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I. STATEMENT OF THE CASE

This matter is before the National Labor Relations Board (the Board) on the Employer Domino's Pizza LLC's (the Employer or Domino's) request for review of the Regional Director's September 14, 2018 Decision and Certification of Representative (Decision), in which she overruled the Employer's objections to conduct affecting the results of an election held on March 16, 2018.¹

The record reflects that the employees at Domino's 150-29 Cross Bay Boulevard, Howard Beach, New York location (Store 3597) did not vote in a free and fair election on March 16. The Petitioner, Local 91, United Crafts and Industrial Workers Union (the Petitioner or the Union), expressly agreed to exclude assistant managers from the voting unit because they are supervisors as defined by Section 2(11) of the National Labor Relations Act (the Act). The Regional Director found that, notwithstanding this stipulation, and with the Union's knowledge and support, at least one assistant manager engaged in prounion conduct that "reasonably tended to coerce or interfere with the employees' exercise of free choice in the election" under the first prong of *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004). Ultimately, however, she concluded that the supervisor's conduct did not "materially affect the outcome of the election" under the second prong of *Harborside* because the Employer did not show that the conduct affected eight or more voters.

Contrary to the Regional Director's conclusion, a shift in only four votes—not eight votes—would have changed the election results, and the record reflects that at least five employees were directly subjected to the prounion supervisor conduct the Regional Director found reasonably tended to coerce or interfere with the employees' exercise of free choice under the first prong of *Harborside*. Additionally, a number of other employees were directly subjected to prounion

¹All dates referenced herein are in 2018, unless otherwise indicated.

supervisor conduct that the Regional Director should have concluded satisfied the first prong of *Harborside*.

There are compelling reasons to grant the Employer's request for review. The Regional Director's conclusion raises substantial questions of law and policy because it ignores or departs from officially reported Board precedent. Moreover, the Regional Director's conclusion is premised on factual findings that are clearly erroneous on the record. Finally, to the extent the Regional Director's conclusion is supported by extant Board law, there are compelling reasons to reconsider and reverse that law. Consequently, the Employer's request for review should be granted, and the March 16 election should be set aside and a new election held.

II. SUMMARY OF FACTS

A. BACKGROUND

Domino's makes, sells, and delivers pizza and related food products nationwide, including out of Store 3597. On February 2, the Petitioner filed a petition to represent "[a]ll employees at the Howard Beach location, including cooks, counter, cashiers, maintenance, drivers/delivery and store managers." On February 12, the parties entered into a Stipulated Election Agreement that specifically excluded "all guards and supervisors as defined by the Act, including Assistant Managers and General Managers." (Jt. Exh. 1.)

An election was held on March 16 (Tr. 47). The tally of ballots reflected that 26 votes were cast for the Petitioner, 11 votes were cast for the Employer, and there were 7 challenged ballots (Bd. Exh. 1).

After the election, Domino's discovered that, with the Petitioner's knowledge and support, Store 3597 Assistant Manager Mohammad Radwon Hussin (Radwon) engaged in prounion conduct throughout the period leading up to the election, including soliciting union authorization

cards from his direct subordinates; telling employees that 30 of their co-workers had signed cards; telling an employee he was the only one from a specific region in Bangladesh who had not signed a card; attending union meetings and encouraging employees to attend union meetings; threatening employees with job loss; promising employees they would receive higher wages, better benefits, more hours, protection from discipline, and job security if the Union won; promising an employee the Union could get him a job if he no longer wanted to work for Domino's; encouraging employees to vote for the Union; showing favoritism to certain employees; appealing to racial/ethnic prejudices; and openly undermining the Employer's position on unions.²

The Employer timely filed 40 objections relating to prounion supervisor and union and third-party conduct that threatened, coerced, and interfered with employees' free choice in the election and thereby destroyed the necessary laboratory conditions. The offer of proof detailed specific evidence supporting each of the objections.

On April 4, the Regional Director overruled 12 of the Employer's objections in their entirety, and 1 objection in part.³ The Regional Director ordered a hearing on the remaining objections. A hearing on those objections was held April 16-20 before Hearing Officer Rachel Zweighaft in Brooklyn.

On June 4, the hearing officer issued her Report on Objections (Report) finding that 1) the parties' pre-election agreement that assistant managers are Section 2(11) supervisors was not

²Domino's also discovered that another assistant manager, Samad Hussan (Samad), engaged in prounion conduct, including soliciting authorization cards, threatening employees with job loss, attending union meetings, and giving favorable assignments to prounion employees; however, the hearing officer did not credit the evidence introduced at the hearing in support of those allegations, and the Regional Director declined to reverse the hearing officer's determinations (Decision, p. 16 fn. 37). The Regional Director erred in this regard.

³The Regional Director overruled objections 4, 6, 9, 11, 16, 17, 18, 21, 25, 35, 37, 38, and a portion of 39.

binding on the Petitioner; 2) the record did not support the conclusion that assistant managers are Section 2(11) supervisors; and 3) the record did not establish that assistant managers engaged in prounion conduct that reasonably tended to coerce or interfere with employees' free choice in the election.

On June 25, the Employer filed exceptions to the hearing officer's Report and a supporting brief.

On September 14, the Regional Director issued her Decision from which this request for review is taken. The Regional Director concluded, contrary to the hearing officer and in agreement with the Employer, that the Petitioner was bound by its pre-election stipulation that assistant managers are Section 2(11) supervisors. The Regional Director further concluded, contrary to the hearing officer and in agreement with the Employer, that Radwon engaged in prounion conduct that reasonably tended to coerce or interfere with the employees' exercise of free choice in the election under *Harborside*. Ultimately, however, the Regional Director concluded that Radwon's conduct did not materially affect the outcome of the election because "[t]he Employer has not shown that Radwon's conduct affected eight or more voters" (Decision, p. 23). Consequently, the Regional Director overruled the Employer's objections and certified the results.

B. STORE 3597'S OPERATIONS

Approximately 44 team members worked at Store 3597 during the relevant time period among the following job classifications: customer service representative (CSR), delivery expert (also referred to as driver), assistant manager, and general manager (Tr. 34). Roughly 75 percent of the workforce, including Radwon and Samad, speak Bengali (Tr. 107-108).

Each Domino's store is led by a general manager and three to five assistant managers (Tr. 36-37). Store 3597 opened approximately three years ago, and the first general manager was Bablu

Rahman (B. Rahman). B. Rahman remained the general manager of Store 3597 until he was terminated at the end of December 2017.⁴ (Tr. 38).

