
From: Lawrence Ben
Sent: Thursday, 5 August 2021
To: Committee, Job Security (SEN)
Subject: RE: Senate Select Committee on Job Security - Questions on notice from 10 June 2021
Attachments: NLRB Hearing Officer's Report.pdf

Good Morning,

As requested, please find **attached** the report from the NLRB's hearing officer.

A brief summary taken from the report (pp. 1-2) is included below:

After conducting the hearing and carefully reviewing the evidence and the arguments made by the parties, I recommend that Petitioner's objections be sustained in part because the evidence demonstrates that the Employer's conduct interfered with the laboratory conditions necessary to conduct a fair election. More specifically, the conduct which interfered with the result of the election relates to the Employer's polling of employees by distribution of vote no paraphernalia in the presence of supervisors and managers (Objection 11), as well as the Employer's unilateral decision to cause the United States Postal Service (USPS or Postal Service) to install a generic unlabeled mail collection box less than 50 feet from the main entrance to its facility, at a location suggested by the Employer and immediately beneath the visible surveillance cameras mounted on the Employer's main entrance (Objections 1-4, 6 and 17). While this is a case of first impression, the Employer's conduct in causing this generic mail receptacle to be installed usurped the National Labor Relations Board's (Board or NLRB) exclusive role in administering Union elections. Notwithstanding the Union's substantial margin of defeat, the Employer's unilateral decision to create, for all intents and purposes, an onsite collection box for NLRB ballots destroyed the laboratory conditions and justifies a second election.

The report is available on the NLRB's website via the following link: <https://www.nlr.gov/case/10-RC-269250>

Best regards,

Lawrence

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**

**AMAZON.COM SERVICES LLC
Employer**

**and
RETAIL, WHOLESALE AND DEPARTMENT
STORE UNION
Petitioner**

Case 10-RC-269250

HEARING OFFICER'S REPORT ON OBJECTIONS

On April 9, 2021, a tally of ballots issued in a mail ballot election that had commenced on February 8, 2021. That tally reflected that a majority of employees who had cast ballots in the election voted against representation by the Retail, Wholesale and Department Store Union (Petitioner or Union). However, the Petitioner contests the results of the election claiming that Amazon.Com Services, LLC (Employer or Amazon) engaged in objectionable conduct. As a result of this objectionable conduct, Petitioner asks that the election be set aside and that a new election be directed. Specifically, the Petitioner contends that the Employer interfered with the laboratory conditions necessary to conduct a fair election by causing a mailbox to be installed on its premises, by polling employees, by threatening employees, by hiring additional police, and by interfering with the Union's access to voters by causing the county to alter the timing of certain traffic lights.

After conducting the hearing and carefully reviewing the evidence and the arguments made by the parties, I recommend that Petitioner's objections be sustained in part because the evidence demonstrates that the Employer's conduct interfered with the laboratory conditions necessary to conduct a fair election. More specifically, the conduct which interfered with the result of the election relates to the Employer's polling of employees by distribution of vote no paraphernalia in the presence of supervisors and managers (Objection 11), as well as the Employer's unilateral decision to cause the United States Postal Service (USPS or Postal Service) to install a generic unlabeled mail collection box less than 50 feet from the main entrance to its facility, at a location suggested by the Employer and immediately beneath the

visible surveillance cameras mounted on the Employer's main entrance (Objections 1-4, 6 and 17). While this is a case of first impression, the Employer's conduct in causing this generic mail receptacle to be installed usurped the National Labor Relations Board's (Board or NLRB) exclusive role in administering Union elections. Notwithstanding the Union's substantial margin of defeat, the Employer's unilateral decision to create, for all intents and purposes, an onsite collection box for NLRB ballots destroyed the laboratory conditions and justifies a second election.

1) BACKGROUND

After recounting the procedural history, and the Employer's operations, I discuss the parties' burdens and the Board's standard for setting aside elections. Then I provide an overview of relevant facts for each Objection and my recommendations, *seriatim*.

A) Procedural History

The petition for election was filed on November 20, 2020. During a pre-election hearing, the Employer and the Petitioner stipulated to most aspects of the election, including jurisdiction, the scope of the bargaining unit and an appropriate bargaining unit. However, the parties could not agree on whether a manual or mail ballot election was appropriate notwithstanding the continuing Covid-19 pandemic. The Employer sought a manual in-person election, whereas the Union agreed to a mail ballot election.

As the issue of election mechanics is not litigable, after the hearing closed the record was left open to permit the parties to submit an offer of proof and legal arguments regarding whether a mail ballot or manual election was appropriate. Despite the Employer's arguments for a manual election, the Acting Regional Director issued a Decision and Direction of Election directing that a mail ballot election commence on February 8, 2021. Eligible to vote in the election were all employees in the following stipulated unit:

All hourly full-time and regular part-time fulfillment associates, seasonal fulfillment associates, lead fulfillment associates, process assistants, learning coordinators, learning trainers, amnesty trainers, PIT trainers, AR quarterbacks, material handlers, hazardous waste coordinators, sortation associates, WHS specialists, onsite medical representatives, data analysts, dock clerks, transportation associates, interim transportation associates,

transportation operations management support specialists, field transportation leads, seasonal learning trainers, seasonal safety coordinators, seasonal process assistants, and warehouse associates (temporary) employed by the Employer at its Bessemer, AL facility; excluding all truck drivers, office clerical employees, professional employees, managerial employees, engineering employees, maintenance employees, robotics employees, information technology employees, loss prevention specialists, guards, and supervisors as defined by the Act.

On April 9, at the conclusion of the ballot count, a tally of ballots was issued and showed that of the approximately 5,867 eligible voters, 738 votes were cast for and 1,798 votes were cast against the Union, with 505 challenged ballots, a number that was not sufficient to affect the results of the election.

Objections were timely filed. The Acting Regional Director for Region 10 ordered that a hearing be conducted to give the parties an opportunity to present evidence regarding certain Objections.¹ As the hearing officer designated to conduct the hearing and to recommend whether the Petitioner's Objections are warranted, I heard testimony and received into evidence relevant documents between May 7, 2021 and May 26, 2021. Both parties filed timely post-hearing briefs that were duly considered. Based upon the credited testimony presented and my consideration of both parties' legal and factual arguments, my recommendation regarding Objections 1 through 7, 10, 11, 13, 14, 15, 17, 19, part of 20, and 23 are contained herein.²

B) The Burden of Proof and the Board's Standard for Setting Aside Elections

It is well settled that "[r]epresentation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Therefore,

¹ The Acting Regional Director ordered that a hearing be conducted on the following objections: Objections 1 through 19, the interrogation allegation in Objection 20, Objections 22 and 23. The Acting Regional Director further ordered that the allegations regarding the discipline and discharge of Union supporters contained in Objections 20 and 21 be held in abeyance.

² On June 2, 2021, after the conclusion of the hearing, the Petitioner submitted a written request to withdraw Objections 8, 9, 12, 16, 18 and 22. I recommend that the withdrawal request be approved.

“the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one.” *Delta Brands, Inc.*, 344 NLRB 252, 253, (2005), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). To prevail, the objecting party must establish facts raising a “reasonable doubt as to the fairness and validity of the election.” *Patient Care of Pennsylvania*, 360 NLRB No. 76 (2014), citing *Polymers, Inc.*, 174 NLRB 282, 282 (1969), *enfd.* 414 F.2d 999 (2d Cir. 1969), *cert. denied* 396 U.S. 1010 (1970). Moreover, to meet its burden the objecting party must show that the conduct in question affected employees in the voting unit. *Avante at Boca Raton*, 323 NLRB 555, 560 (1997) (overruling employer’s objection where no evidence that unit employees knew of the alleged coercive incident).

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

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

C) Background Facts

i) The Employer's Bessemer Operation

The Employer operates a global internet-based consumer retail business that sells and distributes goods and services directly to consumers. The Employer's Bessemer, Alabama distribution center (BHM1) is an Amazon robotic sortable fulfillment center from which the Employer distributes sortable goods weighing less than 25 pounds to the consumer. Hourly associates receive, pick, pack and ship the sortable goods. The BHM1 building's footprint is over 855,000 square feet on its first floor, and its operation spans four floors of the building. Around January 2021, the Employer employed nearly 6,200 hourly associates, or bargaining unit employees. The Employer's BHM1 operations is, in a word, massive.

BHMI began operations around March 2020, at the leading edge of the global Covid-19 pandemic in the United States. As a result of many factors, including the size of the facility, the number of hourly associates, the volume of work performed by associates, and the strictly enforced social distancing protocols necessitated by the Covid-19 pandemic, hourly employees apparently have not formed close working relationships with other associates.³ Nearly all of bargaining unit employees who testified were unable to identify their coworkers, and frequently didn't even know their supervisor's names.

ii) The Campaign and the Election

The Union's open organizing campaign commenced around October 20, 2020, when Union organizers first began to handbill at the traffic light at the Premiere Parkway and Powder Plant Road intersection that leads to the main entrance to BHM1. During each shift change, the Union had ten or more union organizers on the public right of way. These organizers distributed handbills and otherwise interacted with employees stopped at the traffic light to educate employees about the Union's campaign. Around a month after initiating its public organizing campaign, the Union filed its Petition for election on November 20, 2020, thus beginning the critical period of the election.

³ To remain operational during a period of high demand for internet-based consumer retail goods, the Employer instituted a number of protocols to limit employees' exposure to the virus. Among the many protocols, the Employer instituted strict social distancing protocols that were monitored, and enforced by its internal electronic surveillance equipment that identified whether employees were within 6 feet of one another, as discussed in the Employer's pre-election offer of proof admitted into the record herein.

The Employer's anti-union campaign was bifurcated. The Employer's "phase 1" campaign began January 10, 2021, after the Decision and Direction of Election (DDE) issued. Phase 1 was 4 weeks long, and each week was assigned a designated "theme," with a different message intended to influence the employees. To deliver this weekly message, the Employer instituted a series of mandatory employee meetings, or captive audience meetings, for bargaining unit employees. Due to the pandemic's social distancing requirements, captive audience meetings were held among small groups of between twelve and twenty-five employees. To ensure it reached over 6,000 employees, the Employer held meetings six days a week, 18 hours a day.

The captive audience meetings were conducted by employee relations managers, who were given the moniker "mini campaign owners" by the Employer. In addition to these "mini campaign owners" (MCO) the Employer hired a cadre of private paid consultants who assisted the MCO's in the Employer's anti-union campaign. While the MCO's presented the Employer's message at its captive audience speeches, the paid consultants also attended meetings to field questions and issues that the MCO's were not equipped to respond to, for instance providing answers to questions and instructions on completing mail ballots. The last captive audience meetings were held on February 6, 2021.

After the ballots were mailed on February 8, 2021, the Employer's campaign shifted to phase 2, the "Get Out the Vote" phase. At the Employer's direction, the campaign shifted to one-on-one face-to-face meetings with associates, and the dissemination of written messages to dissuade employees from supporting the Union. In addition to the one-on-one meetings, during phases 1 and 2, the Employer used a number of other written communications tools to connect with associates and deliver its anti-union message.

The Employer utilized a) text messaging to send texts to associates with registered cell phone numbers; b) "installments," or written flyers, mounted on bathroom stalls at the facility; c) visual messaging on "acid boards", or rather television screens located throughout the facility; d) written messages sent through the Amazon A-to-Z app for employees, a cellular phone based application for employees who opt to download said program; e) emails to the employees called

“insights;” and, f) communications sent by regular U.S. mail to employees’ homes. Similarly, the Union too communicated with employees using all available means of written communication, including texts, emails, postcards, flyers, billboards, and handbills encouraging bargaining unit associates to vote for Union representation.

In addition to their partisan messages, both parties encouraged employee participation. The parties’ efforts in this regard appear to have been largely in vain. Of the approximately 5,867 eligible employees, approximately 53% returned their ballots.⁴ BHM1’s voter participation rate was lower than the pre-pandemic mail ballot election participation rates, that averaged 55% voter participation. See, *Aspirus Keweenaw*, 370 NLRB No. 45 (November 9, 2020). In fact, the BHM1 voter participation rate was much lower than the 72.4% participation rate for mail ballots conducted during the pandemic from March 2020 through September 2020. *Id.* The record is silent as to the cause of the low voter turnout.

2) THE PETITIONER’S OBJECTIONS AND MY RECOMMENDATIONS

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

The credibility analysis may rely upon a variety of factors, including, but not limited to, the context of the witness testimony, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 303–305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Lincoln-Mercury-Mitsubishi, Inc.*, 321 NLRB

⁴ The Tally reflects that there were 5,867 eligible voters, 76 ballots were determined to be void, and 2,536 valid ballots were cast, while another 505 ballots were challenged.

586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings regarding any witness are not likely to be an all-or-nothing determination and I may believe that a witness testified credibly regarding one fact but not on another. *Daikichi Sushi*, 335 NLRB at 622.

A.) Mailbox Related Objections

(i) .Objections 1, 2, 3, 4, 5, 6, 7 & 17

These eight objections all concern the installation of a USPS cluster box unit (CBU) at the Employer's Bessemer facility, BHM1, for the collection of mail ballots. The neutral green-gray CBU was installed in the employee parking lot, near the entrance to the facility and within view of multiple video surveillance cameras. The Employer erected a tent around the CBU, with signage on the tent encouraging employees to vote "here." The Employer sent messages to employees encouraging them to vote and suggesting that they could use the "secure" mailbox installed by the USPS. The installation of this CBU during the critical period and for the primary purpose of collecting NLRB mail ballots is alleged to have destroyed the laboratory conditions necessary to conduct a free and fair election. These 8 independent objections are grouped by type, as set forth below.

(a) Objections 1 and 2 – Official Polling Location

These two objections assert that the installation of the CBU created the impression that the CBU was an official polling location. In **Objection 1**, the Union argues that the Employer acted unilaterally, and without authorization from the Acting Regional Director, when the Employer caused the USPS to install the CBU in a location selected by Amazon, and then the Employer erected its tent around the CBU. The Union argues that this conduct created the impression that this area was an official polling location and that the Employer, rather than the Board, controlled the means and method of conducting the Board's election. Similarly, in **Objection 2**, the Union alleges by having the CBU installed the Employer interfered with the Board's exclusive control over the election.

