

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

King Soopers,

Employer,

Case 27-RC-215705

and

United Food and Commercial Workers Union, Local 7,

Petitioner.

Petitioner's Brief in Opposition to Employer's Request for Review

Todd J. McNamara
General Counsel
United Food and Commercial Workers, Local 7
7760 West 38th Avenue, Suite 400
Wheat Ridge, CO 80033

Raja Raghunath
Associate General Counsel
United Food and Commercial Workers, Local 7
7760 West 38th Avenue, Suite 400
Wheat Ridge, CO 80033

Mathew S. Shechter
McNamara & Shechter LLP
188 Sherman Street, Suite 300
Denver, CO 80203

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Petitioner United Food and Commercial Workers Union, Local 7 (“Local 7” or the “Union”), through its undersigned counsel, hereby submits the following Brief in Opposition to Employer’s Request for Review, dated August 16, 2018 (the “Request”). As set forth below, and in Petitioner’s Brief in Opposition to Employer’s Exceptions to the Hearing Officer’s Report, filed July 20, 2018 (“Petitioner’s Brief”), there is no basis for the National Labor Relations Board (the “Board”) to review or overturn either the factual findings or legal conclusions of the Regional Director, as set forth in her Decision and Certification of Results, dated August 2, 2018 (the “Decision”), and the Board should therefore deny the Request for Review by King Soopers (the “Employer”).

A. Introduction

The Employer lost the representation election in this case by the wide margin of 10 to 2, on May 11, 2018. *See* Order Directing Hearing and Notice of Hearing on Objections, dated May 25, 2018 (the “Notice”), at 1. In response, the Employer raises a spectrum of legal hobgoblins, among them the ludicrous suggestion of an “apparent uprising” of “several Regional Directors,” who are “dissatisfied in the direction of the Board,” and are “imposing their own agenda,” which the Employer later clarifies is a “biased agenda.” Request at 1-2.¹

As with its other assertions in the case to date, the Employer provides no evidence in support of any of these claims. It was this singular failure to produce evidence that led to each of the Hearing Officer’s and Regional Director’s decisions and conclusions in this case. The Employer does not have any new or additional evidence to provide; it simply wishes for the

¹ Notably, the Employer suggested the certification of the unit in question by the Regional Director was evidence of this “uprising.” Of course, the Board just recently *denied* the Employer’s request for review on this issue – which, presumably makes clear that, at least in the instant action, the Employer’s supposed “uprising” is mere agitprop. *See* Order, Case 27-RC-215705, dated August 21, 2018.

Board to overrule the Regional Director's well-reasoned decision, but it asks the Board to do so on the barest imaginable record.

B. Standard of Review

Under its current rules, a Request for Review of a Regional Director Decision, such as the instant one, "will only be granted for compelling reasons." 79 Fed. Reg. 74309 (December 15, 2014). The Board's Rules elaborate that this standard of review requires, inter alia, that the Decision either: departed from or ignored "officially reported Board precedent;" is "clearly erroneous...on a substantial factual issue," and that "error prejudicially affects the rights of a party;" or raises "compelling reasons for reconsideration of an important Board rule or policy." Rule 102.67(d). As discussed *infra*, none of these things can be said about the Decision.

The Employer disagrees with the factual findings and legal conclusions in the Decision, but cannot point to any evidence or contrary authority that was disregarded by the Regional Director, and therefore its Request for Review has no basis. *See, e.g., Vapex*, 287 NLRB 168, 168 n.1 (1987) (holding, in the context of objections dismissed without hearing, that the Board "may properly decline to engage in *de novo* review of underlying documents and rely on the factual representations in the Regional Director's report so long as the objecting party's exceptions do not, by proffer of specific evidence, demonstrate the existence of material factual issues.").

Substantively, the Board adheres to the rule 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) (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) (citation omitted). 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) (citation omitted). In order to meet its burden, the objecting party must show that the conduct in question affected employees in the voting unit. *See Avante at Boca Raton*, 323 NLRB 555, 560 (1997) (overruling objections where no evidence that employees knew of alleged coercive incident). None of these showings are made in the instant record.

C. Argument

1. The Regional Director Correctly Applied the Law

a. The Union Did Not Engage in Unlawful Electioneering and Trespass

The Employer argues first that the Decision’s analysis of the Union’s supposed “continued and unlawful trespass” on the Employer’s property “fundamentally erodes controlling Board precedent,” but does not actually cite any such precedent that was so eroded. Request at 4.

