UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GRILL CONCEPTS SERVICES, INC. D/B/A THE DAILY GRILL, Employer, and UNITE HERE LOCAL 11, Petitioner.	Case No. 31-RC-209589

PETITIONER'S RESPONSE BRIEF
IN OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW

The Regional Director's decision overruling the Employer's objections and certifying the election results after the Union won a majority of votes in a mail ballot election was correct and should be affirmed. There is no evidence of any Union conduct that reasonably could have been taken as coercive. Nor is there any evidence that Union offers to "help" with employees' voting were any threat to the integrity or confidentiality of the vote. Contrary to the Employer's innuendo in its Request for Review, the evidence shows that the offers to "help" were in fact completely unobjectionable: they were offers to drive people who lacked transportation to the post office so they could mail their ballots, or to explain the mechanics of filling out the ballots and signing the envelopes so that their votes would be valid. No ballots were opened or marked in the presence of Union representatives, and no ballots were solicited or handed to Union representatives for mailing.

1. The Employer, as objecting party, has the burden of proving specific conduct that had a reasonable tendency to affect the outcome of the election or to call the integrity of the vote into question.

"The burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one. The objecting party must show, inter alia, that the conduct in question affected employees in the voting unit and had a reasonable tendency to affect the outcome of the election." *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005) (internal quotations omitted). The objecting party must prove that the specific conduct in question had a reasonable tendency to affect the outcome of the election. *Affiliated Computerizing Services*, 355 NLRB No. 163 (2010).

2. The Regional Director correctly determined that the evidence shows no coercion by the Union.

The Regional Director correctly overruled the Employer's objections about supposed coercive behavior by Union representatives in visiting the homes of employees during the mail ballot voting period.

A. The test of whether union representatives' words or conduct are coercive is an objective one.

The Employer contends that actions by Union representatives during the voting period were "as a whole, coercive." Request for Review 13. Thus, the Employer appears to be alleging that the Union violated Section 8(b)(1)(A) of the Act. Alternatively, if the Employer is not alleging an unfair labor practice, it may be alleging that the Union's conduct otherwise had a tendency to interfere with the employees' freedom of choice. On either theory, the test of whether the Union's conduct was objectionable is an objective one.

The test for whether union conduct violates Section 8(b)(1)(A) is "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *NLRB v. Service Employees Local 254*, 535 F.2d 1335, 1337-38 (1st Cir. 1976); *Plumbers Local 38 (Bechtel*

Corp.), 306 NLRB 511, 518 (1992). This objective test is a counterpart to the objective test of employer coercion under Section 8(a)(1).

Alternatively, where pre-election conduct is alleged to be objectionable but not an unfair labor practice, the test is "an objective one, … whether the conduct of a party to an election has the tendency to interfere with the employees' freedom of choice." *Cambridge Tool & Mfg. Co., Inc.*, 316 NLRB 716 (1995); *see Jurys Boston Hotel*, 356 NLRB 927, 928 (2011) (test is whether conduct "could…reasonably have affected the results of the election"). In such an analysis, the subjective reactions of employees is irrelevant to the question of whether there was, in fact, objectionable conduct. *NLRB v. Enterprise Leasing Co. Southeast, LLC*, 722 F.3d 609, 619 (4th Cir. 2013). The *Cambridge Tool* objective test applies to employers and unions alike.

B. Home visits by Union representatives are not themselves objectionable.

As the Regional Director recognized, "union agents may lawfully visit employees at their homes as part of their unionization efforts in both manual and mail ballot elections." Decision and Certification of Representative ("Decision") at 2, citing *San Diego Gas and Electric*, 325 NLRB 1143, 1149 (1998) and *Plant City Welding & Tank Co.*, 119 NLRB 131, 133-34 (1957) (rev'd on other grounds, 133 NLRB 1092 (1961)). Unions are permitted to engage in a variety of persuasive tactics to solicit support for their cause.

