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BJ's Wholesale Club, Inc. and United Food and Commercial Workers Union, Local No. 342. Cases 29–CA–317035 and 29–RC–314143

March 27, 2026

DECISION, ORDER, AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN MURPHY AND MEMBERS PROUTY AND MAYER

On August 15, 2024, Administrative Law Judge Michael P. Silverstein issued the attached decision. The

¹ No exceptions were filed to the judge's recommendations to overrule Union Objections 6 and 16 and to issue a certification of results, and hence we adopt those recommendations pro forma.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We affirm the judge's dismissals of the allegations that the Respondent violated Sec. 8(a)(1) by holding captive-audience meetings to dissuade employees from unionizing and by threatening employees that unionizing would cause the loss of a direct relationship between them and management. In dismissing these allegations, the judge applied *Babcock & Wilcox Co.*, 77 NLRB 577 (1948), and *Tri-Cast, Inc.*, 274 NLRB 377 (1985), respectively. Shortly after the briefing closed in the present case, the Board overruled those precedents in separate cases. See *Amazon.com Services LLC*, 373 NLRB No. 136, slip op. at 1-2 (2024) (overruling *Babcock & Wilcox* to hold that "an employer interferes with employees' decision whether to exercise their Sec[.] 7 rights within the meaning of Sec[.] 8(a)(1) of the Act when it compels employees to attend a captive-audience meeting on pain of discipline or discharge"); *Siren Retail Corp. d/b/a Starbucks*, 373 NLRB No. 135 (2024) (overruling *Tri-Cast* to hold that, to be lawful, employer statements about the impact of unionization on the relationship between employees and management must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control). However, in each case, the Board decided to apply its new rule prospectively only. *Amazon.com Services LLC*, 373 NLRB No. 136, slip op. at 20; *Siren Retail Corp. d/b/a Starbucks*, 373 NLRB No. 135, slip op. at 9-10. Accordingly, the new standards are inapplicable to cases, like this one, that were pending when *Amazon.com Services* and *Siren Retail* were decided. We therefore affirm the judge's dismissal of these allegations. Members Murphy and Mayer did not participate in *Amazon.com Services* or *Siren Retail*, and they express no view on whether those cases were correctly decided. Member Prouty notes that the General Counsel does not argue that the Respondent's statements regarding the loss of a direct relationship with management should be found unlawful even under *Tri-Cast* and its progeny. Accordingly, Member Prouty does not consider that question.

The Respondent argues that the statutory removal protections afforded Board members and administrative law judges are unconstitutional under Article II. Because there is no evidence that the Respondent suffered any harm from those removal protections, its Article II claims

Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply. In addition, the General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings, findings,² and conclusions,³ to adopt the recommended Order as modified and set forth in full below,⁴ and to issue a Certification of Results.

ORDER

The National Labor Relations Board orders that the Respondent, BJ's Wholesale Club, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

are denied. See *SJT Holdings, Inc.*, 372 NLRB No. 82, slip op. 1 fn. 4 (2023) (citing *Collins v. Yellen*, 594 U.S. 220, 257–258 (2021), and *Calcutt v. FDIC*, 37 F.4th 293, 316 (6th Cir. 2022), revd. per curiam on other grounds, 598 U.S. 623 (2023)); *K & R Contractors, LLC v. Keene*, 86 F.4th 135, 148–149 (4th Cir. 2023) ("[R]egardless of how we answer the constitutional question presented by the removal provisions, we would be required to deny the petition because [the petitioner] has not asserted any harm resulting from the allegedly unconstitutional statutes[.]").

³ The judge concluded that the Respondent violated Sec. 8(a)(1) by coercively interrogating employees regarding their protected concerted activity and union sympathies. For the first time on exceptions, the Respondent argues that the Board should abandon its longstanding objective test for analyzing alleged unlawful interrogations and instead apply a subjective standard based on *Counterman v. Colorado*, 600 U.S. 66, 72-78 (2023). This new argument is untimely and waived. See *Yorkkaire, Inc.*, 297 NLRB 401, 401 (1989) ("A contention raised for the first time in exceptions to the Board is ordinarily untimely raised and, thus, deemed waived."), enfd. 922 F.2d 832 (3d Cir. 1990). In any event, the Board has previously rejected this argument on its merits. See *Apple, Inc.*, 373 NLRB No. 52, slip op. at 1 fn. 2 (2024) ("*Counterman* is inapplicable here, as it involved a criminal prosecution, and the Supreme Court's decision gave no indication that its principles or reasoning extends to cases arising under the National Labor Relations Act."), rev. granted on other grounds 143 F.4th 291 (5th Cir. 2025).

⁴ We shall modify the judge's recommended Order to conform to the Board's standard remedial language. We shall also require the Respondent to post notices in both English and Spanish because the record indicates that some unit employees primarily speak Spanish. See, e.g., *HSA Cleaning Inc.*, 373 NLRB No. 46, slip op. 1 fn. 4 (2024); *Arbah Hotel Corp. d/b/a Meadowlands View Hotel*, 371 NLRB No. 126, slip op. at 1 fn. 2 (2022). We shall substitute a new notice to conform to the Order as modified.

We deny the General Counsel's request for a notice-reading remedy and for the hand-delivery of the notice and an explanation of rights to the Respondent's agents with written instructions for compliance. We decline to order these enhanced remedies and find that the Board's traditional remedies are sufficient to effectuate the purposes of the Act in this matter.

For the reasons stated in his concurrence in *CP Anchorage 2 d/b/a Hilton Anchorage*, 371 NLRB No. 151, slip op. at 9-15 (2022), enfd. 98 F.4th 314 (D.C. Cir. 2024), Member Prouty would make a reading of the notice to employees at a group meeting, accompanied by the distribution of the notice to employees at the meeting, a part of the remedy in this case and a standard remedy for all unfair labor practices found by the Board.

1. Cease and desist from
 (a) Coercively interrogating employees about their union activities or sympathies.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of service by the Region, post at its East New York facility in Brooklyn, New York copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent in English and Spanish and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 14, 2023.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for United Food and Commercial Workers Union, Local No. 342, and that it is not the exclusive collective-bargaining representative of these bargaining unit employees.

Dated, Washington, D.C. March 27, 2026

James R. Murphy,

Chairman

David M. Prouty,

Member

Scott A. Mayer,

Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
 POSTED BY ORDER OF THE
 NATIONAL LABOR RELATIONS BOARD
 An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your union activities or sympathies.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

BJ'S WHOLESALE CLUB, INC.