Corina Cojocararu was hired as the general manager of Store 3597 around January 9. Cojocararu was replaced by Nadia Rahman (N. Rahman) around February 12. (Tr. 128-129, 415, 441, 624.)

Between B. Rahman's termination and Cojocararu's hire, Store 3597 operated without a general manager. During that time period, Radwon, Samad, and Assistant Manager Danielle Gravesande were primarily responsible for managing the store.⁵ (Tr. 39.) Assistant Manager Vijai Vissesar transferred from another Domino's store to Store 3597 on January 28 (Tr. 345). Assistant Manager Mohammed Islam (M. Islam) transferred from another Domino's store to Store 3597 on February 12 (Tr. 809-810).

CSRs are generally responsible for making pizzas and taking orders inside the store (Tr. 34, 251, 341, 688). Their tasks are primarily performed along the "makeline,"⁶ at the oven, and at the front carryout counter (Tr. 34-35). CSRs cannot take deliveries because they do not meet Domino's driving requirements (Tr. 35, 114).

⁴B. Rahman was terminated for having team members work off the clock and for allowing people who were not officially hired by Domino's to work at the store (Tr. 38-39). B. Rahman was one of the leaders of the union organizing activity after his termination. However, the Employer's objections related to his involvement (Objs. 35, 37-38, 39) were overruled. Consequently, evidence pertaining to B. Rahman's prounion activity is not relevant except insofar as it overlaps with, and provides context to, the prounion activity of assistant managers.

⁵Radwon testified that "supervisors" were sent to the store every day until a general manager was hired; however, he did not know what their title was and could not recall any of their names (Tr. 625-626).

⁶The makeline is where pizza and other products are prepared (Tr. 87). Typically four team members work along the makeline; however, if it is busy, five or six team members may work there (Tr. 253).

Delivery experts are generally responsible for delivering pizzas and related products in their personal vehicles. They also perform inside duties when there are no deliveries or when additional help is needed. Those duties may include helping on the makeline or at the oven, folding boxes, answering the phone, mopping the store, or cleaning dishes. (Tr. 35-36, 116, 252-253, 331.)

Assistant managers are generally responsible for overseeing the day-to-day operations of the store. To that end they perform a variety of duties intended to ensure that customers are satisfied and the operations are running smoothly and up to Domino's standards. (Tr. 36.) In general, assistant managers have the authority to perform the following duties using independent judgment in the interest of Domino's: 1) interview applicants and make recommendations for hire; 2) reward team members; 3) transfer team members to or from another store; 4) assign team members to times and places and give them significant overall duties; 5) discipline team members; 6) responsibly direct team members; and 7) adjust team member grievances.

In addition to the above-duties, the assistant managers are set apart from the CSRs and delivery experts in the following significant ways: 1) they are held out as supervisors; 2) they undergo extensive training that CSRs and delivery experts do not undergo; 3) they are often the highest level of authority at the store; 4) they are paid more than CSRs and delivery experts; 5) they can earn patches for their uniform based on the store's performance; 6) they attend management-only meetings; and 7) they have keys to the store and the safe.

There are four levels of assistant managers.⁷ A Level 1 Assistant Manager is a new assistant manager who is learning to do paperwork and make "judgment calls" at the store. A Level 2

⁷The level designations for assistant managers relate to Domino's established training program to prepare all assistant managers to become a general manager at some point in the future. There is no difference in authority or scope of supervisory responsibility between the four levels of assistant managers. (Tr. 812.)

Assistant Manager is able to run shifts on his or her own and has learned more about making sales. A Level 3 Assistant Manager is able to do closing paperwork and knows about selling food to other stores. A Level 4 Assistant Manager is able to run his or her own store. (Tr. 388-389, 811.)

The general manager performs the same basic duties as the assistant manager. He or she also makes sure that the assistant managers are properly performing their duties (Tr. 36). Store 3597 operates approximately 126 hours each week, and the general manager typically works 52 hours per week (Tr. 417-418). The assistant managers are the highest level of management authority at the store when the general manager is not present (Tr. 416).

C. OBJECTIONABLE CONDUCT

The Regional Director found credible evidence that Radwon engaged in extensive prouinion conduct during the period leading up to the election. However, she concluded that only some of that conduct reasonably tended to coerce or interfere with the employees' free choice in the election under *Harborside*.

1. Conduct the Regional Director Found Reasonably Tended to Coerce or Interfere with Employees' Free Choice in the Election

a. Solicitation of authorization cards

The Regional Director found credible evidence that Radwon solicited union authorization cards from employees under his immediate supervision (Decision, p. 17). Specifically, the Regional Director found that in December 2017, Radwon spoke to employee Forhad Hussain on the phone about signing some papers and then later tried to give him a paper from the Union (Decision, p. 10). The Regional Director further found that in January 2018, Radwon told employee Shaek Farid that if he wanted a card, he would bring it to him and he could sign it (Decision, p. 10). The Regional Director concluded that Radwon's direct solicitation of Hussain

and Farid had an “inherent tendency to interfere with these employees’ freedom to choose to sign a card or not . . .” (Decision, p. 17).

In connection with her discussion about Radwon’s objectionable solicitation of Hussain and Farid, the Regional Director also credited evidence that Radwon “talked to employees about signing cards,” including telling employees that “30 employees had signed cards” (Decision, p. 17). The Regional Director indicated that this was separate and apart from Radwon’s solicitation of Hussain and Farid.⁸

The Regional Director did not identify the employees Radwon talked to by name, but the record reflects that employees Nagmun Hassan and Delwar Hossen were involved in that discussion. According to Hassan, whom the hearing officer specifically credited (Report, p. 18), upon returning from a delivery one night in February he overheard Radwon loudly conversing with Hossen about the Union, so he interjected (Tr. 332). Hassan testified that Radwon and Hossen “were talking about the benefits of joining the union and maybe signing some papers” (Tr. 333). He recalled Radwon saying to him and Hossen during the conversation that “30 of us had signed the papers” (Tr. 333).

b. Failure to disavow threat

The Regional Director found credible evidence that during the critical period, Radwon failed to disavow a threat made by former General Manager B. Rahman to employee Asifuo Islam (Decision, p. 18). The credited evidence reflects that Islam was driving Radwon home from work one night and asked Radwon about the Union. Radwon then called B. Rahman and put him on

⁸Specifically, the Regional Director observed: “[T]he credible evidence shows that Radwon talked to employees about signing cards; he told employees that 30 employees had signed cards. Further, before the critical period, Radwon solicited drivers Hussain and Farid to sign cards[.]” (Decision, p. 17.)

