

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

RANDALLS FOODS AND DRUG, LP, d/b/a
TOM THUMB

Employer

and

TEAMSTERS LOCAL UNION 745

Petitioner

Case 16-RC-242776

**RANDALLS FOODS AND DRUG LP'S REQUEST FOR REVIEW OF REGIONAL
DIRECTOR'S DECISION AND CERTIFICATION OF REPRESENTATIVE**

Pursuant to Section 102.69(c)(2) of the Rules and Regulations of the National Labor Relations Board ("NLRB" or "Board"), Randalls Foods and Drug, LP ("Employer" or "Tom Thumbs") hereby requests the Board review the Regional Director's September 23, 2019 decision and certification of representative. (Exhibit A). For the reasons set forth below, the Decision and Certification of Representative should be vacated, and the results of the June 28 to July 1, 2019 election should be set aside, and the Board should direct the Regional Director to schedule a new election.

I. PROCEDURAL BACKGROUND

The Petition in this case was filed on June 5, 2019 by Teamsters Local Union 745. Pursuant to a Stipulated Election Agreement between the parties, an election was conducted at Tom Thumb's location in Roanoke, Texas on June 28-30, 2019 in the following unit:

INCLUDED: All full-time and regular part-time Drivers and Spotters.

EXCLUDED: Dispatchers, Mechanics, Managers, Warehousemen, Human Resource Personnel, Watchmen and Supervisors as defined by the Act.

The Tally of Ballots shows that of 78 eligible voters, 44 cast votes for the Union and 31 cast votes against the Union along with one potentially nondeterminative challenged ballot.

On July 8, 2019, the Employer filed timely Objections to Election, a copy of which was served on the Petitioner. A hearing was held on July 29, 2019 and on August 30, 2019, the Hearing Officer issued her Report containing her conclusions and recommendations. On September 13, 2019, Tom Thumb filed Exceptions to the Hearing Officer's Report along with a supporting Memorandum with the Regional Director. On September 23, 2019, the Regional Director issued a decision denying Tom Thumb's Exceptions and certifying the election results. Tom Thumb files the Request for Review of the Regional Director's Decision and requests that the Board grant Tom Thumb's request and issue an Order setting aside the election results and ordering a new election.

II. THE EMPLOYER'S OBJECTIONS

The Employer's Objections provide that during polling hours and in the polling area the Union engaged in improper electioneering and other inappropriate conduct. In addition, Tom Thumb objects based upon the Board Agent's late arrival during one of the voting times.

A. Introduction and Summary of the Argument.

The procedures for the conduct of elections are designed to ensure that the outcome reflects a free and fair choice of the voters. "It has long been established "[t]he Board is responsible for assuring properly conducted elections.'" *Kerona Plastics Extrusion Co.*, 196 NLRB 1120 (1972) (quoting *New York Tel. Co.*, 109 NLRB 788, 790 (1954)). The Board's goal is to conduct elections "in a laboratory under conditions as ideal as possible to determine the uninhibited desires of employees" and to provide "an atmosphere conducive to the sober and informed exercise of the franchise, free not only from interference, restraint, or coercion violative of the Act, but also from other elements which prevent or impede a reasonable choice." *Sewell Mfg. Co.*, 138 NLRB 66, 70

(1962). Further, the Board is “especially zealous in preventing intrusions upon the actual conduct of its elections.” *Claussen Baking Co.*, 134 NLRB 111, 112 (1961).

The Regional Director’s decision as to the misconduct is clearly erroneous on the record and such error prejudicially affect Tom Thumb’s rights under the Act. Further, as shown below, the decision is a departure from officially reported Board precedent. Under these standards, and as shown below, the Hearing Officer erred in concluding that the complained of conduct was insufficient to disturb the laboratory conditions. Accordingly, the Regional Director erred in failing to sustain Tom Thumb’s objections.

B. The Union business agent engaged in electioneering near the polling place that disturbed the laboratory conditions.

Employer Exhibit 1 reproduced in part by the Hearing Officer on page 10 of her Report showed that the Union business agent, referred to by the Hearing Officer as the “Organizer” accessed the property during the second voting session on June 28 at 9:56 p.m. and did not log out until 10:40 p.m. Tr at Employer Exhibit 1 and Report, P. 10.¹ Contrasted with his other entry times coming and going, this length of time was extraordinary in duration, especially how long it took for him to exit once the pre-election conference ended. Indeed, he extended his stay because he remained near the polling place in order to electioneer with voting employees. This was observed by Bill Herrera, referred to in the Report as the “Consultant.” Herrera testified that he saw the organizer talking with a group of employees at the bottom of the stairs leading to the voting area. Herrera consistent with his compliance with the Act did not remain for more than a few seconds as the voting was about to begin. Tr. At 110, 114-15.

