

United States of America
National Labor Relations Board

MERCY, INC. d/b/a/ AMR LAS
VEGAS,
Employer
and
AMERICAN FEDERATION OF STATE
COUNTY AND MUNICIPAL
EMPLOYEES AFSCME LOCAL 4041
(AFSCME LOCAL 4041, EMS
WORKERS UNITED – AFSCME),
Petitioner

Case No. 28-RC-239046

PETITIONER’S STATEMENT IN OPPOSITION TO REQUEST FOR REVIEW

Petitioner, American Federation of State County and Municipal Employees AFSCME Local 4041 (the “Union”), submits this statement in opposition to Mercy, Inc. d/b/a AMR Las Vegas (the “Employer”)’s request for review of the Regional Director’s order to hold the rerun election in abeyance pending investigation and disposition of unfair labor practice charge, Charge No. 28-CA- 241256.

INTRODUCTION

An NLRB Hearing Officer found that the election was tainted by objectionable conduct that “reasonably tended to interfere with employee free choice.” Hearing Officer Report, attached hereto as Exhibit A, at p. 25. The same objectionable misconduct sustained by the Hearing Officer also constitutes unfair labor practices that are under investigation in Charge No. 28-CA- 241256, but have not yet been adjudicated or

remedied.¹ Under these circumstances, the Regional Director correctly applied the Board’s long-standing blocking charge policy because the unfair labor practice charges, if true, “would destroy the laboratory conditions necessary to permit employees to cast their ballots freely and without restraint or coercion.” John E. Higgins, ed., *The Developing Labor Law* 603 (6th ed. 2012); *Bishop v. N. L. R. B.*, 502 F.2d 1024, 1029 (5th Cir. 1974) (“If the employer has in fact committed unfair labor practices and has thereby succeeded in undermining union sentiment, it would surely controvert the spirit of the Act to allow the employer to profit by his own wrongdoing. In the absence of the ‘blocking charge’ rule, many of the NLRB’s sanctions against employers who are guilty of misconduct would lose all meaning.”). Here, there is an uncontested finding by a Hearing Officer that the employer’s misconduct interfered with the employees’ choice and there will likely be a finding that the misconduct also constitutes unfair labor practices. These unfair labor practices must be remedied in an attempt to restore the laboratory conditions before a new election takes place.²

The Employer’s argument that a rerun election should proceed while the unfair labor practices remain unremedied should be rejected. It makes no sense to rerun the election

¹ The Employer did not file exceptions to the Hearing Officer’s report, yet it has apparently filed a Position Statement challenging the unfair labor practice charge.

² *Sysco Grand Rapids, LLC & Gen. Teamsters Union Local No. 406, Int’l Bhd. of Teamsters*, 367 NLRB No. 111 (Apr. 4, 2019) (ordering special remedies “in light of the Respondent’s extensive and serious unfair labor practices when faced with its employees’ union organizational efforts. These additional remedies should serve to dissipate as much as possible any lingering effects of the Respondent’s unfair labor practices and to ensure that a fair second election can be held.”).

when the unfair labor practices that were found to interfere with free choice in the first election have not yet been remedied.³ The Employer cites nothing to suggest that the Employer's conduct leading up the first election would not continue to interfere with the employees' free and fair choice of representative or that the Employer would not engage in the same conduct again, resulting in the need for yet a third election. There is no reason to believe that the mere passage of a few months since the tainted election would somehow ameliorate the impact of the Employer's unlawful conduct or somehow restore the laboratory conditions the Board requires for the exercise of free choice. It would be a waste of Board resources to proceed with a rerun election in this case prior to adjudication of the unfair labor practice charge. If the Union loses the election, it is reasonably likely that such a loss would be because the unfair labor practices that interfered with employees' free choice the first time around have not been remedied. As such, that second election would also need to be set aside, resulting in the need for yet a third election following the conclusion of the unfair labor practice proceedings and associated remedies.

To the extent that the Employer's Request for Review challenges the blocking policy altogether, such arguments should be reserved for rulemaking, not these proceedings.

FACTS AND PROCEDURAL HISTORY

The Union filed its representation petition in this case on April 4, 2019. On April

³ *Peoples Gas Sys., Inc. v. N. L. R. B.*, 629 F.2d 35, 47–48 (D.C. Cir. 1980) (“holding a rerun election simply because of the passage of time rewards employer recalcitrance and offers no deterrence to future unfair labor practices”).

26 and April 30, 2019, an election was held and by a very close margin, the nonprofessional employees voted against union representation.⁴ Following the election, on May 7, 2019, the Union timely filed objections and offers of proof. On May 10, 2019, a few days after filing the objections to the election, the Union filed a coextensive unfair labor practice charge.⁵

On May 21, 2019, the first day of the hearing on the objections, (eleven days after the Regional Director issued the Notice of Hearing on objections and the Union submitted the coextensive Unfair Labor Practice charge), the Employer submitted a motion to postpone the hearing on the objections and consolidate the hearing on the objections with the Unfair Labor Practice charge proceedings. In accordance with § 11407 of the CaseHandling Manual, the Regional Director denied the Employer's motion to postpone and/or consolidate, and the parties proceeded with a hearing on the objections.

On June 14, 2019, the Hearing Officer issued a report sustaining seven of the Union's objections and because such conduct "reasonably tended to interfere with employee free choice," the Hearing Officer recommended that a new election be held. Hearing Officer Report, Ex. A hereto, at p. 25. Briefly summarized, the objections that

⁴ Pursuant to the stipulated election agreement, the proposed unit consisted of two groups: a professional unit consisting of registered nurses and a non-professional unit consisting of emergency medical technicians, paramedics, vehicle service technicians and field training officers. The professional unit voted for union representation and to be in their own professional unit. The nonprofessional employees voted against union representation 143-167, which means that 13 votes could have changed the outcome of the election. There were eight challenged ballots.

⁵ The Order Directing Hearing and Notice of Hearing on Objections was issued on May 10, 2019. On May 10, 2019, the Union submitted and served (including electronically on Counsel for the Employer) their Unfair Labor Practice Charge. 28-CA-241256.

were sustained by the Hearing Officer that also constitute unfair labor practices and were asserted in the Union's coextensive unfair labor practice charge include the following objections:

Objection 1: The Employer unlawfully threatened to withhold a regular, annual wage increase during the days following the filing of the Petition and leading up to the representation election. Hearing Officer Report, at pp. 5-7. Because AMR's wage increases, which are awarded annually, are planned, regular pay increases that are part of the status quo, the Employer's threats to withhold them violated §8(a)(1). *See Valmet, Inc.*, 367 NLRB No. 84 (Feb. 4, 2019) (affirming judge's findings that the Respondent violated Section 8(a)(1) and engaged in objectionable election conduct by threatening to withhold employees' regularly scheduled step-progression wage increases

Objections 2 and 3: The Employer engaged in unlawful coercive threats of termination and loss of benefits following the filing of the Petition by telling the employees if they voted for Union representation the Employer would have to enforce its policies more strictly. Hearing Officer Report at pp. 7-9. The Employer's unlawful threats of termination and loss of benefits included threats that if employees voted for Union representation, the Employer's current policies and practices of "flexible arrangements" with respect to terms and conditions of employment would no longer apply. *See Sysco Grand Rapids, LLC & Gen. Teamsters Union Local No. 406, Int'l Bhd. of Teamsters*, 367 NLRB No. 111 (Apr. 4, 2019) (threat to enforce Company sick leave rules more strictly if the Union came in constituted an unlawful threat of a loss of benefit in violation of 8(a)(1)); *Allegheny Ludlum Corp.*, 320 NLRB 484 (1995) (threats that employee "would not get

away with things” and loss of flexibility in working conditions if employees voted for union representation violated 8(a)(1)).

Objection 4: The Employer maintained a discriminatory, unlawful and overly broad policy of prohibiting “campaigning” on behalf of the Union on “work times” and “work areas” without any indication of what that meant. The ambiguous language confused employees into believing they could not discuss the Union at any time during their shifts or on company property, when employees have no prohibition on other subjects of conversation. Hearing Officer Report, at pp. 9-10. *Sysco Grand Rapids, LLC & Gen. Teamsters Union Local No. 406, Int'l Bhd. of Teamsters*, 367 NLRB No. 111 (Apr. 4, 2019) (“[A]n employer violates the Act when employees are not allowed to discuss unionization but may talk about other subjects unrelated to work.”); *W. D. Manor Mech. Contractors, Inc. & Sheet Metal Workers Int'l Ass'n, Local No. 359, AFL-CIO, Clc*, 357 NLRB 1526, 1541 (2011) (admonition to employees that they could not speak to union agent on the jobsite during company time “clearly violated longstanding Board law that the limitation to ‘company time’ ambiguously may confuse employees into believing that they cannot engage in union activity or solicitation from the time they come to work until the time they leave. Such a rule violates Section 8(a)(1) of the Act ...”) (citing *St. George Warehouse, Inc.*, 331 NLRB 454, 462 (2000)).

Objection 6: The Employer’s high-level corporate managers, Donna Miller and Scott Dralle, who had no practice of soliciting employee grievances and complaints, unlawfully solicited grievances in order to try to deter employees from choosing union representation. Hearing Officer Report, at pp. 12-13. Where, as here, “an employer, who

has not previously had a practice of soliciting employee grievances or complaints, adopts such a course when unions engage in organizational campaigns seeking to represent employees, we think there is a compelling inference that he is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary.” *Reliance Elec. Co.*, 191 NLRB 44, 46 (1971). *Sysco Grand Rapids, LLC*, 267 NLRB No. 111 (employer violations of 8(a)(1) included “[s]oliciting grievances and promising to remedy them in order to discourage employees from selecting union representation.”).

The Employer did not file any exceptions to the Hearing Officer’s report. The Employer also did not request review of the Regional Directors’ denial of the Employer’s motion to postpone the hearing on objections and/or consolidate the objections proceeding with the unfair labor practice charge proceedings.

