

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

**STATION GVR ACQUISITION, LLC D/B/A
GREEN VALLEY RANCH RESORT SPA CASINO**

Employer

and

Case 28-RC-208266

**LOCAL JOINT EXECUTIVE BOARD OF LAS
VEGAS AFFILIATED WITH UNITE HERE
INTERNATIONAL UNION**

Petitioner

HEARING OFFICER'S REPORT ON OBJECTIONS

I. INTRODUCTION

On November 8 and 9, 2017,¹ agents of Region 28 conducted an election among certain employees of the Employer. A majority of employees casting ballots in the election voted for representation by the Petitioner. However, the Employer contests the results of the election claiming that the Petitioner, Petitioner's committee leaders, and the Board agents conducting the election engaged in objectionable conduct and, therefore, asks that the election be set aside and that a new election be held.

The Employer argues that the Petitioner engaged in misconduct in the weeks prior to the election and on the days of the election. More specifically, the Employer contends that, during the critical period, the Petitioner prepared Election Day Sign Up sheets and instructed its committee leaders to direct eligible voters that they must sign-up to vote during a specific voting session and that they must vote in favor of the Petitioner. The remaining objections charge the Petitioner and its agents with misconduct occurring on the days of the election. In this regard, the Employer contends that Petitioner's agents, specifically committee leaders or other pro-Petitioner employees: (1) escorted groups of voters to the polling room; (2) escorted voters to the polling room one-at-a-time; (3) directed voters to show their marked ballots to the union observers to prove how they voted; (4) directed voters to wear union buttons when voting; (5) patrolled the hallway near the polling room and maintained a physical presence near the polling room; (6) instructed voters waiting in line to vote where to stand and when to enter the voting room creating the impression that the Petitioner, not the Board, controlled the voting process; and (7) engaged in objectionable list-keeping. The Employer also contends that the Petitioner designated a person who could not read as an observer for the purposes of intimidating voters.

¹ All dates occurred in 2017 unless otherwise specified.

The Employer also contends that the Board agents engaged in misconduct in four out of 12 objections. More specifically, the Employer contends that the Board agents: (1) allowed voters to openly carry their cell phones into voting booths and the voting room and failed to instruct voters that the use of such devices was restricted; (2) allowed voters to linger or converse near the ballot box and/or beverage station thereby enabling voter fraud, coercion and intimidation; (3) failed to maintain an appropriate flow of voters resulting in unreliable verifications of voter eligibility; and (4) permitted a purported illiterate employee to serve as a union observer, who the Petitioner designated as an observer for the sole purpose of intimidating voters.

After conducting the hearing and carefully reviewing the evidence as well as arguments made by the parties, I recommend that the Employer's objections be overruled because the evidence is insufficient to show that either the Petitioner, Petitioner's committee leaders, and the Board agents engaged in objectionable conduct. More specifically, there was no evidence that the Petitioner and its committee leaders engaged in coercive conduct in connection with its pre-election campaigning. Moreover, there is no evidence that any of the committee leaders or other employees or individuals engaged in any misconduct at or near the polls. Finally, there is no evidence that the Petitioner engaged in objectionable list-keeping where the evidence failed to establish that employees knew of such activity. As for the objections attributing misconduct to the Board agents, the evidence similarly fails to establish that the Board agents engaged in objectionable conduct or in any irregularity during the voting process.

After recounting the procedural history, I discuss the parties' burdens and the Board standards for setting aside elections, including the standards for setting aside elections when alleged misconduct is by individuals who are not agents of the party charged with objectionable conduct. Next, I discuss the parties' burden with respect to establishing an agency relationship along with my reasons for finding that the Petitioner's committee leaders are not general agents of the Petitioner. Then I describe the Employer's operation and election schedule. Finally, I discuss each objection.

II. PROCEDURAL HISTORY

The Petitioner filed the petition on October 19. (Bd. 1(a).²) The parties agreed to the terms of an election and the Regional Director for 28 approved their agreement on October 26. (Bd. 1(a).) The election was held on November 8 and 9. (Bd. 1(a).) The employees in the following unit voted on whether they wished to be represented by the Petitioner:

All regular full-time and regular part-time and regular on-call Banquet Bartenders, Banquet Porters, Banquet Servers, Bar/Beverage Porters, Bartenders, Bell Captains, Bell Persons, Beverage Servers, Bus Persons, Concession Workers, Catering Beverage Porters, Cooks, Cook's Helpers, Counter Attendants, Food

² References to the transcripts are designated as "Tr.____," the Employer's exhibits as "ER____," the Petitioner's exhibits as "Pet.____," the Regional Director's exhibits as "Bd.____."

Servers, Gourmet Hosts/Cashiers, Host/Cashiers, IM Porters, Kitchen Runners, Kitchen Workers, Lead Banquet Porters, Lead Counter Attendants, Lucky VIP Attendants, Lucky VIP Bartenders, Pantry Workers, Pantry Workers 11, Resort Guest Room Attendants, Resort Housepersons, Resort Steakhouse Cooks, Resort Suite Guest Room Attendants, Room Runners, Service Bartenders, Sprinters, Status Board Operators, Steakhouse Captains, Stove Persons, Sushi Cooks, Team Member Dining Room Attendants, Turndown Guest Room Attendants, Utility Porters, VIP Attendants, VIP Bartenders, VIP Lounge Bartenders, VIP Servers employed by the Employer at Green Valley Ranch Resort Spa Casino; excluding all other employees, including all front-desk employees, valet parkers, gaming employees (dealers, slot attendants, cage cashiers), inspectresses, engineering and maintenance employees, office clerical employees, confidential employees, and all guards, managers and supervisors as defined by the Act.³

(Bd. 1(a) at fn. 2.) The ballots were counted and a tally of ballots was provided to the parties. (Bd. 1(a).) The tally of ballots shows that out of approximately 833 eligible voters, 571 ballots were cast for the Petitioner, and that 156 ballots were cast against representation. (Bd. 1(a).) There were three void ballots and three non-determinative challenged ballots. (Bd. 1(a).) Thus, a majority of the valid ballots were cast in favor of representation by the Petitioner.

Objections were timely filed. The Regional Director for Region 28 ordered that a hearing be conducted to give the parties an opportunity to present evidence regarding the objections. (Bd. 1(a).) On November 30, the General Counsel issued an order transferring the instant case from Region 28 to Region 27. (Bd. 1(e).) As the hearing officer designated to conduct the hearing and to recommend to the Regional Director for Region 27 whether the Employer's objections are warranted, I heard testimony and received into evidence relevant documents on December 5, 7, 8, 11, 12, and 13.⁴

III. THE BURDEN OF PROOF AND THE BOARD'S STANDARDS 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.*

³ In this Hearing Officer's Report on Objections, as in the hearing transcript, all references to "team member" or "team members" refer to employees of the Employer.

⁴ At the hearing, I declined to grant any request for post-hearing briefs; however, I accepted closing arguments as well as any memoranda on points and authorities. In this regard, I accepted the Employer's Memorandum of Points and Authorities dated December 13, the Employer's letter addressed to the Regional Director for Region 28 dated November 28 and the Employer's closing argument. I also accepted the Petitioner's Memorandum of Law received on December 13 and Petitioner's closing argument. References to the Employer's Memorandum of Points and Authority are designated as "ER Br. __," references to the Employer's letter to the Regional Director for Region 28 are designated as "ER RD Ltr. __," and references to the Petitioner's Memorandum of Law are designated as "Pet. Br. __."

Hood Furniture Mfg. Co., 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted)). Therefore, “the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one.” *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005) (citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989)). To prevail, the objecting party must establish facts raising a “reasonable doubt as to the fairness and validity of the election.” *Patient Care of Pennsylvania, Inc.*, 360 NLRB 637, 637 (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, Inc.*, 323 NLRB 555, 560 (1997) (overruling employer’s objection where no evidence that unit employees knew of the alleged coercive incident).

A. Legal Standard for Alleged Party Misconduct

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, 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, Inc.*, 268 NLRB 868, 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)).

B. Legal Standard for Alleged Third-Party Misconduct

Where misconduct is attributable to third parties, including employees, the Board will overturn an election only if the misconduct is “so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.” *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984).

C. Legal Standard for Alleged Board Agent Misconduct

Where misconduct is attributable to a Board agent or a Regional office procedural irregularity, the Board will set aside an election where “the manner in which the election was conducted raises a reasonable doubt as to fairness and validity of the election.” *Polymers*, 174 NLRB at 282; see also *Patient Care of Pennsylvania*, 360 NLRB at 637. The Board has also stated that an election must be set aside “when the conduct of the Board election agent tends to destroy confidence in the Board’s election process or could reasonably be interpreted as impairing the election standards the Board seeks to maintain.” *Sonoma Health Care Ctr.*, 342 NLRB 933, 933 (2004). There is not a “per se rule that representation elections must be set aside following any procedural irregularity.” *St. Vincent Hosp., LLC*, 344 NLRB 586, 587 (2005) (quoting *Rochester Joint Board v. NLRB*, 896 F.2d 24, 27 (2d Cir. 1990)). Thus, the Board “requires more than mere speculative harm to overturn an election.” *J. C. Brock Corp.*, 318 NLRB 403, 404 (1995) (citation omitted).

IV. AGENCY STATUS OF PETITIONER'S COMMITTEE LEADERS

The Employer alleges that the Petitioner's agents, specifically members of the Petitioner's in-plant organizing committee or other pro-Petitioner employees, engaged in objectionable conduct during the critical period and on the days of the election. Thus, there is a question as to whether these committee leaders should be construed as general agents of the Petitioner so that their conduct may legally be attributable to the Petitioner. In answering this question, I first discuss the record evidence regarding the agency status of the committee leaders, followed by a discussion of how agency is established, and conclude with my reasons for determining that the committee leaders are not general agents of the Petitioner.

A. Record Evidence Regarding the Agency Status of Committee Leaders

The Petitioner expanded its organizing campaign in the five months leading up to the election. For instance, in June 2017 the Petitioner opened its Green Valley Ranch (GVR) office located about one and a half miles away from the Employer's property. (Tr. 702; Tr. 764.) The Petitioner also increased the amount of organizers assigned to its organizing campaign. (Tr. 777-780.) In June 2017, the Petitioner employed nine organizers to work on the campaign, then 12 by the summer, and then employed up to 28 organizers by mid-October 2017 up until the election. (Tr. 718; Tr. 777-780.) The Petitioner also organized an in-plant organizing committee comprised of unpaid, volunteer employees of the Employer, whose members were known as committee leaders. (Tr. 623; Tr. 732; Tr. 762.) The committee leaders wore a union button that displayed the union logo and the words "committee leader." (Tr. 230; Tr. 586; Tr. 737-738; ER 6.) From about June 2017 to the election, the in-plant organizing committee's membership increased from about 50 committee leaders to about 60-70 committee leaders. (Tr. 716; Tr. 776.) Petitioner's organizers and the committee leaders both played active roles in the Petitioner's organizing campaign.