(b) Objections 3 and 4 – Surveillance

These two objections allege that the Employer's installation of the CBU to collect employees' ballots at a location where the Employer's existing video surveillance cameras could record employees interfered with the conduct of the election. Specifically, the Union alleges the Employer maintains numerous security cameras at its facility, including cameras on the outside

its building. As a result of these visible cameras, employees reasonably perceived these cameras could record their activities at, around and near the CBU tent, thereby creating the impression that the Employer was engaged in surveillance of employees entering and exiting the polling area. In **Objection 3**, the Petitioner alleges the cameras and the placement of the CBU created the impression of surveillance of employees protected activities, and in **Objection 4**, the Petitioner alleges Employer created the impression it was recording the identity of employees who entered and exited the polling area.

(c) Objection 5 – Polling

In **Objection 5**, the Union alleges the Employer engaged in polling by urging employees to bring their ballots to work and to use the collection box to vote, and then observed which employees complied by videotaping the employees who entered and exited the tent around the CBU. The Union alleges the Employer's tracking and polling of eligible voters created the impression that the secrecy of the ballot was compromised.

(d) Objection 6 – Electioneering

In **Objection 6**, the Union alleges the Employer engaged in unlawful electioneering near the CBU by erecting a tent around the collection box that included signage transmitting one of the Employer's campaign messages, i.e., "speak for yourself." The Union alleges this corresponds with other campaign literature broadcast by the Employer and was electioneering at or near this putative polling area.

(e) Objection 7 – Ballot Solicitation

In **Objection 7**, the Union alleges the Employer's agents engaged in a campaign to pressure and/or coerce employees into bringing their mail ballots to the worksite CBU. The Union alleges this conduct interfered with employees' free exercise of the right to vote and/or constituted a form of ballot solicitation and/or harvesting.

(f) Objection 17 – Denigration of Union and Grant of Benefit

Finally, in **Objection 17**, the Union alleges the Employer's agents circulated a rumor before the ballots were even mailed that a collection box would be installed for the purpose of returning employees' ballots. In response to employee inquiries, the Union informed employees the DDE did not authorize a collection box at the facility even though the Employer requested

one. The Union alleges that the Employer's subsequent installation of the collection box undermined the Union's message, created the impression among employees that the Employer had the power to override the DDE and conferred a "benefit." The Union alleges the Employer's actions were done for the purpose of influencing the outcome of the election and was reasonably calculated to have that effect.

ii) Record Evidence

(a) Background

As a preliminary matter, the Employer denies that the installation of the CBU was in contravention of any Board related directives. After the pre-election hearing concluded, the Employer was provided the opportunity to submit an offer of proof by December 28, 2020. The Employer's offer of proof included declarations from various agents of the Employer and experts in the field of infectious diseases. In addition, the offer incorporated a number of pioneering proposals for safety protocols that the Employer's managers and experts maintained were necessary for conducting an in-person manual election. For instance, among the novel proposals related to conducting a safe election in the midst of a global pandemic, the Employer proposed that Amazon would provide vending machines to disburse ballots and "pass through voting boxes."

In addition to the Employer's offer of proof, and its proposed protocols for a manual election, the Employer's January 7, 2021, pre-election post-hearing brief included additional proposals for precautions in the event a mail ballot election was directed. Specifically, the Employer proposed procedures including the installation of a "collection receptacle" at its facility in order to "Maximize Voter Participation." The Employer proposed that the NLRB, "install, with Amazon's support a mail-ballot drop box at BHM1." The Employer requested that the Acting Regional Director order the installation of a secure drop box clearly marked with the "Notice of Election on official NLRB paper," at BHM1. The Employer's proposed that only the Board would have access to ballots in the secure drop box. Alternatively, the Employer proposed that a Board agent be stationed at the BHM1 facility to collect the mail ballots in a traditional ballot box.

On January 15, 2021, the Acting Regional Director issued her Decision and Direction of Election (DDE). Based on the Covid positivity rate in Jefferson County, the Acting Regional Director directed a mail ballot election. In her decision, the Acting Regional Director addressed the Employer's novel proposals for a manual election. In addressing the Employer's proposals, the Acting Regional Director noted that "utilization of the Employer's extensive resources would tend to give the appearance to voters that the Region is accepting benefits from the Employer . . . use of equipment clearly belonging to the Employer, such as pass-through boxes or vending machines, likewise implies a problematic amount of Employer involvement in the election proceedings." The DDE did not, however, specifically address the Employer's novel proposals for conducting a mail ballot election. Rather, the DDE directed a mail ballot election be conducted in accordance with established Board election procedures – procedures that have never included onsite ballot collection.

The Employer asserts that its "collection box" proposal was not rejected by the Acting Regional Director. However, in its Request for Review filed with the Board on January 21, 2021, the Employer asserted the Acting Regional Director erred by "declining to *accept any of Amazon's proposed safeguards* to protect voters, reduce disputes and *increase voter turnout*" (*emphasis in original*). The Employer argued the Acting Regional Director erred by her failure to adopt its proposal to require "the NLRB place a mail-ballot drop box at BHM1." The Employer's Request for Review, including the assertion that the Director's failure to adopt the proposals to increase voter turnout was in error, was denied by the Board on February 4, 2021 – the very same date that the CBU was installed.

(b) The Installation of the CBU

It is uncontested that there were multiple existing safe and secure methods for employees to mail their ballots. Jay Smith, the United States Postal Service (USPS) director of enterprise and key accounts, testified that there were multiple options, including mailing the ballots from employees' homes, depositing them in the official blue collection boxes in employees' neighborhoods, or depositing ballots at the local post office. The Employer's own evidence established that within 20 miles of BHM1 there are 49 United States Post Office branches with secure mail receptacles, as well as another 183 "Other Mailing Locations." Notwithstanding the other potential secure mailing sites, Amazon was intent on "providing associates a convenient

location to mail in their ballots,” as reflected in the Employer’s email to supervisors and managers.

According to the Employer’s witness, Amazon initially requested a blue traditional USPS mailbox on December 22, 2020, after the pre-election hearing but before its offer of proof or brief had been filed. There is no evidence that Amazon or USPS had identified the need for any type of mail receptacle at the BHM1 facility prior to the Employer’s December 2020 request. Around January 7, 2021, Brian Palmer sent a follow-up written request to USPS Enterprise Account Director Robert Deboard seeking authorization to install a privately purchased traditional blue mail receptacle. Palmer’s email to USPS manager Robert Deboard, indicates that Amazon “decided” to “go ahead” with the installation of, “a collection box on-site at our Bessemer facility . . .” and requested Deboard’s approval for the Employer’s installation of a “Salisbury Industries’ Courier Box, Blue, Powder Coated, Free Standing” mailbox. The Salisbury Industries’ website reveals that this privately purchased blue mail receptacle resembles the traditional USPS official secure mailbox.

Notwithstanding the Employer’s willingness to install its own mailbox, on January 8, 2021, Linda Mercer, the USPS strategic account manager, informed Palmer that a “private collection box may not be utilized” due to “Aviation Mail Security.”⁵ Mercer advised that the USPS would supply a box.

Shortly after the Acting Regional Director’s DDE issued directing a mail ballot election, Amazon’s efforts to secure a mailbox at BHM1 intensified. The reason the Employer sought the mailbox is clear. The Employer wanted a mailbox installed so that employees could return their ballots from the BHM1 facility. As Palmer explained to USPS manager Mercer on January 27,

⁵ Despite USPS official’s directive that a private mailbox would be unauthorized, the Employer apparently proceeded to purchase the mailbox anyway, as reflected in the internal emails with the USPS. On February 2, 2021, Adam Baker, Amazon’s vice president of North America and EU transportation, emailed Jakki Krage Strako, USPS chief commerce and business solution officer, advising Strako that the Employer had, in fact, already ordered “a box matching the USPS specs that will arrive in time, but [Palmer] just found out that it needed an ‘arrow key.’ [The Employer has] now also ordered one with an arrow key, that will not arrive for 4-6 weeks missing the vote.” So, in February, the Employer had purchased a private box to install at BHM1, even though it was able to persuade USPS to install a receptacle.

2021, the Employer's "intent" was to make it *"as easy as possible for employees to vote by mail, and to encourage as high a turnout as possible."*

On January 20, 2021 – two business days after the January 15 DDE – Palmer emailed Mercer that the Employer's "deadline" for installing the mailbox was February 7, 2021, that the mailbox was a "very high priority item," and a "must have" for the Employer's senior leadership. By late January 2021, the installation of a mail receptacle at BHMI became a high-level priority for Amazon. And, as USPS's customer, Amazon's priority became USPS's priority, as reflected in emails between and among the Employer and USPS.

For instance, on January 26, 2021, USPS's Mercer assured Palmer that installation of a mail receptacle at BHM1 had been escalated to "a priority at the highest level of the [USPS] (Dave C included) and it must get done." Dave Clark, according to the testimony, is the USPS senior vice president of worldwide operations. On January 27, 2021, the USPS internal emails again identify the installation of a mailbox as a "highly visible David Clark initiative." According to Palmer's January 27, 2021, response, this issue was of, "utmost importance to [Amazon's] senior leadership."

Between Mercer's January 8 directive that the Employer could not install a privately purchased blue mailbox and late January, the USPS and the Employer determined to forego the installation of an official blue mailbox unit. Instead, according to Palmer's email, the Employer "decided to go with a regular collection box that was not a blue box – to avoid this administrative process which we knew would take additional time and have some kind of volume floor." As a result of this concession, the USPS agreed to install a USPS owned cluster box unit.

Jay Smith, the director of enterprise and key accounts for the USPS works with the "highest profile e-commerce and retail customers." Smith testified that on January 27th, he was made aware that Amazon was seeking a mailbox installed at BHM1, and that the USPS had agreed to install a CBU. Smith testified that a CBU is a central delivery point and the preferred mode of mail delivery at new residential or commercial buildings, where mail for multiple customers can be centrally distributed. Smith further testified that in his twenty-eight years with the USPS, he was never involved in the installation of a CBU for a private company. Smith

acknowledged that it is “common to have customers ask for collection boxes,” but clarified that these requests are common when office and residential complexes are being constructed. USPS Bessemer Acting Officer in Charge Tanula Rhoten-Coleman testified that in her experience, most CBUs are provided by the customer, not USPS.

With regard to the location of the mailbox, it is clear that Amazon, not USPS, selected the situs of the CBU. According to Miguel Harris, a BHM1 procurement analyst, he initially determined there were three potential locations for the CBU, all located in “heavy traffic areas” on the main walkway in front of the main entrance to the facility. When USPS Manager Stephanie Johnson first came to BHM1 on February 3, Harris presented the three locations, and Johnson agreed to install the box at its current location, as described below. The very next day, on February 4, 2020, USPS agents installed the CBU in the location proposed by the Employer. On the day of installation, Harris recalled that there were some employees in the parking area during a break who would have seen the USPS employees installing the box. However, none of the employees was identified, nor was any testimony elicited regarding the number of employees were on break who might have witnessed the USPS officials installing the unmarked CBU.

The cluster box was installed on the Employer’s main walkway at the main entrance of the BHM1 facility. The CBU is located on the median near the second row of cars in the parking lot, adjacent to the handicapped parking spots on the first row. The CBU is generic and nothing on the CBU identifies it as USPS property.

The “CBU” is a mail receptacle typically seen at apartments and other sites where multiple recipients receive mail. The receptacle is a greenish-gray rectangular metal box on a post that is bolted to a cement pad. The box has 12 small, numbered doors with locks, and one much larger area with two doors, labeled “1P,” and “outgoing mail.” The 12 smaller doors are traditionally used to deposit mail for delivery to different customers, where each customer is issued a key specific to their box. The two boxes that comprise the single “IP” unit were combined based on modifications made by USPS for this Employer.

As demonstrated by the internal USPS emails, the CBU is “an old modified unused CBU . . . installed for temporary use . . .” USPS modified the box so that it would accommodate more

outgoing mail, in anticipation of a large number of mail ballots being deposited. As a result of the modification, the outbound mail slot has one small door, the same size as the regular incoming boxes and traditionally used for outgoing mail. In addition, the small outgoing mail slot's metal base, or floor, was removed so it is integrated with the large box underneath. Normally, the large door is used for the USPS delivery person to drop off packages for customers, however, the modifications provided a larger area for mail collection, expanding the capacity to approximately 725 letters.

The outgoing mail receptacle is only accessed by use of a special lock that requires a USPS special "arrow" key.⁶ An "arrow" key must be checked out by the USPS mail carrier each day, to ensure the security of outbound mail. The use and distribution of arrow keys is regulated by USPS for security purposes. No evidence was presented that Amazon, or any other third party, had an Arrow key for the outbound mail, or could otherwise access the box.⁷ At the time of the cluster box's installation, Amazon was, however, provided with two keys to access the inbound mail slot assigned to the Employer, "Box 1." However, all managers and supervisors were notified that they were not to be near the cluster box during the election period.

⁶ The Union observes that while modifying the mailbox to enlarge the outgoing mail receptacle, the metal barrier between incoming mailbox 12 and the outgoing mail receptacle was removed. The Union asserts that if someone had a key to mailbox number 12, they could have gained access to the outgoing mail compartment simply by reaching down. While the Union's theory regarding unauthorized access to outgoing mail appears feasible, there is absolutely no record evidence that any party had access to the mailbox marked number 12, and this theory is pure speculation. Moreover, no employee had knowledge of the open cavity between box 12 and the outgoing mail, thus this error in construction could not possibly have affected the results of the election.