The Board's decision can be found at <https://www.nlr.gov/case/29-CA-317035> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the



Evamaria Cox, Esq., for the General Counsel.
Amber Rogers and James La Rocca, Esqs., for the Respondent.
Eric Milner, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL P. SILVERSTEIN, Administrative Law Judge. On April 14, 2023, the National Labor Relations Board conducted a representation election for the meat and deli department employees of BJ's Wholesale Club, Inc.'s (Respondent) East New York location to decide whether they wished to be represented for purposes of collective bargaining by United Food and Commercial Workers Union, Local 342 (the Union or Charging Party or Petitioner). The Union lost the election 14 to 7 with 1 challenged ballot. The Union filed post-election objections, and the General Counsel issued a complaint, each alleging misconduct by Respondent in the run-up to the election.

As will be explained *infra*, I find that club manager Andre Batts interrogated unit employees Julius Anderson and Mark Ellis on separate occasions regarding their feelings about the Union. I also find that Fresh Manager Tanakha Campbell told deli clerk Mark Ellis on the day of the election that he needed to vote if he knew what was good for him. But I also find that these were isolated incidents and there is no evidence that the impacted employees shared what happened with any eligible voters. Because the alleged misconduct did not interfere with the laboratory conditions of the election, I will not order a rerun election and instead recommend the issuance of a certification of results.

The Union filed the charge in Case 29-CA-317035 on April 28, 2023. The complaint issued on March 19, 2024, and Respondent filed its Amended Answer on May 29, 2024.

On April 20, 2023, the Union filed objections to conduct affecting the results of the election in Case 29-RC-314143. On April 2, 2024, Regional Director Teresa Poor issued a Report on Objections, Order Consolidating Cases, and Notice of Hearing on Objections which consolidated two objections for hearing with the unfair labor practices alleged in the complaint.

The cases were tried in Manhattan on June 20 and 21, 2024¹. At trial, all parties were afforded the right to call, examine, and

¹ On August 2, 2024, Respondent filed a motion to amend the transcript. Neither the General Counsel nor the Petitioner objected to this motion. Therefore, I grant Respondent's motion to amend the transcript.

² The General Counsel called two witnesses—Sergio Alvarez and Julius Anderson—while the Charging Party called one witness—Mark Ellis. Respondent called six witnesses—Courtney Murtha, Tanakha Campbell, Andre Batts, Barbara Sorge, Raja Mahmood, and Victor Castro.

cross-examine witnesses², to present any relevant documentary evidence, and to argue their respective legal positions orally.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by Counsel for the General Counsel and Respondent³, I make the following:

FINDINGS OF FACT

JURISDICTION

Respondent admits, and I find, that it is a corporation engaged in the retail operation of wholesale food and general merchandise warehouses throughout the United States. Respondent further admits that its principal office is located in Marlborough, Massachusetts and the facility involved in these cases is located at 339 Gateway Drive in Brooklyn, New York. In conducting its business operations over the last year, Respondent derived gross revenue in excess of \$500,000 and purchased and received goods and materials valued in excess of \$5000 from entities located outside the State of New York. Respondent also admits, and I find, that it has been an employer engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.⁴

Based on the foregoing, I find that this dispute affects commerce and that the National Labor Relations Board (the Board) has jurisdiction over this case pursuant to Section 10(a) of the Act.

REPRESENTATION CASE BACKGROUND

On March 14, 2023, the Union filed a representation petition with Region 29 of the Board seeking to represent certain employees of Respondent. The parties' stipulated election agreement identified the voting unit as follows:

Included: All full time and regular part-time employees of the Deli and Meat Departments employed by the Employer at its facility located at 339 Gateway Drive, Brooklyn, New York.

Excluded: All other employees, including, but not limited to truck drivers, clerical and administrative employees, professional employees, sales employees, bakery employees, front end employees, floor employees, managers, guards and supervisors as defined by the Act.

The election took place in the training room located on the 2nd floor of Respondent's facility and the polling times were from 8 a.m. to 9:30 a.m. and from 2:30 p.m. to 4 p.m. on April 14, 2023.

The Tally of Ballot showed the following results:

Approximate number of eligible voters	23
Number of void ballots	0
Number of ballots cast for the Petitioner	7
Number of votes cast against labor organization	14

³ Petitioner's motion to accept its late-filed posthearing brief is addressed *infra* on pp. 10 and 11.

⁴ Although Respondent's amended answer did not specifically admit that it is an employer within the meaning of Section 2(2) of the Act, Respondent did not contest its employer status at the hearing, and the overwhelming weight of the record testimony and documentary evidence convinces me that Respondent is an employer within the meaning of Sec. 2(2) of the Act.

Number of valid votes counted	21
Number of challenged ballots	1
Number of valid votes counted plus challenged ballots	22

The challenged ballots were not sufficient in number to affect the results of the election. Therefore, a majority of the valid votes counted were not cast for Petitioner.

In the Region's Report on Objections⁵, the following two objections were set for a hearing before the undersigned:

Objection #6: The Petitioner alleges that during the critical period, Respondent intimidated and coerced employees by calling them into management offices and asking them questions about their support for the Petitioner and union activity, and created an impression of surveillance.

Objection #16: The Petitioner alleges that the Respondent, after the opening of the second polling session, told employees that they had to vote and implied that there would be repercussions if they did not vote.

ALLEGED UNFAIR LABOR PRACTICES

The Complaint Allegations

The complaint identified the following alleged unfair labor practices:

Paragraph 5: Since in or around March 2023, Respondent required its employees to attend mandatory meetings for the purpose of exposing employees to Respondent's statements in opposition to the Union.

Paragraph 6: Since in or around the third week of March 2023, more precise dates currently unknown to the General Counsel, Respondent, by Club Manager Batts, in the manager's office, interrogated employees about their activities on behalf of the Union.⁶

Paragraph 7: On or about April 7, 2023, in a letter sent by Club Manager Batts and Assistant Club Manager Castro to employees, Respondent threatened employees with the loss of Respondent's "open door policy" if employees supported or voted for the Union.⁷

Relevant Facts

Respondent sells groceries and general merchandise in warehouse clubs across the United States. The setting for these cases

is Respondent's Club 138, which is located in the East New York section of Brooklyn. (Tr. 232, 280–281.) Club 138 has a sales floor of 125,000 square feet divided into separate departments – produce, meat, deli, bakery, grocery, front end, and general merchandise. (Tr. 232–233.) As of March 2023, Andre Batts was the club manager and Victor Castro was the assistant club manager, while Tanahka Campbell served as the fresh manager, supervising the produce, deli, and bakery departments.⁸ (Tr. 221, 231, 234.)

About 240 team members work at Club 138, but in the Union's RC petition, it sought to represent only the club's approximately 23 deli and meat department employees. (Tr. 71, 233.) The meat department is located near the rear of the club. Meat department employees rotate, package, cut, wrap, and display fresh and processed meats for sale in the warehouse. (Tr. 68–69, 232–233.) About 8 employees work in this department either as meatcutters (butchers) or meat clerks and at least one employee is also responsible for cooking rotisserie chickens. (Tr. 71, 133.) Next door to the meat department is the deli department, where employees rotate, cut, slice, and package fresh cold cuts and cheeses. (Tr. 69, 233.)

