objection 3, and I agree with the hearing officer that it should be overruled.

Objection 4: The Petitioner Gave Its Observer an Expectation of Payment for Her Vote

The Employer objected that the Petitioner paid its observer, the Deli Manager, for her to vote for the Petitioner.⁵

The hearing officer found that the Petitioner reasonably compensated the Deli Manager two times – once (in the amount of \$150.14) for her day spent participating as a witness in the preelection hearing on March 12, 2018, and again (in the amount of \$138.06) for her time and effort spent serving as the Petitioner's observer at the election on May 11, 2018. The hearing officer determined that these payments were not a "bribe" for the Deli Manager to vote for the Petitioner, and that the Deli Manager understood that the purpose of the payments was to compensate her for time and effort for being a witness at the preelection hearing and then an observer at the election itself.

The hearing officer also concluded that these payments were not grossly disproportionate to the Deli Manager's usual pay rate or to the value of her time and effort in attending the preelection hearing and the election. The Deli Manager spent over eight hours at the preelection hearing, for which the Petitioner compensated her \$150.14, or \$18.77 per each of the eight hours. The Deli Manager's regular hourly wage rate was \$20.73. For the election, the proceedings officially began with the prehearing conference at approximately 7:00 a.m., and the voting took place from 7:30 a.m. to 9:30 a.m. and then again from 5:30 p.m. to 7:30 p.m., with the ballot count taking place following the close of the polls. The hearing officer observed there must have been travel time to get to the preelection conference, and then again at the end of the day's election activity after the ballot count. As the hearing officer stated, approximately 13 hours elapsed in relation to that day's election activities, from around 6:30 a.m. (or even earlier with travel time) to the closing of the polls at 7:30 p.m., not even taking into account the ballot count and travel home. The Petitioner paid the Deli Manager \$138.06 for that day. Assuming 13 hours, the Deli Manager's compensation of

⁵ The record evidence also shows that the Employer paid its observer, the Associate Relations Specialist.

\$138.06 amounted to \$10.62 per hour, which was much less than her \$20.73 hourly rate as the Deli Manager.

The hearing officer also concluded that, even if the payments were improper, the payments were made only to the Deli Manager and therefore only her single vote potentially could have been affected. The hearing officer observed that the Petitioner prevailed in the election by a vote of 10 to 2. Thus, even if the payments compromised the Deli Manager's individual vote, the payment reasonably would not have affected the other nine voters who voted for the Petitioner.

In its exceptions, the Employer did not specifically contest the hearing officer's finding that even if the payments to the Deli Manager were improper, those payments reasonably would not have affected the other nine voters who did not receive any payment from Petitioner and who voted for the Petitioner. The exceptions do not mention that specific finding, and the Employer's brief does not contest that point. In the absence of grounds for overturning the hearing officer on that point, there is no reason to conclude that a majority of voters would have voted differently than they did. Moreover, I conclude that there is merit to the hearing officer's point, and I affirm her. Because there is no legitimate basis for concluding that the Petitioner's payment to the Deli Manager for being its observer had an impact on a majority of the voters who favored the Petitioner, there are no grounds for overturning the hearing officer's conclusion that the Employer's objection about the payment to the Deli Manager is invalid.

Additionally, there is no merit to the Employer's contention that the hearing officer ignored record evidence showing that the Deli Manager admitted that the Petitioner paid her to vote for the Petitioner. The Employer relies on evidence involving a question by the Employer's attorney and the Deli Manager's response to that question. At the very beginning of the attorney's cross-examination of the Deli Manager, he asked the following question: "So you got paid to come down and testify, correct?" The Deli Manager answered "yes." The Employer then followed up with this question: "And you got paid to vote, correct?" The Deli Manager answered, "I guess, yes." Far from ignoring this evidence, the hearing officer expressly addressed its import. The hearing office stated the following:

Contrary to the Employer, I find that Deli Manager[']s hesitant "I guess, yes" to a compound question about whether she was "paid to come and testify" and "paid to vote" (Tr. 208) is hardly acknowledgement of receiving a bribe, especially in light of consistent and more specific testimony, which I credit, that she was paid for the time she was spending as an observer (EX 2(a); Tr. 178-79, 204, 222.)

In that regard, the record reflects that the Employer's attorney also asked the Deli Manager if she had told other employees that she had been paid both to testify and to serve as an observer and the Deli Manager confirmed that she had. This testimony shows that the Deli Manager understood the payment to be for her services as an

observer, not for her vote for the Petitioner. The Deli Manager also testified that the payment was not the reason for her vote, and that the payment did not affect her decision. The hearing officer credited the Deli Manager, and there is no valid reason for reversing her credibility resolutions. Consequently, I affirm the hearing officer's analysis.

The Employer also relies on a notation on a W-4 form that the Deli Manager completed in connection with her observer service, which stated "KS 89 Vote Deli 5-11-18." The Employer contends that this notation establishes that the Petitioner paid the Deli Manager for her vote, and that the Deli Manager understood the payment as payment for her vote. The hearing officer dealt with this contention as well. The hearing officer stated the following about the notation on the W-4 form:

Counsel's attempts to characterize the W-4 as an admission by the Union that she was paid for her vote, and not for the time she spent observing at "the vote" are similarly unpersuasive.

I agree with the hearing officer's resolution of this contention.

The Employer also faults the hearing officer for taking into account not only the time spent in official observer duties at the election, but also time spent in the preelection conference and in traveling to and from the polls. The Employer contends that the record does not expressly include evidence about when the Deli Manager arrived at the polling area before the preelection conference or in travel time. However, the hearing officer is allowed to make reasonable inferences, and it stands to reason that the Deli Manager had to travel to get to and from the polls before and after the day's election.

The Employer also asserts that the Petitioner did not have any legitimate reason for paying Deli Manager for the day of the election because the Employer was obligated to pay her, and did pay her, for 40 hours of work that week even if she did not actually work 40 hours that week. The record does not reflect how much or for how many hours the Employer actually paid the Deli Manager for that week. Nor does the record reflect that the Employer paid the Deli Manager her usual wages specifically for the day of the election. At the hearing, the Associate Relations Specialist testified that she did not believe that the Employer had paid the Deli Manager for being the election observer on May 11. She also testified that the Employer would not compensate any employee for doing something on a day off, unless the employee was doing something for the Employer. The Employer did not present other affirmative evidence showing that it paid the Deli Manager for the day of the election, such as payroll documents or competent testimony from someone with actual knowledge about the issue. Also, the Deli Manager was a witness, but she was not asked whether the Employer paid her for that day. The Employer's Associate Relations Specialist testified about the Employer's general practice of reimbursing employees for time away from work for union business. Her testimony, however, was very general, vague and it did not describe the scope of this general practice. The evidence does not establish whether the Employer followed

this general practice with respect to the Deli Manager's service as the Petitioner's observer at the election. Also, it is not clear if this asserted general practice applied to all employees – including those employees who were not currently represented by a labor organization and only were involved in organizing efforts - or only to employees who UFCW Local 7 already represented in the Employer's stores.

Therefore, I find that the Employer has not met its burden of proof with respect to Objection 4, and it is overruled.

Objection 6: The Petitioner Made Misrepresentations About the Benefits That Employees Would Obtain If They Voted

The Employer objected that the Petitioner made material, gross, and deceptive misrepresentations of the benefits that the employees would obtain if they voted for the Petitioner, including misrepresentations about health care benefits.

The hearing officer determined that the Petitioner did not make any objectionable misrepresentations during the campaign. The hearing officer specifically addressed the Employer's claim that the Petitioner's Treasurer made an objectionable misstatement of the law when, at the preelection hearing on the petition, he stated during his testimony that if employees voted to join the existing meat/seafood bargaining unit then they would be entitled to benefits as part of the Petitioner's Taft-Hartley funds. The hearing officer found that the Employer's attorney immediately challenged that statement at the hearing, which took place two months before the election. The hearing officer also found that in the intervening two months before the election, the Employer issued written correction of the Treasurer's statements.

In its exceptions to the hearing officer's report, the Employer excepted to the hearing officer's finding that "a misstatement of the law, such as Petitioner's Treasurer ... is alleged to have made at the preelection hearing, is likewise not objectionable conduct." In its brief in support of exceptions, the Employer did not make any argument to support this exception.

Absent specific grounds for excepting to the hearing officer's disposition of this objection, I affirm the hearing officer. Additionally, I agree with hearing officer's findings.

Therefore, I find that the Employer has not met its burden of proof with respect to Objection 6, and it is overruled.

II. CONCLUSION

In summary, based on the entire record – including the hearing officer's report and recommendations, the exceptions and arguments made by the Employer and Petitioner's opposition to the Employer's exceptions – and in accordance with my conclusions detailed above, I overrule the Employer's objections, and I shall certify the results of the election.

III. CERTIFICATION OF RESULTS

An election has been conducted under the Board's Rules and Regulations among the following group of employees of the Employer to determine if they desired to be included in the existing unit of meat cutters, apprentices, wrappers, butcher block sales persons, and clean-up personnel, in the meat market or markets owned or operated by the Employer in the metropolitan area of Broomfield, Colorado (Store Nos. 86, 89, and 118) currently represented by United Food and Commercial Workers International Union, Local 7:

All full-time and regular part-time delicatessen department employees employed by the Employer at Store No. 89, located in Broomfield, Colorado; excluding all other employees, store manager, assistant store managers, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

The Tally of Ballots shows that United Food and Commercial Workers International Union, Local 7 has been designated by the employees in that group as their collective bargaining representative.

As authorized by the National Labor Relations Board,

It is certified that United Food and Commercial Workers International Union, Local 7 may bargain for the employees in the above group as part of the unit of employees which it currently represents.

IV. REQUEST FOR REVIEW

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision which may be combined with a request for review of the regional director's decision to direct an election as provided in Sections 102.67(c) and 102.69(c)(2), if not previously filed. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by **August 16, 2018**. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties

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and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Issued this 2nd day of August 2018.

/s/ Paula Sawyer

PAULA SAWYER
Regional Director

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

KING SOOPERS, INC.

Employer

and

Case 27-RC-215705

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

Petitioner

HEARING OFFICER'S REPORT ON OBJECTIONS

I. INTRODUCTION

On May 11, 2018 an agent of Region 27 conducted an election among certain employees of King Soopers, Inc. (the Employer). A majority of employees casting ballots in the election voted for representation by the United Food and Commercial Workers International Union Local 7 (the Petitioner). However, the Employer contests the results of the election claiming that the Petitioner engaged in objectionable conduct, and therefore asks that the election be set aside and that a new election be held. Specifically, the Employer contends that the Petitioner, or its observer, engaged in the following objectionable conduct: (1) engaging in coercive trespass and electioneering during the critical period; (2) selecting an election observer who was aligned with management; (3) making coercive statements to voters in the polling area; (4) making payments to its election observer; and (5) making material misrepresentations to employees about the benefits they would receive if they voted for the Petitioner.

After conducting the hearing and carefully reviewing the evidence as well as arguments made by the parties, I recommend that the Employer's objections be overruled in their entirety because there is insufficient evidence to show that either the Petitioner or the Petitioner's observer engaged in objectionable conduct that would raise doubts as to the fairness or validity of the election. More specifically, the credited evidence supports the conclusion that the Petitioner's observer was neither a managerial employee nor an employee of the Petitioner, and the parties established by stipulation that she was not a statutory supervisory. Accordingly, she appropriately served as an observer, and her conduct at the polls did not create an atmosphere of fear or reprisal warranting a new election. Further, the credited evidence was insufficient to establish that the Petitioner engaged in coercive electioneering and trespass in the days leading up to the election, that it made coercive payments to its observer, or that it made coercive campaign misrepresentations.

After recounting the procedural history, I discuss the parties' burdens and the Board standard for setting aside elections, including the standards for setting aside elections when alleged misconduct is by individuals who are not agents of the party charged with objectionable conduct. Next, I will discuss the parties' evidentiary burdens for establishing an agency relationship, along with my reasons for finding that the Petitioner's observer is not a general or

EXHIBIT B

specific agent of the Petitioner with respect to the statements allegedly made by her during polling. Then I describe the Employer's operation and an overview of relevant facts. Finally, I discuss each objection.

II. PROCEDURAL HISTORY

The Petitioner filed the petition on March 1, 2018. The election was held on May 11, 2018 pursuant to a Decision and Direction of Election.¹ The employees in the following group voted to determine whether they wished to be represented by the Petitioner, in an existing multi-store unit of meat department employees:

Included: All full-time and regular part-time delicatessen department employees employed by the Employer at Store No. 89, located in Broomfield, Colorado Excluding: all other employees, store manager, assistant store managers, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

The ballots were counted and a tally of ballots was provided to the parties. The tally of ballots shows that 10 ballots were cast for the Petitioner, and that 2 ballots were cast against representation. There were no challenged ballots. Thus, a majority of the valid ballots were cast in favor of representation by the Petitioner.

Seven objections to the election were timely filed. The Regional Director for Region 27 ordered that a hearing be conducted to give the parties an opportunity to present evidence regarding five of the Employer's objections (Objections 1-4 and 6). As the hearing officer designated to conduct the hearing and to recommend to the Board whether the Employer's objections are warranted, I heard testimony and received into evidence relevant documents on June 5, 2018. At the close of hearing, I permitted the filing of post-hearing briefs. Both the Petitioner and the Employer filed briefs, which were afforded my full consideration.²

III. THE BURDEN OF PROOF AND THE BOARD'S STANDARD FOR SETTING ASIDE ELECTIONS

It is well settled that "[r]epresentation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Therefore, "the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one." *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). To prevail, the objecting party must establish facts raising a "reasonable doubt as to the fairness and validity of the election." *Patient Care of Pennsylvania*, 360 NLRB 637 (2014), citing *Polymers, Inc.*, 174 NLRB 282, 282 (1969), enf. 414 F.2d 999

¹ A Request for Review of the Decision and Direction of Election of Election was filed by the Employer and is currently pending before the Board.

