UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

TRADER JOE'S EAST, INC.

Employer

and **Case 9-RC-309216**

TRADER JOE'S UNITED

Petitioner

HEARING OFFICER'S REPORT ON OBJECTIONS

On January 25 and 26, 2023, an agent of Region 9 of the National Labor Relations Board conducted an election to determine whether a unit of employees at Trader Joe's East, Inc. (Employer), wished to be represented for the purposes of collective bargaining by Trader Joe's United (Petitioner). The Employer filed six objections as follows:

1. Trader Joe's United ("Union"), through its agents, officers, and representatives, including union attorney, Seth Goldstein, and Connor Hovey, Jayne White, Morgan Gillenwater, Angel Gross, Katrissca Howard, Phillip Hernandez, and Jaiah Ignacio unlawfully interfered with the conduct of the election by repeatedly approaching and cornering Crew Members while they were working and while the polls were open, to intimidate Crew Members into voting for the Union. The Union's and the named Crew Members' (whether acting as agents of the Union or otherwise) unlawful conduct created an atmosphere of fear and coercion and interfered with the laboratory conditions necessary to conduct a free and fair election and/or created a general atmosphere of fear and reprisal that rendered a free election impossible.

2. On or about the dates of the election and during or about the time polls were open, the Union, through its agents, officers, and representatives, unlawfully cornered and coerced and intimidated eligible voters by approaching Crew Members who were believed to support Trader Joe's while they were working and directing those Crew Members not to vote. This unlawful conduct created an atmosphere of fear and coercion and interfered with the laboratory conditions necessary to conduct a free and fair election and/or created a general atmosphere of fear and reprisal that rendered a free election impossible.

3. The Union, through its agents, officers, and representatives, interfered and restrained employees in the exercise of their Section 7 rights and tainted the results of the election through additional unlawful conduct that created an atmosphere of fear and coercion and interfered with the laboratory conditions necessary to conduct a free and fair election and/or created a general atmosphere of fear and reprisal that rendered a free election impossible. Examples of the Union's additional inappropriate conduct engaged in while the polls were open include:

    a. Through union Attorney, Seth Goldstein, harassing and intimidating Crew Members by shouting "solidarity" at them while they were working in the Store in and around the no-electioneering area and then taunting them when they disagreed;

b. Through union attorney, Seth Goldstein, and union agents or representatives Connor Hovey, Jayne White and Morgan Gillenwater, by harassing and intimidating Crew Members, all of whom were eligible voters, in the Store for up to an hour while they were working;

c. Through union attorney, Seth Goldstein, and agent or representative Connor Hovey by addressing a massed assembly of Crew Members, all of whom were eligible voters, on Trader Joe's premises while they were working and within 24 hours of the election;

d. Through union agents and/or representatives Angel Gross, Katrissca Howard, and Phillip Hernandez by harassing and intimidating Crew Members, all of whom were eligible voters, while they were working.

4. During the critical period before the election on January 25 and 26, 2023, the Union, through its agents, officers, and/or representatives, interfered and coerced eligible voters by engaging in a pattern of repeated harassing, coercive, and intimidating behavior towards eligible voters on social media, including, but not limited to: (a) creating a threatening atmosphere, including berating and denigrating Crew Members who disagreed with the Union; (b) instructing eligible voters who did not support the Union's organizing efforts to transfer out of the Store; (c) discouraging eligible voters from exercising their protected right to express their views on unionization; and (d) repeatedly making unwelcome, intrusive, harassing, and intimidating comments to eligible voters. The Union's unlawful conduct created an atmosphere of fear and coercion and interfered with the laboratory conditions necessary to conduct a free and fair election and compromised the validity of the election.

5. During the critical period before the election on January 25 and 26, 2023, the Union, through its agent and/or representative Connor Hovey, unlawfully coerced and intimidated eligible voters by sending threatening text messages to Crew Members who he believed did not support the Union. The Union's and Hovey's unlawful conduct created an atmosphere of fear and coercion and interfered with the laboratory conditions necessary to conduct a free and fair election and compromised the validity of the election.

