

Nos. 18-3695, 19-1157

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

DOLGENCORP, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Dolgencorp, LLC (“the Company”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Decision and Order issued against the

Company on December 11, 2018, and reported at 367 NLRB No. 48. (A. 1-3.)¹

The Board found that the Company unlawfully refused to bargain with the United Food and Commercial Workers, Local 655 (“the Union”), which the Board has certified as the bargaining representative of a unit of sales associates at the Company’s Auxvasse, Missouri retail store.

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act (“the Act”), 29 U.S.C. § 160(a), which empowers the Board to prevent unfair labor practices affecting commerce. The Court has jurisdiction pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), and venue is proper because the Company transacts business in Missouri. The Board’s Order is final, and the Company’s petition and the Board’s cross-application were timely because the Act places no time limitation on the initiation of review or enforcement proceedings.

Because the Board’s Order is based, in part, on findings made in an underlying representation (election) proceeding (Board Case No. 14-RC-209845), the record in that proceeding is part of the record before this Court, pursuant to Section 9(d) of the Act, 29 U.S.C. § 159(d). *See Boire v. Greyhound Corp.*, 376

¹ Record references in this brief are to the Joint Appendix (“A.”). References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” references are to the Company’s opening brief.

U.S. 473, 477, 479 (1964). Section 9(d) does not give the Court general authority over the representation proceeding, but authorizes review of the Board's actions in that proceeding for the limited purpose of deciding whether to "enforc[e], modify[], or set[] aside in whole or in part the [unfair-labor-practice] order of the Board" 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act, 29 U.S.C. § 159(c), to resume processing the representation case in a manner consistent with the ruling of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

STATEMENT OF THE ISSUE

The ultimate issue is whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5), (1), by refusing to recognize and bargain with the Union. The dispositive underlying issue is whether the Board reasonably overruled the Company's election objections and certified the Union as the bargaining representative of a unit of company employees.

Millard Processing Servs., Inc. v. NLRB, 2 F.3d 258 (8th Cir. 1993)
Beaird-Poulan Div., Emerson Elec. Co. v. NLRB, 649 F.2d 589 (8th Cir. 1981)
Corner Furniture Discount Ctr., 339 NLRB 1122 (2003)
Ideal Elec. & Mfg. Co., 134 NLRB 1275 (1961)

STATEMENT OF THE CASE

The Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the exclusive bargaining representative of the sales associates at its retail store in Auxvasse, Missouri. The Company admits its refusal but claims that the Board erred in overruling its election objections and certifying the Union as bargaining representative. (Br. 14.) In the objections before the Court, the Company alleged that an employee unlawfully threatened to slash the tires of coworkers who did not vote in favor of the Union and offered a coworker \$100 as an inducement to vote in favor of the Union. The Board's findings, the procedural history of the representation and unfair-labor-practice cases, and the Board's conclusions and Order, are set forth below.

I. PROCEDURAL HISTORY

A. The Representation (Election) Proceeding

The Company is engaged in the retail sale of food, snacks, health and beauty aids, cleaning supplies, family apparel, housewares, and seasonal items. (A. 1; 9, 405.) Its Auxvasse, Missouri store employs 6 sales associates. (A. 121; 58, 135.)

In early November 2017, Adam Price, a part-time lead sales associate at the Auxvasse store, became dissatisfied when the Company decreased his, and three coworkers, work hours. (A. 326-27). Because of his dissatisfaction, he contacted

the Union's organizing director, Billy Myers, who advised Price to gauge interest in unionization among his coworkers. (A. 235-36, 306-07, 325-27.) Over the next few days, Price spoke with the three coworkers whose hours had been reduced about the possibility of unionization. (A. 325-27.)

On November 14, 2017, after Myers met briefly with employees to solicit signatures on union-authorization cards, the Union filed an election petition, seeking to represent a unit of sales associates employed at the Company's Auxvasse store. (A. 2, 118-19; 157.) The parties reached a Stipulated Election Agreement, which was approved by the Board's Region 14 on November 24. (A. 118; 405-07.) An election was conducted on December 8, and the Union prevailed by a 4-2 vote. (A. 118; 404-07.)

Based on complaints of coercion from two unit employees, the Company filed objections to the election alleging that, prior to the election, Price and/or Myers had threatened employees, made false and deceptive statements to employees, engaged in impermissible electioneering, and improperly interfered with the election by creating an atmosphere of fear and coercion. (A. 119; 191-93, 399-402.) The Acting Regional Director ordered that a hearing be conducted regarding the Company's objections, and a hearing was held on January 3, 2018. The Acting Regional Director subsequently reopened the record in response to an

allegation by the Company of witness tampering at the January 3 hearing, and a second hearing was held on February 1 to explore that allegation. (A. 119.)

The Hearing Officer issued his report on February 8, in which he recommended rejecting all the Company's objections. (A. 118-34.) On March 23, the Acting Regional Director adopted the Hearing Officer's recommendations and issued a Decision and Certification of Representation, designating the Union as the exclusive bargaining representative of the Company's Auxvasse sales associates. (A. 75-83.) The Company filed a request for review of that Decision and Certification, which the Board denied on June 21. (A. 13, 15-76.)

B. The Unfair-Labor-Practice (Failure-to-Bargain) Proceeding

Following the Union's certification, the Company refused the Union's requests to bargain. (A. 5, 10-11.) Based on a charge filed by the Union, the General Counsel issued a complaint alleging that the Company had unlawfully refused to recognize and bargain with the Union. (A. 9-12.) Thereafter, the General Counsel filed a motion for summary judgment, and the Board issued a Notice to Show Cause why the Board should not grant that motion. (A. 1.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On December 11, 2018, the Board (Members McFerran, Kaplan, and Emanuel) issued its Decision and Order, granting the General Counsel's motion for summary judgment and finding that the Company's refusal to recognize and

bargain with the Union violated Section 8(a)(5) and (1) of the Act. (A. 1-3.) The Board concluded that all representation issues raised by the Company in the unfair-labor-practice proceeding were, or could have been, litigated in the underlying representation proceeding, and that the Company neither offered to adduce at a hearing any newly discovered or previously unavailable evidence, nor alleged the existence of any special circumstances that would require the Board to reexamine its decision in the representation proceeding. (A. 1.)

To remedy the unfair labor practice found, the Board's Order requires the Company to cease and desist from refusing to recognize and bargain with the Union or, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157. (A. 2.) Affirmatively, the Board directed the Company to bargain with the Union upon request and, if an understanding is reached, to embody that understanding in a signed agreement. It further ordered the Company to post a remedial notice. (A. 2.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize or bargain with its employees' duly certified Union. The Company admittedly refused to recognize and bargain to challenge the Board's certification of the Union. That challenge,

however, fails because in the underlying representation proceeding, the Board reasonably concluded that the Company failed to meet the heavy burden necessary to overturn the employees' vote for union representation. It pursues only two of its objections before the Court and each is without merit.