The committee leaders were much involved in the Petitioner's organizing efforts. Committee leaders solicited signed union authorization cards, accompanied organizers during house-visits, brought team members to the GVR office, distributed union leaflets, and attended union meetings. (Tr. 222; Tr. 228; Tr. 313-315; Tr. 587-588; Tr. 591; Tr. 735-736; Tr. 762-763; Tr. 768; Tr. 771; Tr. 774.) And to the extent that committee leaders could, they answered team members' questions about attending union meetings, provided information received at union meetings, answered questions about union authorization cards, and provided the location of the Petitioner's GVR office. (Tr. 228-229; Tr. 231; Tr. 740-743.) In June 2017, the Petitioner launched the button-up phase of its organizing campaign when it sought a commitment of a majority of the bargaining unit to openly wear union buttons at work. (Tr. 587; Tr. 764.) During this phase, committee leaders distributed union buttons to other team members or brought other team members to the union office to get a button. (Tr. 764; Tr. 768.) Additionally, during the critical period, specifically after the election dates had been scheduled, committee leaders assisted the Petitioner with its get-out-the-vote campaign. As I discuss in more detail below in Employer Objection 1, the Petitioner gave committee leaders a list of team members' names and their contact information and instructed them to contact the team members on their list and get the team members to commit to vote on a certain date and time. (Tr. 784; ER 1; ER 3.)

The Petitioner did not rely exclusively on the committee leaders in its organizing campaign. The Petitioner's organizers also maintained an active physical presence. For example, during the button-up phase of the organizing campaign, committee leaders brought team members to the GVR office to get a union button. (Tr. 764.) While there, team members met with organizers or attended union meetings led by Petitioner's organizers, who then educated the team members about their Section 7 rights. (Tr. 733-734; Tr. 764-767.) When committee leaders brought team members to the GVR office, organizers met with team members and answered team members' questions or, in some cases, took the team members' photograph to use in its campaign literature. (Tr. 222; Tr. 284; Tr. 309; Tr. 141-146; Tr. 165-167; Tr. 762-763; ER 2.) With respect to campaign literature, the record establishes that during the critical period, the Petitioner published and distributed campaign literature containing portraits of approximately 638 team members—more than half of the bargaining unit. (Tr. 88; Tr. 831; ER 2.) To obtain these photographs, the Petitioner's organizers obtained signed media release forms from each team member. (Tr. 831-838; ER 2; Pet. 2.) International Union Vice President Kevin Kline testified that over 500 team members in the bargaining unit came to its GVR office. (Tr. 734; Tr. 762-763.)

The Petitioner also maintained a constant presence separate and apart from the committee leaders. Specifically, between October 24 and on the days of the election, the Petitioner sent campaign literature via text messages to approximately 500 team members. The Petitioner sent these text messages to team members who had previously opted to receive such messages when they signed a union authorization card. (Tr. 838; Tr. 840-852; Tr. 863-864; ER 2; Pet. 3-8.) The Petitioner also employed two spokespersons, including a communications director, to do press releases and speak on the Petitioner's behalf. (Tr. 829-832; Tr. 855-859; Pet. 10.) Petitioner's communications director also met and prepared team members for press opportunities and instructed them to speak about their personal stories and not on the Petitioner's behalf. (Tr. 829; Tr. 855.)

B. Legal Standard for Agency Status

The burden of proving agency is on the party asserting it. *Millard Processing Serv., Inc.*, 304 NLRB 770, 771 (1991), *enfd.* 2 F.3d 258 (8th Cir. 1993), *cert. denied* 510 U.S. 1092 (1994). The agency relationship must be established with regard to the specific conduct that is alleged to be unlawful. *Cornell Forge Co.*, 339 NLRB 733, 733 (2003) (citing *Pan-Oston Co.*, 336 NLRB 305, 306 (2001)). An individual can be a party's agent if the individual has either actual or apparent authority to act on behalf of the party. *Cornell Forge*, 339 NLRB at 733.

The Board applies the common law principles of agency in determining whether an alleged agent is acting with apparent authority on behalf of a party when the alleged agent makes a particular statement or takes a particular action. *Pan-Oston*, 336 NLRB at 305 (collecting cases and other supporting authority). In this regard, the Board has stated:

Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question. [Citation omitted]. Either the principal must intend to

cause the third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such as belief. [Citations committed].

Id. 305-306 (collecting cases). Furthermore, with respect to a principal's liability for the actions of its agent, the Board has stated:

A principal is responsible for its agents' conduct if such action is done in furtherance of the principal's interest and is within the general scope of authority attributed to the agent . . . it is enough if the principal empowered the agent to represent the principal within the general area in which the agent has acted.

Bio-Medical Applications of Puerto Rico, Inc., 269 NLRB 827, 828 (1984).

General union agency will not be established on an employee's status alone as a strong or leading union supporter. *United Builders Supply Co., Inc.*, 287 NLRB 1364, 1365 (1988). “[E]mployee members of an in-plant organizing committee are not, per se, agents of the union.” *Mastec N. Am., Inc.*, 356 NLRB 809, 809 (2011) (citations omitted). In fact, “the Board ‘will not lightly find an employee ‘in-plant organizer’ to be a general agent of the union.’” *Id.* (quoting *S. Lichtenberg & Co.*, 296 NLRB 1302, 1314 (1989)).

C. Recommendation

The Employer failed to prove that the committee leaders are general agents of the Petitioner. Foremost, there is no evidence that the Petitioner held any of the committee leaders out as its spokesperson, did anything to place them in a position of importance, or did anything that would give them general authority. Furthermore, the Employer has not demonstrated that the committee leaders had apparent authority because it has not shown any Petitioner conduct that could have given other team members reason to believe that the committee leaders were acting on the Petitioner's behalf. On this record, approximately 50-70 committee leaders distributed literature and union buttons, solicited signatures on authorization cards, and talked to their fellow employees about the union or the election. However, this alone is insufficient to confer them with general authority. Indeed, the Board has held that such activities are insufficient to make employees general agents of the union. *Mastec N. Am.*, 356 NLRB at 809-810; *Foxwoods Resort Casino*, 352 NLRB 771, 771 (2008) (“[T]he Board has found activities such as distributing literature, soliciting signatures on authorization cards, and talking to fellow employees about the union insufficient” to establish general agency); *Advance Products Corp.*, 304 NLRB 436, 436 (1991) (same); *United Builders Supply*, 287 NLRB at 1365 (same).

The Board has found in-plant organizing committees to be general agents of the union where they were substantially involved in the election campaign in the absence of union representatives. *E.g.*, *Bio-Medical of Puerto Rico*, 269 NLRB at 827-828 (finding two employees were union agents where the evidence showed, *inter alia*, that union officials failed to disassociate the union from the employees' actions, allowed the employees to speak on behalf of the union at meetings held by the union for employees, and allowed them to make special

appearances with union officials at election functions). The Board has also found in-plant organizing committees to be general agents of the union when they serve as the primary or only conduit for communication between the union and other employees. *Bristol Textile Co.*, 277 NLRB 1637, 1637 (1986) (finding an employee was a union agent where he was the only conduit for communication between the union and other employees). Neither of those conditions exists here. Rather, the record establishes that the Petitioner maintained a substantial presence throughout its organizing campaign. In this regard, the Petitioner began its campaign with nine organizers and then increased that number to 28 organizers by the time of the election. Additionally, the Petitioner opened the GVR office near the Employer's property, where organizers met with approximately 500 team members—more than half of the bargaining unit. The record further establishes that Petitioner's organizers communicated directly with team members. For instance, Petitioner's organizers led union meetings, met with team members at the union office, and sent campaign literature via digital means to more than 500 team members during the critical period. The foregoing establishes that the Petitioner not only maintained a substantial presence throughout the campaign but also maintained a presence separate and apart from the committee leaders. This is so especially where the Petitioner had two spokespersons to speak on the Petitioner's behalf. Based on the foregoing, I do not find that the committee leaders are general agents of the Petitioner.

I have determined that the committee leaders are not general agents of the Petitioner. Accordingly, I will apply the standard for alleged third-party misconduct for each objection involving alleged misconduct by committee leaders.⁵ *Crestwood Convalescent Hosp.*, 316 NLRB 1057, 1057 (1995) (applying the standard for third-party misconduct to members of the in-plant organizing campaign who were found not be the union's agents).

V. THE EMPLOYER'S OPERATION AND ELECTION SCHEDULE

The Employer operates a resort, spa and casino in Henderson, Nevada. (Tr. 771; ER 4-5.) The election was held in the Employer's property in a banquet room called El Cielo 2. (ER 4-5.) The election was held over the course of two consecutive days on Wednesday, November 8 and Thursday, November 9. The polls were open at the same time on both days as follows: (1) a morning session from 6 a.m. to 9 a.m.; (b) a mid-morning/afternoon session from 11 a.m. to 2 p.m.; and (c) an evening session from 4 p.m. to 7:00 p.m. (ER 4-5.) The Employer and the Petitioner had three observers present at all six voting sessions. (Tr. 683.)

VI. THE EMPLOYER'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

⁵ I do, however, find that the committee leaders are special agents of the Petitioner with respect to their role during Petitioner's get-out-the-vote campaign as I explain in Employer Objection 1, *infra*.

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.

Objection 1: Petitioner Distributed Election Day Sign Up Sheets to Committee Leaders, Who Then Directed Other Team Members That They Must "Sign Up" to Vote on a Specific Voting Session and That They "Must Vote 'Yes' for the Union"

A. Record Evidence⁶

The Employer presented six witnesses in support of its first objection. International Union Vice President Kevin Kline testified about the creation, scope and use of documents labeled "Election Day Sign Up" by the Petitioner and the committee leaders. Committee leaders Alejandra Lopez and Osmani Diaz testified about the instructions a Petitioner's organizer gave to them about the use of these documents. They also testified about the conversations each had with other team members pursuant to the organizer's instruction. Employer's observers Cristina Herescu, Dale Shaw and Tim Williams testified about conversations each had with a committee leader or committee leaders with respect to a document labeled "Election Day Sign Up."

1. Creation, Scope and Use of the Election Day Sign Up Sheets

The Petitioner launched a get-out-the-vote campaign during the critical period. (Tr. 708; Tr. 709-727; Tr. 747-750; Tr. 758-762; Tr. 780-786; ER 1; ER 3.) In so doing, the Petitioner prepared documents labeled "Election Day Sign Up" (or "sign-up sheets"). (ER 1; ER 3.) The sign-up sheets contained the following information: on the left of the page, a list of team members' names and their contact information; and on the right of the page, the election schedule by date and time. (ER 1; ER 3.) The Petitioner prepared these sheets using its own records; that is, Petitioner obtained the team members' contact information from the team members themselves. (Tr. 725-726.) More specifically, the Petitioner obtained team members' contact information from those who had previously signed union authorization cards. (Tr. 326-327; Tr. 725-726.) The Petitioner's get-out-the-vote campaign did not target all eligible voters, however. Rather, it targeted approximately 568 team members whom the Petitioner believed

⁶ During the direct examination of Employer's observer Cristina Herescu, it became apparent that the Employer sought to litigate the showing of interest. (Tr. 77-82; Tr. 201-204.) Accordingly, I ruled that the elicited testimony was irrelevant to the issues set for hearing. Moreover, relying on the Board's decision in *Precision Products Grp.*, 319 NLRB 640, 641 (1995), I concluded that as the hearing officer I lacked the authority to "consider issues that are not reasonably encompassed within the scope of the objections that the Regional Director set for hearing." Here, none of the objections allege that the Petitioner or its agents threatened, misled or otherwise coerced employees into signing union authorization cards.