speakerphone, at which point B. Rahman told Islam, among other things, that if Domino's wins the election it would send some drivers to another store, and the general manager would write them up if they did anything wrong and fire them if they received two write-ups. (Tr. 174-175.) The Regional Director concluded that B. Rahman's threat "would reasonably tend to interfere with employee free choice . . ." (Decision, p. 18).

c. Telling employees to vote for the Union

The Regional Director found credible evidence that during the critical period, Radwon told Islam he should vote for the Union (Decision, p. 18). The Regional Director concluded that "this statement by Radwon would reasonably tend to interfere with employee free choice . . ." (Decision, p. 19).⁹

2. Conduct the Regional Director Found Did Not Reasonably Tend to Coerce or Interfere with Employees' Free Choice in the Election

a. Statements about job loss

The Regional Director found credible evidence that Radwon made statements about job loss to at least five employees during the critical period. Specifically, the Regional Director found that Radwon told Islam that if the Union did not win, people would get fired (Decision, p. 10). The Regional Director further found that Radwon told Hossen and two other employees, Nezid Ulhassan and Shaid Palit, that if the Union lost the election, Radwon and other employees would lose their jobs, but if the Union won the election, Hossen would need his permission to work in

⁹As explained further below, *infra* fn. 17, the Regional Director also found that Radwon told employees they would get better benefits, including higher wages, vacation and medical benefits, job security, and assistance finding other work if they voted for the Union (Decision, p. 11). While this was not a direct statement to employees that they "should vote for the Union," it is certainly reasonable to infer that the same message was being conveyed. Obviously if Radwon did not want employees to vote for the Union, he would not have told them about these alleged benefits or, for that matter, engaged in any other prounion coercive conduct. Thus, the Regional Director should have considered these statements the equivalent of Radwon telling employees they should vote for the Union.

the store (Decision, p. 11). Finally, the Regional Director found that Radwon told employee Mohin Uddin that employees would not have jobs if the Union won (Decision, p. 11).

The Regional Director concluded that because Radwon did not have the authority to discharge or effectively recommend discharging employees, “employees in these circumstances would not reasonably be coerced by Radwon’s statements” (Decision, p. 19). The Regional Director added, without explanation, that Radwon’s remark that Hossen would need his permission to work in the store if the Union won the election “is not the type of conduct which would reasonably interfere with or coerce an employee to vote for the Union” (Decision, p. 19).

b. Attendance at union meetings

The Regional Director found credible evidence that Radwon attended at least two Union meetings, spoke to or texted employees about attending Union meetings, and encouraged one employee to go to a Union meeting during the critical period (Decision, p. 19). Text messages between Radwon and a Union representative confirm this (Emp. Exh. 11). The Regional Director concluded, however, that because there was no evidence Radwon spoke about the Union or solicited cards at the meetings, or required employees to attend the meetings, Radwon’s conduct “would not reasonably interfere with or coerce employees in their free choice” (Decision, p. 20).

c. Promises of better benefits

The Regional Director found credible evidence that Radwon told employees they would get better benefits, including higher wages, vacation and medical benefits, job security, and assistance finding other work, if the Union won the election (Decision, p. 20). Specifically, the Regional Director found that Radwon told Hossen, Ulhassan, and Palit that the Union would give them a starting rate of \$18.50 per hour, medical benefits, vacation benefits, and a job guarantee.¹⁰

¹⁰The drivers were earning \$13.50 per hour at the time (Tr. 151).

The Regional Director further found that Radwon told Farid that if the Union was voted in, employees' wages would increase to \$18.00 per hour, and they would get additional benefits, including medical benefits and job security. Additionally, the Regional Director found that Radwon told Farid he would be able to work whenever he wanted, and the Union could help employees obtain jobs outside of Domino's if they wished. Finally, the Regional Director found that three other employees credibly testified about similar promises made by Radwon.¹¹ (Decision, p. 11.)

The Regional Director concluded that Radwon's promise of job security as a benefit of unionization would not be reasonably construed as a threat of loss of continued employment if the employees did not vote for the Union because the credited evidence did not establish that Radwon's supervisory authority included the ability to discharge or effectively recommend the discharge of employees. Similarly, she concluded that Radwon's promise of improved wages and vacation and medical benefits would not reasonably coerce or interfere with employees' free choice because the credited evidence did not establish that Radwon's supervisory authority included the ability to increase employees' hourly wage rate or provide vacation or medical benefits. (Decision, p. 20.)

The Regional Director did not address whether the following statements by Radwon reasonably tended to coerce or interfere with employees' free choice: 1) statements to Farid that

¹¹Although she did not mention them by name, the Regional Director was referring to Hussain, Hassan, and Mohammed Roknuzzaman, all of whom the hearing officer specifically credited on this issue (Report, p. 22). Hussain testified that Radwon told him that if the Union won, employees would get job security and benefits, including paid vacation, more hours, and higher pay (Tr. 238-239). Hassan testified that Radwon told him and Hossen that if they joined the Union their salary could go up to \$20.00 per hour and they could get benefits, raises every six months, and job security (Tr. 332-333). And Roknuzzaman testified that Radwon told him the Union could increase his hours, medical benefits, and job security, and protect him from being disciplined for coming into work late (Tr. 260).

he would be able to work whenever he wanted and that the Union could help employees obtain jobs outside of Domino's if they wished; 2) statements to Roknuzzaman that the Union could protect him from being disciplined for coming into work late and could increase his hours; and 3) a statement to Hussain that employees would get more hours if the Union won. The Regional Director's failure to address the "hours" portion of this evidence was particularly significant given that assistant managers had considerable authority to set and adjust the schedule. (Tr. 78-79, 366, 485-486, 505.)

d. Undermining the Employer's position on unions

The Regional Director found credible evidence that Radwon was involved in three separate incidents during the critical period in which he attempted to undermine the Employer's position on unionization and confuse employees. The first incident occurred on the evening of February 8 at the store when six or seven employees were present. The Regional Director found that Radwon told Program Leader/Market Trainer Ashrahfuz Mutlib that the Employer could have meetings about the Union but that employees would listen to him (Radwon).¹² The Regional Director further found that Mutlib asked Radwon if there was anything he could do to stop the Union activity, and Radwon told him no. According to the Regional Director, the evidence did not clearly establish that the employees heard the conversation. (Decision, p. 20.)

The second incident occurred shortly before the originally scheduled election date of March 2. The Regional Director found that as Mutlib was posting the required Notices of Election at the store in front of eight or nine employees, Radwon stated that the employees should vote

¹²Mutlib specifically testified that Radwon told him "whatever way I [Radwon] tell them to go, that's the way they're going to go." He also testified that Assistant Manager MD Islam was present during the conversation. (Tr. 105.)