First, the Company failed to demonstrate that a threat allegedly made by employee Adam Price, even assuming it occurred, happened within the "critical period" between the representation petition and the election. The Board thus overruled the Company's objection based on its long-standing, court-approved rule, pursuant to which pre-petition conduct is generally insufficient to warrant setting aside an election. The Company's challenges to the factual finding that any threat, if made, was outside the critical period fail because that finding was based on well-founded credibility determinations, and the Company cannot meet the high bar for rejecting such determinations by the factfinder. In addition, the Court does not have jurisdiction to consider the Company's challenges to the Board's critical-period rule and application of that rule in this case, which were never presented to the Board. The rule is, in any event, a reasonable exercise of the Board's expertise and role in managing representation elections, and the rare cases finding exceptions to the rule are materially distinguishable.

Second, the Company also failed to prove that an offer of cash made by Price to coworker Joanna Durlin constituted objectionable conduct. To start, the

Board reasonably found that the more stringent standard applicable to assessing alleged pre-election misconduct by third parties applied to this objection because the Company fell far short of demonstrating that Price was an agent of the Union. Establishing agency requires a showing that the Union engaged in conduct that would have reasonably led others to believe Price was its agent. The Company erroneously focuses on the conduct of Price himself, which cannot establish agency and, in any event, shows at most that he was an ardent union supporter who invited the Union to organize the Auxvasse sales associates—not a union agent. The Board further reasonably rejected the Company’s allegation that Price offered Durlin money in exchange for her vote. The credited testimony amply demonstrates that Price’s offer was unconditional, not linked to Durlin’s union support or vote, and thus unobjectionable. Once again, the Company’s challenge to that finding relies on successfully disputing the factfinder’s credibility determinations and it fails to do so. And, finally, the Company’s reliance on cases where unions or union agents offered benefits before elections, or where benefits were explicitly offered in exchange for union support, are all materially distinguishable from the unconditional, third-party offer at issue here.

STANDARD OF REVIEW

To the extent the Board's decision turns on its factual findings, those findings are to be treated as conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); see *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951); *NLRB v. MDI Commercial Servs.*, 175 F.3d 621, 625 (8th Cir. 1999). As a result, this Court will not “displace the Board’s choice between two fairly conflicting views” in a particular case, “even though the court would justifiably have made a different choice had the matters been before it de novo.” *NLRB v. Metal Container Corp.*, 660 F.2d 1309, 1313 (8th Cir. 1981). Rather, the Board’s decision “may be supported by substantial evidence even though a plausible alternative interpretation of the evidence would support a contrary view.” *Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 771 (D.C. Cir. 2012) (quotation marks and citation omitted).

Of particular relevance in this case, determinations of witness credibility are “within the sound discretion of the trier of facts and should be reversed only in extraordinary circumstances.” *Porta-King Bldg. Sys. v. NLRB*, 14 F.3d 1258, 1262 (8th Cir. 1994) (citation and internal quotation marks omitted). Accordingly, the Court will not overturn the Board’s credibility determinations “unless they shock the conscience.” *NLRB v. RELCO Locomotives*, 734 F.3d 764, 787 (8th Cir. 2013).

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION

Section 7 of the Act grants employees the right to choose a representative and to have that representative bargain with their employer on their behalf. 29 U.S.C. §157. Employers have a corresponding duty to recognize and bargain with their employees’ chosen representative and refusal to do so violates Section 8(a)(5) of the Act. 29 U.S.C. § 158(a)(5). Moreover, an employer who violates Section 8(a)(5) also violates Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the[ir statutory] rights” 29 U.S.C. § 158(a)(1); *St. John’s Mercy Health Sys. v. NLRB*, 436 F.3d 843, 846 (8th Cir. 2006).

Here, the Company has admittedly refused to recognize or bargain with the Union. In its defense, the Company challenges the validity of the Union’s certification as bargaining representative, arguing that the Board erred by overruling two of the Company’s election objections, one based on an alleged threat and the other on an alleged bribe.² As we now show, the Board reasonably

² In its brief, the Company does not challenge the Board’s decision to overrule its other six election objections. Issues “not meaningfully argued in an opening brief are waived.” *Ahlberg v. Chrysler Corp.*, 481 F.3d 630, 634 (8th Cir. 2007); *see also Cintas Corp. v. NLRB*, 589 F.3d 905, 916 (8th Cir. 2009); *accord Fed. R.*

overruled those objections. Because the Company provided no basis for setting aside the election, it violated Section 8(a)(5) and (1) by refusing to recognize or bargain with the Union, and the Board is entitled to enforcement of its Order.

A. An Employer Challenging Its Employees' Election of a Union as Their Representative Bears the Heavy Burden of Proving that Alleged Misconduct Interfered with the Employees' Free Choice

In evaluating alleged pre-election misconduct, this Court applies “a strong presumption that [the election] reflects the employees’ true desires regarding representation.” *Deffenbaugh Indus., Inc. v. NLRB*, 122 F.3d 582, 586 (8th Cir. 1997). As a result, Board-supervised representation elections “are not to be set aside lightly,” and the party seeking to set aside such an election “carries a heavy burden.” *Millard Processing Servs.*, 2 F.3d at 261. To meet that burden, the objecting party must “show by specific evidence not only that improprieties occurred, but also that they interfered with the employees’ exercise of free choice to such an extent that they materially affected the election results.” *Id.* (quoting *Beaird-Poulan Div., Emerson Elec. Co. v. NLRB*, 649 F.2d 589, 592 (8th Cir. 1981)).

Overturning a representation election requires an especially compelling showing where the alleged improprieties involve employee (third-party) conduct,

App. P. 28(a)(8) (opening brief must contain the appellant’s contentions and the reasons for them).

rather than the conduct of the union or the employer. As this Court has explained, “unions and employers cannot prevent misdeeds by persons over whom they have no control,” *Millard*, 2 F.3d at 261, and conduct that is not attributed to the union or employer is less likely to affect the outcome of an election. *Deffenbaugh Indus.*, 122 F.3d at 586. Thus, an election will be set aside for such third-party misconduct only if that misconduct was “so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.” *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); accord *Millard Processing Servs.*, 2 F.3d at 261. The effect of alleged misconduct is evaluated objectively, from the perspective of a reasonable employee. *NLRB v. Downtown Bid Servs. Corp.*, 682 F.3d 109,116 (D.C. Cir. 2012). And “while the size of the unit and the closeness of the vote may be relevant considerations in determining whether free choice was interfered with, neither fact is sufficient to raise a presumption that the conduct had an impact on the election results.” *NLRB v. Browning-Ferris Indus. of Louisville, Inc.*, 803 F.2d 345, 349 (7th Cir. 1986) (citation omitted); accord *Deffenbaugh Indus.*, 122 F.3d at 586 (“closeness of the election may also be considered, but it is not the determining factor”) (citation omitted).