6. A number of employees reported that they felt harassed and/or intimidated during the critical period by some or all of the foregoing conduct, the Union, through its agents, officers, and/or representatives, unlawfully interfered with the conduct of the election. The Union's unlawful conduct created an atmosphere of fear and coercion and interfered with the laboratory conditions necessary to conduct a free and fair election and compromised the validity of the election.

After conducting a hearing and carefully reviewing the evidence as well as the arguments made by the parties, I recommend that the evidence was insufficient to show that the Petitioner engaged in unlawful conduct which created an atmosphere of fear and coercion and interfered

with the laboratory conditions necessary to conduct a free and fair election and/or created a general atmosphere of fear and reprisal that rendered a free election impossible. Therefore, I recommend that an appropriate certification issue.

After recounting the procedural history, I discuss the applicable burdens of proof and the Employer's operation and discuss each objection in further detail.

PROCEDURAL HISTORY

The Petitioner filed the petition on December 20, 2022. The parties agreed to the terms of an election and the Acting Regional Director approved a Stipulated Election Agreement on January 12, 2023. The election was held on January 25 and 26, 2023. The employees in the following unit voted on whether they wished to be represented by the Petitioner:

> All full-time and regular part-time crew and merchants employed by the Employer at its 4600 Shelbyville Road, Suite 111, Louisville, Kentucky facility (Store No. 628); excluding all mates, captains, office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

The ballots were counted, and a Tally of Ballots was provided to the parties. Out of 106 eligible voters, 48 votes were cast for the Petitioner and 36 votes were cast against the Petitioner. There were 7 challenged ballots, a number that was not sufficient to affect the results of the election.

Objections were timely filed**.** The Acting Regional Director ordered that a hearing be conducted to give the parties an opportunity to present evidence regarding the objections. As the hearing officer designated to conduct the hearing and to recommend to the Acting Regional Director whether the Employer's objections are warranted, I heard testimony and received into evidence relevant documents on March 20, 21, 30, and 31, 2023. The Employer and the Petitioner filed briefs on April 7, 2023, and they were fully considered.

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

THE BURDEN OF PROOF AND THE BOARD'S STANDARD FOR SETTING ASIDE ELECTIONS

It is well settled that "[r]epresentation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires

of the employees." *Lockheed Martin Skunk Works,* 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Therefore, "the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one." *Delta Brands, Inc.*, 344 NLRB 252, 253, (2005), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). To prevail, the objecting party must establish facts raising a "reasonable doubt as to the fairness and validity of the election." *Patient Care of Pennsylvania*, 360 NLRB No. 76 (2014), citing *Polymers, Inc*., 174 NLRB 282, 282 (1969), enfd. 414 F.2d 999 (2nd Cir. 1969), cert. denied 396 U.S. 1010 (1970). Moreover, to meet its burden the objecting party must show that the conduct in question affected employees in the voting unit. *Avante at Boca Raton*, 323 NLRB 555, 560 (1997) (overruling employer's objection where no evidence that unit employees knew of the alleged coercive incident).

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

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

THE EMPLOYER'S OPERATION

The Employer is a grocery store (Store #628) and wine shop (Store #625), located next to each other with separate entrances. The wine shop is about twice the size of the grocery store. The bargaining unit employees, supervisors, and managers work in both locations. The Employer sells quality products from all over the world at best value prices. The highest level in-store manager is Captain Craig Wood. Mates Keith Akers, Bobby Buchanan, Drew Vandron, Christine Romero, Christi Campbell, and Travis Todd report to Wood and supervise Crew Members. Mates are supervisors who support Crew Members, support the Captain's vision for the store, and provide feedback and reviews of Crew Member's work. Crew Members support their team and give customers a great experience. The product team works product throughout

the store by refilling shelves and keeping the store full of products. The customer team works with customers and works at the cash register.

THE UNION'S STRUCTURE

The Union is an independent national organization founded and represented by Trader Joe's crew members. There are no elected local officers at the Louisville, Kentucky location. National officers include President Jamie Edwards, Vice President Sarah Beth Ryder, and Communications Director Maeg Yosef. Louisville Crew Member Connor Hovey was the first Louisville crew member to reach out to the Union regarding organizing the employees at the Louisville, Kentucky store. Yosef held weekly virtual meetings using Google Meets with local crew members starting around August 2022 and running through the election dates.

