

20-60515

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

RANDALLS FOOD & DRUG, L.P.,

Petitioner Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent Cross-Petitioner

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

**BRIEF FOR RESPONDENT CROSS-PETITIONER
NATIONAL LABOR RELATIONS BOARD**

KIRA DELLINGER VOL
Supervisory Attorney

MICAH P.S. JOST
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-0656
(202) 273-0264

PETER B. ROBB
General Counsel

ALICE B. STOCK
Deputy General Counsel

RUTH E. BURDICK
Acting Deputy Associate General Counsel

DAVID HABENSTREIT
Assistant General Counsel

National Labor Relations Board

STATEMENT REGARDING ORAL ARGUMENT

The Board submits that oral argument would not be helpful to the Court.

This case involves the Board's application of well-established, uncontested standards to straightforward, largely undisputed facts, and the Company raises no novel or complex issues.

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**BRIEF FOR RESPONDENT CROSS-PETITIONER
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JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Randalls Food & Drug, L.P. (“the Company”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, an Order issued by the Board on June 9, 2020, reported at 369 NLRB No. 100. (ROA.543-45.) The Board found that the Company unlawfully refused to bargain with International Brotherhood of Teamsters, Local Union 745 (“the Union”), which the Board had certified as the

collective-bargaining representative of a unit of the Company's employees after a secret-ballot election.

The Board had jurisdiction over the unfair-labor-practice proceeding under Section 10(a), 29 U.S.C. § 160(a), of the National Labor Relations Act ("the Act"), 29 U.S.C. § 151, et seq. Under Section 10(e) and (f) of the Act, the Court has jurisdiction over this case, and venue is proper because the underlying unfair labor practices occurred in Texas. 29 U.S.C. § 160(e) and (f). The petition and cross-application are timely, as the Act provides no time limit for those filings.

Because the Board's Order is based in part on findings made in an underlying representation (election) proceeding (Board Case No. 16-RC-242776), the record in that proceeding is part of the record before the Court. 29 U.S.C. § 159(d); *Boire v. Greyhound Corp.*, 376 U.S. 473, 477, 479 (1964). Section 9(d) of the Act does not give the Court general authority over the representation proceeding, but authorizes review of the Board's actions in that proceeding for the limited purpose of deciding whether to enforce, modify, or set aside the Board's unfair-labor-practice order in whole or in part. 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act to resume processing the representation case in a manner consistent with the Court's ruling. 29 U.S.C. § 159(c); *Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

ISSUE STATEMENT

Whether the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union, which turns on whether the Board acted within its discretion when it overruled the Company's election objections and certified the Union as the representative of a unit of the Company's employees.

STATEMENT OF THE CASE

In the underlying decision, the Board found that the Company unlawfully refused to recognize and bargain with the Union as the certified representative of the truck drivers and spotters who work at the Company's distribution center in Roanoke, Texas. The Company defends its admitted refusal to bargain only by asserting that the Board erred in overruling each of its five post-election objections and certifying the Union. If the Court agrees that the Board acted within its discretion in overruling the objections, then the Board is entitled to enforcement of its Order.

I. Procedural History

A. The Representation Proceeding

The Company operates a distribution center in Roanoke, Texas, which supplies its supermarkets in the region. (ROA.311, 543; ROA.25, 29.)¹ On June 5, 2019, the Union petitioned for an election to represent the truck drivers and spotters at the center in collective bargaining. (ROA.309, 335 n.25; ROA.210, 256, 257.) The parties entered into a stipulated election agreement providing for the employees to vote in six sessions over three days, from 1:00 p.m. to 7:30 p.m., and from 10:30 p.m. to 12:30 a.m., each day. (ROA.309; ROA.258-60.)

The election was held on June 28, 29, and 30. Out of 78 eligible voters, 44 employees voted for union representation and 31 employees voted against. There was also one nondeterminative, challenged ballot, and two employees did not vote. (ROA.309, 350; ROA.46, 258, 261.)

The Company filed five objections to the conduct of the election, alleging misconduct on the part of a union organizer, a Board agent, and various employees. (ROA.309; ROA.263-65.) Following an administrative hearing (ROA.1-252), a Board hearing officer prepared a Report on Objections in which she concluded that the Company had not established that objectionable conduct

¹ Record citations preceding a semicolon refer to the Board's findings; those following refer to the supporting evidence.

warranted setting aside the election (ROA.308-46). The Company filed exceptions to the hearing officer's report, which the Regional Director found meritless.

(ROA.350-57.) The Regional Director accordingly overruled the Company's objections and certified the Union as the drivers' and spotters' collective-bargaining representative. (ROA.358.) The Company filed a request for review of the Regional Director's Decision and Certification of Representative, which the Board denied. (ROA.382.)