The Board, moreover, generally will not consider alleged improprieties occurring outside the “critical period” prior to an election—that is, the period beginning with the union’s filing of an election petition and ending with the

election. *Ideal Elec. & Mfg. Co.*, 134 NLRB 1275, 1278 (1961). Courts have endorsed the Board’s critical-period rule as a “convenient device to limit the inquiry to the period near the election when improper acts are most likely to affect the employees’ freedom of choice.” *Amalgamated Clothing & Textile Wkrs. v. NLRB*, 736 F.2d 1559, 1567 (D.C. Cir. 1984); *see also, e.g., Uniroyal Tech. Corp. v. NLRB*, 98 F.3d 993, 996-97 (7th Cir. 1996) (applying Board’s critical-period rule); *Randall, Burkart/Randall Div., Textron, Inc. v. NLRB*, 638 F.2d 957, 960 (6th Cir. 1981) (same); *NLRB v. Claxton Poultry Co., Inc.*, 581 F.2d 1133, 1135 (5th Cir. 1978) (same); *cf. NLRB v. Earle Indus.*, 999 F.2d 1268, 1272 (8th Cir. 1993) (rejecting allegation of “critical period misconduct”). Accordingly, absent “extremely unusual circumstances,” conduct occurring before the critical period—i.e., before the election petition was filed—cannot serve as the basis for setting aside an election. *Amalgamated Clothing & Textile Wkrs.*, 736 F.2d at 1567; *see also Pac. Coast M.S. Indus. Co.*, 355 NLRB 1422, 1443 (2010) (distinguishing as exceptions to rule cases involving financial incentives for union support or particularly egregious conduct and applying rule to bar consideration of “isolated solicitation of an authorization card”); *Randall, Burkart/Randall Div. of Textron*, 638 F.2d at 960 (Board will consider pre-petition conduct “when there is significant post-petition conduct related to or continuing from pre-petition events”).

B. The Board Reasonably Overruled the Company’s Objection Based on an Alleged Threat by Employee Price

1. The credited evidence supports the Board’s finding that even assuming employee Price made the alleged threat, he did so outside the critical period

In its first objection, the Company alleged that Price unlawfully threatened to slash the tires of anyone who did not vote in favor of the Union. Specifically, both before and after the election, the Company had received reports from employee Jennifer Miles that Price had made such a threat while attending a party at her house.³ Consistent with its critical-period rule, the Board reasonably overruled the Company’s objection. As demonstrated below, substantial evidence supports the Board’s finding that the Company failed to demonstrate that if Price made such a threat, he did so during the critical period.

³ Human Resources Vice-President Kathleen Reardon credibly testified that Miles approached her on December 4 to ask how to pull a union-authorization card. Miles then backtracked, asserting that Price would slash her tires if he learned that she no longer supported the Union, and stated that she would simply vote against the Union in the upcoming election. (A. 121; 190.) Immediately following the December 8 election, employee Joanna Durlin, who was visibly upset and crying, complained to Reardon that she and Miles had “felt pressured” to vote for the Union and wanted to change their votes. (A. 122; 191.) When Reardon spoke to the two employees, Durlin stated that she had been promised \$100 to vote for the Union (discussed below, pp. 42-46), and Miles cited pressure from Price and Myers, reiterating Price’s alleged threat to slash her tires. (A. 122; 193.) At Reardon’s request, each employee subsequently wrote a statement memorializing her allegations. (A. 121-22; 194-98, 419, 421.)

As the Board found (A. 79-80, 122-23), Miles claimed that Price made the alleged threat at a “coming together party of people that signed cards” at her house (A. 219). It is undisputed in the record, and the Company does not contest, that if Price made the threat, he did so at Miles’ party. And the credited evidence further demonstrates that employee Price only ever attended one gathering at employee Miles’ house. (A. 341-42.) That party was on November 11, three days before the Union’s November 14 representation petition started the critical period. (A. 331, 157.) Based on those facts, the Board reasonably declined to overturn the election based on the alleged threat. *See Ideal Elec.*, 134 NLRB at 1277-78.

In finding that the gathering at issue occurred on November 11, the Hearing Officer explicitly credited Price, the only witness to provide any testimony as to the exact date of the party, over Miles, who thought it had occurred weeks later.⁴ In support of that credibility determination, the Hearing Officer noted that Price was able to pinpoint the date as November 11 by examining his text messages during the hearing. Price found a text message from Miles inviting him to a bonfire at her home that day. Price also credibly testified that the November 11 gathering was the only time he had been in Miles’ home. (A. 80; 331.) Finally,

⁴ The Hearing Officer’s report correctly identifies the date as November 11 when discussing and crediting Price’s testimony (A. 122-23) but later erroneously states that the gathering occurred on November 8 (A.124). The Acting Regional Director correctly clarified that the gathering occurred November 11. (A. 80; 331.)

the Hearing Officer noted (A. 123) that November 11 was a more plausible date for a party of card-signers than the times suggested by Miles because it was “much closer” to when the employees signed cards.⁵

By contrast, the Hearing Officer found Miles’ testimony vague and unconvincing overall, and specifically with respect to the party date, which he found would naturally stand out more than a “non-descript work day that would easily blend with many others.” (A. 122.) As the Hearing Officer noted, Miles could not recall the date of her party—she gave only a “general timeline,” and a shifting one at that. (A. 122; 219-20, 227-28, 234.) For example, while Miles initially testified that the gathering was “maybe two weeks” prior to the election, she admitted when pressed that she was “not sure of the timeline” because “[e]verything happened so quickly.” (A. 219.) Nor could she place the party either before or after the Thanksgiving holiday (November 23), a memorable day in that time period. She later narrowed the time frame down to one week before

⁵ Moreover, although the Hearing Officer did not cite this principle, the Board and courts consider particularly reliable the testimony of current employees testifying against their employer’s interests, as Price was here, because “these witnesses are testifying adversely to their pecuniary interest.” *Flexsteel Indus.*, 316 NLRB 745, 745 (1995), *enforced mem.*, 83 F.3d 419 (5th Cir. 1996); *see also Shop-Rite Supermarket*, 231 NLRB 500, 505 n.22 (1977) (testimony of current employees that is adverse to their employer is “given at considerable risk of economic reprisal, including loss of employment . . . and for this reason not likely to be false”).

the December 8 election, or after she volunteered to serve as the Union's election observer on November 27. (A. 219-20.)

In crediting Price over Miles, the Hearing Officer also relied (A. 123) on his observations of the demeanor of both witnesses, a factor which is afforded "particular weight." *Beaird-Poulan Div., Emerson Elec.*, 649 F.2d at 592-93.

While Price was calm, self-assured, and answered questions from both counsel in a "deliberate and non-evasive manner," the Hearing Officer found Miles "much more evasive, vague, and on occasion argumentative with opposing counsel."

(A. 123.) He cited, for example, Miles' responses when union counsel asked about her failure to block text messages that she later described as harassing and probed whether Miles knew how to block texts. Instead of answering the latter question, Miles challenged the attorney, "Is that sarcasm?" (A. 233.) In addition, the Hearing Officer highlighted that, contrary to record evidence, "Miles refused to admit she frequently participated" in the purportedly harassing text exchanges among a group of unit employees and union representative Meyers during the campaign. (A. 232.) In fact, Miles was the most active participant in the group, sending more than double the number of text messages Price sent and, at times, initiating the group's exchanges. (A. 425-61).

2. The Company’s Argument that Price’s Alleged Threat Occurred During the Critical Period Depends on Rejecting the Factfinder’s Well-Founded Credibility Determinations

To challenge the Board’s finding that any threat by Price occurred outside the critical period, the Company must persuade this Court to reject the factfinder’s credibility determinations. The Company does not come close to showing that those determinations “shock the conscience,” however, as it must for the Court to disregard them. *RELCO Locomotives*, 734 F.3d at 787 (8th Cir. 2013).