BJ's Response to the Filing of the Representation Petition

After receiving notice of the representation petition in about mid-March 2023, Respondent embarked on an aggressive campaign to convey its position that Respondent's meat and deli employees should reject the Union. This campaign had two main components: 1) group meetings with HR representatives and 2) individual meetings with Andre Batts.

Group Meetings with Human Resources

From March 20 through April 12, Respondent human resources representatives conducted group meetings for meat and deli employees to promote Respondent's existing benefits package as well as Respondent's union-free philosophy and open-door policy.⁹ (Jt. Exh. 1; Tr. 179, 201.) Senior human resources business partner Courtney Murtha led some of these meetings while HR business partners Sana Naz, Sasha Neve, and Viviana Diaz led the remainder of the meetings. (Tr. 184, 187.) Neither Batts nor Castro attended these meetings.

At each of these meetings, 3–6 employees listened to a PowerPoint presentation given by either Murtha, Naz, Neve, or Diaz. PowerPoint slides referenced Respondent's open-door and union-free philosophies, Respondent's benefits package, answered the question "What is a Union?" and provided an overview of election procedures, union authorization cards, and union dues.

that at the time the representation petition was filed and through the election, meat department manager Raymond Gonzalez was on vacation. (Tr. 77, 116.) But Victor Castro testified that Gonzalez was the meat department manager in March/April 2023. (Tr. 342–343.) Since no issue in the unfair labor practice allegations or objections turns on the identity of the meat department manager during the election campaign, it is not necessary for me to make a finding regarding this issue.

⁹ During this same time period, Respondent conducted similar meetings for its front-end employees, who were not the subject of the instant representation petition. (Tr. 196–197.) No employees testified about the meetings with front-end team members and no complaint allegations (or objections) specifically reference those meetings.

⁵ The Union withdrew objections 3 through 5 and 7 through 14. The Report on Objections overruled objections 1, 2, and 15. (GC Exh. 1 (n).)

⁶ This allegation is coextensive with Petitioner Objection 6.

⁷ At the outset of the June 20th hearing, Counsel for the General Counsel withdrew complaint paragraph 8, which alleged that "On or about April 7, 2023, in a letter sent by Club Manager Batts and Assistant Club Manager Castro to employees, Respondent threatened employees with the loss of unspecified benefits if they supported or voted for the Union." (GC Ex. 1(k); Tr. 9.)

⁸ There was conflicting testimony regarding the identity of the meat department manager in the spring of 2023. Former meatcutter Sergio Alvarez testified that at the time of the election, there was no manager for the meat department. (Tr. 35.) Meatcutter Julius Anderson testified

(R. Exh. 1, Tr. 195, 200.)

Regarding Respondent's open-door philosophy, the PowerPoint presentation noted that employees are encouraged to bring forward work-related issues, management will work with team members to find a solution, and employees may voice their concerns to their direct supervisor, or any member of BJ's management team. Regarding Respondent's union-free philosophy, the PowerPoint presentation noted that "BJ's strongly believes that we do not need a union here, BJ's wants to be able to talk with you directly, and we believe remaining union free is what is best for all team members at BJ's." (Jt. Exh. 1.)

Courtney Murtha testified that each meat and deli department team member was supposed to attend one of these group meetings and that Respondent tracked attendance at these meetings. (Tr. 198.) She testified that it was not mandatory for employees to attend these meetings, but Murtha did not specifically tell any of the gathered employees whether the meeting was mandatory or not. (Tr. 198, 202.) Murtha also testified that she was not present when the meat and deli employees were told to come to the training room. But Sergio Alvarez testified that he found out about the group meeting when assistant club manager Victor Castro approached him in the meat department and told Alvarez that "they" wanted to talk to him upstairs and that Alvarez should report to the conference (training) room. Castro did not tell Alvarez the purpose of the meeting nor did he specifically say who wanted to speak to him. (Tr. 31, 42.) And Castro did not specifically tell Alvarez whether this meeting was mandatory or not. (Tr. 48, 360.)

Julius Anderson testified that fresh department lead Dale Thomas came by the meat department and told Anderson that he had to go to a meeting upstairs. Anderson asked Thomas what the meeting was about, but Thomas did not respond. When Anderson said that he wasn't going to the meeting, Victor Castro came down to the meat department and told Anderson that he had to go upstairs for a meeting in the training room. Castro proceeded to escort Anderson up the stairs leading to the training room. (Tr. 77-78, 109.)

Open-Door Policy

Andre Batts testified that Respondent's open-door policy permits team members to speak to him directly about anything on their minds. Batts asserted that this policy applied to all team members, including meat and deli department employees. Batts said that Respondent encourages employees to talk to their immediate manager if they have a concern and then work their way up the supervisory chain. For instance, if an employee went to a manager, asked a question, but did not get the answer they wanted, the employee could speak with Batts. If the employee did not receive the answer they were looking for from Batts, they could call the regional HR business partner, whose name was posted at Club 138. (Tr. 237-239.)

Batts testified that a copy of Respondent's open-door policy is posted in the club and is also available in the employee handbook. (Tr. 239-240.) The handbook, which was updated on February 27, 2023, identifies Respondent's open-door commitment as follows:

"At BJ's, management's door is always open. Our managers

and supervisors are dedicated to establishing a culture of trust and communication and encourage team members to approach them to:

- Ask for counsel or feedback
- Ask questions about a subject
- Express a complaint or concern
- Raise awareness of a problem
- Ask for help in resolving a concern
- Make suggestions for change
- Discuss other topics

This communication is important and is built on mutual trust. To make full use of our open door commitment, we ask team members to:

- Try to resolve minor concerns with other team members before reaching out to your supervisor/manager
- Communicate with your supervisor/manager whenever possible instead of going to a more senior manager first. If you ever believe that your concern has not been adequately addressed, you can always share your concern with the next level of management.
- Step 1: Start with your Direct Supervisor/Manager
- Step 2: Share with your Assistant Club Manager
- Step 3: Share with your Club Manager
- Step 4: Share with your Regional Director of Operations
- Step 5: Share with your Regional Human Resources Business Partner
- Ask for an appointment in advance, whenever possible, if you want to talk about a significant or delicate matter.

We are ready to take the necessary steps to resolve any workplace issues that come up at the earliest time possible, and we will work with you to find a fair and constructive solution." (R. Exh. 2; Tr. 240.)