THE EMPLOYER'S OBJECTIONS AND MY RECOMMENDATIONS

Objections 1, 2, 3b and 3d: The Employer failed to establish that the Petitioner repeatedly approached, cornered, coerced, and/or intimidated Crew Members and directed Crew Members to vote for the Union or not to vote, creating an atmosphere of fear and coercion which interfered with the laboratory conditions necessary to conduct a free and fair election or created a general atmosphere of fear and reprisal that rendered a free election impossible.

Record Evidence

The Employer alleges that union agents, officers, and representatives created an atmosphere of fear and coercion by repeatedly approaching, cornering, coercing, intimidating and harassing Crew Members for up to an hour while they were working and directing them to not vote. No testimony or evidence was presented which indicated that any eligible voter was told to not vote or impeded in their attempts to vote. Additionally, there is no evidence or testimony regarding any potentially objectionable conduct by Jayne White, Phillip Hernandez, or Jaiah Ignacio, or any conduct which occurred while the polls were open.

There is no dispute of facts that on January 25, 2023, Crew Member Connor Hovey and Union Attorney Seth Goldstein were inside the grocery store and wine shop portions of the store and spoke to employees prior to the polls opening. Hovey and Goldstein describe that they said hi to employees and did not have any conversations, other than with crew member and known union supporter Lee Fortner. Goldstein testified that he was there to get a look at the store and to thank crew members who had worked hard on the union campaign. No evidence was presented regarding what was said in these conversations and no evidence was presented indicating that these conversations lasted more than a minute or two.

The only evidence of any employee being cornered is provided by Captain Wood when he testified that he saw Crew Members Katrissca Howard and Angel Gross, who were known

union supporters, cornering suspected anti-union employee Erin, last name unknown. [1]/ This testimony is undisputed and uncorroborated. No evidence was presented regarding what was said or that Erin brought a complaint regarding this incident to the Employer. The Employer did not call Erin, Howard or Gross to testify.

Board Law

In determining whether an individual is an agent of a party, the Board applies common law principles of agency, and an agency relationship is established where a principal's manifestation to a third party supplies a reasonable basis for the third party to believe that the principal has authorized the alleged agent to perform the acts in question.

The standard in measuring whether a party's conduct is objectionable is whether it would reasonably coerce employees in their election choice. See *Baja's Place*, 268 NLRB 868 (1984); *The Great Atlantic and Pacific Tea Company, Inc.*, 177 NLRB 942 (1969); and *Coca-Cola Bottling*, 273 NLRB 444 (1984). The test to be utilized is whether a remark can reasonably be interpreted by an employee as a threat, regardless of the subjective effect on the actual listener. *Smithers Tire*, ~~308~~ NLRB 72 (1992). See also *TNT Logistics North America, Inc.*, 345 NLRB 290 (2005).

Recommendation

Here, the Employer asserts Hovey and Goldstein are agents of the Union. The evidence supports that Hovey was portrayed as the spokesperson for the Union at the Louisville, Kentucky store and engaged in conduct through the organizing period at the direction of the national officers. The evidence supports that Goldstein was acting as a representative of the Union as their attorney at the pre-election conference and during the election and conducted himself at the direction of the Petitioner. Therefore, Hovey and Goldstein are agents of the Union and their involvement in the alleged actions in this matter will be addressed from that standpoint. No evidence regarding the agency status of Howard and Gross was presented. Therefore, their conduct will be addressed as third-party conduct.

There is no dispute that Goldstein and Hovey spoke to employees on the day of the election or that an employee appeared to be cornered by two known union supporters. No evidence was provided regarding the comments made by and to Crew Members in these interactions and there was no evidence the conduct was repeated. There is insufficient evidence to demonstrate that these incidents caused fear among employees or that any misconduct occurred during these incidents. I find that the Petitioner's conduct was not objectionable, and I recommend that Objections 1, 2, 3b, and 3d be overruled.

[1]/ There was testimony regarding an Erin Brown who attended negotiations with the Union, but there is no testimony to indicate that is the same Erin as referred to on this matter. They will be treated as two separate individuals named Erin.

