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

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

Employer

and **Case 28-RC-208266**

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

Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Stipulated Election Agreement, an election was conducted on November 8 and 9, 2017 in a unit of certain of the Employer's hotel, resort, and casino employees ("team members").[1] The tally of ballots showed that of the approximately 833 eligible voters, 571 cast ballots for the Local Joint Executive Board of Las Vegas Affiliated with United Here International Union ("Petitioner" or "Union"), and 156 cast ballots against representation. There were 3 challenged ballots. Therefore, Petitioner received a majority of the votes.

On November 14, 2017, the Employer timely filed twelve objections to conduct affecting the election. The Regional Director for Region 28 ordered that a hearing be conducted to give the parties an opportunity to present evidence regarding the objections. On November 30, 2017, the case was transferred to Region 27. Pursuant to Region 28's Order Directing Hearing on Objections, and subsequent Order Rescheduling hearing, a six-day hearing was conducted in December 2017 in Las Vegas, Nevada before a designated Hearing Officer from Region 27. On

[1] Including all regular full-time and regular part-time and regular on-call Banquet Bartenders, Banquet Porters, Banquet Servers, Bar/Beverage Porters, Bartenders, Bell Captains, Bell Persons, Beverage Servers, Bus Persons, Concession Workers, Catering Beverage Porters, Cooks, Cook's Helpers, Counter Attendants, Food Servers, Gourmet Hosts/Cashiers, Host/Cashiers, IM Porters, Kitchen Runners, Kitchen Workers, Lead Banquet Porters, Lead Counter Attendants, Lucky VIP Attendants, Lucky VIP Bartenders, Pantry Workers, Pantry Workers 11, Resort Guest Room Attendants, Resort Housepersons, Resort Steakhouse Cooks, Resort Suite Guest Room Attendants, Room Runners, Service Bartenders, Sprinters, Status Board Operators, Steakhouse Captains, Stove Persons, Sushi Cooks, Team Member Dining Room Attendants, Turndown Guest Room Attendants, Utility Porters, VIP Attendants, VIP Bartenders, VIP Lounge Bartenders, VIP Servers employed by the Employer at Green Valley Ranch Resort Spa Casino; but excluding all other employees, including all front-desk employees, valet parkers, gaming employees (dealers, slot attendants, cage cashiers), inspectresses, engineering and maintenance employees, office clerical employees, confidential employees, and all guards, managers and supervisors as defined by the Act.

February 9, 2018, the Hearing Officer issued his Report on Objections (Report) in which he recommended overruling the objections in their entirety.

The Employer timely filed thirty exceptions to the Hearing Officer's recommendations. In its exceptions, the Employer contends that the Hearing Officer erred by:

1) concluding that the Employer failed to meet its burden of establishing objectionable conduct which affected the results of the election (Report p. 2);
2) concluding that there was "no evidence that any of the committee leaders or other employees or individuals engaged in any misconduct at or near the polls." (Report p. 2);
3) concluding that the evidence failed to establish the employees knew or would reasonably believe that the Petitioner was keeping a list of who had voted (Report p. 2);
4) refusing to consider testimony concerning pre-petition conduct that gave "meaning and dimension" to the Petitioner's post-petition objectionable conduct. (Report p. 9, fn. 6);
5) concluding that the "Employer sought to litigate the showing of interest." (Report p. 9, fn. 6);
6) concluding that the record failed to establish that team members knew or reasonably believed that their responses to Committee Leaders regarding when they intended to vote would be shared with the Petitioner (Report p. 12.);
7) revoking the Employer's subpoena duces tecum seeking information that would have revealed the identity of Petitioner's Committee Leaders thereby denying the Employer due process. (Report p. 12, fn. 7);
8) concluding that the Petitioner's "get-out-the-vote campaign, including its use of sign-up sheets" was unobjectionable polling of sentiments (Report, p. 13);
9) giving dispositive weight to the Union's stated motive ofits "get-out-the-vote" campaign and sign-up sheets, rather than considering the objective effect on unit employees;
10) concluding that the "get-out-the-vote campaign, coupled with its use of the sign-up sheets, amount to nothing more than non-coercive pre-election polling permitted under the Act" (Report p. 13-14);
11) disregarding the testimony of a witness that she was "told" to fill out the sign-up sheet. (Report p. 14, fn. 8);
12) overruling Employer's Objection 1 (Report p. 15);
13) crediting the testimony of an employee as to the circumstances under which she escorted employees to the polls (Report p. 17);
14) concluding that the individuals who "escorted" employees to the polls were not Petitioner's Organizers or Committee Leaders (Report p. 18);
15) failing to consider the "escorting" of employees to the polls in the context of the Petitioner's "campaign of surveillance and tracking of employees' voting activities" (Report
p. 18);
16) overruling Employer's Objections Nos. 2-3 (Report p. 18);

