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

VIA 313 PIZZA RESTAURANT II, LLC

Employer

and **Case 16-RC-300851**

RESTAURANT WORKERS UNITED

Petitioner

REGIONAL DIRECTOR'S DECISION AND CERTIFICATION OF REPRESENTATIVE

Via 313 Pizza Restaurant II, LLC (Employer or Via), contests the results of a manual election because of alleged objectionable conduct before and during the critical period. I have considered the evidence and the arguments presented by the Employer, and as discussed below, I agree with the Hearing Officer that all the Employer's Objections should be overruled. Accordingly, I am issuing a Certification of Representative.

Based on a petition filed by Restaurant Workers United (Petitioner or the Union) on August 5, 2022 and amended on August 22, 2022, and pursuant to a Decision and Direction of Election issued on September 19, 2022, a mail ballot election was conducted[1] among the following unit of employees of the Employer at its facility located at 3016 Guadalupe Street, Suite 100, Austin, Texas 78705 (the North Campus facility):

> **INCLUDED:** All full-time and regular part-time Cashiers, Hosts, Hostesses, Servers, Server Assistants, Bartenders, Cooks, Doughs, and Dishwashers.
>
> **EXCLUDED:** All General Managers, Assistant General Managers, Assistant Managers, Kitchen Managers, MIT Managers in Training, Training Managers, BOH Trainees, FOH Trainees, BOH Trainers, FOH

[1] Separate mail ballot elections were conducted during the same period for two of the Employer's other locations. Those elections are not at issue in this case.

> Trainers, Corporate Trainers, Guards, and Supervisors as defined by the Act.
>
> **OTHERS PERMITTED TO VOTE:** At this time, no decision has been made regarding whether employees classified as BOH Shift Managers and FOH Shift Managers are included in, or excluded from, the bargaining unit. Individuals in this classification may vote in the election but their ballots shall be challenged since their eligibility has not been determined. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

The ballots were counted on October 20, 2022. The tally of ballots showed that of the approximately 37 eligible voters, 11 cast ballots in favor of representation by Petitioner, and 7 cast ballots against representation. There were 15 challenged ballots, a sufficient number to affect the results of the election. The Employer timely filed objections to the election. Petitioner timely filed objections to the related election as well as partially overlapping unfair labor practice charges. On August 27, 2024, I issued an Order Consolidating Cases and Consolidated Complaint in the unfair labor practice proceedings. The same day, I issued an Order Directing Hearing on Challenged Ballots and Objections in Case 16-RC-300851, 16-RC-300859, and 16-RC-300860 and directed that a hearing be held on the objections filed by the Employer and Petitioner to conduct affecting the results of each election. Finally, on the same date, pursuant to 29 CFR 102.69(c)(ii), I issued an Order Further Consolidating Cases and Notice of Hearing setting the election objections and unfair labor practices for a consolidated hearing before an administrative law judge. Prior to the consolidated hearing opening, I approved an informal settlement agreement wherein, *inter alia*, the parties agreed to waive their objections, set aside the result of the first election, and re-run the election.

On March 18, 2025, a manual election was conducted at the North Campus facility. The tally of ballots showed that of the approximately 59 eligible voters, 22 cast ballots in favor of representation by Petitioner, and 16 cast ballots against representation. There were 3 challenged

ballots, an insufficient number to affect the results of the election. Thus, a majority of employees at the North Campus facility selected the Petitioner as their exclusive representative for the purposes of collective bargaining.

The Employer timely filed five objections to conduct which allegedly affected the results of the North Campus re-run election. On April 3, 2025, I issued an Order Directing and Notice of Hearing on Objections. The parties were provided the opportunity to present testimony and other evidence[2] regarding the Employer's Objections during a hearing conducted before a hearing officer on May 7 and 8, 2025, via the Zoom for Government platform.

At the hearing, the Employer withdrew Objections 3 and 4. As a result, the following three Objections are before me:

> **Objection 1:** The entire process—from solicitation of interest to election—should be set aside due to inherent supervisory taint. The Company's BOH and FOH Shift Managers are supervisors under 29 U.S.C. § 152(11). The election should be set aside because a supervisor cannot represent employees for purposes of collective bargaining, *Kennecott Copper Corp.*, 98 NLRB 75 (1951), nor may an organization controlled by supervisors do so, *Brunswick Pulp & Paper Co.*, 152 NLRB 973 (1965). In this instance, Petitioner was founded by a Shift Manager. That Shift Manager has held the role of Director with Petitioner since its founding and can manage the affairs of Petitioner. Moreover, that Shift Manager solicited employees to sign authorization cards for Petitioner and oversaw the filing of the petition for representation.
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> **Objection 2:** During polling hours, Petitioner and/or its agents were stationed near the polling area for a sustained period thereby destroying the laboratory conditions necessary for the conduct of a free and fair election. It is well-settled that the Board does not permit parties or their agents to be stationed near the polling area and a party's sustained presence near the polling area is grounds for overturning an election. See *Nathan Katz Realty LLC v. NLRB*, 251 F.3d 981 (D.C. Cir. 2001). Importantly, two individuals were statutory supervisors. See *Electric Hose & Rubber Co.*, 262 NLRB 186 (1982) (supervisors present where employees had to pass in order to vote "was coercive evidence of such a nature as to have destroyed the laboratory conditions necessary for the conduct of a free and fair election."). This conduct coerced voters in the exercise of their Section 7 rights.

[2] The Employer excepts to certain procedural rulings made by the Hearing Officer which it claims unduly limited its ability to present its case. Those exceptions will be discussed in detail below.

> **Objection 5:** The Company objects to Petitioner's conduct throughout the critical period and while the polls were open including coercively polling, interrogating, and surveilling voters, creating a hostile work environment for workers they perceived as non-supportive of Petitioner, and defacing employee property. This conduct coerced voters in the exercise of their Section 7 rights.

On May 14, 2025, the Employer timely filed a post-hearing brief related only to the "jurisdictional issue" raised by the Employer's Objection 1.[3] On May 22, 2025, the Hearing Officer issued a report recommending all of the Employer's Objections be overruled because "[t]he Employer [] failed to establish: 1) a *prima facie* case that objectionable conduct occurred; and separately 2) even assuming objectionable conduct occurred, that it impacted a sufficient number of eligible voters to warrant setting the election aside." On June 6, 2025, the Employer filed Exceptions to the Hearing Officer's Report on Objections and a Brief in Support of its Exceptions. The Employer raises 81 exceptions asserting that the Hearing Officer's factual findings and legal conclusions were erroneous and that the Hearing Officer's conduct of the hearing prevented the Employer from fully and fairly litigating its Objections.

For the reasons set forth below, I adopt the Hearing Officer's recommendations and issue a Certification of Representative.

A. Representation Elections Are Not Lightly Set Aside, and the Employer Has a Heavy Burden of Proof

A foundational principle in representation cases is that "elections are not lightly set aside" because "[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000) (quoting *NLRB v. Hood Furniture Mfg. Co*., 941 F.2d 325, 328 (5th Cir. 1991)) (internal citations 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)

[3] The Hearing Officer permitted briefing on this sole issue. See Section 29 CFR §102.69(c)(1)(iii).

(citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989)). "The burden is on the objecting party to show by *specific evidence* that there has been prejudice to the election." *Affiliated Computer Servs.*, 355 NLRB 899, 900 (2010) (citing *NLRB v. Mattison Machine Works*, 365 U.S. 123, 123-24 (1961)). (Emphasis added). Furthermore, to meet its burden, the Employer must show that the conduct in question affected employees in the voting unit. *Avante at Boca Raton, Inc.*, 323 NLRB 555, 560 (1997).

The Board's long-settled rule is that, with rare exception, only conduct occurring during the critical period between the filing of the petition and the date of the election may serve as a basis for setting aside an election. *See Wyandanch Day Care Ctr.*, 323 NLRB 339, 339 fn.2 (1997) (citing *Ideal Elec. & Mfg. Co.*, 134 NLRB 1275 (1961)). In the context of a re-run election, the critical period is the date between the initial election and the re-run election. *Singer Co.*, 161 NLRB 956 fn. 2 (1966).