With respect to the decision to credit Price, the Company spills much ink (Br. 18-24) debating the date the employees signed union-authorization cards, which does not affect the Board’s finding. The Company emphasizes that the Hearing Officer relied, in part, on the rationale that it would be more likely for Miles to have a party for card signers *after* signing, whereas there is evidence that the party happened two days *before* signing. But, as the Hearing Officer explained, his focus was the proximity of the party date to the card signing—he found it more likely for employees to gather to celebrate “much closer” to when they signed the cards, “not a month or so after.” (A. 123.) While he later described the party as “a few days after” the card signing, the general-proximity point is still valid even if he mistook the precise order of events. If the cards were signed two days after the party, it is, as the Acting Regional Director subsequently reasoned, “just as likely that the party was intended to be coming together of those

employees who intended to sign cards.” (A. 79.) The Company fixates on the Hearing Officer’s purported factual error regarding the order of events but offers no explanation for why employees would have united specifically to celebrate card signing weeks after the signing (and petition), shortly before the election.

The crux of this aspect of the Hearing Officer’s analysis—that it is more likely for Miles to have thrown a party for card signers on a date that was close to the signing of the cards, rather than weeks later as Miles stated—holds true regardless of whether the cards were signed on November 8 or November 13. Thus, the Company’s assertion that “the Regional Director disposed of [the Company’s] objection by contriving a different rationale” is spun from whole cloth. To the contrary, the Acting Regional Director simply rejected the Company’s argument that adjusting the signing date of the cards by 5 days would undermine the Hearing Officer’s credibility determination that the party was held November 11. In any event, as described above, the proximity of November 11 to the card signing was only one reason the Hearing Officer provided for his credibility determination, and the Company’s arguments regarding the other reasons are also unpersuasive.

As the Hearing Officer noted, Price’s account was also believable because he had a text message pinpointing the date of the party he attended at Miles’ house as November 11. (A. 123.) The Company is grasping at straws by asking this

Court to reject that evidence because the text message Miles sent Price inviting him to the gathering “said nothing about a meeting to discuss union issues,” which is how Price later described the gathering in his testimony. (Br. 21.) The Company goes so far as to assert that the invitation “cannot plausibly be read” as describing the party at which the alleged threat occurred. (Br. 21.) But of course it can: Price testified that he had never attended any other gatherings or otherwise been in Miles’ home. And Miles, who wrote the text, did not testify that Price threatened her at a union meeting; she described a “party” for union supporters—it is certainly plausible that she planned a celebration and Price took the opportunity to discuss the Union while there, which could explain his later characterization of the evening.

As a curious and last-ditch effort to undermine the Hearing Officer’s decision to credit Price, the Company argues that Price’s testimony should not be believed because he allegedly intimidated employee Joanna Durlin on the day of the objections hearing, purportedly “confirm[ing] the pattern of Price’s threatening behavior during the campaign.” (Br. 45.) In response to that allegation, the Board reopened the record and gave the Company the opportunity to present supporting evidence. It failed to do so. Rather, Durlin testified that, while she was sitting outside the hearing room during the first hearing, she overheard Price tell another employee that the witness-sequestration order was futile because Price would later

get access to the hearing transcript through the Union. At the time of his statements, he and the person he was talking to were seated on the opposite side of the waiting area from Durlin. (A. 82, 131-32.)

As the Hearing Officer and Acting Regional Director found, Price's remarks are best "characterized as a misunderstanding of the purposes of sequestration," which is intended to prevent witnesses from adjusting their testimony based on the accounts of other witnesses. (A. 132.) *See Marcus Mgmt.*, 292 NLRB 251, 264 n.8 (1989) (purpose of witness sequestration is to present "individual and unprompted versions of the events in question"); *accord United States v. Vallie*, 284 F.3d 917, 921 (8th Cir. 2002) ("purpose of sequestration is to prevent witnesses from tailoring their testimony to that of prior witnesses"). Specifically, the Hearing Officer found that "two employees were essentially complaining that [the Hearing Officer] had not allowed them to be present in the hearing room" and commented that the order "made no sense in their eyes [because] they [would] eventually be able to see a transcript of the testimony." (A. 132.) In other words, Price's comment was based on a misunderstanding rather than a deliberate attempt to violate the sequestration order, much less threaten other witnesses, and it was part of an amicable conversation with another employee, not directed at Durlin at all. As such, the Hearing Officer reasonably concluded that the innocuous comment did not impact Price's credibility. (A. 132.)

The Company's challenges to the Hearing Officer's reasons for discrediting Miles' account of Price's alleged threat are equally unavailing. To start, its argument (Br. 23) that the transcript does not support the Hearing Officer's observation that Miles' was argumentative when she challenged union counsel's question about blocking texts merely illustrates why a reviewing court cannot, based on the dry transcript of a hearing, easily assess the factfinder's observations, which are based not only witnesses' words but also on tone, body language, and facial expressions. *See Shen Lincoln-Mercury-Mitsubishi, Inc.*, 321 NLRB 586, 589 (1996) (deference is owed to demeanor-based credibility determinations because fact finder "sees the witnesses and hears them testify, while the Board and the reviewing court look only at the cold records") (quoting *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962)); *accord Stanley v. Henderson*, 597 F.2d 651, 653 (8th Cir. 1979) (deference to factfinder especially appropriate in cases "primarily based upon oral testimony and where the [factfinder] had an opportunity to view the demeanor and credibility").

The Company's further argument (Br. 24-25), that the Hearing Officer's rationale for discrediting Miles' testimony about Price's threat is contrary to *International Longshoremen's Assn.*, 366 NLRB No. 20 (Feb. 20, 2018), is also misguided. There, a judge discredited a female witness who had allegedly suffered physical and sexual harassment in the workplace because, in his view, the witness

would not have “meekly allowed” the harassment. He based his credibility determination on his impression that the witness was a “tough woman” who performed manual labor “on the docks” and had previously been employed as a truck driver in Iraq. 366 NLRB No. 20, slip op. at 3. Setting aside the plain factual distinctions between her situation and that of Miles, the Hearing Officer’s assessment of Miles’s credibility is not analogous to the judge’s rejected rationale. The Hearing Officer did not find Miles’ testimony about the alleged threat less believable because she did not stop engaging in, or affirmatively block, the group texts. Instead, he cited as examples of her evasive and argumentative demeanor that she “refused to admit she frequently participated in these group texts in spite of the record showing otherwise” (A. 123) and was argumentative when questioned about whether she knew how to block texts. *See Budrovich Contracting Co.*, 331 NLRB 1333, 1339 (2000) (upholding credibility determination based on judge’s observation that witness was “evasive in his responses, self-serving, and/or unduly protective of the Respondent and, consequently, his testimony was lacking in candor and forthrightness”), *enforced*, 20 F. App’x 596 (8th Cir. Oct. 15, 2001).

Nor, contrary to the Company’s suggestion, did the Hearing Officer or Acting Regional Director implicitly credit Miles’s testimony that Price actually made the threat because they were “unwilling to reject” her testimony. (Br. 22.)

The Hearing Officer explicitly stated that Price “credibly denied” making the threat and he generally credited “the testimony of Price over that of Miles.” (A. 122.)

But he ultimately found it unnecessary to make a credibility determination regarding the threat itself—whether it was made and, if so, what it entailed—given that the party where it allegedly occurred was outside of the critical period. The Company’s contrary assertion amounts to nothing more than conjecture.