B. The Unfair-Labor-Practice Proceeding

On October 23, 2019, the Union requested that the Company recognize and bargain with it as the certified representative of the drivers and spotters, but the Company refused. (ROA.544; ROA.506, 509.) The Union then filed an unfair-labor-practice charge (ROA.510), and the General Counsel issued a complaint (ROA.519-23), alleging that the Company's refusal violated the Act. Thereafter, the General Counsel filed a motion for summary judgment, given there were no disputed facts, and the Board issued a Notice to Show Cause why the Board should not grant the motion. (ROA.529.)

II. The Board's Conclusions and Order

On June 9, 2020, the Board (Chairman Ring and Members Kaplan and Emanuel) issued its Decision and Order granting the General Counsel's motion for summary judgment and finding that the Company's refusal to recognize and

bargain with the Union violated Section 8(a)(5) and (1) of the Act. (ROA.543-45.)

The Board concluded that all representation issues the Company raised in the unfair-labor-practice proceeding were, or could have been, litigated in the underlying representation proceeding, and that the Company neither offered to adduce at a hearing any newly discovered or previously unavailable evidence, nor alleged the existence of any special circumstances that would require the Board to reexamine its decision in the representation proceeding. (ROA.543.)

To remedy the unfair labor practice, the Board's Order requires the Company to cease and desist from refusing to recognize and bargain with the Union or in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157. The Board also directed the Company to bargain with the Union upon request and embody any understanding the parties reach in a signed agreement. Finally, it ordered the Company to post a remedial notice. (ROA.544-45.)

SUMMARY OF ARGUMENT

In assessing each of the Company's objections, the Board applied well-established legal standards that the Company does not contest in its opening brief. And in each instance, the Board thoroughly analyzed the record evidence and reasonably found that the Company did not meet its burden of proving election misconduct or interference with employees' exercise of free choice. Before the Court, the Company does no more than weakly reiterate arguments that the Board reasonably rejected. It provides no basis for nullifying the drivers' and spotters' selection of the Union as their representative in a secret-ballot election.

ARGUMENT

The Board Acted Within Its Broad Discretion in Overruling the Company's Election Objections and Certifying the Union, and the Company's Admitted Refusal To Recognize and Bargain with the Union Violated Section 8(a)(5) and (1) of the Act

Under Section 8(a)(5) of the Act, it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5). Such a refusal also violates Section 8(a)(1) of the Act, which makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise" of their rights under the Act. 29 U.S.C. § 158(a)(1); *Porta-King Bldg. Sys. v. NLRB*, 14 F.3d 1258, 1261 (8th Cir. 1994). *See NLRB v. Laney & Duke Storage Warehouse Co.*, 369 F.2d 859, 869 (5th Cir. 1966). The Company concedes that it refused to bargain with the Union in order to

seek court review of the Board’s certification of the Union following its election victory. (Br. 10, 13.) As we show below, the Company provides no basis for disturbing the certification.

A. The Court Defers to the Board’s Determination that an Objecting Party Has Not Met Its Burden of Proving that an Election Was Not Fairly Conducted

“Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.” *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). In carrying out that task, “the Board seeks to establish election conditions as ideal as possible.” *Bos. Insulated Wire & Cable Co.*, 259 NLRB 1118, 1118 (1982), *enforced*, 703 F.2d 876 (5th Cir. 1983). But the Board recognizes that “elections must be appraised realistically and practically, and should not be judged against theoretically ideal, but nevertheless artificial, standards.” *Id.* (quoting *The Liberal Market, Inc.*, 108 NLRB 1481, 1482 (1954)) (internal quotation marks omitted). “Consequently, the need for . . . a new election is judged not against a standard of perfection, but against the likelihood that the outcome of the election might have been affected.” *NLRB v. Klingler Elec. Corp.*, 656 F.2d 76, 89 (5th Cir. 1981).

The party objecting to a representation-election result has the “heavy burden” of supplying “specific evidence of specific events” that warrant

overturning employees' choice. *Con-way Freight, Inc. v. NLRB*, 838 F.3d 534, 537 (5th Cir. 2016). "A simple showing of misconduct alone is not sufficient to mandate that result; the [objecting party] must also show that the acts interfered with the employees' exercise of free choice to such an extent that they materially affected the results of an election." *NLRB v. Gulf States Cannery, Inc.*, 634 F.2d 215, 216 (5th Cir. 1981) (per curiam) (citation and internal quotation marks omitted). Unsupported conjecture and speculation do not suffice to make that showing. *NLRB v. Capitan Drilling Co.*, 408 F.2d 676, 677 (5th Cir. 1969). "The burden [i]s not on the Board to show the election was fairly conducted but on [the objecting party] to show it was not." *Laney & Duke Storage*, 369 F.2d at 864.