To set aside an election because of a party's misconduct, the misconduct must have reasonably tended to interfere with employees' free and uncoerced choice in the election. *Baja's Place, Inc.*, 268 NLRB 868, 868 (1984). In determining whether a party's conduct has the tendency to interfere with employee free choice, the Board considers several factors:

> (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; (9) the degree to which the misconduct can be attributed to the party.

Cedars-Sinai Med. Ctr., 342 NLRB 596, 597 (2004) (citing *Taylor Wharton Div.*, 336 NLRB 157, 158 (2001)). Additionally, "[t]he Board has long held that 'the subjective reactions of employees

are irrelevant to the question of whether there was, in fact objectionable conduct.'" *See, e.g.*, *Hopkins Nursing Care Center*, 309 NLRB 958, 958 n.4 (1992) (quoting *Emerson Electric Co.*, 247 NLRB 1365, 1370 (1980), *enf'd.* 649 F.2d 589 (8th Cir. 1981)); *In Re of G. H. Hess, Inc.*, 82 NLRB 463 n.3 (1949) ("The determination of whether statements are coercive does not depend on whether they have had the intended effect, or upon the subjective state of mind of the hearer.").

The rulings of the Hearing Officer will only be overturned if they constitute prejudicial error. See, e.g., *Fox Television Stations, LLC*, 2021 WL 5386255 at *1 fn. 1 (2021) (unpublished); *Hitachi Rail Honolulu JV*, 2021 WL 1814933 at *1 fn. 1 (2021) (unpublished). "The Board's established policy is not to overrule a hearing officer's credibility resolutions unless a clear preponderance of all the relevant evidence convinces us they are incorrect." *Associated Rubber Co.*, 332 NLRB 1588, 1589 (2000) (Citing *Stretch-Tex Co.*, 118 NLRB 1361 (1957)).

B. Summary of Record and Overview of the Employer's Operations

The Employer is small restaurant chain specializing in "Detroit-style" pizza but serving other food and beverages as well. The North Campus facility is situated at the corner of Guadalupe and West 31st streets in Austin, Texas. A parking garage (the G31 garage) is connected to the building. An employee entrance to the North Campus facility is located within the garage. The main customer entrance to the North Campus facility is located on 31st Street, at the corner of Guadalupe Street. Across the five lanes that comprise Guadalupe Street is Wheatsville Co-op, a store where the Employer's employees commonly go to pick up drinks.[4]

[4] The Employer excepts to the Hearing Officer's inclusion of certain details describing the North Campus facility and the area surrounding it, including the relevance of such details. I find that these details are relevant for background, context, and as it pertains to Objections 2 and 5. Other than these generalized Exceptions, the Employer failed to identify any specific error made by the Hearing Officer in his description. I find no error or prejudice to the Employer as a result.

The Employer's Brief in Support of Exceptions does not identify with any specificity which portions of the brief support each exception. Rather, the Employer appears to have presented its argument wholistically, categorized by Objection rather than exception. Therefore, I have considered the Employer's exceptions and arguments in the same way and will discuss them accordingly.

C. The Objections and Analysis

1. The Employer Failed to Establish the Petition Must Be Dismissed (Exceptions 2, 12, 14, 16, 52-78)

> **Objection 1:** The entire process—from solicitation of interest to election—should be set aside due to inherent supervisory taint. The Company's BOH and FOH Shift Managers are supervisors under 29 U.S.C. § 152(11). The election should be set aside because a supervisor cannot represent employees for purposes of collective bargaining, *Kennecott Copper Corp.*, 98 NLRB 75 (1951), nor may an organization controlled by supervisors do so, *Brunswick Pulp & Paper Co.*, 152 NLRB 973 (1965). In this instance, Petitioner was founded by a Shift Manager. That Shift Manager has held the role of Director with Petitioner since its founding and can manage the affairs of Petitioner. Moreover, that Shift Manager solicited employees to sign authorization cards for Petitioner and oversaw the filing of the petition for representation.

The Hearing Officer, as permitted by 29 CFR §102.66(c), solicited a written offer of proof from the Employer regarding its bases for this Objection.[5] The Employer asserts two separate bases for Objection 1: (1) at the time of the filing and amendment of the petition, a front of house (FOH) shift manager, as Section 2(11) supervisor, controlled the Petitioner as a member of its Board of Directors; and (2) around that same time, this front of the house (FOH) shift manager provided unlawful supervisory assistance and the Petitioner accepted that assistance. Thus, the Employer argues, the Petition must be dismissed as a matter of law because the Petitioner lacked standing on

[5] The Employer excepts to the Hearing Officer's determination that Employer Exhibit 1 constitutes the entirety of the alleged misconduct in Objection 1. In reviewing the record, I note that the Employer agreed with that assertion.

the date the Petition was filed, the Petition is therefore invalid, and any resulting election is a nullity.

The Employer points to *Kennecott Copper Corp.*, 98 NLRB 75 (1952) for the proposition that a supervisor cannot represent employees for the purposes of collective bargaining. *Kennecott* is distinguishable from the instant facts. Namely, in *Kennecott*, the Petitioner was an individual supervisor seeking to represent a unit consisting of himself and two other employees. Two statutory labor organizations intervened, and the Board dismissed the petition because the *individual* seeking to represent the unit was a statutory supervisor. In this case, a statutory labor organization (Restaurant Workers United) seeks to represent the North Campus employees, not an individual supervisor. Therefore, the categorical rule articulated in *Kennecott* is inapposite. See, *Allen B. Dumont Laboratories, Inc.*, 88 NLRB 1296, 1299 n. 3 (1950). (Supervisors' "[m]ere membership in a petitioning union … or the holding of office therein … is not sufficient to warrant dismissal of the petition.").

Assuming, *arguendo*, that the front of the house (FOH) shift manager was a supervisor, the question then turns to the Employer's argument that this individual's dual-status as a purported supervisor and member of the Petitioner's Board of Director's created a sufficient conflict of interest to disqualify the Petitioner from representing the Employer's employees. See, *Sierra Vista Hospital*, 241 NLRB 631 (1979); *Highland Hospital*, 288 NLRB 750 (1988). As an initial matter, the Employer appears to rely on a comment, taken out of context, made by the hearing officer that, for the purposes of briefing, he would, "accept that the front of the house (FOH) shift manager invented the Petitioner. He started it. He was in *complete control* of the Petitioner at all times. He is a supervisor." However, shortly thereafter, as confirmed by Employer counsel on the record, the Hearing Officer framed the issue as:

> Hearing Officer: Number one, by virtue of [the front of the house (FOH) shift manager] being in a position of leadership or any other position of authority, as you assert in your offer of proof, by virtue of his title and duties in the Petitioner, and by virtue of what you are alleging, him being a supervisor, him being a statuary (sic) 2(11) supervisor, just by virtue of those two facts, if true, at the time of the filing of the petition, there was no question concerning representation. As such, it follows there can be no petition and it must be dismissed. This was all an error. Is that accurate?
>
> Mr. Nucci: That's one part of it.[6]

In light of this latter exchange, confirmed by Employer counsel and as described in the Employer's offer of proof, I do not find, for the purposes of this analysis, the front of the house (FOH) shift manager had "complete control" over Petitioner. Rather, as set forth in the Employer's Offer of Proof, the front of the house (FOH) shift manager served as one of three Directors of the Petitioner.[7]

In *Sierra Vista*, the Board emphasized that an "employer who seeks to establish a disqualifying conflict of interest" carries a heavy burden. 241 NLRB at 634. Notably, the Board also emphasized that it was not "countenancing any fishing expeditions in representation hearings …." *Id*. Rather, an employer must "adduce probative evidence substantiating a claim that supervisory participation in the affairs of the union presents a clear and present danger of interference with the bargaining process" and a failure to adduce such evidence "will be summarily found lacking in merit." *Id*. I agree with the Hearing Officer, for the reasons set forth in his decision, that the Employer has failed to carry its heavy burden. The Employer cannot rely on its claims of an "inherent" taint or conflict, it must adduce specific evidence that the front of the house

[6] The other part is the alleged unlawful assistance rendered by the front of the house (FOH) shift manager is discussed below.