The Regional Director properly agreed with the Hearing Officer’s conclusions 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.”

Decision at 3. The Union already has a collective bargaining agreement with the Employer’s Meat and Seafood department in Store 89, which contains some limitations on store visitation. Transcript of Hearing (“Tr.”) 99:7-18; and Exhibit 4. Those terms are honored in the breach more than anything else, as it was un rebutted that the Union’s organizing director had visited fifteen to twenty of the Employer’s other stores, and had never been told he shouldn’t be there or that he was trespassing. Tr. 175:5-15. The Employer’s Human Resource Manager admitted that the Employer does not consistently object or claim trespass when such store visits occur. Tr. 117:10-20.

Similarly, other than parroting the mantra that the alleged trespass was coercive, the Employer produced *no* testimony that *any* coercion occurred. In fact, the testimony was universally the opposite. Tr. 226:12-25, 227:19-21, 229:10-12, 264:19-24, and 265:2-7. The Employer's only witness to have observed the interaction could not offer any evidence to support the Employer's specious contention of coercion:

Q And you didn't sit and listen in on the conversation, correct?

A No, sir.

Q So you have no idea what was discussed, correct?

A No, sir.

Q So correct, you have no idea?

A Correct.

Tr. 114:22-115:3. In addition, as detailed in Section C(2)(b), *infra*, numerous employees testified that the Union applied no coercion or pressure to their vote. Tr. 265:10-17 and 267:20-268:6. The discussions that the Union did have with employees occurred outside the store, and during breaks. Tr. 124:18-125:1, 226:8, 265:2-7, and 267:16-25.

Accordingly, the Regional Director concluded that "the evidence does not establish that these interactions between the managers and the organizers had an impact on the election outcome." Decision at 3. This is precisely the analysis that is called for in *Baja's Place*, 268 NLRB 868 (1984), the precedent that Employer argues was violated. The Union's alleged conduct could not "reasonably tend" to interfere with employee free choice if there is *no record evidence* that the conduct that is alleged actually occurred. *See Sunward Materials*, 304 NLRB 780, 780 n.3 (1991) ("The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect.") (*citing Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957)).

The only other precedents the Employer offers are general propositions on employer property rights under the National Labor Relations Act (NLRA), including one, *Purple*

Communications, that deals with an entirely unrelated factual scenario, namely employee access to employer email and electronic platforms as opposed to physical presence in a place of public accommodation. *See* Request at 5. It is difficult to comprehend how any of these precedents are “fundamentally erode[d]” by the Decision, and the Employer chooses not to explain, since one cannot explain the inexplicable.

Instead, the Employer recites a series of facts that have no support anywhere in the record of this proceeding, that the Union’s organizers trespassed “for hours, engaging in coercive and intimidating conduct...and disrupting King Soopers’ business operations.” *Id.* The Regional Director’s factual conclusions, that none of these allegations were supported by the record, are discussed more extensively in Section C(2), *infra*, but the Board has already held that whether or not a legal trespass occurs is not a dispositive consideration under the NLRA. *See Retail Store Employees Local 428 (Levitz Furniture)*, 204 NLRB 1046, 1051-52 (1973) (holding no violation of Section 8(b)(1)(A), where union organizers entered facility against management wishes multiple times in a day, but “there was no showing of a disruption or more than momentary interruption in the serving of customers,” and contact with employees on premises “consisted of no more than a momentary salutation, with practically no interruption of their duties,” therefore “[w]hether the Company had a right to exclude union organizers from its store or whether, under the circumstances, the union agents were engaging in what may have amounted to trespassing, need not be decided.”). In the instant case, the Employer was unable to point to *any* lost productivity or interruption. Tr. 115:19-116:19 and 118:11-16.