"In passing on objections to elections it is for the Board to decide whether the conduct charged reasonably tends to interfere with the voters' free choice." *Laney & Duke Storage*, 369 F.2d at 864 (citations omitted). "Thus, the only question presented to the Courts in an election review is whether the Board has reasonably exercised its discretion." *NLRB v. Osborn Transp., Inc.*, 589 F.2d 1275, 1279 (5th Cir. 1979) (quoting *Pepperell Mfg. Co. v. NLRB*, 403 F.2d 520, 522 (5th Cir. 1968)) (internal quotation marks omitted). In reviewing the Board's determinations, the Court is guided by the "strong presumption" that ballots cast in a Board-supervised election "reflect the true desires of the employees," and it

recognizes that “[r]epresentation elections are not lightly set aside.” *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991).

B. The Board Acted Within Its Discretion in Overruling the Company’s Election Objections

1. The Company’s claim of objectionable electioneering by the Union’s organizer is unsupported

The Board acted within its discretion in overruling the Company’s objection that the Union’s organizer, Carlos Mendez, engaged in impermissible electioneering during the election. As the Board found (ROA.351-52), the Company did not establish that Mendez engaged in much of the conduct alleged, or that the actions he did take were objectionable.

Before and after each polling session, the parties held short election conferences attended by a Board agent, the Company’s vice president of labor relations and its labor relations consultant, Mendez, and the parties’ designated employee election observers. (ROA.312-13; ROA.130-31.) They met in the room where voting was to take place—an enclosed, second-story space in the Company’s truck-shop building. (ROA.316; ROA.74, 107, 277.) To reach that room, voters were to enter the truck shop and walk up a staircase, across a landing, and through a door. (ROA.327-28; ROA.109-14, 125-26, 277.)

On June 28, when the pre-election conference ended shortly before the 10:30 p.m. start of the second voting session, Mendez descended the stairs from the

voting room to leave the premises. After he reached the first level of the building, a group of about five employees approached and briefly conversed with him. (ROA.321; ROA.115-16, 181.) The employees asked where Mendez would be during the voting session, and he told them he had to leave the property. There was no discussion of how employees should vote. (ROA.321; ROA.181-82.) Mendez left the building, walked to his car, drove to the perimeter of the premises, and checked out at the guard shack at 10:40 p.m. (ROA.321; ROA.73-74, 81, 274.)

In evaluating Mendez's chance interaction with employees as he left the election conference, the Board (ROA.382) applied the analytical framework set forth in *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118, 1118 (1982), *enforced*, 703 F.2d 876 (5th Cir. 1983). Under that framework, the Board considers allegations of improper electioneering at or near the polls under two distinct standards.

First, the Board applies a prophylactic rule under which it "will set aside an election on the basis of any prolonged conversations between a representative of a party to the election and employees waiting in line to vote, without inquiring into the nature of the conversation itself." *Bos. Insulated*, 259 NLRB at 1118. That rule, which the Board announced in *Milchem, Inc.*, 170 NLRB 362, 362-63 (1968), is designed to discourage last-minute electioneering and interference with the

voting process. The Board’s application of that rule, however, is “informed by a sense of realism.” *Id.* at 363. The Board will not overturn an election based on “any chance, isolated, innocuous comment or inquiry by an employer or union official.” *Id.* And the rule against prolonged conversation applies only within specific, narrowly circumscribed physical parameters. Specifically, it covers employees who are within the voting area or waiting in a line stretching directly from it. Where those “precise factors are not present,” the Court has upheld the Board’s policy that “the *Milchem* strict rule is inapplicable.” *Bos. Insulated Wire & Cable Sys. v. NLRB*, 703 F.2d 876, 881 (5th Cir. 1983).

Second, where *Milchem* does not apply, the Board employs a flexible, multifactor analysis. “When faced with evidence of impermissible electioneering, the Board determines whether the conduct, under the circumstances, ‘is sufficient to warrant an inference that it interfered with the free choice of the voters.’” *Bos. Insulated*, 259 NLRB at 1118-19 (quoting *Star Expansion Indus.*, 170 NLRB 364, 365 (1968)). The Board considers the following factors: (1) “whether the conduct occurred within or near the polling place,” (2) “the extent and nature of the alleged electioneering,” (3) “whether it [wa]s conducted by a party to the election or by employees,” and (4) “whether the electioneering [wa]s conducted within a designated ‘no electioneering’ area or contrary to the instructions of the Board agent.” *Id.* at 1119 (footnotes omitted).