The Board continues to investigate the Unfair Labor Practice charge. The Union understands that the Employer has submitted a Position Statement disputing the Unfair Labor Practice charge allegations. Given the serious nature of the allegations and their tendency to interfere with employee free choice of representative, the determination to block the rerun elections while those charges are pending is entirely within Regional Director’s discretion.

ARGUMENT

1) The Regional Director’s Determination to Proceed Does Not Warrant Review

Contrary to the Employer's unsupported assertion, nothing on the face of the Regional Director's determination to hold a rerun election in abeyance is "arbitrary and capricious." The Board's Rules and Regulations and CaseHandling Manual permit the exact course of action the Regional Director has taken here where both objections and unfair labor practice charges that are either partially or totally coextensive with the objections are submitted. Sections 11407 and 11730.02 of the CaseHandling Manual contemplate deferral of the processing of coextensive unfair labor practice charge until after a hearing on objections to an election and then, if the hearing results in a finding that there is merit to the objections and that the objectionable conduct interfered with employees' free choice, to hold a rerun election in abeyance pending the outcome of the coextensive unfair labor practice charges. Section 1147 provides in relevant part as follows:

If the charging party chooses not to withdraw the unfair labor practice charge, the regional director nonetheless may decide it is appropriate and more expeditious to hold the charge in abeyance and process the challenges and/or objections. Agreement of the parties is not required. This alternative procedure could be used where the unfair labor practice allegations and the challenges and/or objections are coextensive or related, and the resolution of the challenges and/or objections in the representation case, after Board review, is likely to provide an appropriate basis for resolving the unfair labor practice case.

...after reviewing the record evidence from the challenges/objections hearing, the regional director may conclude that dismissal of the charge would be inappropriate and the charge should be processed further. Whether a rerun election should be conducted notwithstanding a pending charge is governed by the considerations set forth in Secs. 11730-11734.

Section 11730.02 which governs whether and when a rerun election should be conducted when there are coextensive unfair labor practice charges, provides that the Regional Director has discretion to block a rerun election under the circumstances present

here where a charge has been filed and the unfair labor practices must be remedied because the unlawful conduct interferes with employees' free choice:

When the charging party in a pending unfair labor practice case is also a party to a petition, **and the charge alleges conduct that, if proven, would interfere with employee free choice in an election, were one to be conducted**, and no exception (Sec. 11731) is applicable, the charge should be investigated and either dismissed or remedied before the petition is processed if the charging party files a request to block accompanied by a sufficient offer of proof and promptly makes its witnesses available.⁶

The Regional Director's determination here was in accordance with these rules. As set forth above, Objections 1-4 and 6, which were sustained, constitute unfair labor practices. The Hearing Officer found the objectionable conduct alleged in the coextensive unfair labor practice charge was sufficient "to establish that the Employer's conduct as set forth in Objections 1-4, 6, 10, and 11 reasonably tended to interfere with employee free choice." Exhibit A, at p. 25.

There has not yet been any remedy for the unlawful conduct and the Employer appears to be challenging the unfair labor practice charges despite its failure to file any exceptions to the Hearing Officer's report. The Regional Director appropriately determined that a rerun election must await the remedies of an unfair labor practice proceeding before a new election can be held. Left unremedied, the multiple, pervasive unfair labor practices will continue to taint the employee's free choice of representative. By way of just one example, after the employees were unlawfully told that they might not receive their regular

⁶ The Union submitted a request to block pending resolution of the unfair labor practice together with offers of proof and advised the Board its witnesses were available prior to issuance of the Regional Director's Order holding the election in abeyance.

annual status quo wage increase because the Union had filed a representation petition, and following the Union's loss in the representation election, employees actually did receive the annual wage increase that they were told they might not receive if they voted for union representation. The only way to ameliorate the prejudice and harm caused by this unfair labor practice and restore laboratory conditions (if that is even possible at this point) is through appropriate remedies including, for example, a cease and desist order and notice remedies so that employees are expressly advised that the post-election wage increase they received was NOT because the Union lost the election, but because the wage increase was a planned status quo wage increase that they would have received regardless of the outcome of the representation election. Given the Employer's unlawful conduct, it is entirely within the Regional Director's sound discretion to defer a rerun election until there is an order granting a remedy for the unfair labor practice charges that interfered with the employees' choice of representative and the Employer actually carries out that remedy.⁷ Otherwise, there is nothing to restore the "laboratory conditions" that the Act contemplates.

In its Request for Review, the Employer does not cite a single Board decision that finds that a Regional Director's determination to hold a rerun election in abeyance under the circumstances present here is somehow arbitrary and capricious on its face as required to grant review. To the contrary, the Board has repeatedly refused to reverse a Regional Director's determination to hold a petition in abeyance where there are unremedied unfair

⁷ Contrary to the Employer's hyperbolic assertion that the Regional Director has ordered that the election be frozen "indefinitely," the Regional Director has ordered the case held in abeyance only pending investigation and disposition of a related unfair labor practice charge against the Employer. See Blocking Letter dated July 18, 2019.

labor practices. *See, e.g., Wellington Indus., Inc.*, 359 NLRB 246, 246 n. 3 (2012) (“The fact that these violations also remain unremedied further supports the Regional Director's decision to continue to hold the petition in abeyance.”); *Valley Hosp. Med. Ctr., Inc.*, No. 28-RD-192131, 2017 WL 2963204, at *1 n.1 (July 6, 2017) (“If the employer has in fact committed unfair labor practices and has thereby succeeded in undermining union sentiment, it would surely controvert the spirit of the Act to allow the employer to profit by his own wrongdoing. In the absence of the ‘blocking charge’ rule, many of the NLRB's sanctions against employers who are guilty of misconduct would lose all meaning. . . .”) (quoting *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215, 228 (5th Cir. 2016)).

2) Changes to the Blocking Policy Are Inappropriate Absent Notice and Comment Rulemaking

As set forth above, the Regional Director’s decision to hold the petition in abeyance was in accordance with the Board’s Rules and Regulations, enacted after notice and comment rulemaking. 29 C.F.R. § 103.20; 29 Fed. Reg. 74308-01 (Dec. 15, 2014) (issuing final rule on Representation – Case Procedures). *See* Case Handling Manual §§ 11407, 11730.02. As the Employer notes, the representation-case procedure rules are on the Board’s 2019 Rulemaking Agenda. *See, e.g.,* NLRB Rulemaking Agenda Announced, 2019 WL 2225400 (May 22, 2019). However, the current policy is still in force. While the Employer is free to comment on proposed changes to the representation case procedures at the appropriate juncture or may also file its own petition for rulemaking, its request for the Board to revisit the rules in an adjudicatory setting should be rejected. The blocking charge

policy is now codified in the Board’s regulations, and the Board “is bound by its own rules until it changes them” in accordance with notice and comment rulemaking. *Human Development Ass'n v. NLRB*, 937 F.2d 657, 661 (D.C. Cir. 1991) (citations omitted). Rule-making procedures “may not be avoided by the process of making rules in the course of adjudicatory proceedings.” *NLRB. v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969).

Moreover, as the Board has noted, the blocking charge doctrine has remained unchanged – although not set forth in regulations until recently - even though other representation procedures were changed. *Valley Hosp. Med. Ctr., Inc.*, 2017 WL 2963204, at *1 n.1. Even if the Board were to “reconsider” the blocking charge doctrine now codified in regulations, any new rule announced that departs from well-established precedent would substantially change substantive rights and work a manifest injustice and therefore could not be applied retroactively to this case. *Dresser Indus., Inc.*, 264 NLRB 1088, 1089 (1982).

CONCLUSION

For the foregoing reasons, the Union respectfully requests that the Board deny the Employer’s Petition for Review.

Respectfully submitted this 7th day of August, 2019.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on August 7, 2019, I electronically submitted the attached to the National Labor Relations Board for filing with a copy by email and mail to the following Attorney for Mercy, Inc. d/b/a AMR Las Vegas:

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EXHIBIT A

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

MERCY, INC. d/b/a AMR LAS VEGAS

Employer

and

Case 28-RC-239046

**AMERICAN FEDERATION OF STATE COUNTY
AND MUNICIPAL EMPLOYEES AFSCME
LOCAL 4041 (AFSCME LOCAL 4041, EMS
WORKERS UNITED-AFSCME)**

Petitioner

HEARING OFFICER'S REPORT ON OBJECTIONS

I. INTRODUCTION

On April 26 and 30, 2019¹, an election by secret ballot was conducted among certain employees of Mercy, Inc. d/b/a AMR Las Vegas (the Employer).

American Federation of State County and Municipal Employees AFSCME Local 4041 (AFSCME Local 4041, EMS Workers United-AFSCME) (the Petitioner) filed timely objections to conduct affecting the results of the election, claiming that the Employer engaged in objectionable conduct, and therefore asks that the election be set aside and that a new election be held. Specifically, the Petitioner contends that the Employer: threatened to withhold employees' regular annual wage increases; threatened employees with loss of benefits; maintained an overly broad policy prohibiting employees from campaigning on behalf of the Petitioner during work time and in work areas; maintained an impression of surveillance; solicited employee grievances; interrogated employees; held meetings with groups of employees within 24 hours of the election; violated instructions from Board agents that neither party was permitted to change its observers during the polling times of any polling session; failed to provide the Petitioner a complete and accurate voter list; and, in general, the Employer's conduct created an atmosphere making a free choice by its employees during the election impossible.

After conducting the hearing and carefully reviewing all of the evidence as well as all of the arguments made by the parties, I recommend that the Petitioner's objections be sustained in part because the evidence demonstrates that the Employer engaged in objectionable conduct. More specifically, the credited evidence supports a conclusion that the Employer: threatened to withhold employees' regular annual wage increases; threatened employees with a loss of flexibility with their benefits because the Employer would be required to more strictly adhere to its policies; maintained an ambiguous and overly broad policy prohibiting employees from

¹ All dates are in Calendar Year 2019, unless specified otherwise.

campaigning on behalf of the Petitioner during work time and in work areas; solicited employee grievances; failed to provide the Petitioner a complete and accurate voter list; and, based on the foregoing as a whole, the Employer's conduct created an atmosphere making a free choice by its employees during the election impossible.

