UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

CASE NO. 05-RC-245597

SYSCO HAMPTON ROADS, INC.,

Employer,

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL UNION 822,

Petitioner.

SYSCO HAMPTON ROADS INC.'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION ON OBJECTIONS AND CERTIFICATION OF REPRESENTATIVE AND BRIEF IN SUPPORT

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Sysco Hampton Roads, Inc. ("SHR" the "Employer" or the "Company") respectfully submits this Request for Review and, in support thereof, states the following:

I. SUMMARY OF THE REQUEST FOR REVIEW

The instant Request for Review seeks reversal of the Regional Director's Decision on Objections and Certification of Representative in the above-captioned matter. Following a Board-supervised election, the Employer filed timely Objections to the Election predicated on the inclusion of statutory supervisors in the bargaining unit, and the extensive and active pro-union participation in the campaign and election by one of those supervisors, Team Lead, Joseph Whitlock ("Whitlock"). The evidence adduced at hearing demonstrated the Team Leads, most notably Whitlock, were supervisors within the meaning of Section 2(11); possessed and exercised multiple indicia of supervisory authority; and, at a minimum, Whitlock was clearly identified as being closely aligned with management. Moreover, the participation in the campaign and electoral process by Whitlock, was admittedly "hot and heavy" on behalf of the Union, and included home visits with Union organizers, daily solicitation of subordinates on behalf of the Union, and even included Whitlock serving as the Union's election observer in two of the voting periods where the majority of delivery associates cast their ballots. Particularly in a small unit, and in an election decided by a handful of votes, the Employer maintained that the inclusion of the supervisory Team Leads and the pro-union activity of Whitlock, unquestionably tainted the entire organizing and electoral process and required that the results be set aside and the election re-run.

The Regional Director, after inexplicably and inexcusably delaying for more than eight (8) months after the close of the Objections hearing, issued his subject Decision in which he overruled the Objections and issued a Certification of Representative. In his Decision, he concludes that the Team Leads, including Whitlock, are not supervisors within the meaning of Section 2(11) of the

Act; and he rejects the alternative argument that even if not 2(11) supervisors, Whitlock was so closely aligned with management that his participation on behalf of the Union tainted the electoral process. As matters of undisputed fact and law, the Regional Director is flatly wrong on both counts.[1] The Board should grant review; and, reverse the patently erroneous decision below.

II. FACTUAL AND PROCEDURAL BACKGROUND

Sysco Hampton Roads ("SHR") sells, markets, and distributes food products to restaurants, healthcare and educational facilities, the military, lodging establishments and other customers who prepare meals outside the home. SHR's main facility is located in Suffolk, Virginia. In addition to the Suffolk facility, the Company operates six (6) domicile yards[2] located in Richmond, Virginia; Williamsburg, Virginia; Virginia Beach, Virginia; Elizabeth City, North Carolina, Manteo, North Carolina; and Maple (Currituck), North Carolina. Delivery associates distribute goods from all locations, and shuttle drivers deliver the trailers to each of the domicile yards at night.

The instant matter arises from a representation petition filed by the International Brotherhood of Teamsters, Local 822 (the "Union"), seeking to represent delivery associates at SHR.[3] The Union initially filed its representation petition on or about July 26, 2019. The petition sought an election in a proposed unit of some eighty-six (86) delivery associates described as "all

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[1] For purposes of this Request for Review, the Company will only focus on the supervisory status and closely aligned with management status of Whitlock.

[2] Domicile yards are locations where shuttle drivers drop off trailers on a nightly basis, and delivery associates pick up the trailers to deliver SHR products the following day.

[3] References to the hearing transcript are by the letters "Tr." followed by page and line number, *e.g.*, "Tr. ___:___." References to exhibits introduced by the Hearing Officer are by the letters "Bd. Ex." followed by exhibit number, *e.g.*, "Bd. Ex. ___". References to SHR's exhibits are by letters "E. Ex." Followed by exhibit number, *e.g.*, "E. Ex. __." References to the Regional Director's Decision are by "Regional Director's Decision" followed by the corresponding page number, *e.g.*, "Regional Director's Decision p. __."

route drivers, shuttle drivers, van drivers, ship drivers, night drivers, and all drivers at the… satellite yards."

On August 2, 2019, the Company filed a Motion to Dismiss the Union's Representation Petition because it lacked information required by the Board's Rules and Regulations. (Bd. Ex. 1(E).) That same day and, because of the Company's motion, the Union filed its First Amended Petition. (Bd. Ex. 1(D).) On August 5, 2019, the then Acting Regional Director denied the Company's Motion to Dismiss the Union's Representation Petition. (Bd. Ex. 1(H).)

On August 9, 2019, SHR filed a Motion for Collateral Investigation, Dismissal of Petition and Postponement of Hearing, establishing that the Transportation Department Team Leads the Union sought to include within the unit were Section 2(11) Supervisors under the National Labor Relations Act (the "Act"), and that the pro-union activity of its Team Lead Whitlock tainted the representation petition's showing of interest. (Attachment A) On the same day, August 9, 2019, the then-Acting Regional Director held that the supervisory issue would not be resolved prior to the election because Team Leads represented less than 20% of the eligible voting unit.[4] As a result, and without waiving its rights to appeal its position on the representation petition, the tainted showing of interest, and/or the Section 2(11) supervisory status of the Team Leads, the Company, Union, and Region reached a stipulated election agreement.

On August 29, 2019, the Region conducted a representation election. The tally of the ballots revealed that there were 45 votes for the Petitioner, 32 against representation and 3 challenged ballots that were held non-determinative in light of the tally. Thus, the election results

[4] This is yet another example of the problems caused by the Board's 2015 "modifications" to its Representation Case rules and why the Board's 2020 modifications are necessary and appropriate. Had this issue been properly resolved at the outset the election would not have been conducted without knowing the status of all the individuals in the unit, and the complications and delay that now attend to this matter could have been avoided.

would have been reversed by a change in merely seven votes, and the challenges would have been determinative by a change in merely five votes.

On September 5, 2019, SHR filed Objections to the Election and Conduct Affecting the Results of the Election, and an Offer of Proof. (Bd. Ex. 1(J).) On September 12, 2019, SHR supplemented its Offer of Proof. On September 27, 2019, the then-Acting Regional Director issued her decision on Objections 1, 5, 7 and 8, and an Order Directing Hearing and Notice of Hearing on Objections 2 Through 4 and 6. (Bd. Ex. 1(M).) On October 10, 2019, SHR filed its Request for Review of the then Acting Regional Director's Decision on Objections 1 and 8, and on October 17, 2019 (Attachment B), the Union filed its Opposition to the Employer's Request for Review.[5]

On October 21 and 22, 2019, a hearing was held before Hearing Officer Andrea Vaughn as to: (1) whether the Team Leads were Section 2(11) Supervisors under the Act; (2) whether Whitlock's pro-union activity tainted the electoral process; and, (3) whether Whitlock, acting as the Union observer, engaged in objectionable conduct.

On December 11, 2019, Hearing Officer Vaughn, issued a Report and Recommendation on the Company's Objections ("R&R"). The Hearing Officer incorrectly recommended SHR's objections be overruled because the evidence allegedly failed to show that Team Leads were Section 2(11) Supervisors under the Act. Alternatively, the Hearing Officer concluded that if the Team Leads, specifically Whitlock, were supervisors under the Act, then the election must be rerun because Whitlock acted as the Union observer during two (2) polling periods.

[5] On January 23, 2020, the Board denied the Employer's Request for Review, stating "[w]e observe, however, that the Acting Regional Director's decision in this regard raises many of the concerns that led the Board to recently adopt procedural changes that will limit regional directors' discretion to defer litigation and resolution of eligibility disputes." (Attachment C).

Then, on August 7, 2020, some *eight (8) months after* the Hearing Officer issued her Report and Recommendation, the Regional Director issued his decision. In accordance with the Board's rules and regulations, the Company now seeks review of this Decision.

III. THE REGIONAL DIRECTOR'S DECISION

The Regional Director rejected the Employer's contention that its Team Leads, most notably Whitlock, were supervisors within the meaning of Section 2(11) of the Act; and rejected the contention that Whitlock's pro-union activity had tainted the results of a close election. The Regional Director is simply wrong as a matter of fact and law with respect to his conclusion regarding supervisory status. His rejection of the tainted election contention is even more astonishing; and merits a brief initial summary.

With regard to the taint issue, the Regional Director first finds that since Whitlock is not a supervisor his pro-union activity is not material. This argument fails because his predicate conclusion regarding supervisory status is erroneous. However, he further finds any alternative basis for concluding that Whitlock's conduct tainted the election need not be considered. Thus, he dismisses, out of hand, the fully litigated and fully briefed alternative argument that even if Whitlock was not a statutory supervisor, he was so closely aligned with management that his pro-union activity tainted the election. He dismisses this contention on the utterly specious ground that the Employer did not utilize the specific phrasing "closely aligned with management" when it filed its initial Objections. To consider this argument would, in the view of the Regional Director, be an impermissible "expansion" of the scope of the Objections. He takes the untenable position that he is not even required to consider this claim despite the matter having been litigated and briefed. The position is so frankly outrageous that it is little wonder it took more than eight (8) months to concoct.

IV. THE REGIONAL DIRECTOR COMMITTED REVERSIBLE ERROR BY FAILING TO ADDRESS THE TAINED ELECTION ISSUE ON PROCEDURALLY UNSUPPORTED AND UNTENABLE GROUNDS.

The failure by the Region to properly deal with the tainted electoral process and to set aside its results on the basis of Whitlock's involvement begins with an apparent misunderstanding by the Region of its own proper role in the representation case context. The representation case process is non-adversarial one in which the Region's singular and overriding concern must be to insure a free and fair election that is conducted with the requisite "laboratory conditions". See, NLRB Outline of Law and Procedure in Representation Cases §§ 3-820, 22-118, 22-232. This is the Region's first, and most important responsibility - a reality apparently lost in this instance. The failure of the Hearing Officer to conduct an adequate hearing, and most especially, the invention by the Regional Director of a hyper-technical pleading requirement/preclusion scheme to avoid addressing conduct that clearly interfered with employee free choice is explicable only by the Region's collective failure to recognize its responsibilities in administering the Act.

In his Decision, the Regional Director dismisses Whitlock's obviously objectionable conduct by variously claiming there is insufficient evidence in the record, and, most importantly, because the original Objections did not specify that Whitlock's pro-union activity was objectionable both because he was a statutory supervisor, and, because of the factually subsumed reason that he was also closely aligned with management. The Regional Director does not indicate the authority for this Draconian pleading requirement, save for the bald and conclusory assertion that to do otherwise would be an impermissible "expansion" of the Objections. That is simply incorrect, and the Regional Director cites no authority for the proposition. The reason for this omission is simple. There is no such authority.

What was always the focus of the objection was Whitlock's *pro-union conduct*. That was plainly raised by the original Objections and was never "expanded".[6] There was no new "objectionable conduct" alleged, there was no new factual claim. At best, all that "changed" was the legal theory upon which that same conduct was objectionable. Even that "change" is merely theoretical since the evidence bearing on the closely aligned with management theory was subsumed in the statutory supervisor theory; and, to the extent it was not, that is the failing of the Region, not the Employer.

Under such circumstances, the Regional Director was not free to merely dismiss or fail to consider the impact of Whitlock's activity on the electoral process because the original Objection did not include the phrase "closely aligned with management". Doing so was not merely a completely untenable elevation of form over substance, it was an abdication of the Region's responsibility to ensure a free and fair election and a direct contravention of controlling law and precedent. Thus, the Board has consistently held that a regional director "is not required to, nor can he [/she] properly, ignore evidence relevant to the conduct of the election… simply because [a party] may not have specifically mentioned such conduct in its objections." *American Safety Equipment Corp*., 234 NLRB 501 (1978); *see also* Case Handing Manual ("CHM") § 11392.11. Moreover, "evidence of unalleged objectionable conduct which the Regional Director received or discovers during the investigation should be considered." CHM § 11394.

Here, the Employer did *not* fail to mention the objectionable conduct. To the contrary, it raised it early on, repeated it, fully litigated it and briefed it. At most, the Employer arguably did

[6] Indeed, Whitlock's conduct was raised and in issue from the very filing of the petition. There were never arguments made by the Company related to adding a claim or objection that the Union circulated misleading literature or bribed someone. These examples would be instances in which the Company was "expanding the scope of the objections." Whereas, here, the Company has done no more than argue an alternative to a legal theory that was fully and fairly litigated at the hearing.

not initially and precisely articulate the specific theory upon which the uncontested facts and conduct required setting aside the election. Yet all the facts pertinent to such theory are on the record, the theory was plainly subsumed by the initial Objections, and it was subsequently and specifically briefed to the Regional Director. To suggest, without citation to any authority[7], as does the Regional Director, that he need not consider such plainly objectionable conduct under these circumstances is not only contrary to Board law, it is simply indefensible.

Equally indefensible is the suggestion that the record from the Objections hearing does not contain sufficient evidence for the Regional Director to conclude that Whitlock's conduct requires setting aside the election. As noted below (see pp. 12-17, 20-21, *infra*) the record contains more than enough evidence in this regard. Moreover, given that Whitlock's conduct was plainly in issue, any conceivable deficiency in the record evidence is the direct fault of either the Hearing Officer, or the Regional Director, and would require remand, not dismissal. Once again, Board law and proper procedure could hardly be clearer. As an adjunct of the representation process, the resolution of challenges and objections is essentially a non-adversarial process. CHM § 11392.10. The role of the Board agent acting as Hearing Officer is "completely nonpartisan; the Board agent is responsible for bringing the regional director *all the available facts*." *Id*, emphasis supplied. The Hearing Officer should "take pains to see that the record contains all relevant and competent evidence," and should actively participate. CHM § 11442.3(b). This includes cross-examining and asking questions to witnesses. *Id*. The Hearing Officer must also "be cognizant that his/her primary responsibility is […] to see that the record is full and contains all relevant and competent evidence…" *Id*.

[7] The Regional Director merely asserts that the theories of "supervisory status" and "closely aligned with management" status are somewhat different as his authority for wholly disregarding the latter. The observation, while theoretically correct, is simply of no moment in the present context. Here, the record contains more than enough evidence to determine both issues.

There is no question that Whitlock's conduct and status was squarely in issue. If there were any material deficiencies in the record regarding either that fault lies squarely with the Hearing Officer.[8] Such deficiencies, however, are not, particularly in the instance of an R Case hearing, license for a Regional Director to dismiss facially meritorious objections. If the Regional Director truly believed dispositive evidence was missing from the record, his option, indeed his responsibility, would have been to remand, not dismiss. However, and as noted below, the Regional Director did not truly believe the record was inadequate, because it plainly was not. The claim of record insufficiency was merely a transparent attempt to bolster a completely unwarranted result.

The record was replete with evidence of both Whitlock's 2(11) status, and his stature of being closely aligned with management, as well as his extensive activity on behalf of the Union. The fact that the Regional Director erred in dismissing the objectionable conduct on the basis of some non-existent pleading requirement is made clearer still by analogy to the C Case context. In a C Case, which by contrast is a distinctly adversarial proceeding, the Board routinely finds violations that are based on *theories* unpled by the General Counsel, it even finds violations based on unpled unfair labor practices as long as the issue is closely connected with the subject matter of the complaint and has been fully litigated. *Pergament United Sales*, 296 NLRB 333, 334 (1989), enf'd 920 F.2d 130 (2d Cir. 1990). Moreover, the Board has concluded that where a witness testified to the facts giving rise to the unalleged violation, no party has objected to the testimony, and the parties have had an opportunity to further explore the issue during the hearing, the "fully

[8] Throughout the entirety of the two-day hearing, the Hearing Officer only asked a mere six (6) questions to clear or fill the record with what she believed was pertinent information. (Tr. 36:21-37:9 (three questions related to coach cards); 183:16-21 (one related to Witness' absence from work); 286:17-287:2 (two questions related to Union's exhibit regarding the safe driver record)). Rather than engaging in the hearing, Hearing Officer Vaughn sat, facing her computer, typing, not fully engaged in the witness testimony.

litigated" requirement is met. *Id.*; *see also Desert Aggregates*, 340 NLRB 289, 293 (2003). Whether an issue has been fully litigated also "rests in part on whether the absence of a specific allegation precluded a respondent from presenting exculpatory evidence or whether the respondent would have altered the conduct of its case at the hearing, had a specific allegation been made." *Pergament*, 296 NLRB at 335.

The pleading "infirmity" upon which the Regional Director bases his Decision herein would never, in similar circumstances, preclude an unfair labor practice finding under *Pergament, supra.* Bearing in mind that a C Case is adversarial, and that the role of the Agency is entirely different than in an R Case, the claimed "infirmity" here, *a fortiori*, should not preclude its consideration.

The Regional Director overruled SHR's objection number one (1), stating that the Company failed to timely raise an objection asserting teams leads, specifically Whitlock, were closely aligned with management, and that such an expansion would be impermissible of the scope of the Employer's timely filed objections. This reasoning is unfounded, as the Regional Director cannot ignore all of the evidence raised at the hearing, and the analysis under the closely aligned with management was fully litigated.

V. THE REGIONAL DIRECTOR COMMITTED REVERSIBLE ERROR IN FAILING TO FIND THAT WHITLOCK WAS A STATUTORY SUPERVISOR AND/OR CLOSELY ALLIGNED WITH MANAGEMENT

A. Relevant law

Section 2(11) of the Act defines the term Supervisor:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is

> not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is intentionally written in the disjunctive, and, it is thus not necessary for an individual to possess all or even a majority of the authorities set forth in or to be deemed a "supervisor." Indeed, possession of any one of the enumerated powers is sufficient to confer supervisory status. *Chicago Metallic Corp*., 273 NLRB 1677, 1689 (1985); *NLRB v. Kentucky River Cmty. Care, Inc*., 532 U.S. 706, 712-13 (2001) (reaffirming that the possession of only one of the indicia of supervisory status is sufficient to establish supervisory status).

The Board has often framed the above definition in a three-part test: (1) whether the employee has the authority to engage in any one of the twelve actions listed in Section 2(11) of the Act (or to effectively recommend such actions); (2) whether the exercise of such authority requires the use of independent judgment; and (3) whether the employee holds the authority in the interest of the employer. If the answer to each of these three questions is in the affirmative, then the employee will be deemed a supervisor under the Act. *Reeves Bros., Inc*., 277 NLRB 1568 (1986); *see also NLRB v. Yeshiva Univ*., 444 U.S. 672 (1980) (individual is a supervisor if he meets any one of the 12 enumerated factors).