The Company further speculates (Br. 22) that Miles “had absolutely no motive to invent such a story,” so the only conceivable reason Miles might have disavowed her vote immediately after the election was “pressure and threats” from the Union. That assumption ignores that employers and unions are both capable of interfering with employee free choice. While there is no allegation that the Company unlawfully interfered with the election, the Company’s Vice-President of Human Resources, Reardon, who was based out of an office 400 miles away and responsible for all of the Company’s 14,000-plus stores, arrived at the Auxasse store “a day or two after the petition was filed.” (A. 174-76.) She remained at the store until the election, “cleaning windows” and “stocking product[s].” (A. 181, 190.) Her presence did not go unnoticed. Indeed, in the group text exchange, Price remarked that the store was “crawling with management executive vice president HR people,” (A. 438), and Miles herself characterized the increased management presence as “odd” and “really weird.” (A. 425-26.) While Reardon

testified that she was at the Auxvasse store every day “to be available for the employees should they have questions” (A. 202), it defies common sense for the Company to argue that the only plausible explanation for Miles’ change of heart is *union* interference.

In essence, the Company implores the Court to discard the factfinder’s credibility determinations in favor of an alternative interpretation of the testimony. That, of course, is not the role of the Court, as it is “for the [B]oard to make credibility determinations.” *York Prods., Inc. v. NLRB*, 881 F.2d 542, 544 (8th Cir. 1989). More fundamentally, cases like this one, in which there is conflicting testimony, are those where “essential credibility determinations [must] be[] made,” *NLRB v. Nueva Eng’g, Inc.*, 761 F.2d 961, 965 (4th Cir. 1985), and where deference to the Board and judge is most appropriate. *See Porta-King Bldg. Sys. v. NLRB*, 14 F.3d 1258, 1262 (8th Cir. 1994).

3. The Company’s challenge to the Board’s application of *Ideal Electric* is jurisdictionally barred and is, in any event, without merit

There is no merit to the Company’s contention (Br. 25-28) that the Board erred in its “mechanical” application of *Ideal Electric*, which establishes that misconduct before a representation petition is filed is insufficient to set aside the ensuing election except in rare cases. 134 NLRB 1275, 1278 (1961). As a threshold matter, the Company did not argue before the Board that the decisions

below had misapplied *Ideal Electric* or that the narrow exceptions to the critical-period rule should apply. In fact, the Company did not even cite *Ideal Electric* in its request for review of the Acting Regional Director’s Decision and Certification, or in its brief in support of its exceptions to the Hearing Officer’s report. Rather, the Company limited its arguments to challenging the Hearing Officer’s factual determination that the gathering where Price allegedly issued a threat took place prior to the filing of the petition. Thus, the Court is jurisdictionally barred from considering the Company’s challenge to the Board’s application of *Ideal Electric*. See 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *NLRB v. Cornerstone Builders, Inc.*, 963 F.2d 1075, 1077 (8th Cir. 1992). Moreover, because “points not meaningfully argued in an opening brief are waived,” *Ahlberg v. Chrysler Corp.*, 481 F.3d 630, 634 (8th Cir. 2007), the Company has forfeited any potential argument that extraordinary circumstances warrant a departure from this jurisdictional bar.

In any event, the Board’s application of *Ideal Electric* in this case conforms to precedent. While the Board and courts have recognized departures from the critical-period rule, they are limited to “extremely unusual circumstances.”

Amalgamated Clothing & Textile Wkrs., 736 F.2d at 1567. Thus, in *Amalgamated Clothing*, the court reasoned that multiple anonymous pre-petition threats to anti-union employees, including one that there were “5 sticks of dynamite for [the recipient’s] house” and another that “something bad is liable to happen to your truck,” were insufficiently egregious to warrant an exception to *Ideal Electric*. *Id.* Conduct that the Board or courts have found warranted an exception to the critical-period rule, including in the cases cited by the Company, tends to fall into a few narrow categories, which would not apply here even if Price made the threat as alleged.

One exception to *Ideal Electric*, developed in response to *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973), involves union agents’ solicitation of the union-authorization cards supporting an election petition using threats of job loss or unlawful promises of benefits. *See e.g., Lyons Rests.*, 234 NLRB 178, 179 (1978) (union warned employees they would not work for employer if they did not sign authorization cards); *Gibson’s Discount Ctr.*, 214 NLRB 221, 221-22 (1974) (union solicited authorization cards with unlawful promise to waive union-initiation fees). Thus, while the Company is correct that in *NLRB v. R. Dakin & Co.*, 477 F.2d 492, 494 (9th Cir. 1973), the Ninth Circuit disapproved of the *Ideal Electric* rule, that decision pre-dated both the Supreme Court’s *Savair* decision and the Board’s subsequent recognition that the critical-period rule could be suspended

in exceptional circumstances. The *R. Dakin* Court’s concern—that the rule, as then applied by the Board, “flatly bar[red] the consideration of all pre-petition misconduct,” without exception—has been resolved. *NLRB v. Lawrence Typographical Union*, 376 F.2d 643, 652 (10th Cir. 1967), which the Company also cites (Br. 26), also preceded *Savair*, but the court’s rationale—that the effects of an employer’s pre-decertification-petition bribe could linger into the critical period—is consistent with the Supreme Court’s and the Board’s later rationale respecting similar pre-petition misconduct by unions. 376 F.2d at 652 (rejecting application of *Ideal Electric* to bar consideration of employer’s offer of super-seniority to strike replacements).

The Company’s reliance (Br. 26-27) on *Catholic Medical Center of Brooklyn & Queens v. NLRB*, 589 F.2d 1166, 1172 (2d Cir. 1978), is similarly misplaced. There, the court assumed the validity of the *Ideal Electric* rule but highlighted that it “was faced with the narrower question” of *Ideal Electric*’s application to alleged misconduct that occurred “during the pendency of a petition for election subsequently withdrawn and shortly replaced. *Id.* Specifically, the court considered the effect on the election of alleged authorization-card solicitation by pro-union supervisors. The Board has since recognized that alleged *supervisory* misconduct, particularly involving card solicitation, may also warrant an exception to the critical-period rule. *See Harborside Healthcare, Inc.*, 343 NLRB 906, 912

(2004) (supervisor’s pre-petition coercion may carry through post-petition campaign because his inherent authority over employees is ongoing).

Other exceptions to the critical-period rule have involved pre-petition conduct particularly likely to have effects lingering into the critical period due to the egregious or repeated nature of the conduct, sometimes even into the critical period. *See, e.g., NLRB v. L&J Equip.*, 745 F.2d 224, 237 (3d Cir. 1984) (court found pre-petition arson that destroyed the truck of an employee who opposed union “inextricably linked” to arson during critical period); *Willis Shaw Frozen Food Express, Inc.*, 209 NLRB 267, 268 (1974) (“series of abhorrent acts” including shootings, stabbings, and assaults was extreme enough for effects to persist). Even assuming that Price made the threat the Company claims that he made, which has not been established, his conduct plainly falls far short of the types of “abhorrent acts,” repeated or renewed threats, supervisory misconduct, and coercive card solicitation that the Board and courts have recognized as exceptions to *Ideal Electric*.