After recounting the procedural history, I discuss the parties' burdens and the Board standard for setting aside elections. Then, I describe the Employer's operations and an overview of relevant facts. Finally, I discuss the facts and analysis, make my recommendation for each objection, and set forth my conclusion and the appeal procedure.

II. PROCEDURAL HISTORY

A. The Petition and the Stipulated Election Agreement

The Petitioner filed the petition on April 4. The parties agreed to the terms of an election and the Region approved their Stipulated Election Agreement (Agreement) on April 16. The election was held on April 26 and 30, among employees in the following voting groups (collectively, Unit employees):

Voting Group – Unit A (Professional Unit):

INCLUDED: All full-time and regular part-time registered nurses (RNs) employed by the Employer.

EXCLUDED: All other employees, office clerical employees, managerial employees, guards and supervisors as defined in the Act.

Voting Group – Unit B (Nonprofessional Unit):

INCLUDED: All full-time and regular part-time emergency medical technicians (EMTs), paramedics, vehicle service technicians (VSTs), and field training officers (FTOs) employed by the Employer.

EXCLUDED: All other employees, office and clerical employees, managerial employees, guards and supervisors as defined in the Act.

In the Agreement, the parties agreed that, if a majority of the Professional Unit employees cast ballots indicating their desire to be included in a unit with Nonprofessional Unit employees, they would be so included, and their votes on the question of whether they wished to be represented by the Petitioner would be counted together with the votes of the Nonprofessional Unit to decide the question concerning representation for the overall unit consisting of all Unit employees. The parties further agreed that, if on the other hand, a majority of the Professional Unit employees cast ballots indicating that they did not wish to be included in a unit with Nonprofessional Unit employees, their ballots would be counted separately to decide the question concerning representation in a separate Professional Unit.

B. The Election and the Tallies of Ballot

On April 30, after the election had concluded, during the ballot count, a majority of the Professional Unit employees cast ballots indicating that they did not wish to be included in a Nonprofessional Unit. Therefore, two separate tallies of ballots were prepared.

First, the Tally of Ballots for the Professional Unit (Professional Unit Tally) shows that, of the three eligible voters, two votes were cast for, and one vote was cast against Petitioner. Therefore, a majority of Professional Unit employees casting ballots in the election voted for representation by the Petitioner.

Second, the Tally of Ballots for the Nonprofessional Unit (Nonprofessional Unit Tally) shows that, of the approximately 352 eligible voters, 143 votes were cast for and 167 votes were cast against the Petitioner, with 8 challenged ballots, a number insufficient to affect the results of the election. Thus, a majority of the valid ballots for the Nonprofessional Unit employees were not cast in favor of representation by the Petitioner.

C. Petitioner's Objections and Order Directing Hearing on Objections

On May 7, objections were timely filed by the Petitioner. The Employer did not file objections to the election.

On May 10, the Regional Director for Region 28 ordered that a hearing be conducted to give the parties an opportunity to present evidence regarding the Petitioner's objections. As the hearing officer designated to conduct the hearing and to recommend to the Regional Director whether the Petitioner's objections are warranted, I heard testimony and received into evidence relevant documents from May 21 through May 23.

III. THE BURDEN OF PROOF AND THE BOARD'S STANDARD FOR SETTING ASIDE ELECTIONS

It is well settled that "[r]epresentation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Therefore, "the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one." *Delta Brands, Inc.*, 344 NLRB 252, 253, (2005), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). To prevail, the objecting party must establish facts raising a "reasonable doubt as to the fairness and validity of the election." *Patient Care of Pennsylvania*, 360 NLRB No. 76 (2014), citing *Polymers, Inc.*, 174 NLRB 282, 282 (1969), *enfd.* 414 F.2d 999 (2d Cir. 1969), *cert. denied* 396 U.S. 1010 (1970). Moreover, to meet its burden the objecting party must show that the conduct in question affected employees in the voting unit. *Avante at Boca Raton*, 323 NLRB 555, 560 (1997) (overruling employer's objection where no evidence that unit employees knew of the alleged coercive incident).

In determining whether to set aside an election, the Board applies an objective test. The test is whether the conduct of a party has “the tendency to interfere with employees’ freedom of choice.” *Cambridge Tool Pearson Education, Inc.*, 316 NLRB 716 (1995). Thus, under the Board’s test, the issue is not whether a party’s conduct in fact coerced employees, but whether the party’s misconduct reasonably tended to interfere with the employees’ free and uncoerced choice in the election. *Baja’s Place*, 268 NLRB 868 (1984). See also, *Pearson Education, Inc.*, 336 NLRB 979, 983 (2001), citing *Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970).

In determining whether a party’s conduct has the tendency to interfere with employee free choice, the Board considers a number of factors: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among employees in the voting unit; (3) the number of employees in the voting unit who were subjected to the misconduct; (4) the proximity of the misconduct to the date of the election; (5) the degree to which the misconduct persists in the minds of employees in the voting unit; (6) the extent of dissemination of the misconduct to employees who were not subjected to the misconduct but who are in the voting unit; (7) the effect, if any, of any misconduct by the non-objecting party to cancel out the effects of the misconduct alleged in the objection; (8) the closeness of the vote; and (9) the degree to which the misconduct can be attributed to the party against whom objections are filed. *Taylor Wharton Division*, 336 NLRB 157, 158 (2001), citing *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

IV. THE EMPLOYER’S OPERATION

The Employer provides medical transportation services out of its office and place of business in Las Vegas, Nevada (the facility). The Employer’s Senior Operations Supervisor is Mark Wilton (Mr. Wilton), who oversees the Employer’s supervisors and the Employer’s operations. It is undisputed that Mr. Wilton is a supervisor under Section 2(11) of the Act, as he has the authority on behalf of the Employer to hire and discipline its employees. Operations Supervisors Mario Perkins (Mr. Perkins), Silvio Flores (Mr. Flores), and Hal Wyrick (Mr. Wyrick) (collectively, Operations Supervisors) report to Mr. Wilton. These Operations Supervisors ensure that the Employer has proper staffing to meet the Employer’s daily operational needs.

V. THE PETITIONER’S OBJECTIONS AND MY RECOMMENDATIONS

The Order Directing Hearing in this matter instructs me to resolve the credibility of witnesses testifying at the hearing and to make findings of fact. Unless otherwise specified, my summary of the record evidence is a composite of the testimony of all witnesses, including in particular testimony by witnesses that is consistent with one another, with documentary evidence, or with undisputed evidence, as well as testimony that is uncontested. Omitted testimony or evidence is either irrelevant or cumulative. Credibility resolutions are based on my observations of the testimony and demeanor of witnesses and are more fully discussed within the context of the objection related to the witnesses’ testimony.

A. Objection 1: Employer Threats to Withhold Unit Employees' Regular Annual Wage Increases

1. Record Evidence

a. The Employer's Consistent Past Practice of Annual Wage Increases

The Employer has a consistent past practice of granting its Unit employees annual wage increases. In both 2017 and 2018, the timing of these wage increases occurred in July. In 2016, Unit employees received annual wage increases approximately the pay period before November 3, 2016.

b. The Employer's Meetings with Unit Employees Before the Election

It is undisputed that prior to the election, the Employer held two sets of multiple daily meetings with its Unit employees about the upcoming election. The Unit employees were paid to attend these meetings. Witness testimony varied about the number of attendees at each meeting, ranging between three and forty Unit employees that attended each meeting. Either Mr. Wilton, Mr. Perkins, Mr. Flores, or Mr. Wyrick presided at each of these meetings. The record does not reflect specifically which meeting each supervisor presented, nor does it indicate exactly how many meetings each supervisor held with Unit employees. Each Employer presenter used the same PowerPoint presentation at each meeting. There was one PowerPoint presentation for the first set of meetings (first PowerPoint) and another PowerPoint presentation used for the second set of meetings (second PowerPoint).

i. The Employer's First Set of Meetings about the Election

Between April 11 through 14, the Employer held its first set of meetings with Unit employees, occurring multiple times each day. During these meetings, the Employer presented its first PowerPoint presentation entitled "Considerations About the Union Issue." Pet. Ex. 16 at *1, slide 1. One of the slides in the first PowerPoint has the header, "Collective Bargaining," and contains a quote on the left side of the slide stating, "If we have a union, we will get a raise in a couple of weeks." *Id.* at *6, slide 11. This quote is followed by a number of bullet points on the right side of the same slide, stating:

- No one knows for sure.
- It could be months...or years.
- Sometimes an agreement is never reached.
- Our obligation is only to bargain in good faith.

Id.

Although witness testimony about the specific words used by each Employer presenter during each meeting differed, the message conveyed by the Employer's first PowerPoint

presentation was clear---the Employer was unsure whether Unit employees would receive their annual wage increases if they voted for the Petitioner.

ii. The Employer's Second Set of Meetings about the Election

On unspecified dates after April 14, but before the first day of the election on April 26, the Employer held its second set of meetings with Unit employees, occurring at multiple times on multiple days. During these meetings, the Employer presented its second PowerPoint presentation entitled "AMR---Facts & Bargaining." Pet. Ex. 17 at *1, slide 1. One of the second PowerPoint slides contains the question, "What happens to wages and benefits while the bargaining process continues?" *Id.* at *32, slide 63. The next slide responds, "Future wage rates and benefits await the outcome of the bargaining process." *Id.* at slide 64.

According to Mr. Wilton's testimony, during the meetings that Mr. Wilton led with Unit employees, Mr. Wilton told Unit employees that all wages, benefits, and conditions of employment were on hold and frozen pending the collective bargaining process.