Moreover, the power to "effectively recommend" action with respect to one or more of Section 2(11) authority indicators results in statutory supervisory status, just as much as the independent, actual power to make decisions in these areas. *Albertson's, Inc*., 310 NLRB 960 (1993) (grocery department managers were statutory supervisors because they could effectively recommend hiring, discipline, transfer, layoff and promotion); *K.B.I. Security Services*, 318 NLRB 268 (1995) (employee was a statutory supervisor because he could effectively recommend formal discipline). The authority to effectively recommend generally means, "the recommended action is taken without independent investigation by superiors[.]" *Children's Farm Home*, 324 NLRB 61,

61 (1997); *see also DirecTV*, 357 NLRB 1747, 1748–49 (2011); *Ryder Truck Rental*, 326 NLRB 1386 (1998). The Board has also held that individuals are Section 2(11) supervisors "even if [he] does not issue discipline entirely on [his] own, [he] uses independent judgment to effectively recommend discipline… when [he] brings rule infractions and misconduct to [management's] attention, thereby initiating the discipline process." *Progressive Transportation Services, Inc*., 340 NLRB 1044, 1045 (2003).

B. Whitlock as a Section 2(11) supervisor

Undisputed record evidence reflects that it is rare for any member of management to issue formal disciplinary actions to delivery associates because SHR retains hard working, high quality drivers. (Tr. 63:8-18.) However, undisputed record evidence also shows that Team Leads, including Whitlock, have the authority to effectively recommend disciplinary action against rant-and-file delivery associates. (Tr. 63:25-64:8, 65:10-23, 173:12-19, 176:1-178:18.) Moreover, every delivery associate who testified, confirmed that they thought the Team Leads, specifically including Whitlock, had the authority to discipline them and/or fire them, and, that they have never been informed otherwise. (Tr. 178:21-25.) While others may be involved in a disciplinary matter, most especially a discharge, that is largely immaterial since, "the [NLRA] does not preclude supervisory status simply because the recommendation is subject to a superior's investigation." *ITT Lighting Fixtures v. NLRB*, 712 F.2d 40, 45 (2d Cir. 1983), *cert. denied*, 466 U.S. 978 (1984).

In Whitlock's case, the record demonstrated, without dispute, that just two (2) months before the Petition was filed, and while helping the Union in its organizing efforts, Whitlock effectively recommended the termination of Terrill Harris ("Harris"), a newly hired delivery associate. (Tr. 67:8-68:15.) The Board has held that individuals who use their independent judgment to effectively recommend discipline are Section 2(11) supervisors. *See e.g., Progressive*

Transportation Services, Inc., supra (The Board held that an individual who cast a determinative challenged ballot was a statutory supervisor. In finding that the individual was a supervisor, the Board determined that "even if [she] does not issue discipline entirely on her own, she uses independent judgment to effectively recommend discipline…when she brings rule infractions and misconduct to [management's] attention, thereby initiating the discipline process.") It was undisputed that Whitlock was the only member of management to ride with Harris for an observation, and the Company looked to Whitlock's supervisory expertise, and only to Whitlock, to make the termination decision. (Tr. 67:24-68:15, 271:24-272:8.) Matt Grace, Vice President of Operations, specifically testified that he relied on Whitlock's recommendation, and that no other member of management observed Harris' skills as a delivery associate. (*Id.*) Whitlock could have recommended more training, or some less sanction, yet chose not to do so. SHR relied on Whitlock's recommendation and did not consider other, less severe, available alternatives. This alone is enough to establish Whitlock as a Section 2(11) supervisor.

However, even further, the record disclosed that Whitlock is the highest ranking transportation official at the facility and/or available during the entire night shift.[9] Thus, if Whitlock was not a supervisor, there would be no one to responsibly direct the night shuttle drivers and other delivery associates during the night shift. (Tr. 21:1-18.) *See, e.g., NLRB v. Missouri Red Quarries, Inc.*, 853 F.3d 920 (8th Cir. 2017) (finding that secondary indicia supports supervisory status when if the employee was not a supervisor the quarry would be left without an on site supervisor for weeks at a time, concluding "[i]t is not 'a reasonable conclusion' to this Missouri Red would run its quarry - which is spread across 400 acres and operated around the clock - 'without on-site supervision.'"); *Essbar Equipment Co.*, 315 NLRB 461 (1994); *Iron Mountain*

[9] The night shift consisted of ten delivery associates, and Whitlock. (E. Ex. 1.)

Forge Corp., 278 NLRB 255, 262 (1986) (leadman held to be 2(11) supervisors where otherwise there would be a total absence of regular direct supervision of rank-and-file employees); *Chem Fab Corp*., 257 NLRB 996 (1981) (leadman held supervisor where he was the "ranking" person in charge of the second shift); *Luke's Supermarket, Inc.*, 228 NLRB 763, 763-64 (1977) (finding individual to be a statutory supervisory because, in part, the grocery department would otherwise lack any supervisors); *Ohmite Mfg. Co.*, 220 NLRB 1206 (1975) (group leader held 2(11) supervisor where, during the evening shift, he was the only one in charge of the janitors). To hold any differently would mean reaching the unsupportable conclusion that once the first shift of delivery associates and management leaves, the night shift transportation department runs without any onsite supervision. It is simply untenable to conclude that SHR would operate a multi-million dollar operation for an extended period without anyone responsible for, or directing the work for an entire shift of employees.

The Company, in its Brief in Support of its Exceptions to the Hearing Officer's decision also outlined numerous other examples in which Whitlock engaged in 2(11) duties, including, but not limited to: (1) Whitlock is required to perform one observation, one ten-minute safety huddle, and five coach cards per week, and is disciplined for not performing these duties (Tr. 25:11-19, 26:4-17, 27:1-3, 31:7-16, 35:15-41:12, 37:4-9, 52:7-54:11; E Exs. 6, 8, and 14); (2) Whitlock trains new delivery associates, and does so by observing the associates on routes to determine whether he/she is safe to operate a large tractor-trailer on his/her own (Tr. 271:24-272:13); (3) Whitlock has coached non-probationary delivery associates, including one instance where he coached a delivery associate about a near miss incident (Tr. 98:20-100:7); (4) Whitlock has been required to attend leadership training classes through Sysco Interactive University with other members of the management team, including Transportation Management Annual Training, and Inclusive

Leadership (Tr. 32:11-34:19; E. Ex. 7); and (5) Whitlock dispatches delivery associates while delivery associates do not (Tr. 48:18-51:4, 172:16-173:12).

The record is replete with overwhelming evidence that Whitlock is a Section 2(11) Supervisor, and any conclusion to the contrary is simply erroneous.

C. Whitlock is Closely Aligned with Management

Even assuming, *arguendo*, that Whitlock's authority fails to meet the 2(11) threshold, he was clearly held out as a member of management, and clearly perceived as such by rank-and-file employees. The record evidence of this "alignment with management" is overwhelming and unrebutted.

An employee is "closely aligned" when, under a totality of circumstances, the employer has placed a non-supervisor, non-management employee in a position in which he could reasonably be viewed by employees as closely identified with management. *BCW, Inc.*, 304 NLRB 780, 781 (1991). The question of whether someone is closely identified with management is fact-intensive, focusing on the individual's duties and interactions with management and employees alike. *Southland Frozen Foods*, 282 NLRB 769 (1987).

"An employee, who has none of the authority vested in supervisory personnel, may be closely identified with management if he or she relays information to employees and has been placed by management in a strategic position where employees could reasonably believe that the employee speaks on its behalf." *Southland Frozen Foods*, 282 NLRB at 770. A closely aligned employee may receive "special treatment," or "function[] other than as a rank-and-file employee." *In re B-P Custom Bldg. Prods., Inc.* 251 NLRB 1337, 1346 (1980). "Evidence that co-workers considered the person as management, and that the person monitored employees or otherwise

served in a quasi-agency capacity for the employer, is particularly telling." *BCW, Inc.* 304 NLRB at 780–81.

As noted earlier, Whitlock plainly met the 2(11) threshold, and his subsumed authorities meet the "aligned with" threshold as well. The similarities are so extensive that they are ordinarily viewed together particularly where, as in the present case, one is analyzing whether the person in question can lawfully act as an election observer. *See Southland Frozen Foods, Inc., supra*. Much of the record evidence, virtually all of which were undisputed, demonstrates that Whitlock was not only a supervisor, but was closely aligned with management:

- Whitlock is the only member of management on the night shift in the transportation department. (Tr. 21:1-17.) As the only member of management, he is responsible for handling night shift call outs, assigning and changing night shift work, and taking night shift duties if he cannot find a replacement. (Tr. 57:2-58:17, 59:22-60:10, 316:9-13.)
- All delivery associates who testified perceived Whitlock as a member of management, including those who worked directly with Whitlock. (Tr. 182:23-183:6, 191:11-24, 197:11-22, 203:16-25, 206:15-207:12, 208:12-18, 214:7-25.)
- Whitlock was required to conduct observations, fill out coach cards, and conduct safety huddle meetings. No other delivery associates are required to do these tasks. Instead, these tasks are limited to just members of management.[10] (Tr. 25:11-19, 29:16-24, 35:15-37:9, 270:4-12, 274:25-275:5, 280:3-282:22.)

[10] Delivery associates testified, and all confirmed they believed Whitlock was a supervisor and could affect their terms and conditions of employment. The Regional Director erroneously appears to conclude that four is not enough (Regional Director's Decision p. 15.) If that is the case, it is a deficiency on the part of both the Regional Director and the Hearing Officer. If he truly believed the evidence was there, but inadequate, his responsibility was to remand, not to use it as an excuse.

- Whitlock performed observations a mere two (2) weeks before the representation election. (Tr. 28:7-25.)
- Whitlock conducted and filled out coach cards less than two (2) weeks before the representation election. (Tr. 38:22-39:21.)
- Whitlock has disciplined delivery associates, including recommending the termination of a delivery associate just two (2) months before the Union filed its petition, and likely during the period Whitlock was engaged in gathering delivery associate representation cards. (Tr. 67:1-68:15, 271:20-272:13.)
- Whitlock assigned and directed work of delivery associates, including those not assigned to night shift work. (Tr. 221:18-222:25, 276:3-277:10, 282:11-22, 311:13-312:13, 317:2-318:23.)
- SHR could hold Whitlock accountable for not conducting himself as a supervisor or as a representative of management, and had held other Team Leads accountable in the past. (Tr. 41:15-44:10, 79:25-88:3.)
- Whitlock is paid differently and higher than delivery associates that he supervises. (Tr. 89:12-23; 108:19-109:5, 274:1-16.)

This information, alone, is enough to establish that, under the totality of circumstances, SHR placed Whitlock (presuming he is not a Section 2(11) supervisor, which he is) in a position in which he could reasonably be viewed by delivery associates as closely identified with management. The record is abundantly clear with examples of Whitlock's interactions with other members of management and delivery associates, and Whitlock himself testified to the nature of his interactions. (*See e.g.*, Tr. 221:18-222:4, 223:5-9, 225:24-226:5, 229:19-230:10, 234:25-235:14, 269:9-14, 276:3-277:10, 280:3-24, 282:5-25) Once raised, the Hearing Office had a duty

to complete the record to the extent necessary[11], and the Union had ample notice and opportunity to endeavor to rebut the facts presented. The Hearing Officer did not do the former, and the Union failed to do the latter inasmuch as the facts were incontrovertible.

VI. WHITLOCK'S INVOLVEMENT IN THE CAMPAIGN AND ELECTORAL PROCESS WAS EXTENSIVE AND REQUIRES THAT THE ELECTION BE SET ASIDE AND RE-RUN

It is well-settled that supervisory or managerial involvement in an organizing campaign on behalf of a petitioning labor organization is generally objectionable as it directly and substantially interferes with employee free choice. See, *Harborside Healthcare, Inc.,* 343 NLRB 906 (2004). Here, Whitlock's conduct, in every material respect, is the same or greater than that which the Board on *Harborside* determined to be sufficient to warrant setting aside an election. It is equally well-settled that the utilization of a supervisor, or individual closely aligned with management as an election observer likewise interferes with free choice and is grounds for setting aside an election.

Supervisor taint cases can also involve supervisor solicitation of union authorization cards. In *Stevenson*, the Board explained that supervisor participation in the solicitation of authorization cards: (1) "might well imply to the employee that their employer favors the union"; or (2) might coerce employees into signing authorization cards for fear of future retaliation by the supervisors. 174 NLRB 865 (1969). In *Harborside, supra*, the Board held that supervisor solicitations are inherently coercive absent mitigating circumstances — both explicit and implicit conduct will taint an election. There, the employer ran a nursing home, and the union filed a petition to represent service and maintenance employees. *Id*. at 907. Prior to the election, a licensed practical nurse ("LPN"), who was determined to be a Section 2(11) supervisor, spoke to unit employees about support for the union, and asked associates to sign union cards and to come to union meetings. *Id*.

[11] In the Employer's view, it is more than complete already.

The LPN continued, telling associates that if they did not vote for the union, he/she would lose his/her job because he/she signed a union card. *Id*. The Board stated "absent mitigating circumstances, supervisory solicitation of an authorization card has inherent tendency to interfere with the employee's freedom to choose to sign a card or not." *Id*. at 911. The Board went even further to provide an example when it is not clear whether the associate is a supervisor:

> Our dissenting colleagues also complain that, persons who solicit in the belief that they are employees may ultimately be held to be supervisors, and their conduct will thus be objectionable. Although there are no facts in this case, our colleagues are correct. However, the law is evenhanded in this respect. For example, if an individual whom an employer believes is not a supervisor tells an employee that unionization will lead to plant closure, and the Board later determines that the individual is a supervisor, the employer may be liable for the conduct. The essential point, in both cases, is that employees should be free from coercive or interfering tactics by individuals who are supervisors, even if the employer or union believes that the individual is not a supervisor.

Id. Further, and in contradiction to the Hearing Officer's recommendation , the Board stated that simply because the solicitation of cards occurred prior to the filing of the petition (outside the critical period):

> …*does not* necessarily mean that the conduct is not cognizable as an objection because the impact of the supervisor's solicitation would ordinarily continue to be felt during the critical period. This is so because of the power of the supervisor over an employee. We think that the solicited employee would be very reluctant to ask a supervisor for the return of a signed card, should the employee change his mind about the wisdom of having signed it.

Id. at 912. The Board then stated that it will consider pre-petition conduct that "is sufficiently serious to have affected the results of the election." *Id*. at fn. 21.

Despite repeated concerns regarding his status, Whitlock served as the Union's election observer in the subject election (Tr. 182:21-22, 236:23-237:1); and, it is difficult to imagine a series of facts in which an individual was more extensively and prominently involved in a union's organizing efforts than was Whitlock in the instant case. Thus, Whitlock, by his own admission,

campaigned “hot and heavy” on behalf of the union. (Tr. 235:15-20.)Alone, and in the company of union organizers, he advocated for the Union with his subordinates, solicited them on behalf of the Union, accompanied Union organizers on employee home visits, met with employees and Union representatives for lunch, made pro-union phone calls, sent text messages and otherwise disseminated pro-union campaign materials to his subordinates and other rank-and-file employees. The Company outlined the many undisputed instances in which Whitlock interfered with delivery associate’s Section 7 rights to organize without supervisory coercion in its prior supporting briefs, including:

- Whitlock admitted he was a lead organizer. Specifically, he was “approached by an organizer. [Whitlock] liked what [the Union organizer] had to say. And [he] took [his] role - [he] talked to people about the campaign” (Tr. 235:17-20);
- As one of the lead Union organizers, Whitlock went to delivery associates’ homes, called and text messaged delivery associates, told the international and local Union organizers who they needed to talk to, and asked delivery associates to sign Union authorization cards (Tr. 283:23-284:7);
- Whitlock went to Christopher Duncan’s, Delivery Associate, house with a Union organizer to discuss why Duncan should join the Union (Tr. 208:7-17);
- Whitlock called and texted Duncan throughout the critical period to make sure he was still “on board” with the Union (Tr. 210:9-211:24);
- Whitlock discussed why delivery associates needed the Union, while on the clock, on more than one occasion, as testified to by John Brent and Shawn Piatt (Tr. 183:7-184:6, 216:1-15);

- Whitlock had Union organizers target William (Gibby) Kohout, by having the organizers wear cowboy boots and talk about guns and the NRA, incorrectly stereotyping Kohout (Tr. 198:9-22);
- Whitlock called Kohout and told Kohout not to tell anyone Whitlock had called because Whitlock "could get fired for this" (Tr. 196:9-11, 197:24-198:6); and
- Whitlock asked associates to sign Union authorization cards (Tr. 196:1-7, 196:25-197:15).

It is precisely this type of pervasive, and aggressive supervisory conduct that taints the electoral process and requires the election results be set aside. It is self-evident that there cannot be a fair election process, nor can there be requisite "laboratory conditions" for one when employees, are repeatedly confronted by their supervisor who is aggressively advocating on behalf of the Union; and, who are again confronted with that same individuals, wearing official government identification designating him as "Union Observer", in the formal polling place itself, accompanied by an NLRB official.

It is also Whitlock's action as the Union's designated election observer that likewise destroys the requisite laboratory conditions and compels vacating the election results. Board law requires that an election must be set aside if a party's election observer is a statutory supervisor, or, could be reasonably perceived as being "closely aligned with management." *First Student, Inc.,* 355 NLRB 410, 410 (2010) (expanding on the rule in *In re Family Serv. Agency,* 331 NLRB 850 (2000) which stated that "either party's use of a statutory supervisor as an election observer constitutes objectionable conduct"). The no supervisor/closely aligned with management observer rule is "aimed primarily at preventing intimidation that might take place should the employer choose to have supervisory employees present." *Diamond Int'l Corp. v. NLRB*, 646 F.2d 1, 3 (1st Cir. 1981). The Board has also noted, however, that "[t]he rule would appear equally applicable

should a union choose to have a statutory supervisor as an observer." *Embassy Suites Hotel, Inc.*, 313 NLRB 302, 302 n.4 (1993).

Under current Board law, the prohibition of statutory supervisor observers by either party *also* applies when an observer is not technically a Section 2(11) supervisor if the individual is found to be closely aligned with management: his presence as the employer's observer at . . . voting sessions is *per se* objectionable and warrants setting aside of the first election. *Southland Frozen Foods, Inc.*, 282 NLRB at 770 ("[T]he test for determining whether an individual properly may serve as an observer is not limited to an inquiry into whether the individual is a statutory supervisor, but it also includes an inquiry into whether the individual is closely identified with the employer.") Thus, even if the Board finds Whitlock was not a Section 2(11) supervisor, the record has established, threefold, that Whitlock was closely aligned with management and his role as the Union's election observer was unlawful under the Act.

VII. THIS RC PETITION DEMONSTRATES WHY IT IS AN ERROR BY A REGION TO CONDUCT AN ELECTION BEFORE DETERMINING THE SECTION 2(11) STATUS OF TEAM LEADS

Since August 9, 2019, SHR has urged the Region to determine the supervisory status of the Team Leads prior to the election. Specifically, Section 2(11) status was needed to be determined prior to the election because the Company and delivery associates viewed them as Supervisors, and the Team Leads were actively involved in the Union's campaign, and as a result, Team Leads tainted the pre-petition signatures for representation and engaged in objectionable conduct during the sterile period. The then-Acting Regional Director declined to make a determination prior to the vote, and the current Regional Director still does not see the fundamental flaw in this denial..