Furthermore, the Board will not consider allegations of misconduct unrelated to the objections unless the "objecting party demonstrates by clear and convincing proof that the evidence is not only newly discovered but also previously unavailable." *Rhone-Poulenc, Inc.*, 217 NLRB 1008, 1008 (1984). The Employer did not demonstrate that Cristina Herescu's testimony in this regard was previously unavailable.

would vote for the Petitioner. International Union Vice President Kevin Kline testified that the Petitioner targeted team members who already demonstrated union support by openly wearing union buttons at work. (Tr. 275-276; Tr. 571; Tr. 717; Tr. 783).

The Petitioner's organizers distributed sign-up sheets to approximately 60-70 committee leaders. (Tr. 238; Tr. 274; Tr. 565; Tr. 716; Tr. 720.) For the most part, each committee leader received a sign-up sheet with a unique list of team members' names and their contact information. The Petitioner assigned committee leaders to certain team members based on whether the committee leader had solicited a signed union authorization card from the team member(s) on his or her sign-up sheet; whether the committee leader shared the same language as the team member(s) on his or her sign-up sheet; or whether the committee leader worked in the same department as the team member(s) on his or her sign-up sheet. (Tr. 250-253; Tr. 272; Tr. 565; Tr. 715-726; ER 3.) Some committee leaders received duplicate sign-up sheets, as was the case with Alejandra Lopez and Osmani Diaz. (Tr. 250-253; Tr. 272; Tr. 565; Tr. 715-726; ER 3.)

The Petitioner's organizers also instructed committee leaders what to do with the sign-up sheets. According to International Union Vice President Kevin Kline, the organizers instructed the committee leaders to talk to the team members listed on their sign-up sheets about the election, to inform them of the polling times, to ask them when they planned to vote, to get them to commit to vote on the first day, and to report back to the organizers who on their sign-up sheet had voted. (Tr. 581-584; Tr. 707; Tr. 719-720; Tr. 747; Tr. 783-784.) Kevin Kline further testified that the Petitioner wanted to know who had voted to make sure that all of the Petitioner's 'yes' votes turned out; because if they had not, then the Petitioner's organizers would call them or pay the team members a home visit to remind them to vote. (Tr. 720-724.) The Petitioner's organizers further instructed committee leaders to report back whether a team member declined to share when the team member intended to vote. Kevin Kline testified that the Petitioner wanted this information because if the team member refused to provide it, then the Petitioner would assess that team member as a 'no' vote. (Tr. 784.) Committee leaders Alejandra Lopez and Osmani Diaz corroborated Kevin Kline with respect to the instructions they received from an organizer regarding their respective sign-up sheets. For instance, both Alejandra Lopez and Osmani Diaz testified that when Lisa Mitchell, Petitioner's organizer, handed them a sign-up sheet, she told them to ask the team members on their list when they intended to vote. (Tr. 223-226; 238-239; Tr. 250; Tr. 329; Tr. 565; Tr. 572; ER 3.) Lisa Mitchell further instructed them to report back whether or not a team member said he or she would vote during a certain voting session. (Tr. 263; Tr. 565; Tr. 572; Tr. 581-584.)

2. Committee Leaders Ask Other Team Members About Voting

The record establishes that committee leaders followed the organizers' instructions. First, committee leader Alejandra Lopez credibly testified that she asked one team member on her list when he or she intended to vote. She also asked the team member whether he or she had voted. (Tr. 255; Tr. 261-263; Tr. 265; Tr. 327-328; Tr. 331.) Furthermore, Alejandra Lopez testified that she told organizer Lisa Mitchell that the same team member had voted. (Tr. 269-271.) She also told the organizer who else on her sign-up sheet she observed had voted. (Tr. 269-271.)

Alejandra Lopez was not in the presence of any other team member when she called Lisa Mitchell to tell her who had voted. (Tr. 330-333.) Committee leader Osmani Diaz testified that he talked to at least two team members on his sign-up sheet about when they intended to vote. He further testified that he marked his sign-up sheet to indicate on what date and time these team members said they planned on voting. (Tr. 570-574; Tr. 619-622; ER 3.) Osmani Diaz also added a name at the bottom of his sign-up sheet indicating the name of a team member who had voluntarily told him when she planned on voting. (Tr. 575-578; Tr. 622; Tr. 636-637; Tr. 645-646; ER 3.) Unlike Alejandra Lopez, Osmani Diaz credibly testified that he did not tell Lisa Mitchell when the team members said they planned on voting because he lost his sign-up sheet. (Tr. 572; ER 3.) However, Osmani Diaz testified that he told Lisa Mitchell who on his sign-up sheet had voted. (Tr. 581-584; ER 3.) No evidence was presented that other team members knew that Osmani Diaz had shared this information with Lisa Mitchell. (Tr. 580-583.) The record establishes that these committee leaders asked other team members about voting; however, the record does not establish that these committee leaders showed their sign-up sheets to any of the solicited team members. (Tr. 635; Tr. 659.)

The Employer presented two witnesses who had previously seen a sign-up sheet. For instance, Employer's observer Cristina Herescu testified that she saw a sign-up sheet three days before the election. (Tr. 71-75; Tr. 137-140; ER 1.) She testified that a pro-Petitioner employee showed it to her when he asked her if and when she planned on voting. (Tr. 71-75; Tr. 137-140; ER 1.) The team member told her to write her name on the sign-up sheet to indicate the date and time she intended to vote, which she did. (Tr. 72; Tr.139.) During this conversation, the team member asked her if she knew whether another team member planned on voting. When she replied that she did not, the team member told Cristina Herescu to ask the team member via text message whether the team member was planning to vote and to allow him to take a picture of the team member's response. (Tr. 140.) That was the extent of their conversation. (Tr. 139-140.) The record does not establish whether Cristina Herescu sent the text message or whether the team member took a picture of the text message. Cristina Herescu testified that she was not asked how she intended to vote. (Tr. 72.)

Employer observer Dale Shaw testified that he also saw a sign-up sheet prior to the election. (Tr. 354-356; Tr. 369-377; ER 1.) Dale Shaw first saw the sign-up sheet when two team members wearing committee leader buttons approached him at the Employer's parking lot to ask him if and when he planned on voting. (Tr. 354-356; Tr. 369-377; ER 1; ER 6.) He recognized his name and the names of other team members on the sign-up sheet. (Tr. 354.) Dale Shaw refused to tell the team members when he planned to vote but asserted that he would. (Tr. 354.) In response, the two team members asked if he was sure he would vote, which he said yes, and that was the end of their conversation. He testified that no one asked him how he intended to vote. (Tr. 373-374.)

The Employer presented three additional witnesses who testified about having had conversations with other team members about voting. First, the Employer's observer Tim Williams testified that prior to the election team members asked him whether he would vote and how he would vote. (Tr. 533.) (The record is not clear as to how long before the election he was

asked.) He testified that he felt harassed by other team members, who wore union buttons, constantly telling him that he had to vote. (Tr. 534.) The Employer did not present evidence that this witness had seen a sign-up sheet. (ER 1.) Next, the Employer called team member Miriam Rivera as a witness. She testified that no one asked her when she would vote, including Osmani Diaz; conversely, she testified that she volunteered when she would vote to Osmani Diaz. (Tr. 635-637.) She credibly testified that she has never before seen a sign-up sheet. (Tr. 635; ER 1.) Third, the Employer called team member Eligio Jauregui as a witness. He also testified that neither a committee leader nor a team member wearing a committee leader button asked him when he planned on voting. He, too, credibly testified that he has never before seen a sign-up sheet. (Tr. 659; ER 1.)

The record establishes that some committee leaders, pro-Petitioner employees, and some employees wearing union committee leader buttons asked other team members if and when they would vote. The record further establishes that committee leaders Alejandra Lopez and Osmani Diaz and, based on International Vice President Kevin Kline's testimony, other committee leaders shared the solicited team members' responses with the Petitioner's organizers. The record does not establish, however, that any of the solicited team members knew that the committee leaders or other soliciting pro-Petitioner employees were sharing their responses with the Petitioner's organizers. Lastly, the record does not establish that any committee leader or Petitioner agent instructed other team members that they must sign-up to vote on a specific voting session or that they "must vote 'yes' for the Union" either during the critical period or on the days of the election. (Tr. 276-277.)

B. Board Law and Recommendation⁷

The record establishes that during the critical period, the Petitioner instructed committee leaders to ask about 568 team members if and when they intended to vote and report their responses to the Petitioner's organizers. In the Petitioner's view, if the solicited team member confirmed to a committee leader that he or she would vote, then the Petitioner could count on the team member's support on the day of the election. In other words, the Petitioner's get-out-the-vote campaign was a means of measuring whether the Petitioner had the continued support among a majority of the bargaining unit, especially where team members whose names appeared on sign-up sheets had previously expressed union support by either having signed a union

⁷ At the hearing, I partially granted the Petitioner's petition to revoke Employer's subpoena *duces tecum* no. B-1-Z-1SXBX served on the Petitioner's Custodian of Records. More specifically, I granted Petitioner's petition to revoke subpoena request no. 1 *in toto*, which sought the production of all sign-up sheets. (Tr. 37-38; Tr. 53; Tr. 688-700; Tr. 716.) The record established that the sign-up sheets identified employees who had signed union authorization cards and also identified employees who had served on the Petitioner's in-plant organizing committee. In light of the Section 7 interests involved, I granted the petition to revoke finding that the need to protect the employees' confidentiality interests protected by Section 7 outweighed the Employer's need to obtain the information to establish its case with respect to the creation, scope and the Petitioner's use of the sign-up sheets, especially where, as here, the Employer was able to do so upon the examination of International Union Vice President Kevin Kline. *Nat'l Tel. Directory Corp.*, 319 NLRB 420, 421 (1995) ("[T]he confidentiality interest of employees who have signed authorization cards and attended union meetings are paramount to the Respondent's need to obtain the identities of such employees for cross-examination and credibility impeachment purposes.")

authorization card or having openly worn a union button. On the other hand, the Employer argues that the Petitioner, through the committee leaders, used the sign-up sheets to monitor whether employees would vote or had voted, thereby creating an unlawful impression of surveillance or impression that the Petitioner was monitoring and maintaining a list of those who had voted.

As an initial matter, the record supports that the Petitioner endowed committee leaders with actual authority to ask team members on the Petitioner's behalf if and when they planned on voting and to report their responses back to the Petitioner. In so finding, I rely on International Union Vice President Kevin Kline's testimony that he instructed the organizers to inform the committee leaders to ask other team members when they planned on voting and to report their responses back to the organizers. This finding is further supported by the testimony of committee leaders Alejandra Lopez and Osmani Diaz regarding the instructions they received from organizer Lisa Mitchell in connection with their sign-sheets. For the same reasons as to how employees who solicit authorization cards are deemed special agents of the union for the limited purpose of assessing the impact of statements made during the solicitation, here, too, are the committee leaders deemed special agents of the Petitioner for the purpose of soliciting information as to if and when team members on their respective sign-up sheets would vote or had voted. *Davlan Eng'g, Inc.*, 283 NLRB 803, 803 fn. 2 (1987). Accordingly, the Petitioner will be deemed responsible for representations or statements made when its committee leaders asked team members on their respective sign-up sheets when they intended to vote or whether they had voted. *Ibid.* For the purposes of this objection only, I examine the committee leaders' conduct under the standard for alleged party misconduct in determining whether or not to set aside the election based on the alleged objectionable conduct. For the reasons that follow, I find that the Petitioner and its committee leaders did not engage in objectionable conduct but rather engaged in non-coercive pre-election polling.