The Employer’s citation to *River Walk Manor*, 269 NLRB 831 (1984), for the proposition that “the Board will not hesitate to commit the necessary investment of time and money” to examine violations of pre-election laboratory conditions, where there is *prima facie* evidence of

such violations, is singularly inapt. No such *prima facie* evidence was provided in the instant case. *Cf. Precision Plating*, 243 NLRB 230, 236 (1979) (noting that objecting party “made his *prima facie* case with the testimony of one witness to each alleged coercive conversation.”). Furthermore, the Employer fails to note that the “investment of time and money” referred to by the Board in *River Walk Manor* is a full investigation and, if warranted, a hearing to adjudicate any credible claims of violations. *See Holladay Corp.*, 266 NLRB 621 (1983) (remanding “these objections to the Regional Director for a full investigation *or* a hearing *as he deems appropriate*.”) (emphasis added). The Employer was given the privilege of an investigation and hearing by the Regional Director of Region 27, and it failed entirely to make its case in those proceedings, leading to its instant Request, blatantly accusing the Regional Director of a biased agenda. Such arguments should be given short shrift.

b. The Union Election Observer Was Not Closely Identified With Management

The Employer then goes on to raise a series of objections concerning the Union Election Observer, who was the Deli Manager². As an initial matter, the Employer argues that the Regional Director improperly concluded that “the Employer did not put the Petitioner on notice that there was an additional issue – different from the supervisory issue – relating to [the Union election observer’s] qualification as an observer.” Decision at 7; and Request at 20-21. The Regional Director did so because she found that 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.” Decision at 6.

² The Deli Manager falls within the scope of the unit certified by the Regional Director, and the Union represents department managers, such as the Deli Manager, as part of its bargaining units throughout Colorado, including in Store 89. *See* Decision and Direction of Election, Case No. 27-RC-215705, dated May 1, 2018, at 11 (“At store No. 89, the meat department manager is included in the contractual unit.”).

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.

Id. at 7. Further, as the Regional Director noted, the “Employer included the Deli Manager on the list of eligible voters and she voted at the election without challenge from the Employer.” *Id.* at 8. Nevertheless, the Regional Director, went ahead and analyzed the record evidence on the Union observer’s identification with management, and determined that,

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.

Id. at 7. The Regional Director correctly described the state of Board law on the question of individuals closely identified with management, noting that the holding of *Family Service Agency*, 331 NLRB 850 (2000), “is limited only to statutory supervisors,” and it is unclear “if that holding also extends to individuals who are closely identified with management.” Decision at 5. *See also Sunward Materials, supra* at 781 (1991) (finding that non-supervisory “persons closely identified with management may not act as employer observers”) (citation omitted); and *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 Employer argues that the Regional Director failed to properly apply Board precedent in reaching this determination, but only offers general quotations from these precedents, and does not indicate what analysis *should* have occurred that did not. Request at 7-8. For her part, the Regional Director examined *all* of the record evidence on this issue, including the “vague and general” testimony of the Employer’s only witness on this topic, Decision at 12, and concluded that it did not amount to a close identification with management for the purposes of upsetting the

election's laboratory conditions. *See* Decision at 8-13. In so concluding, it was not inappropriate for the Regional Director to take into consideration that 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.

Decision at 9. This is not a "tautology," as the Employer claims, but an expression of the very logic of the precedents being discussed. *See First Student*, 355 NLRB 410, 411 (2010) (noting that the "Board's election observer rules, then, are carefully designed not to achieve a formalistic equivalency, but rather to address the economic realities of the workplace."). *See also Westwood Horizon*, 270 NLRB 802, 803 (1984) (conduct of employee who is not union agent 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 Employer's failure to show how these precedents were ignored or departed from by the Regional Director is particularly glaring, given that the factual situations in the precedents it provides uniformly contain, in the records of those cases, far more extensive examples of supervisory power than can be found in the instant case. *See* Request at 11-13 (citations omitted). It is difficult to comprehend how a Regional Director's refusal to extend a given precedent to a less-extreme factual scenario undercuts that precedent. This is not an instance in the law where the greater must necessarily include the lesser.

Rather than explain its puzzling assertion, the Employer instead deploys a fictional prohibition on "piecemeal findings," that was purportedly violated by the Regional Director in ruling upon the supervisory duties of the Union's election observer. Request at 10-11. These findings, largely based on the Deli Manager's own testimony, include detailed analysis of the

Deli Manager's job title, uniform, ability to schedule deli employees, and her inability to hire, fire, or demote employees. Decision at 9-11. Rather than piecemeal, the points discussed by the Regional Director are emblematic of an approach that evaluated the totality of the evidence, and found the Employer's arguments wanting.