On December 18, 2019, the Board issued modifications to representation case procedures. These modifications support the Company's argument that the supervisory status of the Team Leads should have been decided prior to the election was ordered. As stated by the Board, "the changes clarify some procedures that better ensure the opportunity for resolution of unit scope and voter eligibility issues prior to an election..." NLRB Fact Sheet, Revisions to the Board's Representation Case Procedures, https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-7843/representation-case-procedures-fact-sheet.pdf (Dec. 2019). Relevant to this matter, the Board stated that disputes regarding unit scope and voter eligibility, including supervisory status, should be litigated at the pre-election hearing and resolved by the regional director before an election is directed. According to the Board, this new rule promotes fair and accurate voting, and transparency by better defining the unit prior to the election. Specifically to the supervisory issue, "the final rule will give better guidance to the employees and parties and will help avoid conduct that may give rise to objections and unfair labor practices." 84 F.R. § 69524.

This new rule is exactly what the Company asked Region 5 and the then-Acting Regional Director to do. If the Team Leads were found to be Section 2(11) Supervisors from the onset of the Petition being filed, the Union may not have used a Team Lead as its chief organizer or the polling observer during two (2) of the election periods when most voters cast ballots. Moreover, delivery associates would have known that the Team Leads could not inhibit their Section 7 rights, and charges and/or objections could have been filed against the Team Leads for engaging in improper and unlawful conduct. Importantly, most of the Objections filed relate to Team Lead(s) conduct, all of which could have been decided by the Acting Regional Director well before the election. Instead, the Region refused to hear this important issue at the onset. Given the Board's

recent guidance, it is not too late to correct this error. The Board can recognize the impact on Section 7 voter rights allowing the Team Leads to campaign for the Union in this factual context, recognize that the decision is not consistent with current Board guidance, and rerun the election.

VIII. CONCLUSION

Based on the foregoing, the Board should overrule the Regional Director's Decision, sustain the Company's Exceptions and Objections, and order a rerun election without interference from the Team Leads Section 2(11) Statutory Supervisors.

Dated this 28th day of August, 2020.

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

By: _____

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Counsel for Sysco Hampton Roads, Inc.

ATTACHMENT A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

SYSCO HAMPTON ROADS, INC.,	)	
	)	
Employer,	)	
	)	
and	)	**Case No. 05-RC-245597**
	)	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS UNION, LOCAL 822, AFL-CIO, CLC,	)	
	)	
Petitioner.	)	
	)	

MOTION FOR COLLATERAL INVESTIGATION,
DISMISSAL OF PETITION AND POSTPONEMENT OF HEARING

The Employer, Sysco Hampton Roads, Inc. ("Sysco Hampton Roads" or "Employer"), through undersigned counsel, requests an administrative investigation of the Petitioner's showing of interest.[1] This request is based on evidence that the Employer's Team Lead, Joseph Whitlock ("Whitlock"), actively participated in securing the Petitioner's showing of interest without the knowledge or consent of the Employer, thereby violating the employees' rights under Section 7 of the National Labor Relations Act ("the Act"). To the extent he did so with the knowledge of the Union, the Union has violated Section 8(b) of the Act as well.

Whitlock is a statutory supervisor pursuant to Section 2(11) of the Act. Indicia of supervisory status includes:

> Mr. Whitlock works from the main Suffolk location. He is the only transportation supervisor on the night shift.

[1] *Georgia Craft Co.*, 120 N.L.R.B. 806 (1958); *Globe Iron Foundry*, 112 N.L.R.B. 1200 (1955).

Mr. Whitlock effectively recommends approval of transfers.

Mr. Whitlock effectively recommends the termination or retention of probationary employees.

Night drivers look to Mr. Whitlock as their supervisor.

Mr. Whitlock, without approval from others, schedules drivers for days off without pay.

Mr. Whitlock directs the work of drivers. He regularly changes scheduled routes from 10 to 8 hours at his sole discretion.

Mr. Whitlock determines, in his sole, discretion when and how defective trailers are replaced.

Mr. Whitlock receives all driver call outs. Mr. Whitlock decides, in his sole discretion, how routes are covered when call outs occur and who covers them.

Mr. Whitlock ranks drivers for awards such as the "Top Dog Award" and "Hall of Fame" award.

Mr. Whitlock receives at least a dollar more per hour than drivers.

Mr. Whitlock has his own mailbox like other supervisors. Drivers do not have mailboxes.

Mr. Whitlock administers safety awards and coaching through the "Origami" program. Only supervisors and leads do this.

Mr. Whitlock effectively recommends scheduling of drivers to compensate for vacations, shortages at the various locations, and other staffing matters.

Witnesses will include Supervisors Mr. John McMurtrie and Mr. Matt Race.

The Company has sent evidence of taint by separate cover to preserve the secrecy of the witness, who fears retaliation from Mr. Whitlock.

This coercive conduct was directed toward employees who are supervised by Whitlock as well as other employees. *Glen's Market and UFCW Local 876*, 344 N.L.R.B. No. 25 (February 22, 2005). Accordingly, Petitioner's showing of interest was illegally obtained and is tainted by supervisory intervention and participation. *Harborside Healthcare, Inc. and Service Employees International Union*, Local 47, 343 N.L.R.B. No. 100 (December 8, 2004), *on remand from Harborside, Inc. v. NLRB*, 230 F.2d 206 (6th Cir. 2000).

The Region should invoke the Board's blocking charge policy and cease further processing of this R case matter until the showing of interest and unfair labor practice issues have been fully investigated. Thus, the hearing currently scheduled for August 12, 2019 should be cancelled, and any further rescheduling (if appropriate) should await the outcome of these investigations. It is likely that a full investigation of these issues will lead to dismissal of the petition.

WHEREFORE, the Employer asks that the petition be dismissed with prejudice[2] and with instructions that Petitioner be precluded from attempting to secure a new showing of interest for no less than six (6) months following the dismissal. This minimal period of time is necessary to remove the taint of supervisory participation and to ensure the employees' ability to freely and properly exercise their Section 7 rights.

Additionally, the Employer asks that the R case hearing in this matter, currently scheduled for August 12, 2019, be postponed while the Regional Director conducts the requested Collateral Investigation.

[2] *Sourdough Sales*, 246 N.L.R.B. 106 (1979); *Dexter Foods, Inc*., 209 N.L.R.B. 369 (1974).

Dated: August 9, 2019

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

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CERTIFICATE OF SERVICE

This is to certify service of the above and foregoing SYSCO HAMPTON ROADS, INC.'S MOTION FOR COLLATERAL INVESTIGATION TO DISMISS PETITION AND POSTPONE HEARING by electronic mail to the below indicated counsel of record for the Union and by electronic filing to the Regional Director for Region 5 on this the 9th day of August, 2019.

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ATTACHMENT B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

Sysco Hampton Roads, Inc.,	)	
Employer,	)	
	)	
and	)	**Case No. 05-RC-245597**
	)	
International Brotherhood of Teamsters,	)	
Local Union 822	)	
Petitioner.	)	
	)	

EMPLOYER'S REQUEST FOR REVIEW OF THE ACTING REGIONAL DIRECTOR'S DECISION ON OBJECTIONS 1 AND 8

Employer, Sysco Hampton Roads, Inc. ("SHR" or the "Company"), through undersigned counsel, and pursuant to § 102.69(c)(2) of the National Labor Relations Board's (the "Board") Rules and Regulations, files this Request for Review of the Decision on Objections 1 and 8 issued by the Acting Regional Director for Region 5 (the "ARD") on September 27, 2019. The Board should grant this Request for Review because: (1) a substantial question of law and policy is raised; (2) the ARD's action departs from officially reported Board precedent and the Rules and Regulations; and (3) there are compelling reasons for reconsideration of an important Board rule or policy.

I. STATEMENT OF THE CASE

SHR sells, markets, and distributes food products to a wide variety of customers who prepare meals outside of the home. SHR's main facility is located in Suffolk, Virginia. It also operates six domicile yards throughout Virginia and North Carolina.[1]

[1] The domicile yards are located in Richmond, Virginia; Williamsburg, Virginia; Virginia Beach, Virginia; Elizabeth City, North Carolina; Manteo, North Carolina; and Maple (Currituck), North Carolina.

On or about July 26, 2019, the International Brotherhood of Teamsters, Local Union 822 (the "Union") filed a representation petition ("First Petition") with the Board. The First Petition was served on the Company on July 29, 2019.[2] On August 2, 2019, SHR filed a Motion to Dismiss the Union's First Petition ("Motion to Dismiss")[3] because it lacked vital information required by the Board's Rules and Regulations. That same day, and as a result of the Company's Motion to Dismiss, the Union filed its First Amended Petition ("Petition").[4] On August 5, 2019, the ARD denied the Company's Motion to Dismiss.[5] On August 9, 2019, SHR filed a Motion for Collateral Investigation, Dismissal of Petition and Postponement of Hearing ("Motion to Dismiss II"), establishing that the Team Leads were Section 2(11) supervisors, and that the Petition's showing of interest was tainted by one of the Team Leads, Joseph Whitlock.[6] The Company then timely filed its statement of position[7] and prepared for a hearing. On August 9, 2019, ARD held that the supervisory issue would not be resolved prior to the hearing because the Team Leads represented less than 20% of the voting unit.[8]

Because of the ARD's decision to defer ruling on the Section 2(11) supervisory status issue, the Company, Union, and the Region[9] began discussions regarding a stipulated election agreement.

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[2] Attachment A, First Petition.

[3] Att. B, August 2, 2019 Motion to Dismiss.

[4] Att. C, First Amended Petition.

[5] Att. D, Order Denying Company's August 2, 2019, Motion to Dismiss.

[6] Att. E, Motion to Dismiss II.

[7] Att. F, SHR's Statement of Position.

[8] This was either communicated via email or telephone through Stephanie Eitzen ("Ms. Eitzen"), Field Attorney, NLRB - Region 5.

[9] Through Ms. Eitzen.

At that time, SHR's counsel and Ms. Eitzen discussed waiver of the Company's current position, including the Section 2(11) supervisory status and supervisory taint issues. In an email dated August 11, 2019, SHR's counsel reiterated that SHR was in no way waiving its pre-election positions and reserved the right to pursue them, if necessary.[10] Ms. Eitzen responded with "Thank you. This looks good to me…" Based on this preservation and assurance, SHR entered into a stipulated election agreement.[11]

On August 29, 2019, the Region conducted a representation election. The tally of the ballots revealed that a majority of those casting ballots voted for Union representation.

II. THE OBJECTIONS AND THE ARD'S ERRONEOUS FINDINGS

On September 5, 2019, the Company timely filed Objections to the election and conduct affecting the results of the election, and an accompanying Offer of Proof.[12] SHR also requested additional time to supplement its Offer of Proof with additional evidence, which the Region granted. The Company filed its Supplemental Offer of Proof on September 12, 2019.[13] Relevant to this Request for Review, the Objections state:[14]

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[10] Att. G, Email from Counsel dated August 11, 2019.

[11] Att. H, Stipulated Agreement.

[12] Att. I, Objections and Offer of Proof. For confidentiality of the witnesses, the Company has redacted the Offer of Proof from the service copy to the Union.

[13] Att. J, Supplemental Offer of Proof. For confidentiality of the witness, the Company had redacted the Supplemental Offer of Proof from the service copy to the Union.

[14] The Acting Regional Director dismissed Objection 5 because the Company agreed that the Team Leads would vote subject to challenge. As demonstrated in this Request for Review, the Company had no choice but accept this condition. The ARD told the parties that she would not consider supervisory status at any hearing and this discretionary decision is permitted by the Board's regulations. GC Memorandum 15-06, p. 18 (2015); CHM § 11084.3. At the same time, the regulations provide for no prehearing mechanism that allows the Company to challenge this decision. It would make little sense to demand a hearing only to be told on the record again that the issue of supervisory status would not be considered at the hearing. If the ARD had made the determination of Section 2(11) supervisory status of the Team Leads before the election, they would not have been able to vote, would not have been able to go anywhere near the voting area, and would not have been able to act as the Union's observer at the largest polling area for two (2) polling sessions.

> OBJECTION #1: The Petition should have been dismissed because a known supervisor as defined by Section 2(11) of the Act tainted the showing of interest supporting the petition.
>
> OBJECTION #8: The representation petition in this matter should have been dismissed because the Union failed to satisfy the requirements of Section 102.61(a)(11-12) of the Rules and Regulations when they failed and refused to specify timely voting type, date(s), time(s), and location(s) of the election sought.

The ARD issued a Decision on Objections 1, 5, 7 and 8, and Order Directing Hearing and Notice of Hearing on Objections 2 Through 4 and 6 on September 27, 2019.[15] The decision states the states the following related to the Company's Objections 1 and 8:

> OBJECTIONS 1 & 8: Employer's objections 1 and 8 are related because they both state that the petition should have been dismissed. Moreover, they both concern issues that the Employer raised, and I addressed, before the election. Objection 1 concerns the alleged supervisory taint of showing of interest. I previously decided that the Employer's supporting evidence of alleged supervisory taint was insufficient to invalidate the showing of interest. Now, after an election has been held, the adequacy of the showing of interest is irrelevant. *Gaylord Bag Co.*, 313 NLRB 306 (1993). Objection 8 concerns the omission to the Petitioner's proposal regarding the election date, time, and location in the original petition.[16] That objection is now also moot after the parties have entered into a Stipulated Election Agreement and the election has been conducted. In addition, by Order dated August 5th, I denied the Employer's Motion to Dismiss the Petition on these grounds.

The Acting Regional Director also dismissed Objection 7 regarding the Board Agent's failure to co-mingle the ballots. While the Company believes that the failure to comingle may result to discrimination and retaliation by the Union, it is not requesting review of the decision as to this Objection. The Company will state that the amount of voters at each domicile location made obvious how many associates voted and for whom, thus creating targets in the areas where drivers voted for the Company instead of the Union, as the Union predicted.

[15] Att. K, Decision on Objections 1, 5, 7 and 8, and Order Directing Hearing And Notice of Hearing on Objections 2 Through 4 and 6.

[16] The footnote reads: "The Petitioner filed the representation petition on July 26 and an amended petition, providing its proposal regarding the election date, time and location, on August 2."

III. ARGUMENT

A. Requests for Review, Generally

Pursuant to Section 102.67(d) of the Board's Rules and Regulations, as incorporated by Section 102.69(c)(2), a party may request review of a Regional Director's post-election Decision on Objections on one or more of the following grounds:

> (1) That a substantial question of law or policy is raised because of:
>
> (i) The absence of; or
>
> (ii) A departure from, officially reported Board precedent.
>
> (2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
>
> (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
>
> (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

29 C.F.R. § 102.67(d).

In this case, the Board should grant Review because the ARD's action, on its face, departs from officially reported Board precedent, and is clearly erroneous on the record in a manner prejudicially affecting the rights of the parties. Furthermore, the ARD's action and this Request for Review involve changes to the Board's Election Rules effective April 14, 2015, and compelling reasons exist for reconsideration of application of those Rules.

B. The Acting Regional Director Erred In Dismissing Objection 1.

As a general rule, pre-petition conduct may be considered where it "adds meaning and dimension to related conduct." *Dresser Industries*, 242 NLRB 74 (1979). Moreover, pre-petition conduct can be a basis for an objection when the activity is "likely to have significant impact on the election." *See Royal Packaging Corp.*, 284 NLRB 317 (1987); *Gibson's Discount Center*, 214

NLRB 221 (1974). The Board has gone on to find that pre-election campaign interference may be subject to both unfair labor practice charges and objections to an election. NLRB Outline of Law and Procedure in Representation Cases § 24-300.

In *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004), the Board affirmed *Gibson's Discount Center's* exception in the context of supervisor coercion to get employees to sign union authorization cards. There, the employer ran a nursing home, and the union filed a petition to represent service and maintenance employees. *Id*. at 907. Prior to the election, a licensed practical nurse ("LPN"), who was determined to be a Section 2(11) supervisor, spoke to unit employees about support for the union, and asked associates to sign union cards and to come to union meetings. *Id*. The LPN continued, telling associates that if they did not vote for the union he/she would lose his/her job because he/she signed a union card. *Id*. The Board stated "absent mitigating circumstances, supervisory solicitation of an authorization card has inherent tendency to interfere with the employee's freedom to choose to sign a card or not." *Id*. at 911. The Board went even further to provide an example when it is not clear whether the associate is a supervisor:

> Our dissenting colleagues also complains that, persons who solicit in the belief that they are employees may ultimately be held to be supervisors, and their conduct will thus be objectionable. Although there are no facts in this case, our colleagues are correct. However, the law is evenhanded in this respect. For example, if an individual whom an employer believes is not a supervisor tells an employee that unionization will lead to plant closure, and the Board later determines that the individual is a supervisor, the employer may be liable for the conduct. The essential point, in both cases, is that employees should be free from coercive or interfering tactics by individuals who are supervisors, even if the employer or union believes that the individual is not a supervisor.

Id. Further, and most important to the argument now being made by the ARD, the Board stated that simply because the solicitation of cards occurred prior to the filing of the petition (outside the critical period):

> …*does not* necessarily mean that the conduct is not cognizable as an objection because the impact of the supervisor's solicitation would ordinarily continue to be felt during the critical period. This is so because of the power of the supervisor over an employee. We think that the solicited employee would be very reluctant to ask a supervisor for the return of a signed card, should the employee change his mind about the wisdom of having signed it.

Id. at 912. The Board then stated that it will consider pre-petition conduct that "is sufficiently serious to have affected the results of the election." *Id*. at fn 21.

Here, the Company filed its Motion to Dismiss II on August 9, 2019, prior to signing the stipulated agreement on October 11, 2019. It was accompanied by an offer of proof from voting unit employees who had been coerced by a supervisor in an effort to get these employees to sign union cards and support the Union.[17] At that time, the ARD denied[18] the Company the opportunity to present evidence of Section 2(11) supervisor status and taint at a hearing prior to the signing a stipulated agreement, stating that she found the Company's presented evidence was "insufficient,"[19] and that the status of the alleged Section 2(11) supervisors would not be determined until after the election, if necessary, because the Team Leads represented less than 20% of the petitioned-for unit.[20] Only after these events occurred did the Company agree to a

[17] Att. L. Company's Offer of Proof for Motion to Dismiss II. For confidentiality of the witnesses, the Company has redacted the Offer of Proof from the service copy to the Union.

[18] It is important to note, that the Company is not aware of a formal issuance of a Decision on its Motion to Dismiss II. The Company reviewed the NLRB's docket, and went through emails from the ARD's secretary and Ms. Eitzen, and has found no Decision on the matter.

[19] The Region provided the Company with two days to gather evidence to provide to the ARD. In that small period of time, the Company was able to provide the Region with an offer of proof demonstrating clear supervisory taint. A party's offer of proof need not present a voluminous narrative to warrant a hearing. As former Members Miscimarra and Johnson explained upon implementation of the current Representation Case Rules, an offer of proof "is an informal short-form description of potential evidence." 79 Fed. Reg. 74308, 74446 (December 15, 2014) (dissenting views of Members Miscimarra and Johnson).