Thus, the Employer ominously reports that "Union representatives systematically targeted specific employees for home visits on or around December 9, 2017, when the ballots were expected to arrive at employees' homes." Request for Board Review at 4; Tr. 460:20-461:13. But this is an unobjectionable organizing technique.

C. Statements and actions by Union representatives were not coercive.

The record does not disclose any coercive statements or actions by Union representatives during home visits.

The Employer claims that "the Union's conduct here is, as a whole, coercive." Request for Review at 13. But it offers no evidence of coercive words or conduct by Union representatives on home visits.

The Employer cites the following testimony by employee Kurt Mann, being examined by Employer's counsel, in support of its contention that the Union's conduct was coercive:

> Q. Okay. How was their demeanor? Were they aggressive or pushy?
> A. They're always a little intimidating, kind of; not mean, but definitely forceful, for sure.
> Q. Did you feel like they were being a little coercive at all?
> A. Absolutely.
> * * *
> Q. And what type of things were they doing that made them seem to you as pushy or aggressive?
> A. Insisting upon not leaving until I can help them, or they were pretty forceful in telling me, like, hey we want to make sure this happens, can you—can we do it now, can we—you know, it was pretty forced. It was tough to not notice the—they were trying to be nice about it, but at the same time, like, you could tell they weren't going to take no really, for an answer.

Tr. 223:23-224:25.

Contrary to whatever notions this exchange is intended to suggest, Mann's testimony concerning the Union visit demonstrates nothing more than legitimate attempts to provide information and persuade. Mann explained on cross examination that the Union made two home visits to him. The first was short and ended when he told the representatives he didn't have time to talk and closed the door. Tr. 235:24-236:12. The second was longer. The Union representatives talked about the advantages that the Union hoped to negotiate: affordable health insurance, better wages, better job protection. Tr. 237. In an exchange immediately following the passage quoted above, the witness explained that he "kind of heard them out for a second," then told them he was getting ready for work and did not need help. Tr. 225:2-4. He explained

that the Union representatives attempted to "interject with new pieces of information," but they left when he made it clear that he did not have time to speak with him. Tr. 243:17-244:18. He acknowledged that the Union representatives never threatened him or said they would retaliate if he did not support the Union. Tr. 237:21-24.

Mann's testimony shows that the Union representatives, on the second of two home visits, tried to persuade Mann about the advantages of having union representation. They spoke forcefully but were also "trying to be nice about it." They did not threaten Mann. Nothing in what Mann describes crosses the line from attempting to persuade into coercion.

The only other words or actions by Union representatives that the Employer claims were coercive is that "Union representatives even entered Lucas Chim's home without his knowledge or consent." Request for Review at 7, citing Tr. 87:24-88:9. This claim is based on a misinterpretation of confusing testimony. Chim testified that he himself did not invite the Union representatives into his home. Tr. 88:20-23. But he also testified that his family was at home, that the representatives spoke with his family, and that his wife woke him up to see the representatives. Tr. 88:5-9. The obvious inference is that Chim's wife or another family member invited the representatives in, then woke Chim, who was napping. The representatives spoke with Chim for about half an hour, then left when he asked them to. Tr. 90:7-23. In other words, this was an ordinary, lawful home visit where nothing coercive occurred.

Besides these two passages from the hearing testimony, all of the other evidence that the Employer contends shows the "Union's coercion," which the Employer lists on pages 13 to 14 of its Request for Review, is actually not evidence of any wrongful actions or statements by Union representatives. Rather, it is evidence of how some employees felt, subjectively, during the organizing campaign and the election.

D. The Employer's reliance on employee testimony about subjective emotional reactions is merely an attempt to obscure the lack of coercion.