⁷ Employee Kevin Jackson's testimony that he witnessed Allied Security personnel accessing the box on several occasions is not credible. Jackson, who appeared uncomfortable and agitated during this line of testimony, testified that he witnessed Allied security officers in the tent near the CBU around January 2021 (a date preceding the installation of the CBU). Jackson testified that on one occasion, around 5:30 a.m., he was in his car with his headlights on and saw two guards near the tent. Jackson testified that one guard, a heavy-set male, opened the box, but Jackson couldn't see what the guard was doing. There were no corroborating witnesses. I cannot credit this testimony, as it is inherently unreliable. Jackson testified that he normally parks between the CBU and the building entrance in a handicapped spot. Parked in this location, even if Jackson backed in and his headlights faced the tent, he would have faced the covered rear of the tent not the front entrance. Furthermore, even if Jackson had been parked in front of the tent, his line of sight, according to Jackson, did not allow him to see what was occurring inside the tent, so his testimony that he saw someone open the outgoing mail was unbelievable. Under the circumstances, based on my observation of Jackson and absent any corroborating evidence, I cannot credit Jackson's testimony that the security guards had access to the mailbox.

The mailbox was located about 135 feet from the main employee entrance to the BHM1 facility, the only entrance used by employees. Rob Street, the BHM1 loss prevention manager testified that there are 30 surveillance cameras on the front side of the BHM1 building facing the parking area where the box was located. Street acknowledged that four surveillance devices on the face of the building appear to be directly facing the CBU. After the mailbox was installed, someone in employee relations directed the procurement operations analysts to secure a tent to be placed over the mailbox. Harris testified that the tent was installed because “some issue [was] brought up with cameras pointed at the mailbox and making sure that no associates could be viewed while voting.” A vendor erected a large white tent, open completely on the side that faced the street. On the left-hand side, at the employee walkway into the building, the Employer attached a large banner that stated, *inter alia*, “mail your ballot here.”

It is clear that absent the tent, employees had reason to believe that the Employer could observe which employees accessed the CBU and/or used the box to deposit ballots – particularly since proper completion of a mail ballot requires the sender to use the NLRB’s distinctive yellow outer-envelop. Street testified that employees could see the surveillance “globes” that cover the surveillance cameras. As a result of these globes, according to Street, while employees would know there were surveillance cameras on the building, employees would not know specifically where the cameras inside the globe were pointed and would not know the various cameras’ fields of view. Street testified that the cameras were unable to zoom in sufficiently so as to discern specific information regarding events occurring in the parking lot. Notwithstanding the surveillance cameras’ apparent lack of high-quality surveillance capability, Street testified that during the election the loss prevention staff was instructed not to review the camera footage from surveillance video cameras that were pointed at the tent.

Street testified that there are around 1,300 cameras distributed inside and outside the facility. Employees believed that the Employer had cameras that were tracking, at the very least, which employees entered the CBU tent. Employee Daryll Richardson observed that the Employer maintains security cameras and that, “[e]verywhere you move, security camera watching you.” [sic] Or, as employee Emmit Ashford observed, “Amazon is surveilled everywhere. . . you assume that everything can be seen,” and that he assumed that “Amazon

monitors everything on their campus or facility.” Many employees, including Daryll Richardson, Jennifer Bates, Emmitt Ashford, Daryll Craig, Hope Pendleton and Kevin Jackson all credibly testified that they believe that there are cameras in the parking lot. While Amazon security manager Street testified that, in fact, the Employer does not maintain any cameras in the employee parking lot, many of the bargaining unit employees who testified believed that, like all other areas on the Amazon campus, that the parking lot was under surveillance. While Street testified that the surveillance system was insufficient to track who entered the tent, Street acknowledged that neither the inadequacies of the Employer’s surveillance system, nor the prohibition on managers reviewing the surveillance camera footage during the election period, were communicated to employees.

After the tent was erected by a third-party vendor, it is undisputed that Amazon adorned one side of the tent with a large banner that read, “speak for yourself, mail your ballot here.” It is not clear when and for how long the sign remained on the tent, but employee witnesses testified that this sign was in place during the polling period, while ballots were being returned by employees. Before the Employer erected this signage, on February 4, 2021, when the mailbox was installed, Brian Palmer asked USPS manager Smith and other USPS managers whether the Employer could “place anything on the [CBU] to point out the mail slot, like an arrow or a vote here sticker?” Smith responded that the USPS did not “want to see anything else put around that box indicating that it was a vote.” In fact, Smith testified he was surprised to learn from the *Washington Post* that the Employer had erected the tent with a sign indicating employees should vote using the new CBU.

The Union contends that the sign reflected one of the Employer’s campaign themes, “speak for yourself,” and that the Employer encouraged employees to use the newly installed CBU. Employee Timothy Bibbs recalled returning from leave, seeing the newly installed CBU and asking an unidentified male from human resources about the CBU. Bibbs testified that the HR agent told Bibbs to return his ballot in the CBU. Other messages from the Employer similarly reminded employees that this “secure” mail receptacle had been installed and was available for employees to mail their ballots securely.

On February 17, the Employer sent a message to employees from “BHM1 leadership,” that advised employees, “The US Postal Service has installed a secure mailbox just outside the BHM1 main entrance, making mailing your ballot easy, safe, and convenient.” On that same date, another message was sent to employees advising that “rumors” were circulating that union organizers had been offering to fill out mail ballots, and warned employees to not “let anyone trick you. . . .”⁸ The same message encouraged employees to mail their ballot from a “secure” USPS mailbox, and that, “USPS has installed a secure mailbox just outside the BHM1 main entrance, making mailing your ballot easy, safe and convenient.”

Communications sent by the Employer also reflect that the Employer’s campaign propaganda included the message that employees should speak for themselves, not through a third party. For example, The Employer’s witness, employee Elizabeth Green, testified that the Employer placed banners around the facility that said, “speak for yourself” and “vote no.” For instance, on January 4, 2021, the Employer sent an email to unit employees that stated: “Don’t Give Up Your Voice.”

The Amazon BHM1 facility is serviced by a rural mail carrier. While the carrier does not wear a USPS uniform, he or she drives a USPS vehicle. The outgoing mail from the CBU was retrieved from the box Monday through Saturday by the rural carrier. No evidence was presented that established that any entity, other than the USPS, had actual control over the contents of the outgoing mailbox in the CBU.

iii) Board Law

Whether an employer engages in objectionable conduct by causing the USPS to install a mail collection apparatus at its facility during a mail ballot election is a question of first impression for the Board.

⁸ No evidence was presented to substantiate the circulation of any rumors that the Union engaged in ballot harvesting, or that any Union agent was stealing ballots from employees’ mailboxes. The Employer’s witness, employee Dawn Hoag, testified that “there were, myself included, a lot of people that felt like there was a really good chance that our ballots could be taken out of our home mailboxes.” However, other than Ms. Hoag’s “personal fear,” she failed to identify any other employees or establish any rumors of ballot harvesting by the Union. Ms. Hoag’s bias was obvious in her testimony, and based on my observations of Hoag I cannot credit her vague testimony regarding employees’ alleged fear of ballot harvesting.

It is, however, axiomatic that, “control of the election proceedings and the determination of the steps necessary to conduct that election fairly [are] matters which Congress entrusted to the Board alone.” *N.L.R.B. v. Waterman Steamship Corporation*, 309 U.S. 206, 226 (1940). In defining what procedures are necessary, the Board has, “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). As the Board observed, it is within the Board’s sole, “province and duty to safeguard its electoral processes from conduct which inhibits the free exercise of employee choice.” *Boston Insulated Wire Co.*, 259 NLRB 1118 (1982). To this end, as the Board most recently observed, “[e]ven the appearance of irregularity in election procedures may cast doubt on the validity of an election and its results.” *Professional Transportation, Inc.*, 370 NLRB No. 132 (2021).

The Board will set aside an election when the alleged objectionable conduct “so interfered with the necessary ‘laboratory conditions’ as to prevent the employees’ expression of a free choice in the election.” *Dairyland USA Corp.*, 347 NLRB 310, 313 (2006), *enfd. sub nom. NLRB v. Food & Commercial Workers Local 348-S*, 273 Fed. Appx. 40 (2d Cir. 2008). The Board employs an objective test to determine if “the conduct of a party to an election has the tendency to interfere with the employees’ freedom of choice.” *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995).

(a) Objections 1 and 2 – Official Polling Location

The Union asserts that as a result of the “coerced assistance” of the USPS, the Employer effectively created a “polling place” at BHM1. Further, according to the Union, by erecting a tent adorned with its oft repeated “speak for yourself” message, and encouraging employees to cast their ballots using the CBU, the Employer created the impression that the mailbox was an “official” polling place. By doing so, according to the Union, the Employer usurped a Board function, and undermined the integrity of the Board election. In contrast, the Employer asserts that the Petitioner must establish actual “evidence that [the mailbox] would have affected the results of the election,” citing, *Amveco Magnetics*, 338 NLRB 905 (2003). In other words, the Employer asserts that the Petitioner must establish that a sufficient number of voters refrained from voting, or were otherwise influenced, so as to affect the outcome of the election —

effectively arguing that the Union must establish that over 1,000 voters were actually influenced to refrain from voting, or to cast ballots for the Employer.

To maintain the integrity of its elections, the Board safeguards the administration of elections and does not delegate any functions to the parties. See, *Alco Iron & Metal Co.*, 269 NLRB 590, (1984). By allowing an observer to translate the voting procedures for employees, the Board found that the agent had “delegated an important part of the election procedure to the employer’s agent, conveying the impression that the Petitioner, and not the Board was responsible for running the election,” and ordered a second election. *Id.* at 591–592 . See also *Monroe Mfg. Co.*, 200 NLRB 62, 74 (1972) (a party telling three employees waiting in line they were not eligible and could go home “might well convey to other the impression that the employer had some effective connection with, if not control over, the election itself”). Compare *San Francisco Sausage Co.*, 291 NLRB 384 (1988) (Board agent allowing petitioner to use intercom to announce employees could vote not objectionable delegation of minor task); *Regency Hyatt House*, 180 NLRB 489, 490 (1969) (election upheld where Board agent permitted union observer, without objection from employer observer, to give the only Spanish-speaking employee direction on how to vote). It is the mere appearance that a party has control over the election that destroys the laboratory conditions necessary to conduct an election.

(b) Objections 3 and 4 – Surveillance

In determining whether a party’s conduct is objectionable surveillance, case law considers the duration of the party’s presence, the location of the party agent, and the conduct of the party. The continual presence of party representatives in or near the polling area may be objectionable surveillance sufficient to overturn the results of the election. See *ITT Automotive*, 324 NLRB 609 (1997), *enfd.* in part 188 F.3d 375 (6th Cir. 1999); *Electric Hose & Rubber Co.*, 262 NLRB 186 (1982); and *Performance Measurements*, 148 NLRB 1657 (1964). In *Blazes Broiler*, 274 NLRB 1031, 1032 (1985), the Board found no objectionable conduct in a union agent’s sitting in a restaurant approximately 30 feet from the polling area because the agent had no direct view of the entrance to the voting area. The absence of knowledge was established because while the union’s agent “could see who entered the hallway leading to banquet room. . . [h]e had no way of knowing who was entering the hallway to vote” *Id.* In another case, the

Board found no objectionable conduct when three supervisors stood 25 feet from the polling location, because the supervisors were in an area where they regularly stood as part of their duties, didn't approach, or speak with voters. *Roney Plaza Mgmt., Corp.*, 310 NLRB 441, 447 (1993); *Cf. Red Lion*, 301 NLRB 33 (1991) (Board reversed hearing officer's impression-of-surveillance finding where employer's conduct was justified by valid business reason of which employees were aware), see also, *Patrick Industries, Inc.*, 318 NLRB 245, 256 (1995).

On the other hand, in *Performance Measurements Co., Inc.*, 148 NLRB 1657, 1659 (1964), the Board stated that the employer engaged in objectionable surveillance by the president's "continued presence" near the polling area. In that case, the president was seated at a table approximately six feet from the polling room's door and, at times, stood by the door to the election area so that it was necessary for each voter to pass within two feet of him to gain access to the polls. *Id.* Similarly, the Board found objectionable a supervisor's standing ten-fifteen feet from the entrance of the voting area, and two other supervisors' extended presence in the area voters had to pass to access the poll. *Electric Hose & Rubber Co.*, 262 NLRB 186, 216 (1982). In *Electric Hose & Rubber*, the Board reasoned that the only plausible explanation for the supervisors' conduct was to convey to employees that they were being watched. *Id.*; See also, *ITT Automotive*, 324 NLRB 609 (1997), *enfd.* in part 188 F.3d 375 (6th Cir. 1999)(objectionable surveillance based on "continued presence" of managers in an area where employees had to pass to vote and where managers could observe employees waiting in line to vote).

The Employer argues that it retained the right to maintain security measures during the election, and, citing to an ALJ decision, argues that "it is neither unlawful nor objectionable to maintain or operate security cameras that happen to record protected activity while operating in a normal, customary manner." *Pacific Coast Sightseeing Tours & Charters, Inc.* 365 NLRB No. 131, slip. op. at 11 (2017). In *Pacific Coast Sightseeing*, the union alleged that the employer engaged in objectionable conduct by creating the impression of surveillance where the election signs were posted near existing signs that stated, "warning security cameras in use." *Id.* Dismissing the union's objection, the ALJ reasoned there was no impression of surveillance because the cameras were inoperable, and the employees were accustomed to the signs that had been posted for many years. *Id.* In contrast to the Employer's assertion regarding its right to

maintain security, Petitioner argues that the Employer cannot avail itself of the Board's cases that allow for the normal and customary operation of security cameras, because the Employer created the potential for surveillance by selecting a site for the CBU within the line of sight of its existing video cameras.

(c) Objection 5 – Polling

In this objection, the Union asserts that by encouraging employees to mail their ballots through the CBU, then videotaping which employees complied, the Employer engaged in objectionable polling. The surveillance of employees by use of existing surveillance cameras is addressed in Objection 4, *supra*. Notwithstanding the language of its objection, in its brief Petitioner asserts that the objectionable polling concerns the consultants' one-on-one solicitation of employees to determine whether they had received ballots. The alleged "polling" of employees by consultants is discussed *infra* at 2.c. As this conduct is not immediately related to the CBU, it will not be separately addressed herein.