Mendez's conduct was not objectionable under either standard. First, it did not come within the *Milchem* rule, as the Board found, because there was "no evidence that the employees who [Mendez] spoke to were waiting in line to vote, otherwise in the polling area, or captivated in any way." (ROA.352.) The Company does not dispute that the employees had not yet queued up to vote. And it concedes that the conversation was "near the polling place"—not in it. (Br. 16.) Thus, the conversation did not take place in an area governed by *Milchem*. See *Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 269-70 (D.C. Cir. 1998) (*Milchem* rule not implicated where union agent did not approach employees waiting in line to vote); *NLRB v. Del Rey Tortilleria, Inc.*, 823 F.2d 1135, 1141 (7th Cir. 1987) (same where employees were waiting to enter building but not in line extending from polling area); *Marvil Int'l Sec. Serv., Inc.*, 173 NLRB 1260, 1260-61 (1968) (same as to electioneering at the foot of stairway leading to second-floor voting room). Moreover, the Board reasonably found that the Company failed to establish that Mendez's "chance, isolated, [and] innocuous" remarks constituted "prolonged" conversation under *Milchem*. (ROA.352.) See *Con-way Freight*, 838 F.3d at 539 (union observer's "brief, isolated remarks d[id] not violate the *Milchem* rule); *Amalgamated Serv. & Allied Indus. Joint Bd. v. NLRB*, 815 F.2d 225, 227-29 (2d Cir. 1987) (same).

Second, the Board reasonably found that Mendez’s conduct did not invalidate the election under the *Boston Insulated* multifactor inquiry. That framework, after all, is used to evaluate “whether the *electioneering* substantially impaired the exercise of a free choice so as to require the holding of a new election.” *Bos. Insulated*, 703 F.2d at 881 (emphasis added). Here, the record evidence proves only that Mendez was on the property for about 10 minutes after a pre-election meeting and that he spoke to some employees. As the Board found, that is “insufficient evidence of electioneering,” even leaving aside Mendez’s specific, credited, and uncontroverted testimony that he said nothing about how employees should vote, and only engaged in an exchange of pleasantries and responses to employees’ questions about his own plans. (ROA.352.) *See J.P. Mascaro & Sons*, 345 NLRB 637, 638 (2005) (employer president’s handshaking and conversation outside polling place was unobjectionable in absence of evidence of electioneering).²

The Company adds nothing by asserting that Mendez identified himself to a guard as an “employee” when he checked in on the third day of voting. (Br. 16-17.) Even assuming that the allegation was true, the Board noted that the

² The Company suggests that the Board should not have believed Mendez (Br. 16-17), but the Court does not overturn the Board’s credibility determinations unless they are “inherently unreasonable or self-contradictory.” *Central Freight Lines, Inc. v. NLRB*, 666 F.2d 238, 239 (5th Cir. 1982). The Company makes no such showing here.

Company offered no evidence that any unit employee learned of the misrepresentation or that it “actually led to any prohibited electioneering.” (ROA.352.) Before the Court, the Company does no more than hint at the “possibility” that Mendez could have misstated his identity “to gain access to electioneer.” (Br. 17.) “That speculation beagle will not catch the rabbit.” *NLRB v. New Orleans Bus Travel, Inc.*, 883 F.2d 382, 385 (5th Cir. 1989).

The Board decisions upon which the Company relies (Br. 17-18) further confirm the inadequacy of its evidence. In both cases, a union agent engaged in actual electioneering—not mere small talk—by telling employees how to vote. *Brinks, Inc.*, 331 NLRB 46, 46 (2000); *Star Expansion*, 170 NLRB at 365. And the electioneering took place inside the polling place, *Brinks*, 331 NLRB at 46, or in a proximate area where the Board agent had prohibited electioneering, *Star Expansion*, 170 NLRB at 365. In both instances, too, the electioneering continued in spite of the Board agent’s admonishment. *Brinks*, 331 NLRB at 46; *Star Expansion*, 170 NLRB at 364. Because nothing of the sort happened here, the Board reasonably rejected the Company’s argument that those cases require a different result. (ROA.352.)

2. The brief delay in one voting session did not raise a reasonable doubt as to the fairness and validity of the election

The Company likewise failed to show that the Board should have overturned the election based on a brief delay in opening the polls for one voting session. On June 29, the second polling day, a new Board agent assigned to run the election got lost on her way in. (ROA.322-24; ROA.147, 190.) As a result, voting began approximately 15 minutes after the scheduled 10:30 p.m. start time. (ROA.323-24, 353; ROA.106, 264.) One employee came to the polls before 10:30 and left without voting, but he succeeded in voting later. (ROA.324; ROA.106-07, 215.)