The bulk of the evidence that the Employer points to in support of its "coercion" claim is solely about the subjective reactions of employees to objectively lawful statements and actions by Union representatives. Employees testified that they subjectively felt bothered by the very fact of Union home visits, and that there was "tension" at work around the issue of unionization. The Board has long held that such evidence of subjective concerns is not relevant to the question of whether a union's or an employer's behavior is objectively objectionable. Indeed, if representation elections had to be re-run merely because employees did not feel comfortable with the lawful attempts of employers and unions to persuade them to one side or another, or because there was tension in the workplace during the pre-election period, representation election results would almost never be final.

The Employer's bullet-pointed list of supposed "coercion" on pages 13 and 14 of its Request for Review is nearly all subjective observations of employees. Several employees testified that they were "upset" or felt "uncomfortable" or "pressured" when Union representatives visited their homes. But there was no evidence of behavior or speech by Union representatives that was objectively coercive or threatening. This testimony about subjective reactions is therefore not relevant to whether the Employer's objections should be sustained.

Ashlynn Camberos testified that she had her ballot delivered to her mother's address "to avoid receiving it in front of Union members," according to the Employer. Request for Review at 13. But the Hearing Officer and Regional Director both correctly noted that Cambreros's testimony about why she had the ballot sent to her mother's address was unclear, because she also testified that it was sent there "because my address for the Daily Grill was my mother's address … And I had just moved to this house." Decision at 5; Tr. 199:22-200:3. Moreover,

since the test here is an objective one, Camberos's subjective worries and decisions about which address to use is not relevant. There is no evidence of objectively coercive behavior directed at Camberos.

Similarly, the Employer claims that Stephanie and Kimberly Mendez "rushed to get their mail ballots from their mailbox upon seeing the Union representatives arrive." Request for Review at 13, citing Tr. 371:2-372:9. But there is no evidence that Union representatives did or said anything that would give either employee an objective reason to be afraid for the confidentiality or validity of their ballots. So their decisions to "rush" to their mailbox provides no reason for upholding an objection.

Similarly, the Employer claims that Macey Sheets "did not sign her mail ballot for fear that it would not remain anonymous." Request for Review at 14. The Employer claims that "[t]he Union's unwelcome home visits stoked this fear." Once again, there is no objective evidence that Union representatives did anything that would reasonably create fear about a lack of anonymity. It is not objectionable for a union to make a home visit that is "unwelcome" as long as the conduct of that visit is not coercive—and there is no evidence that anything improper occurred or was said during the visits to Macey Sheets.

Finally, the Employer claims that three employees "testified that the Union's home visits had an effect on their concerns regarding the anonymity of their vote." Request for Review at 14. But once again there is no evidence of any Union conduct that would reasonably have given rise to such concerns. Indeed, since the Employer closely examined all of the complaining employees at length in a three-day hearing without eliciting any such evidence, and since the objecting party bears the burden of demonstrating that objectionable conduct occurred, the only fair conclusion is that there was no objectionable conduct.

The Employer also claims that "the Union's home visits persisted in the minds of these employees, as they discussed it amongst themselves for months following the vote." The fact that employees discussed the home visits is not objectionable, nor does it indicate that objectionable conduct occurred. Rather, it suggests that the organizing drive and election were noteworthy topics of conversation in the workplace, which is hardly surprising.

In short, the Employer here is attempting to stitch together the subjective complaints of a few employees who were not thrilled to be visited at home by Union representatives or who became nervous about their votes becoming known. But the Employer has absolutely no objective evidence of objectionable behavior on the part of the Union or third parties. The subjective reports therefore provide no basis for overturning the election results.

3. The Regional Director correctly determined that there was no behavior that compromised the secrecy or integrity of the ballots.

The Employer tries to imply that the Union's home visits included some type of interference with the secret ballot or with the vote itself. But there is no evidence of this. The Employer can point to no evidence that employees opened their ballots or voted in the presence of Union representatives. Nor can it point to any evidence that Union representatives took possession of any ballots. In fact, even the Employer's claims that the Union asked employees to open ballots in the presence of Union representatives or to hand over completed ballots to the Union for mailing are not supported by the evidence. The Employer's brief relies upon innuendo and confusion.