(d) Objection 6 – Electioneering

The Board does not prohibit all electioneering during polling periods. However, the Board has prohibitions regarding where electioneering can be conducted during an election. In *Claussen Baking Company*, 134 NLRB 111 (1964), the Board specifically prohibited electioneering "at or near the polls." *Id.* The Board has further refined this prohibition, and evaluates the following factors to determine whether a party engaged in impermissible electioneering: 1) whether the conduct occurred within or near the polling place, 2) the extent and nature of the alleged electioneering, 3) whether it is conducted by a party to the election or by employees, and 4) whether the electioneering occurred within a designated no-electioneering area or contrary to the instructions of the Board agent. *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118 (1982), *affd.* 264 NLRB 44 (1982), *enfd.* 703 f. 2d 876 (5th Cir. 1983).

The Board has applied its prohibition on electioneering near the polling area to include signage and banners. See, *Pearson Education, Inc.*, 336 NLRB 979 (2001), *enfd.* 373 F.3d 127 (D.C. Cir. 2004). In *Pearson*, the Board determined that a second election was warranted in part because the employer engaged in impermissible electioneering during the election by displaying a poster depicting the union's strike activity in an area every voter had to pass in order to vote. *Id.*

Whether and/or how the Board's rules on electioneering during an election applies to a mail ballot election is an issue of first impression for the Board. Normally, there is not a traditional "polling area" during a mail ballot election, nor does a Board agent delineate the "no electioneering area" – so the Board's traditional *Boston Insulated Wire* analysis wouldn't apply to a mail ballot election. However, the Petitioner argues that here, by installing a CBU, the Employer created a putative "polling area," and by erecting its campaign materials on the tent outside this area, the Employer engaged in unlawful electioneering.

(e) Objection 7 – Ballot Solicitation

In a mail ballot election, it is objectionable conduct for a party to collect or otherwise handle an employee's mail ballot. *Fessler & Bowman, Inc.*, 341 NLRB 932, (2004). Recently, the Board held that during a mail ballot election merely soliciting an employee's ballot is objectionable, in part because solicitation suggests to the voter that a party is "officially involved in running the election" which is "incompatible with [the Board's] responsibility for assuring properly conducted elections. *Professional Transportation*, 370 NLRB Slip. op. at 3 (internal citations omitted); Cf. *Human Development Assn.*, 314 NLRB 821 (1994).

(f) Objection 17 – Undermining Union and Grant of Benefit

The Board will infer that an announcement or grant of benefit during the critical period is objectionable; however, the employer may rebut the inference by establishing an explanation other than the pending election for the timing of the announcement or the timing or the bestowal of the benefit. *Star, Inc.*, 337 NLRB 962, 963 (2002). The employer may rebut the inference by showing that there was a legitimate business reason for the timing of the announcement or for the grant of the benefit. *Id.* See also *Adams Super Markets Corp.*, 274 NLRB 1334, 1334-1335 (1985); *Oxco Brush Division of Vistron Corp.*, 171 NLRB 512, 513 (1968). In *B & D Plastics*, 302 NLRB 245 (1991), the Board set forth the factors to determine whether a grant of benefit would tend to unlawfully influence the outcome of the election: (1) the size of the benefit conferred in relation to the stated purpose for granting it; (2) the number of employees receiving it; (3) how employees reasonably would view the purpose of the benefit; and (4) the timing of the benefit.

The Petitioner also advances another theory of violation, intermingled with the grant of benefit. Essentially, the Union argues that the Employer's conduct in regard to the mailbox undermined the Union's authority. Petitioner asserts that based on rumors circulating at the facility, employees asked Union agents whether a collection box would be available at BHM1. The Union informed employees that the Employer's request for an official collection box was denied. The Union asserts that by causing the USPS to install a CBU, the Employer deliberately undermined the veracity of the Union, and created the impression that the Employer, rather than the Board, controlled the election process. This argument is a novel argument, and there is no Board law cited in support of this proposition. The Employer, in contrast, asserts that the Union "blatantly mischaracterized the DDE," which did not prohibit the installation of a USPS owned CBU.

iv) Recommendation

Based on the absence of evidence that any agent of the Employer solicited employee ballots, or that the mailbox and video surveillance thereof resulted in "polling" employees regarding their union sympathies, I recommend that Objections 5 and 7 be dismissed.

With regard to Objections 1 - 4, 6 and 17, while both parties attempt to address each of the 8 mailbox related objections individually, I find it is the aggregate effect of the mailbox that affected the results of the election. It is the totality of the circumstances created by the installation of the mailbox absent any authorization from the Board. It was the solicitation that employees use the CBU, a perceived benefit to employees. And, it was the installation of the CBU, at a location that reasonably appeared to be within the viewing field of the Employer's multiple security surveillance cameras that so tainted the election that a second election is necessary. Regardless of whether the Employer succeeded in defeating the Union in a landslide, the Employer's conduct herein so undermined the laboratory conditions necessary to ensure a free and fair election, a re-run election is necessary. Over 2,000 employees did not vote in the election, a sufficient number to affect the results of the election. While it is unknown why these employees refrained from voting, there is, at the very least, the possibility that the Employer's misconduct influenced some of these 2,000 eligible voters.

The Employer argues that the USPS installed the CBU, not the Employer. As discussed below, this is mere scapegoating. Furthermore, the Employer argues that even if it was responsible for installing the CBU, its purpose was pure, and served the legitimate cause of encouraging voter participation. However, the Board doesn't require evidence of intent to find objectionable misconduct. Finally, the Employer maintains even if it committed an error in judgment, there is no existing Board precedent or rule prohibiting an employer from installing a mailbox on its property, therefore, its conduct cannot be prohibited. The Employer fails to appreciate that this conduct has never occurred before because few, if any, employers have the means, the will, and the influence to cause the installation of a mail receptacle at their location in under six-weeks for the sole purpose of providing employees a method of returning their mail ballots. So, merely because this is a case of first impression should not insulate the Employer from a finding of misconduct sufficient to justify a second election.

It is clear that the sole reason the Employer sought to have a mailbox installed was the possibility that the Acting Regional Director would order a mail ballot election. In fact, the Employer was so dedicated to providing an onsite mail receptacle, the Employer purchased its own private, blue mailbox. Had the USPS not denied the Employer's request, the Employer would have installed the Salisbury Industries' powder blue mailbox it purchased. After the Employer's private mail receptacle installation was rejected by the USPS, the Employer requested an official USPS mailbox. Due to USPS restrictions, the Employer was unable to secure a traditional blue mail receptacle, however, exercising its enormous influence over the USPS, the Employer was able to secure a neutral CBU. Normally, according to the local USPS official, such boxes are purchased by the customer. Instead, in an effort to placate the Employer, the USPS officials at the highest levels jumped through hoops to not only secure a CBU, but make substantial alterations to this CBU, and install it within the short time frame set by the Employer – a time frame that not coincidentally coincided with the mail ballot election.

The Employer correctly observes that Acting Regional Director did not have the prescient foresight to prohibit the Employer from pressuring the USPS to install a mailbox, or CBU. However, the Employer did understand that the Acting Regional Director, by her silence in the DDE, rejected the Employer's requests for an official NLRB mail ballot collection receptacle at

the BHM1 facility. It is disingenuous to argue that because the DDE didn't specifically address the Employer's requested ballot collection receptacle proposal, the Acting Regional Director didn't reject the request. In fact, the Employer argued to the Board that the Acting Regional Director's failure to accede to the Employer's demands for such a receptacle was in error – and the Board also rejected this request. The Employer knew that had it installed its own collection device it would have committed clear objectionable conduct, or ballot harvesting. To circumvent existing Board law, the only arguable option was to persuade the USPS to install a collection receptacle.

The Employer's scapegoating of the USPS is ineffective, as the evidence established that the Employer used its considerable influence to compel the USPS to authorize and install a mailbox. USPS acted solely on the demands of the Employer, as there was no prior consideration by the USPS regarding a mailbox at BHM1. The decision to place a temporary receptacle at BHM1 was motivated solely by the Employer's demands. Moreover, the Employer's ultimate control over the installation of the CBU demonstrates further that USPS was merely complying with the Employer's demands. The CBU was installed in accord with the timeline devised by the Employer, and with great haste. The CBU was installed in a location selected by the Employer. While the Employer's agent selected three potential locations, there was no evidence that the USPS independently selected a location, rather it approved the location selected by the Employer.

The Employer unconvincingly asserts that the USPS has the lawful authority to determine where to place a mailbox. The Employer argues that if the Board finds the installation of a CBU to be objectionable conduct, this decision will interfere with USPS's authority and would amount to the NLRB unilaterally regulating a matter – like mail collection – that clearly falls under another federal agency's purview. This argument might be sustainable if the objection related to an existing official US Mail receptacle that was not installed solely because an Employer induced the USPS to install it. However, here, the Employer, not the USPS defined not only the time of installation, but chose the location for installation. By finding the Employer's conduct objectionable, the Board is not regulating mail collection, but is ensuring that Board elections are conducted in the requisite laboratory conditions.

The box itself is not an “official” looking blue mailbox normally associated with the USPS, and labeled as an official mailbox with the USPS logo on the side. Instead, the neutral CBU the Employer received within its mandated timeline does not reflect that it is the property of the USPS. There is nothing about the CBU that would indicate that it was furnished by the USPS. The Employer’s evidence that “some” employees may have seen the CBU installed hardly establishes that the majority of bargaining unit employees knew this box was an official, and secure mailbox.

The evidence established that after installation, the Employer engaged in a campaign to encourage its employees to use this mail receptacle to return their ballots. Text messages and other electronic communications notified employees that the USPS had installed a mailbox for the sole purpose of providing employees an “easy, safe and convenient” way to mail their ballots. During its “Get Out the Vote” campaign, the paid consultants encouraged employees to return their ballots using the CBU. In another electronic communication in February, the Employer raised unsubstantiated rumors that the Union’s agents were harvesting mail ballots, insinuated that employees’ home mailboxes were not secure, but provided the “secure” alternative of the USPS installed CBU. While the Board does not regulate campaign materials for truthfulness, such uncorroborated accusations of unlawful conduct demonstrate the lengths the Employer took to persuade employees to use the CBU.

Credible evidence failed to establish that anyone aside from the USPS had access to the outgoing mail, or that the CBU was compromised in any way. However, even absent evidence that the Employer had access to the CBU, there was sufficient evidence that employees reasonably believed their activities were being tracked. The Employer, who routinely monitors employee movement and admittedly maintains 1,300 surveillance cameras at its facility, acknowledges that it maintains video surveillance cameras on the front of its facility. A number of these cameras admittedly faced the location the Employer chose for the CBU. In apparent acknowledgment that the cameras, at the very least, appear to capture activities at the CBU, the Employer erected a large tent, ostensibly to provide some assurances that employees activities inside the tent were not being observed.

The Employer maintains that its outdoor surveillance cameras do not have sufficient range to accurately record discernable pictures of the employees entering the tent. Moreover, the loss prevention managers and supervisors were instructed not to view this supposedly inadequate video footage of employees entering the tent during the course of the election. However, there was no evidence that the inadequacy of the surveillance cameras, or the alleged directive restricting review of the surveillance footage, was information disseminated to employees, or that there was widespread knowledge of the equipment's alleged inadequacy.

In fact, at a facility where the Employer admittedly tracks employees, numerous employees believed not only that the Employer was able to track who entered the tent, but that the Employer maintained additional cameras in the parking lot that would permit the Employer to surveil employees' activity in the tent. An employer does not violate the law when existing surveillance cameras record employees Section 7 activity. In contrast, employers who install cameras for the purpose of recording Section 7 activities violates the Act. If it is unlawful to install cameras for the purpose of recording Section 7 activities, one can extrapolate that it is equally unlawful to encourage employee Section 7 activity (employees voting is the exercise their right to choose to organize a union, or not) at a location under video surveillance. Where, as here, the Employer directed the installation of a mailbox in the direct line of its existing surveillance cameras, it cannot claim that the apparent surveillance was merely incidental to its right to protect its property. While the CBU remained secure, there is ample evidence that employees reasonably believed that the Employer was able to surveil employees' ingress and egress into the tent, and could discern which employees mailed ballots from the CBU.

Moreover, the installation of the CBU to collect employees' ballots was intended to serve as a benefit to employees, a benefit granted during the critical period. The Employer's primary purpose in securing the CBU was to provide employees a receptacle for their outgoing mail ballots. The Employer announced this newly installed CBU to, "mak[e] mailing your ballot easy, safe, and convenient." Based on the many maneuverings endured by the Employer to secure the mail receptacle, it is clear that the Employer perceived this on-site receptacle as beneficial to employees.

Applying the Board's four factor test, it is clear that this benefit would be the type to interfere with an election. In *B & D Plastics*, 302 NLRB 245 (1991). The "size" of the benefit herein was relative; however, the benefit was extended to all bargaining unit employees, and granted during the polling period. Finally, and relevant to the Petitioner's arguments in Objection 1, Objection 2, and Objection 17, is the question of how employees would reasonably view the benefit. While employees were likely not privy to the Employer's many machinations to secure the CBU on the eve of the election, it could not go without notice that the Employer had managed to persuade the USPS to install a CBU.

In analyzing whether a pre-election grant of benefits "created an atmosphere that interfered with employees' free choice," the Board has recognized that:

The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). The Board has held that the rationale of *Exchange Parts* is applicable to objections cases. See, e.g., *United Airlines Services Corp.*, 290 NLRB No. 114 (Aug. 24, 1988).

B&D Plastics, Inc., 302 NLRB 245 (1991). Here, the Employer's "fist inside the velvet glove" takes on a new meaning. Rather than causing employees to infer that the Employer has the means to rescind benefits, the grant of benefit herein might also imply that the Employer has the will and means to cause federal agencies to bend to its will. Further, employees familiar with the DDE, or who were informed by the Union that the Employer's request for a collection box was denied by the Board, could reasonably surmise that the Employer had disregarded NLRB dictates, or, at the very least, that Amazon's lawyers could "out lawyer" the Acting Regional Director. Such conduct undermines the authority of the Board to establish and maintain procedures for conducting a free and fair election. If an Employer merely communicating that certain employees waiting to vote is sufficient to undermine the Board's authority, or implicitly establish an Employer's unauthorized control over election procedures, then an Employer

unilaterally determining its own procedures for mailing ballots must also interfere with the Board's election procedures. See, *Monroe Mfg.*, 200 NLRB at 74.