Consistent with its precedent, the Board reasonably determined that the slight delay in starting one of six voting sessions did not warrant rerunning the entire election. (ROA.352-53.) “The Board ‘does not set aside an election based solely on the fact that the Board agent conducting the election arrived at the polling place later than scheduled, thereby causing the election to be delayed.’” *Midwest Canvas Corp.*, 326 NLRB 58, 58 (1998) (quoting *Jobbers Meat Packing Co.*, 252 NLRB 41, 41 (1980)). Rather, in that circumstance, the Board may set aside the election if: (1) the number of voters who were “possibly excluded could have been determinative,” (2) other circumstances suggest that “the vote may have been affected by the Board agent’s late opening,” or (3) it is “impossible to determine

whether [the] irregularity affected the outcome of the election.” *Id.* (citations and internal quotation marks omitted).

Here, as the Board recognized, only 2 of 78 eligible employees did not vote, and the Union won by 13 votes, with 1 challenged ballot. (ROA.353.) Thus, as a matter of arithmetic, the number of employees who conceivably could have been unable to vote due to the late start could not have affected the result. Under similar circumstances, the Court upheld the Board’s refusal to overturn an election in *NLRB v. Klinger Electric Corp.*, where the election began 17 minutes late and ended 15 minutes late, only 2 employees failed to vote, and the union prevailed by a margin of 32 to 15. 656 F.2d 76, 88 (5th Cir. 1981). *See also Jobbers Meat Packing Co.*, 252 NLRB at 41 (the Board declined to set aside an election that started 2 hours late, preventing an employee from voting, where the vote could not have been outcome determinative). Moreover, although the Company argues that one employee was unable to vote when he first attempted to do so (Br. 19), it did not establish that the initial attempt even occurred during the scheduled polling period (ROA.324). And in any event, the Board credited the unrebutted testimony that the employee was not ultimately disenfranchised. (ROA.324).

As the Board found, the Company presented no evidence that the delay nonetheless affected employee attitudes or otherwise could have influenced the election outcome. (ROA.324, 353.) Nor has the Company tried to explain why it

would be impossible to determine whether it did or not. Instead, it references cases in which the Board found, on facts entirely unlike those here, that parties did make those evidentiary showings. (Br. 19.) For instance, in *B&B Better Baked Foods*, an election scheduled to last only 2 hours was delayed by 40 minutes—a “substantial departure” from the scheduled election time—and the number of employees who did not vote could have changed the result. 208 NLRB 493, 493 (1974). And *Nyack Hospital* involved allegations that turnout was depressed by a 55-minute delay in an 8-hour election across 3 bargaining units covering approximately 875 employees. 238 NLRB 257, 257-58, 260 (1978). In 2 of the units, the votes of employees possibly disenfranchised could have changed the result. *Id.* at 260.

Here, by contrast, the Board reasonably found that the “fifteen-minute delay in one of six sessions in an election with over 25 hours of scheduled voting time [wa]s not a substantial departure from the scheduled voting hours.” (ROA.353.) The Company “does not offer the slightest indication how this minor departure from the election schedule could have influenced the election.” *Klingler Elec.*, 656 F.2d at 88.

3. It is not objectionable for a party’s observer to wear union or employer insignia

Equally meritless was the Company’s objection to a union observer’s attire. At both polling sessions on June 30, the employee serving as observer for the

Union wore a shirt bearing the Union's logo over the left breast. The shirt made no reference to the election, and no party objected to it. (ROA.326; ROA.132, 211.)

Meanwhile, the Company's observers wore shirts bearing the Company's logo. (ROA.326; ROA.132, 151-52, 178, 211, 229-30.)

As the Board clearly stated in the sole case the Company cites (Br. 20), the Board "does not prohibit" election observers from wearing campaign insignia. *U-Haul Co. of Nev., Inc.*, 341 NLRB 195, 196 (2004), *bargaining order enforced*, 490 F.3d 957 (D.C. Cir. 2007). The Board has long held, with court approval, that an observer's display of pronoun or antiunion insignia "does not in itself constitute interference with an election." *Pillsbury Co., Larkwood Farms Div.*, 178 NLRB 226, 226 (1969). *See Van Leer Containers, Inc. v. NLRB*, 841 F.2d 779, 788 (7th Cir. 1988) (collecting cases). As the Court has noted, that sort of insignia is unlikely to confuse or coerce employees, who are generally well aware that observers represent the interests of the parties. *Laney & Duke Storage*, 369 F.2d at 864 (citing *W. Elec. Co.*, 87 NLRB 183, 185 (1949)).

The shirt at issue here was particularly unobjectionable, as it identified the observer's affiliation without "refer[ring] in any way to the election or indicat[ing] to voters how they should vote." (ROA.327.) Nor, as the Board noted, is there any evidence of misconduct by the observer. (ROA.354.) The Company offers only a

conclusory suggestion that party insignia “could disrupt laboratory conditions” (Br. 20), but it provides no reason to think that it did so here.