[20] Pursuant to GC Memo 15-06, p. 11, the Regional Director will determine which issues will be litigated at the hearing. Here, the Regional Director made it clear to the Company that any issue related to Section 2(11) supervisory status and supervisory taint would not be heard at a hearing before the election.

stipulated election agreement, but only under the condition that it was not waiving its arguments related to dismissing the Petition, a condition that was not rejected by the Region.[21] Now, the Region contends that tainted support for the Petition is "irrelevant" because the election has already been held. This ruling is clearly erroneous. It departs from officially reported Board precedent. *See Harborside Healthcare, Inc., supra.* Further, the ruling provides compelling reasons for reconsideration of an important Board rule or policy.

The ARD's ruling is clearly erroneous. The ARD has in fact completely avoided considering, much less deciding, the issue of tainted support for the Petition by ignoring it until after the election and then saying the fact of tainted support for the Petition is "irrelevant" because the election has been held. This cannot be the way the Regulations were intended to be used. Supervisory taint of an election petition is an extremely serious matter and should be addressed at a time when the finding can have real meaning. In a case such as this, where the taint was obvious, the issue of supervisory status and the tainted of the showing of interest they generated should be litigated prior to any election. If taint is shown, the Petition should be dismissed. If this is not the law, it should be. As the Board observed in *Harborside Healthcare, Inc., supra*, the critical factor is whether the voters are "…free from coercive or interfering tactics by individuals who are supervisors…" It is impossible to be free of such interference when voters go into the booth not knowing if the primary Union supporter (and one of its election observers) is a Section 2(11) supervisor.

The ruling was also clearly prejudicial. The Company has every right to expect both a duty of loyalty from its supervisors and that their supervisors will not coerce employees in the exercise of their choice in whether to select union representation. The Company was denied both of these

[21] *See* Att. G.

legitimate expectations when the ARD refused to consider whether the Team leads were Section 2(11) supervisors while allowing them to solicit support for the Union and act as Union observers. The prejudice to the Company in refusing to consider these issues prior to any election and then declaring them "irrelevant" after the election is obvious.

For the reasons set forth above, the Objection should be sustained and the Petition should be dismissed. Alternatively, the election results should not be certified and a new election should be conducted. The new election should not be conducted until at least 90 days after a new election is ordered to allow time for the effects of the supervisory taint to dissipate.

C. The Acting Regional Director Erred In Dismissing Objections 8.

Section 102.61(a)(11-12) of the Board's Rules and Regulations state that RC petitions shall contain "the type, date(s), time(s), and location(s) of the election sought" and "any other facts." (emphasis added) *see also* GC Memo 15-06, p. 2. The Outline of Law and Procedure in Representation Cases 3-500, citing to the Case Handling Manual § 11011, states that when a petition does not meet sufficiency for any reason, the petitioner should be requested to withdraw the petition.

Despite the specific and unequivocal rules and procedures in place, the ARD allowed the Union to amended the First Petition. Such allowance grants the Union a license to nullify the clear requirements of the Board's regulations. It permits the Union to delay stating its election preferences until well after the petition is filed in direct violation of the requirements of the regulations. It is unfair and prejudicial to an employer to be required by a Region to guess about how and when the union might want the election for which it petitioned. Essentially, this places the onus on the employer to select the election details sought by the union when the regulations

require the exact opposite. The ARD decision, then, is clearly a departure from established Board rules and was prejudicial to the interests of the Employer.[22]

D. The Decision to Deny a Hearing on Objections 1 and 8 Result from the Invalid 2015 Changes to Representation Case Rules.

The Representation Case Rules, as currently construed, impermissibly infringe upon the Company's free speech and due process rights, as well as its access to legal representation. The Rules also undermine employee free choice and privacy rights, thus violating the Company's and employees' rights as guaranteed under the Act. Former Members Miscimarra and Johnson explained these issues more fully in their dissenting opinions to implementation of the current Rules. 79 FR at 74308, 74430-60. The Company adopts and relies upon every argument described by Members Miscimarra and Johnson regarding the invalidity and inappropriateness of the current Rules.

Two specific aspects of the 2015 changes deprive the Company and its employees of due process rights here. First, the final rule, as currently interpreted, leaves Regional Directors the discretion on when he/she can defer unit issues regarding individual eligibility or inclusion. GC Memo 16-04, p. 8, CHM §11084.3. Since the rule, a Regional Director "ordinarily" needs not to decide issues on eligibility and inclusion prior to the election. Outline of Law and Procedure § 3-890; Rule §102.64(a). Here, the issue of whether the Team Leads were Section 2(11) supervisors should have been reviewed *before* the election because it would have substantially affected the validity of the election. Since the Petition was filed, the Company has argued and presented evidence of Section 2(11) supervisor status, and supervisory taint of the Team Leads. Had the ARD made a determination on the issue before the election, instead of deferring the issue, the

[22] Similar to the Company's Objection 1, this issue was preserved by counsel for SHR, and the Company should now be afforded an opportunity to litigate the matter to the extent possible under the law.

parties would have had an actual answer to the supervisory and taint issue, the parties would not have to potentially run another election due to the objectionable conduct, and the parties would have known whether Team Leads could not act on the Union's behalf based on their supervisory status. Instead, the ARD failed to make a determination, which has now caused objections, a hearing, a request for review, and the need for another election if the Petition is not dismissed as it should be. Specifically, six (6) of the eight (8) Objections revolve around these 2(11) supervisory and taint specific issues. All of which could have been eliminated if the ARD heard evidence when requested in early August 2019.

Second, § 102.69(c)(2) now provides that the Board will review all appeals of Regional Directors' post-election Decisions on a discretionary, rather than mandatory, basis. As former Members Miscimarra and Johnson explained, this change undermines uniformity in representation cases and encourages an increase in inefficient test of certification cases. 79 FR 74308, 74449-51. Perhaps most disconcertingly, elimination of mandatory review diminishes the role of the Presidentially-appointed and Senate-confirmed Board Members, contrary to Congress's statutory framework. This change deleteriously affects every representation case in which post-election proceedings occur, and every Request for Review, including the instant Request.

As a result, the Board should adopt interpretations of the Rules that clarify them in circumstances like those presented by this case. The Board should recognize that supervisory taint of the showing of interest supporting a representation petition is not a case that "ordinarily" would permit the Regional Director to defer the question of supervisory status. Where the issue of Section 2(11) supervisory status is raised in the context of demonstrating that the showing of interest supporting a petition is tainted by supervisory coercion, the status of the individuals tainting the petition should be determined before any election is held. If supervisory status is shown, then the

issue of whether the petition was tainted should also be decided ***before*** an election is held. If supervisory taint of the showing of interest is established, then the petition should be ***dismissed*** with other relief dependent upon the circumstances proved at a hearing.

IV. CONCLUSION

For the reasons set forth above, the Request for Review should be granted, and the Board should direct the Regional Director to sustain Objections 1 and 8 in this case.

Dated this 10th day of October, 2019.

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

By:

Douglas M. Topolski

1909 K Street, N.W., Suite 1000
Washington, DC 20006
Telephone: 202.263.0242
Facsimile: 202.887.0866
Email: douglas.topolski@ogletree.com

Counsel for Sysco Hampton Roads, Inc.

FORM NLRB-502 (RC)
(2-18)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
RC PETITION

DO NOT WRITE IN THIS SPACE	
Case No. 5-RC-245597	Date Filed 7/26/19

***INSTRUCTIONS:** Unless e-Filed using the Agency's website, www.nlrb.gov/, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.*

1. PURPOSE OF THIS PETITION: RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. **The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.**

2a. Name of Employer:	2b. Address(es) of Establishment(s) involved *(Street and number, City, State, ZIP code)*:
Sysco Hampton Rds. Inc.	7000 Harbour View Blvd. Suffolk, VA 23435
3a. Employer Representative - Name and Title: Scott Thibodeau, President	3b. Address *(if same as 2b - state same)*: Same

3c. Tel. No.	3d. Cell No.	3e. Fax No.	3f. E-Mail Address
757-673-4000	Unk	757-673-4148	Thibodeau.scott@shr.sysco.com

4a. Type of Establishment *(Factory, mine, wholesaler, etc.)*	4b. Principal Product or Service	5a. City and State where unit is located:
Food service delivery	Food	Suffolk, VA.

5b. Description of Unit Involved:
Included:
See attachment A
Excluded:
All others and security guards as defined by the act.

6a. Number of Employees in Unit: 86

6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? [x] Yes [ ] No

Check One: [ ] 7a. Request for recognition as Bargaining Representative was made on (Date) _____ and Employer declined recognition on or about (Date) _____ (If no reply received, so state).
[ ] 7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8a. Name of Recognized or Certified Bargaining Agent *(If none, so state)*	8b. Address:

8c. Tel. No.	8d. Cell No.	8e. Fax No.	8f. E-Mail Address

8g. Affiliation, if any:	8h. Date of Recognition or Certification	8i. Expiration Date of Current or Most Recent Contract, if any *(Month, Day, Year)*

9. Is there now a strike or picketing at the Employer's establishment(s) involved? _____ If so, approximately how many employees are participating? _____
(Name of Labor Organization) _____, has picketed the Employer since *(Month, Day, Year)*

10. Organizations or individuals other than Petitioner and those named in items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. *(If none, so state)*

10a. Name	10b. Address	10c. Tel. No.	10d. Cell No.
		10e. Fax No.	10f. E-Mail Address

11. Election Details: If the NLRB conducts and election in this matter, state your position with respect to any such election: 11a. Election Type: [ ] Manual [ ] Mail [ ] Mixed Manual/Mail

11b. Election Date(s):	11c. Election Time(s):	11d. Election Location(s):

12a. Full Name of Petitioner *(including local name and number)*:	12b. Address *(street and number, city, State and ZIP code)*:
Teamsters Local 822	5718 Bartee St. Norfolk, VA. 23502

12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent *(if none, so state)*:
International Brotherhood of Teamsters

12d. Tel. No.	12e. Cell No.	12f. Fax No.	12g. E-Mail Address

13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding:

13a. Name and Title:	13b. Address *(street and number, city, State and ZIP code)*:
Steve Jacobs, Business agent	5718 Bartee St., Norfolk, VA. 23502

13c. Tel. No.	13d. Cell No.	13e. Fax No.	13f. E-Mail Address
757-461-7172	757-647-8351	757-459-2570	sjacobs82276@yahoo.com

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name *(Print)*	Signature	Title	Date
Steve Jacobs	electronic signature	Business agent	7/26/19

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information may cause the NLRB to decline to invoke its processes.

Attachment A

5-RC-245597

ATTACHMENT

"A"

All route drivers, shuttle drivers, van drivers ship drivers, night drivers and all drivers at the following satellite yards:

Richmond, VA

5436 Jefferson Davis Hwy.

Va. Beach VA.

2044 Landstown Ctr. Way

Williamsburg VA.

1570 Penniman, Rd.

Manteo, N.C.

1013 Driftwood Dr.

Maple (Currituck) N.C.

264 Airport Rd.

Elizabeth City, N.C.

660 Old U.S. Hwy 17-S

Attachment A

NATIONAL LABOR RELATIONS BOARD
REGION 5

SYSCO HAMPTON ROADS, INC.,	)	
	)	
Employer,	)	
	)	
and	)	Case No. 05-RC-245597
	)	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 822,	)	
	)	
Petitioner.	)	

SYSCO HAMPTON ROADS, INC.'S MOTION TO DISMISS THE UNION'S PETITION

Sysco Hampton Roads, Inc. (the "Employer"), through undersigned counsel, and pursuant to the National Labor Relations Board Rules & Regulations, the Case Handling Manual, and the Outline of Law and Procedure in Representation Cases, respectfully submits this Motion to Dismiss the International Brotherhood of Teamsters Local 822's (the "Union") Representation Petition, in absence of withdrawal. For the reasons set forth below, the petition should be dismissed absent withdrawal.

ARGUMENT

On or about July 26, 2019, the Union filed a representation petition (the "Petition") with the National Labor Relations Board ("NLRB"), Region 5, in the above-captioned matter. On July 29, 2019, the Petition was served on the Company. The Petition, as filed, lacks vital and required information, including the type, time, date, and place of the proposed election. On July 31, 2019, the Region informed the Employer's counsel that the Union wanted a manual ballot "as soon as possible." As the Region knows, the information provided by the Union is insufficient and does not cure the fatal defects in the Petition. Accordingly, the Union must withdraw the petition.

Attachment B

Alternatively, the Region must dismiss the Petition if the Union fails to withdraw the petition in a timely fashion.

Section 102.61(a)(11)-(12) of the NLRB Rules and Regulations states that RC petitions *shall* contain "the type, date(s), time(s), and location(s) of the election sought," and "any other facts." (Emphasis added). The Outline of Law and Procedure in Representation Cases 3-500, citing to the Case Handling Manual Section 11011, states that when a petition does not meet sufficiency for any reason, the petitioner should be requested to withdraw the petition.

It is not sufficient to permit the Union to amend the existing Petition. The regulations are specific and unequivocally require the Union to inform the Employer of its election preferences at the time the Petition is filed. Allowing an amendment would, in fact, grant the Union a license to delay stating its election preferences until well after the Petition is filed in direct violations of the requirements of the regulations. The Employer should not be required to guess how and when the Union might want an election it is requesting, essentially placing the onus on the Employer to schedule the election sought by the Union when the regulations require exactly the opposite.

Accordingly, the Region should instruct the Union to withdraw the Petition. If the Union refuses to do so, the Regional Director should dismiss the Petition.

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

/s Douglas M. Topolski
1909 K Street N.W., Suite 1000
Washington, DC 20006
Telephone: 202.263.0242
Fax: 202.887.0866
Email: douglas.topolski@ogletree.com

Attachment B

CERTIFICATE OF SERVICE

This is to certify service of the above and foregoing SYSCO HAMPTON ROADS, INC.'S MOTION TO DISMISS THE UNION'S PETITION by electronic mail to the below indicated counsel of record for the Union and by electronic filing to the Regional Director for Region 5 on this the 2nd day of August, 2019.

Ms. Nancy Wilson
Regional Director
National Labor Relations Board
Region 5
100 S. Charles Street, Suite 600
Baltimore, MD 21201
Nancy.Wilson@nlrb.gov

Ms. Stephanie Cotilla Eitzen
Field Attorney
Region 5
100 S. Charles Street, Suite 600
Baltimore, MD 21201
Stephanie.Eitzen@nlrb.gov

Mr. Steve Jacobs
Business Agent
International Brotherhood of Teamsters, Local 822
5718 Bartee Street
Norfolk, VA 23502
sjacobs82276@yahoo.com

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

/s Douglas M. Topolski

1909 K Street N.W., Suite 1000
Washington, DC 20006
Telephone: 202.263.0242
Fax: 202.887.0866
Email: douglas.topolski@ogletree.com

Attachment B

FORM NLRB-502 (RC)
(4-15)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

First Amended RC PETITION

DO NOT WRITE IN THIS SPACE	
Case No. 05-RC-245597	Date Filed

INSTRUCTIONS: Unless e-Filed using the Agency's website, www.nlrb.gov, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.

1. **PURPOSE OF THIS PETITION**: **RC-CERTIFICATION OF REPRESENTATIVE -** A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. **The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.**

2a. Name of Employer	2b. Address(es) of Establishment(s) involved *(Street and number, city, State, ZIP code)*
Sysco Hampton Roads , Inc.	7000 Harbour View Boulevard, Suffolk, VA 23435

3a. Employer Representative – Name and Title	3b. Address (If same as 2b – state same)
Scott Thibodeau President	SAME AS ABOVE

3c. Tel. No.	3d. Cell No.	3e. Fax No.	3f. E-Mail Address
(757) 673-4000		(757) 673-4148	thibodeau.scott@shr.sysco.com

4a. Type of Establishment *(Factory, mine, wholesaler, etc.)*	4b. Principal product or service	*5a. City and State where unit is located:*
food service delivery	food	Suffolk, VA

5b. Description of Unit Involved	6a. No. of Employees in Unit:
Included: Included: All route drivers, shuttle drivers, van drivers, ship drivers, night drivers, and all drivers employed at by the Employer at its Suffolk facility and at the following satellite yards: 1) Richmond VA, 5436 Jefferson Davis Hwy.; 2) Virginia Beach VA, 2044 Landstown Center Way; 3) Williamsburg VA, 1570 Penniman Road; 4) Manteo N.C., 1013 Driftwood Dr.; 5) Maple (Currituck) N.C., 264 Airport Road; and 6) Elizabeth City N.C., 660 Old U.S. Hwy 17-S **Excluded:** All other employees and security guards as defined by the Act	86 6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes [x] No [ ]

Check One: ____ 7a. Request for recognition as Bargaining Representative was made on (Date) _____ and Employer declined recognition on or about _____ (Date) *(If no reply received, so state).*

____ 7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8a. Name of Recognized or Certified Bargaining Agent ***(If none, so state).***	8b. Address
None	

8c. Tel No.	8d Cell No.	8e. Fax No.	8f. E-Mail Address

8g. Affiliation, if any	8h. Date of Recognition or Certification	8i. Expiration Date of Current or Most Recent Contract, if any *(Month, Day, Year)*

9. Is there now a strike or picketing at the Employer's establishment(s) involved? x None If so, approximately how many employees are participating? _____
(Name of labor organization) _____ has picketed the Employer since *(Month, Day, Year)* _____.

10. Organizations or individuals other than Petitioner and those named in items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. *(If none, so state)*
None

10a. Name	10b. Address	10c. Tel. No.	10d. Cell No.
None		10e. Fax No.	10f. E-Mail Address

11. **Election Details:** If the NLRB conducts an election in this matter, state your position with respect to any such election.		11a. Election Type: x Manual ___ Mail ___ Mixed Manual/Mail
11b. Election Date(s): Thursday August 15th 2019	11c. Election Time(s): Suffolk facility 2am to 6am, 6pm to 9pm ,/ satellite yards 1;30am to 5:30am, 3pm to 6pm	11d. Election Location(s): Suffolk Main Site, 7000 Harbour View Blvd, Suffolk, VA 23435, All satellite yards, (1) Richmond VA, 5436 Jefferson Davis Hwy, (2) Virginia Beach VA, 2044 Landstown Centre Way; (3) Williamsburg VA, 1570 Penniman Road;(4) Manteo N.C, 1013 Driftwood Dr; (5) Maple (Currituck) N.C 264 Airport Road; (6)Elizabeth City N.C, 660 Old U.S Hwy 17-S

12a. Full Name of Petitioner (***including local name and number)***	12b. Address *(street and number, city, state, and ZIP code)*
Teamsters Local 822	5718 Bartee Street, Norfolk, VA 23502

12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent *(if none, so state)*
International Brotherhood of Teamsters

12d. Tel No.	12e. Cell No.	12f. Fax No.	12g. E-Mail Address
(630) 202-3688			raul_05@comcast.net

13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.

13a. Name and Title	13b. Address *(street and number, city, state, and ZIP code)*
Raul Alfaro	5718 Bartee Street, Norfolk, VA 23502

13c. Tel No.	13d. Cell No.	13e. Fax No.	13f. E-Mail Address
(630) 202-3688	757-647-8351	757-459-2570	raul_05@comcast.net

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name *(Print)*	Signature	Title	Date
Raul Alfaro			

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

Attachment C

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq*. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Attachment C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

SYSCO HAMPTON ROADS, INC.