“yes” for the Company and “no” for the Union, but Mutlib immediately corrected Radwon in front of the employees to indicate that a “yes” vote was for the Union (Decision, p. 21).¹³

The third incident occurred in a car in the store parking lot before the March 16 election. The Regional Director found that General Manager N. Rahman was in the car talking to two employees (Kamrul Hassan (K. Hassan) and Ashbak Ahmen) about the Union, and N. Rahman told them not to support the Union just because someone else told them to. The Regional Director further found that Radwon entered the car and told N. Rahman that she should not discuss the Union or any “pro-company thing” with employees.¹⁴ The Regional Director found that N. Rahman then told Radwon “that she would continue to talk the (sic) employees.” (Decision, p. 21.)

The Regional Director concluded that, because “after each of these three incidents, the Employer’s higher managers immediately disavowed Radwon’s statements in the presence of employees,” Radwon’s statements did not interfere with employees’ free choice (Decision, p. 21). The Regional Director did not explain why she concluded that a higher manager immediately disavowed Radwon’s comments to Mutlib on February 8, when there is no evidence to support that conclusion.

e. More favorable assignments

The Regional Director found credible evidence that Radwon sometimes “showed favors” to four drivers, two of whom were open Union supporters. The Regional Director further found credible evidence that employees complained to Assistant Manager Vissesar and General Manager

¹³The record actually reflects, and the hearing officer found, that Radwon was *screaming* vote “yes” for the Company and vote “no” for the Union (Tr. 110; Report, pp. 23-24).

¹⁴According to the hearing officer, Radwon also told N. Rahman, in the presence of K. Hassan and Ahmen, that she (N. Rahman) should “stay away from the whole thing” (Report, p. 24).

N. Rahman that employees who supported the Union were being dispatched more favorable orders. (Decision, p. 13.)

The Regional Director concluded that, because no unfair labor practice charges were filed alleging that any supervisors' assignments were unlawful, it was not possible to determine that the alleged conduct interfered with the election (Decision, p. 21).

f. Appeal to racial/ethnic prejudices

The Regional Director found credible evidence that when Radwon solicited a card from Farid, Radwon told Farid that the other employees from Sylhet, a city in Bangladesh, had already signed cards. However, the Regional Director concluded that Radwon's single statement, which occurred about three months before the election, did not rise to the level of a sustained appeal to racial prejudice under Board law. (Decision, p. 22.)¹⁵

III. LEGAL ARGUMENT

The Regional Director's finding that Radwon's coercive conduct did not materially affect the outcome of the election under *Harborside* is clearly erroneous on the record given that a shift of only four votes would have changed the outcome, and the record confirms that at least five employees were directly subjected to the conduct. The Regional Director's finding that other conduct by Radwon did not reasonably tend to coerce or interfere with employees' free choice in the election under *Harborside* is also clearly erroneous on the record and inconsistent with Board precedent. Finally, to the extent Board precedent supports the Regional Director's conclusion that

¹⁵The Regional Director did not address the credited evidence that during the phone call between former General Manager B. Rahman and employee Islam, which involved Radwon's failure to disavow B. Rahman's threat, B. Rahman also told Islam he was "my people" and should understand about voting for the Union (Report, p. 32).

certain conduct did not reasonably tend to coerce or interfere with employees' free choice in the election, that Board law should be reconsidered and overruled.

A. THE *HARBORSIDE* TEST

The Board has long held that when a supervisor engages in prounion activity, the “continuing relationship” between the supervisor and an employee creates a possibility that an employee could be “coerce[d] into supporting the union out of fear of future retaliation by a union-oriented supervisor.” *Madison Square Garden Ct., LLC*, 350 NLRB 117, 119 (2007) (quoting *Sheraton Motor Inn*, 194 NLRB 733, 734 (1971)). In *Harborside*, the Board held that it will look to two factors to determine whether supervisory prounion conduct upsets the requisite laboratory conditions for a fair election:

1. Whether the supervisor’s prounion conduct reasonably tended to coerce or interfere with the employees’ exercise of free choice in the election, including (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct and (b) an examination of the nature, extent, and context of the conduct in question.
2. Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.

Harborside, 343 NLRB at 909.

In addition to establishing a new test for evaluating the impact of prounion supervisor conduct on employee free choice, the *Harborside* Board reversed prior law concerning the solicitation of union authorization cards by supervisors. Under prior law, the solicitation of cards was not objectionable where “nothing in the words, deeds, or atmosphere of a supervisor’s request for authorization cards contains the seeds of potential reprisal, punishment or intimidation.” *Millsboro Nursing & Rehabilitation Center*, 327 NLRB 879, 880 (1999). In *Harborside*, the Board

held that such supervisory solicitations are “inherently coercive absent mitigating circumstances.” *Harborside*, above at 906. The Board in *Harborside* further held that the effects of a supervisor’s coercive solicitation of authorization cards may continue to be felt during the critical period between the filing of the petition and the election, even if the card solicitation occurred prior to the filing of the petition. *Id.* at 912.

B. RADWON’S SOLICITATION OF AUTHORIZATION CARDS, FAILURE TO DISAVOW A THREAT, AND TELLING AN EMPLOYEE TO VOTE FOR THE UNION MATERIALLY AFFECTED THE OUTCOME OF THE ELECTION

Although she correctly found that Radwon engaged in prounion conduct that reasonably tended to coerce or interfere with employees’ free choice in the election under the first prong of *Harborside*, the Regional Director committed reversible error by concluding that such conduct did not materially affect the outcome of the election under *Harborside*’s second prong.

1. The Regional Director inexplicably miscalculated the number of votes necessary to change the election results.

The tally of ballots from the March 16 election reflected that 26 votes were cast for the Petitioner, 11 votes were cast for the Employer, and there were 7 challenged ballots (Bd. Exh. 1). Assuming, as Board law requires, that those seven challenged ballots voted for the Employer, see *Harborside*, above at 913 fn. 23 (“In assessing the size of the margin of victory, the Board will assume the unopened, uncounted challenged ballots were cast in favor of the objecting party.”) (citing *Acme Bus Corp.*, 316 NLRB 274, 274 (1995)), the Petitioner’s margin of victory was eight votes.

While the Regional Director accurately observed that the Petitioner’s margin of victory was eight, she erroneously presumed that “a shift of at least *eight votes* would be necessary to change the election results” (Decision, p. 23) (emphasis added). Straightforward math and established Board law dictate that a shift of only *four votes* would have changed the election results

here.¹⁶ See, e.g., *Chinese Daily News*, 344 NLRB 1071, 1072 (2005) (finding that where the union's margin of victory was 8, "a change in as few as 4 votes would have changed the election results"); *Harborside*, above at 913 (finding that where the union's margin of victory was 11, "a shift in as few as six votes would have changed the election results").