The Organizer’s lengthy stay is coupled with his actions on June 30 when he informed the security guard as he was trying to access the property that he was an “employee.” Tr. at 67. The

¹ “Tr” refers to the Hearing Transcript and “Report” refers to the Hearing Officers Report.

security guard's testimony on this point was disputed by the Organizer but there was nothing in the record to establish that the non-employee guard was not credible or was mistaken in his testimony. Indeed, the Hearing Officer acknowledged that it was possible the Organizer had misrepresented his status as an employee, but she said that he may have made the misrepresentation only to expedite his access to avoid being late. Report, P. 13. The Hearing Officer clearly erred in creating her own explanation for the lie and completely discounting the possibility it was done to gain access to electioneer as he had on June 28th. His motives are relevant to show he engaged in improper conduct. Further, he clearly lied when he testified that he did not tell the guard he had identified himself as an employee (Tr. at 190) which the Hearing Officer should have noted and relied upon to discount his testimony. The Regional Director failed to address the significance of the lie and otherwise contended it was not material to the misconduct. Further, the Regional Director completely ignored the Hearing Officer's fabricated explanation for the Union agent having misrepresented himself as an employee.

The Board has long held that "regardless of the content of the remarks exchanged," prolonged conversation by representatives of any party with prospective voters in the polling area "constitutes conduct which, in itself," will invalidate an election." *Milchem, Inc.*, 170 NLRB 362 (1968) (emphasizing the importance of ensuring [t]he final minutes before an employee casts his vote should be his own, as free from interference as possible"). See also, *Brinks Inc.*, 331 NLRB 46 (2000) (finding for the employer under the *Boston Insulated Wire* factors because the person who electioneered was "an agent of the Union at the time of his misconduct" and "party electioneering during the voting...is a serious interference with the election process"); *In re Star Expansion Industries Corp.*, 170 NLRB 364 (1968) (holding for the employer because a union observer "acting on behalf of the [union] was engaged in electioneering activities in close

proximity to the polls” even though he never entered the polling area during the polling period); *Tyson Fresh Meats, Inc.*, 343 N.L.R.B. 1335 (2004) (setting aside election where agents of the union sat at a table near voting room entrance for approximately an hour and engaged employees in conversations of at least 5 to 10 minutes outside of polling area while employees waiting to vote).

Here, it is undisputed that the Organizer remained on the premises on June 28 for at least 10 minutes after voting began at the 10:30 session and was observed talking with employees near the voting area. The conduct standing alone warrants overturning the election. His misconduct in this regard is amplified by his misrepresentations to a third party employed security guard to gain access to the property.

C. The Board agent engaged in misconduct by arriving late for a voting period.

Tom Thumb is not contending that the Board agent arrived late intentionally or otherwise intended to disturb the voting times. But, she did arrive late as the Hearing Officer concluded. Report at 18. The Regional Director nevertheless overruled this objection because of the lack of evidence that her tardiness interfered with voters’ ultimate ability to cast a vote. Tom Thumb contends that is not the appropriate analysis. Rather, the Board looks to the “possible” effect of agent misconduct. Indeed, the Board has set aside elections where there were departures from the scheduled voting period involving either delayed openings (as is the case here) or early closing of the polls. Where a Board agent arrived 40 minutes late, the election was set aside because the votes of those “possibly excluded” from voting may have affected the outcome, and notably “the ensuing votes may have been affected by the conduct of the Board agent.” *B & B Better Baked Foods*, 208 NLRB 493 (1974). In another case involving a delayed opening, the Board set aside the election even though the number of eligible voters who did not vote could not have affected

the outcome; the Board agreed with the regional director's finding that "the votes cast may have been affected by conduct of the Board agent." *Nyack Hosp.*, 238 NLRB 257, 260 (1978).

Tom Thumb contends that the Regional Director erred by failing to follow the reasoning of these two cases and failing to conclude that the agent's late arrival could have possibly excluded voters (Herrera testified that he knew one voter who lost the opportunity to vote due to the Board agent's later arrival. Report, P. 17 and Tr. At 105-06 and otherwise affected subsequent votes mandating that the election result should be set aside.

D. The Union observer Stacey Bess improperly wore clothing prominently displaying clothing with a union insignia that disturbed the laboratory conditions.