Fessler & Bowman, Inc., 341 NLRB 932 (2004), explains a distinction between objectionable and unobjectionable conduct with respect to mail ballots which can help frame the analysis of the evidence in this case. In *Fessler & Bowman*, union representatives collected mail ballots which had been completed and sealed from at least two employees and mailed the ballots.

Id. at 932. In a separate instance, a union representative offered to pick up another employee's ballot and asked that employee to ask co-workers to bring in their ballots for collection. *Id.* at 932-33. The Board considered these actions separately. It held that "where a party collects or otherwise handles voters' mail ballots, that conduct is objectionable and may be a basis for setting aside the election." *Id.* at 934. However, the Board found that the "solicitation of voters' ballots did not constitute objectionable conduct." *Id.* Such solicitation "did not create an opportunity for ballot tampering or for a breach of secrecy," nor did it in some other way "inflict actual harm on the election process." *Id.*

The evidence shows that neither objectionable "collecting"/"handling" nor unobjectionable "solicitation" occurred here. Rather, the Union's offers to "help" were offers to explain correct voting procedure, including explaining the importance of signing the envelope after sealing, and offers to help employees without means of transportation to get to a post office to mail their ballots.

A. Careful examination of the evidence shows that the Union did not solicit ballots from employees, much less take any actions that might raise genuine doubts about anonymity or the integrity of the voting process.

Here, the Employer claims that "testimony establishes that the Union representatives attempted to convince employees to open their ballots in their presence." Request for Board Review at 7.[1] However, the actual testimony does not support this claim. The Hearing Officer correctly analyzed this evidence, observing that "the testimony about what was meant by

[1] Contrary to the implication created by the Employer's poor phrasing in this passage in its brief, the Union does not "agree[]" that its conduct was "illegal." Rather, the record cites offered by the Employer after this sentence in its brief are testimony by Union representatives that were trained not to handle employees' mail ballots and not to be present when employees opened or filled out their ballots.

'helping' is equivocal." Hearing Officer's Report at 7. Since the objecting party has not met its burden of proof, the election should not be set aside.

The Employer claims that four employees were subject to solicitation by the Union and/or third parties to either open their ballots in front of them, vote in front of them, or hand over their completed ballots to be mailed. These are: Stephanie Mendez, Kurt Mann, Benjamin Acosta, and Macey Sheets. Request for Review at 13.

But the evidence does not establish that any of these four employees were solicited in the way the Employer claims. Stephanie Mendez testified that the Union's offer of "help" was to "take me to put postage if I wanted to," Tr. 129:13-15—in other words, to give her a ride to a post office—and to show her what the ballot looks like and how to sign it, Tr. 143:18-22. Thus, the evidence does not establish that Union representatives or anyone else solicited Stephanie Mendez to open her ballot or vote in the presence of others, or to give her ballot to others to put in the mail.[2]

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[2] Another employee, Kimberly Mendez, did not give clear testimony that her ballot was solicited. The Hearing Officer's Report acutely analyzes the evidence with respect to K. Mendez: although she stated that the Union and/or third parties offered to "help" her vote, Tr. 128,

> [w]hen asked pointedly whether the Union and/or third parties asked her to open her ballot and vote in front of them, K. Mendez responded non-definitively: "Well, yea, pretty much, since they were telling me that they wanted to help me." [Tr. 129]. Her answer suggests that she assumed that the Union's and/or third parties' offer to help her vote meant that they wanted her to vote in front of them, but not that they had explicitly requested this of her. When asked again if the Union and/or third parties had asked her to vote in front of them, K. Mendez was again equally non-definitive: "they asked me if I was onboard with them, and they believed that I wasn't going to be onboard with them. And I told them I don't think I'm onboard with you." [Tr. 129].

Hearing Officer's Report at 7. The Hearing Officer also declined to credit hearsay testimony by Stephanie Mendez that Kimberly had told her that the Union and/or third parties had tried to make Kimberly vote in front of them. *Id.* at n. 12.