² References to the Employer's Post-Hearing Brief below are designated as "ER Br__"; references to the Petitioner's Post-Hearing Brief are designated as "Pet Br____", page references to the transcript designated as "Tr.____", and references to Employer and Petitioners' exhibits are "EX" and "UX" respectively.

(2d Cir. 1969), cert. denied 396 U.S. 1010 (1970). Moreover, to meet its burden the objecting party must show that the conduct in question affected employees in the voting unit. *Avante at Boca Raton*, 323 NLRB 555, 560 (1997) (overruling employer's objection where no evidence that unit employees knew of the alleged coercive incident).

In this case, the Employer's objections rest upon an underlying assertion that Deli Manager Tiffany Seitz has certain statuses, and the Employer bears the burden of proof on these issues as well. Thus, the Employer, as the party asserting Tiffany Seitz' managerial status bears the burden of proof on that issue. *Republican Co.*, 361 NLRB No. 15, slip op. at 4 (2014); *LeMoyne-Owen College*, 345 NLRB 1123, 1128 (2005); *Waste Management de Puerto Rico*, 339 NLRB 262, 279 (2003). And insofar as the Employer asserts that Seitz is an agent of the Petitioner, it bears the burden of proof on that issue. *Millard Processing Serv. Inc.*, 304 NLRB 770, 771 (1991).

In determining whether to set aside an election, the Board applies an objective test. The test is whether the conduct of a party has "the tendency to interfere with employees' freedom of choice." *Cambridge Tool Pearson Education, Inc.*, 316 NLRB 716 (1995). Thus, under the Board's test the issue is not whether a party's conduct in fact coerced employees, but whether the party's misconduct reasonably tended to interfere with the employees' free and uncoerced choice in the election. *Baja's Place*, 268 NLRB 868 (1984). See also, *Pearson Education, Inc.*, 336 NLRB 979, 983 (2001), citing *Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970). In determining whether misconduct warrants setting aside an election, the Board evaluates the following factors: (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party in canceling out the effect of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. *Avis Rent-A-Car System*, 280 NLRB 580, 581 (1986).

IV. THE EMPLOYER'S OPERATION AND ELECTION SCHEDULE

The Employer operates a chain of grocery retail stores, one of which is King Soopers Store #89 in Broomfield, Colorado. The election was held in the employee break room of that location on May 11, 2018 from 7:30 to 9:30 a.m. and 5:30 to 7:30p.m. (Tr. 32, 36.) Associate Relations Specialist Stephanie Klein served as the Employer's observer and Deli Manager Tiffany Seitz served as the Petitioner's observer. Both attended the pre-election conference and both polling sessions. (Tr. 31, 35-36, 57.)

V. STATUS OF DELI MANAGER TIFFANY SEITZ, PETITIONER'S ELECTION OBSERVER

The parties stipulated on the record that Deli Manager Tiffany Seitz was not a supervisor within the meaning of 2(11) of the Act. (Tr. 27.) The record evidence of various types of

supervisory authority purportedly exercised by deli managers (as detailed below in connection with my discussion of Seitz' managerial status) was either conclusory, hypothetical, or lacking in the requisite specificity to determine that Seitz or other deli managers actually exercise these authorities with sufficient discretion or independent judgment to establish that they are supervisors within the meaning of Section 2(11) of the Act. For example, although there was testimony that Seitz makes employees' schedules based on their shift selections and "approves" employees' shift trades, there was no specific evidence regarding what criteria or information she relies upon, what level of discretion she exercises, or whether this task is essentially "routine or clerical in nature." Similarly, evidence that Seitz has "written up" employees for "temp log" violations or attendance does not establish what independent judgment she exercises in this regard, what (if any) adverse impact these "write ups" have, or whether management routinely accepts her recommendations for discipline without further review or investigation. Accordingly Deli Manager Tiffany Seitz was an undisputed eligible voter and cast her ballot without challenge. As such, the record evidence is insufficient to warrant disturbing the parties' stipulation.

However, the Employer bases its objections on contentions that Seitz was a managerial employee within the meaning of the Act, or at least aligned with management, with respect to Objection 2, and that she was acting as an agent of the Petitioner with respect to her as alleged in Objections 3, 4, and 6. I will first address the evidence as to Ms. Seitz managerial status under the Act in her employment capacity as Deli Manager. I will separately consider other evidence and arguments bearing on her eligibility to act as Petitioner's election observer, notwithstanding her status as unchallenged eligible voter and statutory employee, for discussion below in connection with Objection 2.

1. Seitz Status as Employer's Manager

a. Record Evidence Regarding Seitz' Managerial Status

The Employer's witnesses Associate Relations Manager Fred Woodward and Associate Relations Specialist Klein both testified as to the general scope of retail department managers' and deli managers' duties and authorities. However, neither works in Store 89, and their testimony as to the actual exercise of those authorities by department managers at that location, or in the deli specifically, was very limited. Deli Manager Seitz testified as to the actual exercise of her authority in Store #89, which apparently differed in some respects from the Employer's practice at other stores. Her testimony, which seemed to me forthright on this issue, was corroborated by the employee witnesses who worked in the deli department. Therefore, to the extent that Woodward and Klein's testimony conflicted with that of witnesses who work in Store 89, I have credited Deli Manager Seitz and the other employees of Store 89.

Department Managers have a variety of managerial responsibilities including "collaborating" with Store Managers to "determine hours and sales of their department," assigning job duties, writing schedules, helping with training, performing new-hire and annual reviews of associates, generally "monitoring" their departments, and recommending when an employee is "not working out." (Tr. 69.) There was generalized testimony that they administer the Employer's policies and procedures, including its code dating and temperature log policies

for deli food safety, disciplinary policies, non-solicitation policies, non-discrimination and harassment and other policies in the policies procedures manual. (Tr.62-63, 69, 70-71, 210.) . But the only record evidence as to how exactly deli managers “administer” these policies is that they can discipline associates for violating them, and they “sign off” on food safety and night crew sweep logs. (Tr. 62-63, 71, 218.) With regard to discipline for these failures, testimony was conflicting in terms of the deli manager’s independence or discretion. According to the witnesses from Associate Relations, deli managers do not need any management approval to suspend or discipline employees for policy violations (Tr. 62-63, 71), and Deli Manager Seitz corroborated that this was true in the other store where she had worked. (Tr. 217-18). However, Seitz testified that the Store Manager of Store 89 instructed department managers in a huddle they must involve the Human Resources Assistant Manager in any write ups they issue. (Tr. 216-17.) Deli managers also cannot make any personnel decisions (raises, promotions, terminations) without involving store management—or even Human Resources or Labor Relations in some cases—before decisions are made. (Tr. 53-54.) Many disciplinary decisions are also run by Labor Relations before they are finalized. (Tr. 55.) Seitz has never fired, promoted, or demoted anyone. (Tr. 191.)

Deli Managers are distinguishable from other deli associates in that they wear black aprons or vests and name tags that indicate their “manager” title. (Tr. 37, 78, 232.) They also participate in management meetings, at which store management reviews sales and results, plans as a team for “holiday implementation and sales,” celebrates successes, and discusses personnel situations and hours. (Tr. 69-70.) Afterwards, department managers are expected to share information with their respective departments in their “huddles.” (Tr. 70, 232.) However, witnesses did not elaborate on what “holiday implementation and sales” planning involves or means, let alone what role department managers play in formulating or executing these or other strategic plans.

The evidence suggests that the Deli Manager has an active role in scheduling employees for their shifts insofar as she pulls up the available shifts on the computer, oversees employees bids for shifts and schedule changes, and then writes the schedule. (Tr. 69, 73-74, 190-91.) But as far as larger questions of staffing and hours are concerned, the testimony suggests that either Store Manager Lisa Evans or the Assistant Store Manager, determines the “department needs,” decides who is approved for training shifts to prepare for promotion, and reviews the final schedule. (Tr. 73-74, 192-93, 218, 252-54.) And although there was testimony that department managers “collaborate” with store management to determine hours and sales of their departments (Tr. 69), the record did not describe the role, input, or discretion of department managers in that collaboration.

Deli Managers purportedly haven an “impact” on hiring (Tr. 70), but the testimony did not elaborate what that impact is in any detail, or whether the deli managers have any influence in determining overall staffing needs for their department. Deli managers are supposed to perform performance excellence discussions (PEDs) which are a form of employee reviews. (Tr.69, 79, 193-94, 216.) However, there was no testimony regarding the impact, if any, of these reviews on discipline, promotion, awards, or other employment actions.

b. *Legal Standard for Managerial Status*

Although the Act does not specifically address “managerial employees,” they have long been excluded from the Act’s protection as a matter of Board policy, affirmed by the Supreme Court. See *NLRB v. Yeshiva University*, 444 U.S. 672 (1980); *Ford Motor Co.*, 66 NLRB 1317, 1322 (1946); *Palace Laundry Dry Cleaning Corp.*, 75 NLRB 320, 323 fn. 4 (1948). “Managerial employees” are defined as employees who formulate and effectuate high-level employer policies or “who have discretion in the performance of their jobs independent of their employer’s established policy.” *Republican Co.*, 361 NLRB No.15, slip op. at 3 (2014) (quoting *General Dynamics Corp.*, 213 NLRB 851, 857 (1974) (editorial page editor was a managerial employee because of his role formulating editorial policies, controlling contents of the editorial page, and assigning editorial pieces to writers). These decisions must be made on behalf of the employer. *Allstate Insurance Co.*, 332 NLRB 759, 762 (2000). The Board has stated that an employee does not acquire managerial status by merely making some decisions or exercising some judgment “within established limits set by higher management.” *Holly Sugar Corp.*, 193 NLRB 1024, 1026 (1971). Rather, managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. *NLRB v. Yeshiva*, 444 U.S. at 682.

c. *Recommendation*

I do not believe the Employer has met its burden of demonstrating that Deli Manager Tiffany Seitz is a managerial employee within the meaning of the Act. The testimony regarding Seitz’ responsibilities with regard to administering deli food safety policies and the employer’s Policies and Procedures Manual does not reveal that she is in any way responsible for formulating or changing those policies, or that she has discretion to deviate from those policies on the employer’s behalf. Although Associate Relations Manger Woodward testified in conclusory terms that Seitz “collaborates” with store management with regard to determining “hours and sales” of the department, he offered no detail as to the types of operational decisions that entails, what independent input or role the Deli Manger has, or the scope of discretion she has in implementing, altering, or deviating from hours and sales decisions in her oversight of the deli. Further, Woodward’s testimony that she is responsible for “monitoring” her department provided no detail with respect to the scope of her authority or the types of matters in which she is allowed to exercise her own judgment in running the deli or ensuring food safety as opposed to simply following the employer’s guidelines. This does not demonstrate the independence required to find that she is a managerial employee. See *Rockspring Development, Inc.*, 353 NLRB 1041 (2009) (safety coordinator was not a managerial employee where he did not formulate safety policies or exercise discretion outside the policies, but only devised tactics and gave safety talks to achieve those goals).

Furthermore, there was no testimony regarding whether deli managers have any role in establishing or changing staffing, disciplinary, or other policies in their department. To the contrary, the evidence consistently suggested that any discretion Seitz exercised, from issuing write-ups for log violations to staffing the night shift and hot bar, was within limits set by Store Management, and subject to their final approval. Nor does the fact that Seitz trains or instructs

other employees, by itself, establish managerial status, as she does not exercise sufficient independent discretion or judgment in carrying out these duties. *Wolf Creek Nuclear Operating Corp.*, 364 NLRB No. 111, slip op. at 3 (2016). In this regard, Seitz testified that she trains associates to prepare them for promotion, but only those associates designated by Store Management. And the record does not reveal what role, if any, Seitz has in developing training protocols or materials.

In light of all of the foregoing, I recommend finding that the Employer has failed to meet its burden in proving that Deli Manager Seitz is a managerial employee within the meaning of the Act.

2. Seitz' Status as Petitioner's Agent

a. *Evidence Regarding Ms. Seitz' Agency Status*

The Employer proffered scant evidence in support of its assertion that Deli Manager Seitz was acting as an agent of the Petitioner when she made particular comments to voters during polling. It is uncontested that Deli Manager Seitz was the Petitioner's observer. (Tr. 31, 35-36, 57.) It is likewise uncontested that she was promised compensation by the Petitioner at her normal hourly rate of \$20.73 for the day that she was subpoenaed by the Petitioner to testify at the pre-election hearing and for the day that she served as Petitioner's observer. (Tr. 166-68, 174, 204, 222; EX1, EX2.) But the W-4 forms signed by Seitz for those payments are titled "TIME LOSS REIMBURSEMENT FORM" and include handwritten notations for "King Soopers NLRB Hearing" and for the "KS Vote Deli 5-11-18." (EX1(a), EX2(a).) Moreover, these forms contain an explicit disclaimer that "**Local #7's reimbursement of your lost wages does not create an employment relationship between you and Local #7...**" (EX1(a), EX 2(a).) (italics, bold, and underline in original) There is evidence that at least some employees were aware of some of this compensation to Seitz, as she admitted that she "probably" told people, and two employees testified that they were aware that she was paid as an observer. (Tr. 204, 208, 239, 250.) However, the record is vague as to how many employees knew about which payments, or when they found out, except that Employee Stephanie Sullivan found out after the election. (Tr. 241.)