[7] I emphasize that the front of the house (FOH) shift manager role as a Director, his alleged acts in furtherance of that role, and his status as a Section 2(11) supervisor are *presumed* for the purposes of this analysis. The Hearing Officer ruled that no further evidence on this point was necessary because the Employer failed to establish a *prima facie* case in support of Objection 1, even assuming the front of the house (FOH) shift manager acted in all the ways the Employer alleged. I affirm that decision.

(FOH) shift manager's role as a Director posed a clear and present danger to interfere with the bargaining process. *Highland Hospital*, 288 NLRB 750, 756. Nothing in the Employer's offer of proof describes the specific authority this individual had or exercised by virtue of his status as a FOH Shift Manager.[8] Similarly, nothing in the Employer's Offer of Proof describes with any particularity the specific duties the front of the house (FOH) shift manager exercised in his role as one of three Directors of the Petitioner – especially as it pertains to the individual's role in the bargaining process.

The Employer's reliance on the Petitioner's corporate filings is unavailing because those filings speak only to the purpose of the Petitioner, not the specific role that the front of the house (FOH) shift manager played in furtherance of those goals. Similarly, the Employer's reliance on the petition seeking the reinstatement of a fired employee is unhelpful because there is no reference to or demand to bargain in the petition. As a result, the Employer has failed to demonstrate any actual conflict of interest as a result of the front of the house (FOH) shift manager's alleged dual-agency status. See *NLRB v. Walker County Medical Center, Inc.*, 722 F.2d 1535, 1541 (11th Cir. 1984). (Finding the employer failed to meet its burden because it did not "produce any evidence of *actual* conflict of interest … [r]ather, all of the [employer's] evidence was predicated on the *potential* for conflict.") (emphasis added).

The Hearing Officer was additionally correct in noting that the front of the house (FOH) shift manager is no longer employed by the Employer, and has not been since some point in late 2022.[9] I affirm the Hearing Officer's analysis that, under *Highland Hospital*, this "insulation of

[8] Furthermore, the paper duties described in the Employer's Offer of Proof appear to relate only to certain low-level day-to-day operations. These duties do not suggest that FOH Shift Managers would have any role whatsoever in the bargaining process on behalf of the Employer.

[9] The Employer failed to provide the specific date on which the front of the Houst (FOH) shift manager left the Employer's employment. Therefore, the Employer failed to establish that the front of the Houst (FOH) shift manager was a dual agent at any point in the critical period of the re-run election.

the collective-bargaining process from the influence or participation of" the front of the house (FOH) shift manager renders disqualification of the Petitioner inappropriate. 288 NLRB 750, 752 (1988). Additionally, the conflict-of-interest test in *Sierra Vista* requires the Employer to prove "a clear and *present* danger of interference with the bargaining process …" which, since late 2022, the Employer cannot do. 241 NLRB at 634. (Emphasis added). For the reasons stated above, I affirm the Hearing Officer's findings and conclusion that the Employer failed to establish objectionable conduct based upon the front of the house (FOH) shift manager's alleged dual-agency status.

Next, I turn to what the Employer has characterized as "unlawful assistance" by the same front of the house (FOH) shift manager. The Employer excepts to the Hearing Officer's focus on whether this individual's acts, in 2022, had any impact on the 2025 re-run election.[10] Rather, the Employer argues that the Hearing Officer should have found that the Petitioner lacked standing, at the time of the filing of the Petition in 2022, based on "assistance" the front of the house (FOH) shift manager provided to the Petitioner while he was employed as a statutory supervisor. The Employer alleged the following assistance by the front of the house (FOH) shift manager: (1) his status as a Director allowed Petitioner to maintain its non-profit status because Texas law requires three directors and, without the individual, Petitioner would have lost its nonprofit status;[11] (2) enabling Petitioner to maintain non-profit status allowed Petitioner to avoid federal and state corporate taxes in its fundraising efforts; (3) enabling Petitioner to maintain non-profit status allowed Petitioner to maintain an "image of credibility;" (4) relayed to another agent of the Petitioner a conversation he had with an employee who expressed discomfort about alleged

[10] The Hearing Officer correctly found that, because these acts occurred outside of the critical period, they cannot form the basis of an Objection.

[11] It is not clear on what basis the Employer seemingly concludes that Petitioner could not have simply replaced the front of the house (FOH) shift manager with another individual.

antagonism directed against her because she did not support Petitioner; (5) led a mid-shift walkout from the North Campus facility and spoke to media outlets during the walkout while wearing a red cape with the RWU initials on the back; and (6) was involved in the drafting and submission of a petition seeking the re-hiring of another employee who employees believed was wrongfully terminated.[12]

In support of its standing argument, the Employer cites to *Halben Chem. Co., Inc.*, 124 NLRB 1431 (1959). In that case, the Board had previously found in a related unfair labor practice proceeding that the employer violated Section 8(a)(2) of the Act by voluntarily recognizing the petitioner, while a question concerning representation existed by virtue of pending decertification petition for a different incumbent union. Thus, in the representation case, the Board held that the petitioner did not have standing to file its petition because, at the time of filing, it was still enjoying the fruits of the unlawful assistance. No such 8(a)(2) violation has been found in this case or any related case.

The Board has long held that "a contention alleging domination or assistance of a labor organization by an employer is in effect an unfair labor practice charge, and therefore not properly litigable in a representation proceeding." *Bi-States Co.*, 117 NLRB 86 (1957).[13] In this case, the Employer essentially characterizes alleged pro-union conduct by a supervisor as "unlawful assistance." In that regard, the Board has developed a separate test to determine when pro-union supervisory conduct justifies setting aside an election. See, *Harborside Healthcare*, 343 NLRB 906 (2004). The Employer apparently concedes that the conduct which forms the basis of its

[12] Although the Employer proffered a copy of the petition, the Employer did not provide the date it was drafted or delivered, the petition itself is not dated, and it does not make any bargaining demand.
[13] In *Sierra Vista*, the Board departed from this general rule for the purposes of its conflict-of-interest analysis. 241 NLRB at 634. The Employer's unlawful assistance argument is separate and distinct from its conflict-of-interest argument, which I have addressed above. Therefore, the general rule outlined in *Bi-States Co.* remains applicable for the purposes of analyzing the alleged unlawful assistance.

"unlawful assistance" assertion did not affect the 2025 re-run election and instead relates only to the Petitioner's standing to file the Petition in 2022. Specifically: "So I hear you. It's not – we're not dealing with an impact necessarily of the election in 2025. What we are dealing with is, at that point, was there a question of representation as of August 5th or August 22nd [2022], when the amendment was filed, can that continue on?". Because, as noted above, the Employer cannot litigate in this representation case what is, essentially, an unfair labor practice allegation, I find the Employer's standing argument lacks merit. To the extent that the Employer asserts that the Hearing Officer erred by conducting the *Harborside* analysis at all, I find that any such error does not prejudice the Employer in light of my above determination.