2. Board Law

An employer's statement that wages will be frozen until a collective-bargaining agreement is signed violates Section 8(a)(1) if the employer has a past practice of granting periodic wage increases. *Jensen Enterprises*, 339 NLRB 877, 877 (2003). Periodic wage increases become conditions of employment if they are an established practice regularly expected by the employees. *Id.* (citing *Daily News of Los Angeles*, 315 NLRB 1236 (1994), *enfd.* 73 F.3d 406 (D.C. Cir. 1996)). An employer's annual wage increases must occur with such regularity and frequency that employees could reasonably expect them on a regular and consistent basis. *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353 (2003), *enfd.* 112 Fed.Appx 64 (D.C. Cir. 2004). Further, the employer's continuation of such annual wage increases must be expected, as similar in kind and degree to what the Employer has done in the past. *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 13 (2017); *Daily News of Los Angeles*, 315 NLRB 1236 (1994), *enfd.* 73 F.3d 406 (D.C. Cir. 1996); *United Rentals*, 349 NLRB 853, 854-855 (2007); *Mission Foods*, 350 NLRB 336, 337 (2007). An employer's obligation in maintaining the status quo during negotiations, if employees select union representation, includes continuing such annual wage increases as it had in the past. *See Valmet, Inc.*, 367 NLRB No. 84, slip op. at 11 (2019).

3. Recommendation

Because the record reflects that the Employer had a past practice of regular annual wage increases, including such annual wage increases in July of 2017 and 2018 and in November 2016, these planned, regular pay increases are part of the status quo. *Philadelphia Coca-Cola Bottling Co.*, *supra*. The Employer had an obligation to maintain the status quo following the filing of the petition. *Valmet, Inc.*, *supra*. The Employer told its Unit employees during these meetings that their regular wage increases would be on hold and frozen pending the collective bargaining process. The Employer's admitted repeated statements to Unit employees that these

annual wage increases would be on hold and frozen, combined with the undisputed content from the Employer's first PowerPoint and second PowerPoint presentations during the meetings with Unit employees constituted objectionable conduct warranting setting aside the election. *See Valmet, Inc.*, supra, slip op. at 1 (affirming the judge's finding that the employer's Plant Manager threatened employees that step-progression wage increases would be "frozen" during negotiations). Based on the foregoing and the record as a whole, I recommend sustaining the Petitioner's Objection 1 that the Employer threatened to withhold Unit employees' regular annual wage increases.

B. Objections 2 and 3: Employer Threatening Employees if They Voted for the Petitioner, Employees Would Lose Benefits because the Employer Would Strictly Enforce its Policies

1. Record Evidence

The first PowerPoint presentation contains a slide with a header of "Union Representation," and a bullet point stating, "No other deals, flexible arrangements, special accommodations." Pet. Ex. 16 at *4, slide 7. Another slide from the first PowerPoint has a "Collective Bargaining" header, with a quote on the left hand side of the slide stating, "If a final contract includes working arrangements that do not meet my needs or schedule, I'll just not join the union." *Id.* at 7, slide 13. On the right side of the same slide, there are a number of bulletpoints, stating as follows:

- You may have been told this, but that is not how it works.
- A contract applies to everyone in the unit regardless of who did or did not vote for the union.
- No exceptions
- No special arrangements
- No flexibility
- No options

Id.

While the witness testimony differed regarding exactly what was said during the meetings regarding the Employer's flexibility and special arrangements for its employees, I credit the employee testimony that the Employer had a past practice of being flexible with its Unit employees regarding employee scheduling and attendance. Employees testified that examples of such flexibility included the Employer granting an employee's short notice request to take paid time off, allowing its employees to accrue more attendance points than its policy stated warranted employee termination, and allowing its employees to work "amnesty shifts" to decrease their number of attendance points. It is undisputed that the Employer posted a list of Unit employees' attendance points (attendance points list), including each employee's employee number (to maintain the confidentiality of each employee) and that employee's number of accrued attendance points. According to multiple employee witnesses, according to this posted

attendance points list, many Unit employees had accrued more than the maximum number of attendance points warranting termination pursuant to Employer policy.

According to the credited testimony of multiple employee witnesses, consistent with the excerpts from the first PowerPoint and second PowerPoint presentations set forth above, during the Employer's meetings with its Unit employees, the Employer stated that if the Unit employees voted in favor of the Petitioner, the Employer would lose its ability to be flexible and lenient with its Unit employees and would lose its ability to offer special accommodations for each employee's particular circumstances. Further, according to the credited employee testimony, consistent with the excerpted content from both PowerPoint presentations set forth above, the Employer stated that if the Petitioner prevailed at the election and a union was in place, that the Employer would be required to uniformly follow its policies and would no longer be able to make exceptions for any Unit employees.

2. Board Law

Statements made by an employer to employees may convey general and specific views about unions or unionism or other protected activity as long as the communication does not contain a "threat of reprisal or force or promise of benefit." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). Statements are viewed objectively and in context from the standpoint of employees over whom the employer has a measure of economic power. *Green Apple Supermarket of Jamaica, Inc.*, 366 NLRB No. 124 (2018) (citing *Mesker Door, Inc.*, 357 NLRB 591, 595 (2011)).

An employer violates Section 8(a)(1) by threatening it will more strictly enforce rules or policy because of employees' protected activity. *Miller Industries Towing Equipment, Inc.*, 342 NLRB 1074, 1074 (2004) (employer unlawfully threatened stricter rule enforcement and restrictions on protected activities in non-work areas in response to unionization); *Long-Airdox Co.*, 277 NLRB 1157 (1985) (employer unlawfully threatened employees with plant closure and told them it would more strictly enforce plant rules); see also *La-Z-Boy Midwest*, 241 NLRB 334, 334-335 (1979) (finding that a supervisor engaged in objectionable conduct when he separately threatened two employees to apply more stringent work rules in the event employees exercised their Section 7 right to select union representation).

An employer's threat to enforce Company rules more strictly if the union prevails is an unlawful threat of a loss of benefit. *Sysco Grand Rapids, LLC*, 367 NLRB No. 111, slip op. at 25 (2019) (citing *Hyatt Regency Memphis*, 296 NLRB 259, 271 (1989) (employer's statements that employees would not "get away with things" constituted an 8(a)(1) threat of benefit and change of working conditions)); *Allegheny Ludlum Corp.*, 320 NLRB 484 (1995) (telling employees they will lose flexibility in working conditions if they bring in the union constitutes an unlawful threat of a loss of benefits), *enfd. in rel. part* 104 F.3d 1354 (D.C. Cir. 1997); *L'EGGS Products, Inc.*, 236 NLRB 354, 383 (1978) (comments that employees may face different and more restrictive leave and vacation policies if unionized constitute unlawful threats), *enfd. in rel. part* 619 F.2d 1337 (9th Cir. 1980); *Miller Industries Towing Equipment, Inc.*, *supra* at 1084

(statements to employees that previous leniency regarding break times would no longer occur in a union setting violated Section 8(a)(1)).

3. Recommendation

It is undisputed that during the Employer's first set of meetings between April 11 through 14, the Employer's first PowerPoint presentation to its Unit employees stated if the Unit employees choose "Union Representation," they would have "No other deals, flexible arrangements, special accommodations," "No exceptions," "No special arrangements," "No flexibility," and "No options." Relying on this content from the first PowerPoint presentation, the Employer's message is clear--if the Unit employees voted in favor of the Petitioner, the Employer could no longer be flexible with its employee benefits, including employee scheduling and attendance, and would have to strictly enforce its policies, including its policy mandating termination after Unit employees accrued a maximum number of attendance points. Based on the foregoing and the record as a whole, I recommend sustaining Objections 2 and 3, finding that the Employer threatened Unit employees with a loss of benefits if they voted in favor of the Petitioner because the Employer would have to strictly enforce its policies.

C. Objection 4: Employer's Prohibition of Unit Employees Campaigning for Petitioner during Work Time in Work Areas

1. Record Evidence

I credit the unrefuted testimony of multiple employee witnesses that Unit employees were permitted to discuss a variety of subjects unconnected with their work tasks with their coworkers during their shifts, such as talking with each other about their families and things they did during their time off.

Mr. Wilton testified that he told Unit employees in at least all of the approximately twelve meetings that he conducted that Unit employees were not allowed to "campaign" for the Petitioner "on work time or in work areas." Mr. Perkins testified he provided employees a similar instruction during the approximate ten meetings he conducted. At hearing, Mr. Wilton explained that "work time" meant when there is an expectation that Unit employees are completing work duties and that "work areas" meant areas where there was an expectation that Unit employees complete their work duties. Examples of "work areas" witnesses provided in the record include the Employer's facility, ambulances, and the garage at the facility. Mr. Wilton testified that the break room at the facility is not a "work area." Notably, however, Mr. Wilton and Mr. Perkins admitted that they did not provide any clarification or specifics to Unit employees to explain what the Employer meant by "campaigning," "work time," and "work areas."

2. Board Law

It is well settled that an employer may prohibit discussions regarding union matters "during periods when the employees are supposed to be actively working," if the employees are also prohibited from discussing other subjects "not associated or connected with the employees'

work tasks.” *Scripps Memorial Hospital Encinitas*, 347 NLRB 52, 52 (2006). However, if employees are permitted to discuss other matters unrelated to work during worktime, an employer violates Section 8(a)(1) by prohibiting similar conversation regarding union-related issues. *Id.*; see also *Sysco Grand Rapids, LLC*, supra, slip op. at 26 (citing *G4 Secure Solutions, Inc.*, 364 NLRB No 92, slip op. at 2–3 (2016) (citing *Jensen Enterprises Inc.*, supra at 878)). The governing principle is that a rule is presumptively invalid if it prohibits solicitation on the employees' own time. *Our Way, Inc.*, 268 NLRB 394, 394 (1983) (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)).