The Company also argues, for the first time, that the critical-period rule leads to “absurd results.” (Br. 26.) But because the Company never raised that challenge before the Board, the Court lacks jurisdiction to consider the argument. 29 U.S.C. § 160(e); *see also supra*, pp. 26-27. In any event, the Company’s argument conveniently ignores that it is for the Board, which has overseen

representation elections for decades, to establish appropriate procedures. As the Supreme Court recognized, Congress gave the Board a “wide degree of discretion” to establish the “safeguards necessary to insure the fair and free choice of bargaining representatives by employees.” *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); accord *Warren Unilube, Inc. v. NLRB*, 690 F.3d 969, 974 (8th Cir. 2012). Based on considerations of equity and orderly administration of the Act, the Board has consistently held for 58 years that misconduct occurring before the filing of a representation petition will generally not be considered as a basis upon which to set aside an election. The Company describes the election-petition cut-off as arbitrary (Br. 25-26) and cites examples of critical-period conduct more remote from the election than the pre-petition conduct here, *see, e.g., Wilkinson Mfg. Co. v. NLRB*, 456 F.2d 298 (8th Cir. 1972); *NLRB v. Van Gorp Corp.*, 615 F.2d 759, 764 (8th Cir. 1980). But it fails to acknowledge the benefits of a clear presumptive definition of the critical period during which the Board will scrutinize an election campaign. There is an unmistakable logical link between the filing of a representation petition and the start of intense campaigning. Conversely, the foreseeable downsides (in terms of efficiency and finality) of requiring the Board to stringently evaluate any alleged misconduct no matter how distant from an election, or to engage in a fact-intensive analysis to set the cut-off in each case are also apparent.

Finally, even if the Court disagrees with the Board's application of *Ideal Electric*, the Company's argument that this Court should make the factual finding that the threat occurred and, therefore, "can and should render judgment" for the Company, borders on absurd. (Br. 44-45.) As described above, because the Board dismissed the objection as based on conduct outside the critical period, it did not make a factual finding as to whether the threat was made or, if it was, exactly what was said or under which circumstances. It is impossible without further factfinding to know, for instance, whether the statement Price allegedly made while drinking at a social gathering was "made in a serious manner," as the Company asserts. (Br. 39.) The Company's extended discussion (Br. 40-44) of how the legal standard for non-party conduct might apply to the alleged threat as the Company describes it is entirely irrelevant in the absence of such baseline facts. Its further argument (Br. 38-40) purporting to apply the party-misconduct standard to nonexistent "facts" is even more off-point, given the Board's finding that Price was not a union agent. There is, in sum, nothing for the Court to assess at this juncture. The Court does not make factual determinations so, in the event the Court concludes the Board incorrectly applied the law, remand would be appropriate. *Beverly Enters.-Minn. v. NLRB*, 266 F.3d 785, 789 (8th Cir. 2001).

C. The Board Reasonably Overruled the Company’s Objection Based on Price’s Unconditional Offer of Money to a Coworker

In its second objection, the Company alleged that, Price, acting as an agent of the Union, unlawfully offered to pay \$100 to any employee who voted for the union; before the Court, the Company argues only that Price made such an offer to employee Joanna Durlin. Substantial evidence, however, supports the Board’s finding that employee Price was not a union agent. Accordingly, the third-party standard applies to the Company’s objection regarding his offer of money to employee Joanna Durlin, which cannot be attributed to the Union. Ample evidence also supports the Board’s finding that because the offer was unconditional, it was not objectionable.

1. Price was not a union agent

As an initial matter, the Board reasonably found that the Company failed to prove Price was a union agent. The Company does not argue that Price had actual authority to act on behalf of the Union. Rather, it claims that he had apparent authority, which is “created through a manifestation by the principal to a third party that supplies a reasonable basis for the third party to believe that the principal has authorized the alleged agent to do the acts in question.” *Serv. Emps. Local 87 (West Bay Maint.)*, 291 NLRB 82, 82-83 (1988) (citing *NLRB v. Donkin’s Inn, Inc.*, 532 F.2d 138, 141 (9th Cir. 1976), and *Alliance Rubber Co.*, 286 NLRB 645, 646 n.4 (1987)). In other words, the principal must either intend to cause another

person to believe that the agent is authorized to act for him or undertake conduct the principal should realize is likely to create such belief. Restatement (Second) of Agency § 227 cmt. a (1958); *Carbon Fuel Co. v. United Mine Workers of Am.*, 444 U.S. 212, 213-14 (1979) (Board applies common-law agency principles). A necessary condition for apparent authority, therefore, is that there be a manifestation by the principal to a third party. *Id.* at § 8.

As the party asserting the existence of an agency relationship, the Company has the burden of proof. *Corner Furniture Discount Ctr.*, 339 NLRB 1122, 1122 (2003). Furthermore, it must prove agency in connection with each instance of allegedly unlawful conduct. Restatement (Second) of Agency § 227 cmt. a (1958); *see also Cornell Forge Co.*, 339 NLRB 733, 733 (2003) (“agency must be established “with regard to the specific conduct that is alleged to be unlawful”); *Daylan Eng’g*, 283 NLRB 803, 804 (1987) (employee agency status to solicit authorization cards “is limited to conduct connected with the solicitation”). Finally, “[w]hether an individual was a union agent is a question of fact.” *Millard Processing Servs., Inc. v. NLRB*, 2 F.3d 258, 263 (8th Cir. 1993) (citation and internal quotation marks omitted); *see also NLRB v. Int’l Bhd. Of Boilermakers*, 321 F.2d 807, 810 (8th Cir. 1963) (finding Board’s agency determination was supported by substantial evidence).

Substantial evidence supports the Board's finding (A. 120) that the Company failed to meet its burden: the record contained no evidence whatsoever indicating that the Union manifested any intent to vest Price with authority to act on its behalf, or that any employee would reasonably have believed that it had. The Company adduced no evidence that any union official engaged in any conduct that would have led employees reasonably to believe that Price had a special status beyond committed union supporter, much less that he was a union agent or running the Union's organizational campaign. To the contrary, after Price contacted the Union, its organizer, Myers, directed the campaign and interacted personally with the unit employees, including Durlin. As the Board detailed (A. 76-78), Myers was actively engaged with employees during the period leading up to the election, communicating with them and visiting regularly. And he made clear to employees that he had initiated the one task Price performed specifically on behalf of the Union—distributing a survey—with the intent of exploring employee preferences to develop the Union's bargaining position. (A. 447.)

The Company's challenge to the Board's finding, and argument that Price was a union agent, is flawed from the outset because it relies primarily on actions undertaken by Price himself—not on any manifestation by the Union. That turns well-established agency law on its head, as the relevant inquiry is into the principal's conduct. *See supra*, pp.32-34; *see, e.g., Downtown BID Servs. Corp.*,

682 F.3d at 114 (even though many employees and the employee in question thought the employee was a union agent, the record evidence supported the finding that the union “never engaged in any conduct that would reasonably create that impression”). Accordingly, the Company’s insistence (Br. 38) that “Myers never told the other employees Price was not a union agent or that Price was not authorized to speak on the Union’s behalf,” misses the mark: the Union was under no obligation to confirm Price’s non-agent status having done nothing to suggest he was acting on its behalf.