The Employer also asserts, without citing record support, that Seitz was the Petitioner's "primary contact" and that her co-workers viewed her as such. (ER Br.18.) To the contrary, the only record testimony regarding that issue reveals that when asked by Employer's counsel if Seitz was the Petitioner's "main contact," Organizer Randy Tiffey responded that she was not, and further stated that he did not have any strategy discussions with her during organizing. (Tr. 166.) I credit these denials, as there is no evidence to the contrary, and Tiffey offered this testimony in a straightforward and candid manner. The record evidence did reveal that Seitz was a supporter of the Petitioner and that she shared that with other employees, by text message and in person before the election. (Tr. 200-01, 209-10, 220.) However, there is no record evidence that employees sought her out when they had questions for the Petitioner. The record support cited by the Employer in its brief does not indicate that Seitz was asked about her prior union experiences when she shared them with other employees. (Tr. 220.) Rather, employees Morgan

Neely, Stephanie Segura, and Stephanie Sullivan all testified that they met with Chris Lopez and Randy Tiffey to ask their questions. (Tr. 225-27, 264-65, 267-68.)

b. *Legal Standard for Agency Status*

The agency relationship must be established with regard to the specific conduct that is alleged to be unlawful. *Cornell Forge Co.*, 339 NLRB 733, 733 (2003) (citing *Pan-Oston Co.*, 336 NLRB 305, 306 (2001)). An individual can be a party's agent if the individual has either actual or apparent authority to act on behalf of the party. *Cornell Forge*, 339 NLRB at 733.

The Board applies the common law principles of agency in determining whether an alleged agent is acting with apparent authority on behalf of a party when the alleged agent makes a particular statement or takes a particular action. See *Pan-Oston*, 336 NLRB at 305 (collecting cases and other supporting authority). In this regard, the Board has stated:

Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question. [Citation omitted]. Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such as belief. [Citations omitted].

The Board applies the common law principles of agency in determining whether an alleged agent is acting with apparent authority on behalf of a party when the alleged agent makes a particular statement or takes a particular action. *Pan-Oston*, 336 NLRB at 305 (collecting cases and other supporting authority). Furthermore, with respect to a principal's liability for specific actions of its agent, the Board has stated:

A principal is responsible for its agents' conduct if such action is done in furtherance of the principal's interest and is within the general scope of authority attributed to the agent . . . it is enough if the principal empowered the agent to represent the principal within the general area in which the agent has acted. *Bio-Medical Applications of Puerto Rico, Inc.*, 269 NLRB 827, 828 (1984).

a. *Recommendation*

The Employer has failed to meet its burden of proving that Tiffany Seitz an agent of the Petitioner. The record evidence that the Petitioner compensated Seitz on two discreet occasions for her "time loss" to participate in Board processes is insufficient to prove an ongoing employment or agency relationship extending to conduct of the organizing campaign. There is no evidence that Seitz was an employee of the Petitioner at any point, nor would she reasonably have understood herself to be, given the bold disclaimers in the W-4s she signed. And there was no evidence that the Petitioner designated or identified Seitz as having authority to act or speak on their behalf throughout the campaign, or in any specific situations, other than to appoint her as an election observer. An observer is deemed by the Board to be an agent of a union only with respect to their conduct monitoring the election. *Brinks, Inc.*, 331 NLRB 46, 46 (2000). And

the Board has declined to hold that an individual is a general agent merely by virtue of acting as its observer or supporting the union. *DEO Enterprises, Inc.*, 309 NLRB 578, 578 n.5 (1992); see also *NLRB v. Downtown Bid Services Corp.*, 682 F.3d 109, 115 (2012) (upholding the Board's determination that a union had not cloaked an employee with apparent or actual authority to engage in misconduct by designating them as an observer). Finally, the Employer cites no authority, and I am aware of none, holding that an individual becomes an agent of a party by virtue of providing testimony as their witness in a legal proceeding.

Further, the record contains no evidence that the Petitioner held Deli Manager Seitz out to employees as its spokesperson or "employee contact" during organizing, or that employees perceived her in that light. The Employer likewise offered no evidence of action by the Petitioner that would give deli employees reason to believe that she was acting on their, except in her capacity as its observer. Even assuming *arguendo* that employees perceived Seitz as a strong supporter of the Petitioner or a leader in organizing, general union agency will not be established on the basis of an employee's status as a strong or leading union supporter. *United Builders Supply Co., Inc.*, 287 NLRB 1364, 1365 (1988); see also *Mastec N. Am., Inc.*, 356 NLRB 809, 809 (2011) ("employee members of an in-plant organizing committee are not, per se, agents of the union" and "the Board 'will not lightly find an employee 'in-plant organizer' to be a general agent of the union.'") (quoting *S. Lichtenberg & Co.*, 296 NLRB 1302, 1314 (1989)).

Because I have determined that Deli Manager Seitz was not a general agent of the Petitioner, or a specific agent with regard to the organizing campaign, I will apply the standard for alleged third-party misconduct for any objections involving her conduct. See *Westwood Horizon*, 270 NLRB 802, 803 (1984) (third-party and employee misconduct warrants setting aside an election only if it is "so aggravated as to create a general atmosphere of fear and reprisal rendering a free and fair election impossible.")

VI. THE EMPLOYER'S OBJECTIONS AND MY RECOMMENDATIONS

The order directing a hearing in this matter instructs me to resolve the credibility of witnesses testifying at the hearing and to make findings of fact. Unless otherwise specified, my summary of the record evidence is a composite of the testimony of all witnesses, including in particular testimony by witnesses that is consistent with one another, with documentary evidence, or with undisputed evidence, as well as testimony that is uncontested. Omitted testimony or evidence is either irrelevant or cumulative. Credibility resolutions are based on my observations of the testimony and demeanor of witnesses and are more fully discussed within the context of the objection related to the witnesses' testimony.

Objection 1: The Petitioner Engaged in Unlawful Electioneering and Trespass on the Employer's Property on About May 9.

Record Evidence

Background relevant to this objection includes the fact that the Petitioner's already represents the Employer's Meat and Seafood Department employees at Store 89, and has a collective-bargaining agreement contains terms allowing "Union Representative Visitation" at

the store. (Tr. 99-100; EX4 (p.45).) The language of the visitation clause limits visitation rights to the Petitioner's CEO, Deputy Secretary, and Business Representative, and then only for limited purposes related to contract administration. (Id.) But Petitioner's Organizing Director Randy Tiffey testified without contradiction that he has visited 15-20 of the Employer's other locations where he has previously engaged in organizing efforts and has never been told he was trespassing or shouldn't be there. (Tr. 175.) Manager Woodward confirmed that the Employer does not always object or claim trespass when Petitioner's Directors not named in the CBA visit their stores, unless the visits negatively impact customer service or productivity. (Tr. 117.) The parties' practice is that the Petitioner's representative "check in" with on-site management, and then let employees know they are there so they can conduct business on employees' breaks or lunches. (Tr. 129-30, 184, 96, 100.)

The record has established that on the morning of about May 8 or 9, just a few days before the election, Petitioner's Organizers Randy Tiffey and Chris Lopez arrived at the Employer's store to talk to employees. They checked in first at the service desk, then encountered Associate Relations Manager Fred Woodward who was there speaking with employees about the union campaign. (Tr. 94, 96, 127-30.) Neither side testified that Woodward asked them to leave that morning. (Tr. 94-96, 127-29.)

However, at Woodward's instruction (Tr. 95), Store Manager Lisa Evans told Tiffey and Lopez that they either had to go to the break room or go outside to the smokers' area once they had walked around to let employees know they were there. (Tr. 95, 130-31.) Tiffey said he disagreed that the CBA's visitation language was interpreted that way, said as much to Evans, and did not go to either break area. (Tr. 97.) I credit Tiffey's unchallenged testimony that Store Manager Evans never told them they needed to leave the property or asserted that they were trespassing. (Tr. 131.)

Tiffey and Lopez spoke with one deli employee on her break in the deli seating area to answer questions she had about dues. (Tr. 94, 113, 124-25, 148-50, 186-87.) Manger Woodward saw this interaction, but could not hear what they were talking about. (Tr. 114-15.) Tiffey and Lopez went to the break room at some point, but there were no deli employees there, so they talked with at least one meat employee in the deli/meat area, and were present on other areas of the sales floor that day. (Tr. 94, 124-26, 131, 185-86.) They left the store for lunch and to speak with other deli employees on their breaks at a nearby Starbucks and came back a few different times. (Tr. 124, 126, 131, 160-61, 187, 225-29, 264-65.)

Later that evening, around 5:30-6:30, Woodward noticed Tiffey and Lopez near the deli again, and so he and HR Manager Margie Marone approached them. (Tr. 95-98, 131-32.) Woodward acknowledged he first waited and "gave them a few minutes to talk to people" and let employees know they would be at the smokers' table or the break room to conduct business, and then approached Tiffey and Lopez only after they continued to walk the sales floor for another 15-20 minutes. (Tr. 95-96.) Woodward first confirmed with Tiffey that Store Manager Evans had talked with them about going to the break room or outside. And Tiffey responded that he believed Evans was misinterpreting the visitation language of the CBA. (Tr. 96-97, 131-32.) So then Woodward asked Tiffey and Lopez to go "outside" or go to the break room. Tiffey responded that Woodward was also misinterpreting the visitation language of the CBA, and that

he (Tiffany) would need to talk to his boss to decide what to do. (Tr. 96, 131-32.) Woodward walked away while Tiffany tried to call his boss without success. (Tr. 97, 132-33.) Woodward approached again, and insisted that Tiffany and Lopez leave. (Tr. 97, 132-33.) Tiffany again challenged Woodward's interpretation of the CBA, and said he was awaiting instructions from his boss. But Woodward gave an ultimatum that if they didn't leave he would have to "notify the proper authorities to remove them." Tiffany said that Woodward should do what he had to do and that the police could decide when they got there. (Tr. 95, 97, 104, 132-34.) Tiffany and Lopez waited around for another 15-20 minutes, during which time Woodward called the police. (Tr. 98, 134-35.)

Tiffany and Lopez left before the police arrived, so Woodward the police department again to tell them that they no longer needed to dispatch anyone. (Tr. 98, 134.) It is undisputed that throughout these encounters, although the situation became more tense, the parties were trying to be discreet, the conversations remained calm, and the Petitioners representatives never raised their voices, cursed, or became physical. (115-17, 128, 133-34.) Further, although these encounters occurred near, or "in the line of sight" of the deli, there is no evidence that voters actually saw or overheard these exchanges. (Tr. 97-98, 115-16.)

Board Law and Recommendation

The Employer has failed to meet its burden of showing that its managers' encounters with the Petitioner on May 8 or 9 were coercive in nature, affected any eligible voters, or would have otherwise interfered with employees' free and uncoerced choice in the election. Even granting that the Petitioner's representatives may have exceeded the terms of the parties' visitation agreement, the facts as I credit them showed that the Employer did not object to Tiffany and Lopez being on the premises when they arrived, and did not ask them to leave until hours later. Leading up to that, both Store Manager Evans and Associate Relations Manager Woodward just asked the Petitioner's representatives to conduct any business they had in the break room or "outside" or at the smokers' table, a condition on visitation that does not appear in the parties' agreement.

Once the Employer demanded that Tiffany and Lopez leave the premises, the Petitioner's organizers did so, albeit after lodging their disagreement as the employer's interpretation of their visitation rights. They did so without engaging in any loud, disrespectful, or disruptive behavior, and before the police arrived. I find that this trespass was not inherently coercive or objectionable conduct and would not warrant setting aside the election. *See Genesis Health Ventures of WV*, 326 NLRB 1208 (1998) (no objectionable conduct where the trespassing union organizer left a few minutes after being asked, but before the police arrived, and her conduct involved no assault, threats, or coercive statements). Indeed, the conduct in the present case would have even less tendency to intimidate voters than in *Genesis* because there is no evidence that a single employee actually overheard Woodward's and Evans' conversations with Tiffany, heard that the Petitioner had been asked to leave, or knew that the police had been called. *Compare id.* at 1213-14 (trespassing organizer was asked to leave in front of a mandatory staff meeting of employees, sparking an argument among voters about whether she had the right to be there). Thus, the Petitioner's conduct in this case similarly "cannot reasonably be found to have caused fear among employees." *Id.* at 1214.

The conduct at issue here is also distinguishable in several important respects from *Phillips Chrysler Plymouth, Inc.*, the case relied upon by the Employer. See 304 NLRB 16 (1991). First, in *Phillips Chrysler* the union organizer got into a “shouting match” with the Employer that “continued on for some time,” with organizers “belligerently” refusing to leave even after police were called. *Id.* at 16. That confrontation would have a greater impact on employees than the Petitioner’s disagreement with Woodward, which was undisputedly in calm and discreet tones, and ended with the organizers leaving before the police arrived. Further, the incident in *Phillips Chrysler* occurred on the day of the election, when impact of any such trespass would be greater than here, where the incident occurred two or three days before polling. *Id.* Thus, I do not find that Tiffey and Lopez’ conduct was similarly objectionable.

The Employer has likewise failed to meet its burden of showing that the Petitioner engaged in any coercive and objectionable conversations with eligible voters, on or off the Employer’s premises, in the days leading up to the election. The uncontroverted testimony shows that two or three days before the election, the Petitioner met with employees on their breaks, one in the deli seating area and the others at a nearby Starbucks, to answer employees’ questions about what their dues pay for and what benefits the Petitioner would try to negotiate. There is no indication that these meetings were other than voluntary, and the record is completely devoid of any threats or unlawful promises by the Petitioner. I find these conversations to be lawful and unobjectionable electioneering. For the foregoing reasons, I overrule Objection 1.

Objection 2: The Petitioner Selected, as Its Election Observer, An Individual Who Was a Statutory Manager or Was Closely Aligned With Management

Record Evidence

The evidence is undisputed that the Petitioner selected Deli Manager and eligible voter Tiffany Seitz as its observer and that at the pre-election conference, the Employer’s attorney objected to her selection on the basis that she was a manager, or was closely aligned with management. (Tr. 33-34, 60-61, 140-42.) I have determined that Seitz was not a managerial employee, and the parties stipulated that she is not a statutory supervisor under Section 2(11) of the Act, a stipulation that, as explained above, I will not disturb based on the record before me. Nevertheless, the Employer contends that she was ineligible because she could reasonably be viewed as aligned with management by employees.