3. Recommendation

Employee witnesses testified, absent any contrary evidence, that Unit employees are permitted to discuss a variety of subjects with each other during their shifts. Mr. Wilton admitted that he instructed Unit employees in at least all of the dozen meetings he conducted with Unit employees between April 11, 2019, and the beginning of the election on April 26, 2019, that Unit employees were prohibited from “campaigning” on behalf of the Petitioner on “work time” in “work areas.” Mr. Perkins testified he provided employees a similar instruction during the approximate ten meetings he conducted. Mr. Wilton and Mr. Perkins admittedly did not provide any clarification to Unit employees about what they meant by “campaigning,” “work time,” or “work areas,” which ambiguously may have confused employees into believing that they cannot engage in discussions about the Petitioner at any time during their shifts, violating Unit employees’ Section 7 rights. *Our Way, Inc.*, supra. Based on the foregoing and the record as a whole, I recommend sustaining Objection 4, finding that the Employer prohibited its Unit employees from campaigning on behalf of Petitioner during work time in work areas while permitting employees to freely discuss other subjects. See, *EYM King of Michigan*, 366 NLRB No. 156 (2018).

D. Objection 5: Impression of Surveillance of Union Activity

1. Record Evidence

As indicated above at Objection 4, Mr. Wilton and Mr. Perkins testified that they instructed Unit employees during meetings that they conducted that employees were prohibited from campaigning on work time and in work areas. Mr. Perkins further testified that the Employer’s labor consultants instructed the Employer’s supervisors that if they observed Unit employees campaigning for the Petitioner on work time during work hours, they were supposed to instruct Unit employees that they were not allowed to do so. Similarly, Mr. Flores testified that he was instructed that if he observed Unit employees engaging in such campaigning, to politely ask them to “go available,” meaning to go in-service and be available to run 911 calls. However, according to Mr. Perkins, the Employer’s supervisors “weren't supposed to look” for Unit employees engaging in such campaigning for the Petitioner.

I credit employee Amber Ratto’s (Ms. Ratto) testimony that Mr. Wilkins told Unit employees present during a meeting Ms. Ratto attended that if the supervisors observed Unit employees engaging in activity on behalf of the Petitioner, the supervisors would tell the employees to “stop,” and Ms. Ratto stopped engaging in such activity after this meeting because

she thought she might get in trouble if she did so. Ms. Ratto admitted, however, that no supervisor told her that she would get in trouble if she engaged in activity on behalf of the Petitioner at work.

The record reflects generally that the Employer has surveillance cameras at its facility and in its vehicles. However, there is no record evidence to show that the Employer was using its surveillance cameras to find out if its Unit employees were engaging in campaigning or any other activity on behalf of the Petitioner.

2. Board Law

The Board's test for determining whether an employer unlawfully creates an impression of surveillance is whether under the circumstances, an employee reasonably could conclude from the statement in question that his protected activities are being monitored. *Mountaineer Steel, Inc.*, 326 NLRB 787 (1998), enfd. 8 Fed. Appx. 180 (4th Cir. 2001). The Board has held that it is not a violation of the Act for an employer to merely observe open union activity, so long as its representatives do not engage in behavior that is "out of the ordinary." *Durham School Services*, 361 NLRB 393, 410 (citing *Partylite Worldwide, Inc.*, 344 NLRB 1342 (2005), and *Arrow Automotive Industries*, 258 NLRB 860 (1981), enfd. 679 F.2d 875 (4th Cir. 1982)). The standard is an objective one, based on the rationale that "employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Flexsteel Industries*, 311 NLRB 257 (1993). The gravamen of such violation is that employees are led to believe that the employer has placed union activities under its watch. *Consol. Commc'ns Holdings, Inc.*, 366 NLRB No. 172 (2018), citing *Bridgestone Firestone South Carolina*, 350 NLRB 526, 527 (2007).

3. Recommendation

The record evidence is insufficient to establish that the Employer would engage in any conduct "out of the ordinary" to find out if its employees were engaging in campaigning or any other activity on behalf of the Petitioner. Compare *Durham School Services*, supra (finding that a supervisor, who was writing on a clipboard as she observed employees standing in front of a union table, engaged in conduct that was out of the ordinary and thereby created the impression of surveillance). Rather, the record reflects that the supervisors warned the Unit employees that if the supervisors happened to observe the employees engaging in campaigning during work time and in work areas, the supervisors would tell the employees to stop and go to work. This evidence is insufficient to establish that the Employer maintained an impression of surveillance of Unit employees' Section 7 activity. Based on the foregoing and the record as a whole, I recommend overruling the Petitioner's Objection 5 alleging that the Employer engaged in objectionable conduct by maintaining an impression of surveillance of its employees' activities on behalf of the Petitioner.

E. Objection 6: Employer Solicitation of Grievances from Unit Employees

1. Record Evidence

Based on uncontroverted testimony from multiple employee witnesses, two high level managers from AMR, Regional Director Donna Miller (Ms. Miller) and President of the South Region Steve Dralle (Mr. Dralle), attended at least one of the Employer's meetings with Unit employees between April 11 through 26. Ms. Miller and Mr. Dralle did not work at the facility with Unit employees. Neither Ms. Miller nor Mr. Dralle testified at the hearing.

These employee witnesses testified that both Ms. Miller and Mr. Dralle spoke during the meetings they attended. According to employee testimony, Ms. Miller said that it was regrettable that she didn't have an opportunity to work with the Unit employees and that Ms. Miller would like to work with the Unit employees to help them resolve their issues without a third party in between. Ms. Miller provided the Unit employees her personal cell phone number and told employees to call her any time with their concerns. Ms. Miller told the Unit employees that if they had questions or concerns, Ms. Miller wanted Unit employees to have a way to contact her, on her personal cell phone.

One employee testified that Mr. Dralle stated during the meeting that Mr. Dralle started in his position at AMR around January 2019. Mr. Dralle told Unit employees that he realized that the Unit employees were unhappy and all had some concerns, including about Unit employees' high turnover rate. According to that employee, Mr. Dralle also stated that he would like to do his best to address Unit employees' concerns and change these things, but it would take some time to do so.

One employee testified that at an unspecified period of time, the previous Regional Director Tony Greenway had also provided Unit employees access to his phone number. However, there is no record evidence to show that the Employer had a previous practice of soliciting employee concerns the way Ms. Miller and Mr. Dralle did during at least one meeting with Unit employees between April 11 through 26.

2. Board Law

Where, as here, an employer, who has not previously had a practice of soliciting employee grievances or complaints, adopts such a course when unions engage in organizational campaigns seeking to represent employees, the Board has held there is a compelling inference that the employer is implicitly promising to correct those inequities it discovers as a result of its inquiries and likewise urging on its employees that the combined program of inquiry and correction will make union representation unnecessary. *Reliance Elec. Co.*, 191 NLRB 44, 46 (1971), enfd. 457 F.2d 503 (6th Cir 1972); *Hospitality Services*, 330 NLRB 317 (1999); *Evergreen Am. Corp.*, 348 NLRB 178, 215 (2006), enfd. 531 F.3d 321 (4th Cir. 2008).

The essence of a solicitation of grievance violation is not the solicitation itself, but the inference that the employer will redress problems. *Id.* (citing *Doane Pet Care*, 342 NLRB 1116 (2004); *Maple Grace Health Center*, 330 NLRB 775 (2000); *NLRB v. V & S Shuler*

Engineering, 309 F.3d 362, 270-271 (6th Cir. 2002)). Further the fact that an “employer's representative does not make a commitment and specifically take corrective action does not abrogate the anticipation of improved conditions expectable for the employees involved. The inference that an employer is going to remedy the same when it solicits grievances in a pre-election setting is a rebuttable one.” *Id.* (citing *Majestic Star Casino*, 335 NLRB 407 (2001); *Laboratory Corp. of America*, 333 NLRB 284 (2001); *Capitol EMI Music*, 311 NLRB 997, 1007 (1993), *enfd.* 23 F.3d 399 (4th Cir. 1994)).

In the Board's recent *Sysco Grand Rapids, LLC* case, during a captive audience meeting, a high level manager told its employees that the Company was communicating employees' concerns to Company management where there was an understanding of the issues causing the employees' discomfort and happiness. *Sysco Grand Rapids, LLC*, *supra*. The Board found that such statements during an organizing campaign were unlawful because the employer's solicitation of grievances “raises an inference that the employer is promising to remedy the grievances,” an inference that is especially compelling when the employer makes such statements during a campaign after not having a history of soliciting employee grievances. *Id.* (citing *Garda CL Great Lakes, Inc.*, 359 NLRB 1334 (2013) (citing *Amptech, Inc.*, 342 NLRB 1131, 1137 (2004))). In *Sysco Grand Rapids, LLC*, as here, there was no evidence that the employer addressed employee concerns to such an extent in the past. Additionally, as here, the high level manager there also referenced “a third party” getting involved. *Id.* The Board found that under those circumstances, the high level manager's promise to remedy employees' grievances with a responsive grant of benefits was unlawful under Section 8(a)(1).

Other Board decisions finding unlawful solicitation of grievances include the following: *Federated Logistics at Operations*, 340 NLRB 255, 268-269 (2003) (give the company a second chance, and “you wouldn't need a third party in order to take care of your needs.”); *Doane Pet Care*, *supra* at 1122 (issues raised by employees would be looked into); *Alamo Rent-A-Car*, 336 NLRB 1155, 1175 (2001) (supervisor wrote down benefits suggested by employees); *Majestic Star Casino*, *supra* at 408 (employer would look into employees concerns); *Wake Electric Membership Corp.*, 338 NLRB 298, 306 (2002) (employees should give the company another chance); *Naomi Knitting Plant*, 328 NLRB 1279, 1280-1281 (1990) (employer will get back to employee with answer); *6 West Limited*, *supra* (promise to look into matter); *Coronet Foods*, 305 NLRB 79, 85 (1991) (supervisor wrote down employees suggestions, and said he would submit them to higher-level supervisor); *Reliance Electric*, *supra* (employer will look into or review requests); *Carbonneau Industries*, *supra* (employer would see what he could do); *NLRB v. V & S Schuler Engineering*, *supra* at 370-371 (employer asked “employees for time to deal with these problems and that they could have another vote on the union in the future if they wanted.”).