The Union argues that by erecting a tent, adorned with one of the Employer's many campaign slogans, the Employer committed objectionable electioneering. A party may violate the Board's no electioneering rules by erecting signage at or near the polls. See, *American Medical Response*, 339 NLRB 23 (2003). In assessing whether a parties' signage is objectionable, the Board evaluates whether the sign was at or near the polling place, the nature of the electioneering and whether the conduct was contrary to instructions of the Board (e.g., posted within the designated no-electioneering area). Here, the sign, with one of the Employer's campaign slogans, was attached to the outer wall of what was arguably a makeshift polling place. However, as this was a mail-ballot election, there was no designation of a specific "no-electioneering area." "Absent designation of a specific no-electioneering area by the Board agent, the area 'at or near the polls' is the area for which the Board applies strict rules against electioneering. *Bally's Park Place, Inc.*, 265 NLRB 703, 703 (1982). Thus, the wall of the ostensible polling area is sufficient close to the "poll" that the Board's no electioneering rule should apply.

The Employer argues that electioneering is not prohibited during a mail ballot election, and, in any event, the reasons for the Board's prohibition on electioneering are not present herein. The Employer argues that the purpose of the prohibition is to ensure that no party influences voters who are en route to cast their ballots. In the present situation, ballots were already in the possession of employees, and it was unlikely that any employee entered the tent without having already completed the ballot. The Employer argues that since employees' ballots were already cast, the Employer's campaign messaging would have little, if any, influence on any voter's decision. This distinction, however, is not one articulated by the Board. Applying the Board's "no-electioneering" framework, the placement of the sign would be objectionable. While the "electioneering" alone would not have so substantially interfered with the election to require a rerun, I recommend that the electioneering be considered as one of many factors that resulted in the election results being tainted by the CBU. Based on the totality of the circumstances I recommend that the election results be set aside.

It is well settled that the Board, in conducting elections, must maintain and protect the integrity and neutrality of its procedures. See, e.g., *Family Service Agency, San Francisco*, 331 NLRB 850 (2000) citing *Glacier Packing Co.*, 210 NLRB 571 (1974). I would recommend that by causing the USPS to install an unmarked CBU to collect ballots, and encouraging employees to cast their ballots using this CBU, the Employer engaged in objectionable conduct. This recommendation is based upon the manner in which the mail receptacle was installed that created the impression that the Employer could unilaterally establish procedures for the election, and cast doubt on the Board's authority and control over the election procedures. It further considers the Employer's exclusive control over the location of the CBU in the immediate view of its surveillance cameras. The situs of the CBU created the impression that the Employer was surveilling employees' Section 7 activities, and the inclusion of the Employer's campaign propaganda on the tent leading to the CBU further instilled the impression that the Employer had created its own voting location without any authorization from the Board. By manufacturing a situation that created the impression that the Board had, either voluntarily or involuntarily, ceded its authority for collecting ballots and establishing procedures for conducting the election, the Employer interfered with the election proceedings. Under the circumstances, where the authority of the Board was compromised by the conduct of a party, and that same conduct impacted employees and was coupled with other transgressions that interfered with employee free choice, a free and fair election was impossible. Under the circumstances, I recommend that a second election be ordered.

B. Threats & Coercion-Changes to Benefits and Supervisor Access

Two objections, Objections 10 & 19, allege that during captive audience speeches and during conversations with employees the Employer threatened and coerced employees by intimating that if the Union succeeded employees would lose existing benefits and pay.

In **Objection 10**, the Union alleges that during captive audience speeches and individually, the Employer's agents threatened employees with the loss of benefits and/or pay if

the Union were voted in, and threatened employees that if they selected the Union employees risked losing health insurances benefits, paid leave, and other benefits.

In **Objection 19**, the Union alleges that the Employer threatened employees that if the Union were successful, they would lose access to their managers and supervisors, and that they would no longer be able to seek individual accommodations.

1) Background

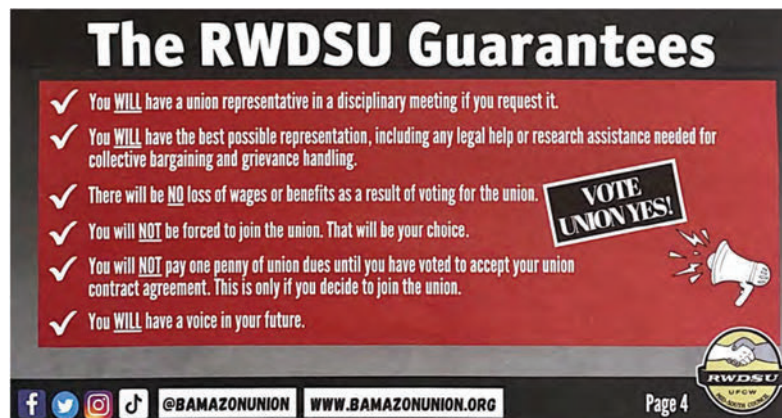
During the critical period, it is uncontested that both parties engaged in extensive campaigning. Over the course of more than four months, both the Union and the Employer communicated their campaign messages to employees via in-person small-group meetings, written communications, direct contact, as well as billboards and celebrity endorsements. While the Union culls through thousands of such campaign messages to argue that the Employer's communications contained coercive threats, the Employer argues that its themes and messages were merely lawful campaigning. Moreover, the Employer asserts that as part of its lawful campaign it sought to counter the Union's allegedly false promises.

2) Threatened Loss of Benefits

(i) Facts

Around November or December, according to the Union's Director of Organizing, Joshua Brewer, the Union distributed a handbill titled "Bamazon Union FACTS."⁹ The handbill guarantees the following:

⁹ Apparently, as part of its branding, the Union referred to its campaign as the "Bamazon" Union. A play on words, incorporating the nickname for one of the state's major universities, "[Ala]Bama", into the Union's moniker.



These same “RWDSU Guarantees” were also included, verbatim, in the Petitioner’s “Bamazon Union Newspaper” mailed to bargaining unit employees in February 2021.

After this Union’s handbill was disseminated, beginning around January 10, 2021, the Employer began Stage 1 of its anti-union campaign. During this initial stage of its campaign, from January 10 through February 6, 2021, in addition to distributing its anti-union message messages to employees, the Employer began a series of 30-minute mandatory captive audience meetings with small groups of employees.

During the meetings, MCO’s (employee relations managers) delivered prepared presentations regarding the Union’s campaign. The MCO addressed employees using Power Point slide presentations, and showed videos at some meetings. After the prepared presentation, the MCO would open the floor for employee questions, answered by either the MCO or the consultant who was also present.

The Union presented multiple employee witnesses who recalled that at unspecified captive audience meetings, unidentified agents told employees that if the Union succeeded employees would lose benefits. For instance, employee Daryll Richardson testified that at a meeting he attended employees were told that if the Union came in employees’ pay would “drop.” Employee Kristina Bell, testified that during a meeting she attended the speaker said that employees’, “pay could definitely decrease, and you could lose some of your benefits.” Frederick Brewer recalled that the Employer’s agents said that if the employees selected the

Union, “the Union would take away all that stuff we had: the benefits, money, and everything. We would -- we would lose all that stuff.”

Other employee witnesses recalled that the threat of decreased wages and benefits was presented as a possibility. For instance, Emmitt Ashford testified that employees were told that “there’s just a lot of things that [employees] *could* lose,” and that the Employer “insinuated” that it would “*potentially* try to take away the things we already had.” Employee Serena Wallace testified that employees were told that if the Union prevailed, “all your benefits and stuff will deplete because *they don’t have to accept anything that the Union had offered.*” On cross examination, most of the Union witnesses, including Ashford, Wallace, Bell, and Woods acknowledged that during the meeting, the presenters stated that during negotiations wages and benefits could improve, stay the same, or decrease.


In contrast, the Employer’s witnesses, testified that during captive audience speeches the speakers followed the Power Point slides, and said that that wages and benefits were subject to negotiations. Employees Dawn Hoag, Carla Johnson, Thomas Lewter and Jeff Thompson all testified, in response to leading questions on direct, that the Employer’s agents did not say that the employees would lose pay or benefits.

None of the employee witnesses had a precise recall of what was said during the meetings. No employee identified the agent who spoke during the meetings they attended, nor did they identify the dates of time of the meetings they attended. Neither party presented any witness who could identify any potential corroborating employee witness present during the alleged statements regarding benefits. Both parties’ witnesses testified about their present recollection regarding captive audience speeches made in January 2021, nearly five months earlier, and after a deluge of campaign materials from both sides. On balance, witnesses on both sides demonstrate weak recall of what was actually said, and I will, therefore, rely on the Power Point messages.

In particular, during one presentation the Employer discussed the give-and-take of collective bargaining. The presentation included the following slide:

The Law Doesn't Lie

<p>THE RWDSU says there will be no loss of wages or benefits if you vote them in, but the law says the union cannot guarantee that.</p> <p>During bargaining, you could end up with more, the same, or less of what you already have.</p> <p>The NLRB's own documents show this.</p>	<p>"If the union tells you that what you have now is guaranteed, it is not telling you the truth. The truth is that you can lose wages and benefits in collective bargaining." (222 NLRB 635)</p> <p>"There is, of course, no obligation on the part of the employer to contract to continue all existing benefits, nor is it an unfair practice to offer reduced benefits." (133 NLRB 1132)</p> <p>"Collective bargaining is potentially hazardous for employees, and as a result of such negotiations, employees might possibly wind up with less benefits after unionization than before." (228 NLRB 440)</p> <p>"...In the give and take of bargaining, the union might want to give up insurance, holidays, or vacation time in order to obtain dues checkoff from the company." (281 NLRB 338)</p> <p>"Under the law, an employer is not required even to continue in effect its existing benefits if a union wins." (170 NLRB 1413)</p>
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In addition, the Employer's same power point provided "comparative" wages from Petitioner's collective bargaining agreement at another company in Alabama and detailed the broad management rights clause in the same collective bargaining agreement.

It is undisputed that the "no guarantee" theme was included in a number of other the Employer's campaign messages to employees. For instance, in a text message delivered to employees from "BHM1 leadership" on January 11, 2021, the Employer asked whether employees "know collective bargaining is a give and take process?" The message also stated that the "union's negotiators may trade away something valuable to you. . . ." On three other occasions, January 12, January 14, and February 2, 2021, a message concerning collective bargaining appeared on employees' A-to-Z app. All three A-to-Z app messages advised employees that during collective bargaining the Union cannot guarantee improvements, and that employees "could end up with more, the same . . . or less than what you make today."

This message was repeated often by the Employer during the course of its campaign. For instance, a January 13, 2021 text message to employees advised that:

Text Message

A word from BHM1 leadership: Did you know during a union negotiation no one can guarantee or predict the outcome of collective bargaining? Everything is on the table. You may end up with more, the same, or less than you already have today. For example, the union may accept fewer benefits for you in return for taking dues directly out of your check and sending them directly to the union. This is called "dues check-off" and is something unions routinely fight for because it makes it easier for them to take your money! Visit DoltWithoutDues.com to learn more.

(ii) Board Law

The Union maintains that the Employer's campaign materials and captive audience speeches contained materials that coercively forecasted a loss of benefits and/or pay. In contrast, the Employer argues that this is mere campaign propaganda, and the Board long ago declined to regulate the parties' campaign speech on the basis of misleading or false statements. *Midland Nat'l Life Ins. Co.*, 263 NLRB 127, 133 (1982).

An employer engages in objectionable conduct if it responds to a union campaign by threatening to decrease existing benefits, or if its statements otherwise create the impression that its employees' selection of a bargaining representative will be futile or harmful to their interests. *See Aqua Cool*, 332 NLRB 95, 96 (2000); *Textron, Inc.*, 199 NLRB 131, 131 (1972). In evaluating a statement, the Board neither relies on the employees' subjective interpretations nor the employer's intent, but instead applies an objective test to determine whether the remarks had a reasonable tendency to coerce employees. *See, Smithers Tire and Automotive Testing of Texas, Inc.*, 308 NLRB 72, 72 (1992).

Statements must be evaluated in context, and statements regarding reduced benefits typically do not constitute objectionable conduct if made in reference to the give and take of collective bargaining. *Plastronics, Inc.*, 223 NLRB 155, 156 (1977). As the Board stated in *Plastronics*, an employer engages in objectionable conduct if it creates the impression that what employees ultimately receive in bargaining depends on what the Union can negotiate to maintain, however:

such statements are not objectionable when additional communication to the employees dispels any implication that wages and/or benefits will be reduced during the course of bargaining and establishes that any reduction in wages or

benefits will occur only as a result of the normal give and take of collective bargaining. *Id.*

(iii) Recommendation

In the present case, the Employer's campaign materials did not threaten to bargain from scratch, or imply that it alone held the key to restoration or retention of existing benefits. Instead, the Employer, using language from the Board's own cases, informed employees of the risks inherent in the give-and-take of collective bargaining. In context, the Employer's message advised employees that, during negotiations, employees risked the reduction in benefits, as the Petitioner might elect, for instance, to negotiate reduced benefits in exchange for other contractual benefits such as dues deductions. The Board has long held that it is permissible for an employer to inform its employees of the "realities of collective bargaining, which includes the possibility that the Union, in order to secure some other benefits, might trade away existing benefits." *Tufts Bros.*, 235 NLRB 808 (1978). I am persuaded that, in the context of its campaign messaging, the Employer was only lawfully communicating to employees that as a result of collective bargaining negotiations employees could lose benefits as a result of the normal give and take of negotiations. I would recommend that the objection alleging that the Employer threatened employees with a loss of benefits be overruled.

3) Threat Regarding Supervisory Access

(i) Facts

The Union alleged that the Employer coerced employees through its widely disseminated campaign materials advising employees that if the Union won, employees would lose their direct access to management. For instance, during the critical period, the Employer sent employees a text that stated:

Don't Give Up Your Voice: If a union represents employees at BHM1 and you have a problem or concern, you cannot go to your manager, you must bring that concern to the union instead. . . . If you're unhappy with that decision, we can't help you. We want to continue to work directly with you, without a third-party between us.