The Employer's witnesses could only testify to the general scope of duties and authority of department managers, such as deli managers, and neither worked in Store 89, so their testimony as to the actual exercise of those authorities by department managers at that location, or in the deli specifically, was very limited. They could only testify that department managers' responsibilities include "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. 69:6-20. They also gave generalized testimony that the department managers administer the Employer's policies and procedures, including its code dating and temperature log policies for deli food safety, disciplinary policies, non-solicitation policies, and other policies in the employee handbook. Tr. 62:2-63:10, 70:5-71:23, and 210:24-25. The Regional Director considered this testimony, and found it insufficient, as their "knowledge about the Deli Manager was limited, at best," and their "testimony was too vague and general and lacking in detail to establish that the Deli Manager had a close connection to management." *Id.* at 11-12. *See also Sunward Materials, supra* at 780 n.3.

In contrast, the Deli Manager herself testified as to the actual exercise of her authority in Store 89, and how it differed in some respects from her experience at another of the Employer's stores. This testimony was credited by the Hearing Officer and corroborated by the testimony of other deli employees. She testified that the Store Manager of Store 89 instructed department

managers in a huddle that they were required to involve the Human Resources Assistant Manager in any write ups they issue. Tr. 216:21-217:12. She also testified that she never fired, promoted, or demoted anyone, Tr. 191:19-25, and her and others' testimony made it clear that, although she had an active role in scheduling employees for their shifts, including writing the schedule, it was the Store Manager or Assistant Store Manager who would determine the "department needs," decide who was approved for training shifts to prepare for promotion, and approve the final schedule. Tr. 73:11-23, 192:18-193:6, and 252:5-254:10.

The Regional Director therefore affirmed the Hearing Officer's conclusions that any discretion the Deli Manager exercised was within limits set by store management, subject to their final approval, and that, under Board law, the fact that she trains or instructs other employees does not, by itself, establish sufficient independent discretion or judgment in carrying out these supervisory duties. Decision at 12-13. *See also Wolf Creek Nuclear Operating Corp.*, 364 NLRB No. 111, slip op. at 3 (2016).

The Employer claims that this is "a clear departure from established Board precedent," but tellingly attaches *no* citations to any precedent to that sentence, as none exist. The alleged "piecemeal findings" actually serve as individual factual tiles in a mosaic, and the picture depicted thereby fully supports the Regional Director's conclusions. The only authorities the Employer offers are the same ones already discussed in the Decision, none of which contain the phrase or concept "piecemeal findings," because, again, no such concept exists, under the NLRA or any other applicable law. The Employer is here grasping at the barest wisps of legal straw.

c. The Union Election Observer's Text Message Was Not Reasonably Encompassed Within the Employer's Objections and Was Not Coercive

The Regional Director properly concluded that a text message sent by the Union's election observer the night before the election "was not reasonably encompassed within the

Employer's objection about the Deli Manager's conduct during the polling," since the direction of hearing on objections "expressly related to comments that were directed at voting employees, not conduct directed to employees away from the polls." Decision at 14. *See also* NLRB Casehandling Manual Sec. 11424.3(b) (Regional Director may only consider conduct that was not specifically alleged in the Employer's objections where those additional issues would be considered "reasonably encompassed within the scope of the specific objections set for hearing" by her.).

The Regional Director nevertheless went on to analyze the substance of the text message, affirming the Hearing Officer's findings 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 rendering a free election impossible." *Id.* at 15.

Although the Employer's argument on this point is not a model of clarity, its complaint appears to be that the Regional Director should have "no discretion to ignore such evidence." Request at 14. But, as the preceding paragraph indicates, the Regional Director did *not* ignore any evidence relating to the text message. Rather, she reached the conclusion that the record evidence of that message's content and context did not rise to the level of a violation of the NLRA. Decision at 15. This is borne out by the testimony of employees, who indicated that the text message had no impact on their vote. Tr. 233:18-24. The Employer argues that the message was "coercive and intimidating," but cites to portions of the hearing transcript that say *no such thing*. Request at 15. This is because there *is* no record evidence that the text message was either coercive or intimidating. Tellingly, even though there were two votes against the Union, the Employer did not call a single witness to state that he or she felt coerced by the text message. Rather, the record testimony was clear that this was not how the message was seen:

Q Did that text impact your vote at all?

A Absolutely not.