Employer

and Case 05-RC-245597

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS LOCAL 822

Petitioner

ORDER DENYING EMPLOYER'S MOTION TO DISMISS PETITION

On July 26, 2019, the Petitioner filed a representation petition, in Case 05-RC-245597, seeking to represent all route drivers, shuttle drivers, van drivers, ship drivers, night drivers, and all drivers employed by the Employer at various facilities in Virginia and North Carolina. On August 2, 2019, the Petitioner filed an amended petition. Also on August 2, 2019, the Employer filed a motion to dismiss the petition.

The Employer contends the Petitioner should withdraw the petition and, failing to do so, the Region should dismiss the petition because the Petitioner left Section 11 of the petition, election details, blank. The Employer cites to Section 102.61(a)(11)-(12) of the Board's Rules and Regulations, stating that RC petitions shall contain "the type, date(s), time(s), and location(s) of the election sought" and "any other facts" and the Outline of Law and Procedure in Representation Cases 3-500, citing to the Case Handling Manual Section 11011, stating that when a petition does not meet sufficiency for any reason, the petitioner should be requested to withdraw the petition.

Attachment D

The Petitioner's amended petition corrects the defect described above by providing, in Section 11, its proposal regarding the election date, time, and location. Notwithstanding, the Board has explained, "we adhered faithfully to the practice of deciding on its merits any case in which it appeared that a real question concerning representation existed, despite the fortuity that a petition might have disclosed faulty, incomplete, inaccurate, or otherwise imperfect information," *Advance Pattern Co.*, 80 NLRB 29 at 31 (1948). Indeed, since 1948, under *Advance Pattern* and its progeny, the Board has consistently held that so long as it is clear that there is a need for the Board to resolve a question of union representation in the workplace, the Board will not dismiss a union's petition simply because of a technical omission on the form that can be easily cured at the pre-election hearing. In *Aria Resort & Casino, LLC*, 363 NLRB No. 24, slip op. at 1 (Nov. 3, 2015), the Board rejected an employer's contention that the underlying petition must be dismissed due to the petitioner's failure to fill out Section 7 of the petition form, concerning whether it had requested recognition. The Board noted that "[t]o dismiss the petition under these circumstances would be an abrogation of the Board's statutory duty—set forth in Section 9(c)(1) of the Act—to resolve questions concerning representation." *Id.*, slip op. at 1.

Here, the Petitioner's failure to complete Section 11 of the petition has been cured by the filing of the amended petition. I find it would be an "abrogation of the Board's statutory duty" to dismiss the petition on these grounds. *See Aria Resort & Casino, LLC*, 363 NLRB No. 24, slip op. at 1. The Employer has not been prejudiced by the omission of the information in Section 11 of the petition. It may, in its statement of position or at a hearing, make its own proposal

concerning the election details and, now, with the Petitioner's filing of the amended petition, it is aware of the Petitioner's proposal.

Accordingly, for the reasons discussed above,

IT IS ORDERED that the Employer's Motion to Dismiss the Petition is hereby denied.

Dated at Baltimore, Maryland, this 5th day of August 2019.

/s/ Nancy Wilson

Nancy Wilson, Acting Regional Director
National Labor Relations Board, Region 5
Bank of America Center, Tower II
100 S. Charles Street, Ste 600
Baltimore, MD 21201

Attachment D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

SYSCO HAMPTON ROADS, INC.,	)	
	)	
Employer,	)	
	)	
and	)	**Case No. 05-RC-245597**
	)	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS UNION, LOCAL 822, AFL-CIO, CLC,	)	
	)	
Petitioner.	)	
	)	

MOTION FOR COLLATERAL INVESTIGATION,
DISMISSAL OF PETITION AND POSTPONEMENT OF HEARING

The Employer, Sysco Hampton Roads, Inc. ("Sysco Hampton Roads" or "Employer"), through undersigned counsel, requests an administrative investigation of the Petitioner's showing of interest.[1] This request is based on evidence that the Employer's Team Lead, Joseph Whitlock ("Whitlock"), actively participated in securing the Petitioner's showing of interest without the knowledge or consent of the Employer, thereby violating the employees' rights under Section 7 of the National Labor Relations Act ("the Act"). To the extent he did so with the knowledge of the Union, the Union has violated Section 8(b) of the Act as well.

Whitlock is a statutory supervisor pursuant to Section 2(11) of the Act. Indicia of supervisory status includes:

> Mr. Whitlock works from the main Suffolk location. He is the only transportation supervisor on the night shift.

[1] *Georgia Craft Co.*, 120 N.L.R.B. 806 (1958); *Globe Iron Foundry*, 112 N.L.R.B. 1200 (1955).

Attachment E

Mr. Whitlock effectively recommends approval of transfers.

Mr. Whitlock effectively recommends the termination or retention of probationary employees.

Night drivers look to Mr. Whitlock as their supervisor.

Mr. Whitlock, without approval from others, schedules drivers for days off without pay.

Mr. Whitlock directs the work of drivers. He regularly changes scheduled routes from 10 to 8 hours at his sole discretion.

Mr. Whitlock determines, in his sole, discretion when and how defective trailers are replaced.

Mr. Whitlock receives all driver call outs. Mr. Whitlock decides, in his sole discretion, how routes are covered when call outs occur and who covers them.

Mr. Whitlock ranks drivers for awards such as the "Top Dog Award" and "Hall of Fame" award.

Mr. Whitlock receives at least a dollar more per hour than drivers.

Mr. Whitlock has his own mailbox like other supervisors. Drivers do not have mailboxes.

Mr. Whitlock administers safety awards and coaching through the "Origami" program. Only supervisors and leads do this.

Mr. Whitlock effectively recommends scheduling of drivers to compensate for vacations, shortages at the various locations, and other staffing matters.

Witnesses will include Supervisors Mr. John McMurtrie and Mr. Matt Race.

The Company has sent evidence of taint by separate cover to preserve the secrecy of the witness, who fears retaliation from Mr. Whitlock.

Attachment E

This coercive conduct was directed toward employees who are supervised by Whitlock as well as other employees. *Glen's Market and UFCW Local 876*, 344 N.L.R.B. No. 25 (February 22, 2005). Accordingly, Petitioner's showing of interest was illegally obtained and is tainted by supervisory intervention and participation. *Harborside Healthcare, Inc. and Service Employees International Union*, Local 47, 343 N.L.R.B. No. 100 (December 8, 2004), *on remand from Harborside, Inc. v. NLRB*, 230 F.2d 206 (6th Cir. 2000).

The Region should invoke the Board's blocking charge policy and cease further processing of this R case matter until the showing of interest and unfair labor practice issues have been fully investigated. Thus, the hearing currently scheduled for August 12, 2019 should be cancelled, and any further rescheduling (if appropriate) should await the outcome of these investigations. It is likely that a full investigation of these issues will lead to dismissal of the petition.

WHEREFORE, the Employer asks that the petition be dismissed with prejudice[2] and with instructions that Petitioner be precluded from attempting to secure a new showing of interest for no less than six (6) months following the dismissal. This minimal period of time is necessary to remove the taint of supervisory participation and to ensure the employees' ability to freely and properly exercise their Section 7 rights.

Additionally, the Employer asks that the R case hearing in this matter, currently scheduled for August 12, 2019, be postponed while the Regional Director conducts the requested Collateral Investigation.

[2] *Sourdough Sales*, 246 N.L.R.B. 106 (1979); *Dexter Foods, Inc*., 209 N.L.R.B. 369 (1974).

Attachment E

Dated: August 9, 2019

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

Douglas M. Topolski
1909 K Street, N.W., Suite 1000
Washington, D.C. 20006
Tel: 202-887-0855
Fax: 202-887-0866
douglas.topolski@ogletree.com
Counsel for Defendant
Sysco Hampton Roads, Inc.

Attachment E

CERTIFICATE OF SERVICE

This is to certify service of the above and foregoing SYSCO HAMPTON ROADS, INC.'S MOTION FOR COLLATERAL INVESTIGATION TO DISMISS PETITION AND POSTPONE HEARING by electronic mail to the below indicated counsel of record for the Union and by electronic filing to the Regional Director for Region 5 on this the 9th day of August, 2019.

Ms. Nancy Wilson
Regional Director
National Labor Relations Board
Region 5
100 S. Charles Street, Suite 600
Baltimore, MD 21201
Nancy.Wilson@nlrb.gov

Ms. Stephanie Cotilla Eitzen
Field Attorney
National Labor Relations Board
Region 5
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Baltimore, MD 21201
Stephanie.Eitzen@nlrb.gov

Mr. Raul Alfaro
Business Agent
International Brotherhood of Teamsters,
Local 822
5718 Bartee Street
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Sysco Hampton Roads, Inc.

Attachment E

Ogletree Deakins

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Douglas M. Topolski
202-263-0242
Douglas.topolski@ogletree.com

August 7, 2019

VIA E-FILING
Stephanie Eitzen, Esquire
Field Attorney
NLRB - Region 5
100 S. Charles Street, Suite 600
Baltimore, MD 21201

RE: Sysco Hampton Roads, Inc.
Case No. 05-RC-245597

Dear Ms. Eitzen:

As you know, we represent Sysco Hampton Roads, Inc. ("Sysco Hampton Roads" or the "Company") in the above-referenced matter. Please accept this letter as the Company's statement of position concerning the petition for representation ("Petition") filed by the International Brotherhood of Teamsters, Local 822 ("Petitioner" or the "Union") on or about July 26, 2019 and served on or about July 29, 2019.[1]

I. BACKGROUND

Sysco Hampton Roads sells, markets and distributes food products to restaurants, healthcare and educational facilities, the military, lodging establishments and other customers who prepare meals outside of the home. Sysco Hampton Roads' main facility is located in Suffolk, Virginia. In addition to that facility, the Company operates six domicile yards located in Richmond, Virginia; Williamsburg, Virginia; Virginia Beach, Virginia; Elizabeth City, North Carolina; Manteo, North Carolina; and Maple (Currituck), North Carolina.

[1] Pursuant to 29 C.F.R. §102.63, Form 505 and the requisite commerce questionnaire is enclosed as Attachment A, the petitioned-for employees are listed in Attachment B, and those employees asserted by the Employer for exclusion are listed in Attachment D. Any documents provided as part of this statement of position ("Statement of Position") are considered to be purely factual in nature and should not be viewed as privileged under the attorney-client or work product doctrine and nothing contained in this Statement of Position is intended to affect the privileged nature of any past, present, or future privileged communications between Sysco Hampton Roads and its legal advisors.

II. THE PROPOSED UNIT

A. The Unit Proposed by the Union is Mischaracterized

The Petition was filed on or about July 26, 2019, and served to the Company on or about July 29, 2019. Therein, Petitioner sought an election in the purported unit of eighty-six (86) driver associates described as follows:

> All route drivers, shuttle drivers, van drivers ship drivers, night drivers and all drivers at the following satellite yards:
>
> Richmond, VA
> 5436 Jefferson Davis Hwy.
>
> Va. Beach VA.
> 2044 Landstown Ctr. Way
>
> Williamsburg VA.
> 1570 Penniman, Rd.
>
> Manteo, N.C.
> 1013 Driftwood Dr.
>
> Maple (Currituck) N.C.
> 264 Airport Rd.
>
> Elizabeth City, N.C.
> 660 Old U.S. Hwy 17-S

Although the Petition was directed to Sysco Hampton Roads located at 7000 Harbor View Blvd., Suffolk, VA, the description of the unit involved as indicated in 5b of the Petition did not include the Suffolk facility. Additionally, the Petition, as filed and served to the Company, failed to list the type, time(s), date(s), and location(s) of the requested election. On July 31, 2019, the Region communicated the deficiencies to the Union, and the Union stated only that it wanted a "manual ballot as soon as possible."

On August 2, 2019, the Company filed a Motion to Dismiss the Union's Petition based on the Union's failure to comply with procedural requirements in the filing of the Petition, citing to the National Labor Relations Board's Rules and Regulations, and the Case Handling Manual.

Later on August 2, 2019, the Union filed an amended petition ("Amended Petition"), now requesting a manual election on Thursday, August 15, 2019, with election polls at the Suffolk Facility, and the six domiciles, with voting times for the Suffolk facility at 2:00 a.m. to 6:00 a.m. and 6:00 p.m. to 9:00 p.m., and in each domicile from 1:30 a.m. to 5:30 a.m. and 3:00 p.m. to 6:00 p.m.

The Amended Petition proposed the following unit:

> All route drivers, shuttle drivers, van drivers, ship drivers, night drivers, and all drivers employed at by the Employer at its Suffolk facility and at the following satellite yards: 1) Richmond VA, 5436 Jefferson Davis Hwy.; 2) Virginia Beach VA, 2044 Landstown Center Way; 3) Williamsburg VA, 1570 Penniman Road; 4) Manteo N.C., 1013 Driftwood Dr.; 5) Maple (Currituck) N.C., 264 Airport Road; and 6) Elizabeth City N.C., 660 Old U.S. Hwy 17-S. Excluded: All other employees and security guards as defined by the Act.[2]

On August 5, 2019, the Region denied the Company's Motion to Dismiss the Union's Petition.

The unit sought by the Union, is now described as follows:

> All delivery associates, special delivery drivers, and shuttle drivers employed at or dispatched from the following locations of the Employer: Suffolk, Virginia; Richmond, Virginia; Virginia Beach, Virginia; Williamsburg, Virginia; Manteo, North Carolina; Maple (Currituck), North Carolina; and Elizabeth City, North Carolina. Excluding all other associates, guards and supervisors as defined in the Act.

Should an election be ordered, the unit should be described in this manner. (*See* Form 505, Attachment B). However, the Region must exclude "team leads" from the unit as statutory supervisors.

B. The Team Leads are Supervisors Under the Act and Should Be Excluded From the Unit

Pursuant to Section 2(11) of the National Labor Relations Act ("the Act"), the term "supervisor" means any individual having the authority, in the interests of the employer, to hire, transfer, suspend, lay off, recall, promote, assign, discharge, reward, or discipline other employees, or to responsibly direct them, or to adjust the grievances, or effectively recommend such action, where the exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment. Importantly, however, this Section is written in the disjunctive (using the word "or" not "and"). To qualify as supervisor, therefore, it is not necessary that an individual possess all or even a majority of the powers specified in Section 2(11) of the Act; rather, possession of any one of them is sufficient to confer supervisory status. *Chi. Metallic Corp.*, 273 NLRB 1677, 1689 (1985), enf'd in relevant part 794 F.2d 527 (9th Cir. 1986); *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 712-13 (2001) (reaffirming that the possession of only one of the indicia of supervisory status is sufficient to establish supervisory status).

Moreover, the power to "effectively recommend" action with respect to one or more of Section 2(11) authority indicators results in statutory supervisory status just as much as the independent, actual power to make decisions in these areas. *Albertsons, Inc.*, 310 NLRB 960 (1993) (grocery

[2] Notably, the description of the Union's proposed unit did not exclude statutory supervisors.

Attachment F

department managers were statutory supervisors because they could effectively *recommend* hiring, discipline, transfer, layoff and promotion); *K.B.I. Sec. Servs.*, 318 NLRB 268 (1995) (employee was a statutory supervisor because he could effectively *recommend* formal discipline).

Team Leads qualify as 2(11) supervisors in a variety of ways because they meet multiple indicia of statutory supervisor, including executing supervisory duties in the employer's while exercising independent judgment and effectively recommending action related to more than one of Section 2(11) authority indicators and the petitioned unit employees.

Section 2(11) Supervisors/Team Leads to be excluded: Keith Dessenberg, Steve Farrow and Joseph Whitlock (*See* Form 505, Attachment D).

III. THE PETITION SHOULD BE DISMISSED

A. The Petition Must Be Dismissed, or Alternatively Withdrawn, Because the Union Failed to Sufficiently Describe the Type, Date, Time, and Location of its Requested Representation Election

The Rules and Regulations state that RC petitions shall contain facts, including the type, date, time, and location of the lection sought. The Outline of Law and Procedure in Representation cases 3-500, citing to the Case Handling Manual Section 11011, states that when a petition does not meet sufficiency, the petitioner should be requested to withdraw the petition. Absent withdrawal, the petition should be dismissed.

It is not sufficient to permit the Union to simply amend the bare Petition.[3] The regulations are clear, and require the Union to inform the Company of its election preferences at the time the Petition is filed. The Region's concession to allow the Union to file an amendment, in effect, allows the Union to void the regulations' requirement that a petition *shall* contain election details. Further, allowing this omission forces the Company to guess at how and when the Union maybe wants the election, essentially placing the burden on the Company to schedule times for an election requested by the Union. The Company does not waive this objection to the Petition and these proceedings and reserves the right to challenge the Region's decision not to dismiss the Petition by all available means. The Union's failure to follow the rules inherently raises ground for objections to any election.

B. By Participating in Collecting the Showing of Interest and Coercing Employees to Sign and Support the Union, a Team Lead, as a Supervisor, Tainted the Petition.

As the Board frequently has recognized, supervisor support for a union will taint a showing of interest when the supervisor's actions would reasonably tend to coerce or interfere with the employee' exercise of free choice in the election. *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004). *See also, Napili Shores Condo. Homeowners' Ass'n v. NLRB*, 939 F.2d 717, 719 (9th Cir. 1991), citing *NLRB v. Island Film Processing Co.*, 784 F.2d 1446, 1452 (9th Cir. 1986) (supervisor

[3]In addition, the description of the proposed unit was revised in the Amended Petition. This further demonstrates the Union's cavalier attitude to adherence to the proper procedural requirements. Apparently, the Union believes it should be permitted to modify a petition at any time, without regard to the Rules or the prejudicial negative ramifications to the Company's ability to respond to the Petition.

support for a union will taint a showing of interest when the supervisor's actions would reasonably tend to lead the employees to support the union because they fear future retaliation by the supervisor). Actual coercion or intimidation is not required here: circumstances that merely tend to interfere with the election are enough.

Furthermore, under established Board law, all cards (or signatures) that the supervisor Team Leads either collected or assisted in collecting are tainted and cannot be counted for the showing of interest. It is well-established that if a supervisor directly solicits authorization cards, those cards are tainted and may not be counted for the showing of interest. *See Nat'l Gypsum Co.*, 215 NLRB 74 (1974) (finding supervisory taint when supervisors personally solicited and obtained signatures and signed their names as "witnesses" on the back of many of the cards before turning them in to the petitioner); *Se. Newspapers, Inc.*, 129 NLRB 311 (1960) (petition dismissed when a supervisor participated in obtaining the signatures of all the employees whose cards were submitted for the showing of interest); *Toledo Stamping & Mfg. Co.*, 55 NLRB 865, 867 (1944) (petition dismissed when authorization cards secured with the assistance of a supervisor).