A similar message was disseminated during captive audience speeches. According to employee Emmit Ashford, at an unspecified captive audience speech the speaker said if the

Union won the Employer's supervisors could no longer help individual employees. Similarly, employee Jennifer Bates remembered that at a captive audience speech the speaker said that if employees voted for the union, employees would "no longer have a relationship with the company," and would not be able to "talk to [management] because the third party would come in and they would intervene. The Employer does not contest that this was one of many themes used during the campaign to defeat the Union.

(ii) Board Law

The Union argues that employees perceived their access to management, and the open-door policy as a benefit, and the Employer's statements indicating removal of the benefit were coercive threats under Section 7 of the Act. Notwithstanding the Union's theory, the Board has held that an employer does not engage in objectionable conduct when it warns that unionization will alter employees' existing relationship with managers. *Tri-Cast, Inc.*, 274 NLRB 377, 377 (1985). In *Tri-Cast*, the employer told employees that the existing policy of handling employee issues "on an informal and person-to-person basis" would change if the union successfully organized its workforce. *Id.* Recently, applying the *Tri-Cast* doctrine, the Board found lawful a chief executive's statement that if unionized, "employees would deal with the Respondent through the Union, which would speak on their behalf." *Tesla, Inc.* 370 NLRB No. 101, slip op. at 9 (2021). Similarly, under the *Tri-Cast* doctrine, the Board has found no objectionable conduct when an employer informed employees that if the union prevailed employees, "would no longer have a voice," and "would lose their direct employer-employee relationship." *Hendrickson USA, LLC*, 366 NLRB No. 7, fn. 2 (2018).

(iii) Recommendation

Based on the Board's *Tri-Cast* doctrine, regardless of whether employees perceived their access to management as a benefit, the Employer's campaign materials regarding the loss of access to supervisors was not objectionable conduct and I recommend that this objection be dismissed in its entirety.

C. Polling of Employees

In **Objection 11** the Union alleges that the Employer engaged in an extensive campaign of polling employees and interrogating employees regarding their support for the Union.

(1) Distribution of Vote No Paraphernalia

(i) Facts

It is uncontroverted that during the first phase of the Employer's union campaign, during captive audience speeches, the Employer made available to employees "vote no" paraphernalia. At different meetings, the Employer made available a "vote no" pin, and a "vote no" hang tag for employees' vehicles. Consultant Bradley Moss who was hired by the Employer for the campaign testified that during the course of the captive audience speech, a human resources manager who was in the room would lay out these "vote no" accessories on a table at the back of the room. The speaker would tell employees the paraphernalia was available, and employees could voluntarily pick up the materials as they exited.

(ii) Board Law

In general, employer polling of employee sentiment is generally assumed to be coercive, and elections will be set aside on this basis. See, e.g., *Offner Electronics, Inc.*, 127 NLRB 991 (1960). As the Board has observed, "any attempt by an employer to ascertain employee views and sympathies regarding unionism generally tends to cause fear of reprisal in the mind of employees . . . and, therefore tends to impinge his Section 7 rights." *Stuksnes Construction Co.*, 165 NLRB 1062, 1062 (1967). An Employer commits objectionable polling when "employees are forced to make an observable choice that demonstrates their support for or rejection of the union." *Barton Nelson, Inc.*, 318 NLRB 712, 712 (1995).

It is not objectionable, however, for an employer to merely make antiunion paraphernalia available. See, e.g., *Columbia Alaska Regional Hospital*, 327 NLRB 876 (1999); *Black Dot, Inc.*, 239 NLRB 929 (1978). Objectionable conduct will be found, however, where the offer of such materials pressures employees to make an "open or observable choice," regarding whether they support the union. See, e.g., *2 Sisters Food Group, Inc.*, 357 NLRB 1816, 1818–1819 (2011); *Circuit City Stores*, 324 NLRB 147 (1997); *Barton Nelson, Inc.*, 318 NLRB 712 (1995); *A. O.*

Smith Automotive Products Co., 315 NLRB 994 (1994); *Gonzales Packing Co.*, 304 NLRB 805 (1991) (citing *Pillowtex Corp.*, 234 NLRB 560 (1978)).

(iii) Recommendation

The Union argues that by leaving the vote no paraphernalia out for employees at the captive audience meetings, the “employees were forced to either pick up the anti-union paraphernalia or not in plain view of the MCO’s, consultants and HR representatives, effectively having to declare whether they were for or against the Union.” In contrast, the Employer argues that the employees could voluntarily elect to take these materials, and there was no “lists of who took “Vote No” Pecky pins or anti-union car tags offered at the meetings in Phase 1 of the campaign.”¹⁰

The Employer argues that distribution of anti-Union materials in the presence of managers was not objectionable because it didn’t maintain a list of employees who elected to retrieve the paraphernalia. However, the Board has not previously required that an Employer maintain a demonstrable list of which employees take anti-union materials. Instead, the Board finds that the mere act of requiring an employee to make a demonstrable choice is coercive.

An employer does not commit objectionable misconduct if it makes campaign paraphernalia available to employees at a central location if supervisors are absent from the distribution process. *Circuit City Stores*, 324 NLRB 147 (1997); *Barton Nelson, Inc.*, 318 NLRB 712 (1995); *Gonzales Packing Co.*, 304 NLRB 805, 815 (1991). For instance, in *Columbia Alaska Regional Hospital*, 327 NLRB 876 , where the anti-union materials were left for employees to take, the Board found no objectionable conduct because the materials were in locations where supervisors and managers were not normally present.

In contrast, an employer cannot allow its agents to distribute campaign paraphernalia in a manner that pressures employees to make an observable choice that demonstrates their support for or rejection of the union. *A.O. Smith Automotive Products Co.*, 315 NLRB 994 (1994). For

¹⁰ “Pecky” is a yellow character that resembles a yellow “minion” from the 2010 Universal Pictures movie, “Despicable Me,” and is apparently used as a mascot for this Employer. Pecky appears on t-shirts, pins and other paraphernalia distributed by the Employer to employees.

instance, where an employer distributed its anti-union campaign materials from the plant manager's office, the Board reasoned that it was objectionable because the nature of the distribution pressured employees to, "openly to declare themselves against the union by presenting themselves in his office for a vote no button." *Valmet, Inc.*, 367 NLRB No. 84, Slip. Op. 3 (2019).

In the present case, the Employer's managers provided employees with the option to retrieve the materials, and there is no evidence of any type of actual coercion. However, the materials were placed in plain view of the managers, such that employees were forced to make a discernable choice to retrieve the materials, or not, under the observation of employee relations and human resources managers. While the Employer's argument that it maintained no list of employees who took the materials is not a factor previously considered by the Board, it is of some relevance herein. The Employer employed around six-thousand employees at the time of its captive audience speeches, and conducted numerous small group meetings over the course of eighteen-hours each day, over the course of a four-week period. It is unlikely that absent some method of recording which employees opted to take the anti-union materials that the Employer's manager could actually track which employees took the "vote no" paraphernalia. Nevertheless, the issue is not whether the Employer was engaged in actual tracking of employee sentiment, but whether its conduct could reasonably cause an employee to perceive that the Employer was trying to discern their support for, or against, the Union – as it is the act of attempting to discern employee support that "tends to cause fear of reprisal in the mind of employees . . . and, therefore tends to impinge his Section 7 rights." *Stuksnes Construction Co.*, 165 NLRB 1062, 1062 (1967).

I find that by distributing these anti-union materials in the presence of managers, the Employer committed objectionable conduct. Notwithstanding the substantial margin of defeat, the misconduct herein occurred on numerous occasions at untold number of meetings. Virtually all of the bargaining unit employees were subjected to the misconduct, as these were mandatory employee meetings. Under the circumstances, I find that this conduct is objectionable.

(2) Polling to Gauge Union Support

(i) Facts

The Union also asserts that, during the critical period, the Employer polled employees regarding their job satisfaction and solicited employee feedback in order to gauge employee support for the Union. It is uncontested that the Employer maintains a procedure to solicit feedback from its associates using its “Connections” framework. Through this framework, the Employer asks its hourly associates a variety of questions to gauge employee satisfaction on an assortment of issues related to their employment, often intended to gauge employee job satisfaction and morale. The “Connections” questions are transmitted to employees and appear on the computer in their workstations. In addition, the “Connections” questions appear on television screens at kiosks located on the work floor. Employees submit their answers using a dedicated computer located at a dedicated kiosks. Participation in these surveys is encouraged but voluntary. While answering the survey question, employees are provided the opportunity to offer suggestions for improvement.

Employee Serena Wallace testified that the nature of the questions changed “dramatically” during the Union’s campaign. According to Wallace, during the Union’s campaign, the questions focused on employee job satisfaction, asking how supervisors were perceived, and whether employees would recommend the Employer to others. Wallace did not testify regarding the types of questions the Employer posited before the Union campaign.

While Wallace provided general testimony that the nature of the “Connections” survey questions changed during the Union campaign, the Employer presented a spreadsheet of the BHM1 Connections questions, reflecting the first and last time a survey question was transmitted to employees. Jena Smith, an employee relations manager, testified that certain questions may be asked repeatedly, however, the spreadsheet only reflects the first and last time a survey question was presented.

The spreadsheet reveals that, in fact, since as early as October 2019, before the facility became operational, the Employer transmitted questions to employees regarding their job satisfaction. For instance, questions regarding supervisors and managers responsiveness, whether employees deemed the job challenging, whether employees knew how to raise work related issues, and whether employees were treated fairly and with respect have been asked since

2019. The Employer's spreadsheet demonstrates that the Employer was polling employees about employee engagement, their work environment, their team, management, and supervision, as well as their overall job satisfaction long before the advent of the Union's campaign.

(ii) Board Law

In the absence of a previous practice of doing so, an employer's solicitation of grievances during an organizational campaign is objectionable if the employer expressly or impliedly promises to remedy those grievances. *Sweetwater Paperboard*, 357 NLRB 1687 (2011). This is so even if the employer does not commit itself to specific corrective action, because "employees would tend to anticipate improved conditions of employment which might make union representation unnecessary." *Majestic Star Casino, LLC*, 335 NLRB 407, 407–408 (2001) (quoting *Uarco, Inc.*, 216 NLRB 1, 1–2 (1974)); see also *American Freightways*, 327 NLRB 832 (1999) (single past instance of soliciting grievances does not establish past practice). However, no objectionable conduct occurs where solicitation of grievances occurred before the union filed its petition. *MacDonald Machinery Co.*, 335 NLRB 319, 320 (2001).

(iii) Recommendation

The evidence established that the Employer has engaged in polling of employees' job satisfaction through its "Connections" framework since before the facility even opened. There was no change in the nature of the questions as a result of the Union's campaign. Thus, the Employer's continued use of its connections platform to poll employees is not objectionable conduct.

(3) Interrogation/Polling Regarding Whether Employees Had Voted

(i) Facts¹¹

Finally, the Union asserts that the Employer's agents interrogated and/or polled individual employees on the BHM1 work floor. All of these alleged interactions occurred after the ballots were mailed on February 8, 2021, during Phase 2 of the Employer's anti-union campaign, the "Get Out to the Vote" phase. During Phase 2 of the election campaign,

¹¹ Petitioner's Objection, as filed, does not allege that the Employer committed objectionable conduct by maintaining a list of voters. However, as both parties have briefed their arguments based on this theory of objection law, I will similarly address this alleged objectionable conduct.

consultants were directed to engage in one-on-one conversations with employees regarding whether they had received and understood the ballot and instructions.

Todd Logan, the corporate employee relations principal for Amazon robotics central and Gulf Atlantic regions testified that he “owned” the BHM1 campaign, and was responsible for the day-to-day management of the campaign. To run the campaign, Logan enlisted the employee relations managers at the BHM1 site, and hired outside consultants. Logan personally trained the employee relations managers and consultants before the Employer’s campaign. In stage two, the consultants were directed to interact individually with employees to determine whether they had received their mail ballot kit. Logan testified that before embarking on stage two of the campaign, he instructed consultants not to, “ask an associate whether they voted . . . if they voted yes or no . . . if they favor or don’t favor the union . . . if they’re pro-union, pro-Amazon, whatever.”

According to Logan, the Employer’s goal was to achieve “100 percent employee participation.” To this end, the Employer instructed consultants to interact with eligible voters on the work floor during work time. According to paid consultant Bradley Moss, consultants were given a list of approximately 300 employees each day for the consultants to approach. MCO’s were instructed to determine whether employees had received their mail ballots. Moss testified that the consultants were also instructed to encourage associates to return their ballot, and to facilitate the associate’s understanding of how to cast and return their completed ballot. In addition, consultants were directed to compile a list of any eligible voter who had not received their ballot.

Moss testified that, consistent with the instructions, he did not ask employees whether or how they had voted. Nevertheless, some associates volunteered this information. Moss testified that he would carry the list of employees he was instructed to speak with, and on that list he would notate when he spoke to the employee, if they volunteered that they had voted, or indicated they had not received a ballot. At the end of each workday, Moss testified that the list with his notations was returned to an MCO. While Logan and Moss testified that the consultants were instructed not to ask whether employees had voted, Moss testified that he carried “I voted”

pins to distribute-but he distributed these pins only when employee asked for a pin, or volunteered that they had voted. Moss testified that employees would request an “I voted” pin, and he would distribute them without asking if employees voted. Moss testified that he never initiated any conversations regarding whether or how an employee voted. Moss further stated that even if an employee volunteered the information, he never recorded how an employee voted, or whether they supported the Union. If an employee had not received a ballot, or if it was damaged, he would leave a slip of paper with information on how to contact the Regional office.

It is undisputed that the consultants were in the plant asking whether employees received a ballot. This was confirmed by the employee witnesses called by the Employer. Most employee witnesses, both Union and Employer, recalled that the consultants approached them and asked whether they had received a ballot.¹² Some employees, like Hope Pendleton, recalled that she was told she could mail the completed ballot from the new CBU at the facility.