It is undisputed that Stacey Bess wore clothing showing his support for Teamsters 745 during the time he was serving as a union observer. Report, P. 19. The evidence showed that during a prior voting time, the Board Agent suggested the observer should not wear union related clothing and the observer removed a union vest. Tr. at 130. Where the Regional Director erred was concluding that this was insufficient to set aside the election.

The Board consistent with the Agent's admonition has stressed that observers should refrain from wearing clothing that connects them to a party. *U-Haul Co. of Nevada, Inc.*, 341 NLRB 195 (2006) ("The Board discourages...observers from wearing campaign insignia."). This preference is meaningful in that it shows the possibility that such conduct could disrupt laboratory conditions. That is what occurred here and supports an order setting aside the election.

E. Employees maintained signage in their vehicles near the voting area and during voting times supporting the union.

Once again, the facts here are not in dispute. The evidence showed that while employees were voting, there was pro-union signage visible in vehicles that were close to the voting area. Tr.

at. 120-21 and Report, P. 20-22. The Regional Director nevertheless concluded that they didn't disturb the laboratory conditions because they were too far away from the voting. This conclusion is inconsistent with Board law and otherwise ignores the reality that regardless of their positioning they remained visible to eligible voters throughout the voting periods. See, e.g., *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 991-993 (D.C. Cir. 2001) (holding that the conduct of two union employees in a car parked outside the election location "substantially impaired the employees' exercise of free choice."); *Pearson Education, Inc.*, No. CA-26182, 2000 BL 24960 (holding that a "poster, which was in plain view of all persons who were going to vote" warranted setting aside the election results).

As with the other objections discussed above, this one is another example of an indication that voters were deprived of true laboratory conditions and as such warrants setting aside the election.

F. An employee wearing a Teamsters 745 vest solicited other eligible voters to raise money to assist another eligible voter and in so doing disturbed the laboratory conditions. Tom Thumb also contends that the Regional Director erred in concluding that the individual responsible for the solicitations was not a union agent.

This objection involves a rather unique set of facts which again, are not disputed. While voting was ongoing, one or more employees who were conspicuous union supporters by virtue of their clothing and rhetoric during the post-petition period, sought donations from other employees to purportedly assist another voting employee with alleged financial difficulties. Tr. at 91-97 and Report, P. 25. Where the Regional Director erred was failing to recognize the likely impression that this was the union stepping in to assist the employees in place of the Employer. Indeed, the soliciting of employees done by someone referred to by the Hearing Officer as a Union Committeeman had previously sought to have the Employer raise the funds but was not successful

in that effort due to the Employer's concern about the perception of "buying" votes. Tr. at 152-153. This left employees with the clear impression that the union was engaged in trying to raise money for another voting employee. This effort went on during the 3 days of voting.

Under these circumstances, there is no doubt the Regional Director erred in concluding that this misconduct did not affect the laboratory conditions. *See MeadWestvaco Corp.*, No. RC-6684, 2009 BL 420720 ("During...the critical period, conduct that creates an atmosphere rendering improbable a free choice by employees warrants invalidating an election").

Likewise, the Regional Director erred by finding that the Committeeman was not acting as a union agent while engaging the solicitations. Again, it is undisputed that he was wearing a bright Teamsters 745 vest; and it is undisputed the union identified him as a committeeman in a letter it sent to the Employer. Tr. at 93, 153. Under these circumstances, he was presenting himself to his co-workers as a union agent. *See Tyson Fresh Meats, Inc.*, 343 NLRB 1335 (2004) (where the Board found the union stewards involved were agents of the Union when they spoke to voters waiting in line to vote, placing probative value on the alleged agents' union steward positions inasmuch as the union encouraged employees to perceive stewards as representatives of the union by giving them the responsibility of orienting new hires to the benefits of unionization, the collective bargaining agreement provided that stewards had express authority to present grievances on behalf of employees, the stewards involved participated in labor management meetings throughout the year and wore purple hats signifying their status as union stewards); *In Re Bio-Medical Applications of Puerto Rico, Inc.*, 269 NLRB 827 (1984) (where the totality of the evidence, including the employees traveling with union officials to a plant ' other than the one where they worked and introducing themselves to employees as the union's representatives, indicated agency status).

Accordingly, the Regional Director erred in failing to find that this constituted objectionable conduct warranting the election be set aside.

G. The Regional Director erred in failing to conclude that the totality of the objectionable conduct disturbed the laboratory conditions and in determining that Tom Thumb failed to preserve this objection.