3. Recommendation

Based on uncontroverted employee testimony summarized above, both Ms. Miller and Mr. Dralle, high level corporate managers who did not work with Unit employees at the facility, solicited Unit employees' concerns during at least one meeting with Unit employees between April 11 through 26. There is no record evidence to show that the Employer addressed Unit

employees' concerns to such an extent in the past. Additionally, Ms. Miller also referenced her preference to work directly with the Unit employees to help them resolve their issues without a "third party" in between. Based on the foregoing and the record as a whole, I recommend sustaining Objection 6, finding that the Employer solicited employee grievances.

F. Objections 7 and 8: Employer Interrogation about Activities on behalf of Petitioner and Holding a Mandatory Meeting with Employees within 24 hours of the Election

1. Record Evidence

Mr. Wilton testified that in the afternoon on April 25 – the day before the election – he told a group of Unit employee VSTs, in their working area, that the Employer could not speak to a group or hold a meeting with employees within 24 hours of the election. Mr. Wilton estimated that approximately four to five VSTs were present at that time he made that statement. Then, Mr. Wilton asked two unidentified VSTs to step aside to have a one-on-one conversation with each VST individually. Mr. Wilton selected these two VSTs because he did not know them and did not recall seeing them in the Employer's meetings about the election. Mr. Wilton told each VST that the voting started the next day and asked each VST if he or she had any questions regarding anything pertaining to the election. Each VST responded that he or she did not have any questions.

Mr. Wilton testified that he had other one-on-one conversations with approximately a dozen Unit employee paramedics and EMTs about the election within 24 hours of the election, on April 25. Mr. Wilton said that the conversations were essentially the same, with Mr. Wilton asking each Unit employee individually if he or she had any questions and whether there was anything Mr. Wilton could clarify for the employee. These individual conversations occurred as Mr. Wilton was passing through the employees' working areas at the Employer's facility. There is no record evidence to indicate that any of Mr. Wilton's one-on-one meetings with each Unit employee occurred in any supervisor's office or in the polling area.

There is no testimony from any Unit employees or any other record evidence about any interrogation by the Employer or about attending any meetings with a group of employees within 24 hours of the election as alleged in Objections 7 and 8.

2. Board Law

In determining the lawfulness of an interrogation the Board evaluates whether, under the totality of the circumstances, it reasonably tended to restrain, coerce, or interfere with the employees' exercise of their protected rights under the Act. *Bristol Indus. Corp.*, 366 NLRB No. 101, slip op. at 2 (2018) (citing *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985)). This inquiry involves a case-by-case analysis of various factors, including (1) the background, i.e., whether the employer has a history of hostility toward or discrimination against union activity, (2) the nature of the information sought, (3) the identity of the interrogator, (4) the place and method of the interrogation; and (5) the truthfulness of the interrogated employee's reply. See *Bourne v. NLRB*,

332 F.2d 47, 48 (2d Cir. 1964). The Board also considers whether or not the interrogated employee is an open and active union supporter. See, e.g., *Southern Bakeries, LLC*, 364 NLRB No. 64, slip op. at 7 (2016), enfd. in relevant part 871 F.3d 811 (8th Cir. 2017). These factors “are not to be mechanically applied”; they represent “some areas of inquiry” for consideration in evaluating an interrogation's legality. *Rossmore House*, 269 NLRB at 1178 fn. 20.

Employers are “prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election.” *Peerless Plywood Co.*, 107 NLRB 427, 429 (1953). However, the Board has held that supervisors or even high-ranking employer officials may speak to employees one-on-one on the day of the election and exhort them to vote against a union, so long as those conversations are not threatening or coercive, and take place away from the polling area and away from the locus of final authority, such as a manager's office. *2 Sisters Food Group*, 357 NLRB 1816 (2011), incorporated by reference in 361 NLRB 1380 (2014).

3. Recommendation

The record evidence is insufficient to establish that the Employer interrogated any Unit employees or held any prohibited group meetings with Unit employees within 24 hours of the election as alleged in Objections 7 and 8.

With respect to the alleged interrogation in Objection 7, Mr. Wilton testified that he met individually with approximately fourteen employees on the day before the election and asked each employee if the employee had any questions or if there was anything Mr. Wilton could clarify for the employee about the election. There is no record evidence showing that Mr. Wilton asking each employee if the employee had any questions or needed any clarification about the election reasonably tended to restrain, coerce, or interfere with the employees' exercise of their protected rights under the Act. Applying the *Bourne* factors, although it was clear based on the Employer's meetings with its Unit employees that the Employer was encouraging its Unit employees to vote against representation by the Petitioner, the record reflects that on April 25 - the day before the election - as Mr. Wilton was passing by each employee's work areas at the facility, Mr. Wilton simply asked each employee if he or she had questions or needed clarification about the election. There is no record evidence to support that any of these meetings occurred in any supervisor's office or in the polling area.

Unlike *Bristol Indus. Corp.*, cited by the Petitioner, in which the sole owner and highest ranking company official asked an employee if he had signed a union authorization card, there is no record evidence that Mr. Wilton asked any employee whether he or she supported the Petitioner. 366 NLRB No. 101, slip op. at 2. Further, *Bristol Indus. Corp.* is distinguishable because the employee in that case provided the owner an untruthful response, whereas there is no record evidence to support that any employee provided untruthful responses to Mr. Wilton. *Id.* Based on the foregoing and the record as a whole, I recommend overruling Petitioner's Objection 7 alleging that the Employer engaged in objectionable conduct by interrogating employees about their activities on behalf of the Petitioner in the workplace.

As for the alleged mandatory meetings with a group of employees within 24 hours of the election as alleged in Objection 8, there is no record evidence to support that the Employer held any group meetings with Unit employees within 24 hours of the election. Rather, the record reflects that Mr. Wilton has individual conversations with approximately fourteen employees in the employees' work areas at the facility on the day before the election. During these conversations, Mr. Wilton simply asked each employee if he or she had questions or needed clarification about the election. There is no record evidence to show that any conversation was threatening or coercive, or that any conversation occurred in the polling area or any supervisor's office. Based on the foregoing and the record as a whole, I recommend overruling the Petitioner's Objection 8 alleging that the Employer held a mandatory meeting with a group of employees within 24 hours of the election.

G. Objection 9: Employer Swapping its Observers during the First Polling Session on April 26, 2019, contrary to Board Agent Instructions

1. Record Evidence

The Agreement signed by the Petitioner and the Employer and approved by the Region on April 16 contains the following language:

11. OBSERVERS. Each party may station an equal number of authorized, nonsupervisory-employee observers at the polling places to assist in the election, to challenge the eligibility of voters, and to verify the tally.

Additionally, before the election, on April 19, the Board agent assigned to process the petition (Board agent 1) emailed counsel for the Petitioner and the Employer to obtain each party's position on having "one observer each for each of the voting sessions." The Petitioner's counsel replied to Board agent 1 by email the same date, without including the Employer counsel, asking if the Petitioner could "switch off observers during the election period." On the same date, Board agent 1 replied by email to the Petitioner's counsel, without including the Employer counsel, stating that the Petitioner "can switch off observers for each session (i.e. a different observer in the morning from the afternoon or different observers on different days), but the Region would not entertain a request to have multiple observers relieving each other during the same polling session."

On the day before the election, at 9:00 a.m. on April 25, the Board agent assigned to conduct the election (Board agent 2) conducted a pre-election conference (PEC) with the parties and their observers. The record does not reveal whether Board agent 1 or if any other Board agents were present at the PEC. No Board agent testified at the hearing. The Petitioner's Area Organizing Director Mark Cavanah (Cavanah) testified that he and all four of the Petitioner observers attended the PEC. Cavanah testified that the Employer's representative Eric Kerkoff (Kerkoff) and both Employer observers attended the PEC. Kerkoff and the Employer observers were not called to testify at the hearing.

According to Cavanah, at the PEC, Kerkoff raised the issue of the Employer swapping out its observers for both morning polling sessions of the election. Cavanah testified that he told

Kerkoff that he asked the Region about swapping out its observers during both morning polling sessions and was told no, the number of observers for each polling session was going to stay at one per party. According to Cavanah, Board agent 2 told the parties that he would ask the Region again whether the parties could swap observers during the morning polling session but the Region would probably still say each party was limited to one observer for each polling session.

On April 25, after the PEC, Board agent 2 sent an email to the Petitioner counsel and Employer counsel summarizing that the Employer's representative asked the Board agent during the pre-election conference whether the Employer "might exchange observers each hour during the polling session." Board agent 2 indicated that "the Region had addressed this issue already and that the parties would not be permitted to do so." Board agent 2 referred to Section 11310 of the NLRB Casehandling Manual, Part 2, Representation Proceedings (the Manual), which states, "Each party may be represented at the polling place by an *equal*, predesignated number of observers." (emphasis in original), as reiterated in the parties' Agreement, as quoted above. Board agent 2 continued, "the number of observers per party per session is one."

In Board agent 2's April 25 email to Employer counsel and the Petitioner counsel, Board agent 2 further stated that he is unaware of any agreement between the parties to provide more than one observer per session as discussed in Section 11310 of the Manual, which states that "[w]here each party is represented by more than one observer," "[i]f observers are to work in shifts, or to relieve each other, all such arrangements must be made and policed by the head observers."

Cavanah testified that he was present prior to the opening of the morning polling session on April 26, along with two unidentified Board agents, Kerkoff, the Petitioner observer, and the Employer observer. According to Cavanah, as Cavanah was leaving the polling site, Cavanah was told that the Employer was going to swap its observers for the first polling session. Cavanah said that he thought the parties were told they were not permitted to swap out their observers during any polling session. According to Cavanah, an unidentified Board agent replied that the parties would talk about it later.