Objection 3a: The Employer failed to establish that the Petitioner, through union attorney Seth Goldstein, harassed and intimidated Crew Members by shouting "solidarity" at them while they were working and taunting them when they disagreed.

Record Evidence

The Employer contends that Goldstein, as he was leaving the wine shop prior to the start of the election, raised his fist and shouted "solidarity" at Crew Member Rebecca (Bex) Verrill, who was working the register at the time, and then responded to Verrill's remark that she was not part of the Union group, that she was "one of those." No evidence was presented to indicate that this occurred while the polls were open.

Hovey, Goldstein, and Verrill all testified regarding what happened that morning and surveillance video of the incident was entered into evidence. Verrill testified that as Hovey and Goldstein were exiting the wine shop, Goldstein raised his fist and shouted "solidarity" at her. Verrill then told Goldstein she was not part of the union group and that Goldstein replied "oh, you're one of those." Verrill testified that she had not done anything to provoke this. Hovey testified that he did not remember any of that happening. Goldstein testified that he does not recall saying solidarity in the wine shop, only in the grocery store, and that he may have waved as he left the wine shop.

The surveillance video supports the Union's testimony, and contradicts Verrill's, as to what happened while Hovey and Goldstein were in the wine shop before the polls opened on the first day of the election. The time stamp on the video clearly shows that this interaction occurred around 10:30 a.m., an hour-and-a half before the polls opened. On the video, as Hovey and Goldstein enter the wine shop, Verrill raises her fist toward Hovey and Goldstein and appears to say something as she does so, directly contradicting her previous testimony that she did nothing to provoke Goldstein reacting to her. As Hovey and Goldstein leave the wine shop approximately one minute later, Goldstein can be seen raising an open hand and moving it to the side as he leaves the wine shop. It is unclear from the video whether any words were spoken during that time as there is no sound with the video and it is unclear whether Verrill's mouth is moving.

Board Law

The standard in measuring whether a party's conduct is objectionable is whether it would reasonably coerce employees in their election choice. See *Baja's Place*, supra; *The Great Atlantic and Pacific Tea Company, Inc.*, supra; and *Coca-Cola Bottling*, supra. The test to be utilized is whether a remark can reasonably be interpreted by an employee as a threat, regardless of the subjective effect on the actual listener. *Smithers Tire*, supra. See also *TNT Logistics North America, Inc.*, supra.

Recommendation

Verrill's testimony contradicts the surveillance video, and no evidence was presented or claims made regarding the authenticity of the surveillance video. I do not credit Verrill's

testimony on this matter as it is contradicted by the video evidence and the testimony of Hovey and Goldstein. Additionally, Verrill refused to return to the hearing to provide additional testimony regarding the video after the Petitioner had a chance to review the video and an adverse inference is made based on the Employer failing to cooperate and produce Verrill for additional cross-examination.

I find that the conduct attributed to Goldstein did not occur as alleged and therefore does not raise a reasonable doubt as to the fairness and validity of the election and I recommend that Objection 3a be overruled.

Objection 3c: The Employer failed to establish that the Petitioner, through Goldstein and Hovey addressed a massed assembly of Crew Members who were eligible voters while they were working and within 24 hours of the election.

Record Evidence

The Employer contends that the Petitioner held a captive audience meeting with a massed assembly of eligible voters during the 24-hour period just prior to the election. The testimony, through Crew Member Ila Wrucke and Mate Christi Campbell, support that Hovey and Goldstein spoke to a group of at most 4 of 106 eligible voters/Crew Members while those Crew Members were working in the Grocery store spice area, within the 24-hour period before the election. Hovey and Goldstein admit to talking to employees briefly and saying hi and thanks to those who helped with the organizing campaign. No evidence was presented regarding what was said by anyone in this situation.

Board Law

Employer captive audience meetings within 24 hours of the election, as well as meetings with individuals or small groups of employees **away from their workstations** have been found objectionable. *Peerless Plywood Co.*, 107 NLRB 427 (1959) (Emphasis added.). This rule, however, does not prohibit "minor" conversations between supervisors or union agents and a few employees during the 24-hour period before the election. See *Electro Wire Products*, 242 NLRB 969 (1979) and *Business Aviation, Inc*., 202 NLRB 1025 (1973).