While the Hearing Officer addressed Tom Thumb's objection as to the totality of the misconduct, the Regional Director held that Tom Thumb failed to preserve it by not presenting it as a stand-alone objection in its initial filing. The Regional Director clearly erred in finding a waiver. The Board has long held that "the Regional Director is not required to nor can he properly ignore evidence relevant to the conduct of an election" because a party did not specifically mention it in its objections. *American Safety Equipment Corporation*, 234 NLRB 501 (1978). Tom Thumb clearly articulated its position that the totality of the misconduct warranted an order setting aside the election and the Union was able to and did litigate the issue. Tr. at 240.

With regard to the substantive argument, as noted at the outset of this brief the Act and NLRB law mandates that the Board and here the Regional Director ensure that an election was held without conduct "which prevent[s] or impede[s] a reasonable choice." *Sewell Mfg. Co.*, 138 NLRB 66. The Employer presented substantial evidence that the Union engaged in conduct that did prevent or impede a reasonable choice. This is made even more clear by the totality of the misconduct. The Regional Director erred in failing to find that the amalgamation of the misconduct even if not singularly objectionable so as to warrant a set aside election, was nevertheless objectionable by its totality.

This is consistent with the Board's approach where, as is the case here, the record shows multiple instances of misconduct that taken together support a conclusion that the election should be set aside. See e.g. *Aramark Sports, Inc./SFS*, No. RC-21685, 2011 BL 489298 (setting aside

CERTIFICATE OF SERVICE

I certify that the Randalls Foods and Drug LP's Request for Review of Regional Director's Decision and Certification of Representative in this case were served by E-File and Regular U.S. Mail this 7th day of October, 2019 upon the following parties:

Timothy L. Watson
Regional Director
National Labor Relations Board
Region 16
819 Taylor Street, RM 8A24
Fort Worth, TX 76102-6017
NLRBRegion16@nrb.gov

David K. Watsky
Lyon, Gorsky & Gilbert, L.L.P.
12001 N. Central Expressway
Suite 650
Dallas, TX 75243
dwatsky@lyongorsky.com

Arturo Laurel
National Labor Relations Board
Region 16
819 Taylor Street, RM 8A24
Fort Worth, TX 76102-6017
Arturo.Laurel@nrb.gov

Executed on October 7, 2019, at Atlanta, GA

/s/ Jeffrey A. Schwartz

Jeffrey A. Schwartz

EXHIBIT A

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18**

RANDALLS FOOD AND DRUG, L.P.

Employer

and

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 745**

Petitioner

Case 16-RC-242776

**REGIONAL DIRECTOR DECISION AND
CERTIFICATION OF REPRESENTATIVE**

Pursuant to a Stipulated Election Agreement, an election was conducted on June 28 to July 1, 2019¹ in a unit of the Employer's full-time and regular part-time drivers and spotters. The tally of ballots showed that of the approximately 78 eligible voters, 44 cast ballots for Petitioner, and 31 cast ballots against representation. There was one challenged ballot. Therefore, Petitioner received a majority of the votes.

The Employer timely filed five objections. On August 30, the Hearing Officer issued a Report in which she recommended overruling the objections in their entirety. On September 13, the Employer filed timely Exceptions to the Hearing Officer's recommendations, along with a Brief in support of its Exceptions.

I conclude that the Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. Further, I have considered the evidence and the arguments presented by the parties and, as discussed below, I agree with the Hearing Officer that all of the Employer's objections should be overruled. Accordingly, I am issuing a Certification of Representative.

I. THE OBJECTIONS

The Hearing Officer's Report on objections contains detailed factual findings, and thus a comprehensive recounting of the facts underlying this dispute is unnecessary. Briefly, the contested election took place at the Employer's Roanoke, Texas facility. The Union filed an RC petition in this matter on June 5, and the parties reached a Stipulated Election Agreement shortly thereafter. The agreement called for polling sessions at the dates and times listed in the chart below:

¹ All dates hereinafter are in 2019, unless otherwise noted.

| Date | Session One | Session Two |
|-------------|--------------------|----------------------|
| June 28 | 1:00 pm to 7:30 pm | 10:30 pm to 12:30 am |
| June 29 | 1:00 pm to 7:30 pm | 10:30 pm to 12:30 am |
| June 30 | 1:00 pm to 7:30 pm | 10:30 pm to 12:30 am |

The Employer's Exceptions generally track its underlying Objections. The five specific Employer Exceptions (and their underlying Objections) center on conduct that took place during or between the polling times listed above. The final Exception, which does not track any specific written objection, asserts that the totality of the conduct contained in the five specific Exceptions is sufficient to warrant overturning the election.