The Petitioner's pre-election get-out-the-vote campaign, including its use of the sign-up sheets, was not a poll of the team members' preferences *per se* (*i.e.*, did not expressly ascertain how team members would vote). Nevertheless, its campaign was still a poll of sentiment meant to measure whether the Petitioner still enjoyed support from a majority of the bargaining unit. This is so where all team members whose names appeared on the sign-up sheets had either signed union authorization cards or openly wore union buttons. *Cf. Glamorise Found., Inc.*, 197 NLRB 729, 729 (1972) (employer's contest calling for voters to estimate the number of 'no' votes they thought would be cast in the election was really an unlawful poll of sentiment). Crediting Kevin Kline's testimony, the record establishes that the purpose behind the use of Petitioner's sign-up sheet and pre-election polling was to ascertain whether or not it could still count on its supporters to turn out and vote for representation by the Petitioner. Thus, under Board law, it is established that non-coercive pre-election polling by a union does not warrant setting aside an election. *J.C. Penny Food Dep't*, 195 NLRB 921, 921 fn. 4 (1972). Indeed, the Board has stated that "it is not objectionable conduct for a union to solicit employees non-coercively to support it and to maintain a written record of how employees respond." *Randall Warehouse of Arizona*, 347 NLRB 591, 595 (2006). Here, the Petitioner's get-out-the-vote

campaign, coupled with its use of the sign-up sheets, amount to nothing more than non-coercive pre-election polling permitted under the Act.

On the other hand, the Board has found a union's interrogation coercive and in violation of Section 8(b)(1)(A) of the Act where there is some additional conduct by the union that made the interrogation coercive. *E.g.*, *Graham Eng'g*, 164 NLRB 679, 695 (1967) (union unlawfully questioned an employee concerning his support for a rival union where the interrogation occurred against the background of the union's threat of reprisals against adherents of the rival union made at a union meeting); *Retail Clerks (Skorman's Miracle Mart)*, 160 NLRB 709, 710 (1966) (union unlawfully questioned employees about their de-authorization activities and threatened to keep them under surveillance); *Stokely-Bordo*, 130 NLRB 869, 873 (1961) (union vice president unlawfully questioned employees about their involvement in dissent union activity in the presence of employer officials and other union representatives). Here, the Employer has not shown that committee leaders questioned team members in a context of threats of reprisal or other coercive conduct. The record shows that pro-Petitioner employees with union buttons and committee leaders simply asked other team members, including Cristina Herescu, Dale Shaw and Tim Williams, if and when they planned on voting.⁸ And although the Employer presented one instance where a team member (Cristina Herescu) was told to mark on a sign-up sheet the date and time she planned on voting, the Board has previously determined that such record-making in the context of polling is not objectionable in the absence of any coercive conduct or threats of reprisal. For instance, in *Springfield Hosp.*, 281 NLRB 643, 692-693 (1986), *enfd.* 899 F.2d 1305 (2d Cir. 1990), the judge, with the Board's affirmation, held that the union did not engage in objectionable conduct during the pre-election campaign when pro-union employees engaged other employees in conversations about the union and maintained several charts reflecting the extent of its support among the employees. *Id.* In that case, if the union's organizers and the pro-

⁸ Employer's observer Cristina Herescu testified that a team member *told* her to fill out the sign-up sheet. (Tr. 73; Tr. 139.) Relying on her choice of words, the Employer argues in its Memorandum of Points and Authorities that the team member coerced her into completing the sign-up sheet and then *told* her to ("or demanded that she") text another team member to ask if and when the latter planned on voting. (ER Br. 6.) Although the word "told" has, at times, connotations of obligation, requirement and coercion, I do not find that is what her testimony conveyed here. In so finding, I note that Cristina Herescu testified to a conversation she had with a team member in Spanish—a language she admitted she is not fluent in—and translated it into English—her second language. (Tr. 155-156; Tr. 162-164.) Considering that true connotations get lost in translation, and given the witness's demeanor and the nature and brevity of the conversation she had with the team member about the sign-up sheet, which was absent of any threats of reprisals, I find that there was no coercion. Accordingly, I refuse to find that the team member *told* her to sign the sign-up sheet, that is, required, ordered or obligated that she do so.

Additionally, I find that Tim Williams was not unlawfully interrogated when he was asked by pro-Petitioner employees if he would vote in the election in the absence of any threats or coercion. In this regard, Tim Williams testified that he felt "harassed" when pro-Petitioner employees asked him on a daily basis whether he would vote. Tim Williams chose the word "harassed" to describe how he felt by the pro-Petitioner's persistence. Based on his demeanor during this specific testimony, I note that his choice of words expressed feelings of "annoyance" by the pro-Petitioner employees' conduct. Absent any threats or other coercive statements, "the Act allows employees to engage in persistent union solicitation even when it annoys or disturbs the employees who are being solicited." *Ryder Truck Rental, Inc.*, 341 NLRB 761, 761 (2004) (citations omitted), *enfd.* 401 F.3d 815 (7th Cir. 2005).

union employees determined that the employee was for a union, the pro-union employees put a star next to his or her name; and if the employee was against the union, the employee's name was yellowed-out. *Id.* Because there was no showing that the union and its pro-union employees engaged in any coercive conduct when recording employees' sentiments on charts, the judge overruled the employer's objection. *Id.* Here, as in *Springfield Hosp.*, the Employer has not presented any evidence that the Petitioner's committee leaders coerced any employee, including Cristina Herescu and Dale Shaw, into marking the sign-up sheet to indicate when they planned on voting. As in *Springfield Hosp.*, the Petitioner's agents asking eligible voters if and when they planned on voting and recording their responses on a sign-up sheet, standing alone, amounted to non-coercive union polling permissible under the Act. Accordingly, I overrule Employer Objection 1.

Employer Objection 1 also alleges that the Petitioner's agents instructed employees that they "must sign-up to vote" and "must vote 'yes' for the Union." There is no evidence that Petitioner's agents, including the committee leaders, required employees to sign a sign-up sheet or sign-up to vote on a particular voting session, let alone were told that they "must vote 'yes' for the Union." Because the objection is unsubstantiated, I similarly overrule the objection.

Objection 2: The Union's Agents Escorted Groups of Eligible Voters to the Voting Room

Objection 3: The Union's Agents Escorted Voters to the Voting Room One-At-A-Time and Departed Only After the Voter Entered the Voting Room

A. Record Evidence

The evidence in support of the Employer Objections 2 and 3 primarily rests on the testimonies of Employer's observers Cristina Herescu, Dale Shaw, Roland Vanderburg, Marshall Tresaugue, Anthony Rios and Tim Williams. The Employer also called two committee leaders, Alejandra Lopez and Osmani Diaz, and team member Eligio Jauregui who each testified how they were accompanied by another team member into the polling room.

Cristina Herescu served as an Employer observer during both morning and evening sessions of the election. (Tr. 59; Tr. 98.) In direct examination, she generally testified that throughout the election, she witnessed team members bring other team members into the polling room, or in her words, witnessed team members showing other team members where the polling room was. (Tr. 65-66.) In cross-examination, however, she testified that she witnessed one instance where a team member at the front of the polling room's doors gestured to other team members where the polling room was. (Tr. 134-135; Tr. 168-174; Tr. 176.) Cristina Herescu was unable to identify the team member by name but recognized that this team member had already voted earlier. She also testified that the team member wore union buttons but did not identify what kind of buttons he wore. (Tr. 135-136; Tr. 168-174.) Moreover, Cristina Herescu did not identify how many voters were "escorted" by this team member. Beyond gesturing to other voters where the voting room was, the team member did not engage in any other conduct and left

the polling area once the other team members entered the polling room.⁹ (Tr. 174.) Cristina Herescu further testified in cross-examination that she observed a couple of times when team members, who had already cast a ballot, waited outside the polling room for another team member to finish casting a ballot. (Tr. 126-127.) The witness did not identify whether these team members were committee leaders or how long these individuals waited outside the polling room.

Dale Shaw served as an Employer observer during both evening voting sessions. (Tr. 351-352.) He testified that on two or three occasions, a Board agent told individuals who were standing by the polling room's entry doors that they would have to stand to the right or left of the doors and that those individuals complied. (Tr. 367.) No testimony was elicited as to whether these individuals were voters waiting in line to vote or how long these individuals remained, if at all, near the polling area. Beyond remaining near the polling area to the point that a Board agent had to tell them to stand to the either the right or left of the doorway, these individuals did not engage in any other conduct. (Tr. 367.)

Marshall Tresaugue served as an Employer observer during the mid-morning/afternoon and evening voting sessions on the first day of the election. (Tr. 440.) He testified that he repeatedly witnessed the same pro-union team members walking other people to the polling room's doors.¹⁰ (Tr. 448.)

Roland Vanderburg served as an Employer observer during both morning voting sessions. (Tr. 393-394.) In direct examination, he generally testified that he witnessed people directing others into the polling room and heard the words, "this is where you go." (Tr. 398; Tr. 409.) In cross-examination, however, he testified to two specific instances of this conduct, one at each voting session. (Tr. 408-411.) As for the first instance, he witnessed an individual stand by the polling room's doors directing other individuals into the room. (Tr. 408-409.) The individual remained by the entrance door until he or she was asked by a Board agent to leave. (Tr. 398; Tr. 409.) No testimony was elicited as to how long this individual stood by the polling room's doors, nor how many other individuals he or she directed to the polling room. As for the second instance, he witnessed a woman near the polling room's entrance show two voters where the

⁹ A conflict in Cristina Herescu's testimony emerged in re-direct examination. (Tr. 174-176.) In re-direct examination, she testified that the alleged escort entered the voting room at the same time as the other voters whom he directed into the voting room, thereby contradicting her testimony in cross-examination that she had recognized the team member as having voted earlier that morning. (Tr. 134.) Cristina Herescu further testified during re-direct examination that the alleged escort did not enter the voting room but instead waited outside the voting room. She did not specify for how long the team member waited, nor did the Employer ask. In my view, the conflict in her testimony was the result of confusion on the witnesses' part. Consequently, I do not credit Cristina Herescu's testimony that the alleged escort waited outside the polling room when the voters entered the polling room. Rather, as she testified to in cross-examination, the team member left the polling area when the other team members he led into the voting room entered the polling room. (Tr. 174-175.)

¹⁰ Marshall Tresaugue's testimony in this regard was rather conclusory and lacked any specificity. For example, the record does not establish how many times he saw the same team member walk other voters to the polling room, how he knew that the team members were pro-Petitioner (*i.e.*, they wore union buttons, the team members previously asked him to sign a union authorization card, etc.). For these reasons, as well as the reasons discussed in footnotes 13-16, *infra*, and throughout this report, I do not give much weight to the witness's testimony in this regard.

polling room was and quickly departed thereafter. (Tr. 409-412.) Roland Vanderburg did not identify these individuals; that is, he did not know whether both alleged escorts were either team members, committee leaders, or in any way associated with the Employer. Beyond showing or directing voters to where the polling room was, these unidentified individuals did not engage in any other conduct. (Tr. 409-410.)