Directly underneath the open-door commitment section of the employee handbook is Respondent's Union-Free Philosophy. The section reads as follows:

"We are committed to treating our Team Members in a fair, consistent, and respectful manner. Since we opened our first club in Massachusetts in 1984, BJ's has always been and continues to be a union-free workplace, where we enjoy having a direct working relationship with our Team Members. Here we strive to provide you the following:

- Clearly defined workplace standards
- Open and honest communication through our Open-Door Commitment
- Competitive wages and a pay-for-performance culture

- Flexible work schedules that accommodate Team Member lifestyles
- A comprehensive benefits package including medical and dental benefits, a 401(k) plan, Employee Stock Purchase Plan (ESPP), tuition reimbursement, and paid time off (sick, holiday, personal and vacation days); and
- Support and ongoing development for Team Members, including the ability to learn other roles with cross-training and grow a career.

Keeping our commitment to our Team Members allows us to successfully work together to promote the best of both BJ's and our Team Members without involving third-party unions. Simply put, we know our Team Members best and we know our business best. Working directly with our Team Members in a union-free environment is a major part of BJ's past, current, and future success." (R. Exh. 2.)

Individual Meetings with Andre Batts

As part of its anti-union campaign strategy, Respondent directed Andre Batts to read a series of letters concerning unionization to individual meat and deli department employees. Batts met with employees from about March 18th through April 13th each time he received a new letter from Respondent senior HR director Toni Martini. Martini directed Batts to read the letters slowly and to sign each letter before handing it to the employee. (Jt. Exh. 1; Tr. 235, 252, 257, 300.)

Most of the meetings took place in Batts' office, which is located on the 2nd floor of Respondent's club. Victor Castro would summon the employee by telling them that he and Batts had some information to share with them and ask the team member to come with him. (Tr. 344–345.) Castro and the employee would walk to Batts' office and then Castro would close the office door. Batts was sitting in his office desk chair and the employee and Castro would sit down as well. Batts read the letter in English and Castro read the letter in Spanish to the handful of meat and deli department employees more comfortable communicating in Spanish. Batts then signed the letter and handed it to the employee. According to Batts and Castro, other than translating, Castro did not say anything at these meetings. (Tr. 253, 345, 347.)

Batts testified that he welcomed the employees to his office and told them that he was going to review some information with them. Batts asserts that he did not ask employees any questions before or after reading the letters. (Tr. 253, 257.) He said that if employees had any comments, he would just sit there and listen. Batts specifically denied asking employees what they thought

¹⁰ Castro testified that there were no other conversations during these meetings besides Batts reading the letters. (Tr. 356.)

¹¹ Anderson confirmed that Batts never said that the open-door policy would go away if the Union came in. (Tr. 115.)

¹² In response to my questions, Anderson clarified that he responded in such a way partly because being summoned to a one-on-one meeting in the boss' office oftentimes results in negative consequences for the employee being summoned. (Tr. 98.)

¹³ Ellis testified that at least one of these meetings took place in Castro's office. In their posthearing brief, Counsel for Respondent contends

about the Union or any other questions regarding the organizing campaign. (Tr. 260–261.)¹⁰

Julius Anderson, however, testified that during one of the meetings in Batts' office, Batts said that Respondent received a petition indicating that the Union wanted to represent meat and deli employees, he had worked for the Respondent for over 20 years, and had obtained his position without having a union. Batts then said that Respondent has an open-door policy so that anytime Anderson had a problem, he could come and talk to Batts about it.¹¹ Batts then asked Anderson how he felt about the Union. Anderson responded by saying something to the effect of he didn't know how long he would be working for Respondent¹² and then Batts proceeded to read the prepared letter. (Tr. 82, 114–115, 119–120.) There is no evidence that Anderson shared Batts' inquiry about how he felt about the Union with any other meat or deli employees.

Mark Ellis testified that during one of the meetings in Batts' office, Batts asked him why employees thought that they needed a union and how union organizing began. Ellis testified that in response to Batts' "prying" questions, he told Batts that he opposed the Union. Ellis explained in his testimony that he told Batts he opposed the Union because he didn't want to face retaliation from Respondent for telling his manager that he in fact supported the Union. (Tr. 141.) Ellis also testified that Castro put his hand on his shoulder during one of the meetings and asked him how he felt about the Union. Ellis responded that he didn't know. (Tr. 140–141, 166–167.) There is no evidence that Ellis shared Batts' or Castro's comments with any other bargaining unit employees.¹³

The April 7 Letter to Meat and Deli Department Employees

The only specific letter that the General Counsel asserts is unlawful is the April 7th letter, which reads as follows:

"On April 14, 2023, you have the opportunity to vote in the Labor Board election. We strongly urge you to vote. You have a very important decision to make. It is perhaps the most important decision you will make while working at BJ's.

You can vote for the union and pay monthly union dues for as long as you work at BJ's, accept the risks of collective bargaining, the possibility of strikes, and possible loss of your right to be treated like an individual. In our opinion, voting yes for the union would erode our open door commitment and create an "us v. them" environment, which so often exists in union workplaces.

Or you can vote "NO" in the election and continue to work

that Ellis misidentified the location of Castro's office. (Resp. brief, page 14, fn. 11.) Ellis testified that Castro's office was the second door on the left after walking upstairs. (Tr. 138.) Castro testified that his windowless office was located off the conference room and that none of the meetings with Batts and the deli and meat department employees occurred in this office. (Tr. 350–351.) But Batts identified the windowed office next to his as the assistant manager's (Castro's) office, although he contended that around the time of the election, a marketing representative was using this office. (Tr. 249–250.) Thus, it appears that both Ellis and Castro correctly identified the location of the assistant manager's office.

with us to have your individual needs addressed in a way that is appropriate for you and fair for all team members. A “NO” vote eliminates the possible loss of any of the terrific benefits you now enjoy at BJ’s through collective bargaining. It will permit BJ’s to continue its practice of rewarding you based on your contributions and allowing you to grow and develop within BJ’s.

We hope you will vote and vote “NO” on April 14, 2023 between 8:00am to 9:30am or between 2:30pm to 4:00pm. The election will take place here at Club 138 in the Training Room on the 2nd floor.” (Resp. Ex. 8).¹⁴

Mark Ellis and Tanahka Campbell’s Conversation on April 14

Mark Ellis worked as a deli clerk for Respondent from September 2021 through September 2023. His primary job was to cook rotisserie chickens in the meat department, but he also sliced cold cuts in the deli department. (Tr. 132–133.)

Ellis testified that on the day of the election, sometime during the afternoon polling session, fresh manager Tanahka Campbell approached him while he was taking chickens out of the cooker. (Tr. 151.) In a stern voice, Campbell told Ellis that if he knows what is good for him, he will go up and vote. Ellis replied “ok.” (Tr. 142, 152.) Campbell remained in the work area but did not say anything more to Ellis.¹⁵ About 5-10 minutes later, Ellis went upstairs to vote in the election. (Tr. 142, 150–151.)