Board Law and Recommendation

The Employer has not met its burden of showing that the Petitioner was represented by an objectionable observer. The Board decided that a union may not designate a statutory supervisor as its observer in *Family Service Agency*, 331 NLRB 850 (2000), overruling decades of precedent under *Plant City Welding & Tank Co.*, 119 NLRB 131 (1957), which allowed unions to select statutory supervisors as election observers, while barring employers from doing the same. In *Family Service Agency*, the Board announced as “better practice” a new rule prohibiting “statutory supervisors” from serving as observers for any party on the grounds that it

was consistent with the general practice of barring agents of both parties from the polling area. *Family Service Agency*. at 850-51.

Nevertheless, Employer asserts that Seitz could “reasonably be viewed by the employees as closely identified with management” and that therefore her service as an observer “interfered with the laboratory conditions” of a Board election such that it must be set aside. *Sunward Materials*, 304 NLRB 780 (1991). The Employer mistakenly cites this case (ER Br.14) for the proposition that “any party” may not select an individual closely identified with management as an observer. However, the specific holding of that case is narrower, finding that non-supervisory “persons closely identified with management may not act as *employer* observers.” *Id.* at 781 (citing *Peabody Engineering Co.*, 95 NLRB 952, 953 (1951)) (emphasis added); *see also Mid-Continent Spring Co.*, 273 NLRB 884, (1984) (election set aside when the employer selected a non-supervisory employee who was “closely identified with management” as their observer). The Board has never applied the holding of these cases to a union’s selection of observers. Accordingly, no Board case has yet found a union’s choice of a non-supervisory employee—let alone a member of the proposed bargaining unit—warranted setting aside an election, based on the fact that they were “closely aligned with management.” In the absence of Board precedent, I decline to extend the holding of *Family Service Agency* to this circumstance. Seitz is undisputedly not a statutory supervisor, and I have not found her to be a management employee or agent of either party. Accordingly, her service as the Petitioner’s observer was not objectionable and does not warrant setting aside the election. Therefore, I overrule Objection 2 because it is not substantiated.

Objection 3: The Petitioner’s Observer Engaged in Coercive Conversations With Voters at the Polls³

Record Evidence

The record evidence established that early in the afternoon voting session on May 11, 2018, employees Stephanie Segura and Morgan Neely came to vote together. (Tr. 38-39, 202.) After both voters had cast their ballots, but before they left the room, Seitz said “I really want this for you guys” or something very close to that.⁴ (Tr. 39-40, 58-59, 202-03, 261-63, 268.)

³ The Employer’s original objection raised only Seitz’ alleged statements to the effect of “I really want this,” but I will consider the other conversations that Seitz had with voters at the polls, which the Employer now asserts are likewise objectionable, as I believe they are “reasonably encompassed within the scope of the objections that the Regional Director set for hearing.” *Precision Products Grp.*, 319 NLRB 640, 641 (1995). However, I will not consider her text messages or other pre-election pro-union comments which are unrelated to any timely-filed objection, as the Employer has failed to show that they are “newly discovered but also previously unavailable.” *Rhone-Poulenc, Inc.*, 271 NLRB 1008, 1008 (1984). But even assuming the text message (Tr. 200-01, 209-10, 215-16) could be reasonably encompassed in this objection, I would not find that they were objectionable insofar as they contained no threats or other coercive statements that would impact the election, let alone create an “atmosphere of fear and reprisal.” *Westwood Horizon*, 270 NLRB at 803. And there was no specific testimony about any other pre-election exchanges between Seitz and other employees.

⁴ The only inconsistency in the witness testimony with regard to this situation was that Employer’s Observer Stephani Klein recalled Seitz saying just “I really want this” and Employee Segura agreed that it was “something to that effect.” Employee Neely could not recall detail, only that Seitz was “expressing her excitement.” (Tr. 260.)

The Board Agent immediately stopped the conversation and asked the two voters to leave. (Tr. 39, 203, 213.) Seitz did not otherwise converse with these two voters. (Tr. 60, 261-62.) At that point in the election, as many as four voters had not yet cast their ballots. (Tr. 40.) But no other eligible voters were present at the time of Seitz' remark, and none came in for half an hour. (Tr. 203-04.)

Also during the second session, one of the last voters hurried into the polling location and upon entering addressed Seitz by saying, "I'm sorry I'm late." Seitz responded, "It's okay." (Tr. 40, 42-43, 60, 201-02.) At that time, there was still an hour or more until the polls closed. (Tr. 40, 214.) Seitz admitted that she had asked the employee previously if she was going to come vote. (Tr. 215.) Seitz testified that she did not know why the voter apologized at that time, but testified to her experience that this individual "constantly apologizes for everything." (Tr. 201-02.)

The only other conversations that Seitz is alleged to have had during the polling time was a conversation with an employee who offered to pick up her son (Tr. 38, 244-45) and some small talk about work with employees when they came in to vote, including asking if certain people were scheduled, or talking with employees who volunteered information about what they had done that day (Tr. 37).

Board Law and Recommendation

The Employer has failed to show that Deli Manager/Observer Seitz engaged in coercive conversations with voters that could have affected the outcome of the election. As I have found that Ms. Seitz' is not an agent of the Petitioner, her conduct as an employee will only be grounds for overturning an election if it creates a general atmosphere of fear and reprisal rendering a free and fair election impossible. *Westwood Horizon*, 270 NLRB 802, 803 (1984). None of the above comments meets this standard. The Employer has not alleged a single threatening statement, nor have they alleged any conduct by Ms. Seitz that would reasonably be construed by employees as threatening. Rather, Seitz is alleged to have expressed enthusiasm, to only two employees, about the prospect of the Petitioner winning the vote, and reassured a third employee who apologized for being late that she was "okay." I do not find that either comment is coercive in any regard, let alone severe enough to create a general atmosphere of fear and reprisal.

But even assuming, without finding, that Deli Manager Seitz was speaking as an agent of the Petitioner during her time as its observer, or would reasonably be perceived by the voters as such, the Employer has not met its burden of proving that she engaged in any conversations or conduct that "reasonably tended to interfere with employees' free and uncoerced choice in the election." *Baja's Place, Inc.* 268 NLRB 868 (1984).

Seitz comment to employees Segura and Neely about how she "wanted this for you guys" was undisputedly made after their votes had been cast, and with no other eligible voters present. Thus, this comment cannot violate the Board's prohibition against parties electioneering or

The difference is negligible, as the testimony is mutually corroborative in important respects. But I have credited Seitz, the speaker, as she appeared to me candid in admitting her statement, and certain about what she had said.

conversing with employees waiting to cast ballots. *See e.g. NLRB v. WFMT*, 997 F.2d 269, 275 (1993) (objection overruled where observer's comment was directed to someone "not waiting to cast her ballot," the Board Agent immediately cautioned the observer, and no evidence that eligible voters who had not voted overheard the comment); compare *Milchem, Inc.*, 170 NLRB 362, 362-63 (1968) (prohibiting "conversations between a party and voters while the latter are in a polling area *awaiting to vote*") (emphasis added). The Employer urges that it would be "reasonable that this comment had a coercive impact on the remaining employees." However the record does not demonstrate that any employees who had yet to vote overheard this comment, or heard it secondhand. I cannot presume, in the absence of any evidence, that this remark was disseminated to the remaining voters. The burden was on the Employer to establish this fact. Accordingly, I do not believe the evidence has established that this remark had any effect on the outcome of the election.

The second interaction, when a voter apologized to Seitz for an unknown reason and Seitz said, "It's okay," does not establish that Seitz engaged in objectionable conversations at the polls. The voter who made the apology did not take the stand to explain her remarks, given that she was certainly not "late" to vote, and Seitz testified that she did not know why the voter was apologizing. I cannot now speculate as to the content or coercive nature of any prior exchanges that may have prompted this apology that were not on the record. But it is clear from the record that Seitz neither initiated this exchange, nor did she respond with any comments that contained express or implied threats. In this context, I find that "It's okay" was a pleasantry that did not carry any meaning obviously relevant to an election.

I find it to be of no significance that another employee volunteered to pick up Ms. Seitz' son and babysit him. Whether employees have a personal relationship or do personal favors for one another outside of work has no bearing on the election, and the Employer has cited no case standing for the proposition that it does. Other than that, the testimony shows that Seitz engaged in small talk about work that was described by the Employer's observer with no great detail. But the evidence does not show that these exchanges involved comments that could be construed as electioneering or were otherwise coercive and threatening. Therefore, I do not believe this evidence established that Seitz engaged in coercive conversations with voters at the polls. Therefore, I overrule Objection 3 in its entirety.

Objection 4: The Petitioner Gave Observer an Expectation of Payment for Her Vote

Record Evidence

The record evidence established that the Petitioner offered Seitz two payments. The first equaled 8 ½ hours at her normal hourly pay rate of \$20.73 for a day spent participating in the pre-election hearing as a witness on March 12, 2018. (EX1(a); 168-70, 174, 208.) This totaled \$150.14. (EX1(b).)

The second payment was for 8 hours at her hourly rate of pay for the day Seitz spent as an observer on the Petitioner's behalf on May 11, 2018. (EX2(a); Tr. 142, 166-68, 204, 221-22.) This totaled \$138.06. (EX2(b).) That day, there were two election periods of 2 hours each, plus

a pre-election conference starting no earlier than 6:30am, an hour before the polls opened. (Tr. 32, 57.) Seitz did not receive this second payment because it was erroneously sent to the wrong address. (Tr. 173, 181, 204, 208.)

There was no testimony regarding whether Seitz was actually scheduled to work on either March 12, 2018 or May 11, 2018, only that she is not “usually” there on Fridays (May 11, 2018 fell on a Friday). (Tr. 245.) But the Employer’s witness testified that as a “full-time” employee, Seitz is “guaranteed” 40 hours, whether she is there or not. (Tr. 77-78.) It is the Petitioner’s policy to compensate observers at their hourly rate for their lost time, or for giving up their time to serve as observers. (Tr. 142.) Although Petitioner once compensated time spent at hearings by paying a witness fee and mileage, they now pay that time at an hourly rate. (Tr. 168-69, 174.)

As noted above, at least some employees were aware of some of this compensation to Seitz, as she admitted that she “probably” told people, and two employees testified that they were aware that she was paid as an observer. (Tr. 204, 208, 239, 250.) Employee Stephanie Sullivan heard about Seitz payments for observing, but only after the election. (Tr. 241.) The record does not disclose who else knew, which payments they knew about, or when they found out.

Board Law and Recommendation

The Employer has not met its burden of showing that Seitz received objectionable payments or promise of payment, or that any such conduct would warrants setting aside the election under these circumstances.

The Employer asserts that the payment to Seitz reflected on the May 11, 2018 W-4 was a blatant bribe for her vote. (ER Br. 22.) The evidence, as I credit it, does not support a finding that this payment was intended as a bribe for her vote, or that she understood it that way.⁵ I find that she was compensated for her time and effort serving as an election observer, and that she understood the payment as such. The Board has found that unions may compensate observers for their service, so “no implication of impropriety arises from the fact of payment alone.” *Easco Tools*, 248 NLRB 700, 700 (1980). Such compensation is objectionable only when employees are promised or receive payments that are “grossly disproportionate to the employees’ usual pay rate or to what the union could reasonably consider was the value of their...work as observers.” *Quick Shop Markets, Inc.*, 200 NLRB 830, 831 (1972) (no new election because payments to observers worth twice their usual pay were not “grossly disproportionate”). Payments to employees subpoenaed in Board proceedings are similarly proper, and are judged objectionable only when the circumstances show they are likely to influence the election. *Commercial Letter Inc.*, 200 NLRB 534 (1972) (finding payments for “lost time” at subpoenaed

⁵ Contrary to the Employer, I find that Seitz hesitant “I guess, yes” to a compound question about whether she was “paid to come and testify” and “paid to vote” (Tr. 208) is hardly acknowledgement of receiving a bribe, especially in light of consistent and more specific testimony, which I credit, that she was paid for the time she was spending as an observer. (EX2(a); Tr. 178-79, 204, 222.) Counsel’s attempts to characterize the W-4 as an admission by the Union that she was paid for her vote, and not for the time she spent observing at “the vote” are similarly unpersuasive.

employees' hourly rate to appear at the hearing, in lieu of the normal mileage and witness fees, were not objectionable, even when checks were received on the eve of the election).

The Board has not articulated a bright-line standard for when payments to employees are considered "grossly disproportionate." But the Board has found that payments to an observer allowing them to essentially double-dip with regular wages or take paid leave, can be considered improper. *Easco Tools*, 248 NLRB at 700-01 (payments amounting to a full day off for 1 ½ hours of work, regardless of whether observers went back to work, and essentially got paid double, or took the rest of the day off paid, were grossly disproportionate). Payments equaling several times the employees normal rate of pay are also objectionable. *S&C Security*, 271 NLRB 1300, 1301(1984) (employee paid \$50 for 2 hours of observing when his hourly rate was only \$6.48). The fact that Seitz did not actually receive this payment is immaterial, as the Board has found that payments reasonably anticipated by observers can taint an election. *Id.* at 1301(1984). But it is also immaterial whether Seitz was scheduled to work on the day of the election or the hearing, since such payments are not simply meant to replace lost wages, but can compensate for the reasonable value of her time and work as an observer, even including travel time. See e.g. *Quick Shop Markets*, 200 NLRB at 831 (employees can be compensated for "reasonable value of their...work as observers"); *Aurora Steel Prod.*, 240 NLRB 46, 46 n.3 (1979) (payments amounting to twice the employees normal pay for 4 hours away from work was proper, considering "the fact that the employee would also have to be compensated for his travel time").