The Employer's Exceptions in this matter cite to little specific record evidence and generally do not dispute any specific factual findings made by the Hearing Officer. Rather, the Employer focuses on asserted legal errors made by the Hearing Officer in her recommendation to overrule its five objections. Having reviewed the case law cited by the Employer, along with other case law relevant to the Exceptions, I find that the Hearing Officer correctly recommended overruling each of the Employer's five Objections. I will address my reasoning for each Exception below.

Finding Regarding the Employer's First Exception

The Employer's first Exception centers on the conduct of Petitioner's Organizer around the time of the election. Specifically, the Employer contends that the Organizer engaged in prohibited conduct by engaging in conversation with employees "near" the polling location on June 28 and by misrepresenting his position to a third-party security guard on June 30. I find that the Employer's Exception is without merit.

The Board utilizes a multi-factor analysis when determining whether prohibited electioneering has occurred. Relevant factors include, but are not limited to, the number of employees who witnessed or were subjected to the alleged misconduct; evidence of dissemination of any misconduct; the closeness of the misconduct to the date of the election; and the number of incidents of alleged misconduct. *Avis Rent-a-Car System, Inc.*, 280 NLRB 580, 581 (1986), *enforced sub nom., I.T.O. Corp. of Baltimore v. NLRB*, 818 F.2d 1108 (4th Cir. 1987). The Board has also adopted a *per se* rule that prolonged conversations between union representatives and employees waiting in line to vote, regardless of content, require the setting aside of an election. *Milchem, Inc.*, 170 NLRB 362 (1968); *Tyson Fresh Meats, Inc.*, 343 NLRB 1335 (2004).

In agreement with the Hearing Officer, I find that a detailed application of these factors is unnecessary here, as the record contains insufficient evidence of electioneering. With regard to the June 28 incident, the Employer points to two pieces of evidence—its visitor log (Employer Exhibit 1) and the testimony of its Consultant—as a basis for overturning the Hearing Officer’s recommendation. The visitor log, however, merely reflects that the Petitioner’s Organizer stayed on the Employer’s property for about ten minutes after the polls had opened on June 28. The Employer’s consultant, in turn, testified that he very briefly witnessed the Organizer speaking to a group of employees shortly before the polls opened. Thus, even ignoring the Organizer’s (credited) testimony in which he denied engaging in electioneering, there is no affirmative evidence to support the Employer’s contention.

The Employer next points to certain evidence that the Organizer misled a third-party security guard by stating the he was an “employee” on June 30. This contention is similarly without merit. The interaction occurred between a non-unit guard and the Organizer, and it was not overheard by any unit employees. Even assuming that the Guard’s account is fully credited, the Guard admits that the Organizer eventually represented that he was from the Union, and thereafter the Guard entered information indicating such in the Employer’s visitors log. Further, and most importantly, the Employer presented no evidence that any misrepresentations that may have occurred actually led to any prohibited electioneering by the Organizer on June 30 or any other date of the election. As is the case with the Employer’s contentions regarding the June 28 incident, a detailed analysis under *Avis Rent-a-Car* is unnecessary as there was no evidence of electioneering to consider.

Finally, the caselaw cited by the Employer in support of its Exception is readily distinguishable. The Employer first argues that the Organizer’s conduct falls within the *per se* rule articulated in *Milchem* and *Tyson Fresh Foods, supra*. The record does not support this claim, as there is no evidence that the employees who the Organizer spoke to were waiting in line to vote, otherwise in the polling area, or captivated in any way. There is also no evidence that the conversation was prolonged in nature or related to the employees’ votes. Rather, the evidence supports that any conversation that occurred falls within the “chance, isolated, [and] innocuous” remarks that the Board found permissible in *Milchem*. 170 NLRB at 363. The remaining cases cited by the Employer are also inapposite, as both *Brinks, Inc.*, 331 NLRB 46 (2000) and *Star Expansion Industries Corp.*, 170 NLRB 364 (1968), involved direct appeals by a union agent to vote in favor of the union near the polling area—which, as discussed above, is not supported by the record evidence here. As such, this Exception is meritless.

Finding Regarding Employer’s Second Exception

The Employer next excepts to the Hearing Officer’s treatment of the late arrival of the Board Agent conducting the election at the second session on June 29. Specifically, the Employer contends that the Hearing Officer erred by failing to consider “the possible ‘effect’ of agent misconduct.” (Exceptions brief at 5.) Contrary to the

Employer's assertions, I find that the Hearing Officer appropriately applied Board law to the facts of the case.