4. Employees’ pronoun car signs, which could not be seen from the voting place, did not interfere with employee free choice

In overruling the Company’s objection based on the presence of pro-union signs in employee cars during one voting session, the Board applied (ROA.354) the *Boston Insulated* factors set forth above (p. 12). Under that test, the Board acted within its discretion in finding that the signs did not warrant overturning the election.

First, as the Board found, the location of the signs weighed against a finding of coercion. (ROA.328, 354.) The signs were in car windows in a parking lot about 100 feet from the building where polling took place. (ROA.118-19.) They could not be read from the building in which employees voted, and they could not be seen at all from inside the polling place, where the windows were covered with paper. (ROA.328, 354; ROA.122, 186-89.) *See Am. Med. Response*, 339 NLRB 23, 23 n.1 (2003) (campaign poster approximately 100 feet from polling area, which employees could not see while voting, was not objectionable).

Second, the signs included no threats, promises of benefits, or even instructions. (ROA.354.) Rather, they bore general pronoun statements, such as “Teamster Strong America’s Stronger” and “I’m voting yes.” (ROA.329-30;

ROA.279, 281-82.) *See Lucky Cab Co.*, 360 NLRB 271, 291 (2014) (posters stating “Vote No; No Union,” positioned where most voters would pass them on the way to the polls, were unobjectionable), *enforced*, 621 F. App’x 9 (D.C. Cir. 2015) (per curiam).

Third, the Company never argued, and there is no evidence, that the Union—as opposed to prounion employees—was responsible for displaying the signs. (ROA.327, 354.) *See Electro Cube, Inc.*, 199 NLRB 504, 504 (1972) (“Vote Teamsters” sign 40 feet from polling area, for which union was not shown to be responsible, was unobjectionable). And fourth, the signs were outside the voting area, where they did not contravene the Board agent’s instructions. (ROA.354 & n.2; ROA.150.) *See 2 Sisters Food Grp., Inc.*, 357 NLRB 1816, 1841 (2011) (unobjectionable antiunion posters “were not displayed in any no-electioneering area, and their placement did not violate any instructions by the Board agent”).

The two cases the Company cites (Br. 20-21) are distinguishable. In one, the objectionable poster listed strikes involving the union, and the employer hung it within the area curtained off for the election. *Pearson Educ., Inc.*, 336 NLRB 979, 979 (2001), *enforced*, 373 F.3d 127 (D.C. Cir. 2004). In the other, the Board overruled the employer’s objection to two union agents sitting in a car outside the building where polling took place, within the designated no-electioneering zone,

gesturing and honking at voters as they entered. *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 991 (D.C. Cir. 2001). In reversing and remanding, the D.C. Circuit stated that the Board had not sufficiently addressed decisions the court understood to hold that it is objectionable for a party's agents to remain "continually present in a place where employees have to pass in order to vote." *Id.* at 993. Neither case involved what is at issue here: entirely non-coercive signs posted by employees well outside the polling area.

5. Employees did not engage in objectionable conduct by raising funds to save a coworker from being evicted

There is also no merit to the Company's fifth objection, which was based on employees' solicitation of donations for a coworker in urgent need. The Company contends that the fundraising was objectionable because it created "the likely impression that this was the Union stepping in to assist the employees in place of the Employer." (Br. 21.) The Board, however, acted within its discretion in finding (ROA.355-56) that the Union was not responsible for the fundraising, and that the Company did not meet its heavy burden of showing that employees' spontaneous acts of charity somehow rendered a fair election impossible.

The relevant facts are undisputed. In February 2019, driver Stacy Bess learned that another driver's son was suffering from terminal bone cancer. Bess solicited assistance for the driver from church organizations and informed the Company that she was in need. At that time, the Company raised approximately

\$1,000 for her. (ROA.333-34; ROA.89-91, 208-09.) During the first polling session on June 28, between 1:00 p.m. and 2:00 p.m., the same driver informed driver Robert Osborne that she and her son were going to be evicted unless she could pay about \$230 that day. (ROA.334; ROA.218-19.) In response, Osborne approached several other employees to raise money for her. He also asked the Company to take an advance from his own paycheck to give her. (ROA.334-35; ROA.91-93, 210, 219-20.) While the Company was determining whether it could do that, driver Darlene Cherry wrote a check covering the amount needed to prevent the eviction. Osborne promptly informed the Company that he no longer needed the advance. (ROA.334-35; ROA.94, 219-20.) Thereafter, Cherry and dispatcher Richard Ybarra collected additional funds. They turned over about \$410 to the driver on July 3, after the election. (ROA.335-36; ROA.210, 221.)