Tr. 275:17-18.

d. The Union Election Observer Was Not a General Agent of the Union

The Regional Director properly concluded 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.” Decision at 15. *See also Brinks, Inc.*, 331 NLRB 46, 46 (2000) (election observer is deemed to be an agent of a union only with respect to their conduct monitoring the election.). She also properly affirmed the Hearing Officer’s citation to Board precedent “holding that an employee’s support for a union does not establish general union agency.” Decision at 16. *See also United Builders Supply Co.*, 287 NLRB 1364, 1365 (1988).

The Employer additionally argued that the Deli Manager was the Union’s “primary contact,” and that the other employees in the deli viewed her as such, but the only record testimony on that issue, by the Union’s organizing director, was that she was not. Tr. 166:16-18. Deli employees Morgan Neely, Stephanie Segura, and Stephanie Sullivan similarly testified that they met with the Union’s organizers to ask their questions. Tr. 225:8-227:18, 264:14-265:17, and 267:12-268:13. The Hearing Officer credited this testimony and was affirmed by the Regional Director. Decision at 16-18.

The Employer’s arguments do not address these parts of the Decision or the Regional Director’s conclusion that the Employer “has not met its burden of proof with respect to” this objection. The Employer again only offers citations to general propositions of the law of agency, including a quotation from a dissenting opinion in a Board case where the majority *agreed* with

the precedent cited by the Hearing Officer, in finding that “a vocal and active union supporter” in that case was “not a union agent.” *United Builders Supply Co., supra* at 1364-65 (1988).

The Employer also argues that the Regional Director “applied a higher standard” to the Union’s election observer than the standard set forth in *Baja’s Place*. Request at 17. However, the Employer fails once again to explain how the facts of the instant case support a conclusion that the conduct at issue would “reasonably tend” to interfere with employee free choice. *See Baja’s Place, supra* at 868. Moreover, this is a distinction without a difference, since under either standard, the Employer’s allegations were completely unsupported by the record, however much the Employer may wish it otherwise.

e. The Union Election Observer’s Expectation of Payment Was Not Objectionable

As an initial matter, the Employer’s allegation that the Deli Manager was paid to vote was not included in its original objections, and therefore the Employer should be precluded from raising the argument belatedly. *See* NLRB Rule 102.66(d) (a “party shall be precluded from raising any issue... and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party’s Statement of Position or response”).

The Employer contended that by making a payment to the Union’s Election Observer, the Union gave an excessive economic inducement. Request at 18-19. As the Union’s observer, the Deli Manager was promised compensation by the Union at her normal hourly rate of \$20.73 for the day that she was subpoenaed by the Union to testify at the pre-election hearing, and for the day that she served as the Union election observer. Tr. 166:19-20, 167:15-168:22, 174:11-23, and 204:8-12; and Exhibits 1 and 2. The W-4 forms signed by the Deli Manager 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.” See Exhibits 1 and 2. These forms also contain the explicit disclaimer that the Union’s “reimbursement of your lost wages does not create an employment relationship between you and” the Union. *Id.* The Deli Manager herself understood that she was being paid for “[j]ust the time I was spending there.” Tr. 221:22-24.

The Board has held 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”). The payments do not have to precisely track what the observer might otherwise have received for working during that time. See *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”); and *United Cerebral Palsy of NYC.*, 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).

The Regional Director affirmed the Hearing Officer’s conclusions that the payments to the Union’s election observer

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.

Decision at 16. She also affirmed the inescapable conclusion that, since “the payments were made only to the Deli Manager and therefore only her single vote potentially could have been affected,” it follows that

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.

Id. at 17.

The Employer argues to the contrary that the “Regional Director failed to consider that Seitz told every one of her employees that the Union was paying her,” Request at 27, ignoring that the Regional Director held that 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,” a factor that weighed *against* the payment being found objectionable. Decision at 17-18. Moreover, the evidence demonstrated that the employees she told of the payment were themselves told that she was paid for being an observer, not for her vote. Tr. 239:3-11 and 250:12-18. Declining to reach the conclusion urged by the Employer on a given fact is not a “failure to consider” that fact.

The Employer argues that the Regional Director “ignored well-established Board precedent” that prohibits payments for votes (offering once again only citations to general propositions of law and factually inapposite cases), and in doing so ignores in turn the Regional Director’s specific finding that the Union observer was *not* paid for her vote. Decision at 16-17. *See also* Tr. 204:8-15 and 221:1-24. The Employer did not challenge this finding in its Request, choosing instead to offer citations to its own counsel’s statements, and make the same misleading characterizations of record evidence that were previously argued to, and expressly rejected by, the Hearing Officer and Regional Director. *See* Decision at 17-18.