(ii) **Board Law**

The Union argues that the Board maintains well-established precedent that no party may maintain a list of who has voted. The Employer, in contrast, reasons that different rules apply during a mail ballot election, and, moreover, not all list of employees are objectionable conduct.

The Board’s long standing manual election rule prohibits anyone from keeping a list of persons who have voted. *Cerock Wire & Cable Group, Inc.*, 273 NLRB 1041 (2000). Where a party has maintained such a list of voters, the Board orders a second election because list keeping violates established Board election procedures and “rules which are designed to guarantee free

¹² Employee Daryll Richardson testified that he saw an unidentified person with a notebook showing another employee how to fill out the actual ballot. On cross examination, however, Richardson testified he was in his own work area more than six feet away, that it was loud so he could not hear the conversation, and he was too distant to see the actual document being discussed. Richardson stated that during the alleged conversation he was still working and would “every once in a while . . . glance” over at the employee and the unidentified person, and he noticed the “blue ballots and the yellow ballots.” Richardson could not describe the two individuals involved in this conversation, except that the employee whose ballot was being discussed was female. Based on this testimony, I cannot find that an agent of the Employer completed an employee’s ballot. Richardson could not provide a description of the individuals, Richardson admitted he could not hear what was being discussed, and he was too far away and distracted to observe whether the blue and yellow “ballots” were an official ballot, or merely sample ballots and envelopes. Under the circumstances, I cannot credit Richardson’s testimony that an agent of the Employer completed an employee’s ballot.

choice must be strictly enforced against material breaches in every case, or they may as well be abandoned.” *International Stamping Co., Inc.*, 97 NLRB 921, 924 (1951).

For example, during a manual election, the Board found objectionable conduct where a supervisor checked off discharged employees as they entered its hotel to vote. *Days Inn Management Co., Inc.*, 299 NLRB 735, 736 (1990). In that case, the Board held:

The keeping of any other list of individuals who have voted is prohibited and is grounds in itself for setting aside the election when it can be shown or inferred from the circumstances that the employees knew that their names were being recorded. And this is so even when there has been no showing of actual interference with the voters' free choice. *International Stamping Co.*, 97 NLRB 921 (1951).

While the Union relies on cases that hold that maintaining a list of voters is *per se* objectionable, the Employer distinguishes the present case. The Employer argues that the same rules should not apply in a mail ballot election, particularly where the employer is merely determining whether employees have received a mail ballot. This is, according to the Employer, less coercive than an agent keeping a list of who has entered a polling place. Furthermore, the Employer asserts that this case is analogous to Board’s cases where an employer’s list keeping served a legitimate purpose, and was not objectionable. Contrary to the Union’s assertion, the Employer argues that the Board has not universally prohibited lists keeping during a manual election. For instance, where an employer required off-duty employees to sign in, after voting, in order to receive pay for their time, the Board found no objectionable conduct. *Red Lion*, 301 NLRN 33 (1991). Similarly, the Board found no objectionable conduct where an employer who operated a high-security nuclear plant checked each voter off a list as the employee went to vote, and again when the employee arrived at the polling location. *American Nuclear Resources, Inc.*, 300 NLRB 567 (1990). In that case, the Board reasoned that the employer, who regularly tracked employees whereabouts due to security concerns, did not intimidate employees by its open record keeping because the employer had a legitimate security reason for maintaining the list of employees and their location within the facility. *Id.* In both *Red Lion* and *American Nuclear Resources, Inc.*, the critical factor considered by the Board to determine whether the

employer's conduct was coercive was whether the Employer had a legitimate reason to maintain a list of voters.

In the present case, the Employer argues it had a legitimate reason to poll employees about whether they had received their ballots. The Employer asserted that the reason it polled employees about their receipt of the mail ballot and whether they understood the instructions to voters was to ensure no employee was disenfranchised. The Employer argues that this noble goal of ensuring employee participation was a legitimate reason for the consultants questioning of employees, and list keeping.

(iii) Recommendation

The Employer, essentially, argues that while the Board's rules prohibit list keeping during a manual election, a different rule should apply for a mail ballot election. The issue of list keeping during a mail ballot election is also an issue of first impression for the Board. The coercive effect of an agent ticking off the names of employees who enter the polling area during a mail ballot election is clear. It is much less clear that asking employees whether they received a ballot during a mail ballot election is coercive. At a manual election, a party maintaining a list of employees that entered a polling location could infer that the employee voted and would thereafter be in a position to retaliate against employees who elected to not cast ballots. On the other hand, keeping a list of which employees had received ballots doesn't necessarily indicate whether an employee will make the effort to complete the ballot and return it. As a result, in the mail ballot election, unless the employer was specifically polling employees on whether they mailed their ballots, there is little chance they could infer anything from the mere receipt of a ballot.

Moreover, in the present case, the Employer's articulated reason for polling employees in this fashion, and keeping a list of, at the very least, employees who had not received ballots, served a legitimate purpose. As noted by the Employer, all parties have a vested interest in ensuring that no employee is disenfranchised, or misses the opportunity to vote because they didn't receive a ballot. The evidence established that consultants were instructed to poll employees as to whether they had received their ballots. On occasion, employees volunteered

information, including whether they had voted. Most employee witnesses, especially when pressed, recalled only that the consultant asked them whether they had received a ballot, and asked if they understood how to complete the ballot.¹³

Thus, the credited evidence suggests that the only “list” was of employees who had, or had not, received their ballots. Collecting a list of employees who had not received their ballots served the legitimate purpose of ensuring all eligible voters had the opportunity to vote. Under the circumstances, even if the Board were to apply its general rule to mail ballots prohibiting a party from maintaining a list of which employees voted, there was insufficient evince that such a list was maintained. The credited evidence merely established the Employer maintained a list of voters who had not received their ballots, although some employees would volunteer more information, I find insufficient evidence that a list was maintained of employees who had voted. I cannot conclude that asking employees if they had received their ballot is coercive, or otherwise interfered with the election. Based thereon, I recommend that the objection be dismissed.

D. Isolation of Union Supporters

In **Objection 13** the Petitioner alleges the Employer disparately enforced its social distancing policy by allowing its process assistants to walk the production floor and discuss voting against the Union and moved employees who it believed supported the union into positions that limited their contact with co-workers during working hours.

(i) Record Evidence

In its post hearing brief, the Union appears to have abandoned the allegation relating to the disparate enforcement of the social distancing policy. There was no evidence presented at the hearing to establish any disparate enforcement of social distancing and the record evidence established that process assistants, who were included in the unit, had job duties that required

¹³ Under the circumstances, I do not credit the testimony of the few witnesses who asserted they were asked if they had cast their ballots. The Union, in its brief, did not rely on these witnesses’ testimony. These employees could not identify the consultant or any potential witnesses, and presented no specifics about when the conversation occurred. When confronted about the alleged conversation, the witnesses became combative and appeared off balance, but were still unable to offer any specifics regarding the alleged interrogation regarding whether they had cast ballots.

them to move around the work floor. While it appears that the Union abandoned the disparate enforcement objection, the Union presented evidence and arguments that Union supporters were isolated from their coworkers. Specifically, in the 6,000+ employee bargaining unit, the Union maintains that the Employer moved two Union supporters to isolated positions and that this conduct interfered with the election.

Employee Jennifer Bates was out of work from November through the end of February due to an on-the-job injury. Before going on leave, Bates had performed as a “learning ambassador,” performing training duties in addition to her regular job. While out on leave, Bates participated in at least one media interview, and publicly expressed her support for the Union. Bates returned work the last week of February. Bates testified that on the first day of her return, she was temporarily transferred from Line 2, to Line 1, where she worked alone for the remainder of her shift. This was the only day Bates was assigned to work alone on Line 1.

In addition, Bates testified that she was denied ambassador work. After Bates returned to work, Bates was assigned to regular associate work on the line, and was not assigned to perform any learning ambassador duties. In early March 2021, Bates testified that she was assigned to “shadow” another ambassador. When the ambassador was reassigned, Bates took over the training duties. While Bates was training the new employee, she was approached by Paul Ecker, the new general manager, who informed Bates she needed to return to the line. When Bates asked why, Ecker said that Bates hadn’t been trained “properly the first time,” and they didn’t want her passing bad habits to other employees. Bates speculated that Ecker was referring to Bates’s media interview in which Bates opined that employees were “not trained properly.”

Bates testified that, before she returned to the line, Ecker stated that Bates missed the application period for the ambassador position. When Bates protested that she had never applied before, Ecker explained he established a new procedure for the ambassador program after he was hired. After this incident, Bates testified that she did not perform ambassador work until June 2021.

Bates never identified any witnesses to the conversation between she and Ecker. Moreover, the evidence was insufficient to establish that Union animus, or the desire to isolate Bates, was the cause of her reassignment. The Union presented insufficient evidence to establish that Bates's Union sympathies were the cause of her reassignments, and failed to establish that the reassignments had a negative impact on her employment. However, no testimony was proffered regarding how often Bates had performed ambassador work before the Union campaign, and whether there was any change between March and June 2021. It was unclear if Bates received further training, or applied for the job, all Bates provided was that she had recently performed work as an ambassador. Moreover, there was not a scintilla of evidence that any other employee was treated differently, or that Ecker's new ambassador procedures applied only to Bates.

In addition, the Union alleged that part-time employee Isiah Thomas was also isolated. Thomas, a college student who works weekends, testified that he discussed the Union with his coworkers during breaks. Thomas testified that on two to three occasions he observed that unnamed supervisors or managers were within a few feet of where he was speaking to unidentified coworkers about the Union. Thomas didn't identify the supervisors, managers or employees who were present, but testified that the conversations occurred around December 2020. After these conversations, Thomas testified that on five occasions he was moved to Lane 28, where he would work by himself. There was no testimony to establish the temporal relationship between Thomas's pro-union discussions and when Thomas was moved to Lane 28. Thomas, who began working at the facility around September 9, was not asked whether he had ever been transferred to Lane 28, or to any other lane, before he talked about the Union. While Thomas wasn't asked about whether he had been moved before, other employees testified that it was routine to be moved about the facility.

Employee Relations Principal, Todd Logan testified that employees are routinely moved around within the facility. This testimony is consistent employees' testimony. Logan's testimony was corroborated by a number of employees. For instance, when asked where he worked, employee Emmit Ashford testified that he had been reassigned from the fourth floor to the second floor, and then more recently to the third floor. In Ashford's own words he had been, "shuffled around a lot lately." Employee Frederick Woods explained that employees were not

assigned to a certain floor and that there are “four floors, so I work on all of them. All depends on which workday they put me on.” While the Union argues that these two employees were isolated from other employees, the evidence established that employees are regularly moved to areas where they are needed.

(ii) Board Law

The Board has held that to prove unlawful isolation, it must be established that the employer was unlawfully motivated. See, *Corlis Resources, Inc.*, 362 NLRB 195, 197 (2015). In that case, the Board held that because allegations of isolation are dependent on motivation the Board applies the burden of proof under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert denied* 455 U.S. 989 (1982), *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). In other words, the party advancing such a violation must establish that the isolated employee engaged in union activity, that the employer knew of such activity, the employer bore animus toward the union activity, and that a nexus exists between the employer’s animus and the alleged isolation.

(iii) Recommendation

The Union presented insufficient evidence to support its theory of objectionable conduct. First, assuming *arguendo* the evidence was sufficient to establish the two employees were isolated because of their pro-Union activities, there is insufficient evidence that this action impacted the results of the election. Second, the Petitioner failed to meet its initial burden as there is insufficient evidence of a causal nexus that either Bates or Thomas were isolated because of their Union activity.

In a bargaining unit of over 6,000 employees there is no evidence that moving Bates and Thomas impacted the results of the election. At the time both Bates and Thomas were moved, employees were still under strict requirements to socially distance. There is testimony throughout the record that the work floor is noisy, employees are busy, and there is no evidence that the employees were engaged in Union related discussions while working. Even if Bates and Thomas were the most outspoken of Union supporters, it is unlikely that the temporary reassignment of two employees impacted the results of the election, particularly where the Union lost by a substantial margin.

As to the allegation that Bates and Thomas were moved due to their pro-union activities, there was insufficient evidence that the employees' union sympathies played any role in their assignments. Other employee witnesses testified that they too were moved around routinely. The Union failed to present any testimony regarding whether Bates or Thomas had been similarly reassigned either before or after the Union's campaign. As to Thomas, the record evidence failed to establish any temporal relationship between his Union support and the temporary reassignment.

As to Bates claim that she was reassigned and denied ambassador assignments, Bates's testimony was insufficient to establish that this was the result of her Union activities. While Bates speculated that Ecker was referencing a media interview Bates performed, the Union failed to establish whether Ecker had altered the requirements for the ambassador position, whether any other employees were required to apply for the ambassador position as Ecker stated, or whether Bates received any additional training before allegedly resuming her role. Notably, Bates testified that on the day Ecker removed her from the role, she was "shadowing" another ambassador. However, no explanation was proffered as to why an employee who had previously performed as an ambassador was assigned to follow another ambassador, rather than simply performing in the ambassador capacity. Under the circumstances presented, the evidence was insufficient to establish that Bates was denied ambassador work, or otherwise transferred, because of her Union sympathies and to isolate her from other employees. Nor was there sufficient evidence that Thomas was transferred due to his Union discussions.

Under the circumstances, the evidence is insufficient to establish a prima facia case, and I recommend that this Objection be dismissed.

E. Traffic Light Objections

Objection 14 and **Objection 15** concern the employer's alleged interference with the Union's ability to communicate with voters, based on the recalibration of the traffic signal at the

main entrance to the facility that decreased the time exiting employees were at the light and subject to the Union's agents handbilling.

In **Objection 14**, the Union alleges that, for the purpose of interfering with employees' ability to interact with Union organizers as they exited the facility, the Employer, "pressured government officials into changing the timing on a traffic light so as to interfere with efforts by organizers to hand bill and/or communicate with employees as they left the facility. and making it more difficult for the Union to communicate with employees."