Because the Board evaluates the conduct of parties to an election—employers and unions—under a different standard than non-parties such as employees, the Board began by determining whether the employees involved were agents of the Union. (ROA.355-56.) To evaluate whether an agency relationship exists as to the specific actions alleged to be objectionable, the Board applies common-law principles. *Con-way Freight*, 838 F.3d at 538; *Cornell Forge Co.*, 339 NLRB 733, 733 (2003). “The test of agency in the union election context is stringent, involving a demonstration that the *union* placed the employee in a

position where he appears to act as its representative.” *Con-way Freight*, 838 F.3d at 538 (quoting *Tuf-Flex Glass v. NLRB*, 715 F.2d 291, 296 (7th Cir. 1983)) (internal quotation marks omitted). As the party asserting agency status, the Company had the burden of proving it. *Millard Processing Servs., Inc. v. NLRB*, 2 F.3d 258, 262 (8th Cir. 1993); *Cornell Forge*, 339 NLRB at 733.

The Company argues that Osborne, specifically, was a union agent because he wore a vest bearing the Union’s logo (Br. 22 (citing ROA.94, 154)), and because the Union had identified him and eight other employees as “In-House/In-Plant Organizers” in a May 17 letter to the Company announcing its organizing campaign. (Br. 22 (citing ROA.283).) But under settled law, neither of those facts made Osborne the Union’s agent. “An employee who engages in ‘vocal and active’ support does not become an agent on that basis alone.” *Con-way Freight*, 838 F.3d at 538 (quoting *United Builders Supply Co.*, 287 NLRB 1364, 1364 (1988)). Nor does a union’s designation of its supporters as in-house or in-plant organizers make them its agents. *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 809 (6th Cir. 1989). And the supporters’ choice to wear prounion attire does not suffice either. *See Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1565 (D.C. Cir. 1984) (in-plant organizing committee members who “wore pro-union insignia” were not agents); *Cornell Forge*, 339 NLRB at 733 (employees identified as members of in-plant organizing committee in union’s

letter to employer, who wore union insignia, were not agents); *Rheem Mfg. Co.*, 309 NLRB 459, 462 & n.15 (1992) (member of union’s volunteer organizing committee who wore union T-shirt and hat displaying words “Union Yes” was not union’s agent), *bargaining order enforced*, 28 F.3d 1210 (4th Cir. 1994) (table).

The cases upon which the Company relies (Br. 22-23) illustrate the sort of evidence the Board has relied on in finding agency—and underscore the absence of any comparable evidence here. The employees the Board found to be union agents in *Tyson Fresh Meats* were shop stewards whom the union had authorized to conduct new-hire orientations, present grievances on behalf of employees, and participate in labor-management meetings. 343 NLRB 1335, 1337 (2004). And in *Bio-Medical of Puerto Rico*, the Board found agent status where the union “held out” two employees as its agents by, among other things, permitting them to speak on its behalf at meetings, allowing them to make special appearances with its officials at election functions, and transporting them to another facility to campaign. 269 NLRB 827, 828 (1984). As the Board recognized (ROA.356), the Company produced no evidence of anything like those manifestations of agency from the Union in this case.

Having found that Osborne did not act as a union agent in soliciting donations for his coworker, the Board applied its heightened standard for evaluating whether the conduct of a non-party to the election requires invalidating

the result. In that circumstance, the objecting party must show that the misconduct was “so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible,” *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984), or that it “so substantially impaired the employees’ exercise of free choice as to require that the election be set aside,” *Rheem Mfg. Co.*, 309 NLRB 459, 463 (1992) (citation and internal quotation marks omitted).

Under those principles, the Board reasonably found that the Company did not demonstrate that Osborne’s fundraising constituted misconduct at all—much less misconduct that substantially impaired any employee’s exercise of free choice. (ROA.356.) As the Board noted, there was no evidence of coercion or threats in relation to the fundraising effort, which was not tied in any way to the election. (ROA.356.) Nor was there any evidence that anyone involved with it blamed or disparaged the Company for the driver’s hardship or credited the Union for employees’ voluntary assistance. (ROA.356.) Osborne, in particular, credibly denied making any such statements. (ROA.336-37; ROA.222-24.) And the record evidence supports the Board’s finding that the timing of the effort had nothing to do with the election. As Osborne testified, the imminent threat of a driver’s eviction was the sole reason for soliciting donations during the election. (ROA.336-37; ROA.219, 224.) That unobjectionable motivation was further confirmed by the fact that employees gave the driver only enough to prevent the

eviction during the election, then waited until days later to give her additional donations. (ROA.356.)

The Board, with court approval, has consistently rejected employers' attempts to use employees' charitable, non-union-sponsored activities to overturn election results, as the Company seeks to do here. In *Dolgenercorp, LLC v. NLRB*, the Eighth Circuit upheld the Board's finding that a union supporter's offer of an unconditional \$100 loan to a coworker in financial distress "did not substantially impair [the coworker's] exercise of free choice in the election." 950 F.3d 540, 552 (8th Cir. 2020), *reh'g denied* (Apr. 21, 2020). And in *NLRB v. WFMT*, the Seventh Circuit upheld the Board's finding that employees' pre-election contributions of \$3,000 to \$4,000 into a fund to cover union initiation fees for employees who could not afford them—which the union did not authorize—did not invalidate the election. 997 F.2d 269, 277-78 (7th Cir. 1993). The Board's decision here accords with that precedent.