The Board has held that the delayed opening of a poll due to the late arrival of a Board Agent, standing alone, does not warrant re-running an election. Rather, as the Board explained in *Midwest Canvas Corp.*, 326 NLRB 58 (1998), one of three additional factors must be present: 1) "the votes of those possibly excluded could have been determinative"; 2) "the record also showed accompanying circumstances that suggested the vote may have been affected by the Board Agent's late opening or early closing of the polls"; or 3) "it was impossible to determine whether such irregularity affected the outcome of the election." *Id.* at 58.

While the record is clear that the Board Agent's late arrival did delay the opening of the polls, the evidence is equally clear that none of the three additional factors are met here. The first factor is clearly not met because there were only two employees who did not vote, and the Petitioner won the election by a margin of thirteen votes with one challenged ballot. The second factor also is not satisfied. The only evidence presented by either party relevant to this factor was the testimony of the Employer's Consultant, who only presented evidence regarding the vote of one employee (which again, was far from sufficient to affect the outcome of the election). As to the third factor, I do not believe that the Board Agent's delayed arrival constituted an "irregularity" that affected the outcome of the election. At most, the polls opened 15 minutes after scheduled. There is little direct evidence that any employee sought to vote during this time, that any employees were disgruntled, or affected by the late opening, or that employee free choice was affected in any way. In these circumstances, I conclude that any irregularity did not affect the results of the election.

The cases cited by the Employer in support of its Exception do not warrant a different conclusion. In *B & B Better Baked Foods, Inc.*, 208 NLRB 493 (1974), the number of employees who did not vote in the election were sufficient to change the overall result of the election due to the large number of employees who did not vote and the union's relatively narrow margin of victory—a crucial factor that is not present here. A similar circumstance occurred in two of the three bargaining units at issue in *Nyack Hospital*, 238 NLRB 257, 260 & fn. 21–22 (1978). Further, while both *B & B Foods* and *Nyack Hospital* suggest that an election could be re-run even in circumstances where the number of employees who did not vote would not be sufficient to affect the results of the election, the delay in opening the polls in these cases (40 minutes in *B & B Foods* and about an hour in *Nyack Hospital*) far exceeded any delay in the instant case. For example, the Board in *B & B Foods* characterized the delay in that case as a "substantial departure" from the scheduled election voting hours when the session with the delay was only one hour long and a second afternoon session was only one-half hour. 208 NLRB at 493. In this case, a fifteen-minute delay in one of six sessions in an election with over 25 hours of scheduled voting time is not a substantial departure from the scheduled voting hours. In sum, given the limited number of employees who did not vote and the relatively slight delay in the opening of the polls, I find that the Employer's Exception is without merit.

Finding Regarding Exception 3

The third Exception raised by the Employer rests on an item of Union apparel worn by the Petitioner's Observer at both polling sessions on June 30. The undisputed evidence is that this Observer wore a T-shirt with the Union's logo on it. The Employer contends that this conduct warrants re-running the election. This contention is meritless.

Board law is clear that while it is disfavored for election observers to wear clothing supporting a party to an election, such conduct is insufficient to overturn an election result. This principle is clearly annunciated in the case cited by the Employer—*U-Haul Co. of Nevada*, 341 NLRB 195 (2004)—which in relevant part states that "[t]he Board discourages, *but does not prohibit*, union and employer observers from wearing campaign insignia." *Id.* at 196 (emphasis added). As there is no accompanying evidence of any other misconduct by this Observer, I am overruling the Employer's Exception.

Finding Regarding Exception 4

The Employer's fourth Exception rests on the presence of pro-union campaign propaganda in several vehicles in the Employer's parking lot. The relevant facts to this Exception are brief and undisputed. The signs were in the vehicles of employees, in a parking lot about 100 feet away from the entrance of the building in which the voting took place. The signs were displayed through at least part of the polling session on June 28 and promoted pro-union messages. The record discloses no threats or promises of benefits on the signs. Finally, while the signs may have been visible or partially visible from the building, they were not visible from the polling area itself.

The relevant legal standard for this Exception comes from the Board's decision in *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118 (1982), *enforcement denied*, 703 F.2d 876 (5th Cir. 1983). Under that decision, the Board considers numerous factors including the location of the conduct, particularly if it occurred in a "no electioneering" area; the nature of the alleged electioneering; who engaged in the conduct (employee or a party representative); and if the Board agent warned against the behavior. *Id.* at 1118–19.