Finally, under decades of Board law, it is well-established that the critical period in a re-run election is the time between the date of the initial election and the date of the re-run election. *Singer Co.*, 161 NLRB 956 fn. 2 (1966); *Troutbrook Co. LLC*, 367 NLRB No. 56 at 1 fn. 2 (2018) ("Conduct that occurs before and during the first election, even if it occurred on the date of the election, *cannot* form the basis for an objection to a rerun election because it does not occur within the critical period for the rerun election."). (Emphasis added). This standard is expressly referenced in the Stipulation to Set Aside Election the Employer entered into to resolve the initial election objections and unfair labor practice allegations.[14] And yet, Objection 1 in the instant proceeding is, in all practical respects, the same as its first objection filed after the initial election based on conduct that occurred outside of the critical period. The Employer's objection in 2022 read as follows:

[14] I take administrative notice of the contents of the Board's file in this case, including the Employer's objections to the initial election and the Stipulation to Set Aside Election. See, e.g., *Lord Jim's*, 264 NLRB 1098, 1098 fn. 1 (1982) (The Board may take judicial notice of its own files); *J. S. Abercrombie Co.*, 83 NLRB 524, 524-525, (1949) (Board takes judicial notice of representation proceeding, noting it "is the practice of the Board to take judicial notice of its own records and proceedings.")

> The entire process—from solicitation of interest to election—should be set aside due to inherent supervisory taint. The Company's BOH and FOH Shift Managers are supervisors under 29 U.S.C. § 152(11). [The front of house (FOH) shift manager] has held that role since prior to the filing of the petition for certification. [The front of house (FOH) shift manager] is also a Director of "Restaurant Workers United" and has been in that role since January 24, 2022. Assuming, arguendo, that Petitioner is "Restaurant Workers United," the election should be set aside because a supervisor cannot represent employees for purposes of collective bargaining, *Kennecott Copper Corp.*, 98 NLRB 75 (1951), nor may an organization controlled by supervisors do so, *Brunswick Pulp & Paper Co.*, 152 NLRB 973 (1965). Further, the process was tainted by the involvement of other Shift Managers assisting Restaurant Workers United and exerting undue influence

Objection 1 in the instant case is substantially similar:[15]

> The entire process—from solicitation of interest to election—should be set aside due to inherent supervisory taint. The Company's BOH and FOH Shift Managers are supervisors under 29 U.S.C. § 152(11). The election should be set aside because a supervisor cannot represent employees for purposes of collective bargaining, *Kennecott Copper Corp.*, 98 NLRB 75 (1951), nor may an organization controlled by supervisors do so, *Brunswick Pulp & Paper Co.*, 152 NLRB 973 (1965). In this instance, Petitioner was founded by a Shift Manager. That Shift Manager has held the role of Director with Petitioner since its founding and can manage the affairs of Petitioner. Moreover, that Shift Manager solicited employees to sign authorization cards for Petitioner and oversaw the filing of the petition for representation. Because Petitioner was supervisor-controlled at the time the petition was filed, Petitioner is not entitled to the benefits of the Board's representation case processes to gain certification as the exclusive collective-bargaining representative of the employees, the direction for election was improper, and the election should be set aside.

Based on established Board law specifying the critical period in rerun elections, the Employer has failed to establish objectionable conduct warranting dismissal of the petition.

2. The Employer Failed to Establish Any Other Objectionable Conduct (Exceptions 15, 17-51)

> **Objection 2:** During polling hours, Petitioner and/or its agents were stationed near the polling area for a sustained period thereby destroying the laboratory conditions necessary for the conduct of a free and fair election. It is well-settled that the Board does not permit parties or their agents to be stationed near the polling area and a party's sustained presence near the polling area is grounds for overturning an

[15] Although the Employer alleged in the 2025 Objection 1 that the front of the house (FOH) shift manager solicited authorization cards on behalf of the Petitioner, Employer counsel admitted on the record that it had no evidence within its control to substantiate that allegation.

> election. See *Nathan Katz Realty LLC v. NLRB*, 251 F.3d 981 (D.C. Cir. 2001). Importantly, two individuals were statutory supervisors. See *Electric Hose & Rubber Co.*, 262 NLRB 186 (1982) (supervisors present where employees had to pass in order to vote "was coercive evidence of such a nature as to have destroyed the laboratory conditions necessary for the conduct of a free and fair election."). This conduct coerced voters in the exercise of their Section 7 rights.

With respect to Objection 2, the Employer presented testimony from several statutory employees and one supervisor. One employee testified that, as she was pulling out of her parking spot in the G31 garage to leave, she observed a group of individuals in the back of the parking garage (away from the Guadalupe Street entrance) gathered talking with one another. The group then walked toward the entrance of the garage. One person walked in front of the witness, but did not block her. The witness then exited the garage and did not see anything else. Another employee testified that as she attempted to enter the G31 garage from Guadalupe Street, she observed a group of individuals standing around the entrance.[16] This employee waited for approximately one minute before deciding to go around the corner to the other entrance to the G31 garage. She confirmed that, although she had to circle the garage because there were no open spots, she was able to park. Nothing in the record indicates that she was unable to vote.

The supervisor testified to seeing a group of individuals exiting their vehicles in the G31 garage at around 7:45 a.m. She smiled at them as she walked into the building, and they smiled back. The supervisor saw them again at about 9:00 a.m. as she went back to the garage to put something in her car. The supervisor testified that she did not observe the group stop anyone nor speak to anyone other than themselves. Another employee testified that he entered the G31 garage through the West 31st Street entrance and was able to park and vote without any significant delay. No one was present at the 31st Street entrance and he did not observe any of the individuals at the Guadalupe Street entrance blocking or otherwise engaging with anyone. As he left the garage later

[16] The employee testified that she only recognized one of the individuals in the group.

that day[17] through the Guadalupe Street entrance, he was able to pass through the individuals there without issue.

Lastly, an employee testified that, as he was walking in and later as he was placing his ballot in the ballot box, he observed three individuals inside the Wheatsville Co-op across Guadalupe Street.[18] The witness stated that he saw them for approximately 5-10 seconds. Although he was able to identify the individuals, the witness stated that he could not see what they were looking at and confirmed that they did not have "their faces pressed to the window..." The witness additionally testified that it was a common practice for North Campus employees to go to the Wheatsville Co-op before or after a shift to get, for example, a drink.

Contrary to the Employer's assertion, the Hearing Officer correctly described the governing law regarding party representatives near the polling area.[19] The presence of party representatives near the polling location does not automatically constitute objectionable conduct. *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118 (1982). Rather, the Board considers a number of factors in determining whether objectionable conduct occurred, including the extent and nature of the alleged conduct; whether the conduct occurred in a no-electioneering zone; and whether the conduct was contrary to the Board agent's instructions. *Id*. at 1118-1119. In this case, the Hearing Officer

[17] The record is unclear whether the witness left during polling hours or after the election ended. However, the witness testified that he heard people cheering after the election ended. Therefore, it seems unlikely that this employee left prior to the polls closing. Ultimately, the timing does not materially affect the analysis.
[18] This employee testified that he never observed anyone at the entrance of the G31 garage.
[19] The Hearing Officer presumed for the purposes of his analysis that the individuals located at the Guadalupe Street entrance to the G31 garage were representatives and/or agents of the Petitioner. I note, however, "[t]he Board has long held that prounion employees do not constitute union agents merely on the basis of their 'vocal and active union support[].'" *Cornell Forge Co.*, 339 NLRB 733 (2003) (quoting *United Builders Supply Co.*, 287 NLRB 1364, 1364 (1988)). The party asserting agency relationship has the burden of proving that such relationship exists. *Id*. Although the Employer consistently characterizes pro-union employees as agents, it has made no attempt to show that an agency relationship exists.

properly applied extant law to the facts put forth by the Employer and correctly found that the allegations did not rise to the level of objectionable misconduct.