17) concluding that the individuals "patrolling" the hallway were not Petitioner's Organizers or Committee Leaders (Report p. 22);
18) failing to consider the "patrolling" in the context of Petitioner's "campaign of surveillance and tracking of employees' voting activities" (Report p. 22);
19) overruling Employer's Objection 6 (Report p. 23);
20) concluding that there was no evidence presented that Committee Leaders or other employees knew the Petitioner was keeping track of who had voted (Report p. 24-25);
21) concluding that the Petitioner's conduct would not create "reasonable belief among team members and committee leaders that the Petitioner was engaging in objectionable list-keeping or even keeping a list for that matter" (Report p. 25);
22) concluding that list-keeping is objectionable only near the polls (Report p. 25);
23) concluding that bargaining unit employees and Committee Leaders would have a reasonable belief that the purpose of the information was to engage in electioneering away from the polls (Report p. 26);
24) disregarding the testimony of two employees that they knew that fellow Committee Leaders were aware that the Petitioner was keeping a list of who had voted (Report p. 25-26);
25) focusing exclusively on whether employees would be aware of the Petitioner's act of creating a list, rather than whether they would know or reasonably believe that the Petitioner was "monitoring and tracking" whether they had voted (Report p. 26);
26) failing to consider whether the "oral lists" of those who had voted and which were provided to the Petitioner were, themselves, objectionable "lists" (Report p. 26);
27) considering the Petitioner's purported intent for seeking information about who had voted, rather than the objective impression it would create on employees (Report p. 26);
28) concluding that the Petitioner did not engage in objectionable list keeping and overruling Objection 8 (Report p. 26);
29) concluding that Petitioner's questioning of employees on whether they had voted was not coercive or threatening because of failing to consider pre-petition conduct that gave context and meaning to the Petitioner' questioning of employees about their voting (Report p. 26); and
30) concluding that the Objections should be overruled in their entirety (Report p. 33).

Petitioner timely filed exceptions to the hearing officer's conclusion that the Committee Leaders were special agents of the Petitioner with respect to their role in the "get out the vote" efforts, including soliciting information as to if and when team members would vote or had voted, and that the Petitioner was therefore responsible for statements made by Committee Leaders in the course of those solicitations.

On March 12, 2018, both parties filed answering briefs in opposition to the other parties' exceptions.

I. INTRODUCTION

I have reviewed the record *de novo* in light of the exceptions, briefs and answering briefs. I find that the Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. While the Employer has excepted to some of the hearing officer's credibility resolutions, the Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the reviewer that they are incorrect. *Stretch-Tex Co.,* 118 NLRB 1359, 1361 (1957). I have carefully examined the record and find no basis for reversing the Hearing Officer's credibility findings.

I have considered the evidence and the arguments presented by the parties and, as discussed below in detail, I agree with the Hearing Officer that all of the objections should be overruled. Accordingly, I am issuing a Certification of Representative.

II. SUBPOENA ISSUE

In Employer's Exception 7 to the Hearing Officer's report, the Employer asserts that the Hearing Officer erred in granting petition to revoke Item 1 of subpoena *duces tecum* (B-1-Z1SXBX), thereby denying it due process. Specifically, the Employer argues that the hearing officer's ruling precluded it from identifying the in-plant organizing committee members identified as "Committee Leaders," thereby prejudicing its ability to make a full inquiry into their election-day conduct, including whether they had engaged in any of the unlawful patrolling or other alleged objectionable activity.