As recognized by the Hearing Officer, none of these factors support the Employer's position. The location of the "electioneering" was in a parking lot, in a space that was not visible from the polling area. The electioneering consisted solely of a series of signs that supported the Petitioner but provided no other direction to employees. The signs were located in the vehicles of employees, not union representatives. Finally, the Board Agent conducting the election was aware of and did not warn against the conduct.²

² The Employer's Vice President testified that when she mentioned the signs to the Board agent, he told her that he did not consider the parking lot to be the voting area.

The two cases cited by the Employer in support of its Exception—*Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981 (D.C. Cir. 2001) and *Pearson Education, Inc.*, 336 NLRB 979 (2001), *enforced*, 373 F.3d 127 (D.C. Cir. 2004)—are easily distinguishable on their facts. In *Nathan Katz Realty*, the conduct at issue—sitting in a car and honking a horn at employees—was conducted by union agents, occurred within a designated “no electioneering” zone, and involved a physical presence from individual actors. 251 F.3d at 991–93. *Pearson Education* similarly focused on conduct committed by a party’s agent in much closer proximity to the polling area. 336 NLRB at 979–80. As such, this Exception is similarly without merit.

Finding Regarding Exception 5

The Employer’s next Exception rests primarily on conduct by employees that occurred during and after the polling periods concluded. Specifically, the Employer contends that the Petitioner engaged in objectionable conduct when unit employees solicited donations for a co-worker. I find this Exception meritless.

As the Employer correctly points out, a threshold issue in determining whether objectionable conduct occurred is determining whether any of the employees were acting as agents of the Petitioner. The party asserting agency status, in this case the Employer, bears the burden of proof on this issue. Under established Board law, employees are not typically general-purpose agents for either a union or employer. Therefore, for alleged employee actors, the agency relationship must be established with regard to the specific conduct that is alleged to be unlawful. *Pan-Ostön Co.*, 336 NLRB 305, 306 (2001). As recognized by the Hearing Officer, there are two primary situations in which this agency status can be established. First, an employee can be found to be a union agent “when they serve as the primary conduits for communication between the union and other employees or are substantially involved in the election campaign in the absence of union representatives.” *Cornell Forge Co.*, 339 NLRB 733, 733 (2003); *see United Builders Supply Co.*, 287 NLRB 1364 (1988). Second, an apparent agency relationship can be created “from a manifestation by the [union] to a third-party that creates a reasonable basis for the latter to believe the [union] has authorized the alleged agent to perform the acts in question.” *Corner Furniture Discount Center, Inc.*, 339 NLRB 1122, 1122 (2003).

The Employer contends that agency status is established in this matter by virtue of the fact that at least one of the individuals soliciting donations was a member of the employee organizing committee, and that this individual was wearing a union vest while soliciting donations. Neither of these factors suffice to establish agency status under the Board precedent discussed above. An employee’s presence on an in-house organizing team, without more, does not create agency status. *See, e.g., Advance Products Corp.*, 304 NLRB 436, 436 (1991). Further, there is no evidence that the employee in question otherwise served as a conduit for the union or engaged in organizing actions independent of union agents, as is required under *Cornell Forge, supra*. Finally, as to the issue of apparent authority, there is no evidence in the record that any union agents made any representations to employees that would cause them

to believe that the solicitations were driven by the Petitioner. The mere fact that an employee was wearing a union vest, worn by many employees throughout the campaign, while soliciting donations is insufficient to establish an agency relationship.³ Therefore, in agreement with the Hearing Officer's recommendation, I find that none of the employees soliciting donations were agents of the Petitioner.

Even though the employees soliciting donations were not agents of the Petitioner, their conduct could nonetheless invalidate the results of the election in certain circumstances. The Board has held that the standard applicable to the conduct of non-agent employees (i.e., third parties) is heightened as compared to the standard applied to agents of a party. See, e.g., *Mastec North America, Inc.*, 356 NLRB 809 (2011). According to the Board this heightened standard can be met by conduct that is "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). The Board has also found third-party conduct invalidates an election where it "so substantially impaired the employees' exercise of free choice as to require that the election be set aside." *Rheem Manufacturing Co.*, 309 NLRB 459, 463 (1992).