Anthony Rios served as an Employer observer during the mid-morning/afternoon voting session on the second day. (Tr. 505.) He testified to only one instance where a voter arrived to the polling room accompanied by another individual. (Tr. 508-510.) According to Anthony Rios, the individual stood in the hallway outside the polling room for as long as it took the voter to cast a ballot; and once the voter exited the polling room, the voter and the individual walked away from the polling area. (Tr. 508-512.) Anthony Rios could not identify who the individual was waiting outside the polling area, let alone identify whether that individual was a team member or in any way associated with the Employer. (Tr. 511.) Beyond waiting outside the polling room, this individual did not engage in any other conduct. (Tr. 512.)

Tim Williams also served as an Employer's observer during the final voting session. He testified that he witnessed team members bring other team members into the polling room. (Tr. 526; Tr. 532.) In this regard, he credibly testified that the team members waited outside the polling room while the voter cast his or her ballot; and once the voter exited the polling room, the team member and the voter walked away from the polling area. Beyond waiting outside the polling room, the team member did not engage in any other conduct while standing outside the polling room. (Tr. 536-537.) His testimony did not establish how many times he witnessed the foregoing conduct.

The Employer called two committee leaders to testify, Osmani Diaz and Alejandra Lopez. Each witness testified that they walked with another team member to the polling room to cast a ballot. Additionally, both witnesses credibly testified that they asked their supervisors to be released to go vote in the election. (Tr. 227; Tr. 343; Tr. 614-615.) They testified that when they expressed a desire to vote, another team member asked if he or she could accompany them because they, too, wanted to vote. (Tr. 279; Tr. 335; Tr. 614-615; Tr. 665.) They further testified that they entered the polling room with a co-worker. (Tr. 334; Tr. 615-616; Tr. 665.) Indeed, witness Eligio Jauregui corroborated Osmani Diaz's testimony in this regard. (Tr. 665.) Alejandra Lopez testified about one instance when, during her break, she was near the hallway near the polling room when another team member stopped her to ask where the polling room was. (Tr. 281.) To help the team member, Alejandra Lopez walked the team member to the polling room and departed as soon as the team member entered the polling room. (Tr. 281-282; Tr. 225; Tr. 335-336.)

There was no evidence that the Petitioner's organizers instructed committee leaders to escort other voters into the polling room. (Tr. 750.)

B. Board Law and Recommendation

The record does not establish the identities of any of the alleged escorts. Nevertheless, the Employer argues that the alleged escorts were Petitioner's agents. On the other hand, the Petitioner argues that the Employer failed to identify a single incident in which the foregoing conduct was attributed to any putative Petitioner agent. And I agree. The Employer's observers testified that either a team member or an unidentified individual showed other voters where the voting room was. The Employer's observers further testified that they witnessed either a team member or unidentified individual accompany a voter to the polling room and waited outside the room while the voter cast a ballot. None of them identified these alleged escorts as either committee leaders or team members wearing committee leader buttons. Consequently, the evidence is insufficient to establish that any of these alleged escorts were Petitioner's agents, let alone committee leaders. The Employer failed to establish that any of the foregoing conduct is attributable to the Petitioner or any of its agents. For this reason, I overrule Employer Objections 2 and 3.

Assuming, without finding, that the alleged escorts were Petitioner's committee leaders, I would nevertheless find that the committee leaders did not engage in objectionable conduct. Because I have determined that the committee leaders are not general agents of the Petitioner, I apply the standard for third-party misconduct to the committee leaders' conduct here. And under that standard, I do not find that the committee leaders' conduct was "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizon*, 270 NLRB at 803. As Alejandra Lopez testified, the record shows that the alleged escorts simply showed other voters where the polling room was. The record further shows that committee leaders Alejandra Lopez and Osmani Diaz were accompanied by one other voter when each decided to vote. The record does not reflect that in any of the foregoing conduct, the committee leaders engaged in any threatening or coercive behavior towards other voters. For foregoing reasons, I also overrule Employer Objections 2 and 3.

Objection 4: The Union's Agents Directed and Instructed Bargaining Unit Employees to Show Their Marked Ballots to the Union's Observers to "Prove" How They Voted

A. Record Evidence

The Employer did not present direct evidence in support of this objection. The record does not show that Petitioner's staff, organizers, committee leaders, or anyone for that matter instructed a voter to show his or her marked ballot to a Petitioner observer to prove how they voted. Rather, the Employer's objection rests solely on the conjecture of four Employer's observers: Cristina Herescu, Dale Shaw, Marshall Tresaugue and Anthony Rios.

Cristina Herescu testified to one incident in support of this objection. She testified that she saw a voter with a ballot in hand, who had already marked her ballot but had not deposited the ballot in the ballot box, walk toward her table. More specifically, she testified that the voter appeared to walk toward the union observer who sat next to her at the observer table. (Tr. 117;

Tr. 123.) The voter did not reach her table because a Board agent stopped the voter and instructed the voter to place the ballot in the ballot box, which the voter did. The voter did not utter anything to the observer, nor did the observer to the voter. Cristina Herescu testified that she could not see how the voter marked his or her ballot. (Tr. 125-126.)

Dale Shaw testified to another incident in support of this objection. In direct examination, Dale Shaw testified that a voter attempted to hand a ballot to a union observer. (Tr. 352-353.) His testimony was rather conclusory in this regard; however, in cross-examination, it was revealed that the voter did not try to hand a ballot to a union observer. Rather, Dale Shaw testified that the voter stepped out of the voting booth and walked toward his observer table with a folded ballot in hand. (Tr. 364-367.) The voter did not reach his table because a Board agent stopped the voter and instructed that the voter place the ballot in the ballot box. Dale Shaw testified that the only thing the union observer told the voter was to place the ballot in the ballot box. He further testified that he could not see how the voter marked his or her ballot because the ballot was folded. (Tr. 365-367.)

Marshall Tresaugue testified that he observed a voter attempt to show his or her marked ballot to a union observer. I do not credit his testimony because it is entirely based on assumption, which he admitted. (Tr. 488.) The basis for this assumption is that he witnessed a voter walk toward an observer table with a ballot in hand. The voter did not walk toward his observer table, however. (Tr. 487; Tr. 491.) The voter did not reach the observer table because the Board agent stopped the voter and then directed the voter to the ballot box. (Tr. 487; Tr. 491.) Marshall Tresaugue did not testify to any misconduct on the part of the union observer who he assumed the voter attempted to show his or her marked ballot. The witness could not recall whether the voter's ballot was folded. Nevertheless, no evidence was elicited regarding whether the witness saw how the voter marked his or her ballot.

Anthony Rios testified that he observed a voter, after having marked his ballot, walk toward his observer table with a folded ballot in hand. Anthony Rios credibly testified that based on the voter's demeanor, the voter looked confused, that is, did not know what to do after marking the ballot so the voter walked over to his table. (Tr. 514-515.) The voter did not reach the table nor did the union observer speak to the voter. (Tr. 516.) There is no evidence that Anthony Rios saw how the voter marked his or her ballot.

B. Board Law and Recommendation

Based on the foregoing evidence, the Employer has failed to prove that the Petitioner or any of its agents directed voters to show their marked ballots to a union observer to prove how they voted. The evidence shows that the Employer rests this objection solely on conjecture of the foregoing witnesses. Moreover, the record fails to show that any voter attempted to show a union observer his or her marked ballot, let alone did so to prove to a union observer how they voted. Because Employer Objection 4 is unsubstantiated, the objection is overruled.

Objection 5: The Union’s Agents Directed Voters to Wear Union Buttons When Voting

A. Record Evidence

The Employer did not present any direct evidence that Petitioner’s organizers or its committee leaders directed voters to wear union buttons while voting. (Tr. 289; Tr. 612; Tr. 666; Tr. 752.)

The only evidence presented that remotely touches on this objection is the testimony of Employer’s observer Marshall Tresaugue. He testified that he witnessed a female team member enter the voting room and ask a Board agent if voters could wear union buttons inside the voting room. (Tr. 445-446; Tr. 465-467.) According to Marshall Tresaugue, the Board agent told her that employees could and she then exited the voting room. Sometime thereafter, Marshall Tresaugue further observed the same female team member enter the voting room along with other voters to vote. (Tr. 465-467.) His testimony did not specify how many other voters entered the room with the female team member. He testified that these voters wore their union buttons; however, his testimony did not establish whether they wore committee leader buttons (ER 6), bartender’s union buttons (ER 7), or any other union button. Moreover, his testimony did not establish whether the female team member wore a union committee leader button or a bartender’s union button.

B. Board Law and Recommendation

The Employer failed to show that the Petitioner’s agents directed voters to wear union buttons when voting as alleged. Accordingly, I overrule Employer Objection 5 because it is unsubstantiated.

Assuming, without finding, that the female team member was a committee leader, I would nevertheless find that she did not engage in objectionable conduct. Further, assuming, without finding, that the female team member had in fact told other team members to wear their union buttons when voting, I would also not find such conduct objectionable. Because I have determined that the committee leaders are not general agents of the Petitioner, I apply the standard for third-party misconduct to the female team member’s conduct. And under that standard, her conduct was not so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible. *Westwood Horizon*, 270 NLRB at 803. This is so considering that the Board has long held that it is not objectionable conduct for employees to wear union buttons when voting. *Furniture City Upholstery Co.*, 115 NLRB 1433, 1434-35 (1956) (holding that the wearing of union buttons by participants in an election is not prejudicial to the fair conduct of an election.) For the foregoing reasons, Employer Objection 5 is further overruled.

Objection 6: The Union’s Agents Patrolled the Hall Immediately Adjacent to the Voting Room in the “No Electioneering” Area and Frequently Looked Inside, Maintaining an Intimidating Physical Presence Around the Voting Room

and Demonstrating that the Union was Monitoring Who Had Voted in the Election

A. Record Evidence

The record does not establish whether the Board agents delineated a specific no-electioneering area. In these circumstances, the Board applies its rules against electioneering only to the customarily proscribed area, *i.e.*, “at or near the polls.” *See Bally’s Park Place, Inc.*, 265 NLRB 703, 703 (1982). In this case, the election was held in a banquet room called El Cielo 2 that was adjacent to a long hallway. (Tr. 431-432; Bd. 2.) A Starbucks, the hotel lobby and lobby bar are located at one end of the hallway, about 20-25 feet away from the entrance to the polling room. (Tr. 431-432.) At the opposite end of the hallway is a juncture located about 30 feet from the entrance to the polling room. (Tr. 432-438; Bd. 2.) At this juncture, one path down the hallway leads to an employee entrance to the back of the house of the Employer’s property. Another path leads down another hallway and another path leads to conference rooms and restrooms. On this record, I find that the no-electioneering area extended to the hallway immediately next to the entrance to the polling room.

The Employer does not contend that any individual engaged in any electioneering at or near the polling area, specifically in the hallway adjacent to the polling room. Indeed, there is no evidence that any individual engaged in electioneering. Rather, the Employer alleges that Petitioner’s agents, specifically committee leaders, patrolled the hallway creating an intimidating physical presence around the polling room. In support of its objection, the Employer relies on the testimony of four witnesses as discussed below.