Contrary to the Regional Director's conclusion, then, if only *four* employees who voted in favor of the Petitioner had voted for the Employer, the result would have been a tie, meaning the Petitioner would have failed to obtain enough votes to win.

2. The record establishes that Radwon solicited authorization cards from at least four employees.

The Regional Director expressly found that Radwon solicited authorization cards from employees Hussain and Farid (Decision, p. 23). The Regional Director also found that Radwon discussed authorization cards with at least two other employees, Hassan and Hossen, although she did not expressly find that Radwon solicited cards from them. The Regional Director should have made that finding based on the credited record evidence.

As explained above, the credited evidence establishes that Radwon talked to Hassan and Hossen about signing cards and told them that 30 of their co-workers had already signed cards. Radwon's discussion with Hassan and Hossen about card signing was objectionable solicitation the same as his discussions with Hussain and Farid. It is immaterial that Radwon may not have directly asked Hassan and/or Hossen to sign a card. It is likewise immaterial that Radwon may not have given Hassan and/or Hossen a card to sign. Indeed, the record does not reflect that Radwon directly asked Hussain or Farid to sign a card, nor does it reflect that he attempted to give Farid a

¹⁶Even the hearing officer correctly concluded that "[f]our votes could have swayed the election, giving the Union a relatively narrow margin of victory" (Report, p. 33).

card, yet the Regional Director concluded that Radwon coercively solicited Hussain and Farid to sign cards.

The Board does not require the presentation of an actual authorization card, or even a specific request that someone sign a card, in order to find that the solicitation of cards has occurred. See, e.g., *Uniflite, Inc.*, 233 NLRB 1108, 1109, 1111 (1977) (finding card solicitation occurred where solicitor asked new employee if she was aware of the unionization effort, told her he could get her a card, and suggested that she talk to an employee on the in-plant organizing committee if she wanted more information); *The J.L. Hudson Company*, 198 NLRB 172, 178 (1972) (finding card solicitation occurred where solicitor told two employees that the union had obtained many membership cards and asked had they signed one).

Radwon's clear motivation for discussing card signing with Hassan and Hossen was to encourage them to sign a card. This is underscored by Radwon's use of a classic sales pitch—telling Hassan and Hossen that 30 of their co-workers had already signed cards. Radwon obviously wanted Hassan and Hossen to believe they were among the remaining few who had yet to sign a card. Radwon employed a similar sales pitch on Farid when, as the Regional Director found, he told him he was the only employee from Sylhet, Bangladesh, who had not signed a card (Decision, p. 17).

The most troubling aspect of Radwon's card discussion with Hassan and Hossen is that it gave him the opportunity to determine whether they were for or against the Union, which the Board in *Harborside* explained is why supervisor solicitation of authorization cards is “inherently coercive.” The *Harborside* Board observed that “[t]he solicitation of cards gives the supervisor the opportunity to obtain a graphic illustration of who is prounion and, by the process of eliminating nonsigners, who likely is not.” 343 NLRB at 911. Consequently, the Board explained, “[w]hen a

supervisor asks that a card be signed, the employee will reasonably be concerned that the ‘right’ response will be viewed with favor, and a ‘wrong’ response with disfavor.” Id.

Radwon’s discussion of card signing with Hassan and Hossen, including his representation to them that 30 other employees had already signed cards, gave him the opportunity to observe their reactions, and it left Hassan and Hossen with the impression that Radwon might treat them differently as their supervisor based on their response. This is precisely the type of coercive conduct the *Harborside* Board deemed objectionable.

The Regional Director’s failure to expressly find that Radwon’s specific discussion of card signing with Hassan and Hossen was inherently coercive solicitation is significant because it caused her to miscount the number of employees who were directly subject to conduct she found reasonably tended to coerce or interfere with employees’ free choice in the election.

3. The record establishes that at least five employees were subjected to Radwon’s coercive conduct.

Had the Regional Director found, based on the credited record evidence, that Radwon solicited authorization cards from Hassan and Hossen, in addition to Hussain and Farid, then she would have concluded that five employees (including Islam, who was subject to other conduct the Regional Director found reasonably tended to coerce or interfere with employee free choice) were directly impacted by Radwon’s coercive conduct.¹⁷ Given that a shift in only four votes could

¹⁷It is also reasonable to assume that if Radwon told Islam to vote for the Union, he told numerous other employees to vote for the Union. If nothing else, the record evidence compels that conclusion given that Radwon told numerous employees about the benefits of voting the Union in. It is simply unreasonable to conclude that telling employees about the benefits of voting a Union in does not equate to telling them to vote for the Union. In fact, Radwon’s promises were arguably more persuasive than him simply telling an employee he should vote for the Union. If someone tells a friend to try a new restaurant because the food is good and inexpensive, the friend is more likely to try it than if the person just tells him he should try it.

have changed the outcome of the election, the Regional Director's conclusion that the Employer failed to meet the second prong of *Harborside* is clearly erroneous on the record.

C. RADWON'S OTHER PROUNION CONDUCT REASONABLY TENDED TO COERCE OR INTERFERE WITH EMPLOYEES' FREE CHOICE

In addition to finding that Radwon solicited authorization cards, failed to disavow a threat, and told an employee he should vote for the Union, the Regional Director credited evidence that Radwon made statements to employees about job loss, attended union meetings and solicited employees to attend union meetings, promised employees better benefits, including higher wages, vacation and medical benefits, job security, assistance finding other work, more hours, and protection from discipline, and undermined the Employer's position on unionization. The Regional Director also found that Radwon treated certain employees more favorably than others and appealed to the racial/ethnic prejudices of employees to encourage them to sign authorization cards. According to the Regional Director, however, none of that conduct reasonably tended to coerce or interfere with employees' free choice under the first prong of *Harborside*. The Regional Director's conclusions are either not supported by the record evidence or are inconsistent with Board law. To the extent the Regional Director's conclusions are supported by Board law, that law should be overruled.

1. Threats of job loss

The Regional Director credited evidence that Radwon made statements of job loss to at least three employees who were not subject to the other conduct the Regional Director concluded was coercive under *Harborside*. Specifically, the Regional Director found that Radwon told Ulhassan and Palit that if the Union lost the election, Radwon and other employees would lose their jobs (Decision, p. 11). The Regional Director further found that Radwon told Uddin that employees would not have jobs if the Union won (Decision, p. 11).