In agreement with the Hearing Officer's recommendation, I find that the evidence in this case does not establish third party misconduct.⁴ There is no evidence that any of the employees soliciting donations threatened their co-workers, or otherwise tied the donations in any way to the Petitioner or election. The timing of the solicitations, while occurring during the election, were necessitated by outside events—specifically, the fact that their co-worker faced imminent eviction brought to their attention on the first day of the election. Further, the record discloses that other than a driver colleague writing a check for an amount to cover the distressed employee's immediate need to prevent eviction that first day, the payment of all the collected money to the employee occurred *after* the election—therefore lessening any hypothetical coercive effect. There is no evidence that the employees blamed or otherwise disparaged the Employer while collecting these donations. These solicitations did not create a "general atmosphere of fear," nor did they "substantially impair[] the employees' exercise of free choice." In sum, this Exception is without merit.

³ The legal authority cited by the Employer in support of its position—*Tyson Fresh Meats, Inc.*, 343 NLRB 1335 (2004) and *Bio-Medical Applications of Puerto Rico, Inc.*, 269 NLRB 827 (1984)—are clearly distinguishable. In each case, there was substantial evidence that the employees in question served as a mouthpiece for the union by, among other factors, visiting plants other than the one where they worked to speak about the union (as in *Bio-Medical Applications*) or by orienting new employees about the benefits of unionization and being granted authority under a collective-bargaining agreement (as in *Tyson Fresh Meats*). None of these factors are present here.

⁴ In support of its legal position regarding the objectionable nature of these solicitations, the Employer cites to the administrative law judge decision in *MeadWestvaco Corp.*, Case No. 11-RC-6684, 2009 WL 259626 (Jan. 30, 2009). In that case, union agents solicited donations from other employers in support of its campaign and advertised them to employees. By contrast, the employees here were not agents of the union, and there is no evidence that the employees advertised these contributions in any way to establish support for the Petitioner.

Finding Regarding Exception 6

The Employer's final Exception asserts that, even if none of the conduct discussed above is enough standing alone to invalidate the election, the cumulative effect of the alleged misconduct sufficiently disrupted laboratory conditions and warrants a re-run election. This Exception is without merit, for at least two reasons.

The first reason this Exception is without merit lies in its procedural deficiency. Board precedent makes clear that "a hearing officer lacks authority to 'consider issues that are not reasonably encompassed within the scope of the objections that the Regional Director set for hearing.'" *DLC Corp.*, 333 NLRB 655, 656 (2001) (quoting *Precision Products Group*, 319 NLRB 640 (1995)). The Employer's written Objections, listed in the record as Board Exhibit 1(d), do not mention this "totality of the objectionable conduct" theory. The Petitioner's written response to these Objections (Petitioner's Exhibit 1) naturally does not address this "totality" theory. The Region's Order Directing Hearing and Notice of Hearing on Objections (Board Exhibit 1(e)) did not reference this theory. The Employer did not mention this theory in its opening statement and mentioned it only in passing at the conclusion of its closing statement. The Petitioner, having not been put on notice of this issue until the conclusion of the hearing, did not address it as part of its closing argument or otherwise put on evidence to rebut this late-found argument. In these circumstances, I find that the Employer's Exception is based on an issue that was not "reasonably encompassed within the scope of the objections," and therefore is not properly before me to consider.⁵

Even assuming it is procedurally appropriate for me to consider this Exception, I would find it unavailing. To the extent that any misconduct occurred, it did not sufficiently affect the laboratory conditions of the election to warrant setting the results aside. The cases cited by the Employer, *Community Medical Center*, 354 NLRB 232 (2009) (two-member decision) and *Aramark Sports, Inc.*, Case No. 4-RC-21685, 2011 WL 5868414, involve multiple *sustained* objections. Given my findings that the individual objections are without merit, this precedent is inapposite.

II. CONCLUSION

Based on the above and having carefully reviewed the entire record, the Hearing Officer's Report and recommendations, and the Exceptions and arguments made by the Employer, I overrule the Objections, and I shall certify the Petitioner as the representative of the appropriate bargaining unit.

⁵ The Hearing Officer's decision to address this totality of the circumstances argument as part of her underlying recommendation does not preclude me from finding that the Employer was procedurally barred from raising this argument. See, e.g., *DLC Corp.*, 333 NLRB at 656 (ordering certification where hearing officer set aside election based on argument that was not encompassed within objections).

III. CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 745, and that it is the exclusive representative of all the employees in the following bargaining unit:

INCLUDED: All full-time and regular part-time Drivers and Spotters

EXCLUDED: Dispatchers, Mechanics, Managers, Warehousemen, Human Resources Personnel, Watchmen and Supervisors as defined by the Act

IV. REQUEST FOR REVIEW

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by October 7, 2019. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review 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 Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: September 23, 2019



Jennifer Hadsall, Regional Director
National Labor Relations Board
Region 18