Kurt Mann, testified that the Union "asked me if I needed help filling it out or I needed help taking it to the post office to mail, or help getting it all filled out and everything sent." Tr. 222:24-223:2. On cross-examination, Mann clarified that the Union representatives offered to take him to the post office so he could put the ballot in the mail and did not ask him to give them his ballot. Tr. 239:8-19. Thus, the evidence does not establish that Union representatives or anyone else solicited Kurt Mann to open his ballot or vote in the presence of others, or to give his ballot to others to put in the mail.

Benjamin Acosta testified that Union representatives offered to "help" him fill out his ballot. Tr. 37. But the Hearing Officer did not credit this as evidence of solicitation because Acosta did not clarify what this supposed offer meant. Hearing Officer's Report at 7. 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. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). The Employer offers no such evidence. And Martha Santamaria, a Union representative who was present during the home visit that Acosta describes, testified at the hearing that the Union representatives never asked Acosta to open his ballot in their presence, Tr. 534:1-15, and did not offer to help Acosta fill out his ballot, Tr. 536:20-24. Particularly in light of Santamaria's testimony, the Hearing Officer's refusal to credit a vague and ambiguous statement by Acosta as referring to wrongful rather than innocuous conduct is quite reasonable.

Macey Sheets gave self-contradictory testimony about what the Union representatives who visited her asked for. She said, "they just wanted to confront like, did you get the ballot, do you need help with the ballot, do you need us to take it to the post office for you." Tr. 317:23-318:1. But when asked to describe "exactly what they said," Sheets responded, "They just

wanted to make sure that I got the ballot. And they wanted to—they asked me if I needed help filling it out. And I just told them no, I'm okay. And then they're like, well, if you do need rides to the post office, let me know. And I told them no, I live walking distance to it, I can drop it off myself." Tr. 318:24-319:5. Sheets further explained, "They definitely just wanted to really make sure that I would get my vote in." Tr. 319:14-15. Thus, the evidence does not establish that Sheets was solicited to open her ballot in front of the Union or third parties. Rather, Union representatives offered to explain the voting process to her or to drive her to the post office, and she declined their offers of help.

Sheets testified that the two Union representatives who visited her on that occasion were Sergio Sorza and a woman she did not recognize. Tr. 318:18-23. Sorza testified at the hearing, and the Hearing Officer credited his testimony, that on the home visits he went on, the Union never asked for ballots to be opened or filled out in their presence. Tr. 464:8-15, 470:12-17; Hearing Officer's Report at 7. Rather, the Union wanted to make sure people had received their ballots, Tr. 463:16-18, to offer to drive people who lacked transportation to drop off their ballots, Tr. 463:24-464:7, and to ensure employees understood to sign the back of the sealed envelope and follow balloting instructions, Tr. 469:22-470:4. Thus, the evidence shows that the offers of "help" with voting that Union representatives made to Sheets were entirely lawful and were not solicitations open the ballot in front of Union representatives or to hand over a ballot for mailing.

Thus, the Employer as objecting party has not met its burden to prove misconduct. Specifically, the evidence does not show that Union representatives solicited mail ballots from employees or asked employees to open their ballots or vote in the presences of Union representatives. Thus, the Board need not reach the question that divided it in *Fessler & Bowman*: whether solicitations to hand over a completed ballot to a union representative, which

the employee rejects, are nevertheless objectionable. The evidence here does not show that any such solicitations took place.

B. Even if the evidence showed that Union representatives had asked employees to open unmarked ballots in front of them or to hand over completed and sealed ballots for mailing, the Regional Director correctly concluded that ballot integrity or secrecy were not impaired.

Even assuming the Employer's contentions which have not been proved—that Union representatives actually solicited employees to open their ballots in the presence of the representatives, or to let the representatives help them mark those ballots, or to hand over completed ballots to the representatives for mailing—it is undisputed that none of the employees took the Union up on such supposed offers. No ballots were opened or marked in the presence of Union representatives, and no ballots were handed over to Union representatives for mailing.