The Company’s argument (Br. 32, 35-36) that Price’s level of involvement was in any way extraordinary—much less sufficient to make him a union agent for all purposes unless the Union affirmatively disclaimed agency—is refuted by even the most cursory glance at the record. As the Board explained, the “only actions on the part of Price which separated him from any other employee union supporters were that he was the employee who initially contacted the Union, and he handed out a survey to other employees designed to indicate which issues were important to them in the event of collective bargaining.” (A. 120.) Even if Myers had not had an active role in introducing that survey to the employees, the distribution of literature and talking to fellow employees do not transform a union supporter into a union agent. *See Foxwoods Resort Casino*, 352 NLRB 771, 771 (2008).

Indeed, in *United Builders Supply Co.*, 287 NLRB 1364, 1365 (1988), the Board reasoned that although an employee was one of the most prominent union supporters, solicited and collected authorization cards, set up some union meetings with other employees, and was selected by the union to serve as its election observer, there was no manifestation to employees broad enough to render the employee a general agent of the union. Even employee members of organizing committees are not, per se, agents of the union. See *Cornell Forge Co.*, 339 NLRB 733 (2003); *Advance Products Corp.*, 304 NLRB 436 (1991). Here, moreover, Price was not even the Union's only employee "contact." Myers also relied on Miles as a conduit between the Union and employees. (A. 315, 321.) For example, Miles informed Myers about management changes in the store, updated Myers on a meeting he was unable to attend, and volunteered to serve as the Union's election observer. (A. 315, 321, 426-429, 432, 437, 439, 443-44.)

The Board and courts have occasionally found unions' failure to clarify employees' non-agent status significant in assessing agency, but those cases involved situations where acknowledged union representatives were present for, or aware of, the alleged agents' misrepresentations of their own authority. For example, in *Bio-Medical of Puerto Rico*, 269 NLRB 827 (1984), two employees were found to be union agents in the absence of affirmative representations by the union where they introduced themselves as union representatives in front of the

union's organizing secretary and president, accompanied union representatives to Board proceedings, and spoke on behalf of the union at employee meetings held by the employer. *Id.* at 827-28. *See also NLRB v. Urban Tel. Corp.*, 499 F.2d 239, 243 (7th Cir. 1974) (court found where union knew of alleged threats made in its name, it was required to disclaim them to avoid responsibility for the threats). In contrast, there is no evidence that Price explicitly held himself out as a union agent or purported to speak on the Union's behalf, much less that the Union was aware of any of his alleged misconduct. It follows, of course, that the Union was under no obligation to affirmatively disclaim Price.

The Company does not advance its argument by relying on cases (Br. 31, 33-36) in which unions were largely absent from unionization campaigns, which were in turn largely run by (agent) employees. For example, in *NLRB v. Georgetown Dress*, the Fourth Circuit found that volunteer employee-members of the in-plant committee were "the union's only in-plant contact with workers." 537 F.2d 1239, 1242-43 (4th Cir. 1976). And in *NLRB v. Kentucky Tennessee Clay*, it found that employees were apparent agents of the union because they "carried out all of the organizing efforts within the facility" and were "instrumental in every step of the campaign process." 295 F.3d 436, 443 (4th Cir. 2002). But as the Fourth Circuit later stated when distinguishing that case, there was "hardly 'any participation whatsoever' by the union official responsible for overseeing the

organizing campaign.” *Ashland Facility Operations v. NLRB*, 701 F.3d 983, 990 (4th Cir. 2012); *see also PPG Indus., Inc. v. NLRB*, 671 F.2d 817, 819 (4th Cir. 1982) (court found in-plant organizing committee was union’s apparent agent because it operated as union’s “alter ego” and handled all contact with rank-and-file employees, who had no direct dealings with union’s professional staff).

Local 340, International Brotherhood of Operative Potters (Macomb Pottery), 175 NLRB 756 (1969), is similarly distinguishable. There, the Board found that a union unlawfully sought to cause the discharge of an employee for nonpayment of union dues after she had effectively revoked her union membership by informing another employee, who was a well-known union supporter, that she did not want to be a union member. *Macomb Pottery*, 175 NLRB 756, 757. In finding that the pro-union employee was a “de facto” agent of the union for purposes of accepting the revocation notice, the Board reasoned that, as the Company notes (Br. 34), the employee-agent had initiated contact with the union, helped secure authorization cards, and served as an information link between the union and employees. *Id.* But crucially, unlike here, the union in *Macomb Pottery* had not had any contact with the employee who revoked her membership. In fact, the Board highlighted that the union had deliberately “stayed away from her.” *Id.* There was no evidence, moreover, that she knew of the activities of other employees who were active union supporters—her only contact with the union had

been through the employee-agent. Here, by contrast, Price was not Durlin's only—or primary—link to the Union. Durlin had extensive direct contact with the Union through Myers. For example, she actively engaged in the group's text exchange, during which she not only asked Myers questions about the election (A. 426), described her frustrations with the Company's scheduling (A. 430-31, 434), and responded to Myers' questions about other employees (A. 432, 438), but also proactively offered to help Myers with the campaign (A. 446).

In contrast to the Company's cases, here the Union actively engaged with employees in every aspect of the campaign. As the Acting Regional Director aptly noted (A. 76-77), Myers visited Auxvasse three times during the short, three-week unionization campaign. (A. 78; 319, 423.) Myers also maintained regular contact throughout the campaign with three of the four union supporters through a group text exchange, answered their questions about the election, solicited a volunteer to serve as the Union's election observer, and organized meetings with employees. (A. 77; 307-20, 426, 431, 433, 436-38, 445.) He also met separately to update an employee who had missed an informational meeting he had held with her coworkers and sent another union representative to meet with the employees in his stead when he was unavailable. (A. 78; 310-13, 319, 423.) Moreover, Myers did attempt to separately contact the one card signer who was not in the text group and

did not—contrary to the Company’s assertion (Br. 37)—rely solely on Price to relay information to that employee. (A. 308, 440-41.)

While the Company faults Myers for not visiting enough and not seeking out the two unit employees who had not signed cards, it fails to acknowledge the material difference between the campaign Myers managed and the campaigns in the cases it cites. The Union, through Myers, reasonably chose to focus its efforts on maintaining the (majority) support of the four card signers and on learning what those unit employees wanted to see in a potential contract, rather than trying to convince the two non-card-signers to support the Union. Moreover, unlike in the Company’s cases, there is no evidence that Myers used Price to organize the two non-card-signers on his behalf. The nature of the campaign thus also distinguishes this case from many of those the Company cites.

In sum, for the reasons discussed above, even if Price had, as the Company insists (Br. 35 page), a “leadership role” (Br. 52) among his fellow employees in the unionization campaign, that would not prove agency status with respect to his alleged misconduct, much less general agency status for all conduct. *See United Builders Supply Co.*, 287 NLRB 1364, 1365 (1988) (Board acknowledged that employee “was a leading, if not the leading, union supporter,” but stated that it had “never held . . . that such status alone is sufficient to establish” agency).

2. Price's offer to Durlin was not objectionable

Because Price was not a union agent, the Company faced, but fell far short of carrying, the heavy burden of showing that Price's offer of money to Durlin created a "general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB at 803 (1984); accord *Millard Processing Servs.*, 2 F.3d at 261. Substantial evidence supports the Board's finding that Price's offer was not, contrary to the Company's allegation, conditioned in any way on Durlin supporting or voting for the Union. In light of that finding, the Board reasonably overruled the Company's objection.