Recommendation

Here, there is no dispute that the Petitioner, through Hovey and Goldstein, spoke to a few employees (4 of 106 eligible voters), at the employees' workstations while the employees were on the clock. This is the type of minor conversations not prohibited by *Peerless*. Again, there is no evidence of what was said or that any conversation occurred away from an employee's workstation. Therefore, I find that the Petitioner's conduct does not rise to the level of a captive audience meeting, and I recommend that Objection 3c be overruled.

Objection 4: The Employer failed to establish that the Petitioner repeatedly harassed, coerced, and intimidated eligible voters on social media.

Record Evidence

The Employer produced part of a Facebook thread in support of this allegation. In that thread, the Employer failed to provide the start of the thread which included Crew Member Ruthie Knights' comments which led Crew Member Morgan Gillenwater to respond and Knights to respond further. [2/] There is no evidence of repeated postings by the same crew member regarding the Petitioner or the organizing campaign.

Board Law

The standard in measuring whether a party's conduct is objectionable is whether it would reasonably coerce employees in their election choice. See *Baja's Place*, supra; ; *The Great Atlantic and Pacific Tea Company, Inc.*, supra; and *Coca-Cola Bottling*, supra. The test to be utilized is whether a remark can reasonably be interpreted by an employee as a threat, regardless of the subjective effect on the actual listener. *Smithers Tire*, supra. See also *TNT Logistics North America, Inc.*, supra.

Recommendation

Here, the Employer failed to provide evidence that the Petitioner engaged in conduct that would reasonably coerce employees in their election choice. The alleged conduct was not repetitive and did not include any reference to Crew Members transferring out of the store or any instance of union supporters berating and denigrating Crew Members who did not support the Union.

The evidence provided by the Employer fails to establish that the Petitioner engaged in a pattern of repeatedly harassing, coercing, and intimidating Crew Members by creating a threatening atmosphere by berating and denigrating Crew Members, instructing eligible voters who did not support the Union to transfer out of the store, discouraging eligible voters from expressing their views on unionization, and repeatedly making unwelcome, intrusive, harassing, and intimidating comments to eligible voters. The evidence provided indicates one Facebook message between two Crew Members disagreeing on what the Union can do for employees and whether a union is needed at the Employer.

I find that the Petitioner's conduct, as the evidence shows, was not objectionable, and I recommend that Objection 4 be overruled.

[2/] There was some hearsay testimony regarding Crew Member Darren Rappa being harassed on Facebook by a former employee, but no direct evidence was produced regarding this alleged incident and there is insufficient evidence to establish that this happened.

Objection 5: The Employer failed to establish that the Petitioner, through Hovey, coerced and intimidated eligible voters by sending threatening text messages to Crew Members who he believed did not support the Union.

Record Evidence

The Employer provided evidence that Hovey and Crew Member Verrill had a conversation, through text messaging, during the critical period in regard to Verrill's lack of support for the Union. The text thread provided by the Employer does not include messages from Verrill other than the start of her response to Hovey which reads "First of all, I haven't said." No evidence of any other text messages was submitted into evidence. It is only a text message from Hovey to Verrill in response to something Verrill sent. In this message Hovey does not threaten to take any action against Verrill and does not discuss any consequences if she votes against the Union. Hovey talks about not trusting Verrill since she told the Employer about the Union organizing. Additionally, there is no evidence that this text message was disseminated to other employees or that Verrill discussed it with other employees.

Board Law

The standard in measuring whether a party's conduct is objectionable is whether it would reasonably coerce employees in their election choice. See *Baja's Place*, supra; *The Great Atlantic and Pacific Tea Company, Inc.*, supra; and *Coca-Cola Bottling*, supra. The test to be utilized is whether a remark can reasonably be interpreted by an employee as a threat, regardless of the subjective effect on the actual listener. *Smithers Tire*, supra. See also *TNT Logistics North America, Inc.*, supra.