Campbell testified that he did not tell Ellis to go vote or else, go vote if he knows what is good for him, or anything to that effect. (Tr. 216–218.) Campbell insists that he didn’t say anything like this to any employee at the club and that he did not speak to any employees about voting on the day of the election. (Tr. 216–218.) Campbell also denies having any discussions with employees about unions and says he never spoke to Ellis about the election or the Union. (Tr. 218–219.) In fact, Campbell could not recall any conversations with deli department employees in March and April 2023. (Tr. 226).¹⁶

Petitioner’s Motion to Accept Its Late-Filed Brief

Posthearing briefs were due on August 2, 2024. Petitioner counsel filed his posthearing brief on the morning of August 3. On August 5, Petitioner counsel filed a Motion for Permission to File a Late Brief in Support of Petitioner’s Objections. In compliance with Section 102.2(d)(2) of the Board’s Rules and Regulations, Petitioner’s motion was accompanied by an affidavit setting forth the reasons why the brief was filed late and why

¹⁴ Other letters touched on different subjects concerning unionization. For example, the April 3rd letter referenced collective bargaining and the March 19th letter focused on union dues and the import of signing a union card. (R. Exh. 5.)

¹⁵ Ellis testified that there were usually 3-4 employees working in the deli department during his shift. He recalled a co-worker named Grace working on that day but could not recall who else was working that day. (Tr. 154–155.) Fresh Manager Tanahka Campbell testified that he was working on the day of the election, but he could not recall who else was working in the deli department that day. (Tr. 216, 225.)

¹⁶ Campbell testified that he was promoted to fresh manager in about October or November 2022, whereby he manages the deli, produce, and bakery departments. (Tr. 215, 220–221.) The General Counsel did not plead Campbell as a supervisor or agent of Respondent in paragraph 4 of its complaint and the Respondent did not stipulate to Campbell’s 2(11)

these circumstances constituted excusable neglect. In essence, Counsel had prepared the brief for filing and service at 11:15 p.m. on August 2, but he accidentally and unknowingly severed the connection to his office’s remote server, which prevented the posthearing brief from being e-filed until the following morning. Respondent submitted a letter brief opposing Petitioner’s motion.

Section 102.2(d)(1) of the Board’s Rules and Regulations states that: “The following documents may be filed within a reasonable time after the time prescribed by these Rules only upon good cause shown based on excusable neglect and when no undue prejudice would result.” Briefs filed in unfair labor practice proceedings as well as representation proceedings are specifically listed in subparagraphs (i) and (ii) of 102.2(d)(1). Although excusable neglect is not defined in the Board’s Rules and Regulations, subsequent Board orders have clarified that technological errors encountered at the last minute of filing do not constitute excusable neglect. See *M&M Affordable Plumbing, Inc.*, Case 13–CA–121459 (order dated May 3, 2018). In *M&M*, counsel for the employer experienced an unexpected work emergency on the day their filing was due, brought the file home to complete that evening, but experienced intermittent difficulty establishing an internet connection from their home computer. Therefore, counsel could not effectuate the electronic filing of their brief until about 90 minutes past the filing deadline. (See M&M’s Motion for Leave to File Exceptions and Supporting Brief, dated April 10, 2018).

Even though Counsel for the General Counsel did not oppose M&M’s motion to file a late brief, and there was no showing of prejudice, the Board denied the employer’s motion. In its Order, the Board stated that experiencing technological problems and handling other legal matters does not rise to the level of excusable neglect under Section 102.2(d) of the Board’s Rules and Regulations. The Board went on to say that:

“a user’s technological problems when attempting to e-file do not constitute excusable neglect. Rather, parties who choose to file on the final day for doing so assume the risk that something can go wrong, particularly if, as here, the attempted filing takes place on the evening of the final day. As specifically stated in the Board’s e-filing instructions, ‘a user who waits until after close of business on the due date to attempt to E-File does so at his/her own peril.’”

or 2(13) status during the hearing. Campbell, however, testified that as fresh manager he approved employees’ vacation requests and had the authority to approve employees’ requests to leave work early. (Tr. 227–228). In determining whether an employee is an agent of an employer, the Board applies common law principles. The Board considers whether, under all the circumstances, the employee would reasonably believe that the alleged agent “was reflecting policy and speaking and acting for management.” *D&F Industries, Inc.*, 339 NLRB 618, 619 (2003). The position and duties of the employee alleged to be an agent are relevant in determining agency status. *Id.* Given Campbell’s duties as a manager for three separate departments at Respondent’s club, and his ability to grant employees’ vacation and time off requests, it is clear that at the very least, Campbell was an agent of Respondent within the meaning of Sec 2(13) of the Act.

Similarly, in *United States Postal Service*, Case 28–CA–175106, counsel for respondent missed the filing deadline by about 45 minutes because his wife had undergone surgery a few days earlier and was serving as her post-surgical caregiver while trying to fulfill work responsibilities. (See Motion for Extension of Time to File Exceptions, dated May 9, 2018). Although Counsel for the General Counsel did not oppose the Motion, and there was no showing of prejudice, the Board on July 9, 2018, denied respondent’s motion, asserting that the reasons for the late filing did not rise to the level of excusable neglect as outlined in *Unitec Elevator Services Co.*, 337 NLRB 426 (2002).

In our case, there has been no showing of prejudice due to Petitioner counsel’s late filed brief. But despite the absence of prejudice, the above guidance from the Board compels me to deny Petitioner’s motion because his 11th hour technological problems do not rise to the level of excusable neglect under the Board’s Rules and Regulations. Thus, I have not considered Petitioner’s posthearing brief in the crafting of this decision.

ANALYSIS

A. Respondent Did Not Violate the Act by Holding Mandatory Small Group Meetings with Its Employees in the Run-Up to the April 14 Election (Complaint Paragraph 5)

Current Board law permits an employer to compel its employees during working hours to attend speeches that express the employer’s opposition towards unionization.¹⁷ *Babcock & Wilcox*, 77 NLRB 577, 578 (1948). The Board confirmed this holding in *Electrolux Home Products, Inc.*, 368 NLRB No. 34, slip op. at 5 (2019), and recently declined to revisit this precedent in *Starbucks Corporation*, 373 NLRB No. 75, slip op. at fn. 4 (2024). In her posthearing brief, Counsel for the General Counsel advocates for the Board to overrule *Babcock & Wilcox* and find that convening captive audience meetings is per se unlawful. As an administrative law judge, it is not my place to make or alter existing law or policy—that is the exclusive domain of the Board. Thus, I find that Respondent did not violate Section 8(a)(1) of the Act by requiring meat and deli employees to attend small group meetings with human resources personnel, as well as individual meetings with Andre Batts (and Victor Castro) in the run-up to the April 14th election.