The Employer's reliance on *Electric Hose and Rubber Co.*, 262 NLRB 186, 216 (1982) is misplaced. In that case, an Administrative Law Judge found objectionable two supervisors' unexplained presence in an area employees *had to pass* in order to vote. Here, even assuming *arguendo* that any of the individuals located at the Guadalupe Street entrance of the G31 garage were union agents, the record evidence shows that employees were not required to pass that entrance in order to vote. The record establishes that the entrance to the polling area was the main front door of the North Campus facility, not the G31 garage, nor the employee entrance located in the garage. Although employees may typically park in the G31 garage as a matter of convenience, there is no evidence in the record to show employees were required to park there in order to access the polling area. Furthermore, objective evidence and witness testimony establish that the G31 garage had two entrances – one a relatively short distance around the corner from the other. Even if employees were required to park in the G31 garage, the evidence conclusively establishes that employees did not have to use the Guadalupe Street entrance in order to park in the G31 garage. As a result, *Electric Hose and Rubber Co.* has no bearing on the instant case.[20]

With respect to the employees in the Wheatsville Co-op, nothing in the record supports an argument that their conduct was objectionable. The following factors weigh against the Employer's argument: (1) the employees were located in an entirely separate building across a five-lane road; (2) the witness's testimony that the employees in the Wheatsville Co-op could see into the North Campus facility was entirely speculative ("I wouldn't say they had their like faces

[20] Because of this finding, I need not rely on the Hearing Officer's analysis of the self-admitted impatient nature of one of the Employer's witnesses nor the plausibility of her testimony regarding how long she waited at the Guadalupe Street entrance.

pressed to the window, you know, but they were *probably able to* just like – they could see me. *If* they looked, they *could* have seen me. And I'm pretty sure they were just kind of like hanging about, you know.") (emphasis added); (3) the witness additionally testified that he could not see what the employees in the co-op were looking at;[21] (4) the witness testified that it was common for North Campus employees to go to the Wheatsville Co-op before or after a shift; and (5) the Employer failed to proffer any other evidence about the conduct (inappropriate or otherwise) of the employees in the co-op.

The Employer again cites to *Electric Hose and Rubber Co.* for the proposition that "[t]he Board does not require direct evidence of an observer's subjective intent. It requires only that the conduct give employees the reasonable impression that they are being watched while exercising protected rights." However, as set forth above, the facts in *Electric Hose* are meaningfully different than the instant case. In *Electric Hose*, the Board found objectionable the presence of a supervisor who, for unexplained reasons, was "stationed" 10-15 feet away from the entrance to the polling area. In this case, the evidence shows conclusively that employees were much farther away, inside an entirely separate building, and were not engaged in any other conduct that might reasonably be construed as objectionable. *Exela Enter. Sols., Inc. v. NLRB*, 32 F.4th 436, 449 (5th Cir. 2022) ("The mere presence of representatives far outside the entrance to the polling place, absent evidence of electioneering, is insufficient to warrant setting aside an election.").

For much the same reason, nothing in this record amounts to an impression of surveillance. Rather, consistent with common practice, a few employees went to a separate location across the street from the polling location. While those employees happened to be near a window, there is no evidence to suggest that the employees were (or even might be) observing voters or engaged in

[21] This testimony undermines the witness' speculation that they could see what was going on in the North Campus facility.

any other objectionable conduct. Nor is there any evidence that it was possible for employees to see into the polling location. Joint Exhibit 2 is instructive on this point. This exhibit is a photograph (taken from Google) of the exterior of the North Campus facility and the Wheatsville Co-op across the street. This photograph demonstrates a substantial glare from the sun preventing one from seeing clearly into the North Campus facility. While the Employer's witness testified that, in his experience, he could see *out of* the Co-op window, there is no testimony in the record to confirm that he (or any other employee) could observe from the Co-op what was happening inside the North Campus facility.[22] And the only objective evidence on this point (Joint Exhibit 2) is inconclusive, at best. I emphasize that I do not affirmatively find that it was impossible to see what was happening in the North Campus facility from inside the Co-op. Rather, it was the Employer's burden (and a heavy one) to provide sufficient evidence to substantiate that objectionable conduct occurred. This the Employer did not do. For the foregoing reasons, I find that there is insufficient evidence to show that any employee might reasonably assume that their participation in the election was under surveillance. As a result, I affirm the rulings of the Hearing Officer and find that the Employer has failed to establish objectionable conduct with respect to Objection 2.

> **Objection 5:** The Company objects to Petitioner's conduct throughout the critical period and while the polls were open including coercively polling, interrogating, and surveilling voters, creating a hostile work environment for workers they perceived as non-supportive of Petitioner, and defacing employee property. This conduct coerced voters in the exercise of their Section 7 rights.

The specific conduct within the scope of Objection 5 is not entirely clear. In its initial offer of proof, the Employer asserted the following bases for the objection in addition to the conduct described above regarding Objection 2: employees calling another employee a "plant" for the

[22] As discussed above, the witness's testimony about what the employees in the Co-op could see is entirely speculative.

purposes of voting in the election;[23] a general hostile work environment caused by the Petitioner; visiting employees at their homes prior to the election to pressure them into joining Petitioner; and texting employees stating they were aware of specific conversation employees were having with the company.[24] During the hearing, the Employer additionally elicited testimony about a petition one employee signed, a "pledge" Petitioner sent to another employee, and alleged interrogations and promises of a grant of benefits by alleged pro-Petitioner supervisors. In its Brief in Support of Exceptions, the Employer describes only (1) a conversation (alleged to include an interrogation, promise of benefits, and disparagement) between an alleged supervisor and another unnamed employee and (2) another employee testifying that he was interrogated "many times," without describing any details about the specific nature of the conversations. Although it is arguably inappropriate for the Employer to exceed the scope of the initial offer of proof I relied upon to order a hearing, the Hearing Officer addressed any potentially objectionable conduct raised on the record and, for the sake of completeness, I do so here as well.

The Employer provided testimony from two statutory employees and one supervisor in support of Objection 5. The supervisor testified to overhearing a conversation between an alleged supervisor and another employee[25] regarding the benefits of unionization. The witness testified that, "in [her] opinion, it came off as if they were just trying to say that they're stupid for trying to not be a part of it when there's so many benefits to being a part of the RWU." Later in her testimony, the witness described the conversation as, "[t]hey were asking questions on the

[23] The Employer further asserted that this employee's vehicle was vandalized because she was considered to be opposed to the Petitioner. However, the Employer abandoned pursuit of this claim during the hearing when the witness testified that she was not aware of the alleged vandalism until after the election.
[24] The Employer failed to elicit any testimony or adduce any other evidence regarding the latter two allegations.
[25] The Employer refused to identify this individual because of a purported fear of retaliation by the Petitioner and/or its supporters. The Employer proffered no evidence, other than as discussed herein, of any intimidating or harassing conduct by the Petitioner and/or its supporters.

guarantee of raises and promotions and if it at all is a guarantee. [The alleged supervisor] was saying that obviously it was otherwise like they wouldn't be pushing for anything and that it would be really stupid of that individual to believe that it wouldn't because it would be a waste of everybody's time, and that he's wasting his time if he's not just going to agree with him and move on."

With regard to Objection 5, one employee testified to a conversation she had with an Assistant Manager the day before the election in which the Assistant Manager asked her if she was a "plant" sent to work at the North Campus facility in order to vote in the election. The witness testified that the Assistant Manager told her "everyone here thinks you're only here to vote." The witness did not testify that any Petitioner agent or pro-petitioner employee accused her of being a plant directly. The other employee witness testified that in February 2023, he was approached by Petitioner agents asking him to sign a petition saying that the Employer engaged in misconduct. The Employer did not produce a copy of the petition nor did the witness testify to any specific language contained therein. The witness stated that he felt uncomfortable not signing the petition because he did not want to be identified as against workers' rights or made to look like a "bad guy" for not signing. The witness did not identify any statements or conduct by Petitioner agents to indicate he was coerced by them to sign the petition – other than simply being presented with the petition. The witness further testified about seeing a text message between a Petitioner agent and another unnamed employee (again the Employer refused to identify this employee) in which the Petitioner agent sent the unnamed employed a link to a pledge. The witness never received a copy of this pledge and did not see it firsthand. Lastly, the witness testified to multiple alleged interrogations he endured by alleged pro-Petitioner supervisors. The witness did not specify the

content of the conversations or any specific questions he was asked other than receiving a text message (not entered into evidence) that asked him "what [he] was thinking."