In **Objection 15** the Petitioner asserts that "acting through local government officials, the Employer "unilaterally changed policies governing employees exiting the workplace in order to limit the union's ability to communicate with those employees."

(i.) Record Evidence

In mid-December 2020, Jefferson County changed the timing of the traffic light at the intersection of Powder Point road and Premier Parkway. This is the primary entrance to the Employer's facility, and is the location where the Union's agents had been handbilling since October 2020. The decrease in the length of the light left the organizers with less time to communicate with employees in their cars who were exiting the facility.

In September 2020, the Employer anticipated hiring additional employees for its "peak" season. In 2020, the Employer's "peak" season began around "Prime Day," scheduled in October, and extended through the December Christmas holidays.¹⁴

Around September 17, 2020, before the Union's public campaign began, Loss Prevention Manager Robert Street testified that the company first requested a traffic study to evaluate the safe ingress and egress of cars at the intersection of Powder Point Road and Premiere Parkway. Street testified that he anticipated an increase in employee headcount, estimating that during the Employer's "peak" business season, a projected 1,500 to 2,000 employees could be leaving the

¹⁴ "Prime Day" is the shopping holiday devised by the Employer and which presumably increases its sales and therefore the demands on its delivery facilities.

facility at one time. To ensure that employee ingress and egress was as quick and safe as possible, Street asked his associate, Adam Williams to contact Bessemer, Alabama regarding the traffic flow. This testimony was corroborated by messages between Street and Williams.

After contacting Bessemer, Williams reported back that Jefferson County, not Bessemer city, controlled the traffic light, and advised Street that he had already requested that Jefferson County conduct a time study on the intersection. According to inter-office messaging between Street and Williams, in September 2020, Ken Boozer of Jefferson County Roads and Transportation told Williams that he intended to set up traffic counters at the intersection the following week.

Beginning October 20, 2020, the Petitioner's agents began regular handbilling at the Powder Plant Road intersection. At the outset of the campaign, the Union had 10-15 agents assigned to this intersection to assist with the handbilling, 24 hours a day, seven days a week. The organizers would stand on the public right of way and approach vehicles stopped on Premiere Parkway while waiting on the signal to exit onto Power Plant Road. Joshua Brewer, director of organizing, testified that before the Union received the list of eligible voters, handbilling was the Union's primary means of communicating with the bargaining unit employees. While the Union used the exit to communicate with employees, uncontroverted evidence established that during this same period there were several accidents that occurred while employees were exiting onto Powder Plant Road.

On December 10, 2020, Williams messaged Street relaying a conversation he had with Boozer from Jefferson County's traffic and roads department. Boozer notified Williams that Jefferson county was "still analyzing the data" from the earlier time study. Williams advised Boozer that the number of employees had significantly increased, and Boozer agreed to "put something together as soon as possible."

The only work orders presented from Jefferson County Roads and Transportation show that around December 15, 2020, a traffic study was requested because traffic was allegedly backing up around shift change. The study was concluded on that same date, and at the same time the county adjusted the signal timing by increasing the length of the green light from 35

seconds to 60 seconds. Robert Street testified that the Employer did not specifically request this adjustment in the length of the light, but only requested that the county perform a traffic study.

(ii) Board Law

The Employer argues that the alteration to the traffic light's timing must be analyzed under the standard applicable to third-party conduct, that requires evidence that the alleged misconduct so "substantially impaired the employees' exercise of free choice as to require the election be set aside." 309 NLRB 459, 462 (1992), *Mastec Direct TV, Inc.*, 356 NLRB 809, 810 (2011). Under this third-party standard, the Employer argues that Petitioner failed to establish actual interference, as there was negligible evidence the change in the traffic pattern inhibited the Union's communication with voters.

The Union, in contrast, assumes that any alteration in its ability to communicate with voters as the exit the facility necessarily results in objectionable conduct. The Union, without citing a case that supports this theory of objection law, argues that the Petitioner does not bear the evidentiary burden to establish that its other avenues of communication with employees were completely stymied by the alleged objectionable conduct. *Bon Marche*, 308 NLRB 184, 187 (1992). Notwithstanding the Petitioner's arguments, it cites to no case in which the Board ordered a rerun election because an employer interfered with a union's ability to communicate with employees. For instance, in the *Bon Marche* case cited by the Petitioner, the Board found that the department store had violated the Act by eliminating the benefit of an employee bulletin board during the election, and specifically stated that it did not "find that the petitioner's alleged ability to communicate with the eligible voters during the election campaign has a significant bearing on whether the respondent's elimination of unfettered access to its bulletin board tainted the election. " *Id.*, see fn. 7.

In the present case, the "change" was caused by a county employee who determined to alter the traffic flow after conducting a traffic study. There is no evidence that the Jefferson County official was influenced by the Union's campaign, or that the Employer initiated the traffic study to interfere with the Petitioner's ability to communicate with employees. The decision to alter the length of the green light, reducing employees' idle time at the traffic light,

was made exclusively by Joshua Boozer, the Jefferson County official. Under these circumstances, the change in the light must be evaluated as third-party conduct.

Where third-party conduct allegedly interfered with an election, the Board evaluates whether the misconduct “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); *Southeastern Mills*, 227 NLRB 57, 58 (1976). The standard for third-party conduct is more difficult to establish than the standards ordinarily applied to party conduct. *Orleans Mfg. Co.*, 120 NLRB 630, 633 (1958). The reason for the higher standard, according to the Board, is that non-party conduct tends to have less effect upon the voters than similar conduct attributable to the employer who has, or the union which seeks, control over the employees’ working conditions. *Orleans Mfg. Co.*, 120 NLRB 630, 633 (1958); see also *Owens-Corning Fiberglas Corp.*, 179 NLRB 219, 223 (1969); *Mastec Direct TV*, 356 NLRB at 811. Further, the Board recognizes that because unions and employers cannot control non-agents, “the equities militate against setting aside elections on the basis of conduct by third parties.” *Lamar Advertising of Janesville*, 340 NLRB 979, 980 (2003).

(ii.) Recommendation

In the present case, the Employer articulated a reasonable business need to contact the Jefferson County officials to evaluate the timing of the traffic signal. Before the Union’s campaign had commenced, the Employer identified an issue with the smooth ingress and egress from its facility. Recognizing that it would increase its employee complement during its busy “peak season,” the Employer sought a time study by a traffic engineer employed by the county to evaluate solutions to projected traffic issues. This issue arose before the Union’s agents began to handbill at the location.

Notably, the county didn’t immediately follow through after the Employer’s initial September 2020 request for a traffic study to alleviate congestion. Instead, as its busy peak season was winding down in mid-December, the Employer had to contact the county a second time regarding the traffic congestion issues. In the meantime, the Petitioner’s agents had set up camp at the traffic signal, and at least one accident had followed. Even if the intervening Union

campaign did exacerbate the traffic issues, however, it is clear that the Employer identified the issue and enlisted the county's assistance before the Union's campaign. Under these circumstances, I cannot conclude that the Union was the motivating factor for the Employer's request for a traffic study.

In that same vein, there is no evidence that the Employer suggested what, if any, changes the county should make. The evidence established that the Employer merely requested a study to ensure orderly ingress and egress. The county, after conducting its independent time study, determined to increase the length of the green light, thereby decreasing the amount of time employees spent at the intersection.

Ultimately, while the Employer's legitimate business interests in facilitating a safe and prompt exit from its facility caused it to instigate the county's traffic study, it was the county that determined what response to take. It was the county that determined to increase the green light's duration, thereby decreasing the idle time of exiting employees on Premier Parkway. The record contains testimony that as a result of the change, the Union's agents had less time to interact with employees as they exited. However, there was no evidence that this decrease in interaction at the light directly impacted the election. The Union had other avenues of communication, and the conduct by a third-party was not so aggravated as to require a rerun election.

F. Discrimination and Interrogation

In **Objection 20**, the Union alleges that the Employer discharged an employee for passing out union authorization cards in non-working areas, and that the Employer interrogated "the" employee regarding employees regarding their union activity."

(i.) Record Evidence

The Acting Regional Director directed me to hear evidence regarding the alleged interrogation, while the unlawful discharge allegation was held in abeyance. Aside from evidence regarding the Employer's polling of employees regarding their ballots, discussed *supra*, there was no evidence that a discharged employee was interrogated. Union provides no arguments in its brief regarding this allegation, except as related to the polling and interrogation of employees discussed in Section 2.) (c)(3), *supra*.

(ii.) Recommendation

There is simply no independent evidence of interrogation by the Employer, and I therefore recommend dismissal of Objection 20.

G. Increased Police Presence and Intimidation

In **Objection 23**, the Union alleges that during the critical period, the Employer hired police officers to patrol the parking lot and observe the conduct of employees and union organizers, creating an atmosphere of coercion and intimidation.

(i) Record Evidence

According to the BHM1 Loss Prevention Manager, Robert Street, around July 2020, a disgruntled associate pulled a gun on the regular Allied security force at BHM1. As a result of this incident, Street requested that Allied provide an increased roving security presence to augment its existing stationary Allied security staff. Because Allied Security was not able to provide mobile security, Street directed Allied to contract with the Bessemer Police Department (BPD) to provide roving off-duty police officers in an official BPD radio car. It was uncontested that since July 31, 2020, before the advent to the Union's campaign, a BPD off-duty officer was stationed at BHM1 around-the-clock. The uniformed officer used his police car to conduct perimeter checks every hour, on the half-hour mark.

In early February 2021, after a few security related incidents, the Employer asked Allied to increase the number of off-duty police officers at the facility from one officer to two officers. Street testified that around February 1, 2020, Amazon, "had a freelance reporter by the name of Kim Kelly videotape for over five minutes on our site in our parking lot. And then during that same week, we had another freelance reporter able to gain access to the site and take pictures of themselves with the building behind it." Street further testified that during the first week of February 2021, another unidentified non-employee posted pictures on social media showing the individual on Amazon property. In addition to these incidents, Street testified that there were reports of non-employees distributing flyers and interacting with employees in the BHM1 parking lot. Street acknowledged that the Employer was unable to confirm whether the people in the parking lot were employees or non-employees.

As a result of the Employer's perception that its perimeter security was insufficient, the Employer determined to contract to hire an additional off-duty officer to ensure that non-employees did not enter its campus. There is no evidence that the police interacted with any employee during the critical period. There is no evidence that the police engaged in any activity that evidenced anti-union sentiment, interfered with any employee's Section 7 activities, or otherwise injected themselves into the campaign.

(ii.) Board Law

Normally, in other contexts, the Board has held that "an employer may seek to have police take action . . . where the employer is motivated by some reasonable concern, such as public safety or interference with legally protected interests." *Nations Rent, Inc.*, 342 NLRB 179, 181 (2004) (citing *Great American*, 322 NLRB 17, 21 (1996)). At a manual ballot election, police presence alone has not been considered of sufficient consequence to require a new election. However, where the police, without cause, "inject themselves into election issues" or "speak to any employees or voters during the election," the Board will find the election environment tainted and order a second election. See, *Louisville Cap Co.*, 120 NLRB 769, 771 (1958); *Vita Food Products*, 116 NLRB 1215, 1219 (1956).

(iii.) Recommendation

The Employer articulated reasonable security concerns that caused it to initially contract for the hire of a roving off duty officer in July 2020, months before the Union initiated its campaign. Similarly, the Employer presented sufficient evidence that in February 2021, it had reasonable security concerns that resulted in the contract for a second roving off-duty police officers to patrol its facility 24/7. While the second officer was hired as a result of security breaches that occurred as a consequence of the Union's campaign, the officer was hired due to actual security issues that had arisen on the Employer's campus. There was no dispute that non-employees entered the Employer's property without permission to film video stories. While the stories were related to the campaign, a campaign that generated massive press interest, there was no evidence the Employer hired the second officer to intimidate employees. The Employer has a right to secure its property against third parties, even the press. Moreover, the Employer has a legitimate need to ensure its employees and their property remain safe and secure.

The officers maintained a visible presence, as that was their purpose – to discourage further encroachment and trespass. However, there was not a scintilla of evidence that the two off-duty police officers interacted with any employee throughout the critical period, or during the election. There was no evidence that any of the police officers engaged in activity related to the election or the Union’s campaign, or otherwise engaged in conduct intended to intimidate voters. Under these circumstances, I cannot find that the presence of hired police officers interfered with the election, and recommend that this objection be overruled.

3. CONCLUSION

Based on the foregoing, I recommend that withdrawal request for Objections 8, 9, 12, 16, 18 and 22 be approved. I further recommend that Objections 5, 7, 10, 13, 14, 15, 19, the interrogation allegation in Objection 20, and Objection 23 be dismissed as there was insufficient evidence of objectionable conduct. Finally, with regard to Objections 1, 2, 3, 4, 6, 11 and 17, I recommend that the Petitioner’s objections be sustained, and that a second election be ordered.

4. APPEAL PROCEDURE

Pursuant to Section 102.69(c)(1)(iii) of the Board’s Rules and Regulations, any party may file exceptions to this Report, with a supporting brief if desired, with the Acting Regional Director of Region 10 by August 16, 2021. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Pursuant to Section 102.5 of the Board’s Rules and Regulations, exceptions must be filed by electronically submitting (E-Filing) through the Agency’s website (www.nlr.gov), unless the party filing exceptions does not have access to the means for filing electronically or filing electronically would impose an undue burden. Exceptions filed by means other than E-Filing must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Section 102.5(e) of the Board’s Rules do not permit a request for review to be filed by facsimile transmission.

Pursuant to Sections 102.111 – 102.114 of the Board’s Rules, exceptions and any supporting brief must be received by the Acting Regional Director by close of business at 4:30 p.m. (E.D.T.) on the due date. If filed electronically, it will be considered timely if the transmission of the entire document through the Agency’s website is accomplished by no later than 11:59 p.m. Eastern Time on the due date.

Within 5 business days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Acting Regional Director may allow, a party opposing the exceptions may file an answering brief with the Acting Regional Director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Acting Regional Director.

Dated at Atlanta, Georgia this 2nd day of August 2021

Kerstin Meyers
Hearing Officer, Region 10
National Labor Relations Board