B. Respondent Did Not Violate the Act by Issuing a Letter Positing the Loss of Respondent’s Open Door Policy if the Employees Selected the Union as Their Collective-Bargaining

¹⁷ Respondent argues that meat and deli employees were not required to attend the meetings with Batts and the HR representatives. I disagree. In this regard, human resources officials did not tell employees that the training room meetings were voluntary and did not tell them that they could leave the meetings if they wished to. (Tr. 201–202.) Furthermore, when he retrieved the employees for the HR meetings, as well as the meetings with Batts, Victor Castro never told the employees that the meetings were optional and never told employees that they didn’t have to go with him if they did not want to. (Tr. 360.) Thus, from the employees’ perspective, either their supervisor or the assistant club manager directed them to go to these meetings, they were never told they had the option to refuse and were never told at the outset of these meetings that their attendance was optional.

Representative (Complaint Paragraph 7)

The gravamen of Counsel for the General Counsel’s allegation in complaint paragraph 7 is that the following highlighted clause in Respondent’s April 7 letter to employees violates Section 8(a)(1) of the Act because it conveyed to employees that unionization meant that employees would lose their ability to adjust grievances directly with management:

“You can vote for the union and pay monthly union dues for as long as you work at BJ’s, accept the risks of collective bargaining, the possibility of strikes, and possible loss of your right to be treated like an individual. In our opinion, voting yes for the union would erode our open door commitment and create an “us v. them” environment, which so often exists in union workplaces.”

But current Board law permits such statements during a representation election campaign. The Board has held that an employer does not violate the Act by informing employees that unionization will bring about “a change in the manner in which employer and employee deal with each other.” See *Tri-Cast, Inc.*, 274 NLRB 377 (1985); *Ben Venue Laboratories, Inc.*, 317 NLRB 900, 900 (1995) (no violation of the Act when the employer’s president told employees that the employer’s open-door policy would no longer exist if the employees voted to unionize); *KGI Fibers*, 280 NLRB 473 (1986) (no violation of the Act when the employer told employees that there would no longer be an open-door policy if the union was voted in because they would have to go through union procedures, like grievances).

On page 42 of her posthearing brief, Counsel for the General Counsel urges the Board “to limit its application of *Tri-Cast* and to hold that preelection statements that explicitly misrepresent employee rights under the proviso to Section 9(a) are unlawful threats of the loss of existing benefits.” Counsel for the General Counsel further asserts that “the Board has subsequently applied its rationale in *Tri-Cast* so broadly that it will find lawful nearly any statement concerning employees’ Section 9(a) proviso rights, and has failed to distinguish between mere predictions of a change in the employer/employee relationship with express statements that employees will not have the rights provided by Section 9(a)’s proviso if they vote for representation.” (GC posthearing br. p. 45.)

But it is not my place to determine whether Board precedent should be limited or overruled—that is the exclusive domain of the Board. In *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130, slip op. at 6 (2023),¹⁸ the Board reaffirmed that

¹⁸ The allegation in *Cemex* involved the employer’s vice-president telling unit drivers that 1) unionization would change their relationship with management; 2) once they were under a collective-bargaining agreement, they would have to go through the union instead of going directly to management; 3) they would lose their ability to deal directly with their supervisors and instead, if they needed anything, would have to work through the union contract or union representative and could not go directly to him because he would not be able to do anything for them; and 4) if employees unionized they were putting at risk their relationship with supervisors. In finding no violation, the Board categorized these comments as nonobjectionable campaign propaganda.

Tri-Cast is still binding precedent and thus its application to the facts here mandates that I dismiss this complaint allegation.

C. Respondent Violated Section 8(a)(1) of the Act When Club Manager Andre Batts Interrogated Employees About Their Union Sympathies (Complaint Paragraph 6 and Objection 6)

The credible record evidence reveals that on two separate occasions in March and April 2023, Andre Batts called prospective voters into his office ostensibly to read one of Respondent's prepared letters concerning the perils of unionization. But on these occasions, Batts went one step further – inquiring how employees felt about the Union and why employees thought they needed a union. These queries violated the Act.

Interrogation Caselaw

To determine the lawfulness of an employer's interrogation, the Board evaluates whether, under all the circumstances, the interrogation reasonably tended to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Quickway Transportation, Inc.*, 372 NLRB No. 127, slip op. at 25 (2023); *Rossmore House*, 269 NLRB 1176, 1177 (1984), affd. Sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). "Factors relevant to the analysis include the background against which the questioning occurred, the nature of the information sought, the identity of the questioner, the place and method of interrogation, the truthfulness of the employee's reply, and whether the employee involved was an open and active union supporter." *Kumho Tires Georgia*, 370 NLRB No. 32, slip op. at 5 fn. 14 (2020); See also *Bannum Place of Saginaw, LLC*, 370 NLRB No. 117, slip op. at 2 (2021), enfd. 41 F.4th 518 (6th Cir. 2022) (the interrogator was the highest-ranking individual at the facility involved, which weighed in favor of finding the interrogation was unlawful).

Objectionable Conduct Caselaw

In *Intertape Polymer Corp.*, 363 NLRB No. 187, slip op. at 2 (2016), the Board confirmed its longstanding rule that a violation of Section 8(a)(1) during the critical election period is, a fortiori, conduct that interferes with the results of the election unless it is so de minimis that it is "virtually impossible to conclude that [the violation] could have affected the results of the election." *Super Thrift Markets, Inc.*, 233 NLRB 409, 409 (1977). See also *Baton Rouge General Hospital*, 283 NLRB 192, 192 fn. 5 (1987); *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962). In determining whether the unlawful conduct is de minimis, the Board considers the number of incidents, their severity, the extent of dissemination, the size of the unit, and other relevant factors. See *Super Thrift Markets*, 233 NLRB at 409.

When the alleged objectionable conduct is not separately alleged as an unfair labor practice, the Board's analysis changes slightly. Thus, the Board will set aside an election when "the objectionable conduct so interfered with the necessary 'laboratory conditions' as to prevent the employees' expression of a free choice in the election." *Dairyland USA Corp.*, 347 NLRB 310, 313 (2006), enfd. sub nom. *NLRB v. Food & Commercial*

Workers Local 348-S, 273 Fed. Appx. 40 (2nd Cir. 2008). The Board overturns election results if the objectionable conduct, taken as a whole, had "the tendency to interfere with the employees' freedom of choice" and "could well have affected the outcome of the election." *NYES Corp.*, 343 NLRB 791, 791 fn. 2 (2004) (citing *Cambridge Tool & Mfg. Co.*, 316 NLRB 716, 716 (1995)). When evaluating the extent to which objectionable threats are disseminated, the Board places the burden of proof on the objecting party, and thus does not presume dissemination. *Dairyland USA Corp.*, 347 NLRB at 313, citing *Crown Bolt, Inc.*, 343 NLRB 776, 777 (2004).