At least one Team Lead, Joseph Whitlock, coerced or interfered with employees' free choice by telling them to sign cards and support the Union.[4] This misconduct should preclude the Region from further processing of this petition because it is not supported by a legitimate showing of interest. Indeed, the Board should invoke its blocking charge policy, and cease further processing of this matter pending a decision as to whether the Petition in this matter should be dismissed because of supervisory taint. The employer will be filing unfair labor practice charges addressing this Union and unauthorized supervisor misconduct

IV. HEARING SHOULD BE POSTPONED

In light of the allegations of supervisor taint of the Petition, as outlined in the Motion for Collateral Investigation, to Dismiss Petition and Postpone Hearing, and the accompanying unfair labor practice charge, the hearing in this matter should be postponed until the completion of the investigation of supervisor coercion of and interference with employees' in their exercise of rights guaranteed by Section 7 of the Act.

V. COMPANY'S POSITION ON ELECTION DETAILS

In the event the Region does not postpone the election, Sysco Hampton Roads proposes the following election details:

Type of Election	**Manual ballot**

[4] See Motion for Collateral Investigation, to Dismiss Petition and Postpone Hearing filed and incorporated by reference herein.

Date	September 5, 2019
Times	Suffolk Facility: 12-9pm Richmond/Williamsburg: 1-3pm, 5-7pm North Carolina Domiciles: 3-5pm, 6-8pm
Locations	Suffolk Facility: Operations Conference Room Richmond/Williamsburg Domiciles: Providence Forge Rec. Center, 9900 Carriage Rd., Providence Forge, VA 23140 North Carolina Domiciles- American Legion, 174 Worth Guard Rd., Coinjock, NC 27923

VI. CONCLUSION

Accordingly, the Petition is not appropriate because it should have been withdrawn and/or dismissed and the classifications listed by the Union are not accurate for the voting unit. The Petition should also be dismissed based on supervisor taint of the showing of interest. Finally, the hearing in this matter should be postponed and the processing of all proceedings cease pending a decision as to whether the Petition in this matter should be dismissed because of supervisory taint.

Sincerely,

/s/ Douglas M. Topolski

Douglas M. Topolski

39546703.1

Attachment F

EXHIBIT A

Attachment F

FORM NLRB-505
(4-15)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
STATEMENT OF POSITION

DO NOT WRITE IN THIS SPACE	
Case No. 05-RC-245597	Date Filed

INSTRUCTIONS: *Submit this Statement of Position to an NLRB Office in the Region in which the petition was filed and serve it and all attachments on each party named in the petition in this case such that it is received by them by the date and time specified in the notice of hearing.* ***Note:*** *Non-employer parties who complete this form are NOT required to complete items 8f or 8g below or to provide a commerce questionnaire or the lists described in item 7. In RM cases, the employer is NOT required to respond to items 3, 5, 6, and 8a-8e below.*

1a. Full name of party filing Statement of Position:	1c. Business Phone:	1e. Fax No.:
Sysco Hampton Roads, Inc.	757-673-4000	
1b. Address *(Street and number, city, state, and ZIP code)*:	1d. Cell No.:	1f. e-Mail Address:
7000 Harbour View Blvd. Suffolk, VA 23435		Douglas.Topolski@ogletree.com

2. Do you agree that the NLRB has jurisdiction over the Employer in this case? [X] Yes [ ] No
(A completed commerce questionnaire (Attachment A) must be submitted by the Employer, regardless of whether jurisdiction is admitted)

3. Do you agree that the proposed unit is appropriate? [ ] Yes [X] No *(If not, answer 3a and 3b.)*

a. State the basis for your contention that the proposed unit is not appropriate. *(If you contend a classification should be excluded or included briefly explain why, such as shares a community of interest or are supervisors or guards.)*

See attachment.

b. State any classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit.

Added:	Excluded:
N/A	Team Leads

4. Other than the individuals in classifications listed in 3b, list any individual(s) whose eligibility to vote you intend to contest at the pre-election hearing in this case and the basis for contesting their eligibility.

N/A

5. Is there a bar to conducting an election in this case? [ ] Yes [X] No *If yes, state the basis for your position.*

6. Describe all other issues you intend to raise at the pre-election hearing.

See attachment.

7. The employer must provide the following lists which must be alphabetized (overall or by department) in the format specified at http://www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015

(a) A list containing the full names, work locations, shifts and job classification of all individuals in the proposed unit as of the payroll period immediately preceding the filing of the petition who remain employed as of the date of the filing of the petition. (Attachment B)

(b) If the employer contends that the proposed unit is inappropriate the employer must provide (1) a separate list containing the full names, work locations, shifts and job classifications of all individuals that it contends must be *added* to the proposed unit, if any to make it an appropriate unit, (Attachment C) and (2) a list containing the full names of any individuals it contends must be *excluded* from the proposed unit to make it an appropriate unit. (Attachment D).

8a. State your position with respect to the details of any election that may be conducted in this matter. Type: [X] Manual [ ] Mail [ ] Mixed Manual/Mail

8b. Date(s):	8c. Time(s):	8d. Location(s):
Thursday, September 5, 2019	Suffolk facility, 12-9 pm; Richmond/Williamsburg 1-3 pm, 5-7 pm NC domiciles 3-5 pm, 6-8 pm	Suffolk - Operations Conference Center Richmond/Williamsburg: Providence Forge Rec Center, 9900 Carriage Rd., Providence Forge, VA 23140; NC - American Legion 174 Worth Guard Rd, Colnlock, NC 27923
8e. Eligibility Period (e.g. special eligibility formula):	8f. Last Payroll Period Ending Date:	8g. Length of payroll period
All employed as of last payroll period end	July 27, 2019	[ ] Weekly [X] Biweekly [ ] Other *(specify length)*

9. Representative who will accept service of all papers for purposes of the representation proceeding

9a. Full name and title of authorized representative	9b. Signature of authorized representative	9c. Date
Douglas M. Topolski, Counsel for Sysco Hampton Roads		8/7/19
9d. Address *(Street and number, city, state, and ZIP code)*		9e. e-Mail Address
Ogletree Deakins 1909 K. St. NW, Ste. 1000 Washington, DC 20006		Douglas.Topolski@Ogletree.com
9f. Business Phone No.:	9g. Fax No.:	9h. Cell No.:
202-263-0242		443-838-2059

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. Section 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation proceedings. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. 74942-43 (December 13, 2006). The NLRB will further explain these uses upon request. Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations and may cause the NLRB to refuse to further process a representation case or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

Attachment F

FORM NLRB-5081
(3-11)

NATIONAL LABOR RELATIONS BOARD

QUESTIONNAIRE ON COMMERCE INFORMATION

Please read carefully, answer all applicable items, and return to the NLRB Office.
If additional space is required, please add a page and identify item number.

CASE NAME	CASE NUMBER
Sysco Hampton Roads and Teamsters Local 822	05-RC-245597

1. EXACT LEGAL TITLE OF ENTITY *(As filed with State and/or stated in legal documents forming entity)*
Sysco Hampton Roads, Inc.

2. TYPE OF ENTITY
☒ CORPORATION ☐ LLC ☐ LLP ☐ PARTNERSHIP ☐ SOLE PROPRIETORSHIP ☐ OTHER *(Specify)*

3. IF A CORPORATION OR LLC
A. STATE OF INCORPORATION OR FORMATION B. NAME, ADDRESS, AND RELATIONSHIP (e.g. parent, subsidiary) OF ALL RELATED ENTITIES
Virigina

4. IF AN LLC OR ANY TYPE OF PARTNERSHIP, FULL NAME AND ADDRESS OF ALL MEMBERS OR PARTNERS

5. IF A SOLE PROPRIETORSHIP, FULL NAME AND ADDRESS OF PROPRIETOR

6. BRIEFLY DESCRIBE THE NATURE OF YOUR OPERATRIONS *(Products handled or manufactured, or nature of services performed)*
Commercial food distribution

7A. PRINCIPAL LOCATION	7B. BRANCH LOCATIONS
7000 Harbour View Blvd. Suffolk, VA 23435	Richmond, VA; Virginia Beach, VA; Williamsburg, VA Manteo, NC; Currituck, NC; Elizabeth City, NC

8. NUMBER OF PEOPLE PRESENTLY EMPLOYED
A. TOTAL 330+ B. AT THE ADDRESS INVOLVED IN THIS MATTER 330+

9. DURING THE MOST RECENT *(Check the appropriate box)*: ☒ CALENDAR ☐ 12 MONTHS or ☐ FISCAL YEAR FY DATES

	YES	NO
A. Did you **provide services** valued in excess of $50,000 directly to customers outside your State? If no, indicate actual value.	X	
B. If you answered no to 9A, did you **provide services** valued in excess of $50,000 to customers in your State who purchased goods valued in excess of $50,000 from directly outside your State? If no, indicate the value of any such services you provided.		
C. If you answered no to 9A and 9B, did you **provide services** valued in excess of $50,000 to public utilities, transit systems, newspapers, health care institutions, broadcasting stations, commercial buildings, educational institutions, or retail concerns? If less than $50,000, indicate amount.		
D. Did you **sell goods** valued in excess of $50,000 directly to customers located outside your State? If less than $50,000, indicate amount.	X	
E. If you answered no to 9D, did you **sell goods** valued in excess of $50,000 directly to customers located inside your State who purchased other goods valued in excess of $50,000 from directly outside your State? If less than $50,000, indicate amount.		
F. Did you **purchase and receive goods** valued in excess of $50,000 from directly outside your State? If less than $50,000, indicate amount.	X	
G. Did you **purchase and receive goods** valued in excess of $50,000 from enterprises who received the goods directly from points outside your State? If less than $50,000, indicate amount.	X	
H. **Gross Revenues** from all sales or performance of services ***(Check the largest amount)***: ☐ $100,000 ☐ $250,000 ☐ $500,000 ☒ $1,000,000 or more *If less than $100,000, indicate amount.*		
I. **Did you begin operations within the last 12 months?** If yes, specify date:		X

10. ARE YOU A MEMBER OF AN ASSOCIATION OR OTHER EMPLOYEE GROUP THAT ENGAGES IN COLLECTIVE BARGAINING?
☐ YES ☒ NO *(If yes, name and address of association or group*

11. REPRESENTATIVE BEST QUALIFIED TO GIVE FURTHER INFORMATION ABOUT YOUR OPERATIONS

NAME	TITLE	E-MAIL ADDRESS	TEL. NUMBER
Doulas M. Topolski, Esq.	Attorney for Sysco Hampton Roads	Douglas.Topolski@Ogletree.com	202.263.0242

12. AUTHORIZED REPRESENTATIVE COMPLETING THIS QUESTIONNAIRE

NAME AND TITLE	SIGNATURE	E-MAIL ADDRESS	DATE
Douglas M. Topolski, Esq.		Douglas.Topolski@Ogletree.com	August 7, 2019

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary. However, failure to supply the information may cause the NLRB to refuse to process any further a representation or unfair labor practice case, or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

Attachment F

EXHIBIT B

Attachment F

ATTACHMENT B

Employees in Petitioned-For Unit

Last name	First name	Position	Location	Shift
Armistead Jr	Phil	Driver	Sysco Hampton Roads	2:00 AM
Ashcraft	Christopher	Driver, Special Delivery	Sysco Hampton Roads	9:00 AM
Askew	Dejon	Driver	Sysco Hampton Roads	2:00 AM
Ayers	Upshur	Driver	Sysco Hampton Roads	2:00 AM
Barnes	James	Driver	Sysco Hampton Roads	2:00 AM
Bell	David	Driver	Sysco Hampton Roads	2:00 AM
Bell	Michael	Driver	Sysco Hampton Roads	9:00 PM
Boone	Calvin	Driver, Shuttle Local	Sysco Hampton Roads	8:00 PM
Boone	Paul	Driver	Sysco Hampton Roads	2:00 AM
Brent	John	Driver	Sysco Hampton Roads	2:00 AM
Brundage	Harold	Driver	Sysco Hampton Roads	2:00 AM
Cheeseman	Rodney	Driver	Shuttle Yard (Williamsburg)	2:00 AM
Cimo	Jason	Driver	Sysco Hampton Roads	2:00 AM
Collins	Mark	Driver Trainee	Sysco Hampton Roads	2:00 AM
Creque	Brad	Driver	Sysco Hampton Roads	2:00 AM
Daniels	Eric	Driver	Sysco Hampton Roads	2:00 AM
Delaney	Okey	Driver	Sysco Hampton Roads	2:00 AM
DiScioscia	Donald	Driver	Sysco Hampton Roads	2:00 AM
Douglas	Ronell	Driver	Sysco Hampton Roads	2:00 AM
Doxie	Josephus	Driver	Sysco Hampton Roads	2:00 AM
Duncan	Christopher	Driver	Shuttle Yard (Williamsburg)	2:00 AM

Ellis Jr	Michael	Driver	Shuttle Yard (Richmond)	2:00 AM
Epps	Terrence	Driver	Shuttle Yard (Williamsburg)	2:00 AM
Fay	Matthew	Driver, Shuttle	Sysco Hampton Roads	8:00 PM
Fleischmann	Adam	Driver	Sysco Hampton Roads	2:00 AM
Frazier	Marquis	Driver, Contingent	Sysco Hampton Roads	2:00 AM
Gallop	Elton	Driver	Shuttle Yard (Manteo)	2:00 AM
Gannon	Steven	Driver	Shuttle Yard (Richmond)	2:00 AM
Gilliam	Clete	Driver	Sysco Hampton Roads	2:00 AM
Gordy	Bryant	Driver	Sysco Hampton Roads	2:00 AM
Grant	Glen	Driver	Sysco Hampton Roads	2:00 AM
Gray	Gerrel	Driver	Sysco Hampton Roads	2:00 AM
Green	Kevin	Driver	Shuttle Yard (Richmond)	2:00 AM
Gross	Brian	Driver	Sysco Hampton Roads	2:00 AM
Hardy	Gerald	Driver	Sysco Hampton Roads	2:00 AM
Hawkins	Kelvin	Driver	Sysco Hampton Roads	2:00 AM
Heath	Shane	Driver	Shuttle Yard (Manteo)	2:00 AM
Hines	Jonathon	Driver, Shuttle	Sysco Hampton Roads	8:00 PM
Hornung	Kyle	Driver	Sysco Hampton Roads	2:00 AM
Hou	Chanvirak	Driver	Sysco Hampton Roads	2:00 AM
Hulings	Robert	Driver, Shuttle Local	Sysco Hampton Roads	8:00 PM
Huntington	Eric	Driver, Contingent	Shuttle Yard (Elizabeth City)	2:00 AM
Jeffries	Kyle	Driver, Special Delivery	Sysco Hampton Roads	9:00 AM
Johnson	Bernard	Driver	Sysco Hampton Roads	2:00 AM

Attachment F

Kadlec	Christopher	Driver Local	Sysco Hampton Roads	2:00 AM
Kello	Andrew	Driver	Shuttle Yard (Virginia Beach)	2:00 AM
Kohout	William	Driver	Shuttle Yard (Richmond)	2:00 AM
Lamarche	Joshua	Driver	Sysco Hampton Roads	2:00 AM
Lantroop	Derrick	Driver, Special Delivery Van Driver	Shuttle Yard (Manteo)	2:00 AM
LaRock	James	Driver, Special Delivery	Sysco Hampton Roads	2:00 AM
Leggett	David	Driver	Sysco Hampton Roads	2:00 AM
Lewis	Brandon	Driver	Shuttle Yard (Richmond)	2:00 AM
Lohman	Tony	Driver	Sysco Hampton Roads	9:00 PM
Lumpkins	Lenwood	Driver	Sysco Hampton Roads	2:00 AM
Marshall	Gregry	Driver	Sysco Hampton Roads	2:00 AM
Marshall	Sturm	Driver	Sysco Hampton Roads	2:00 AM
McClain Jr	Charles	Driver	Sysco Hampton Roads	9:00 PM
McCole	John	Driver	Shuttle Yard (Elizabeth City)	2:00 AM
McDonald	Robert	Driver, Shuttle	Sysco Hampton Roads	8:00 PM
Mercer	Matthew	Driver Local	Sysco Hampton Roads	2:00 AM
Montgomery	Christopher	Driver	Sysco Hampton Roads	2:00 AM
Morey Jr	Richard	Driver	Sysco Hampton Roads	2:00 AM
Olds	Wilbert	Driver	Shuttle Yard (Manteo)	2:00 AM
Olphert Jr	Thomas	Driver	Sysco Hampton Roads	2:00 AM
Olphert Sr	Thomas	Driver	Sysco Hampton Roads	2:00 AM
Piatt	Shawn	Driver	Sysco Hampton Roads	2:00 AM
Ricks	Emmanuel	Driver	Sysco Hampton Roads	2:00 AM

Attachment F

Rinkel	Erik	Driver	Shuttle Yard (Currituck)	2:00 AM
Savage	Kory	Driver	Sysco Hampton Roads	2:00 AM
Sechrist	Anthony	Driver	Sysco Hampton Roads	2:00 AM
Shields	Daniel	Driver	Shuttle Yard (Williamsburg)	2:00 AM
Simons	Edmund	Driver	Sysco Hampton Roads	2:00 AM
Smith	Nathaniel	Driver	Shuttle Yard (Williamsburg)	2:00 AM
Spry	Craig	Driver	Shuttle Yard (Currituck)	2:00 AM
Stadnik	Mykola	Driver Trainee	Sysco Hampton Roads	2:00 AM
Stinson IV	George	Driver	Sysco Hampton Roads	2:00 AM
Strong	Benjamin	Driver	Shuttle Yard (Manteo)	2:00 AM
Struzzieri	Andrew	Driver	Sysco Hampton Roads	2:00 AM
Syran	Benjamin	Driver Trainee	Sysco Hampton Roads	2:00 AM
Thorpe	Daronta	Driver	Sysco Hampton Roads	2:00 AM
Tillett	William	Driver	Sysco Hampton Roads	2:00 AM
Waldbaum Sr	Mark	Driver	Sysco Hampton Roads	9:00 PM
Wiles	Scott	Driver	Sysco Hampton Roads	2:00 AM
Williams	Robert	Driver Trainee	Sysco Hampton Roads	2:00 AM
Williams	Roy	Driver	Shuttle Yard (Richmond)	2:00 AM
Wilson	Derek	Driver, Special Delivery	Sysco Hampton Roads	9:00 AM

39544930.1

Attachment F

EXHIBIT D

Attachment F

ATTACHMENT "D"

39546065.1

Name	Position	Location	Shift
Keith Dessenberg	Team Lead/Driver	Sysco Hampton Roads	2:00 a.m.
Steve Farrow	Team Lead/Driver	Shuttle Yard (Manteo)	2:00 a.m.
Joseph Whitlock	Team Lead/Driver	Sysco Hampton Roads	8:00 p.m.

Attachment F

Greene, Jennifer

Subject: FW: Sysco Hampton Roads, 05-RC-245597

From: Topolski, Douglas M. <douglas.topolski@ogletreedeakins.com>
Sent: Sunday, August 11, 2019 2:20 PM
To: Eitzen, Stephanie C. <Stephanie.Eitzen@nlrb.gov>
Subject: Re: Sysco Hampton Roads, 05-RC-245597

Thanks. Enjoy your Sunday. No offense, but I hope I don't see you tomorrow 😄. Doug.