Under current Board cases, I do not find that the Petitioner's payment to Seitz amounting to 8.5 hours at her normal rate of pay was either intended to, or would have, impaired her free choice in the election. The Petitioner made explicit on its W-4 form that the payment was for her "time loss," at a pre-election hearing where she was subpoenaed to testify almost two months before the election, and Seitz' testimony demonstrated that she understood it as such. I do not find that this payment was improper. Nor do I find that the promise of a payment for 8 hours at Seitz normal wage rate was improper compensation for being an observer for the combined 5 hours of pre-election conference and polling. Notably, in this case, there were two sessions, which spanned 13-hours in one day, and which would have required travel to and from the polling location twice. I do not find that compensating her for one full day of her time, effort, and travel is grossly disproportionate. See e.g. *In re United Cerebral Palsy of NYC, Inc.*, 2001 WL 1736673 (2001) (payment of \$50 for 2½ hours observing was not excessive where the employee normally earned \$9-10 but would have to travel an hour each way to the polling site).

But even assuming *arguendo*, that these payments were improper, this activity affected at most one vote in an election where the Petitioner won by a margin of 10 to 2. Thus, these payments could not have affected the results of the election. See *JRTS Ltd., Inc.*, 325 NLRB 970, 970 n.1 (1998) (two observers could not have affected the election outcome). Compare *Easco Tools*, 248 NLRB at 701 (new election directed where the number of observers offered or receiving payments was sufficient in number to have affected the results of the election); *S&C Security*, 271 NLRB at 1301 (1984) (observer's vote could have affected the outcome of the election). Moreover, the Board will not order an election where, as here, there is no evidence that employees learned of the payments *before* casting their ballots. *JRTS Ltd* at 970 n.1.

Accordingly, I find that the Petitioner's payments to Seitz were not improper, and did not affect the outcome of the election. For all of the foregoing reasons, I overrule Objection 4.

Objection 6: The Petitioner Made Misrepresentations about the Benefits that Employees Would Obtain If They Voted

Record Evidence

The record establishes that at the pre-election hearing in this case, with some employees present, Petitioner's Treasurer Kevin Schneider testified that if employees voted to join the meat/seafood bargaining unit, they would be entitled to benefits as part of the Petitioner's Taft-Hartley funds. (Tr. 84, 105-06; EX3.) This hearing took place nearly two months before the election. (Tr. 107.) Schneider's statement was immediately challenged at the hearing by the Employer's counsel. (EX3.) And in the intervening two months prior to the election, the Employer issued written correction of Schneider's statements. (Tr. 107-08.)

The evidence further establishes that Petitioner's Organizer Randy Tiffey made and distributed a handout titled "COMPARISON OF KROGER CURRENT INSURANCE V. UNION CURRENT INSURANCE." (UX.1; Tr. 138-40.) He distributed this comparison to the employees with the explanation that "this is what we've been successful in negotiating with King Soopers in other locations." (Tr. 136-38, 151-52.) The one employee who recalled receiving this handout and discussing it with Tiffey was told that the Petitioner would have to bargain, so the benefits weren't promised. (Tr. 234-38.)

Board Law and Recommendation

The Board no longer regulates the content of election campaign misrepresentations by inquiring into the truth or falsity of parties' statements. *Midland Nat'l Life Ins. Co.*, 263 NLRB 127, 130 (1982). Instead, the Board will find campaign representations objectionable only when parties use "forged documents which render the voters unable to recognize propaganda for what it is." *Id.* at 133. By this standard, I do not find the Petitioner's insurance handout, or the Petitioner's comments in connection with that handout to be objectionable. Regardless of what inaccuracies it may have contained, or what impression the Petitioner may have conveyed when handing them out, the handout is what it purports to be, a campaign flier clearly marked with the logo and contact information of the Petitioner. (UX1.) The Petitioner made no effort to conceal its origin or make it appear to be a document from the Employer. Therefore, I find that it is clearly identifiable as campaign material from the Petitioner and not objectionable.

The Employer mistakenly relies (ER Br. 23.) on a different standard established by the 6th Circuit in *Van Dorn Plastic Mach. V. NLRB*, 736 F.2d 343, 348 (6th Cir. 1984), where that Court rejected the Board's *Midland* standard. The 6th Circuit standard relies on such factors as the timing of the misrepresentation, the lack of opportunity for the other party to respond, nature of the representations, whether the source of the misrepresentation was identified, and whether there is evidence that employees were affected. *See e.g., Mitchellace, Inc. v. NLRB*, 90 F.3d 1150, 1155 (6th Cir. 1996). The Board has applied this standard on occasion when cases arise in the 6th Circuit, but has otherwise continued to follow its own *Midland* rule. *See United Steel*

Service, 340 NLRB 199, 200 (2003) (case arose in the 6th Circuit); *see also St. Francis Healthcare Centre*, 336 NLRB 678 (2001) (applying *Van Dorn* as law of the case pursuant to a remand from the 6th Circuit). As this case arises in Colorado, and will only be enforced in either the 10th Circuit or D.C. Circuit Court of Appeal, I find that the *Midland* standard is the appropriate standard to apply. Therefore, I find that there has been no objectionable misrepresentation.

Further, a misstatement of the law, such as Petitioner's Treasurer Kevin Schneider is alleged to have made at the pre-election hearing, is likewise not objectionable conduct. *John W. Galbreath & Co.*, 288 NLRB 876 (1988) (objections challenging an employer's misstatements about the effect of being expelled from a union in a closed shop overruled). Moreover, if any employees were misled by the factual content of this statement, it was not because the Petitioner engaged in any fraudulent effort to conceal the source of the comments. Thus, I do not believe the Petitioner made any objectionable misrepresentations during the campaign. I therefore overrule Objection 6.

VII. CONCLUSION

Consistent with my findings above that the Employer's objections be overruled in their entirety, insofar as the Employer has failed to establish that its objections to the election held on May 11, 2018 reasonably tended to interfere with employee free choice. I recommend that an appropriate certification issue.

VIII. APPEAL PROCEDURE

Pursuant to Section 102.69(c)(1)(iii) of the Board's Rules and Regulations, any party may file exceptions to this Report, with a supporting brief if desired, with the Regional Director of Region 27 by July 9, 2018. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Exceptions may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the exceptions should be addressed to the Regional Director, National Labor Relations Board, [Regional address].

Pursuant to Sections 102.111 – 102.114 of the Board's Rules, exceptions and any supporting brief must be received by the Regional Director by close of business 5:00pm on the due date. If E-Filed, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date.

Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. An original and one copy shall be

King Soopers, Inc.
Case 27-RC-215705

submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Dated: June 26, 2018



MICHELLE DEVITT
Hearing Officer

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

KING SOOPERS, INC.

Employer

and

Case 27-RC-215705

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

Petitioner

AFFIDAVIT OF SERVICE OF HEARING OFFICER'S REPORT ON OBJECTIONS

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **June 26, 2018**, I served the above-entitled document(s) by **e-mail and fax** upon the following persons, addressed to them at the following addresses:

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June 26, 2018

Date

Scott D. Young,
Designated Agent of NLRB

Name

/s/ Scott D. Young

Signature

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

KING SOOPERS, INC.,

Case No. 27-RC-215705

Employer,

and

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 7

Union.

**KING SOOPERS' EXCEPTIONS TO
THE HEARING OFFICER'S REPORT**

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**EXHIBIT
C**

Pursuant to NLRB Rules and Regulations 102.69, King Soopers, Inc. (“King Soopers” or “Employer”), by and through its attorneys, Sherman & Howard L.L.C., submits the following exceptions to the Hearing Officer’s June 26, 2018 Report And Recommendations on Objections (“Report”) in the above-captioned matter overruling King Soopers’ objections to the conduct of the election.

1. Exception is taken to the finding, for which there is no support in the record and is not relevant to King Soopers objections, that “supervisory authority purportedly exercised by deli managers... was either conclusory, hypothetical, or lacking in the requisite specificity to determine that Seitz or other deli managers actually exercise these authorities with sufficient discretion or independent judgment to establish that they are supervisors within the meaning of Section 2(11) of the Act.” Report at 3-4.

2. Exception is taken to the finding, for which there is no support in the record, that “there was no specific evidence regarding what criteria or information [Seitz] relies upon, what level of discretion she exercises, or whether this task is essentially ‘routine or clerical in nature.’” Report at 4.

3. Exception is taken to the misstatement of King Soopers’ position, for which there is no support in the record, that “the Employer bases its objections on contentions that Seitz was a managerial employee within the meaning of the Act, or at least aligned with management.” Report at 4.

4. Exception is taken to the finding, characterization, and misstatement of King Soopers’ position, for which there is no support in the record, that the Hearing Officer “will first address the evidence as to Ms. Seitz managerial status under the Act in her employment capacity as Deli Manager.” Report at 4.

5. Exception is taken to the finding, for which there is no support in the record, that Seitz’s “testimony, which seemed to me forthright on this issue, was corroborated by the employee witnesses who worked in the deli department.” Report at 4.

6. Exception is taken to the finding, for which there is no support in the record, that “the only record evidence as to how exactly deli managers ‘administer’ these policies is that they can discipline associates for violating them, and they ‘sign off’ on food safety and night crew sweep logs.” Report at 5.

7. Exception is taken to the finding and characterization, for which there is no support in the record, that “Deli managers [] cannot make any personnel decisions (raises, promotions, terminations) without involving store management—or even Human Resources or Labor Relations in some cases—before decisions are made.” Report at 5.

8. Exception is taken to the finding, for which there is no support in the record, that “the record did not describe the role, input, or discretion of department managers in” collaborating with Store Management regarding hours and sales. Report at 5.

9. Exception is taken to the finding, for which there is no support in the record, that “Deli Managers purportedly haven (sic) an ‘impact’ on hiring [] but the testimony did not elaborate what that impact is in any detail, or whether the deli managers have any influence in determining overall staffing needs for their department.” Report at 5.

10. Exception is taken to the finding, analysis, recommendation, and misstatement of King Soopers’ position, for which there is no support in the record, that King Soopers addressed or argued that “Seitz is a managerial employee within the meaning of the Act.” Report at 6.

11. Exception is taken to the finding, analysis, recommendation, and misstatement of King Soopers’ position, for which there is no support in the record, that the Hearing Officer “recommend[s] finding that the Employer has failed to meet its burden in proving that Deli Manager Seitz is a managerial employee within the meaning of the Act.” Report at 7.

12. Exception is taken to the finding, for which there is no support in the record, that “these forms contain an explicit disclaimer that ‘Local #7’s reimbursement of your lost wages does not create an employment relationship between you and Local #7...’”. Report at 7.

13. Exception is taken to the finding, for which there is no support in the record and is contrary to governing law, that “there is no record evidence that employees sought her out when they had questions for the Petitioner.” Report at 7.

14. Exception is taken to the finding, characterization, and recommendation, for which there is no support in the record and is contrary to governing law, that “the Petitioner compensated Seitz on two discreet occasions for her ‘time loss’ to participate in Board processes is insufficient to prove an ongoing employment or agency relationship extending to conduct of the organizing campaign.” Report at 8.

15. Exception is taken to the finding and recommendation, for which there is no support in the record and is contrary to governing law, that “there is no evidence that Seitz was an employee of the Petitioner at any point, nor would she reasonably have understood herself to be, given the bold disclaimers in the W-4s she signed.” Report at 8.

16. Exception is taken to the finding and recommendation, for which there is no support in the record and is contrary to governing law, that “there was no evidence that the Petitioner designated or identified Seitz as having authority to act or speak on their behalf throughout the campaign, or in any specific situations, other than to appoint her as an election observer.” Report at 8.

17. Exception is taken to the finding and characterization, for which there is no support in the record and is contrary to governing law, that “[t]here is no evidence that Seitz was an employee of the Petitioner at any point, nor would she reasonably have understood herself to be, given the bold disclaimers in the W-4s she signed.” Report at 8.

18. Exception is taken to the finding, for which there is no support in the record and is contrary to governing law, that “there was no evidence that the Petitioner designated or identified Seitz as having authority to act or speak on their behalf throughout the campaign, or in any specific situations, other than to appoint her as an election observer.” Report at 8.

19. Exception is taken to the finding, for which there is no support in the record, that “[t]he Employer [] offered no evidence of action by the Petitioner that would give deli

employees reason to believe that she was acting on [the Union's behalf], except in her capacity as its observer." Report at 9.

20. Exception is taken to the finding, for which there is no support in the record, that "[t]he Employer has failed to meet its burden of showing that its managers' encounters with the Petitioner on May 8 or 9 were coercive in nature, affected any eligible voters, or would have otherwise interfered with employees' free and uncoerced choice in the election." Report at 11.

21. Exception is taken to the finding, for which there is no support in the record, that "Employer did not object to Tiffey and Lopez being on the premises when they arrived, and did not ask them to leave until hours later." Report at 11.

22. Exception is taken to the finding and characterization, for which there is no support in the record, that "[o]nce the Employer demanded that Tiffey and Lopez leave the premises, the Petitioner's organizers did so albeit after lodging their disagreement as the employer's interpretation of their visitation rights." Report at 11.

23. Exception is taken to the finding and characterization, for which there is no support in the record, "that this trespass was not inherently coercive or objectionable conduct and would not warrant setting aside the election." Report at 11.

24. Exception is taken to the finding, for which there is no support in the record and is contrary to governing law, that "the conduct in the present case would have even less tendency to intimidate voters than in *Genesis* because there is no evidence that a single employee actually overheard Woodward's and Evans' conversations with Tiffey, heard that the Petitioner had been asked to leave, or knew that the police had been called." Report at 11.

25. Exception is taken to the finding, for which there is no support in the record and is contrary to governing law, that "Tiffey and Lopez's conduct was [not] objectionable."

26. Exception is taken to the finding and recommendation, for which there is no support in the record and is contrary to governing law, that Board law allows for employees closely identified with management to serve as the Union's observer. Report at 13.

27. Exception is taken to the finding and recommendation, for which there is no support in the record and is contrary to governing law, that Seitz's service "as the Petitioner's observer was not objectionable and does not warrant setting aside the election." Report at 13.