The Petitioner observer for the morning polling session on April 26 testified that he was present during the entire morning polling session, from 4:00 a.m. until 12:00 p.m., along with two unidentified Board agents. According to the Petitioner observer, the Employer's first observer present for the first two hours of the morning polling session was Brad Lundy (Lundy). The Petitioner observer testified that after the first two hours of the morning polling session, at around 6:00 a.m., Joe Rytell (Rytell) came in to replace Lundy as the Employer's observer. According to the Petitioner observer, Rytell was present for the remainder of the first polling session, from approximately 6:00 a.m. until 12:00 p.m. on April 26.

The Petitioner observer could not recall if any voters were present in the polling area at the approximate fifteen to thirty second period of time that Lundy and Rytell switched as the Employer observer. According to the Petitioner's observer, Lundy returned to the polling area during the last two hours of the polling session, at around 10:00 a.m., to advise Rytell that Lundy would not be replacing Rytell as the Employer observer. The record does not reveal whether any

voters were present in the polling area when Lundy returned to the polling site at around 10:00 a.m., nor does it indicate how long Lundy was present in the polling area to advise Rytell that he was not going to replace him.

Cavanah testified when he returned to the polling site after the first polling session closed at 12:00 p.m. on April 26, he found out from the Petitioner observer that the Employer observers had swapped out during the first polling session. Cavanah did not discuss this observer issue with any Board agent after the end of the first polling session on April 26.

Cavanah testified that the Employer swapping out its observer during the morning session on April 26, disadvantaged the Petitioner because Lundy could inform the Employer and other Unit employees who had already voted and get Unit employees who had not voted to vote. Cavanah also testified that allowing the Employer to swap out its observer during the first polling session showed favoritism toward the Employer because the Region instructed the parties before the election that they would not be permitted to do so and the Petitioner followed that instruction.

Cavanah testified that he was unaware of any other similar swap out of observers during any other polling session of the election.

2. Board Law

The Board has held that in a binding stipulated election agreement, the provision for observers is a material term, and that the use of observers by the parties is a right. *Breman Steel Co.*, 115 NLRB 247, 249-250 (1956). Equality in the number of election observers for each party is material to the election process. An election could be set aside if that equality is not preserved. *Summa Corp. v. N.L.R.B.*, 625 F.2d 293 (9th Cir. 1980). The rule followed by the Board appears to be that a mere imbalance in observers is a breach of the stipulation which must be examined in context with the circumstances in each case to determine if the breach was prejudicial or material enough to require the setting aside of the election. *Sonicraft, Inc.*, 276 NLRB 407, 411 (1985).

3. Recommendation

Here, the email from Board agent 2 to the Employer counsel and the Petitioner counsel on April 25, the day before the election, after the 9:00 a.m. PEC, clearly states the Region's instruction to Employer counsel and the Petitioner counsel that each party is entitled to have one observer during each polling session of the election. Kerkoff, the Employer's representative present before the first polling session opened at 4:00 a.m. on April 26, apparently ignored this instruction from the Region and decided that the Employer was going to have its observers switch at approximately 6:00 a.m., after the first two hours of the morning polling session.

Examining in context the circumstances of the Employer's decision to swap its observer during the morning polling session on April 26, the only record evidence is the testimony of Cavanah and the Petitioner observer for that morning polling session at issue. Based on Cavanah's testimony, the Petitioner became aware of the Employer's decision to swap out its

observer shortly before the morning polling session opened at 4:00 a.m. on April 26, as Cavanah was leaving the polling site. The record does not specify the exact time that Cavanah became aware of Employer's decision to swap its observers during the morning polling session. However, the fact that the first polling session opened at 4:00 a.m. would not make it easy for Petitioner to plan for a swap of its observer shortly before the polls opened at 4:00 a.m.

The only record evidence regarding the swap of the Employer's observers during the morning polling session itself is the testimony of the Petitioner observer for that session. Notably, the Petitioner observer could not recall if any voters were present in the polling area at the approximate 15 to 30 second period of time that Lundy and Rytell switched as the Employer observer. The record does not reveal whether any voters were present in the polling area when Lundy returned to the polling site at around 10:00 a.m. to advise Rytell that he would not be replacing him as the Employer observer for the remainder of the morning polling session.

Based on Cavanah's testimony, when he returned to the polling site after the first polling session closed at 12:00 p.m., he learned from the Petitioner observer that Lundy had swapped with Rytell during the first polling session. Cavanah admitted he did not discuss this issue involving the swapping of the Employer observer with any Board agent after the end of the first polling session on April 26.

The circumstances of this objection do not appear to be prejudicial or material enough to require the setting aside of the election. There is no record evidence to indicate that any voter observed two Employer observers present while the polls were open during the morning polling session on April 26. Further, Cavanah admits that he did not even raise the issue about the Employer observer swapping with any Board agent after the morning polling session concluded on April 26. There is no record evidence of any other observer swapping during any other polling session of the election. Based on the foregoing and the record as a whole, I recommend overruling the Petitioner's Objection 9 alleging that the Employer materially breached the Agreement and created the impression of partiality by the Board agent in favor of the Employer.

H. Objection 10: Employer Failing to Provide a Complete and Accurate Voter List

1. Record Evidence

On April 19, Employer counsel emailed Cavanah and the Petitioner counsel the Non-Professional Unit voter list. At the hearing, Cavanah testified that when Petitioner got the voter lists, it sent the employees on the voter lists materials, using the contact information from the voter lists.

On April 20, Petitioner counsel emailed Employer counsel, copying Board agent 1, a list of six "paramedics and EMTs" that Petitioner believed "were incorrectly omitted" from the Nonprofessional Unit voter list. The Petitioner's counsel requested "information for the foregoing individuals" and for the Employer to "review the list and ensure that everyone who should be on it is included and contact information is provided right away." According to Cavanah, the Employer never provided any contact information for these six employees.

Cavanah was the only witness who testified about what was discussed at the 9:00 a.m. PEC on April 25, pertaining to the Nonprofessional Unit voter list. According to Cavanah, there was discussion at the PEC about resolving the six employees the Petitioner identified in its April 20 email that were omitted from the Nonprofessional Unit voter list. According to Cavanah, Kerkoff told him that he would supply information to the Petitioner regarding the six employees, but Kerkoff never did so. Cavanah testified that during the PEC, Board agent 2 tried to assist the parties to resolve the issue involving the six employees the Petitioner asserted should be added to the Nonprofessional Unit voter list. According to Cavanah, because the Employer never provided the Petitioner with “the information” pertaining to these six employees, “it was never resolved.”

On April 25, after the 9:00 a.m. PEC, Board agent 2 sent an email to Employer counsel and to Petitioner counsel regarding the Nonprofessional Unit voter list. According to Board agent 2’s email, “[t]his morning” (presumably referring to the PEC), the parties agreed that four employees should be added to the Nonprofessional Unit voter list, identifying those four employees by name. Board agent 2 continues, “With that, these employees should be added to the voter list.” None of the four employees’ names, apparently agreed upon by the parties during the PEC, were added to the Nonprofessional Unit voter list used during the election.

Board agent 2 additionally identified two employees that the Petitioner claimed, but the Employer did not agree, should be added to the Nonprofessional Unit voter list. These two employees’ names were not added to the Nonprofessional Unit voter list used during the election.

Then, Board agent 2 identified one employee, one of its observers for the first polling session on April 26, Lundy, that the Employer asserted was omitted from the Nonprofessional Unit voter list in error. Lundy’s name is not included in the Nonprofessional Unit voter list used during the election.

To resolve these issues involving the three employees in dispute, Board agent 2 requested that the Employer provide the Petitioner with documents “demonstrating the hours worked” for these three employees. There is no record evidence indicating that the Employer provided the Petitioner with these requested documents.

Finally, Board agent 2 identified three individuals by name that the Employer asserted no longer were employed by the Employer and therefore should be removed from the Nonprofessional Unit voter list. Two of the three employees’ names appear on the Nonprofessional Unit voter list used during the election. Board agent 2 requested that the Employer provide the Petitioner with records demonstrating these individuals’ terminations. There is no record evidence indicating that the Employer provided the Petitioner with these requested documents.

The Nonprofessional Unit Tally shows that there were approximately 352 eligible voters. Board agent 2’s April 25 email summarizing the names omitted from the Nonprofessional Unit voter list shows that there were a total of seven names omitted from the Nonprofessional Unit voter list, including four that the parties apparently agreed that should be added to the list, two

the Petitioner asserted but the Employer disputed should be added to the list, and one (Lundy) that the Employer asserted but the Petitioner did not have sufficient information to determine whether Lundy should be included or excluded from the Nonprofessional Unit voter list. Seven eligible voters omitted out of a total of 352 eligible voters yields an omission of approximately two percent.

According to the Nonprofessional Unit Tally, the Petitioner lost the election by 24 votes and there were 8 challenged ballots. The challenged ballots were not sufficient in number to affect the results of the election.

Cavanah testified that he already had the contact information for one individual the parties apparently agreed should be included on the Nonprofessional Unit voter list because she was part of Petitioner's organizing committee. According to Cavanah, the Employer never provided the Petitioner with any of the contact information for the four individuals the parties agreed should be included on the Nonprofessional Unit voter list, the two individuals the Petitioner claimed should be added to the Nonprofessional Unit voter list, Lundy, or the three individuals the Employer claimed should be removed from the Nonprofessional Unit voter list because they were no longer employed by the Employer.

2. Board Law

Employers are required to provide complete and accurate information as required by *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966). Pursuant to Section 102.62(d) the Board Rules and Regulations, an employer must provide a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular telephone numbers) of all eligible voters. Moreover, an employer's failure to provide the list in proper format shall be grounds for setting aside the election upon timely objection. *Advanced Masonry Assoc.*, 366 NLRB No. 57 (2018).