In this case, the highest-ranking official in Respondent's facility—club manager Andre Batts—called prospective voters to his office, accompanied by the second highest-ranking official in the club - assistant manager Victor Castro. The managers closed the office door and Batts and Castro proceeded to ask Julius Anderson and Mark Ellis how they felt about the Union prior to Batts reading a canned letter conveying Respondent's strong opposition to the Union's presence. Neither Ellis nor Anderson had been open or active union supporters at the time of these conversations and each man testified about the discomfort they experienced during Batts and Castro's questioning. In this regard, Ellis testified that he did not answer Batts' questions truthfully because he feared retaliation if he had openly expressed his support for the Union. And Anderson testified that he felt awkward being asked how he felt about the Union because he was not sure if Batts was on the hunt to find out whether Anderson supported the Union.¹⁹ (Tr. 9697.) This was in stark contrast to Anderson's regular visits to Batts' office to chat about non-work-related topics like investment strategies and Anderson's building of a home in South Carolina. (Tr. 83, 238.)

Credibility

Credibility determinations consider the witness' testimony in context, including, among other things, their demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Double D Construction Group, Inc.*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). The Board has not created a presumption in favor of the testimony of current employees, but the Board has found that "the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests...thus, witness' status as a current employee may be a significant factor, but it is one among many which a judge utilizes in resolving credibility issues." *Advocate South Suburban Hospital*, 346 NLRB 209 fn. 1 (2006), citing *Flexsteel Industries*, 316 NLRB 745 (1995).

On the whole, I found Batts to be a credible witness. But at one point in his cross-examination, he insisted that it was not a policy of Respondent to keep a union-free environment. This flies in the face of the union-free philosophy prominently delineated in Respondent's employee handbook. Thus, Batts'

¹⁹ Anderson served as the Union's observer at the election, but Anderson credibly testified that he had not publicly participated in any union activities prior to April 14, 2023. (Tr. 70, 102.)

stubborn denial of a fact so obvious makes me question the veracity of other more salient aspects of his testimony.

Anderson and Batts' testimony were very similar save for Anderson's assertion that Batts questioned how he felt about the Union. Although Batts denies making this statement, for the following reasons, I credit Anderson over Batts. Anderson was a candid and humble witness who was very willing to agree with Respondent counsel on cross-examination and never exaggerated his testimony. Anderson acknowledged that he regularly initiated conversations regarding non-work-subjects with Batts in his office, but he contrasted those friendly open-door conversations with Castro summoning him to Batts' office, closing the door, and stoking Anderson's fears that he was about to be terminated for his union activities. Anderson acknowledged that Batts' tone was not threatening or confrontational, but Anderson also testified in great detail how he repositioned his chair so that he could see both Castro and Batts during their conversations in Batts' office. And Anderson was very specific about how he tried to get out of attending the group meeting in the training room, but Castro ultimately came down to the meat department to coax Anderson into attending the meeting with human resources.

Anderson's testimony was not 100 percent accurate. He asserted he had 9 meetings with Batts even though there were only 6 letters (and one meeting per letter). Anderson also claimed that Batts told him he had worked for the Respondent for over 20 years, when Batts had only worked for Respondent for 15 years. From my perspective, these minor arithmetic errors do not detract from the main takeaways from these aspects of Anderson's testimony—there were a lot of meetings and Batts had worked for Respondent for a significant amount of time—all of it without a union. I don't expect every witness to have perfect recall, especially when testifying about conversations that took place over a year ago. But these minor mistakes are in a class much different than Batts' willful denial of Respondent's union-free philosophy—an ill-fated attempt to bolster Respondent's legal standing.

For all of the above reasons, coupled with Anderson's status as a current employee of Respondent testifying counter to his club manager, I credit Anderson's testimony over Batts and find that Respondent violated Section 8(a)(1) of the Act by interrogating Anderson about his union sympathies.

Similarly, I found Mark Ellis to be a very credible witness. He was forthright, detailed, and direct in his testimony. His concern about Batts "prying" into his union sympathies was genuine and understandable.²⁰ And his confession to Batts that he opposed the Union such as not to draw retaliation from the Respondent makes perfect sense given the highest-ranking official in the club had just called him to the office, shut the door, and read a series

²⁰ Ellis attributed most of the probing questions to Batts but confirmed that Castro asked him how he felt about the Union.

²¹ The second half of Union objection #6 alleges an impression of surveillance. No evidence was presented in support of such objectionable conduct and so I overrule this objection to the extent it alleges an impression of surveillance.

²² Ellis' testimony regarding his conversation with Campbell was not 100% accurate. For example, Ellis testified that he voted sometime between 1:00pm and 1:30pm, even though it is undisputed that the

of letters conveying Respondent's strong antiunion sentiments. That Ellis attributed one of the intemperate comments to Castro does not undermine Ellis' credibility given his vivid recall of the alleged incident—reciting that Castro placed his hand on his shoulder as he inquired about Ellis' union sympathies.

Based on the above, I find that Respondent coercively interrogated Anderson and Ellis in Batts' office. But based on the record evidence, I also find that these isolated statements do not rise to the level of objectionable conduct. In this regard, there is no evidence that either Ellis or Anderson shared Batts and Castro's comments with any of their coworkers. Given that these incidents are confined to these two employees without dissemination to any other prospective voters, and the margin of victory was 7 votes, it is virtually impossible to conclude that these unlawful statements could have affected the results of the April 14th election. Thus, I conclude that these comments were de minimis in the context of the representation election and I overrule Union Objection #6.²¹

D. There is Insufficient Evidence to Establish That Tanakha Campbell's Statement to Mark Ellis That He Should Go Vote If He Knows What is Good for Him Could Have Affected the Results of the Election (Objection 16)

Although I credit Mark Ellis' testimony that his manager told him to go vote at the outset of the second election session, there is insufficient evidence to establish that Tanakha Campbell's abrasive comment impacted the results of the representation election. In this regard, Ellis' testimony about his election day conversation with Campbell was specific and forthright. Ellis explained where he was when Campbell spoke to him (standing right by the deli in the area where chickens are prepared), what he was doing (taking chickens out of the cookers), and how far he was from the other deli employees working at that time. (Tr. 143, 151–152.) Ellis did not exaggerate, especially when noting that Campbell's tone of voice was stern like he was commanding Ellis to do something (as a manager would give orders to a subordinate), but Ellis was very clear that Campbell was not yelling at him.²²

Campbell, on the other hand, denied telling Ellis that he better go up and vote if he knew what was good for him (or words to that effect). But Campbell went on to say that he didn't recall any specific conversations with Ellis during March or April 2023, nor did he recall any conversations from this time period with any other deli department employees. It's hard to credit Campbell's denial of the specifics of his alleged conversation with Ellis when Campbell could not recall the specifics of any conversation he had with any of the employees he supervised over a two-month period. Therefore, I credit Ellis' detailed, genuine testimony over Campbell's blanket denial.

afternoon polling time was from 2:30 p.m. to 4 p.m. But Ellis also testified that his work hours often changed, he didn't specifically recall the polling times, and that he only found out about the polls being open when Campbell approached him and directed him to go vote. Thus, I conclude that Ellis' recall about the timing of his conversation with Campbell was off by about 60–90 minutes probably because Ellis started working a little later than he remembered. This conclusion is bolstered by Julius Anderson's testimony that Respondent oftentimes switched the start times of Mark Ellis' shifts, but he usually started work at 2 p.m. (Tr. 91.)