28. Exception is taken to the finding and recommendation, for which there is no support in the record and is contrary to governing law, that the Hearing Officer "will not consider her text messages or other pre-election pro-union comments which are unrelated to any timely-filed objection, as the Employer has failed to show that they are "newly discovered but also previously unavailable." Report at 13, fn. 3.

29. Exception is taken to the finding and recommendation, for which there is no support in the record and is contrary to governing law, that the text messages from Seitz the night prior to the election "were [not] objectionable insofar as they contained no threats or other coercive statements that would impact the election." Report at 13, fn. 3.

30. Exception is taken to the finding, for which there is no support in the record, that "either comment is coercive in any regard, let alone severe enough to create a general atmosphere of fear and reprisal." Report at 14.

31. Exception is taken to the finding and characterization, for which there is no support in the record, that "Seitz[']s comment to employees Segura and Neely about how she 'wanted this for you guys' was undisputedly made after their votes had been cast, and with no other eligible voters present." Report at 14.

32. Exception is taken to the finding, for which there is no support in the record and is contrary to governing law, that "the record does not demonstrate that any employees who had yet to vote overheard this comment, or heard it secondhand.... I do not believe the evidence has established that this remark had any effect on the outcome of the election." Report at 15.

33. Exception is taken to the finding, for which there is no support in the record, that "[i]n this context, I find that 'It's okay' was a pleasantry that did not carry any meaning obviously relevant to an election." Report at 15.

34. Exception is taken to the finding, for which there is no support in the record, that “[t]he first [payment to Seitz] equaled 8 ½ hours at her normal hourly pay rate of \$20.73 for a day spent participating in the pre-election hearing as a witness on March 12, 2018,” totaling \$150.14. Report at 15.

35. Exception is taken to the finding, for which there is no support in the record, that “[t]he second payment [to Seitz] was for 8 hours at her hourly rate of pay for the day Seitz spent as an observer on the Petitioner’s behalf on May 11, 2018,” totaling \$138.06. Report at 15.

36. Exception is taken to the finding and conclusion, for which there is no support in the record, that “[t]he evidence, as I credit it, does not support a finding that this payment was intended as a bribe for her vote, or that she understood it that way.” Report at 16.

37. Exception is taken to the finding and conclusion, for which there is no support in the record and is contrary to governing law that “I find that Seitz hesitant ‘I guess, yes’ to a compound question about whether she was ‘paid to come and testify’ and ‘paid to vote’ is hardly acknowledgement of receiving a bribe, especially in light of consistent and more specific testimony, which I credit, that she was paid for the time she was spending as an observer. Report at 16, fn. 5.

38. Exception is taken to the finding, for which there is no support in the record and is contrary to governing law, that “[c]ounsel’s attempts to characterize the W-4 as an admission by the Union that she was paid for her vote, and not for the time she spent observing at ‘the vote’ are similarly unpersuasive.” Report at 16, fn. 5.

39. Exception is taken to the finding, for which there is no support in the record, that “it is [] immaterial whether Seitz was scheduled to work on the day of the election or the hearing, since such payments are not simply meant to replace lost wages, but can compensate for the reasonable value of her time and work as an observer, even including travel time.” Report at 17.

40. Exception is taken to the finding, for which there is no support in the record and is contrary to governing law, that “the Petitioner’s payment to Seitz amounting to 8.5 hours at her

normal rate of pay was [not] intended to, or would [not] have, impaired her free choice in the election.” Report at 17.

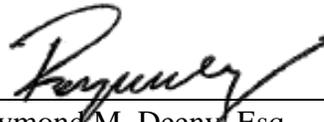
41. Exception is taken to the finding, for which there is no support in the record and is contrary to governing law, that “the promise of a payment for 8 hours at Seitz normal wage rate was improper compensation for being an observer for the combined 5 hours of pre-election conference and polling.” Report at 17.

42. Exception is taken to the finding, for which there is no support in the record and is contrary to governing law that “compensating [Seitz] for one full day of her time, effort, and travel is grossly disproportionate.” Report at 17.

43. Exception is taken to the finding, for which there is no support in the record, that “the Petitioner’s payments to Seitz were not improper, and did not affect the outcome of the election.” Report at 18.

44. Exception is taken to the finding, for which there is no support in the record and is contrary to governing law that “ a misstatement of the law, such as Petitioner’s Treasurer Kevin Schneider is alleged to have made at the pre-election hearing, is likewise not objectionable conduct.” Report at 19.

Respectfully submitted this 10th day of July 2018.



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CERTIFICATE OF MAILING

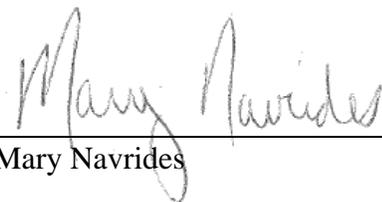
I hereby certify that on July 10, 2018, a true and correct copy of the foregoing **KING SOOPERS' EXCEPTIONS TO THE HEARING OFFICER'S REPORT** was served upon the following:

Paula S. Sawyer (Via E-File)
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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
TWENTY-SEVENTH REGION**

KING SOOPERS, INC.,

Case No. 27-RC-215705

Employer,

and

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 7

Union.

KING SOOPERS' BRIEF IN SUPPORT OF ITS EXCEPTIONS

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Pursuant to NLRB Rules and Regulations 102.69, King Soopers, Inc. (“King Soopers” or “Employer”), by and through its attorneys, Sherman & Howard L.L.C., submits this brief in support of its exceptions to the Hearing Officer’s June 26, 2018 Report on Objections (“Report”) in the above-captioned matter. For the reasons explained below, the Board should reject the Hearing Officer’s findings and recommendations, sustain King Soopers’ objections to the conduct of the election, and order a new election.

INTRODUCTION¹

Board law is clear that voters in a Board election must be able to cast their vote free from outside coercion, intimidation, or irregularities. Regardless of whether such coercion, intimidation, or irregularity may impact the outcome of an election, any deviation from this basic tenet would undermine voters’ trust in the outcome of elections, as well as the public’s trust in the Board’s policies and procedures. As illustrated below, the conduct of the election here created considerable doubt as to whether voters were able to cast their votes under the laboratory conditions necessary to ensure a free and fair election.

Through its Exceptions and Brief in Support of its Exceptions, King Soopers respectfully submits that the Hearing Officer’s determinations are based on flawed factual findings and legal conclusions and should not be adopted. King Soopers’ objections should be sustained and the election should be rerun to ensure free and fair voter choice.

¹ Citations in this brief will be as follows: “Tr. __:__” to indicate the hearing transcript and the corresponding page and line numbers of the transcript; “Ex. B-1(__)” to indicate an exhibit from the Formal Papers; “E. Ex. __” to indicate an Employer Exhibit; and “Union Ex. __” to indicate an Union Exhibit.

STATEMENT OF THE CASE

This case arises from Petition 27-RC-215705 filed by the United Food & Commercial Workers Union, Local No. 7 (“Union,” “UFCW,” “Local 7,” or “Petitioner”), through which the Union sought to represent just the deli employees at King Soopers’ Store No. 89, but included Stores 86 and 118 meat units. On May 1, 2018, the Regional Director found the Petitioned-for Unit appropriate and directed an *Armour-Globe* election in this three-store meat unit only.²

An election was held on May 11, 2018 at King Soopers’ Store No. 89. The deli employees voted for the Union, who represented only the meat employees. The Employer filed timely objections to the election and an offer of proof supporting its objections. The Regional Director granted a hearing on five of the seven objections submitted by the Employer, finding sufficient evidence to hold an evidentiary hearing. This matter came on for hearing before Hearing Officer Michelle Devitt on June 5, 2018. On June 11, 2018, the Parties submitted post-hearing briefs concerning the objections hearing. On June 26, 2018, the Hearing Officer issued the Report overruling King Soopers objections.

STANDARD OF REVIEW

The Board reviews *de novo* a Hearing Officer’s decision and its underpinnings. *See Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950) (“[W]e base our findings as to the facts upon a *de novo* review of the entire record, and do not deem ourselves bound by the Trial Examiner’s findings.”); *Sands Bethworks Gaming, LLC*, 361 NLRB No. 102 (Nov. 12, 2014) (“The Board then stated that it had considered *de novo* the representation issues and the hearing

² The Regional Director’s Decision and Direction of Election is separately under review to the Board.

officer's report recommending disposition of them.”). Where the Hearing Officer's legal conclusions are not based on resolutions of all the relevant facts, the Board should make its own factual findings. See *Williamson Mem'l Hosp.*, 284 NLRB 37, 37 (1987) (“Inasmuch as the judge has failed to perceive and resolve on two occasions the factual and legal issues before him, the Board is certainly free to review the record *de novo* and make appropriate findings of fact and conclusions of law.”).

ARGUMENT

An election must be set aside where “objectionable conduct could well have affected the outcome of the election.” *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995). The Hearing Officer's Report finds that King Soopers' objections to the election should be overruled in their entirety. (Report at 1.) The Hearing Officer's Report ignored and mischaracterized key facts, misapplied Board precedent and held King Soopers to an untenable standard, all of which led to a flawed Report. Indeed, the Hearing Officer considered only the Union's evidence in considering King Soopers' objections, while refusing to consider the key evidence in support of its objections. The Board should disregard the Hearing Officer's Report because, *inter alia*:

- The Hearing Officer erroneously supplements the record by analyzing whether Seitz is a management employee as defined by the Act. (Report at 3-7.)
- The Hearing Officer ignored key facts and misapplied Board law in finding Seitz was not an agent of the Union. (Report at 7-9.)
- The Hearing Officer ignored key facts and misapplied Board law in finding the Union representatives' conduct did not reasonably tend to interfere with the employees' free and uncoerced choice in the election. (Report at 9-12.)
- The Hearing Officer misapplied governing Board law in finding that a person closely identified with management can serve as the Union's observer. (Report at 12-13.)
- The Hearing Officer refused to consider unrebutted record evidence and misapplied governing law in finding the Union did not make coercive and unlawful payments to Seitz. (Report at 13-15.)

- The Hearing Officer discredited key record evidence, refused to consider highly relevant evidence elicited during the hearing, and misapplied Board law in finding Seitz's comments before and during the election did not reasonably tend to interfere with the employees' free and uncoerced choice in the election. (Report at 15-18.)

The Hearing Officer erred by denying King Soopers' First, Second, Third, Fourth and Sixth Objections contrary to the record evidence and governing Board law.

1. Hearing Officer Erroneously Analyzed Seitz's Managerial Status As Defined In The Act.

The Hearing Officer erroneously analyzed whether Tiffany Seitz, the deli manager, is a manager as defined within the meaning of the Act, an argument neither Party put forth during the hearing. (Report at 3-7.) The Hearing Officer's erroneous addition to the record must be disregarded in its entirety because it is not supported by the record evidence. *Rodriguez v. D.C. Office of Empl. Appeals*, 145 A.3d 1005 (D.C. 2016) (Agency official rejected Hearing Officer's Recommendations that were conclusory findings based on his own analysis of the surrounding circumstances and not supported by any facts or evidence on the record). At no point during the hearing or in King Soopers' post-hearing brief did it argue that Seitz was a "managerial employee within the meaning of the Act." (Report at 4.) Further, the Hearing Officer assertion that King Soopers did not meet "its burden of demonstrating Deli Manager Tiffany Seitz is a managerial employee with the meaning of the Act" is misguided as King Soopers never placed this burden on itself during the objection proceedings. (Report at 4.) Thus, the Hearing Officer's finding that Seitz is not a managerial employee within the meaning of the Act must be disregarded in its entirety as an improper addition to the record.

Contrary to the Hearing Officer's misstatement of King Soopers' position, King Soopers did and does argue that Seitz is "closely identified with management," preventing her from serving as the Union's observer. However, the Hearing Officer's Report does not address the

facts or the governing law required to analyze this issue. Indeed, the only law cited by the Hearing Officer is in regard to Seitz's managerial status under the Act. This test is an entirely different standard than that used by the Board to determine if an employee is closely identified with management as to be prohibited from serving as a party's observer.³ The correct Board standard used to determine whether an employee is closely identified with management is discussed in *VJNH, Inc.*, 328 NLRB 87, 167 (1999). The Hearing Officer's erroneous additions to the record and misapplication of Board law and Board standards must be disregarded and the election set aside.

2. The Hearing Officer Erroneously Finds That Seitz Is Not An Agent Of The Union.

a. The Hearing Officer Erred In Her Factual Findings

The Hearing Officer's factual findings are erroneous because she credited and misstated irrelevant evidence, while ignoring and discrediting highly relevant evidence supported by the record. For example, the Hearing Officer discredited the record evidence of the Union's repeated payments to Seitz because they were made on "two discreet occasions" and thus, were insufficient to prove an agency relationship. (Report at 8.) Further, the Hearing Officer erroneously found that the "Employer likewise offered no evidence of action by the Petitioner that would give deli employees reason to believe that she was acting on their [behalf], except in her capacity as its observer." (Report at 9.) Contrary to these holdings, Seitz admitted that she told all of her subordinate employees that she was paid by the Union to testify at the pre-election hearing and she was paid to serve as the Union's observer. (Tr. 204 16-17, 208:17:24, 239:3-7,

³ The Hearing Officer also cites Board law in her finding that the Board does not prohibit a Union's use of an employee closely identified with management. (Report at 12-13.) This misapplication of Board precedent is addressed further below.

250:12:18.) This record evidence is significant in showing the payments were not “discreet,” and gives the deli employees a “reason to believe” Seitz was acting on the Union’s behalf. Indeed, the undisputed evidence is that Seitz’s text message sent the night before the election and Seitz’s comment during the election that she really wanted this vote for the Union is further evidence that Seitz portrayed herself as an agent of the Union. (Tr. 39:12-19; 262:9-11; 202:21-25; 272:6-9.) The record evidence reveals that the deli employees had ample, let alone compelling, evidence to believe Seitz was acting on behalf of the Union. (*Id.*; Tr. 220:9-15; E. Exs. 1 and 2.) Thus, the Hearing Officer’s disregard for the record evidence requires the Board to reject her findings.