The *Excelsior* rule is not intended to test employer good faith or "level the playing field" between petitioners and employers, but to achieve important statutory goals by ensuring that all employees may be fully informed about the arguments concerning representation and can freely and fully exercise their Section 7 rights. *Mod Interiors, Inc.*, 324 NLRB 164 (1997) (citing *North Macon Health Care Facility*, 315 NLRB 359, 360-361 (1994)). Accordingly, the Board requires that the information in the *Excelsior* list be not only timely but complete and accurate so that the union may have access to all eligible voters.

In deciding whether an employer's noncompliance with the *Excelsior* rule warrants setting aside the election, the Board has repeatedly stated that the *Excelsior* rule is not to be "mechanically applied." *Telonic Instruments*, 173 NLRB 588, 589 (1968) (citations omitted). The Board, however, has also recognized that the potential harm from omissions is sufficiently great to warrant an approach that encourages a conscientious effort by employers to comply with the *Excelsior* requirements. *Thrifty Auto Parts*, 295 NLRB 1118 (1989). Accordingly, the Board has looked to whether or not, under the circumstances of a particular case, the employer has "substantially complied" with the *Excelsior* requirements. *Gamble Robinson Co.*, 180 NLRB 532 (1970); *Sonfarrel, Inc.*, 188 NLRB 969 (1971).

The Board has consistently viewed the omission of names from the eligibility list as a serious matter because a party that is unaware of an employee's name suffers an obvious and pronounced disadvantage in communicating with that person by any means. *Women in Crisis Counseling*, 312 NLRB 589 (1993); see also *Thrifty Auto Parts*, supra. Thus, the omission of names from the eligibility list clearly frustrates the policies underlying the *Excelsior* rule since the union may be denied the opportunity prior to the election to inform these voters of its position on the issues raised before the election. The Board has also long recognized that the closeness of the vote is a significant factor in *Excelsior* cases. *Ben Pearson Plant*, 206 NLRB 532, 533 (1973); *Mod Interiors*, 324 NLRB at 164.

The Board considers several factors when analyzing Employer omissions from the voter list, including the percentage of omissions, whether the number of omissions is determinative, i.e., whether it equals or exceeds the number of additional votes needed by the union to prevail in the election, and the employer's explanation for the omissions. *In Re Woodman's Food Markets, Inc.*, 332 NLRB 503, 504 (2000). With respect to whether the omissions involve a determinative number of voters, the Board's *Excelsior* policy was designed to enhance the availability of information and arguments both for and against union representation to employees so that they might render a more informed judgment at the ballot box. *Id.* Thus, the proper focus in determining whether an employer has complied with the requirements of the *Excelsior* rule should be on "the degree of prejudice to these channels of communication, and not the degree of employer fault." *Id.*, (citing *Avon Products*, 262 NLRB 46, 48 (1982)).

3. Recommendation

Analyzing the relevant factors for the Employer omissions from the Nonprofessional Unit voter list, the percentage of omissions was relatively small, approximately two percent of the eligible voters according to the Nonprofessional Unit Tally, and, standing alone, might not warrant setting aside the election. The number of omissions from the Nonprofessional Unit voter list here, seven, is not determinative, as it does not equal or exceed the number of additional votes needed by the Petitioner to prevail in the election, 24.

With respect to the Employer's explanation for the omissions, at hearing, the Employer did not present any justification for its omission of the four names that apparently the parties agreed should have been included on the Nonprofessional Unit voter list or the omission of Lundy which the Employer apparently admitted it omitted in error from the Nonprofessional Unit voter list. I find that the Employer's omissions of these five names from the Nonprofessional Unit voter list shows bad faith by the Employer. Additionally, the Employer did not provide any justification at hearing for its omission of the two individuals which it apparently disputed should be included on the Nonprofessional Unit voter list. I find the Employer's omissions of these two disputed individuals shows a lack of diligence and due care by the Employer, as there is no record evidence that reflects that the Employer ever provided the Petitioner with any documentation to support its position that these two individuals should not be included on the Nonprofessional Unit voter list.

Further, the Petitioner may have suffered substantial prejudice by its inability to communicate with six of these seven employees. Cavanah testified that the Petitioner was never provided any contact information for these seven employees, nor was the Petitioner provided any documents with respect to the three employees omitted from the Nonprofessional Unit voter list which the parties apparently disputed. The record reflects that on Saturday, April 20, the day after the Employer provided the Petitioner the Nonprofessional Unit voter list, the Petitioner notified the Employer that six employees were omitted from the Nonprofessional Unit voter list and identified all six employees by name. The Employer had five calendar days until the parties' PEC at 9:00 a.m. on April 25, and six calendar days until the first day of the election on April 26, to provide the Petitioner the contact information for these six employees and Lundy, and the record reflects that it failed to do so. I find the Employer's failure to provide a timely, complete, and accurate Nonprofessional Unit voter list so the Petitioner may have access to all Nonprofessional Unit eligible voters before the election was objectionable. Based on the foregoing and the record as a whole, I recommend sustaining the Petitioner's Objection 10.

I. Objection 11: By Conduct Alleged in Objections 1-10, the Employer Destroyed Laboratory Conditions Required for Free and Fair Election

1. Record Evidence

The Petitioner did not provide separate evidence in support of Objection 11. Rather, the Objection itself reflects Petitioner's position that the evidence the Petitioner provided in support of its Objections 1 through 10 show that the Employer's general conduct created an atmosphere making a free choice by its Unit employees impossible, regardless of whether or not such conduct constituted unfair labor practices. See *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995) (setting aside election where "three instances of objectionable conduct could well have affected the outcome of the election.") The Petitioner asserts that by the Employer's conduct in Objections 1 through 10, it destroyed the "laboratory conditions" the Board requires for a free and fair election and violated, interfered with, and restrained employees in the exercise of Section 7 rights.

2. Board Law

In determining whether to set aside an election, the test is whether the conduct of a party has "the tendency to interfere with employees' freedom of choice." *Cambridge Tool Pearson Education, Inc.*, 316 NLRB 716 (1995). Thus, under the Board's test, the issue is not whether a party's conduct in fact coerced employees, but whether the party's misconduct reasonably tended to interfere with the employees' free and uncoerced choice in the election. *Baja's Place*, 268 NLRB 868 (1984). See also *Pearson Education, Inc.*, 336 NLRB 979, 983 (2001) (citing *Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970)), *enfd.* 373 F.3d 127 (D.C. Cir. 2004).

In determining whether a party's conduct has the tendency to interfere with employee free choice, the Board considers a number of factors: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among employees in the voting unit; (3) the number of employees in the voting unit who were subjected to the

misconduct; (4) the proximity of the misconduct to the date of the election; (5) the degree to which the misconduct persists in the minds of employees in the voting unit; (6) the extent of dissemination of the misconduct to employees who were not subjected to the misconduct but who are in the voting unit; (7) the effect (if any) of any misconduct by the non-objecting party to cancel out the effects of the misconduct alleged in the objection; (8) the closeness of the vote; and (9) the degree to which the misconduct can be attributed to the party against whom objections are filed. *Taylor Wharton Division*, 336 NLRB 157, 158 (2001), citing *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

3. Recommendation

Summarizing my recommendations above, I recommend sustaining the Petitioner's Objections 1-4, 6, and 10. Objections 1-4 and 6 all occurred during meetings the Employer held with Unit employees from April 1, until an unspecified period prior to the first day of the election on April 26. These meetings occurred multiple times per day and Unit employees were paid to attend these meetings, disseminating this alleged objectionable conduct to all of the approximately three to forty Unit employees who attended these meetings. The alleged conduct involved Unit employees' wages, hours, and other terms and conditions of employment and exercise of Section 7 rights, including threatening Unit employees' regular annual wage increases; threatening Unit employees' flexibility in their scheduling and attendance and stricter adherence to Employer policies; maintaining an overbroad and ambiguous instruction to Unit employees that they were prohibited from campaigning on behalf of the Petitioner on work time and in work areas; and soliciting grievances from Unit employees when it had no previous practice of doing so.

With respect to Objection 10 involving the Employer's failure to provide the Petitioner with a timely, complete, and accurate Nonprofessional Unit voter list prior to the election, the record does not reflect the dissemination of this objectionable conduct to the Unit employees. However, the Employer's failure to provide the contact information for seven employees from the Nonprofessional Unit voter list significantly frustrates achieving the important statutory goal of ensuring that all employees may be fully informed about the arguments concerning representation and can freely and fully exercise their Section 7 rights. *Mod Interiors, Inc.*, supra (citing *North Macon Health Care Facility*, 315 NLRB 359, 360-361 (1994)).

There is no record evidence of any conduct of the Employer to cancel out the effects of the misconduct alleged in Objections 1-4, 6, and 10, and the alleged objectionable conduct in Objections 1-4, 6, and 10 is wholly attributable to the Employer.

As noted above, the closeness of the vote according to the Nonprofessional Unit Tally was 24 votes. Based on the foregoing and the record as a whole, I recommend sustaining Petitioner's Objection 11.

VI. CONCLUSION

Consistent with my findings above that the Petitioner's objections be sustained insofar as there is sufficient evidence to establish that the Employer's conduct as set forth in Objections 1-4, 6, 10, and 11 reasonably tended to interfere with employee free choice, I recommend that the election held on April 26 and 30 be set aside and that a new election be conducted.

VII. APPEAL PROCEDURE

Pursuant to Section 102.69(c)(1)(iii) of the Board's Rules and Regulations, any party may file exceptions to this Report, with a supporting brief if desired, with the Regional Director of Region 28 by June 28, 2019. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Exceptions may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the exceptions should be addressed to Regional Director Cornele A. Overstreet, National Labor Relations Board, Region 28 Phoenix, 2600 North Central Avenue, Suite 1400, Phoenix, Arizona 85004-3099.

Pursuant to Sections 102.111 – 102.114 of the Board's Rules, exceptions and any supporting brief must be received by the Regional Director by close of business at 4:45 p.m. (Phoenix, Arizona local time) on the due date. If E-Filed, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date.

Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Dated in Phoenix, Arizona on the 14th day of June 2019.

/s/ Lisa J. Dunn

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