Specifically, the credited evidence shows that, around the time the petition was filed, Price offered Durlin \$100 because Durlin was in a financial bind after the Company cut her hours. At the time, Durlin was a single mother going through a divorce and used her pay from the Company, which was one of her three jobs, to finance legal fees stemming from her divorce. (A. 124; 275-76, 434.) She expressed her worries to Price, crying and demonstrating significant agitation; in response, Price offered her \$100. (A. 124-25; 334-35.) Durlin never accepted the offer, and Price never gave her any money. (A. 281.)

Those findings rest, in part, on the Hearing Officer's determination to credit Price's account that the offer of money was unconditional, over Durlin's that it was contingent on her voting for the Union. In assessing their conflicting testimony,

the Hearing Officer first determined (A. 124) that Price's story was more plausible because Durlin's dire financial circumstances were the only thing that set her apart from other employees (Miles and Bloom) to whom Price did not offer money. Price knew that Durlin was financially strained, especially after the Company reduced her hours. Indeed, Durlin herself explained in the group text that the Company's sudden reduction of her hours put her between "a damn rock and a hard spot." (A. 434.) Offering her money in response to her distress made sense. By contrast, there is no evidence Durlin, who participated actively in the text exchange throughout the critical period, had wavered in her union support. Accordingly, Price had no reason to offer her money to secure her vote, just as he did not offer money to Miles or Bloom.

As the Hearing Officer also noted, Price's assertion that his offer of money was not conditioned on Durlin's vote was corroborated by Miles. Notably, Miles did not testify that Price told Durlin that the \$100 offer was in exchange for her vote, as Durlin claimed. Rather, Miles testified that after making the offer, Price separately told her that he had offered Durlin \$100 because he did not want her financial situation to cause her to quit. He further explained that he did not want Durlin to quit because he assumed that she was planning to vote for the Union. (A. 227.) Neither Price nor Miles stated that he told *Durlin* that her union support motivated him in any way, much less made the offer contingent on Durlin's union

support or vote. The Company's argument (Br. 50-51) that Miles' testimony did not corroborate Price's because she described Price's offer as a gift rather than a loan (as he described it) is irrelevant: the key, corroborated factual finding is that, whichever it was, it was unconditional.⁶

The Hearing Officer also based his credibility determination on his assessment of Durlin's account of Price's offer as internally inconsistent, and on his observation of Durlin's demeanor, which he described as nervous, anxious, and evasive. While the Company offers (Br. 48-49) an interpretation of Durlin's testimony to address the perceived inconsistencies, the Hearing Officer's confusion is understandable. And while the Company fixates on the Hearing Officer's remark that Durlin brought tissues to the witness stand and looked as though she were prepared to cry, nothing about that observation is "bizarre." *See, e.g., Northwest Pipe & Casting Co.*, 300 NLRB 726, 731 (1990) ("expression of crocodile tears" a relevant and "transparent attempt to shift blame"); *see also Shen Lincoln-Mercury-Mitsubishi*, 321 NLRB at 589 (emphasizing importance of factfinder's demeanor observations and difficulties inherent in reviewing them on cold record). The Company does not even address the example the Hearing Officer provided of Durlin's evasiveness: when asked a straightforward question

⁶ For this reason, the Company's cases (Br. 51-53) for the proposition that a loan can be a thing of value are beside the point.

about another allegedly objectionable incident, she looked at her prior written statement before answering.

The Company wastes additional ink (Br. 46-47, 50-53) relying on a litany of distinguishable cases. Thus, while the Company correctly notes (Br. 51) that “benefits substantially less than \$100” have been found objectionable, its case citations involve situations in which a party (union or employer) was shown to have offered financial benefits, *see, e.g., Crestwood Manor*, 234 NLRB 1097 (1978), and those benefits were either explicitly contingent upon, or could reasonably be interpreted as having been offered in exchange for, union support, *e.g., Tio Pepe*, 263 NLRB 1165, 1165 n.4 (1982) (restaurant employees who controlled tip distribution promise to give greater share to others in order to induce them to vote for union objectionable); *Revco D.S., Inc. v. NLRB*, 830 F.2d 70, 72-73 (6th Cir. 1987) (Court found objectionable union agent’s offer of money in exchange for employee’s vote in favor of representation). This case is distinguishable on both counts: Price was not a union agent and the credited evidence firmly establishes that his offer to Durlin was unconditional. The offer was, moreover, made in response to Durlin’s breakdown over her well-known financial troubles, not in the context of soliciting an authorization card or discussing the union. (A.124, 334-35.)

Finally, the Company's argument (Br. 52) that Durlin would have felt "a sense of obligation to vote for the Union" because "Price explicitly connected his offer to Durlin's vote" is based on discredited evidence and speculation. The credited testimony establishes Price told *Durlin* no such thing. As noted above, to the extent the Company relies on Miles' testimony to support its theory of how Durlin "would have" (Br. 52) felt, Miles recounted not what Price said to Durlin but what Price said to Miles. Relatedly, the Company's contention that Durlin would believe that the offer was contingent because of Price's "leadership role in the organizing campaign" (Br. 52) is simply a repackaging of its effort to portray him as a general union agent for all purposes, which fails for the reasons discussed above (pp. 32-41).

D. Substantial Evidence Supports the Board's Finding that the Totality of Circumstances Do Not Warrant Setting Aside the Election Results

There is no merit to the Company's contention (Br. 53-54) that the totality of the circumstances alleged in the two objections before the Court warrant setting aside the election. An employer may not use a cumulative-effects argument "to turn a number of insubstantial objections to an election into a serious challenge." *Amalgamated Clothing & Textile Workers*, 736 F.2d at 1569 (quoting *NLRB v. Van Gorp Corp.*, 615 F.2d 759, 765 (8th Cir. 1980)).

Although the Company correctly notes (Br. 54) that the size of a unit and the closeness of the election—here a one-vote margin—are relevant factors in assessing the effects of misconduct on an election, “neither fact is sufficient to raise a presumption that the conduct has an impact on the election results.” *NLRB v. Browning-Ferris Indus. of Louisville, Inc.*, 803 F.2d 345, 349 (7th Cir. 1986). Moreover, factual considerations such as closeness of an election “do [] not alter the objecting party’s burden to prove that there has been misconduct to warrant setting aside the election in the first instance.” *Consumers Energy Co.*, 337 NLRB 752, 752 n.2 (2002). Accordingly, courts have upheld elections with similarly close results. For example, in *Rosewood Care Ctr. v. NLRB*, 83 F.3d 1028, 1032 (8th Cir. 1996), this Court upheld a 26-24 vote in favor of representation after determining that threats made to one eligible voter and one noneligible voter did not create a general atmosphere of fear and coercion. *See also Eskimo Radiator*, 688 F.2d 1315, 1317, 1319-20 (9th Cir. 1982) (closeness of election is one factor in scrutinizing pre-election conduct but “not the controlling factor”; upholding 73-70 vote in favor of representation after finding threats did not create atmosphere of fear and coercion).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

Respectfully submitted,

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April 2019

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

DOLGENCORP, LLC	*
	*
Petitioner/Cross-Respondent	* Nos. 18-3695
	* 19-1157
v.	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 14-CA-223328
	*
Respondent/Cross-Petitioner	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 11,127 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection and is virus-free according to that program.

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Dated at Washington, DC
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**UNITED STATES COURT OF APPEALS
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CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2019 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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