Employer observer Cristina Herescu initially testified she saw team members walking past the polling room and, in doing so, looked inside. (Tr. 64-66.) In cross-examination, however, she specifically testified that at both morning voting sessions, she observed at least four or five team members on separate occasions walk back and forth down the hallway. (Tr. 128-130.) Beyond walking down past the polling room’s doors and looking inside the polling room, these team members did not engage in any other conduct. (Tr. 130; Tr. 161-162.) No evidence was presented as to how much time elapsed between the first time Cristina Herescu saw a team member walk past the polling room and the second time she saw that same team member walk past the polling room in the opposite direction. She did not identify whether these team members were committee leaders or wore committee leader buttons.

Employer’s observer Marshall Tresaugue testified that he witnessed team members “patrol” the hallway in the mid-morning/afternoon voting session on the first day of the election. (Tr. 448-449.) He initially testified that he was not sure whether these team members were pro-union employees, but in cross-examination, he contradicted himself and asserted that they were pro-union employees. (Tr. 448-449; Tr. 462-463.) In explaining what he saw, Mitchell Tresaugue testified that team members were simply walking back and forth down the hallway and looking inside the polling room as they walked by. (Tr. 449; 464-465.) He testified that none of these team members stopped in front of the polling room’s doors. Although he testified that he witnessed team members walk down the hallway, he recognized two team members as being

pro-Petitioner employees because they previously talked to him about joining the union. (Tr. 463-464.) Beyond walking past the hallway, these team members did not engage in other conduct. (Tr. 464-465.) Furthermore, Marshall Tresaugue did not identify whether these team members were committee leaders or wore committee leader buttons.

Employer observer Dale Shaw testified that on two or three separate occasions, a Board agent told an individual to step away from the entrance of the polling room's doors. (Tr. 353; Tr. 367.) The individuals complied with the Board agent's instruction. No testimony was elicited as to whether these individuals were team members or committee leaders.

Employer observer Tim Williams testified that, during the final voting session, he witnessed about ten team members on separate occasions walk down the hallway past the polling room's doors and, in doing so, looking inside. (Tr. 530-532; Tr. 538-540.) He saw these team members walk down the hallway only once; that is, they did not walk back down the hallway in the opposite direction passing by the polling room's doors a second time. (Tr. 532.) Beyond walking by the polling room and looking inside, these team members did not engage in any other conduct. (Tr. 539-540.)

B. Board Law and Recommendation

The record does not establish the identities of any of the alleged patrollers. Nevertheless, the Employer argues that the unidentified patrollers were committee leaders and that they engaged in such conduct to monitor and ascertain whether team members had voted. (ER Br. 9.) In doing so, the Employer argues, the Petitioner created the impression that the team members' decision to vote was under surveillance by Petitioner's agents, thereby interfering with their Section 7 rights. (ER. Br. 9.) On the other hand, the Petitioner argues that the Employer failed to prove the unidentified patrollers were in fact Petitioner's agents, let alone anyone whose conduct could be attributable to the Petitioner. And I agree.

The evidence is insufficient to establish the identities of the alleged patrollers. Furthermore, the evidence is insufficient to establish that the alleged patrollers were in fact committee leaders. Rather, the record shows that the alleged patrollers were team members, whose conduct I cannot attribute to the Petitioner. Accordingly, consistent with the witnesses' testimony, these "patrollers" were team members whose union sentiments are generally unknown with the exception of the two team members whom Marshall Tresaugue recognized as pro-Petitioner employees. Because there is insufficient evidence to establish that the alleged patrollers were the Petitioner's agents, I overrule Employer Objection 6.

Assuming, without finding, that the alleged patrollers were committee leaders and/or pro-Petitioner employees, I would nevertheless find that the committee leaders did not engage in objectionable conduct. Because I have determined that the committee leaders are not general agents of the Petitioner, I will apply the standard for third-party misconduct to the committee leaders' conduct here. Here, the record shows that the committee leaders simply walk to and fro the hallway past the polling room and, in doing so, looked inside. This conduct alone is insufficient to establish that it was so aggravated as to create a general atmosphere of fear and

reprisal rendering a free election impossible. *Westwood Horizon*, 270 NLRB at 803. This is so considering that no single alleged committee leader maintained a continued presence in or near the polling room or engaged in any conduct other than looking inside the room as they walked by. *Cf. Performance Measurements Co., Inc.*, 148 NLRB 1657, 1659 (1964) (holding that an employer engaged in objectionable surveillance by the president's "continued presence" near the polling area); *Electric Hose & Rubber Co.*, 262 NLRB 186, 216 (1982) ("Walking past the polling area without stopping, cannot, standing alone, be construed as employer surveillance."). For the forgoing reasons, I also overrule Employer Objection 6.

Objection 7: The Union's Agents Instructed Voters Waiting Outside the Voting Room Where to Stand and When to Enter the Voting Room

A. Record Evidence

The record is devoid of any evidence that an admitted agent of the Petitioner, committee leader, or any team member for the matter instructed voters waiting outside the voting room where to stand or when to enter the voting room. Moreover, there is no evidence that voters waited outside the voting room before entering the voting room.

Rather, the record shows that the Board agents were in control of the voting process. For instance, Cristina Herescu, an Employer's observer during both morning and evening voting sessions, testified that four Board agents were present in the polling room. (Tr. 114.) She further testified that the Board agents directed voters to one of the three observer tables, distributed ballots to the voters, directed voters to voting booths and instructed voters to deposit their ballots in the ballot box. (Tr. 114.) Indeed, she testified that a Board agent remained near the observer tables and that this Board agent assisted the observers with identifying voters or, in some instances, instructed voters to step back from the observer table. (Tr. 119-122.) Employer's observer Roland Vanderburg credibly testified that the Board agents were in control of the voting process during both morning sessions of the election. (Tr. 401-403.) He, too, testified that there was a Board agent who greeted voters at the door, another Board agent near the challenge table, a Board agent directing voters to the appropriate observer table, and other Board agents floating around the polling room. (Tr. 401-403; Tr. 415-429; Bd. 2.) Marshall Tresaugue, the employer observer for the afternoon and evening voting sessions on the first day, testified in a similar fashion. (Tr. 451-474.) Similarly, Tim Williams, the Employer's observer for the final voting session, corroborated the foregoing testimony. (Tr. 540-547.)

B. Board Law and Recommendation

The Employer has the burden of establishing that the conduct alleged in Employer Objection 7 occurred. Because the Employer has not substantiated its objection, Employer Objection 7 is overruled.

Objection 8: The Union's Agents Maintained a List of Who Had Voted

A. Record Evidence¹¹

The record does not establish that the Petitioner engaged in objectionable list-keeping at or near the polls, let alone near the Employer's property. In this regard, the Employer did not present any evidence that any organizer, observer, committee leader or team member engaged in list-keeping or engaged in any conduct that could be interpreted as list-keeping, such as checking names off a list, at or near the polls. Rather, relying on the testimony of International Union Vice President Kevin Kline and committee leaders Alejandra Lopez and Osmani Diaz, the Employer establishes that on the days of the election, the Petitioner kept track of who of its union supporters had voted, as discussed below.

During the days of the election, the Petitioner reminded its supporters to turn out and vote. To do so, Kevin Kline testified that Petitioner's organizers instructed committee leaders to report to them who on their sign-up sheets had voted. The organizers further instructed committee leaders to ask those team members if they had voted. The record establishes that the committee leaders did just that. Indeed, committee leaders Osmani Diaz and Alejandra Lopez testified that, on the days of the election, they informed organizer Lisa Mitchell who had voted. (Tr. 268-271; Tr. 580-582; Tr. 718-726.) They did so, however, not in the presence of any other voter. Similarly, Employer's observer Cristina Herescu testified that a pro-Petitioner team member wearing a committee leader button asked her whether she had voted.¹² (Tr. 91.) Kevin Kline further testified that based on the committee leaders' information, the Petitioner determined who of its supporters had not yet voted and called them to remind them to do so. (Tr. 720-724.) Kevin Kline testified that this "data," which for all intents and purposes was an active list of those who had voted, was stored electronically at the Petitioner's office and never printed. (Tr. 724.) No evidence was presented that the committee leaders or any team member knew that the Petitioner was keeping this "data."

B. Board Law

In Board cases dealing with objectionable list-keeping, the focus on the inquiry must be on what voters observed and could reasonably believe. Indeed, in *Days Inn Mgmt. Co.*, 299 NLRB 735, 737 (1992), the Board stated:

It is well settled that the only list of voters that may be maintained in Board-conducted elections is the official voter eligibility list used to check off the names of voters as they receive their ballots. 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*

¹¹ As an initial matter, I note that the evidence in support of Employer Objection 8 is related to the evidence in support of Employer Objection 1. Accordingly, I incorporate the relevant record evidence in Employer Objection 1 to the objection here.

¹² The record does not establish when the team member asked Cristina Herescu if she had voted.

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.

(own emphasis added); *see also Southland Containers, Inc.*, 312 NLRB 1087, 1087 (1993) (refusing to set aside an election where two employees kept a written list of employees of who was voting 'Yes' and 'No' but had not shown it to other employees); *Cerock Wire & Cable Grp.*, 273 NLRB 1041, 1041 (1984) (holding that union observer did not engage in objectionable list-keeping) (collecting cases).

C. Recommendation

The record lacks direct evidence that any team member, including the committee leaders themselves, was aware that the Petitioner kept track of who had voted. Nevertheless, the Employer argues that the conduct described above created the impression among voters that the Petitioner, through committee leaders, was both monitoring whether team members had voted and keeping a list of those who voted. (ER Br. 7.) The Employer further argues that voters were aware of Petitioner's list-keeping because: (a) the committee leaders themselves were eligible voters; (b) the committee leaders openly asked other voters whether they voted; and (c) the Petitioner used the list to target those who had not voted, thereby creating the impression that the Petitioner monitored who had voted and who had not. In so doing, the Employer argues, the Petitioner's conduct was inherently coercive and unlawful, regardless if any individual subjectively felt coerced citing *Piggly-Wiggly #011*, 168 NLRB 792, 792-793 (1967) (sustaining objection that petitioner representatives engaged in objectionable list-keeping by stationing themselves in front of each store and admittedly checking off names of voters who entered the polling area) and *Med. Ctr. of Beaver Cnty., Inc., v. NLRB*, 716 F.2d 995, 999 (3d Cir. 1983) (ER Br. 7.) On the other hand, the Petitioner argues that because the Employer has not presented evidence that employees were aware that the Petitioner was maintaining a list and, under extant Board law, such conduct is not objectionable citing *Cross Pointe Paper Corp.*, 330 NLRB 658, 622 (2000) (union observer engaged in objectionable list-keeping), *Indeck Energy Serv.*, 316 NLRB 300, 301 (1996) (Board refused to set aside election where there was no evidence that Petitioner's observer or representative actually kept a list and that the employees even suspected that their names were being recorded), *Days Inn Mgmt*, 299 NLRB at 737 (chief engineer engaged in objectionable list-keeping by stationing himself at the entrance to the employer's property, greeted voters as they entered, took voter's names, and openly crossed them off his list of potential voters, and then directed them to the elevator to the polling area), and other cases. (Pet. Br. 8-9.)