Sent from my iPad

On Aug 11, 2019, at 2:12 PM, Eitzen, Stephanie C. <Stephanie.Eitzen@nlrb.gov> wrote:

> Thank you. This looks good to me. I have sent the Stipulated Election Agreement to the Union for his review and signature and I will then forward it to my supervisor. I will be in touch.
>
> Stephanie
>
> Get Outlook for iOS
>
> ---
>
> **From:** Topolski, Douglas M. <douglas.topolski@ogletree.com>
> **Sent:** Sunday, August 11, 2019 1:19:59 PM
> **To:** Eitzen, Stephanie C. <Stephanie.Eitzen@nlrb.gov>
> **Subject:** RE: Sysco Hampton Roads, 05-RC-245597
>
> Hi Stephanie: Here is the stip executed by the Employer including local contacts for all election sites on election day. As to the leads, please be advised that we are opting to go forward with the stip only because the Region has informed us that it will defer any hearing on their supervisory status until after the election and that it will not conduct a hearing on the showing of interest based upon our evidence of supervisory taint. We do not believe it is a productive use of any party's or the Board's resources to open a record only to be told we cannot litigate issues we have already been informed will not be litigated. By signing the stipulation, we do not waive our pre-election positions and reserve the right to pursue them if necessary.
>
> I am leaving Baltimore around 6 am tomorrow and heading for the hearing rom. Please call my cell when the RD approves the stip so that I can redirect myself to alternative locations. Thanks again for your work on this and we shall talk in the morning. For ease of reference, my cell is 443 838 2059. Doug.
>
> **Douglas M. Topolski | Ogletree, Deakins, Nash, Smoak & Stewart, P.C.**
> 1909 K Street, N.W., Suite 1000 | Washington, DC 20006 | Telephone: 202-263-0242 | Fax: 202-887-0866
> douglas.topolski@ogletree.com | www.ogletree.com | Bio
> Currently licensed in Maryland only

Attachment G

From: Eitzen, Stephanie C. <Stephanie.Eitzen@nlrb.gov>
Sent: Saturday, August 10, 2019 2:42 PM
To: raul_05 <raul_05@comcast.net>; Topolski, Douglas M. <douglas.topolski@ogletreedeakins.com>
Subject: Sysco Hampton Roads, 05-RC-245597

Please find attached the revised stipulated election agreement. Let me know if you would like me to make any other changes.

Doug, please send me the Employer's onsite election representative and I will add it to the stipulated election agreement. I will need name, job title, address, email address and telephone number.

Doug, can you give me any other details about the trailer? Is "mobile office trailer" a good description? What are the approximate dimensions? Is there a bathroom? Does it have light and electricity? Will there be space inside of the trailer for the voting booth, and a table and chairs for the Board Agent and observers? I think the Region is going to ask me these questions and I'd like to be able to give them answers so they can approve the stipulated election agreement. I know I was confused, at first, about what the parties meant by a trailer.

I may not get a full approval from the Region over the weekend, but I expect to at least get a green light to proceed or they will let me know if they have any problems with it.

Thanks,
Stephanie Eitzen

Stephanie Cotilla Eitzen
Field Attorney
National Labor Relations Board, Region 5
100 S. Charles Street, suite 600
Baltimore, MD 21201
Telephone: 757-921-9005

This transmission is intended only for the proper recipient(s). It is confidential and may contain attorney-client privileged information. If you are not the proper recipient, please notify the sender immediately and delete this message. Any unauthorized review, copying, or use of this message is prohibited.

Attachment G

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

STIPULATED ELECTION AGREEMENT

Sysco Hampton Roads, Inc. **Case 05-RC-245597**

The parties **AGREE AS FOLLOWS:**

1. PROCEDURAL MATTERS. The parties waive their right to a hearing and agree that any notice of hearing previously issued in this matter is withdrawn, that the petition is amended to conform to this Agreement, and that the record of this case shall include this Agreement and be governed by the Board's Rules and Regulations.

2. COMMERCE. The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act and a question affecting commerce has arisen concerning the representation of employees within the meaning of Section 9(c).

The Employer, Sysco Hampton Roads, Inc., is a Virginia corporation with an office and place of business located at 7000 Harbour View Blvd., Suffolk, Virginia, with other facilities located in the following cities of Virginia: Richmond; Williamsburg; and Virginia Beach and the following cities of North Carolina: Manteo, Maple (Currituck); and Elizabeth City, where it is engaged in the business of selling, marketing and distributing food products. During the past 12 months, in the course and conduct of its operations described above, the Employer derives gross annual revenues in excess of $500,000 and purchased and received good and services valued in excess of $50,000 directly from points located outside the State of Virginia.

3. LABOR ORGANIZATION. The Petitioner is an organization in which employees participate, and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work and is a labor organization within the meaning of Section 2(5) of the Act.

4. ELECTION. A secret-ballot election under the Board's Rules and Regulations shall be held under the supervision of the Regional Director on the date and at the hours and places specified below.

Date	**Place**	**Hours**
Thursday, August 29, 2019	Operations Conference Room 7000 Harbour View Boulevard Suffolk, VA 23435	2:00 am to 6:00 am and 5:00 pm to 9:00 pm
Thursday, August 29, 2019	Mobile office trailer 5436 Jefferson Davis Highway North Chesterfield, VA 23234	2:00 am to 6:00 am
Thursday, August 29, 2019	Mobile office trailer 264 Airport Road Maple, NC	2:00 am to 6:00 am

If the election is postponed or canceled, the Regional Director, in his or her discretion, may reschedule the date, time, and place of the election.

Initials: DT/RA

Attachment H

5. UNIT AND ELIGIBLE VOTERS. The following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time drivers, including delivery associates, special delivery drivers and shuttle drivers, employed by the Employer at, or dispatched from, the following locations of the Employer: Suffolk, Virginia; Richmond, Virginia; Virginia Beach, Virginia; Williamsburg, Virginia; Manteo, North Carolina; Maple (Currituck), North Carolina; and Elizabeth City, North Carolina, but excluding all other employees, guards and supervisors as defined in the Act.

Those eligible to vote in the election are employees in the above unit who were employed during the **payroll period ending on July 27, 2019**, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off.

Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, employees engaged in an economic strike which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Employees who are otherwise eligible but who are in the military services of the United States may vote if they appear in person at the polls or by mail as described above in paragraph 4.

Ineligible to vote are (1) employees who have quit or been discharged for cause after the designated payroll period for eligibility, (2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and (3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced.

Others permitted to vote: The parties have agreed that employees in the classifications of Team Lead/Driver may vote in the election but their ballots will be challenged since their eligibility has not been resolved. No decision has been made regarding whether the individuals in these classifications or groups are included in, or excluded from, the bargaining unit. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

6. VOTER LIST. Within 2 business days after the Regional Director has approved this Agreement, the Employer must provide to the Regional Director and all of the other parties a voter list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available personal home and cellular telephone numbers) of all eligible voters. The Employer must also include, in a separate section of that list, the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge. The list must be filed in common, everyday electronic file formats that can be searched. Unless otherwise agreed to by the parties, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. The font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. When feasible, the list must be filed electronically with the Regional Director and served electronically on the parties. The Employer must file with the Regional Director a certificate of service of the list on all parties.

7. THE BALLOT. The Regional Director, in his or her discretion, will decide the language(s) to be used on the election ballot. All parties should notify the Region as soon as possible of the need to have the Notice of Election and/or ballots translated.

Initials: __DT/RA__

Attachment H

The question on the ballot will be “Do you wish to be represented for purposes of collective bargaining by Teamsters Local Union 822?” The choices on the ballot will be "Yes" or "No".

8. NOTICE OF ELECTION. The Regional Director, in his or her discretion, will decide the language(s) to be used on the Notice of Election. The Employer must post copies of the Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted, at least three (3) full working days prior to 12:01 a.m. of the day of the election. The Employer must also distribute the Notice of Election electronically, if the Employer customarily communicates with employees in the unit electronically. Failure to post or distribute the Notice of Election as required shall be grounds for setting aside the election whenever proper and timely objections are filed.

9. NOTICE OF ELECTION ONSITE REPRESENTATIVE. The following individual will serve as the Employer’s designated Notice of Election onsite representative: Suffolk: Scott Thibodeau, President; 7000 Harbour View Blvd., Suffolk, Va 23435; Telephone: 757 673 4000; Fax: 757 673 4148; Thibodeau.scott@shr.sysco.com. Richmond: Douglas M. Topolski, Counsel; 1909 K Street, N.W., Suite 1000 Washington, DC 20006; Telephone: 202-263-0242, Fax: 202-887-0866; douglas.topolski@ogletree.com. Maple: Sara E. Olschewske, Counsel; The Ogletree Building, 300 North Main Street, Suite 500, Greenville, SC 29601; Telephone: 864-240-8382; Fax: 864-235-8806; sara.olschewske@ogletreedeakins.com

10. ACCOMMODATIONS REQUIRED. All parties should notify the Region as soon as possible of any voters, potential voters, or other participants in this election who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.503, and who in order to participate in the election need appropriate auxiliary aids, as defined in 29 C.F.R. 100.503, and request the necessary assistance.

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.

12. TALLY OF BALLOTS. Upon conclusion of the last voting session at the Suffolk, Virginia voting location, the ballots will be commingled and counted and a tally of ballots prepared and immediately made available to the parties.

13. POSTELECTION AND RUNOFF PROCEDURES. All procedures after the ballots are counted shall conform with the Board's Rules and Regulations.

Sysco Hampton Roads, Inc.	**International Brotherhood of Teamsters, Local Union 822**
(Employer)	(Petitioner)
By /s/ Douglas M. Topolski 08/11/2019	**By** /s/ Raul Alfaro 08/11/2019
(Name) (Date)	(Name) (Date)

Initials: DT/RA

Attachment H

(Union)

By _____

(Name) (Date)

Recommended: /s/ Stephanie Cotilla Eitzen 08/12/2019

STEPHANIE COTILLA EITZEN, (Date)
Field Attorney

Date approved: August 12, 2019

/s/ Nancy Wilson

Acting Regional Director, Region 05
National Labor Relations Board

Attachment H

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

SYSCO HAMPTON ROADS, INC.,	)	
	)	
Employer,	)	
	)	
and	)	**Case No. 05-RC-245597**
	)	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS UNION, LOCAL 822, AFL-CIO, CLC,	)	
	)	
Petitioner.	)	
	)	

SYSCO HAMPTON ROADS, INC.'S OBJECTIONS TO THE ELECTION AND TO CONDUCT AFFECTING ELECTION

On August 29, 2019, the National Labor Relations Board ("Board"), Region 5, conducted a representation election among driver associates of Sysco Hampton Roads, Inc. ("SHR" or the "Company") to see if they wished to be represented by the International Brotherhood of Teamsters Union, Local 822, AFL-CIO, CLC (the "Union"). On that day, the unchallenged ballots were counted with a majority of those ballots voting for representation by the Union. Pursuant to Section 102.69(a) of the Board's Rules and Regulations, SHR files these Objections to the election and the conduct affecting the results of the election:[1]

[1] SHR has filed a request for a seven (7) day extension to provide additional information to the Region regarding its offer of proof, which has simultaneously been e-filed with the Region. This additional time will provide an opportunity for the Company to give even further information related to the supervisory taint objections and objections related to improper support of the Union by supervisory employees whose status as Section 2(11) supervisors should have been determined before any election was held. Thus, the Company seeks to provide additional information to the Region on September 12, 2019.

Attachment I

OBJECTION #1: The Petition should have been dismissed because a known supervisor as defined by Section 2(11) of the Act tainted the showing of interest supporting the petition.

OBJECTION #2: Because the Team Leads are Section 2(11) supervisors under the Act, their conduct tainted the election process when, during the critical period, the Team Leads assisted in soliciting support for the Union.

OBJECTION #3: The Team Leads, Section 2(11) supervisors under the Act, engaged in unlawful polling when they called employees, and went to associate houses, and interrogated employees about their Union sympathies and, by these and other actions, actively encouraged voting unit employees to vote for the Union.

OBJECTION #4: If the petition is not dismissed, the election should be rerun because it is objectionable to defer until after employees have voted the determination of supervisory status as to an individual or individuals known to be strong advocates and campaigners for the Union. Campaigning on behalf of the Union by a supervisor is inherently coercive and *per se* objectionable. Such conduct included, without limitation, regular one-on-one, face-to-face conversations with voting unit employees, texts to voting unit employees, and other overt coercive contacts.

OBJECTION #5: Because the Team Leads are supervisors under Section 2(11) of the Act, their conduct tainted the election when they entered the polling places during the election period.

OBJECTION #6: If the Petition is not dismissed, the election should be rerun because it is objectionable to defer until after employees have voted the determination of supervisor status as to an individual or individuals known to be strong advocates and campaigners for the Union

Attachment I

and then allow that supervisor to act as the Union's observer at both sessions of the polling place where the largest number of voters cast ballots. Specifically, one of the Team Leads and Supervisor, and Chief Union Organizer, Joseph Whitlock, acted as the Union's observer at the Suffolk Facility during the polling periods.

OBJECTION #7: It was objectionable conduct to count the votes from each of the three voting locations separately, rather than first comingling the ballots of all three locations before any tally was conducted.

OBJECTION #8: The representation petition in this matter should have been dismissed because the Union failed to satisfy the requirements of Section 102.61(a)(11-12) of the Rules and Regulations when they failed and refused to specify timely voting type, date(s), time(s), and locations(s) of the election sought.

HEARING REQUESTED: SHR requests a hearing on the genuine issues of material facts raised by this Objection, which will be supported by competent evidence that will be timely submitted to the Regional Director in accordance with the Board's Rules and Regulations.

For the reasons set forth above, and based upon the evidence to be deduced at the hearing, the election results should not be certified and the petition should be dismissed. Alternatively, the results of the election should not be certified and the election should be rerun after a period of time to be determined to allow the supervisory taint and overt supervisory support for the Union to dissipate.

[SIGNATURE PAGE TO FOLLOW]

Attachment I

Dated: September 5, 2019

Respectfully submitted,

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

Mark M. Stubley
300 N. Main Street, Suite 500
Greenville, SC 29601
Tel: 864.240.8318
Fax: 864.235.8806
mark.stubley@ogletree.com

Douglas M. Topolski
1909 K Street, N.W., Suite 1000
Washington, D.C. 20006
Tel: 202-887-0855
Fax: 202-887-0866
douglas.topolski@ogletree.com

Counsel for Employer
Sysco Hampton Roads, Inc.

Attachment I

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

SYSCO HAMPTON ROADS, INC.,	)	
	)	
Employer,	)	
	)	
and	)	**Case No. 05-RC-245597**
	)	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS UNION, LOCAL 822, AFL-CIO, CLC,	)	
	)	
Petitioner.	)	

CERTIFICATE OF SERVICE

I certify that on September 5, 2019, a copy of the foregoing Objections to the Election and to Conduct Affecting Election and corresponding Offer of Proof, was *Electronically Filed* on the NLRB's website at http://www.nlrb.gov.

Also, I do hereby certify that a true and correct copy of the Objections to the Election and to Conduct Affecting Election has been served on the following individual by email this 5th day of September, 2019: Raul Alfaro, Teamster Organizer: raul_05@comcast.net.

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
300 N. Main Street, Suite 500
Greenville, SC 29601
Tel: 864.240.8318
Fax: 864.235.8806
mark.stubley@ogletree.com

Attachment I

Sysco Hampton Roads, Inc.
05-RC- 245597
Offer of Proof

Sysco Hampton Roads, Inc. ("SHR" or the "Company") submits the following evidence in support of its Objections:

Offer of Proof - Redacted

Attachment I

Offer of Proof - Redacted

Attachment I

Offer of Proof - Redacted

Attachment I

Offer of Proof - Redacted

Attachment I

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

SYSCO HAMPTON ROADS, INC.,	)	
	)	
Employer,	)	
	)	
and	)	**Case No. 05-RC-245597**
	)	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS UNION, LOCAL 822, AFL-CIO, CLC,	)	
	)	
Petitioner.	)	

SYSCO HAMPTON ROADS, INC.'S SUPPLEMENTAL OFFER OF PROOF

On September 5, 2019, Sysco Hampton Roads, Inc. (the "Company"), filed its Objections to the Election and Conduct Affecting the Election, and an Offer of Proof. The Company also filed a Request for Extension of Time to File Additional Evidence in support of its objections. The Regional Director granted the extension until September 12, 2019. The Company's Supplemental Offer of Proof is attached for the Region's review.

Dated: September 12, 2019

Respectfully submitted,

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

Mark M. Stubley
300 N. Main Street, Suite 500
Greenville, SC 29601
Tel: 864.240.8318
Fax: 864.235.8806
mark.stubley@ogletree.com

Attachment J

Douglas M. Topolski
1909 K Street, N.W., Suite 1000
Washington, D.C. 20006
Tel: 202-887-0855
Fax: 202-887-0866
douglas.topolski@ogletree.com

Counsel for Employer
Sysco Hampton Roads, Inc.

Attachment J

Sysco Hampton Roads, Inc.
05-RC-245597
Supplemental Offer of Proof

Offer of Proof - Redacted

Attachment J

Offer of Proof - Redacted

Attachment J

Offer of Proof - Redacted

Attachment J

Offer of Proof - Redacted

Attachment J

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

SYSCO HAMPTON ROADS, INC.

Employer

and **Case 05-RC-245597**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL UNION 822

Petitioner

DECISION ON OBJECTIONS 1, 5, 7 AND 8, AND ORDER DIRECTING HEARING AND NOTICE OF HEARING ON OBJECTIONS 2 THROUGH 4 AND 6

Based on a petition filed on July 26, 2019[1] and pursuant to a Stipulated Election Agreement, an election was conducted on August 29 to determine whether employees of Sysco Hampton Roads, Inc. (the Employer) in the following voting unit wish to be represented for purposes of collective bargaining by the International Brotherhood of Teamsters Local Union 822 (the Petitioner or Union):

> All full-time and regular part-time drivers, including delivery associates, special delivery drivers and shuttle drivers, employed by the Employer at, or dispatched from, the following locations of the Employer: Suffolk, Virginia; Richmond, Virginia; Virginia Beach, Virginia; Williamsburg, Virginia; Manteo, North Carolina; Maple (Currituck), North Carolina; and Elizabeth City, North Carolina, but excluding all other employees, guards and supervisors as defined in the Act.

The parties further agreed, as set forth in the Stipulated Election Agreement, that:

> employees in the classifications of Team Lead/Driver may vote in the election but their ballots will be challenged since their eligibility has not been resolved. No decision has been made regarding whether the individuals in these classifications or groups are included in, or excluded from, the bargaining unit. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

The tally of ballots prepared at the conclusion of the election shows that of the approximately 87 eligible voters, 45 votes were cast for and 32 votes were cast against the Petitioner, with 3 challenged ballots, a number that is not sufficient to affect the results of the election.