In addition, the Hearing Officer found that Seitz was not an employee of the Union. (Report at 8.) The Hearing Officer reasoned that Seitz would not have reasonably believed herself to be an employee based on the “bold disclaimers in the W-4s she signed.” *Id.* These findings are erroneous for two reasons. First, the purpose of a W-4 form is for an “employer to withhold the correct amount of federal income tax from your pay.” IRS FORM W-4 (2018), <https://www.irs.gov/pub/irs-pdf/fw4.pdf>. Thus, according to the IRS, the only point of a W-4 form is for use by the employer. Indeed, the W-4 form lists nine reasons for the “reimbursement” that all relate to activities performed by a Union employee. (*See* Ex. 2(a).) Second, the determination of an employment relationship cannot be “disclaimed,” as found by the Hearing Officer. The determination of whether an employment relationship exists is determined by an analysis of the factors articulated by the Colorado legislature. *See* C.R.S. § 8-70-115; 29 U.S.C. § 152(2), (3). Thus, the Hearing Officer’s finding that Seitz is not an employee or, at the very least, an agent of the Union is erroneous and must be disregarded.

b. The Hearing Officer Misconstrues And Misapplies Governing Law.

The Hearing Officer fatally takes a piecemeal approach in finding that Seitz is not an agent of the Union. Specifically, the Hearing Officer found that the Union's payments to Seitz on two separate occasions were insufficient by themselves to prove Seitz was a Union agent. (Report at 9.) Contrary to governing Board law, the Hearing Officer refused to look at the totality of the evidence in favor of finding that Seitz was acting as a Union agent. *See Bio-Medical Applications of Puerto Rico, Inc.*, 269 NLRB 827 (1984) (the Board considered the totality of the evidence in finding agency status for the employees at issue).

The Hearing Officer misapplied Board law in finding that "there was no evidence that the Petitioner designated or identified Seitz as having authority to act or speak on their behalf throughout the campaign, or in any specific situations, other than to appoint her as an election observer." (Report at 8.) This finding is fatally flawed for two reasons.

First, Section 2(13) of the Act explicitly provides that "the question of whether the specific acts performed were actually authorized or subsequently ratified **shall not be controlling.**" *See also Bio-Medical*, 269 NLRB 827 (emphasis added). Contrary to this governing statutory and Board law, the Hearing Officer finds that the lack of evidence concerning the Petitioner's explicit designation of Seitz as its agent controlling.

Second, the Union gave Seitz the actual authority to act on its behalf as its observer prior to the election. All comments by Seitz (that were credited by the Hearing Officer) were made while Seitz was serving as the Union's observer. (Tr. 39:12-19; 262:9-11; 202:21-25; 40:7-41:3.) While King Soopers maintains its position that Seitz was an agent of the Union throughout the campaign because the deli employees reasonably believed her to be acting on behalf of the Union, Seitz, at the very least, was an agent of the Union during the election.

(Report at 9 citing *Brinks, Inc.*, 331 NLRB 46 (2000).) Thus, the Hearing Officer's finding cannot not be upheld.

3. Hearing Officer Erroneously Overruled King Soopers' First Objection.

a. The Hearing Officer Erred In Her Factual Findings

The Hearing Officer misstates the record evidence and credits erroneous evidence in support of her finding that the Union's organizers, Tiffey and Lopez, did not engage in coercive conduct. (Report at 9-12.) The Hearing Officer's finding "that the Employer did not object to Tiffey and Lopez being on the premises when they arrived, and did not ask them to leave until hours later" is contrary to the record evidence. (Report at 11.) In addition, the Hearing Officer inexplicably finds that "[o]nce the Employer demanded that Tiffey and Lopez leave the premises, the Petitioner's organizers did so, albeit after lodging their disagreement as the employer's interpretation of their visitation rights."⁴ (RO at 11.) These findings are contrary to the record evidence and the Hearing Officer herself because Evans and Woodward repeatedly requested Tiffey and Lopez to leave the sales floor. (Report at 10.) Indeed, Tiffey and Lopez refused to leave the sales floor on at least six separate occasions when instructed to do so by Evans and Woodward. (Tr. 96:1-97:17.) Simply because the Employer gave Tiffey and Lopez the option to either go to the "smokers lounge" or the break room does not mean that the Employer permitted the Union to remain on the sales floor and continue trespassing on King Soopers' property. Moreover, the Hearing Officer's finding that Tiffey and Lopez immediately left the premises after demands by Woodward is contrary to every piece of record evidence. (*See*

⁴ The Union's Organizers have no visitation rights under the Broomfield Meat contract. (*See* E. Ex. 4; Tr. 166:8-15; *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 527-28 (1992)).

Tr. 96:1-97:17, 130:17-20, 98:14-22, 97:19-98:13.) The Hearing Officer erroneously discredits the record evidence regarding the repeated conversations between the Employer and the Union representatives requesting Tiffey and Lopez leave the sales floor, and thus her finding must be disregarded.

b. The Hearing Officer Misconstrues And Misapplies Governing Law.

The Hearing Officer cites *Genesis Health Ventures of WV*, 326 NLRB 1208 (1998) in support of her finding that Tiffey and Lopez's conduct is not objectionable. (Report at 11.) *Genesis* held that the conduct at issue was not objectionable because the trespassing union organizer left *five minutes* after being asked, left before the police arrived, and her conduct involved no assault, threats, or coercive statements. *Genesis*, 326 NLRB 1208. This conduct occurred three weeks prior to the election. *Id.* *Genesis* is not only not analogous to the facts in this case, it is not controlling authority. These Union organizers here had no valid purpose for trespassing. They refused to leave after *hours* of repeated requests to leave the sales floor. (Tr. 97:19-98:13.) Their continued trespass and repeated refusal to leave occurred in direct view of the Deli department. *Id.* During their trespass, Tiffey and Lopez engaged in at least one conversation with a deli employee. (Tr. 166:8-15.) Finally, this conduct occurred just *two or three days* prior to the election.

Fatuously, the Hearing Officer further found that the present case has even less tendency to intimidate voters because in *Genesis* the voters who witnessed the argument discussed whether the Union organizer had a right to be there. *Genesis*, 326 NLRB 1208; (Report at 11.) Here, not only does the record show that the confrontation occurred directly in front of the deli department, but a deli employee, who witnessed Tiffey and Lopez's conduct, testified that she knew the organizers were not permitted in the sales area or permitted to engage with employees

in the deli department. (Tr. 234:25-235:21.) The Hearing Officer ignored these key facts which clearly demonstrate the employees' knowledge of the Union's continued trespass.

The Hearing Officer misapplied Board precedent and, thus, her finding cannot be adopted.

4. Hearing Officer Erroneously Overruled King Soopers' Second Objection.

The Hearing Officer recommends that King Soopers' second objection be overruled because she declined to "extend" the holding of *Family Service Agency* to include Union observers who are closely identified with management. This finding is erroneous and warrants setting aside her finding and Report.

The Board has repeatedly held that individuals closely identified with management cannot serve as observers. This holding is not handicapped by whether the observer is serving the Employer or the Union. See *Richmond Health Care*, 12-RC-8064, Regional Director Decision on Remand, 2007 BL 333906 (Jan. 10, 2007) ("[i]n *Family Service Agency*, 331 NLRB 850 (2000), the Board overruled *Plant City Welding* and expanded objectionable conduct to include the use of a supervisor *or an individual closely associated with management* as an observer whether the observer was chosen by the *employer or the union*") (emphasis added.) The Board's repeated affirmations of this broad rule have never been narrowed in order to explicitly allow a Union to use an individual closely identified with management. *First Student, Inc.*, 355 NLRB 410 (2010) ("Thus, as here, the Board prohibits individuals closely identified with management from serving as observers, without imposing a parallel prohibition on *individuals identified with a petitioning union.*") Indeed, the Board's broad holdings in this area of law does not distinguish between which party, the Employer or the Union, the observer is serving. See *Longwood Security Services, Inc.*, 364 NLRB No. 50 ("The Board has adopted a

per se rule that individuals closely identified with management may not serve as observers, without imposing a parallel prohibition on individuals closely identified with a petitioning union.”) As stated in both *First Student* and *Longwood*, the only narrowing of this rule is that it does not apply to “individuals closely identified with a petitioning union.” *First Student, Inc.*, 355 NLRB 410 (2010); *Longwood Security Services, Inc.*, 364 NLRB No. 50.

Further, the Hearing Officer erroneously found that because the Board has never applied its prohibition of individuals closely identified with management to a Union’s selection of an observer that the Board law does not prohibit the Union’s use of such an observer. (Report at 13.) However, simply because the Board has never had to apply this rule to the situation in this case does not mean the Board’s rule is inapplicable. This rule’s application to both Employers and Unions is best explained in *First Student*, where the Board reasoned that “employees [are] aware[] that the employer wields substantial and direct control over their livelihoods and day-to-day working conditions.” *Id.* This reasoning is no different when the individual is serving as the Employer’s observer or the Union’s observer; in each instance the issue involves the power and influence of a person closely identified with management.

King Soopers has never argued that Seitz, the Union’s observer, is prohibited from serving as the Union’s observer because she was closely identified with the petitioning Union. Instead, King Soopers argued that Seitz is prohibited from serving as the Union’s observer because she is closely identified with the *Employer’s* management, giving her immense and direct control and power over the voting employees’ terms and conditions of employment. Thus, the Hearing Officer’s finding is contrary to governing Board law and should be rejected because Ms. Seitz is closely identified with King Soopers’ management and may not serve as the Union’s observer.

5. Hearing Officer Erroneously Overruled King Soopers' Third Objection.

a. The Hearing Officer Erred In Her Factual Findings

The Hearing Officer erred in finding that the text message sent by Seitz to her subordinate employees telling them to vote in favor of the Union was not “objectionable insofar as they contained no threats or other coercive statements that would impact the election, let alone create an ‘atmosphere of fear and reprisal.’” (Report at 13, fn. 3.) Not only was this the Hearing Officer’s only analysis of this significant fact, but the Hearing Officer’s finding that the text message did not contain any “other coercive statements” implies that the text message is a coercive statement. *Id.* Indeed, Seitz’s text message has a significant coercive effect when she states “if you’re not going to stay with the Company or stay with us ... very long, then it would be appreciated if you voted yes.” (Tr. 272:6-9.) Seitz is the deli manager, has almost unfettered control of the voting employees’ terms and conditions of employment, and is telling her employees to vote for the Union under threat of separation from the company. Moreover, Seitz’s text message stating that “*it* would be appreciated,” implicitly refers to herself and the Union as the beneficiaries of the employees’ coerced vote. Thus, there is no doubt that this text message had a coercive effect on the employees and created an atmosphere of fear and reprisal. The Hearing Officer’s finding must be rejected.

b. The Hearing Officer Misconstrues And Misapplies Governing Law.

As discussed above, *supra* section 2(b), the Hearing Officer misapplied Board law in finding Seitz was not an agent of the Union. The Hearing Officer’s own citation to *Brinks, Inc.*, 331 NLRB 46 (2000) holds that an employee acting as the Union’s observer is an agent of the Union while acting as its observer. (Report at 8.) Thus, the Hearing Officer erred when applying the third-party standard to Seitz’s actions during the election. (Report at 14.) Instead,

“the proper test is whether the conduct reasonably tends to interfere with the employees’ free and uncoerced choice in the election.” *Baja’s Place, Inc.*, 268 NLRB 868 (1984). Thus, the Hearing Officer applied the wrong standard to Seitz’s conduct during the election and her findings must be rejected.

Although the Hearing Officer addresses the correct standard after she misapplies the third-party test, she again misapplies the Board standard as articulated in *Baja’s Place*. (Report at 14-15.) The Hearing Officer strapped King Soopers to an untenable standard not articulated under *Baja’s Place* in finding that the evidence did not establish Seitz’s remarks as having “any effect on the outcome of the election.” However, this is not the standard. Seitz’s conduct at the election must “reasonably tend to interfere with the employees’ free and uncoerced choice in the election.” Thus, the Hearing Officer applied a higher standard to the conduct that is required under governing Board law, and her finding must be rejected.

Finally, the Hearing Officer’s rejection of highly relevant record evidence is contrary to Board law. The Hearing Officer refused to consider a text message sent from Seitz to her subordinate employees that stated “if you’re not going to stay with the Company or stay with us ... very long, then it would be appreciated if you voted yes.” (Tr. 272:6-9; Report at 13, fn. 3.) The Hearing Officer found that “the Employer has failed to show that [the text messages] are ‘newly discovered but also previously unavailable’” under *Rhone-Poulenc, Inc.*, 271 NLRB 1008, 1008 (1984). The Hearing Officer’s application of *Rhone* is misguided. The Board’s holding in *Rhone* concerns the Regional Director’s refusal to investigate new evidence first raised in the Employer’s evidence in support of its objections. *Id.* The Regional Director had not granted a post-election objections hearing nor was this evidence elicited during a hearing. *Id.* *Rhone* is entirely inapplicable to the facts at issue in this case. The Board did not hold that

evidence *elicited by the Union* during an objections hearing may not be considered in support of the Employer's objections, as is the case here. *See id.* Neither the Employer, the Union, nor the Hearing Officer objected to the inclusion of this evidence during the hearing. Thus, the evidence of Seitz's text message to her subordinate employees telling them to vote for the Union must be duly considered, and the Hearing Officer's refusal to do so is grounds for this finding to be rejected.