Respondent counsel asserts in their posthearing brief that deli clerk Barbara Sorge's testimony that she did not hear Campbell make the alleged statement to Ellis bolsters Campbell's account while undermining Ellis' credibility. (Resp. posthearing brief, pp. 21, 43.) I do not agree. Sorge testified that she did not know who Mark Ellis was and so the significance of her not overhearing a comment that Campbell made to Ellis is greatly diminished. (Tr. 325.) Additionally, Sorge testified that she never attended any meetings in Batts' office in the runup to the union campaign. (Tr. 323.) Respondent contends, and all parties agree, that during the campaign Batts read a series of letters to all prospective voters in his office. Given that Sorge's testimony runs contrary to this established fact, I cannot credit Sorge.

But crediting Ellis' account of his election day conversation with Campbell does not make Campbell's statement rise to the level of objectionable conduct. Campbell never instructed Ellis how to vote – and so any perceived retaliation attached to the “if you know what's good for you” portion of Campbell's statement does not impact the laboratory conditions needed for employees' free expression of choice in this election. Furthermore, there is no credible evidence that any employees heard Campbell's statement or that Ellis disseminated Campbell's statement to meat and deli employees before going upstairs to vote, or at any time during the second polling session.

I find that our case is analogous to the fact patterns in *M.B. Consultants, Ltd.*, 328 NLRB 1089 (1999), and *Metz Metallurgical Corp.*, 270 NLRB 889, 889 (1984). In *Metz*, the Board declined to set aside the results of an employer election victory when one unit employee had two uncomfortable conversations with supervisors, which were not disseminated to the rest of the bargaining unit. The first conversation in *Metz* is almost identical to the allegation in our case. To this end, a supervisor initiated a conversation asking a bargaining unit employee how he felt about the union. The supervisor then predicted that employees would lose certain fringe benefits if the Union was voted in. The employee replied that this would not happen. Two days later, the employee's direct supervisor accused the employee of insubordination and said: “you don't need any union, your job is on the line.” The credited testimony was that the supervisor had previously criticized the employee for poor work performance and the Board found that a reasonable person would understand the supervisor's criticism to be another warning against poor performance. The Board went on say that even if the initial conversation constituted interrogation and a threat of a loss of benefits, this single incident was de minimis with respect to the results of the election, explaining that the conversation took place several weeks before the election, only one other employee learned about the conversation, and this was a single isolated conversation between a supervisor and an employee. *Id.*

In *M.B. Consultants*, the union lost a representation election 59–53, with no challenged ballots. The Board considered objections to the conduct of the election, including an allegation that

two days before the election, the plant manager approached two employees who supported the union and promised to resolve employee complaints through dialogue if the employees “put the union aside.” The Board found that this statement did not constitute objectionable conduct because there was no affirmative record evidence indicating that the plant manager's statements were disseminated to any other employees, the employees acknowledged that they took no action to pursue the plant manager's suggestion and given the six-vote margin in the election, this single incident could not have affected the results of the election.

Based on the above, I find that the isolated statements that Andre Batts, Victor Castro, and Tanakha Campbell made to Julius Anderson and Mark Ellis do not constitute objectionable conduct because their lack of dissemination to other bargaining unit employees makes it nearly impossible to conclude that these comments impacted the results of the representation election.

Because the conduct alleged in Petitioner's Objections 6 and 16 do not warrant setting aside the election, I direct that, in the absence of exceptions to my recommended Order, Case 29–RC–314143 be severed from Case 29–CA–317035 and the Board issue a Certification of Results of Election. See *Johnston Fire Services, LLC*, 367 NLRB No. 49, slip op. at 1 fn. 3 (2019).

CONCLUSIONS OF LAW

1. The Respondent, BJ's Wholesale Club Inc., is an employer within the meaning of Sections 2(2), (6), and (7) of the Act.
2. The Charging Party, Local 342, UFCW, is a labor organization within the meaning of Section 2(5) of the Act.
3. By engaging in the following acts and conduct, Respondent has violated Section 8(a)(1) of the Act:
 - a. Interrogating employees about their feelings or sympathies for Local 342, UFCW.
 4. All other allegations of the complaint are dismissed.
 5. Respondent did not engage in objectionable pre-election conduct that warrants setting aside the results of the election.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.²³

I will order that Respondent post a notice at its East New York, Brooklyn store in the usual manner, and in accordance with *Starbucks Corp.*, 372 NLRB No. 122, slip op. at 5 (2023), notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

The General Counsel also requests a reading of the notice and for Respondent's supervisors, managers, and agents to be provided written instructions regarding compliance with the provisions of this Notice. The Board generally grants these remedies where the unfair labor practices committed by the respondent are

²³ In their posthearing brief (pp. 46–50), Respondent counsel asserts that all objections and unfair labor practices in these cases must be dismissed because: 1) the NLRB's structure only permits the President to remove Board members for neglect of duty or malfeasance; 2) ALJs have multiple layers of removal protection in violation of Article II of the

Constitution. I deny each of Respondent's constitutional challenges with the understanding that a federal court will likely address these issues at some point in the future. See *SJT Holdings, Inc.*, 372 NLRB No. 82, slip op. at 1–2 (2023); *National Association of Broadcast Employees & Technicians, Local 51 (NABET)*, 370 NLRB No. 114, slip op. at 1–2 (2021).

so pervasive that a notice reading is necessary to dispel the impact of this unlawful conduct. I decline the General Counsel's request for a notice reading here and related enhanced remedies because of the relatively limited nature of the violations.

My order will also provide that in the absence of exceptions, the representation Case 29–RC–314143, be severed from Case 29–CA–317035 and the Board will issue a Certification of Results of Election consistent with this recommended decision and order.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended²⁴

ORDER

Respondent, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their feelings about Local 342, UFCW, or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its East New York, New York facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 14, 2023.

(b) In the absence of exceptions to my recommended decision and Order, the representation Case 29–RC–314143, shall be severed from the unfair labor practice case herein and the Board will issue a Certification of Results of Election.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to

the steps that the Respondent has taken to comply.

Dated, Washington, D.C., August 15, 2024.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT interrogate you regarding your feelings about Local 342, UFCW or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

BJ'S WHOLESALE CLUB, INC.

The Administrative Law Judge's decision can be found at <https://www.nlr.gov/case/29-CA-317035> and 29-RC-314043 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



²⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended

Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.