[1] All dates are in 2019 unless otherwise noted.

Attachment K

THE OBJECTIONS

On September 5, the Employer filed timely objections to the election and to conduct affecting the results of the election with an accompanying offer of proof in support thereof.[2] A copy of the objections was served on the Petitioner and is attached to this Order as Exhibit A. The Employer makes the following objections:

1. The Petition should have been dismissed because a known supervisor as defined by Section 2(11) of the Act tainted the showing of interest supporting the petition.

2. Because the Team Leads are Section 2(11) supervisors under the Act, their conduct tainted the election process when, during the critical period, the Team Leads assisted in soliciting support for the Union.

3. The Team Leads, Section 2(11) supervisors under the Act, engaged in unlawful polling when they called employees, and went to associate houses, and interrogated employees about their union sympathies and, by these and other actions, actively encouraged voting unit employees to vote for the Union.

4. If the petition is not dismissed, the election should be rerun because it is objectionable to defer until after employees have voted the determination of supervisory status as to an individual or individuals known to be strong advocates and campaigners for the Union. Campaigning on behalf of the Union by a supervisor is inherently coercive and *per se* objectionable. Such conduct included, without limitation, regular one-on-one, face-to-face conversations with voting unit employees, texts to voting unit employees, and other overt coercive contacts.

5. Because the Team Leads are supervisors under Section 2(11) of the Act, their conduct tainted the election when they entered the polling places during the election period.

6. If the Petition is not dismissed, the election should be rerun because it is objectionable to defer until after employees have voted the determination of supervisor status as to an individual or individuals known to be strong advocates and campaigners for the Union and then allow that supervisor to act as the Union's observer at both sessions of the polling place where the largest number of voters cast ballots. Specifically, one of the Team Leads and Supervisor, and Chief Union Organizer, Joseph Whitlock, acted as the Union's observer at the Suffolk facility during the polling periods.

7. It was objectionable conduct to count the votes from each of the three voting locations separately, rather than first comingling the ballots of all three locations before any tally was conducted.

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[2] On September 12, following a request for an extension of time and the Acting Regional Director's approval of that request, the Employer provided a supplemental offer of proof in support of its objections.

8. The representation petition in this matter should have been dismissed because the Union failed to satisfy the requirements of Section 102.61(a)(11-12) of the Rules and Regulations when they failed and refused to specify timely voting type, date(s), time(s), and location(s) of the election sought.

DECISION ON OBJECTIONS 1, 5, 7 AND 8

Objections 1 and 8

Employer's objections 1 and 8 are related because they both state that the petition should have been dismissed. Moreover, they both concern issues that the Employer raised, and I addressed, before the election. Objection 1 concerns the alleged supervisory taint of the showing of interest. I previously decided that the Employer's supporting evidence of alleged supervisory taint was insufficient to invalidate the showing of interest. Now, after an election has been held, the adequacy of the showing of interest is irrelevant. *Gaylord Bag Co.*, 313 NLRB 306 (1993). Objection 8 concerns the omission to the Petitioner's proposal regarding the election date, time, and location in the original petition.[3] That objection is now also moot after the parties have entered into a Stipulated Election Agreement and the election has been conducted. In addition, by Order dated August 5th, I denied the Employer's Motion to Dismiss the Petition on these grounds.

Objection 5

Objection 5 asserts the Team Leads tainted the election when they entered the polling places during the election period. As noted above, the parties' Stipulated Election Agreement, which I approved on August 12, provided, in relevant part:

> The parties have agreed that employees in the classifications of Team Lead/Driver may vote in the election but their ballots will be challenged since their eligibility has not been resolved. No decision has been made regarding whether the individuals in these classifications or groups are included in, or excluded from, the bargaining unit. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

This provision of the agreement is consistent with the Board's revised representation case procedures, which permit Regional Directors to defer resolution of individual eligibility or unit inclusion issues. Here, the voter list identified three employees, out of approximately 87 eligible voters, in the classification of Team Lead/Driver who would vote subject to challenge. The three employees cast challenged ballots in the election and the challenges were not sufficient to affect the outcome of the election.

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[3] The Petitioner filed the representation petition on July 26 and an amended petition, providing its proposal regarding the election date, time and location, on August 2.

I conclude that the Employer's Objection 5 does not serve as a basis for setting aside the election results because the parties agreed, in the Stipulated Election Agreement, that employees in these job classifications would vote in the election subject to challenge. They entered the polling places during the election period to cast challenged ballots, per the agreement of the parties.

Objection 7

Objection 7 concerns the Board Agent's conduct in counting the ballots. It asserts the Board Agent failed to comply with the Case Handling Manual by not commingling the ballots of the three voting sites before counting the ballots.[4] The Employer asserts that those individuals present at the ballot count could determine how many employees voted at each of the three voting sites and how many voted in favor of the Petitioner. It states that this information could result in discrimination and retaliation against the employees who did not vote in favor of the Petitioner.

Where objectionable conduct is attributable to a Board Agent, the Board evaluates whether "the manner in which the election was conducted raises a reasonable doubt as to fairness and validity of the election." *Polymers, Inc.*, 174 NLRB 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970). The Board has stated:

> Election procedures prescribed by the General Counsel or a Regional Director are obviously intended to indicate to field personnel those safeguards of accuracy and security thought to be optimal in typical election situations. These desired practices may not always be met to the letter, sometimes through neglect, sometimes because of the exigencies of circumstance. The question which the Board must decide in each case in which there is a challenge to conduct of the election is whether the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election. Id. at 282.

Here, the Board Agent's failure to commingle the ballots of the three ballot boxes before counting the ballots does not raise a reasonable doubt as to the fairness and validity of the election and does not warrant that a new election be conducted. The tally of ballots gives information about the total approximate number of voters, the number of votes cast for and against the Petitioner and the number of challenges. There was no evidence in the offer of proof that the identity of any voter and the manner in which he or she voted had been disclosed. The offer of proof also contained no evidence of actual discrimination or retaliation against employees on the basis of how they voted in the election and, in any event, any such allegations can be investigated and addressed by the filing of unfair labor practice charges. The Employer's Objection 7, and the evidence in support of that objection provided in the offer of proof, is not grounds for setting aside the election.

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[4] The election involved three different sites and various polling sessions, with three separate ballot boxes.

Accordingly, Objections 1, 5, 7 and 8 are overruled.

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, DC by **October 11, 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.nlrb.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, 1015 Half Street, S.E., 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.

CONCLUSION AND ORDER DIRECTING HEARING ON OBJECTIONS 2 THROUGH 4 AND 6

Employer's Objections 2 through 4 all concern the pro-union conduct of individuals classified as Team Leads, whom the Employer alleges are supervisors within the meaning of Section 2(11) of the Act. Objection 2 states the Team Leads tainted the election process by, during the critical period, assisting in soliciting support for the Petitioner. Objection 3 states the Team Leads engaged in unlawful polling by calling employees, going to the houses of employees, interrogating employees about their union sympathies, and encouraging employees to vote for the Petitioner. Similarly, Objection 4 states that Team Leads campaigned on behalf of the Petitioner by having regular one-on-one, face-to-face conversations with voting unit employees, sending them text messages and other conduct campaigning on behalf of the Petitioner.

The Employer asserts the Team Leads are supervisors within the meaning of Section 2(11) of the Act because they each supervise between nine and twelve drivers and: investigate situations that could lead to the discipline and discharge of drivers; conduct performance evaluations of new drivers and effectively recommend whether new drivers should be retained or terminated based on their assessment of how the drivers satisfy the Employer's standards; dispatch drivers and will respond to issues related to dispatching; use independent judgment to call in drivers from a standby list and determine what drivers must come in to work on their days off to satisfy the Employer's staffing needs; and rearrange loads and driver routes based on their assessment of the driver's skills and certifications, as well as order drivers who finish their routes early to assist other drivers who may be behind on their routes. In addition, The Employer notes that the Team Leads: maintain order in their area, particularly in the outlying yards of North Carolina; are responsible for counseling employees on their performance; have a different pay structure than the unit employees; are invited to attend management meetings; and receive a monthly cell phone allowance.

Attachment K

With regards to the alleged objectionable conduct, the Employer's offers of proof do not identify any pro-union by any Team Leads other than Joseph Whitlock (Whitlock). Specifically, the Employer contends that employees would testify at hearing that Whitlock: spoke to an employee in April of 2019 about signing a union authorization card; visited an employee's house, with a Union organizer, "several months ago" to talk about the Union; talked to, called, and sent text messages to employees, at unidentified times, about the Union. In one instance, the Employer's supplemental offer of proof referred to a witness who would testify about Whitlock's conduct at a time before the Union filed the petition.

The conduct described in the Employer's objections 2 through 4 could be grounds for setting aside the election if it is determined that Whitlock is a statutory supervisor or agent of the Employer. As a general rule, the Board will consider conduct as objectionable if it took place during the "critical period", i.e. the period between July 26, the filing date of the petition, and August 29, the date of the election. *Ideal Electric Co.*, 134 NLRB 1275 (1961). However, the Board has considered pro-union conduct by a supervisor that occurred prior to the filing of the petition as objectionable conduct: See *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004) at fn. 21; *Madison Square Garden, Ct., LLC*, 350 NLRB 117 (2007). Accordingly, the conduct in Objections 2 through 4, as described in the Employer's offers of proof, that took place before the filing of the representation petition will also be considered.

Objection 6 states that Team Lead Whitlock, served as the Petitioner's observer at one of the election sites during two different polling times. Whether this conduct could be grounds for overturning the election depends on whether Whitlock is a supervisor within the meaning of Section 2(11) or is perceived by employees as being "closely aligned with management." *First Student, Inc.*, 355 NLRB 410 (2010). The Board has clearly stated that supervisors may not serve as election observers for either party and that an election should be set aside if a party's election observer is perceived as being "closely aligned with management." *In re Family Service Agency*, 331 NLRB 850 (2000); *General Shoe Corp.*, 77 NLRB 124, 127 (1948); *First Student, Inc.*, 355 NLRB 410 (2010).

CONCLUSION AND ORDER

I have concluded that the evidence submitted by the Employer in support of Objections 2, 3, 4, and 6 could be grounds for overturning the election if introduced at a hearing. Accordingly, in accordance with Section 102.69(c)(1)(ii) of the Board's Rules and Regulations, IT IS ORDERED that a hearing shall be held before a Hearing Officer designated by me, for the purpose of receiving evidence to resolve the issues raised by Objections 2, 3, 4, and 6. Specifically, the Hearing Officer will take evidence concerning the supervisory status of Team Leads Joseph Whitlock, Keith Dessenberg and Steve Farrow[5] and the objectionable conduct that is attributed to Whitlock. At the hearing, the parties will have the right to appear in person to give testimony, and to examine and cross-examine witnesses.

[5] Although there was not any objectionable conduct attributed to Keith Dessenberg and Steve Farrow, I have determined that it is most efficient to take evidence and make a determination on the supervisory status of Team Leads since it is necessary to do so with regard to Team Lead Joseph Whitlock.

Attachment K

Upon the conclusion of the hearing, the Hearing Officer shall submit to me and serve on the parties a report containing resolutions of the credibility of witnesses, findings of fact and recommendations as to the disposition of Objections 2, 3, 4, and 6.

NOTICE OF HEARING

Starting at **9:00 a.m. on October 21, 2019**, at the **City of Norfolk Courthouse, 150 Saint Paul's Boulevard, Norfolk, VA** the hearing on objections as described above will be conducted before a hearing officer of the National Labor Relations Board. The hearing will continue on consecutive days thereafter until completed unless I determine that extraordinary circumstances warrant otherwise.

Dated: September 27, 2019

Nancy Wilson, Acting Regional Director
National Labor Relations Board, Region 05
Bank of America Center, Tower II
100 S. Charles Street, Suite 600
Baltimore, MD 21201

Attachment K

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

SYSCO HAMPTON ROADS, INC.,	)	
Employer,	)	
and	)	**Case No. 05-RC-245597**
INTERNATIONAL BROTHERHOOD OF TEAMSTERS UNION, LOCAL 822, AFL-CIO, CLC,	)	
Petitioner.	)	

SYSCO HAMPTON ROADS, INC.'S OBJECTIONS TO THE ELECTION AND TO CONDUCT AFFECTING ELECTION

On August 29, 2019, the National Labor Relations Board ("Board"), Region 5, conducted a representation election among driver associates of Sysco Hampton Roads, Inc. ("SHR" or the "Company") to see if they wished to be represented by the International Brotherhood of Teamsters Union, Local 822, AFL-CIO, CLC (the "Union"). On that day, the unchallenged ballots were counted with a majority of those ballots voting for representation by the Union. Pursuant to Section 102.69(a) of the Board's Rules and Regulations, SHR files these Objections to the election and the conduct affecting the results of the election:[1]

[1] SHR has filed a request for a seven (7) day extension to provide additional information to the Region regarding its offer of proof, which has simultaneously been e-filed with the Region. This additional time will provide an opportunity for the Company to give even further information related to the supervisory taint objections and objections related to improper support of the Union by supervisory employees whose status as Section 2(11) supervisors should have been determined before any election was held. Thus, the Company seeks to provide additional information to the Region on September 12, 2019.

Exhibit A

Attachment K

OBJECTION #1. The Petition should have been dismissed because a known supervisor as defined by Section 2(11) of the Act tainted the showing of interest supporting the petition.

OBJECTION #2: Because the Team Leads are Section 2(11) supervisors under the Act, their conduct tainted the election process when, during the critical period, the Team Leads assisted in soliciting support for the Union.

OBJECTION #3: The Team Leads, Section 2(11) supervisors under the Act, engaged in unlawful polling when they called employees, and went to associate houses, and interrogated employees about their Union sympathies and, by these and other actions, actively encouraged voting unit employees to vote for the Union.

OBJECTION #4: If the petition is not dismissed, the election should be rerun because it is objectionable to defer until after employees have voted the determination of supervisory status as to an individual or individuals known to be strong advocates and campaigners for the Union. Campaigning on behalf of the Union by a supervisor is inherently coercive and *per se* objectionable. Such conduct included, without limitation, regular one-on-one, face-to-face conversations with voting unit employees, texts to voting unit employees, and other overt coercive contacts.

OBJECTION #5: Because the Team Leads are supervisors under Section 2(11) of the Act, their conduct tainted the election when they entered the polling places during the election period.

OBJECTION #6: If the Petition is not dismissed, the election should be rerun because it is objectionable to defer until after employees have voted the determination of supervisor status as to an individual or individuals known to be strong advocates and campaigners for the Union

Attachment K

and then allow that supervisor to act as the Union's observer at both sessions of the polling place where the largest number of voters cast ballots. Specifically, one of the Team Leads and Supervisor, and Chief Union Organizer, Joseph Whitlock, acted as the Union's observer at the Suffolk Facility during the polling periods.

OBJECTION #7: It was objectionable conduct to count the votes from each of the three voting locations separately, rather than first comingling the ballots of all three locations before any tally was conducted.

OBJECTION #8: The representation petition in this matter should have been dismissed because the Union failed to satisfy the requirements of Section 102.61(a)(11-12) of the Rules and Regulations when they failed and refused to specify timely voting type, date(s), time(s), and locations(s) of the election sought.

HEARING REQUESTED: SHR requests a hearing on the genuine issues of material facts raised by this Objection, which will be supported by competent evidence that will be timely submitted to the Regional Director in accordance with the Board's Rules and Regulations.

For the reasons set forth above, and based upon the evidence to be deduced at the hearing, the election results should not be certified and the petition should be dismissed. Alternatively, the results of the election should not be certified and the election should be rerun after a period of time to be determined to allow the supervisory taint and overt supervisory support for the Union to dissipate.

[SIGNATURE PAGE TO FOLLOW]

Attachment K

Dated: September 5, 2019

Respectfully submitted,

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

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Counsel for Employer
Sysco Hampton Roads, Inc.

Attachment K

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

SYSCO HAMPTON ROADS

Employer

and **Case 05-RC-245597**

TEAMSTERS LOCAL UNION 822

Petitioner

AFFIDAVIT OF SERVICE OF: DECISION ON OBJECTIONS 1, 5,7 AND 8, AND ORDER DIRECTING HEARING AND NOTICE OF HEARING ON OBJECTIONS 2 THROUGH 4 AND 6 dated September 27, 2019.

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on September 17, 2019, I served the above documents by electronic mail upon the following persons, addressed to them at the following addresses:

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raul_05@comcast.net

Date: September 27, 2019

Vivian Brown, Designated Agent of NLRB
Name
/s/ Vivian Brown

Attachment K

Offer of Proof - Redacted

Attachment L

Offer of Proof - Redacted

Attachment L

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

Sysco Hampton Roads, Inc. **and** **International Brotherhood of Teamsters, Local 822**	**Case No. 05-RC-245597**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Employer's Request for Review of the Acting Regional Director's Decision on Objections 1 and 8** was served on the following parties via email on this **10th** day of **October**, **2019**:

Nancy Wilson, Acting Regional Director
National Labor Relations Board,
Region 5
Via Electronic Filing

Stephanie C. Eitzen, Resident Agent
National Labor Relations Board
Region 5
Stephanie.Eitzen@nlrb.gov

Raul Alfaro
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OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

Douglas M. Topolski
Counsel for Sysco Hampton Roads, Inc.

Attachment K

ATTACHMENT C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SYSCO HAMPTON ROADS, INC.
Employer

and Case 05-RC-245597

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS LOCAL UNION 822
Petitioner

ORDER

The Employer's Request for Review of the Acting Regional Director's decision overruling Objections 1 and 8 is denied as it raises no substantial issues warranting review.[1]

JOHN F. RING, CHAIRMAN

MARVIN E. KAPLAN, MEMBER

WILLIAM J. EMANUEL, MEMBER

Dated, Washington D.C., January 23, 2020.

[1] In denying review, we find that the Acting Regional Director's decision to defer litigation of the supervisory status of the Team Leads was permissible under the representation-case procedures currently in effect. We observe, however, that the Acting Regional Director's decision in this regard raises many of the concerns that led the Board to recently adopt procedural changes that will limit regional directors' discretion to defer litigation and resolution of eligibility disputes. See 84 Fed. Reg. 69524, 69538-69542 (Dec. 18, 2019). Those amendments are not effective until April 16, 2020, however. See id. at 69524.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

Sysco Hampton Roads, Inc.,	)	
Employer,	)	
	)	
and	)	**Case No. 05-RC-245597**
	)	
International Brotherhood of Teamsters,	)	
Local Union 822	)	
Petitioner.	)	
	)	

CERTIFICATE OF SERVICE

This is to certify service of the above and foregoing **SYSCO HAMPTON ROADS INC.'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DISCION ON OBJECTIONS AND CERTIFICATION OF REPRESENTATIVE AND BRIEF IN SUPPORT** by e-filing and electronic mail to the below on the 28th day of August, 2020.

Sean R. Marshall
Regional Director
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Sean.Marshall@nlrb.gov

Stephanie C. Eitzen
Resident Agent
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Justin P. Keating, Esq.
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OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

By: _____
Mark M. Stubley, Esq.