C. The Company's Cumulative-Impact Theory Is Not Properly Before the Court and Is, in Any Event, Meritless

Finally, the Board reasonably rejected the Company's argument that its meritless objections cumulatively require setting aside the election. As a threshold matter, the Company did not timely raise that objection in the representation proceeding. Specifically, the Company did not reference the cumulative-impact theory in its written objections (ROA.263-65), and the Regional Director's Order

setting the objections for a hearing therefore did not encompass it (ROA.267). Accordingly, the Board concluded that the issue was not properly before it. (ROA.357.) *See Brentwood at Hobart v. NLRB*, 675 F.3d 999, 1006 (6th Cir. 2012) (the Board acted within its discretion in applying its “rule prohibiting hearing officers from expanding hearings beyond matters that are reasonably encompassed by the written objections”).

In its opening brief before the Court, the Company does not acknowledge that procedural finding, much less contest it. Thus, the Company has waived the issue. *See El Paso Elec. Co. v. NLRB*, 681 F.3d 651, 658 (5th Cir. 2012); *NLRB v. Hotel Employees & Rest. Employees Int’l Union Local 26*, 446 F.3d 200, 206 (1st Cir. 2006); *NLRB v. Star Color Plate Serv., Div. of Einhorn Enters., Inc.*, 843 F.2d 1507, 1510 n.3 (2d Cir. 1988). The cumulative-impact argument fails for that reason alone.

In any event, even if the Company had timely raised the theory before the Board and preserved it for the Court’s consideration, it is without merit. As the Court has recognized, “the cumulative impact of a number of insubstantial objections does not amount to a serious challenge meriting a new election.” *Conway Freight*, 838 F.3d at 540 (quoting *Lamar Co., LLC v. NLRB*, 127 F. App’x 144, 151 (5th Cir. 2005)) (brackets and internal quotation marks omitted). Just so, the Board found here that the sundry, unrelated, and unobjectionable occurrences

of which the Company complains had no greater effect on the election when considered in the aggregate. (ROA.357.) See *NLRB v. White Knight Mfg. Co.*, 474 F.2d 1064, 1067-68 (5th Cir. 1973) (evidence concerning a “series of incidents . . . , none of which had any demonstrated influence on the outcome of the election” did not cumulatively meet employer’s burden).

The cases the Company cites do not undermine that determination. (Br. 24) In *Aramark Sports, LLC*, 2011 WL 5868414 (Mar. 22, 2011), an administrative law judge found a second election appropriate after sustaining six objections.³ And in *Community Medical Center*, 354 NLRB 232, 232 & n.4 (2009), *incorporated by reference*, 355 NLRB 628 (2010), *enforced*, 446 F. App’x 463 (3d Cir. 2011), the Board reached the same conclusion based on a party’s multiple unfair labor practices. Here, there were no objectionable acts for the Board to consider in combination. And the only unfair labor practice in this case was the one committed by the Company after the election—the refusal to bargain presently before the Court.

³ Because the Board did not review the judge’s recommended decision, *Aramark Sports* “has no precedential value.” *Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 345 (D.C. Cir. 2003); *Colgate-Palmolive Co.*, 323 NLRB 515, 515 n.1 (1997).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the Company's petition, grant the Board's cross-application, and enter a judgment enforcing the Board's Order in full.

Respectfully submitted,

/s/Kira Dellinger Vol
KIRA DELLINGER VOL
Supervisory Attorney

/s/Micah P.S. Jost
MICAH P.S. JOST
Attorney

PETER B. ROBB
General Counsel

ALICE B. STOCK
Deputy General Counsel

RUTH E. BURDICK
Acting Deputy Associate General Counsel

DAVID HABENSTREIT
Assistant General Counsel

National Labor Relations Board

November 2020

National Labor Relations Board
1015 Half St. SE
Washington, DC 20570
(202) 273-0656
(202) 273-0264

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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RANDALLS FOOD & DRUG, L.P.,)	
)	
	Petitioner Cross-Respondent)	No. 20-60515
	v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	Board Case No.
)	16-CA-251484
	Respondent Cross-Petitioner)	
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(5), 32(a)(6) and 32(a)(7)(B), the Board certifies that its brief contains 6,529 words of proportionally spaced, 14-point type, and the word processing system used was Microsoft Word for Office 365.

/s/David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 3rd day of November 2020