As in *Fessler & Bowman*, there is no evidence of detriment to the integrity or secrecy of the balloting. There was no opportunity for ballot tampering or any breach of secrecy, nor was there "even an appearance" that any of the Union's alleged actions affected the integrity of the vote. *See Tidelands Marine Services, Inc.*, 116 NLRB 1222, 1224 (1956). Thus, the Regional Director correctly concluded that there was no objectionable conduct. Decision at 5.

Even assuming that the Employer proved solicitation in this case, the evidence here does not provide a basis for overturning or eliding the *Fessler & Bowman* distinction between conduct that actually harms the election process and conduct that merely faces the Boards "disapproval" but does not objectively damage the integrity of the vote. Indeed, although Macy Sheets, in response to leading questions, expressed a concern about the anonymity of the voting, Tr. 153:20-24, Sheets also testified that she chose not to sign her sealed envelope after voting because "I kind of felt like that defeats the purpose of the anonymous part of it." Tr. 225:9-11. As the Hearing Officer noted, "If anything, that Sheets was not aware that her failure to sign the

sealed envelope would void her ballot support's the Union's expressed concern about employees not properly completing their ballot, and thus their decision to conduct home visits to offer assistance." Hearing Officer's Report at 12 n. 20. There was no link between Sheets's concern about anonymity and what the Union did or said. Indeed, none of the subjective evidence that the Employer offered about employees' fears is linked to objective attempts at solicitation of ballots by the Union. The record does not provide a basis for overruling *Fessler & Bowman*.

C. Isolated, subjective worries about ballot confidentiality do not warrant setting aside the election.

As with it allegations about coercion, the Employer attempts to muddy the waters about the integrity of the voting by presenting testimony about purely subjective responses.

The Employer points to one employee, Macey Sheets, who testified that she did not sign the envelope for her completed ballot because she was concerned about the confidentiality of her vote. Request for Review at 14; Tr. 333:9-22. As discussed above, the Hearing Officer credited the testimony of Sergio Sorza, who was present during the home visit to Sheets during which her ballot was discussed, that during all of Sorza's home visits, there was no solicitation to open or hand over ballots. So contrary to the Employer's claims, any subjective concerns that Sheets may have had about the confidentiality of her ballot are not attributable to any objectionable or even disfavored actions or speech by Union representatives.

Furthermore, the Board has designed its mail ballot system, much like absentee-ballot systems used in general elections, to make it obvious on the fact of the materials that anonymity is preserved: Employees sign the envelope but not the ballot, and the instructions make clear that it is a "secret ballot" and that failure to sign the envelope will result in a voided ballot. In the absence of evidence of some objective reason for employees to fear that the secret ballot might be compromised, a few reports of subjective "concerns with anonymity" provide no reason

to overturn the election results. There is no reason to doubt the adequacy of the Board's notice of election, the instructions accompanying the ballots, and the ballot design itself.

CONCLUSION

The Regional Director correctly weighed the evidence and applied Board law. The Employer has not met its burden of showing objective evidence of coercion or objective evidence of interference with the integrity or secrecy of the ballot. The Regional Director's decision should be affirmed.

Dated: December 14, 2018

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CERTIFICATE OF SERVICE

I am employed in the city and county of San Francisco, State of California. I am over the age of eighteen years and not a party to the within action; my business address is: 595 Market Street, Suite 800, San Francisco, California 94105.

On December 14, 2018, I served a copy of the following document(s) described as:

PETITIONER'S RESPONSE BRIEF
IN OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW

on the interested party(ies) in this action as follows :

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☒ **BY MAIL:** By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth above.

☒ **BY ELECTRONIC SERVICE**: By transmitting via e-mail the document(s) listed above to the e-mail addressed set forth above on this date.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 14th day of December 2018, at San Francisco, California.

James Fabian