6. Hearing Officer Erroneously Overruled King Soopers' Fourth Objection.

a. The Hearing Officer Erred In Her Factual Findings

The Hearing Officer repeatedly ignores the record evidence in finding the Union did not improperly pay Seitz to serve as the observer and to vote in favor of the Union. (Report at 15-18.) The Hearing Officer first finds that "Seitz[']s] hesitant 'I guess, yes'" to a question regarding whether the Union paid her to vote "is hardly acknowledgement of receiving a bribe, especially in light of consistent and more specific testimony, which I credit, that she was paid for the time she was spending as an observer." (Report at 16, fn. 5.) The Hearing Officer inexplicably refuses to consider a direct admission by Seitz that she was paid to vote in favor of the Union. (Tr. 208:7-8.) In further defiance of the record evidence, the Hearing Officer states that the handwritten note on the W-4 form signed by Seitz and two Union representatives stating "KS 89 vote deli 5/11/18" was not evidence that Seitz was paid to vote in favor of the Union. (Report at 16, fn. 5; E. Ex. 2; Tr. 178:14-15.) The Hearing Officer defends these findings by stating that she does not find support that the payment was intended as a "bribe for [Seitz's] vote or that [Seitz] understood it that way." (Report at 16.) The record evidence is in direct contradiction to these findings. The Hearing Officer's finding must be disregarded in its entirety as she does not credit the unrebutted evidence contained in the record.

The Hearing Officer's finding that Seitz served as an Observer for a "combined 5 hours of pre-election conference and polling" is contrary to the record evidence. (Report at 17.) The Hearing Officer appears to rely on the Employer's observer, Klein's, testimony that she arrived at King Soopers Store No. 89 at 6:30 a.m. (Report at 16; Tr. 32:12-15.) However, the pre-election conference was not scheduled until 7 a.m. (See NLRB Notice of Election.) There is no evidence in the record to suggest that Seitz arrived at the pre-election conference at 6:30 a.m. nor that the pre-election conference began at 6:30 am. Thus, the Hearing Officer's finding must be disregarded as contrary to the record evidence.

The Hearing Officer's finding that there were two voting sessions on the election day "which would have required travel to and from the polling location" is not supported by any record evidence. (Report at 17.) The Hearing Officer may not assume facts that are not contained in the record. *Keller Industries, Inc.*, 170 N.L.R.B. 1715 (1968) (the Board is "constrained to decide this case within the confines of the pleadings and the record made at the hearing and not upon speculations as to what the true state of facts may be.") Thus, the Hearing Officer's assumption that Seitz was required to travel to and from the polling area is without support in the record and must be rejected.

b. The Hearing Officer Ignores, Misconstrues, And Misapplies Governing Law.

The Supreme Court has held that the Board has a wide discretion to "ensure the fair and free choice" of bargaining representatives by employees. *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 276-77 (1973). The Court interpreted this duty as including a prohibition on campaign tactics that induce workers to cast their votes on ground other than the advantages and disadvantages of union representation. *Id.* ("We do not believe that the statutory policy of fair elections ... permits endorsements, whether for or against the union, to be bought and sold.")

Thus a Union is barred from blatantly giving something of value to an employee in exchange for his vote. *Freund Banking Co. v. NLRB*, 165 F.3d 928, 931 (D.C. Cir. 1999). The Hearing Officer ignored this binding law in finding the Union did not unlawfully pay Seitz for her vote. The record evidence is clear that Seitz admitted to being paid to vote in favor of the Union. (Tr. 208:7-8.) Thus, the Hearing Officer's finding that the Union did not provide anything of value in exchange for Seitz's vote must be rejected.

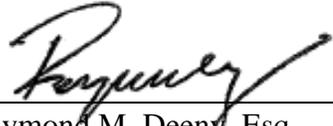
In addition, the Hearing Officer found that the Union's payment to Seitz for her service as its observer was not objectionable because it was not grossly disproportionate to her normal pay. (Report at 16-17.) The Hearing Officer misconstrued and misapplied governing Board law. The Hearing Officer relied on *Quick Shop Markets*, 200 NLRB 830 (1972) and *Aurora Steel Prod.*, 240 NLRB 46 (1979) for the proposition that an observer can be paid for the reasonable value of her work and for her travel time. (Report at 17.) However, these cases have no application to the evidence in the record. The record evidence is clear that Seitz was paid for 8 hours at a rate of \$20.73 per hour, even though the voting period and the pre-election conference lasted only four and a half hours. (E. Ex. 2; Tr. 46:21-22.) This amounts to \$36.85 per hour, \$16.12 more than her usual hourly rate. Seitz's service as the Union's observer did not require her to miss any work hours or suffer any loss of pay because she is guaranteed pay for 40 hours a week, regardless of whether she actually works 40 hours. (Tr. 77:24-78:3.) Thus, Seitz was essentially paid twice for the same amount of work. (See Report at 17, citing *Easco Tools*, 248 NLRB 700 (1980) (payments amounting to a full day off for 1½ hours of work, regardless of whether observers went back to work, and essentially got paid double, or took the rest of the day off paid, were grossly disproportionate)). There was no need to compensate Seitz for the reasonable value of her services, nor was there any record evidence that she incurred any travel

costs, as discussed above. Indeed, the W-4 form signed by Seitz and the Union has a section specifically to reimburse for travel, including miles driven, gas purchases, and per diem. (Ex. 2(a).) Yet, this section was left blank by the Union. The Hearing Officer ignored applicable law where the Board has found payments in excess of an employee's typical hourly rate, or for excess hours not actually worked, have a tendency to influence the election results. *See e.g. Collins & Aikman Corp. v. NLRB*, 383 F.2d 722 (4th Cir. 1967) (union compensated employee observer for 4 hours of work, despite the fact that the employee only spent 1 hour and 30 minutes observing the election); *Plastic Masters, Inc. v. NLRB*, 512 F.2d 449 (6th Cir. 1975) (union compensated employee attendees for 8 hours of their hourly rate, despite the fact that the meeting lasted only 3 hours). The Hearing Officer misapplied Board law and ignored controlling Board law, and therefore, the Hearing Officers findings must be rejected.

CONCLUSION

For the foregoing reasons, the Hearing Officer's findings and recommendations should be rejected and a new election must be ordered so that eligible voters can decide, in an atmosphere free from improper conduct, whether they wish to be represented by the Petitioner.

Respectfully submitted this 10th day of July 2018.



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CERTIFICATE OF MAILING

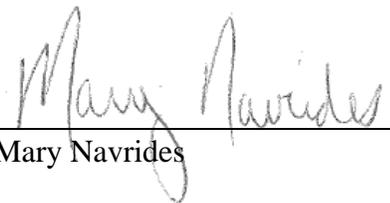
I hereby certify that on July 10, 2018, a true and correct copy of the foregoing **KING SOOPERS' BRIEF IN SUPPORT OF ITS EXCEPTIONS** was served upon the following:

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United States of America
National Labor Relations Board
(CORRECTED)



NOTICE OF ELECTION

PURPOSE OF ELECTION: This election is to determine the representative, if any, desired by the eligible employees for purposes of collective bargaining with their employer. A majority of the valid ballots cast will determine the results of the election. Only one valid representation election may be held in a 12-month period.

SECRET BALLOT: The election will be by SECRET ballot under the supervision of the Regional Director of the National Labor Relations Board (NLRB). A sample of the official ballot is shown on the next page of this Notice. Voters will be allowed to vote without interference, restraint, or coercion. Electioneering will not be permitted at or near the polling place. Violations of these rules should be reported immediately to an NLRB agent. Your attention is called to Section 12 of the National Labor Relations Act which provides: ANY PERSON WHO SHALL WILLFULLY RESIST, PREVENT, IMPEDE, OR INTERFERE WITH ANY MEMBER OF THE BOARD OR ANY OF ITS AGENTS OR AGENCIES IN THE PERFORMANCE OF DUTIES PURSUANT TO THIS ACT SHALL BE PUNISHED BY A FINE OF NOT MORE THAN \$5,000 OR BY IMPRISONMENT FOR NOT MORE THAN ONE YEAR, OR BOTH.

ELIGIBILITY RULES: Employees eligible to vote are those described under the VOTING UNIT on the next page and include employees who did not work during the designated payroll period because they were ill or on vacation or temporarily laid off, and also include employees in the military service of the United States who appear in person at the polls. Employees who have quit or been discharged for cause since the designated payroll period and who have not been rehired or reinstated prior to the date of this election are *not* eligible to vote.

SPECIAL ASSISTANCE: Any employee or other participant in this election who has a handicap or needs special assistance such as a sign language interpreter to participate in this election should notify an NLRB Office as soon as possible and request the necessary assistance.

PROCESS OF VOTING: Upon arrival at the voting place, voters should proceed to the Board agent and identify themselves by stating their name. The Board agent will hand a ballot to each eligible voter. Voters will enter the voting booth and mark their ballot in secret. **DO NOT SIGN YOUR BALLOT.** Fold the ballot before leaving the voting booth, then personally deposit it in a ballot box under the supervision of the Board agent and leave the polling area.

CHALLENGE OF VOTERS: If your eligibility to vote is challenged, you will be allowed to vote a challenged ballot. Although you may believe you are eligible to vote, the polling area is not the place to resolve the issue. Give the Board agent your name and any other information you are asked to provide. After you receive a ballot, go to the voting booth, mark your ballot and fold it so as to keep the mark secret. **DO NOT SIGN YOUR BALLOT.** Return to the Board agent who will ask you to place your ballot in a challenge envelope, seal the envelope, place it in the ballot box, and leave the polling area. Your eligibility will be resolved later, if necessary.

AUTHORIZED OBSERVERS: Each party may designate an equal number of observers, this number to be determined by the NLRB. These observers (a) act as checkers at the voting place and at the counting of ballots; (b) assist in identifying voters; (c) challenge voters and ballots; and (d) otherwise assist the NLRB.

**EXHIBIT
D**



**United States of America
National Labor Relations Board
(CORRECTED)**



NOTICE OF ELECTION

VOTING UNIT

EMPLOYEES ELIGIBLE TO VOTE:

All full-time and regular part-time delicatessen department employees employed by the Employer at Store No. 89, located in Broomfield, Colorado, who were employed by the Employer during the payroll period ending April 28, 2018.

EMPLOYEES NOT ELIGIBLE TO VOTE:

All other employees, store manager, assistant store managers, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

If a majority of valid ballots are cast for UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 7, they will be taken to have indicated that employees' desire to be included in the existing unit of employees comprised of meat cutters, apprentices, wrappers, butcher block sales persons, and clean-up personnel, in the meat market or markets owned or operated by the Employer in the metropolitan area of Broomfield, Colorado (Store Nos. 86, 89, and 118). If a majority of valid ballots are not cast for representation, they will be taken to have indicated employees' desire to remain unrepresented.



**United States of America
National Labor Relations Board
(CORRECTED)**



NOTICE OF ELECTION

DATE, TIMES AND PLACE OF ELECTION

Friday, May 11, 2018	7:30 a.m.-9:30 a.m. and 5:30 p.m.-7:30 p.m.	Employee break room located upstairs in the Employer's facility at 1150 US Hwy. 287, Unit 100, Broomfield, CO
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EMPLOYEES ARE FREE TO VOTE AT ANY TIME THE POLLS ARE OPEN.

ALL BALLOTS WILL BE MINGLED AND COUNTED IMMEDIATELY AFTER THE CONCLUSION OF THE LAST VOTING SESSION.

	<p>UNITED STATES OF AMERICA National Labor Relations Board 27-RC-215705</p>	
<p>OFFICIAL SECRET BALLOT</p>		
<p>For certain employees of KING SOOPERS, INC.</p>		
<p>Do you wish to be represented for purposes of collective bargaining by UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 7?</p>		
<p>MARK AN "X" IN THE SQUARE OF YOUR CHOICE</p>		
<p>YES <input type="checkbox"/></p>	<p>NO <input type="checkbox"/></p>	
<p>sample</p>		
<p>DO NOT SIGN THIS BALLOT. Fold and drop in the ballot box.</p>		
<p>If you spoil this ballot, return it to the Board Agent for a new one.</p>		
<p>The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.</p>		

WARNING: This is the only official notice of this election and must not be defaced by anyone. Any markings that you may see on any sample ballot or anywhere on this notice have been made by someone other than the National Labor Relations Board, and have not been put there by the National Labor Relations Board. The National Labor Relations Board is an agency of the United States Government, and does not endorse any choice in the election.



**United States of America
National Labor Relations Board
(CORRECTED)**



NOTICE OF ELECTION

RIGHTS OF EMPLOYEES - FEDERAL LAW GIVES YOU THE RIGHT TO:

- **Form, join, or assist a union**
- **Choose representatives to bargain with your employer on your behalf**
- **Act together with other employees for your benefit and protection**
- **Choose not to engage in any of these protected activities**
- **In a State where such agreements are permitted, the Union and Employer may enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the Union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the Union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustment).**

It is the responsibility of the National Labor Relations Board to protect employees in the exercise of these rights.

The Board wants all eligible voters to be fully informed about their rights under Federal law and wants both Employers and Unions to know what is expected of them when it holds an election.

If agents of either Unions or Employers interfere with your right to a free, fair, and honest election the election can be set aside by the Board. When appropriate, the Board provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with the rights of employees and may result in setting aside of the election:

- **Threatening loss of jobs or benefits by an Employer or a Union**
- **Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises**
- **An Employer firing employees to discourage or encourage union activity or a Union causing them to be fired to encourage union activity**
- **Making campaign speeches to assembled groups of employees on company time, where attendance is mandatory, within the 24-hour period before the polls for the election first open or the mail ballots are dispatched in a mail ballot election**
- **Incitement by either an Employer or a Union of racial or religious prejudice by inflammatory appeals**
- **Threatening physical force or violence to employees by a Union or an Employer to influence their votes**

The National Labor Relations Board protects your right to a free choice.

Improper conduct will not be permitted. All parties are expected to cooperate fully with this Agency in maintaining basic principles of a fair election as required by law.

Anyone with a question about the election may contact the NLRB Office at (303)844-3551 or visit the NLRB website www.nlr.gov for assistance.