Despite crediting testimony that Radwon made these threats of job loss, the Regional Director concluded that the employees would not reasonably have been coerced because assistant managers only have the authority to verbally warn employees, and there is no evidence verbal warnings lay the foundation for further discipline (Decision, p. 19). The Regional Director's conclusion is flawed in at least two respects.

First, the Regional Director overlooked evidence credited by the hearing officer that assistant managers not only have the authority to issue verbal warnings, they also have the authority to issue written warnings and can even send people home for not complying with Domino's rules. The Regional Director also overlooked credited evidence that an assistant manager can terminate an employee after discussing the matter with a general manager. (Report, p. 13.) While the hearing officer concluded that such authority did not involve independent judgment and therefore did not support the conclusion that assistant managers have the authority to discipline or discharge under Section 2(11), the authority nonetheless exists.

Moreover, employees were well-aware that assistant managers were considered by the Employer and the Union as supervisors with supervisory authority, because the Stipulated Election Agreement (Bd. Ex. 1) was posted in the store for all employees to see, and employees were specifically told that assistant managers were supervisors and excluded from the unit (Tr. 49, 54-55). If there were any doubt about what that meant, employees could have easily read Section 2(11) of the Act, which defines a statutory supervisor, and seen that it may include the authority to discharge and effectively recommend discharge. Consequently, for the Regional Director to completely ignore this record evidence and conclude that assistant managers only have the authority to issue verbal warnings is clearly erroneous.

Second, Board law does not support the proposition that a supervisor must possess the actual authority to discharge someone in order for his or her threat of job loss to be coercive. In *Delta Mechanical, Inc.*, 323 NLRB 76 (1997), the Board found that a team lead's threat to a group of employees that he would fire anyone who "was union" was unlawful notwithstanding that the lead was not authorized to terminate employees. The Board explained: "It is immaterial whether [the lead] has actual authority to fire. As [the lead] reasonably was viewed as [the employer's] agent, employees reasonably would fear that [the lead] would be able to engineer their discharge if he so desired." *Id.* at 78.

Similarly, in *Waste Management, Inc.*, 330 NLRB 634 (2000), the Board set aside an employer's election victory based in part on the union's objection that a supervisor threatened to discharge an employee for defacing a piece of the employer's antiunion campaign literature. The employer admitted that the supervisor told the employee he would be discharged for defacing the literature; however, the employer took the position that the supervisor lacked the authority to actually fire the employee and, therefore, no threat was made. *Id.* at 637. The Board adopted the hearing officer's recommendation to reject this argument. According to the hearing officer, "Whether [the supervisor] could discharge solely on his own initiative or whether he could only effectively recommend such action is of little moment as he was still a supervisor threatening the workplace's version of capital punishment in retaliation for [the employee's] crude, but protected, expression of union sympathy." *Id.* The hearing officer continued, "As a threat of discharge is highly coercive and one of the most serious forms of employer misconducts, I would recommend that [the union's objection] be sustained." *Id.*

The fact that the supervisors in the above cases were not prounion does not make a difference. In *Harborside*, the Board observed that prounion and procompany supervisory conduct

should be treated the same when analyzing whether it has a tendency to coerce or interfere with employee free choice in the election. See *Harborside*, 906 NLRB at 906-907 (“In our view, irrespective of whether the supervisor improperly importunes subordinates to vote for the union or against it, the vice is the same, viz employees may be induced to support/oppose the union because they fear future retaliation, or hope for preferential treatment, by the supervisor.”).

Finally, Radwon’s threats cannot be narrowly viewed only as threats that Radwon *himself* would discharge employees. Indeed, such a view is inconsistent with the fact that Radwon told some employees that even he would be discharged if the Union lost the election. Radwon was obviously conveying to the employees, albeit falsely, that someone higher up had intentions to take adverse action against them unless the Union was voted in. Thus, even if Radwon lacked the actual authority to discharge employees, employees reasonably would have believed he had information about the Employer’s supposed plans to discharge union supporters.

In sum, the Regional Director’s conclusion that Radwon’s threats of job loss were not coercive because he did not have the authority to discharge employees is clearly erroneous on the record and does not comport with Board law. And if Board law does in fact support the Regional Director’s conclusion, it should be overturned to reflect a sound policy that any supervisor – particularly one the parties have expressly agreed at the outset of a campaign is a Section 2(11) supervisor – who threatens employees with job loss in connection with how they vote in an election is doing so coercively notwithstanding their actual authority to discharge employees or otherwise carry out those threats.

2. Attendance at union meetings and encouragement to attend union meetings

The Regional Director found that Radwon attended at least two Union meetings, spoke to and texted employees about attending Union meetings, and encouraged one employee to go to a

Union meeting (Decision, p. 19). Relying on *Northeast Iowa Telephone Co.*, 346 NLRB 465 (2006), and *Stevenson Equipment Co.*, 174 NLRB 865 (1969), the Regional Director concluded that Radwon's actions were not objectionable because there is no evidence he spoke or solicited cards at the meetings or required employees to attend the meetings, and "[a] prounion supervisor's attendance at a union meeting, standing alone, does not establish coercion or interference under *Harborside's* first prong" (Decision, p. 19). The Regional Director misapplied the law to the facts.

First, Radwon did not merely "attend" a union meeting. With the Union's direct knowledge and support, Radwon actually facilitated the meetings and invited employees to attend. The Employer introduced a series of text messages between Radwon and the Union's representative, Peter Scalzo, that span a period of nearly a month and include communications on the day of the original election and the day of the postponed election about meeting times and locations. Radwon also told Scalzo there would be 10-12 people coming to at least one of the meetings. (Emp. Exh. 11.) The hearing officer found these messages "belied" Radwon's testimony that he did not attend any Union meetings or tell employees to go to Union meetings (Report, p. 20). The fact that Radwon would boldly lie under oath about his conduct in arranging, promoting, and attending union meetings tells as much of the story as anything.

Second, the law is not as clear as the Regional Director makes it out to be. Contrary to the Regional Director's understanding, *Northeast Iowa* does not establish a blanket rule that a supervisor's attendance at a union meeting is never coercive. In *Northeast Iowa*, the prounion supervisor's conduct was limited to "attending union meetings, participating in discussions at those meetings, signing authorization cards in front of employees, and mentioning some of the issues that a union could help resolve." 346 NLRB at 467. The Board found that conduct was markedly different from the conduct in *Harborside*, which, like here, involved card solicitation and threats

of job loss in addition to attendance at union meetings. As discussed throughout this brief, Radwon's conduct also included other coercive behavior, all of which must be taken into account when considering whether his attendance at union meetings was also coercive.