The Employer continues to urge its strained interpretation, in isolation, of the answers given to its counsel in his desultory cross-examination of the Union election observer, *see* Request at 28, despite the fact that the Regional Director held that the “hearing officer credited the Deli Manager, and there is no valid reason for reversing her credibility resolutions” on this issue. Decision at 18. *See also Sunward Materials, supra* at 780 n.3 (1991) (established policy of the Board is not to overrule credibility resolutions unless “clear preponderance of all the relevant evidence convinces us that they are incorrect.”) (citation omitted).

2. The Regional Director Made Appropriate Factual Findings

a. The Union Election Observer Was Not Closely Identified With Management

The Regional Director aptly described the record evidence on the Union election observer’s alleged close identification with management as “conflicting, disputed, and general.” Decision at 9. The Employer cites to this evidence, largely consisting of the testimony of one of its witnesses with second-hand knowledge, once again to argue that the Deli Manager “has almost unfettered control over her department,” and has the gall to include citations to record testimony that *states the exact opposite fact*. Request at 22.³

Indeed, the record testimony relied upon by the Regional Director to find that the Union election observer was *not* closely identified with management was extensive, and included the Deli Manager’s own testimony that:

³ Specifically, the Employer cites to the following exchange between its counsel and the Deli Manager:

A I can say that, but it doesn't mean it's going to happen. Upper management always has their heads in our department, in every little thing. *They meddle in everything.*

Q Oh, they meddle? I see.

A Yeah.

Tr. 216:16-20 (emphasis added).

- she only puts together the deli department schedules after employees have selected their shifts, and puts the responsibility on employees to make adjustments to their schedule, Tr. 190:16-21;
- she has never fired, demoted, or promoted any employees, Tr. 191:19-25; and
- she cannot even issue a write up to a deli employee without going through store management.

Tr. 53:9-25, 55:9-23, and 216:21-25. There was no other evidence in the record on any of the observer’s managerial responsibilities that was not speculative. *See* Tr. 107:1-9; and Decision at 11 (describing knowledge of Employer’s witnesses on this topic as “limited, at best,” as well as “non-specific and lacking any examples.”). There is nothing in the Regional Director’s factual findings on this issue that is clearly erroneous.

b. The Union and the Election Observer Did Not Engage in Coercive Conduct

As noted in the prior section, there was also *no* evidence in the record to support the Employer’s claims of repeated coercive statements made by the Union, and each and every witness who *actually* testified on the record directly rebutted these specious claims. The Employer’s only witness to a conversation between a voter and a union representative admitted that he had *no idea* what was said in this brief conversation. Tr. 114:22-115:3. The Union’s organizers, for their part, testified that they left the premises and returned several times during the hours-long period when the Employer claims they were continuously trespassing, notwithstanding repeated and misleading attempts by Employer’s counsel to have the only witness who testified to this conduct say otherwise. Tr. 160:14-161:17. There is no evidence that there was any disruption to the Employer’s business, *see* Tr. 118:11-15, or that there was any cursing, or violent or aggressive behavior. Tr. 115:19-24 and 116:1-2. Tellingly, the Employer’s

witness conceded that there was no evidence that any employee actually observed or heard any of the interactions between store management and Union representatives. Tr. 116:3-19. All but one conversation with voters occurred off the Employer's premises, and nothing else that could possibly be characterized as coercive behavior occurred. Decision at 2-4; and Tr. 94:2-97:18, 124:5-126:12, 127:17-132:23, and 160:6-161:17.

The only allegedly coercive statement in the Employer's objections,⁴ that the Union election observer stated, "I really want this for you guys," or words to that effect, to two voters in the polling area, was made *after* those voters had already voted. Tr. 58:19-25, 202:19-203:2, 262:7-14, and 269:2-6. The comment lasted no more than a couple of seconds. Tr. 59:1-5. Furthermore, no other voters were present or came to the polling place for another half-hour. Tr. 203:10-204:5. Thus, there was no conceivable impact on anyone's vote. *See NLRB v. WFMT*, 997 F.2d 269, 275 (1993) (not objectionable conduct where observer's comment was directed to someone "not waiting to cast her ballot," the Board Agent immediately cautioned the observer, and there was no evidence that eligible voters who had not voted overheard the comment). The Regional Director therefore affirmed the Hearing Officer's conclusion 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.