As the Hearing Officer correctly noted, the Board's standard for evaluating pro-union supervisory conduct is set forth in *Harborside Healthcare*, 343 NLRB 906 (2004), and its progeny. There, the Board defined the standard as follows:

> When asking whether supervisory prounion conduct upsets the requisite laboratory conditions for a fair election, the Board looks to two factors. (1) Whether the supervisor's prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election. This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct; and (b) an examination of the nature, extent, and context of the conduct in question. (2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.

Id. at 909.

Regarding the conversation overheard by the supervisor, as an initial matter, I find no basis to overrule the Hearing Officer's determination to afford no probative weight to the supervisor's testimony. First, although the Employer characterizes this conversation as an interrogation, I find nothing in the witness's testimony to support such a contention. Second, the supervisor's testimony shifted during the course of the hearing. Initially, she framed the conduct of the pro-union supervisors as "in *[her] opinion*, it *came off as if* they were just trying to say that they're stupid for trying to not be a part of it when there's so many benefits to being a part of the RWU." (emphasis added). Later, the supervisor testified in more definitive terms that the alleged pro-union supervisor stated "it would be really stupid" of the unnamed employee to believe there would be no guarantee of raises. Third, the record does not support a promise of benefit – implied or otherwise – if the unnamed employee voted for the Petitioner. Rather, the supervisor's testimony

establishes only that the alleged pro-union supervisor felt it would be stupid not to think employees would receive raises because it would not be worth their time otherwise. As a result, I find that the Hearing Officer correctly determined that this conversation did not meet the first prong of the *Harborside* test.

Another factor militating against the Employer's argument is, as the Hearing Officer properly noted, the Employer refused to identify the allegedly coerced employee and, therefore, he could not confirm that this individual was an eligible voter. It was the Employer's decision to prevent its witness from identifying the unnamed employee. The Employer asserts that it withheld the name of this individual because of fear of retaliation. Although I am sympathetic to these types of concerns, ultimately the Employer made the decision, at its own peril, to withhold the name notwithstanding the potential deleterious effect on its case.[26] Furthermore, there is no evidence in the record to substantiate any reason for an individual to fear retaliation for testifying at the hearing.

Additionally, as the Hearing Officer noted, even if this conversation was coercive, there is insufficient evidence to show that it materially impacted the result of the election. Specifically, the Employer proffered no evidence that details of this conversation extended further than the two individuals involved, and the supervisor who overheard it. Additionally, the Board has long held that an Employer's anti-union stance can mitigate the effect of pro-union supervisory conduct. Here, there is ample evidence in the history of this case and the hearing record to show that the Employer held an anti-union stance. *Tracy Auto, L.P.*, 372 NLRB No. 101 (2023). Therefore, the impact on the unnamed employee's free choice is lessened because it is unlikely that the employee

[26] ("We're also in a difficult position here in this particular hearing given that, yes, there are certain individuals that haven't been named, and I understand that, and that's a separate issue.") The witness, by contrast, expressed no hesitation in providing the names ("… if you want names I don't mind giving them to you ….")

would believe that this pro-union supervisor had any ability to guarantee a raise in the face of Employer opposition to the Petitioner, generally.

With respect to the employee being accused of being a "plant" the evidence clearly establishes that it was an Assistant Manager who stated these alleged rumors. The Employer does not allege that this Assistant Manager also acted as an agent (or was otherwise supportive) of the Petitioner. Other than this one conversation, the Employer presented no evidence to substantiate this supposed rumor or its origins. Therefore, it cannot be fairly said that the Petitioner, its agents, or supporters engaged in any coercive conduct regarding this allegation.

Finally, I find no basis to overturn the Hearing Officer's determination that testimony from an employee related to a 2023 petition, a 2025 pledge, and alleged interrogations had no probative value. As the Hearing Officer correctly pointed out, the employee did not actually see the 2025 pledge and thus there is no meaningful evidence of its contents. Similarly, the witness did not testify to any specifics about the alleged interrogations other than one text message. An interrogation in this context is a term of art with a specific legal definition. See *Rossmore House*, 269 NLRB 1176 (1984), affd. Sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Therefore, the Hearing Officer correctly determined that he could not rely on testimony that the witness was interrogated, without any details about what was actually said or the context in which the alleged interrogations occurred. With respect to the 2023 petition, other than simply being presented with the petition, the witness testified to no Petitioner conduct that could reasonably be construed as coercive. Indeed, his testimony suggests that any discomfort he had in signing the petition was a result of being a new employee and his own desire not to want to seem like a bad guy and/or against workers' rights.[27]

[27] Although the evidence suggests the Hearing Officer incorrectly stated that the witness did not receive a copy of this petition, I find such error is harmless because of the lack of any related coercive conduct.

Furthermore, the witness suggested that Petitioner agents, not alleged to be statutory supervisors, conveyed the 2023 petition and 2025 pledge. Even if these pledges amount to polling, "it is well established that an employer may not conduct a pre-election poll of its employees. On the other hand, a 'union engaged in organizing employees may legitimately measure its support among the work force.'" *Randell Warehouse of Arizona, Inc.*, 328 NLRB 1034 (1999). (Citations omitted). See also, *Kusan Mfg. Co.*, 267 NLRB 740 (1983) (overruling employer's objection that union interfered with the election by soliciting employees to sign a prounion petition, by circulating the petition, and by distributing copies of the petition, in the absence of threats of reprisal), enfd. 749 F.2d 362 (6th Cir. 1984); *J.C. Penny Food Department*, 195 NLRB 921 fn. 4 (1972) (overruling employer's objection that union interfered with the election by polling employees as to how they were going to vote in the election, in the absence of coercion), enfd. 82 LRRM 2173 (7th Cir. 1972).

Because I have found that none of the specific conduct alleged was objectionable, I also find that it cannot form the basis for the Employer's generalized "hostile work environment" claim. Similarly, I find no merit to the Employer's argument that the Hearing Officer incorrectly failed to account for the cumulative number of employees it claims were affected by the alleged objectionable conduct. This is true because if any individual incident is found not to be objectionable, it follows logically that it cannot form the basis for any cumulative effect. Although I understand the Employer's arguments that the Hearing Officer incorrectly dismissed the Employer's Objections, for the reasons set forth above, I disagree. Therefore, I need not determine whether, had the Hearing Officer hypothetically found certain incidents to be objectionable, the cumulative effect would have been sufficient to overturn the election.

For the reasons set forth above, I affirm the rulings of the Hearing Officer and find that the Employer has failed to establish objectionable conduct with respect to Objection 5.

D. Employer's Exceptions Regarding the Hearing Officer's Procedural Rulings and Conduct of the Hearing (Exceptions 1, 3-11, 13, 79-81)

The Employer takes exception to the Hearing Officer's conduct of the hearing and related procedural matters on a number of bases. As set forth above, the rulings of the Hearing Officer will only be overturned if they constitute prejudicial error. See, e.g., *Fox Television Stations, LLC*, 2021 WL 5386255 at *1 fn. 1 (2021) (unpublished); *Hitachi Rail Honolulu JV*, 2021 WL 1814933 at *1 fn. 1 (2021) (unpublished). For the reasons outlined below, I find the Employer's exceptions are without merit and, in any event, do not amount to prejudicial error.

In a post-election hearing, the Hearing Officer's primary role is to ensure that the record contains "all relevant and competent evidence concerning matters raised at the hearing." *Hearing Officers Guide* at 141. In achieving that goal, the Hearing Officer is empowered to participate actively in the hearing, including cross-examining or otherwise calling and questioning witnesses, introducing appropriate documents, passing on the credibility of witnesses, and determining the probative value of evidence entered into the record. The role of a Hearing Officer is not to simply allow any party to proceed in any manner in which it sees fit. As a result, the Hearing Officer's Guide acknowledges that, in some cases, the pursuit of an orderly hearing and a complete record may be perceived as unduly favoring one party over the other. While the Hearing Officer should endeavor to avoid "needlessly taking over," the possibility that one party might interpret the Hearing Officer's conduct incorrectly should not inhibit the primary goal of ensuring a competent record from which to draw appropriate findings and conclusions. Undoubtedly, Hearing Officers will make rulings that one party or another (or perhaps even both) will disagree with. But an adverse ruling – even a series of adverse rulings – does not inherently amount to a lack of

neutrality. *United Nurses Associations of California v. NLRB*, 871 F.3d 767, 778 (9th Cir. 2017). ("Well-established law, including controlling Supreme Court precedent, provides that no due process violation or bias can be inferred from the conduct challenged here: adverse credibility determinations of an employer's witnesses, evidentiary rulings unfavorable to an employer, questioning of an employer's witnesses, and alleged expressions of impatience or anger.") (Citations omitted).