In *Baja's Place, Inc.*, supra, the Board found a petitioner's conduct objectionable when a business representative sent a letter on petitioner's stationery, to a unit employee which read "f you a ." at the same time the business representative sent other unit employees a letter regarding an upcoming union meeting. The Board found that the business representative's follow-up conversation in which he told the unit employee that he would get the employee and get the employee's job were threats of economic retaliation, physical harm, and other unspecified reprisals.

Recommendation

Here, unlike the conduct in *Baja's*, supra, Hovey did not make any text or verbal statements regarding getting Verrill or any other unit employee who he believed was against the Petitioner. Hovey warned Verrill about trusting the Employer and told Verrill he was not sure he could trust her, but Hovey does not state he or anyone else will take any action or do anything to Verrill.

The evidence fails to establish that the Petitioner coerced and intimidated Crew Members through threatening text messages. The message Hovey sent to Verrill cannot be reasonably interpreted as a threat and would not reasonably coerce an employee in their election choice. I

find that Petitioner's conduct was not objectionable, and I recommend that Objection 5 be overruled.

Objection 6: The Employer failed to establish that the Petitioner harassed and intimidated employees during the critical period creating an atmosphere of fear and coercion, and interfered with the laboratory conditions necessary to conduct a free and fair election or that the Petitioner compromised the validity of the election.

Record Evidence

For this catch-all allegation, the evidence supports that there was one text message, one Facebook thread, an interaction between Goldstein and Verrill, a captive audience meeting, and a few interactions between suspected union supporters and suspected anti-union employees. With objection 6, the Employer contends that the Petitioner's conduct, taken together, constitutes objectionable conduct which would interfere with employees' free and uncoerced choice in the election.

The Employer provided some evidence of Crew Members calling Captain Wood racist during the critical period and some racist graffiti found prior to the critical period. The Employer failed to establish any connection with these comments and graffiti with the Petitioner's campaign and organizing. Therefore, this evidence is irrelevant to the question of objectionable conduct.

Board Law

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

Recommendation

As discussed above, the Employer has failed to provide evidence to support its contention that the Petitioner's conduct independently would reasonably coerce employees in their election choice or reasonably be interpreted by an employee as a threat. Together there were six alleged incidents which on their own did not constitute objectionable conduct. At most, 4 employees, out of 106 eligible voters, were subjected to most of the conduct and there is no evidence to indicate that more than 10 employees were subjected to the Facebook message. While it is

possible all 106 eligible voters had access to the Facebook group and relevant posts by Knights and Gillenwater, no evidence was provided to indicate how many eligible voters are members of the Facebook group or how many of the members of the Facebook group saw that post. All incidents occurred within a week of the election and could have persisted in the minds of the approximately 14 employees subjected to the conduct. The vote had a margin of 12 more votes for the Petitioner than against the Petitioner. Some of the conduct can be attributed to the Petitioner, as discussed above. The conduct by the Petitioner, which is not objectionable individually, is also not objectionable cumulatively due to the limited dissemination of the conduct and the lack of threats and coercion regarding the election and voting in the interactions of the employees. I find that the combination of all the alleged objectionable conduct as presented by the Employer, that the Employer has provided sufficient evidence to support that some of the acts occurred, but the evidence is insufficient to rise to the level of objectionable conduct which would reasonably coerce employees. Therefore, I recommend that Objection 6 be overruled.

CONCLUSION

Based on the foregoing, I recommend that the Employer's objections be overruled in their entirety and that an appropriate certification issue.

APPEAL PROCEDURE

Pursuant to Section 102.69(c)(1)(iii) of the Board's Rules and Regulations, any party may file exceptions to this Report, with a supporting brief if desired, with the Regional Director of Region 9 by **June 12, 2023.** A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director.

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

Pursuant to Sections 102.111 – 102.114 of the Board's Rules, exceptions and any supporting brief must be received by the Regional Director by close of business, 4:30 p.m.,(EST) on the due date. If filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date.

Within 5 business days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. An original and one copy

shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Dated: May 26, 2023

/s/ *Tamilyn A. Moore*

Tamilyn A. Moore, Hearing Officer
Region 9, National Labor Relations Board
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CERTIFICATE OF SERVICE

May 26, 2023

I hereby certify that I served the attached Hearing Officer's Report on Objections on all parties by electronic mail at the following addresses:

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