Decision at 13.

⁴ The Employer made additional allegations regarding two other innocuous interactions that were considered, and found insufficient, by the Hearing Officer, the first with a voter who apologized to the observer for being "late," and the second with a voter who offered to pick up the observer's son. The Employer "did not state any particular grounds for ascribing error to the hearing officer" in ruling that these interactions were not objectionable, and accordingly the Regional Director affirmed those findings and conclusions. Decision at 13-14.

In contrast to the Employer’s fact-free insinuations, multiple witnesses testified to the reasons why they voted the way they did in the representation election, none of which included the Deli Manager or her views:

- Stephanie Sullivan testified that she did not feel pressured by the Deli Manager or the Union, Tr. 231:5-9;
- Morgan Neely testified that the fact that the Union election observer was the deli manager did not factor into how he decided to vote, Tr. 268:7-13; and
- Darin Harper testified that she had decided how she was going to vote before the petition was even filed, Tr. 248:3-7.

The Employer poses the hypothetical question of whether “the parties [would] expect the same outcome” if the observer in question was pro-management, and helpfully adds that this “hypothetical illuminates the fact that the standards applied by the Regional Director in this Decision are not applied equally to the Parties.” Request at 26. However, the Regional Director directly addressed this argument, noting that “there is some uncertainty about” whether these standards *should* be applied equally, but in the absence of a clear answer, she went ahead and conducted the analysis *sought by the Employer*, and found insufficient evidence to support the Employer’s contentions. Decision at 5-6. These are not clearly erroneous factual findings.

c. The Payments to the Union Election Observer Were Not Objectionable

The Regional Director properly cast aside the Employer’s strained interpretation of the evidence regarding the purpose of the Union’s payment to the Deli Manager, and appropriately credited that individual’s testimony about her *actual* reasons for voting. Tr. 197:23-198:3. The promise of payment for her time spent as an election observer was *not* one of those reasons. Tr. 204:13-15. Furthermore, as the Regional Director noted with approval,

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.

Decision at 17. *See also JRTS Ltd., Inc.*, 325 NLRB 970, 970 n.1 (1998) (holding that payments to two observers could not have affected the election outcome, and no evidence that employees learned of the payments before casting their ballots). Indeed, here, employees testified that payments to the observer had no impact on their vote. Tr. 241:14-20 and 250:12-16.

The Regional Director similarly did not err when she affirmed the Hearing Officer's credibility determination that the Deli Manager's hesitant answer on cross-examination, "I guess," in reference to being paid to vote, did not outweigh her more "consistent and specific testimony" regarding her voting decision. Decision at 17. In fact, she had already made up her mind:

Q How did you decide how you were going to vote in the election?

A I knew what I was going to vote when I signed my card for the Union.

Q And what did you base that on?

A Being part of the Union previously.

Tr. 197:23-198:3. These are not clearly erroneous findings. *See also Sunward Materials, supra* at 780 n.3 (citation omitted).

D. Conclusion

The Employer's request for review is nothing more than a transparent attempt to substitute the Employer's arguments for the record evidence. The Regional Director's decision is amply supported by the facts and applicable, well-settled Board law. It breaks no new legal ground, let alone constitutes an open rebellion against established precedent. It simply affirms a vote in favor of the union. The time has come to effectuate the overwhelming desire of the

employees in this certified unit. Accordingly, the Union respectfully requests that the request for review and request for oral argument be denied.

Dated: August 23, 2018

Respectfully Submitted,

UFCW Local 7

s/ Todd McNamara
Todd McNamara, General Counsel

s/ Raja Raghunath
Raja Raghunath, Associate General Counsel

7760 W 38th Ave, Suite 400
Wheat Ridge CO 80033
Phone: (303) 425-0897 ext. 429
Email: rajaraghunath@ufcw7.com

Certificate of Service

I hereby certify that the foregoing *Petitioner's Brief in Opposition to Employer's Request for Review* was e-filed with the National Labor Relations Board on August 23, 2018, and served on the same date on the party or parties below by the means indicated.

Ray Deeny via email to **rdeeney@shermanhoward.com**
James Korte via email to **jkorte@shermanhoward.com**
Sherman & Howard

Counsel for Employer

s/ Raja Raghunath
Raja Raghunath