On this record, I do not find that the circumstances created a reasonable belief among team members and committee leaders that the Petitioner was engaging in objectionable list-keeping or even keeping a list for that matter. Foremost, I note that the cases cited above are inapposite to the facts here because those cases involve allegations that either a party agent or other individuals engaged in objectionable list-keeping *at or near the polls*. In this matter, there is no evidence that the Petitioner's organizers, committee leaders or any individual engaged in list-keeping at or near the polls. Nevertheless, the Employer established that on the days of the

election the Petitioner kept an electronic list of those who had voted based on the information reported by the committee leaders. The Employer contends that the circumstances here warrant a finding that team members reasonably believed that the Petitioner was keeping such a list because the committee leaders themselves were voters, the committee leaders asked other employees whether they had voted, and the Petitioner targeted the voters who had not to remind them to vote. However, I disagree because there is no evidence that any of the team members and committee leaders had the slightest suspicion that the Petitioner was engaging in such list-keeping. In so finding, I note that the organizers' instructions to the committee leaders, as explained by International Union Vice President Kevin Kline and committee leaders Alejandra Lopez and Osmani Diaz, lack the slightest reference to soliciting who had voted for the purposes of maintaining said list. Moreover, when the committee leaders themselves asked other team members if they had voted, there was no mention of a list, let alone a statement that the committee leaders wanted this information to report it to the Petitioner.

Rather, the circumstances suggest that team members and the committee leaders themselves had a reasonable belief that on the days of the election, the Petitioner was engaging in electioneering away from the polls. More specifically, the Petitioner was urging its union supporters to turn out and vote for representation by the Petitioner. This is so considering that the team members who were targeted by the Petitioner's organizers and committee leaders were team members who had previously expressed union support. And because the Employer did not present evidence that the Petitioner's organizers or the committee leaders themselves engaged in any coercive or threatening conduct when they asked team members if they had voted or when they reminded them to vote, I find that the foregoing conduct amounted to unobjectionable electioneering away from the polls. *Cf. Comcast Cablevision of New Haven, Inc.*, 325 NLRB 833, 833 fn. 2, 838 (1998) (Board adopted hearing officer's finding that union did not engage in objectionable conduct by simply and briefly urging voters to vote for the union as they entered and left the facility on election day); *see also Boston Insulated Wire*, 259 NLRB 1118, 1118-19 (1982).

Because the Employer failed to prove that team members and committee leaders themselves knew that the Petitioner kept a list of those who had voted, in accordance with the aforementioned Board cases, I overrule Employer Objection 8.

Objection 9: Voters Openly Carried Cell Phones into the Voting Room and Voting Booths and the Board Agents Failed to Instruct Voters That Use of Such Devices Was Restricted

The Employer's objection is two-fold. First, the Employer objects to voters having openly carried cell phones into the polling room and voting booths. Second, the Employer contends that the Board agents failed to instruct voters that use of such devices was restricted.

A. Record Evidence

The Employer presented evidence that some voters entered the voting room and voting booths with their cell phones in hand. Employer's observers Cristina Herescu and Marshall

Tresague primarily testified in support of this objection. (Tr. 114-116; Tr. 445; Tr. 482.) No evidence was elicited regarding how many voters out of the approximately 733 who cast a ballot entered the voting room or voting booths with a cell phone or other mobile device in hand. And other than openly carrying their cell phones, no evidence was presented that any of the voters used his or her mobile device to take pictures, record, answer a call, or type while in the voting room, either in the presence of or in the absence of other voters.

The Employer further alleges the Board agents failed to instruct voters that use of such devices was restricted. However, two Employer's observers refuted this allegation. First, Cristina Herescu credibly testified that Board agents told voters to enter the voting booths without their phones in hand, and that at other times, Board agents instructed voters to put their phones in their pockets. (Tr. 115-116.) As she was an Employer observer for four out of the six voting sessions (both morning and evening sessions), I conclude that the Board agents instructed voters to put their cell phones away throughout both days of the election. The second witness, Marshall Tresague, similarly testified that the Board agents instructed voters to put their cell phones away, albeit only during the evening session when he acted as an observer. (Tr. 445.)

B. Board Law and Recommendation

I overrule Employer Objection 9 to the extent that the objection alleges that the aforesaid voters engaged in objectionable conduct. The record does not establish a single instance when a voter used his or her cell phone or other mobile device while in the polling area. Consequently, I do not find that the mere open possession of a cell phone or other mobile device, standing alone, created "a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons*, 270 NLRB at 803.

Contrary to the Employer's objection, the record establishes that Board agents did not fail to instruct voters to put their phones or other mobile devices away. Accordingly, Employer Objection 9 is unsubstantiated and it is, therefore, overruled.

Objection 10: On at Least Two Occasions, Voters Lingered and Conversated Near the Ballot Box and/or Beverage Station

A. Record Evidence

The Employer did not present evidence that voters lingered near the ballot box. However, it did present evidence that on two separate occasions a pair of voters grabbed beverages from the beverage table located at the back of the voting room. The beverage table was stationed at the opposite end of where the ballot box was placed. (Tr. 109-113; Tr. 415-424; Pet. 1; Bd. 2.) The Employer's objection relies on the testimonies of Employer's observers Roland Vanderburg and Marshall Tresague. Each testified to one instance related to this objection.

First, Roland Vanderburg testified that he witnessed two voters grab a beverage from the beverage station. (Tr. 396.) No testimony was elicited as to which of the morning sessions did this matter occurred at, let alone any evidence regarding how long these voters remained at the

beverage station. No evidence was presented that the pair of voters did anything other than grab a beverage. The record was not clear whether or not there were any other voters present when the pair grabbed a beverage from the beverage station. Roland Vanderburg also testified about what kinds of beverages were available at the beverage station. In this regard, he said that coffee, hot water, tea bags, soda, paper cups and ice were placed on the table. (Tr. 423.)

Second, Marshall Tresaugue testified that he witnessed a pair of voters, who already cast a ballot, stand at the beverage station for about five minutes preparing their beverages. (Tr. 475-477.) I did not find the witness particularly credible on this point.¹³ He further testified that the pair of voters conversed in Spanish while they prepared their beverages. (Tr. 476.) However, the witness could not recount the nature of the voters' conversation. The evidence established that these voters did not engage in any conduct other than talking while preparing their beverages. (Tr. 492.) Moreover, the record is not clear as to whether there were other voters present in the room when the pair prepared their beverages.

B. Board Law and Recommendation

Employer Objection 10 is without merit. The Employer argues that in the two instances when a pair of voters stood by the beverage station and prepared or grabbed beverages, the voters' presence created the impression amongst other voters that their voting activities were being monitored. Contrary to the Employer, I do not find that the foregoing conduct created an objectionable impression of surveillance in the absence of evidence that: (1) other voters were present in the voting room during both instances; (2) that both pair of voters maintained a continued presence beyond the time necessary to grab a beverage or prepare a beverage (*e.g.*, coffee or tea); or (3) that the foregoing voters did anything other than converse while preparing their beverages. Additionally, the Employer does not allege, nor has it presented evidence, that both pairs of voters were committee leaders or putative agents of the Petitioner. Accordingly, under the standard for third-party misconduct, I find that the voters' conduct, without more, did not create "a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons*, 270 NLRB at 803. In light of the aforementioned reasons, Employer Objection 10 is overruled.

¹³ Relevant portions of Marshall Tresaugue's testimony were rather conclusory, speculative, inconsistent and bombastic. For example, in cross-examination, when asked how long the two voters stood by the beverage table, he said "five to ten minutes maybe." (Tr. 476.) Given the apparent uncertainty of his response, when asked again to confirm whether the voters stood at the table for five minutes or ten minutes, he said, "I don't wear a watch either," again evincing, as it was apparent in the witness's demeanor, that he was guessing as to how long the voters remained at the beverage table. (Tr. 477.) Further along this line of questioning, the witness became agitated with proper examination into the reliability and confidence of the witnesses' own memory. As a result, he un-assuredly testified it took the voters five minutes to prepare their beverages. (Tr. 477-478.) ("Let's say 5 so you can get off the question.") See also footnote 10, *supra*, and footnotes 14-16, *infra*. Consequently, I do not credit the witness that the pair of voters remained near the beverage station for five minutes.

To the extent Employer Objection 10 attributes culpability to the Board agents, I find that the Board agents did not engage in objectionable conduct under the relevant standard. On this record, I do not find that the Board agents either destroyed the confidence in the Board's election processes or cast doubt to the fairness and validity of this election by allowing four out of approximately 733 voters to take a beverage from or prepare a beverage at the beverage station. *Polymers*, 174 NLRB at 282; *Sonoma Health Care*, 342 NLRB at 933. In so concluding, I note that the beverage station was at the back of the voting room and away from the ballot box; that there was insufficient evidence to show that these voters maintained a continued presence near the beverage station; that the voters did not engage in any misconduct; and that the record reflects that the Board agents were in control of the voting process at all times. *See* Record Evidence in Employer Objections 7, 9 and 11. For the foregoing reasons, I overrule Employer Objection 10 to the extent it also alleges that the Board agents engaged in objectionable conduct.

Objection 11: An Appropriate Flow of Voters Was Not Maintained, Resulting in Rushed and Unreliable Verifications of Voter Eligibility

A. Record Evidence

It is undisputed that there were three observer tables in the voting room during all voting sessions. It is further undisputed that there were three sets of a union observer and employer observer at each table. During direct examination, the Employer asked employer-observer witnesses to describe the flow of voters entering the voting room. As I discuss in detail below, many of the witnesses described instances when voters either became impatient during the voting process or began pointing to their names on the voter list. No testimony was elicited as to whether or not the Employer's observers, or any other observer for that matter, were unable to verify a voter's eligibility, unable to check names off the voter list, or otherwise faced difficulties performing their duties as an observer.

Cristina Herescu, an Employer observer for four out of six voting sessions, testified that sometimes voter traffic into the voting room ebbed and flowed. (Tr. 61.) She testified that there were ten voters in the room when it was the busiest, typically during the middle of the voting session. (Tr. 118.) She also described three instances when voters became impatient with her when she tried to find their names on the voter list; more specifically, she said that the voters pointed or searched for their names on the voter list. (Tr. 61; Tr. 121.) She asserted that these voters were able to see who else's name had been checked off (*i.e.*, who else had voted). (Tr. 61-62.) Cristina Herescu testified that a Board agent was present at or near the observer table throughout the polling sessions. (Tr. 119-120.) She also testified that the Board agent instructed voters who touched the voter list to stop doing so or directed voters to step back from the observer table. (Tr. 122.) Cristina Herescu did not testify that she was unable to verify a voter's eligibility; rather, she testified that once voters identified themselves by name, she searched for their names on the list and checked their names off the voter list. And in these instances she could not find the voter's name on the voter list, the voter presented identification to the Board agent. (Tr. 119.)

Roland Vanderburg, an Employer's observer during both morning voting sessions, testified that the flow of voters was sporadic. (Tr. 394.) Consistent with Cristina Herescu's testimony, he testified that the greatest number of voters in the room was seven to eight, typically during the middle of the session. (Tr. 403-404.) He, too, described instances when voters became impatient and leaned over the observer table and pointed to their name on the voter list. (Tr. 395; Tr. 404-406.) He described two other instances when voters, who did not check in at his table, became impatient or, as to what he described, annoyed or disturbed with the voting process. (Tr. 397-398.) Roland Vanderburg did not testify that he was unable to verify a voter's eligibility. Instead, his testimony establishes that he was able to do so. In this regard, he testified that he checked names off the voter list as each voter identified himself or herself at his table. (Tr. 395-396.)