The Employer takes exception to the Hearing Officer's decision not to enforce subpoenas issued by the Employer. This exception is without merit. A post-election hearing does not occur as a matter of course. Rather, a party filing objections must simultaneously file an offer of proof "identifying each witness the party would call to testify concerning the issue and summarizing each witness's testimony." 29 CFR §102.66(c). See also, *Transcare New York, Inc.*, 355 NLRB 326 (2010) (to obtain a hearing objecting party must establish that "it could produce specific evidence at a hearing that, if credited, would warrant setting aside the election."). A hearing occurs only if the Regional Director determines that the evidence described in an offer of proof "could be grounds for setting aside the election if introduced at a hearing …." 29 CF §102.69(c)(1)(ii). It is the objecting party's burden to supply evidence sufficient to support a *prima facie* case of objectionable conduct. *Howard Johnson Co.*, 242 NLRB 1284 (1979). A post-election hearing is not, as Employer counsel characterized it, "an exploratory thing …."

Thus, a hypothetical party may not simply conjure up a written offer of proof to obtain a hearing, fail to substantiate its offer at the hearing, and then use the Board's subpoena power to embark upon the proverbial fishing expedition to try to find the evidence it was required to supply in the first place. See *Sierra Vista*, 241 NLRB at 634. (Board emphasized that it was not "countenancing any fishing expeditions in representation hearings …"). This hypothetical

demonstrates the problem in the instant case. The Hearing Officer determined that, even accepting the Employer's proffered facts as true, the Employer failed to adduce a *prima facie* case in support of its Objections. A long subpoena enforcement process, followed by a potentially wide-ranging hearing was unnecessary to decide the instant case, and could amount to a misuse of the Board's subpoena power. As a result, I affirm the Hearing Officer's decision not to enforce subpoenas and find that the Employer has failed to establish any prejudice resulting from this decision.[28]

The Employer also claims that the Hearing Officer improperly sought protected attorney-client communications. The transcript, however, confirms that this is not the case. Indeed, the Hearing Officer reiterated several times that he was not seeking privileged information.[29] Rather, he was seeking to understand if the Employer was questioning its own witness for the first time about facts that underpinned its offer of proof in support of its Objections. It is well-established that facts are not privileged. *Sunland Const. Co.*, 311 NLRB 685, 700 (1993) (quoting *Upjohn Co. v. U.S.*, 449 U.S. 383, 396 (1981).). Therefore, the fact of whether or not a discussion occurred between an attorney and client is not itself privileged – only the contents of that discussion are protected. See, e.g., *Robinson v. Wells Fargo Bank, N.A.*, 2018 WL 1202826, *4, (S.D. Ohio March 7, 2018); *Davine v. Golub Corp.*, 2017 WL 517749, *5 (D. Mass. Feb. 8, 2017) (citing cases); *U.S. v. Carillo*, 16 F.3d 1046, 1050 (9th Cir. 1994); *Ferrand v. Schedler*, 2012 WL 3016219, *6–7 (E.D. La. July 23, 2012).

As discussed above, in filing its Objections and Offer of Proof the Employer, at least implicitly, represented that it had obtained sufficient evidence to support each Objection. It appears therefore that the Hearing Officer was simply seeking to determine whether the Employer had

[28] For the same reasons, I affirm the Hearing Officer's decision to defer his ruling on enforcement until after the Employer presented evidence and testimony within its control.
[29] In this regard, I note that Employer counsel only raised the privilege issue after the Hearing Officer explicitly stated that he was not seeking any privileged information.

properly obtained evidentiary support for its Objections *prior to the hearing*, as is required by the Board's rules. This does not amount to seeking privileged information. For these reasons, this exchange does not evince or give the impression of a lack of neutrality. The Hearing Officer was acting within his duty to ensure that the Board's procedures are followed. Ultimately, Employer's counsel refused to answer the Hearing Officer's question and nothing in the Hearing Officer's report relied on this exchange. Thus, the Employer cannot claim that it was somehow prejudiced by the Hearing Officer asking the question.

The Employer next asserts that the Hearing Officer "suggested sarcasm-laced doubts about counsel's preparation …." In reviewing the portion of the transcript cited by the Employer, I discern nothing whatsoever to support the Employer's claim. The Hearing Officer stated only: "Continue. Objection is withdrawn. You can continue. Go ahead. The record -- by your questions, they will -- they will answer my question. You can continue." Simply put, there is no mention of preparation or any other aspersion cast upon Employer's counsel in this statement.

By the same token, the Employer's assertion that the Hearing Officer "made demeaning remarks to counsel" is without merit. To be sure, "demeaning" may be in the eye of the beholder, but the two portions of the transcript cited by the Employer appear to show no more than directives from the Hearing Officer to Employer's counsel. As stated above, the Hearing Officer's duty is to direct the hearing and so it is unsurprising that the Hearing Officer would do so in this case. Furthermore, the Employer takes the statements on which it relies entirely out of context. For example, the Employer cites the Hearing Officer's statement, "I feel like I have to repeat everything" but omits the rest of the sentence which reads, "because I don't know if we're talking about the same thing." When read in full, and in the context of the larger discussion, it is clear the Hearing Officer was not demeaning Employer counsel. Rather, the Hearing Officer was simply

trying to ensure that there was a mutual understanding between everyone involved. As a result, I find no merit to the Employer's argument that these exchanges suggest a lack of neutrality by the Hearing Officer. See also *United Nurses Associations of California v. NLRB*, supra.

The Employer additionally claims that the Hearing Officer imposed "shifting and contradictory standards" by excluding testimony from Employer witnesses about their subjective responses to alleged coercion while "later" admitting and crediting the same type of testimony from the Petitioner. However, the Employer's transcript citations – one immediately following the other – make clear that the "later" testimony it complains about actually occurred first. The Employer goes on to omit reference to a discussion among the parties in which the Hearing Officer was specifically requested to explain that employees' subjective impressions are not relevant. It is not unusual, and certainly not evidence of bias, for a Hearing Officer to later correct a ruling.[30]

While it is true that the Federal Rules of Evidence are not "controlling" in representation hearings, this does not mean that they are abandoned altogether. Among other things, the Hearing Officer must judge the credibility of witnesses and the probative value of evidence proffered by a party. It is not improper, therefore, for the Hearing Officer to exclude (or discredit) evidence or testimony that has little or no evidentiary value, and the Federal Rules are, at a minimum, a useful guidepost for such determinations. The testimony cited by the Hearing Officer at footnote 28 of his report illustrates this principle well.[31] As the witness was testifying about a conversation she overheard, Employer counsel interrupted for the following exchange:

> [Employer Counsel]: Sorry, [named individual]. If I could just jump in. So [another named individual] has said that it would be a guarantee that there would be a raise?

[30] The record evidence also shows numerous examples of the Hearing Officer overruling objections by Petitioner's counsel. This cuts against the Employer's argument of bias based on evidentiary rulings against the Employer.

[31] The Employer excepts to the Hearing Officer's finding in this footnote. I find no merit to the Employer's exception.

[Witness]: Right.

[Employer Counsel]: So a shift manager is affirming that there would be a guarantee of a benefit. Is that correct?

[Witness]: Correct. Yes.

