

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GRILL CONCEPTS SERVICES, INC. D/B/A
THE DAILY GRILL
Employer

and

Case 31-RC-209589

UNITE HERE LOCAL 11
Petitioner

CORRECTED DECISION ON REVIEW

On April 11, 2018, the Regional Director issued a Partial Decision on Objections and Notice of Hearing in which she overruled the Employer's Objections as they related to her direction of a mail ballot election, but set for hearing the Objections regarding home visits made by the Petitioner's representatives and/or third parties to employees.¹ On June 7, 2018, after a hearing, the Hearing Officer issued a Report and Recommendation on Objection in which she recommended overruling the objections in their entirety. On July 24, 2018, the Regional Director issued a Decision and Certification of Representative, in which she overruled the Employer's exceptions to the Hearing Officer's Report and issued a certification of representative. Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review. The Petitioner filed an opposition.

On November 20, 2018, the Board granted the Employer's request for review "with respect to whether union representatives' offers to help employees with their mail ballots, including offers to help employees fill out their mail ballots, constituted objectionable conduct." Thereafter, the Employer and the Petitioner filed briefs on review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. Having carefully considered the entire record in this proceeding, including the briefs on review, and consistent with Board precedent, we affirm the Regional Director's Decision and Certification of Representative.

Generally speaking, union home visits during election campaigns are lawful and unobjectionable as long as the visitors do not threaten or coerce eligible voters during the visits. *Plant City Welding & Tank Co.*, 119 NLRB 131, 133-134 (1957), revd. on other grounds, 133 NLRB 1092 (1961). If objectionable threats or coercion occur during home visits, the Board follows its usual practice of applying an objective standard in evaluating whether a party's conduct had the tendency to interfere with employee free choice in the election and thus warrants setting the election aside. See, e.g., *Taylor Wharton Division*, 336 NLRB 157, 158 (2001); *Phillips Chrysler Plymouth*, 304 NLRB 16, 16 (1991). The objecting party bears the burden of demonstrating that objectionable misconduct occurred and that it warrants setting the election aside. *St. Vincent Hospital, LLC*, 344 NLRB 586, 587 (2005); *Consumers Energy Co.*, 337 NLRB 752, 752 (2002).

¹ The Employer did not number its objections to the election.

In this case, the allegedly objectionable conduct that occurred during the Petitioner's home visits consists of union representatives' alleged offers to help employees with their mail ballots, including offers to help the employees fill out their ballots. In *Fessler & Bowman, Inc.*, 341 NLRB 932 (2004), a four-member Board unanimously found that the collection of mail ballots by a party is objectionable conduct that may require setting aside the election. *Id.* at 934. The Board evenly split on the further question of whether the solicitation of mail ballots of other employees was also objectionable. Here, there was no testimony (and no contention) that any eligible voter turned their ballot over to a Petitioner representative, so there is no basis for finding objectionable conduct under the unanimous holding in *Fessler & Bowman*. There is also inadequate evidence to establish that any mail ballot solicitation took place. In this regard, all of the Petitioner's witnesses who were present during the home visits in question consistently testified that they merely asked eligible voters whether they had received their mail ballot and offered to explain the process for correctly filling out the ballot (with specific reference to signing across the back flap of the outer ballot envelope).² By contrast, as the Regional Director found, the Employer's witnesses were equivocal or non-definitive as to what exactly occurred when the union representatives offered to "help" them with their mail ballots, sometimes changing their accounts between direct and cross-examination. Given the ambiguity in the Employer's witnesses' testimony, we find that the record does not establish that any solicitation of mail ballots occurred during the home visits.³

For the same reasons, we also reject the Employer's contention that the Petitioner representatives' offers to help employees with their mail ballots were otherwise objectionable. Due to the conflicting and ambiguous testimony, the record does not establish that the Petitioner's representatives sought to physically assist voters in filling out the ballot, sought to have the voters record their votes in the representatives' presence, or engaged in any other conduct that could reasonably be viewed as coercive or imperiling the integrity of the mail ballots in this election.

JOHN F. RING,	CHAIRMAN
MARVIN E. KAPLAN,	MEMBER
WILLIAM J. EMANUEL,	MEMBER

Dated, Washington, D.C., June 28, 2019

² The Petitioner's representatives also offered to drive the eligible voters to the post office to mail their ballots.

³ It is therefore unnecessary to address the question of whether mere solicitation of mail ballots constitutes objectionable conduct, as urged by the partial dissent in *Fessler & Bowman*, *supra* at 935-936. Accordingly, we do not rely on any statements by the Hearing Officer or Regional Director that even if the Petitioner had solicited mail ballots from the employees, such conduct would not be objectionable.