Employer observer Dale Shaw testified that the flow of voters during both evening sessions of the election was steady. (Tr. 351-352; Tr. 359-360.) He recalled two instances, one at each voting session, where both he and the union observer had trouble finding a voter's name, so the voter pointed to his or her name on the voter list. (Tr. 352; Tr. 360-364.) And on both occasions, he, the union observer and the Board agent told the voter not to touch the voter list. (Tr. 361-364.) Dale Shaw testified that thereafter, he and the union observer found the voter's name and checked it off. (Tr. 362.) No testimony was elicited from Dale Shaw as to whether or not he was unable to verify a voter's eligibility or otherwise unable to perform the observer's duties.

Employer observer Marshall Tresaugue testified that the flow of voters was sporadic during both mid-afternoon and evening sessions on the first day of the election. (Tr. 441.) He testified that the Board agents processed voters quickly. For instance, he testified that when voters arrived at the polling room's doors, a Board agent asked them for their last names and then directed the voters to one of the three observer tables. From then on, the voters identified themselves to the observers by name, the observers checked their names off the list, and then another Board agent handed the voter a ballot. (Tr. 472-473.) No testimony was elicited from the witness as to whether or not he was unable to carry out the observer's duties or verify a voter's eligibility due to the flow of voters.

Marshall Tresaugue also testified to instances when voters became impatient. (Tr. 442.) In this regard, he said that there were times when a voter, who had more than one last name, leaned over the table to help the observers search for his or her name on the voter list.¹⁴ (Tr. 442.) He further testified that there were several instances, specifically about 20 or 30, when voters who pointed to the voter list also commented that they knew some of the voters on the list,

¹⁴ In cross-examination, he testified that he witnessed at least 50 voters point to their names on the voter list. (Tr. 486.) I do not credit this testimony because the circumstances show that he guessed and was not sure about his testimony. In particular, when he was asked how many voters pointed to their names on the voter list, he initially said, "I don't know. I didn't count," and when asked for an approximation he said, "Fifty maybe." (Tr. 486.) The witness's wavering demeanor during this point in cross-examination is wholly inconsistent with what the witness later on said, "I count everything." (Tr. 489.)

e.g., “I know that guy,” or “That’s my buddy.”¹⁵ (Tr. 442-443; Tr. 451-454.) He also said that a Board agent was near his table when this occurred and instructed the voters to step back and refrain from leaning over the observer table. (Tr. 451-454; Tr. 479.)

Employer’s observer Anthony Rios testified that the flow of voters was mild in the mid-morning/afternoon session on the second day of the election. (Tr. 506.) He credibly testified that there were two or three voters in the voting room every 15-20 minutes. (Tr. 506-510.) He further testified that he was able to carry out his observer’s duties, including verifying a voter’s eligibility along with his union observer counterpart. He, too, recalled two instances when he and the union observer could not quickly find a voter’s name on the voter list, so the voter reached over the table to help them locate his or her name. (Tr. 507; Tr. 516.) In those instances, other voters’ names had already been checked off. (Tr. 507.) Also, in those instances, the Board agent directed the voters to step back from the table. (Tr. 516.)

Tim Williams, an Employer’s observer on the final voting session, testified that a few voters entered the polling room one at a time. (Tr. 526.) He did not see any voters touch the voter list. (Tr. 528.) He said that some voters showed their Employer-issued identification to verify their eligibility. (Tr. 549-552.)

In all the foregoing instances when voters became impatient, the Employer did not prove, nor does the Employer allege, that these voters recorded or kept of list of whose names were checked off the voter list. Moreover, in all the foregoing instances, the evidence does not establish that the impatient voters were committee leaders or any putative agent of the Petitioner.

B. Board Law and Recommendation

As an initial matter, I note that the voting procedure employed by the Board agents was fair, appropriate and conformed to the NLRB Case-handling Manual. In this regard, Section 11322.1 of the NLRB Case-handling Manual, Part Two, Representation Proceedings (January 2017) states that:

The approaching voters, who should by that time have formed a line, should be asked to call out their names, last names first, as they reach the table. They may also be asked for other identifying information, as necessary. . . . Once a voter’s name has been located on the eligibility list, all observers are satisfied as to the voter’s identity and no one questions his/her voting status, each observer at the checking table should make a mark beside the name. . . . Once a voter has been

¹⁵ I do not credit the witness when he said that there were 20 or 30 instances when a voter pointed to the voter list and made the aforesaid remarks. In so doing, I note that, during this point in cross-examination, the witness expressed a lack of confidence in his own memory (*e.g.*, “It happened on several. . . . I’m not that smart, all right? I can’t count that high”). (Tr. 452-454.) And when he was impeached with his own statement, the witness became agitated and defensive toward the examiner (*e.g.*, “I can count as high as you need me to . . .”). (Tr. 453.) Thus, when I asked him to quantify how many times he witnessed the foregoing conduct, he un-assuredly testified to 20 or 30 instances to, in my view, placate the cross-examiner and move on from that line of questioning. (Tr. 454.) (“It happened more than – it probably happened 20, 30 times. A lot going on at the time. . . .”)

identified and checked off, the observers . . . should indicate this to the Board agent, who will then hand a ballot to the voter.

Following the aforesaid guidelines, the record establishes that a Board agent greeted voters at the entrance, asked for their names and then directed the voter to one of three observer tables. At the observers table, the voters lined up and approached an observer table where the voters identified themselves by name. Upon doing so, both observers searched for the voters' names on the voter list and confirmed the eligibility of the voter by checking their name off the list. Once the observers confirmed the eligibility of the voter, a Board agent handed the voters a ballot and then another Board agent directed the voters to one of the voting booths. It was under this procedure that the Board agents processed about 733 voters throughout 18 hours of polling over the course of two days.

In light of the voting procedure employed, the Employer has failed to establish that the flow of voters entering the voting room to vote was either inappropriate or resulted in unreliable verification of voter eligibility. Foremost, I note that the Board agents cannot control the flow of voters entering the polling room absent some agreed-upon voter release schedule. Nevertheless, the Employer's observers testified that the flow of voters was sporadic and, at most, there were ten voters in the voting room voting. Despite this sporadic flow of voters, there was no evidence that any of the observers were unable to identify voters or determine a voter's eligibility. Indeed, none of the Employer's observers testified that they themselves were unable to identify the voter's eligibility because of the flow of voters, especially during the circumstances when some voters got impatient with the voting process by pointing to their names on the voter list.

The Employer failed to substantiate its objection that observers were unable to verify the eligibility of voters because of the flow of voters. Moreover, the Employer has failed to establish that the Board agents engaged in any irregularity during the voting process resulting in unreliable verifications of voters' eligibility. Accordingly, Employer Objection 11 is overruled.

Objection 12: A Union Observer Was Permitted to Serve as an Observer After Having Asked a Board Agent to Read the Ballot to Her, Indicating that the Purported Observer was Illiterate or Suffered Vision Problems

A. Record Evidence

The Employer presented one witness in support of its final objection, Employer's observer Marshall Tresaugue.

Marshall Tresaugue asserted that one of the Petitioner's observers was illiterate. In this regard, he described a conversation he witnessed between a female voter, who had a ballot in hand, and a Board agent that occurred during the evening session on the first day of the election. (Tr. 440.) He saw the voter hand her ballot to the Board agent and then heard them strike up a conversation in Spanish. Marshall Tresaugue admitted that he does not understand Spanish; consequently, he did not know what the voter or the Board agent said. (Tr. 457.) Nevertheless,

Marshall Tresaugue testified that Board agent read the ballot to the voter because she could not read. (Tr. 458.) He testified that the voter could not read because his union observer counterpart told him so.¹⁶ (Tr. 458.) This fact alone is not the basis of the objection, however. Marshall Tresaugue further testified that because he was an alternate observer, he was in the polling room the following day before the polls opened. (Tr. 459-460.) While there, he recognized the purported illiterate voter in the polling room, who was there to serve as a union observer. (Tr. 459-460.) And relying solely on what his union counterpart had told him the previous day about this voter, Marshall Tresaugue voiced his concern to the Employer's attorney that one of the Petitioner's observer was illiterate. (Tr. 459.)

The identity of the purported illiterate observer remains unknown. The Employer did not call the union observer in question or that observer's Employer counterpart. The Employer did not present evidence this purported illiterate union observer engaged in any misconduct during the second day of the election. Moreover, there is no allegation or evidence that this purported illiterate union observer, or any observer for that matter, was unable to perform the duties of an observer.

B. Board Law and Recommendation

The record establishes that the Employer's objection rests solely on hearsay evidence and speculation. Because the evidence presented lacks any probative value, Employer Objection 12 is unsubstantiated and is, therefore, overruled.

VII. CONCLUSION

I recommend that the Employer's objections be overruled in their entirety.¹⁷ The Employer has failed to establish that its objections to the election held on November 8 and 9

¹⁶ In cross-examination, it was evident that Marshall Tresaugue could not testify about what the Board agent or the voter said because they conversed in Spanish. When asked if he was guessing that the Board agent read the ballot to the voter, Marshall Tresaugue confirmed that he based his assertion solely on hearsay, which lacks any probative value. (Tr. 458.) ("My union observer I worked with said she does not . . . know how to read . . . I got to base it on what I've been told.")

¹⁷ At the hearing, the Employer requested and submitted an offer of proof that I consider Petitioner's pre-petition conduct not only to decide the merits of the objections themselves but also to determine scope of the remedy should I recommend that the election be set aside. (ER Br. 5; ER RD Ltr. 1-6; Tr. 38-45.) I rejected the Employer's request and offer of proof finding that it was irrelevant to the objections set for hearing. In this regard, I granted the Petitioner's petition to revoke, in part, Employer's subpoena *duces tecum* no. B-1-Z1SXBX served on the Petitioner's Custodian of Records. (Tr. 38-45.) More specifically, I granted the Petitioner's petition to revoke subpoena request numbers 8-10, which collectively sought the production of the Petitioner's communications with third parties regarding Station Casinos since January 1, 2015 to the present. I did so finding that the information sought did not relate to the subject matters under investigation in this hearing. (Tr. 38-45.) Similarly, I declined to hear testimony from the Employer's Vice President of Operations for Station Casinos, whom, based on the Employer's offer of proof, would have testified to the Petitioner's pre-petition conduct for the purposes of determining the remedy in the event I decided to set aside the election. I declined to hear this testimony determining that the testimony did not relate to the subject matters under investigation in this hearing. (Tr. 676-680.) Because I

reasonably tended to interfere with employee free choice. Therefore, I recommend that an appropriate certification issue.

VIII. APPEAL PROCEDURE

Pursuant to Section 102.69(c)(1)(iii) of the Board's Rules and Regulations, any party may file exceptions to this Report, with a supporting brief if desired, with the Regional Director of Region 27 by **February 23, 2018**. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Exceptions may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the exceptions should be addressed to the Regional Director, National Labor Relations Board, Byron G. Rogers Federal Building, 1961 Stout Street, Suite 13-103, Denver, CO 80294.

Pursuant to Sections 102.111 – 102.114 of the Board's Rules, exceptions and any supporting brief must be received by the Regional Director by close of business **5:00 p.m. Mountain Time** on the due date. If E-Filed, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than **11:59 p.m. Eastern Time** on the due date.

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

Dated: February 9, 2018



José R. Rojas
Hearing Officer

have overruled the Employer's objections in their entirety, there is no need to consider such evidence for the purposes presented by the Employer.