Although the Federal Rules are not controlling, the Hearing Officer acted well within his authority to find that these clearly leading questions provided no evidentiary value because Employer counsel was, essentially, "speaking into existence a legal conclusion …." Ultimately, the Hearing Officer was correct that a witness's subjective impression is irrelevant and therefore properly excluded such evidence. Furthermore, nothing in the Hearing Officer's reports suggests he relied on any testimony about a witness's subjective feelings as any meaningful evidence.[32] Therefore, I find that the Hearing Officer did not err and the Employer suffered no prejudice as a result.

Next, the Employer argues that the Hearing Officer allowed "personal pique" to color his decision. The basis for this allegation is that the Hearing Officer stated, "You filed a special appeal accusing me of engaging in misconduct, something I take very, very seriously," and that the Hearing Officer "accused" Employer counsel of attacking his objectivity. Regarding the former statement, I presume the Employer would not prefer the opposite, i.e., that the Hearing Officer *not* take seriously any accusation of misconduct. Indeed, it should go without saying that every Board agent must take seriously their obligation to conduct themselves appropriately. Furthermore, the Employer appears to have taken the Hearing Officer's statement entirely out of context. The following is the Hearing Officer's complete statement on this issue, which occurred in the context of a larger discussion regarding the receipt of evidence related to alleged Hearing Officer misconduct (discussed elsewhere in this decision):

> You filed a special appeal accusing me of engaging in misconduct, something that I take very, very seriously. *And I want you to bring that to anybody's attention who*

[32] The Hearing Officer noted the testimony, but it played no role in his analysis.

> *needs to know, because that's a problem. If I engage in misconduct, I deserve to be punished, and this decision needs to be overturned and the right decision need to be made by somebody who has behaved appropriately. I agree 100 percent.* But I still don't think I did anything wrong. You're going to have the opportunity to do that and push it. But I'm not going to let you attack my behavior without at least somebody who may possibly review that seeing the whole picture. I think it's important. It's not going to play a basis. I've heard your objections. We don't need to hear it anymore ….

(Emphasis added). When read in full context, it is clear that the Hearing Officer approached this issue with the seriousness it deserved; expressed a willingness to take accountability if, ultimately, a reviewer of the record found misconduct; and made clear the Employer possessed the opportunity to pursue such a claim. This is precisely the opposite of the Employer's claim.[33] The Employer's additional claim that the Hearing Officer "accused" counsel of attacking his objectivity is nothing more than an accurate recitation of the situation. It is difficult to find otherwise when the Employer makes this argument in a section of its brief specifically dedicated to challenging the Hearing Officer's objectivity.[34] As a result, I see no basis for the Employer's claim that the Hearing Officer's statements evinced bias or any other type of misconduct.

The Employer further argues that the Hearing Officer erred by including in the record communications between the Hearing Officer and the parties prior to the hearing, "to defend his reputation." The Employer correctly points out (and the Hearing Officer agreed on the record) that these communications do not bear on the merits of the Objections. The Employer is incorrect, however, in stating that the Hearing Officer included these e-mails only to defend his reputation. Rather, the Employer accused the Hearing Officer of misconduct during the course of the hearing

[33] The Employer borders dangerously on the frivolous by repeatedly using incomplete and/or out of context statements to support its argument. A review of the record reveals that had the Employer offered complete versions of the facts, its arguments would be seriously undermined, if not disproven entirely. See, *Roemer Industries*, 367 NLRB No. 133, slip op. at 1 n. 2 (2019); Fed. R. Civ. P. 11(b).

[34] I note further that, during the hearing, the Employer filed a Request for Permission to file a Special Appeal in which it accused the Hearing Officer of misconduct. The Acting Regional Director granted the Employer permission to file the Special Appeal and denied it on the merits.

and, because the Employer put the Hearing Officer's objectivity in question for any reviewing authority, the full scope of the communications between the parties became relevant. This is not simply a matter of protecting the Hearing Officer's reputation; it concerns the integrity of the entire hearing and the resulting findings. I find that the Employer suffered no prejudice from the Hearing Officer admitting the pre-hearing e-mails into evidence over its objection.

Accusations of bias are serious and not to be made or taken lightly. They have a significant impact on the immediate parties to the specific case at issue as well as the trust the public places in this Agency, generally. In this case, based on my review of the entire record and for the reasons set forth above, I am confident no such bias exists.[35]

E. Deferring a Ruling on Objections 2 and 5 Is Inappropriate

The Employer alternatively requests that I defer ruling on Objections 2 and 5 because certain employees expressed fear of retaliation if they testified in the postelection hearing.[36] Instead, the Employer requests that the Region obtain this missing evidence pursuant to an investigation of an unfair labor practice charge filed by the Employer. I decline the Employer's request. As set forth above, it is the Employer's burden to produce evidence to substantiate its election objections. To defer to an unfair labor practice investigation would turn this requirement on its head by relying instead on an investigation conducted by the Region to obtain the relevant evidence. The Employer argues, without any legal support, that "[c]ross-examining a fearful witness in the presence of an alleged wrongdoer risks chilling precisely the kind of evidence needed to determine whether a violation occurred." Cross-examination of a witness, however, is an essential part of the Board's

[35] I have considered also, implicit in the Employer's argument, that even if an individual instance described above does not reflect a lack of neutrality, the cumulative effect does. I reject such an argument because if, as I have found, none of the Employer's contentions have merit, then it makes little sense that any may be used as a basis for a cumulative finding.

[36] As noted above, the Employer proffered no evidence to substantiate a claim that the Petitioner engaged in conduct that might reasonably give rise to a fear of retaliation.

postelection hearing process. See, 29 CFR §102.66(a) ("Any party shall have the right … to call, examine, and *cross-examine witnesses* …"). Although the Employer later admits that these witnesses would be subject to identification in an unfair labor practice hearing (assuming one were held), it claims that the chilling effect would somehow be lessened "with Board agents present to represent employee interests." Notwithstanding that it is well-settled that the Board does not represent the interests of charging parties nor any individual witness, this argument makes little sense when considering that the Hearing Officer is a Board agent and is empowered to control the hearing. It is not clear, then, how the chilling effect would be any less in an unfair labor practice hearing. The policies of the Act "favor prompt completion of representation proceedings." *Versail Mfg. Co.*, 212 NLRB 592, 593 (1974). I see no valid reason to delay this proceeding.

F. Conclusion

After a careful review of the applicable legal standards, the record, and the Hearing Officer's Report, I adopt the Hearing Officer's findings and recommendations. In considering the Petitioner's Exceptions, I rely on the Hearing Officer's factual findings and credibility resolutions, which, unless otherwise noted above, I adopt as fully supported in the record. Therefore, the Employer's three objections are overruled, and I am issuing a Certification of Representative.

IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for Restaurant Workers United, and that it is the exclusive representative of all the employees in the following bargaining unit:

> **INCLUDED:** All full-time and regular part-time Cashiers, Hosts, Hostesses, Servers, Server Assistants, Bartenders, Cooks, Doughs, and Dishwashers.
>
> **EXCLUDED:** All General Managers, Assistant General Managers, Assistant Managers, Kitchen Managers, MIT Managers in Training, Training Managers, BOH Trainees, FOH Trainees, BOH Trainers, FOH

Trainers, Corporate Trainers, Guards, and Supervisors as defined by the Act.[37]

REQUEST FOR REVIEW

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and may be filed at any time following this decision until 10 business days after a final disposition of the proceeding by the Regional Director. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

[37] However, BOH Shift Managers and FOH Shift Managers are neither included in, nor excluded from, the bargaining unit covered by this certification, inasmuch as I, did not rule on the inclusion or exclusion of BOH Shift Managers and FOH Shift Managers and ordered them to vote subject to challenge and resolution of their inclusion or exclusion was unnecessary because their ballots were not determinative of the election results.

DATED at Fort Worth, Texas this 2nd day of July, 2025.

Timothy L. Watson
Regional Director
National Labor Relations Board
Region 16
819 Taylor Street, Room 8A24
Fort Worth, Texas 76102