Nor did the Board establish a blanket rule in *Stevenson Equipment*. In that case, which was decided nearly 40 years before *Harborside*, several supervisors initially attended a meeting with employees to encourage them to discuss their concerns about their job. *Stevenson Equipment*, above at 866. During that meeting, a supervisor asked employees to share their thoughts about a union. *Id.* In subsequent meetings, union representatives were present and passed out authorization cards. *Id.* At some point, two of the three supervisors were discharged, yet they continued to attend the meetings. *Id.* The Board concluded that the former supervisors' attendance was not coercive because employees would not reasonably believe they could still impact their jobs. *Id.* With respect to the supervisor who remained employed, the Board concluded that he did nothing more than merely indicate an interest in having a union at the plant. *Id.*

Regardless of whether mere attendance at a union meeting is coercive under extant Board law, the credited record evidence in this case establishes that Radwon solicited employees to attend union meetings throughout the campaign period, including on the election days. With the consent and support of the Union—and while still employed as a Section 2(11) supervisor—Radwon sent group text messages encouraging employees to attend. This was far more egregious than “merely attending” as the Regional Director concluded.

Moreover, as referenced above, Radwon's actions in connection with inviting employees to attend union meetings and actually attending union meetings cannot be viewed in isolation. At a minimum, he also solicited employees to sign authorization cards, failed to disavow a threat from a prior general manager, expressly told at least one employee to vote for the Union, made threats

of job loss, promised employees benefits in exchange for voting for the Union, undermined the Employer's position on unions, treated employees unfairly, and appealed to racial/ethnic prejudices. The Regional Director turned a blind-eye to this additional misconduct when concluding that his "mere attendance" at Union meetings was not coercive.¹⁸

3. Promises of better benefits

The Regional Director found that Radwon told employees they would get better benefits, including higher wages, vacation and medical benefits, job security, and assistance finding other work if the Union won the election (Decision, p. 20). The Regional Director concluded that such promises were not coercive, however, because "[t]he Board has found that statements by a prounion supervisor advising employees of potential benefits of collective bargaining do not reasonably interfere with or coerce employees' freedom of choice in an election" (Decision, p. 20). She also concluded that the promises were not coercive because there is no evidence assistant managers had the authority to increase pay or provide vacation or medical benefits (Decision, p. 20 fn. 44).

To support her conclusion that advising employees of the benefits of unionization is not objectionable, the Regional Director cited *SNE Enterprises, Inc.*, 348 NLRB 1041 (2006), and *Northeast Iowa*, above. Both of those cases are easily distinguishable.

¹⁸It is important to note that a blanket rule that mere attendance at a union meeting is not coercive raises significant policy concerns because, when confronted with evidence that a supervisor was at a union meeting, an employer would have little choice but to poll employees about whether they attended in order to garner evidence to support an objection. Many times employees are unwilling to admit they attended a union meeting, or they are unwilling to divulge what took place there. Consequently, holding that a supervisor's attendance at a union meeting is not coercive unless the supervisor does or says something at the meeting to influence employees to vote for the union is not sound policy.

In *SNE Enterprises*, the prounion supervisor generally told employees that a union would help them get better benefits and treatment. *SNE Enterprises*, above at 1050. In *Northeast Iowa*, the prounion supervisor mentioned to employees some of the issues that a union could help resolve, such as the fairness of scheduling, overtime, and layoffs. *Northeast Iowa*, above at 467. In both cases the Board concluded the statements did not constitute a coercive promise of benefits in exchange for support of the union.

Unlike the facts in *SNE Enterprises* and *Northeast Iowa*, Radwon's statements went far beyond merely talking with employees about the benefits of being in a union. Radwon's statements were couched in terms of what the Union would specifically get them in exchange for their vote. The Regional Director found that Radwon told at least four employees that the Union would increase their pay to between \$18.00 and \$20.00 per hour, and get them medical benefits, vacation benefits, and a job guarantee. Additionally, the Regional Director found that Radwon told at least one employee he would be able to work whenever he wanted, and the Union could help employees obtain jobs outside of Domino's if they wished. (Decision, p. 11.)

Radwon's statements were not akin to a prounion supervisor simply telling employees about the benefits of unionization. He made specific promises to employees in order to influence them to vote for the union. Employees had no reason to believe Radwon could not carry through with those promises given his status as an assistant manager who, more often than not, was the highest level of management at the store. Consequently, the Regional Director erred in relying on *SNE Enterprises* and *Northeast Iowa* to conclude that Radwon's promises were mere innocent promotions of unionization with no coercive impact on employees.

Regarding her conclusion that Radwon's promises were not coercive because he did not have the authority to increase pay or provide vacation or medical benefits, the Regional Director

failed to consider key evidence. Specifically, the Regional Director failed to consider the credited evidence that Radwon also told two employees their hours would improve, one employee he could work whenever he wanted, and one employee he would be protected from discipline. There is a wealth of record evidence confirming that Radwon possessed authority to carry through with those promises (Tr. 78-79, 86-89, 362-363, 366, 390-391, 485-486, 505).

The Regional Director also failed to cite any Board law to support her conclusion that a supervisor has to have actual authority to change a term or condition of employment in order for a promise to change to be coercive. To the extent she is relying on the same theory she relied on to support her conclusion that Radwon's threats of job loss were not coercive because he did not have the authority to discharge, that theory is contradicted by Board law and/or premised on Board law that should be overruled, as explained above.

4. Additional conduct

The Regional Director found, based on the credited record evidence, that Radwon, in the presence of employees, undermined the Employer's position on unionization by making confusing statements in front of employees (Decision, pp. 20-21). She further found that Radwon treated employees unfairly, just not necessarily on the basis of whether they supported or opposed the Union (Decision, p. 21). Finally, she found that Radwon appealed to racial/ethnic prejudices with respect to at least one employee by telling him that everyone from his specific region of Bangladesh had already signed authorization cards (Decision, p. 22). Despite these factual findings, the Regional Director concluded that none of this conduct was coercive. Her analysis is faulty.

With respect to Radwon's attempt to confuse the issues and undermine the Employer's position on unions, it was coercive and had a tendency to interfere with the election because it was

inconsistent with what other members of Domino's management team (with the exception of Radwon's cohort, Samad) had been communicating since it found out a petition was filed. It should not matter that other managers were there to "clean up" Radwon's misstatements and misrepresentations.¹⁹ The reality is Radwon was expressly taking a position in direct contrast to the position management was taking even though he was management, and he had the authority to directly affect the terms and conditions of the employees' employment just like other managers.

Most telling is the fact that Radwon could give employees unfavorable assignments, which he was found to have done. The fact that no unfair labor practice charges were filed claiming that he did so on the basis of whether employees supported or opposed the Union is immaterial. The credited evidence establishes that some employees filed complaints with upper management based on their belief that Radwon was unfairly assigning work on that basis. (Report, p. 25.) In other words, they subjectively believed he was treating Union supporters more favorably. The standard of review, of course, does not even go so far as to require an analysis of the subjective views of employees. Instead, the standard merely requires there to be an objective basis for that belief. If the *credited evidence* reflects that employees actually believed Radwon was unfairly assigning work to Union supporters, then the objective analysis is simple – his conduct was coercive.

Finally, the Regional Director completely misunderstood the import of Radwon's appeal to racial/ethnic prejudices. From a supervisor taint perspective under *Harborside*, Radwon's appeal to even a single employee on that basis was coercive. It does not matter how many other employees Radwon appealed to with that tactic. The cases on which the Regional Director relies

¹⁹As explained above, the Regional Director erroneously assumed that Radwon's exchange with Mutlib on February 8 was, like the other two "undermining" incidents, was followed by an immediate disavowal. It was not. Thus, the only thing on which the Regional Director can hang her hat with respect to the February 8 incident not being coercive is pure speculation that none of the seven or eight employees who were standing nearby at the time overheard the exchange.

to find that there was no sustained course of appeal to prejudices are inapposite because they do not analyze the issue under *Harborside*. What is at issue here is whether the one employee whom the credited record evidence establishes was subjected to the conduct would have reasonably tended to be coerced.

D. THE REGIONAL DIRECTOR’S DECISION RAISES SERIOUS POLICY CONCERNS

If a union can knowingly endorse and encourage a stipulated supervisor’s prounion conduct during the period leading up to an election, then the scales are tipped decidedly in favor of unions during organizing campaigns. No employer can sufficiently mitigate the impact of a stealth campaign that takes advantage of the unique relationship between a supervisor and his employees. See *Madison Square Garden Ct., LLC*, 350 NLRB 117, 121 (2007) (“[A] first-line supervisor has the most day-to-day contact with the employees and can broadly impact employees’ daily working lives.”) (citing *Harborside*).

This is not the more common case where a rogue supervisor contradicts the employer’s message and tells employees why they would be better off with a union. This is a highly unusual case where the Union expressly stipulated that assistant managers were Section 2(11) supervisors and then, throughout the campaign including up to the day of the vote, surreptitiously relied on at least one of those managers to, among other things, solicit authorization cards, threaten employees with job loss, promise employees specific improvements in their wages, benefits, and terms and conditions of employment, offer employees protection from discipline, offer them more hours and the opportunity to work when they want to, encourage employees to attend union meetings, attend union meetings, give unfavorable assignments, undermine the Employer’s position on unions, and appeal to racial/ethnic prejudices.

Compare the circumstances here with the circumstances leading to the invalidation of an employer election victory in *URS Federal Services, Inc.*, 365 NLRB No. 1, slip op. (2016). In that case, the employer won an election by more than 30 votes. However, the Board set the election aside because the employer failed to serve the voter list on the union as required by the Board's Rules and Regulations. The Board overturned the election even though the union was not prejudiced by the employer's failure to serve the list given that the Region had forwarded it to the union when the employer timely filed it.

No rational or defensible argument can be made that the employees in *URS Federal Services* deserved the opportunity to vote in a second election but the employees in the instant case do not. In *URS Federal Services*, not a single employee was disenfranchised, and the employer prevailed by more than 30 votes. Here, at a minimum, employees Hussain, Farid, Hassan, Hossen, Islam, Ulhassan, Palit, Uddin, Roknuzzaman, K. Hassan, and Ahmen were subjected to various forms of prounion supervisor conduct, at least some of which the Regional Director concluded reasonably tended to coerce or interfere with the employees' free choice in the election under the first prong of *Harborside*.²⁰ The margin of victory was eight votes, meaning that if just four employees were influenced to vote for the Union when they would not otherwise have done so, the outcome of the election would have changed.

The Board's primary responsibility in representation cases is to ensure that employees vote in an atmosphere free from undue influence and coercion and thereby express their true desires for representation. As the Board in *General Shoe Corporation*, 77 NLRB 124, 127 fn. 11 (1948), observed long ago, "In election proceedings, it is the Board's function to provide a laboratory in

²⁰It bears repeating that *all* of this conduct was revealed through evidence introduced over the course of a five-day hearing and specifically credited by the hearing officer and Regional Director.

which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.” The conditions under which Domino’s employees voted at Store 3597 on March 16 are about as far from ideal as they could have been.

The Regional Director’s conclusion that Radwon’s conduct did not materially affect the outcome of the election, and her conclusion that some of his conduct did not reasonably tend to coerce or interfere with employees’ free choice in the election, is clearly erroneous on the record, is inconsistent with or grounded in unsound Board law, and raises serious policy concerns that can only be corrected by setting aside the election.

IV. CONCLUSION

For the reasons set forth herein, including any oral argument the Board may permit, the Board should grant the Employer’s request for review and set aside the March 16 election.

Respectfully submitted,

FISHER & PHILLIPS LLP

s/ Reyburn W. Lominack, III

Reyburn W. Lominack, III, Esquire

Michael D. Carrouth, Esquire

1320 Main Street, Suite 750

Columbia, South Carolina 29201

Phone: 803.255.0000

Fax: 803.255.0202

rlominack@fisherphillips.com

mcarrouth@fisherphillips.com

ATTORNEYS FOR EMPLOYER

October 12, 2018

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DOMINO’S PIZZA LLC,)
)
Employer,)
) Case 29-RC-214227
and)
)
LOCAL 91, UNITED CRAFTS AND)
INDUSTRIAL WORKERS UNION,)
)
Petitioner.)
_____)

CERTIFICATE OF SERVICE

It is hereby certified that Employer Domino’s Pizza LLC’s Request for Review of Decision and Certification of Representative was filed electronically on October 12, 2018, and served on the following on the date set forth below:

Steve H. Kern, Esquire
Barnes, Iaccarino & Shepherd LLP
258 Saw Mill River Road
Elsford, NY 10523
skern@bislawfirm.com

Kathy Drew-King
Regional Director, Region 29
National Labor Relations Board
Two MetroTech Center
Brooklyn, NY 11201
kathydrew.king@nlrb.gov

s/ Reyburn W. Lominack, III
Reyburn W. Lominack, III

October 12, 2018