I find no basis for reversing the Hearing Officer's subpoena ruling. While the Employer asserts in its brief in support of its exceptions that the sign-up sheets would have aided it in identifying the employee Committee Leaders in order to identify "patrollers" as agents of the Petitioner (Objection 6), such a list of names would have been of little use to support the testimony of witnesses who did not know the names of individuals who were purportedly seen "patrolling" at or near the polling area. The record indicated that there was a substantial number of such employee Committee Leaders. Insofar as the need for the sign-up sheets related to Objection 6, it would not have been warranted, based on the limited evidence presented in support of that objection, to call each such employee to testify about their whereabouts during the election. Moreover, to the extent that the sign-up sheets relate to other objections, the record contains exemplars of these documents, and Employer had opportunity to examine Committee Leaders about the instructions they received about them, and what they did with them, and also examined team member witnesses about their interactions and conversations with respect to these documents. Further, the Employer was able to examine the Petitioner's Vice President Kevin Kline regarding the creation, uses, and scope of the sign-in sheets generally.

In the absence of an offer of proof or record evidence that employees identified as Committee Leaders were engaged in specific objectionable conduct, let alone on the Union's behalf, I agree with the ruling that the Employer failed to show a need to identify all employees engaged in protected organizing activities as Committee Leaders. Importantly, the record

establishes that the subpoenaed sign-up sheets also contain the names of employees who had signed union authorization cards, and whose confidentiality interests were also at stake. Therefore, I agree with, and affirm, the Hearing Officer's determination that in these circumstances the employees' "paramount" confidentiality interests in the Section 7 activities reflected on the subpoenaed documents outweigh the Employer's purported need for those documents to identify Committee Leaders. *National Telephone Directory Corp.*, 319 NLRB 420, 421-22 (1995). See also, *Trump Ruffin Commercial, LLC,* 2016 WL 4036983 (July 28, 2016) (unpublished) (Board affirmed hearing officer's ruling revoking subpoena request for "any and all photographs or records" because the materials "could expose employee conduct protected by Section 7 of the Act that the Employer could not lawfully have photographed itself" and were "not probative of the Employer's specific objections to the election.") Accordingly, I affirm the Hearing Officer's rulings relating to the subpoena *duces tecum* (B-1-Z1SXBX).

III. THE OBJECTIONS

Employer's Objections 4, 5, 7, and 9-12

The Hearing Officer recommended overruling Objections 4, 5, 7, and 9-12 in their entirety. In the absence of any exceptions to any of those findings by ether party, I adopt *pro forma,* the Hearing Officer's recommendations to overrule these seven objections.

Employer's Objection 1

> [Petitioner] prepared "Election Day Sign Up Sheets" containing names and contact information taken from the list of eligible voters; distributed the Sheets to its agents; and instructed the agents to direct bargaining unit employees that they must "sign up" to vote on a specified date and time, and that they must vote "Yes" for the Union. This interfered with employees' rights to refrain from voting, was intimidating and coercive, destroyed the requirement that their vote be in-secret, voluntary, or anonymous, and demonstrated that the Union was monitoring when they voted.

As to this objection, the evidence established that during the critical period preceding the election, the Petitioner created and made use of "Election Day Sign Up" sheets. These contained a list of names and contact information of employees the Petitioner had determined were likely to vote for the union opposite a grid with the polling dates and times. And as the Hearing Officer's Report details, the evidence further shows that Committee Leaders did, at the Petitioner's instruction, ask team members on sheets assigned to them whether and when they intended to vote, and reported this information to union organizers to some extent. The record revealed no evidence of threats, promises, misrepresentations, or other coercive statements made by Committee Leaders in the course of these conversations with team members. The Hearing Officer found that these sign-up sheets amounted to non-coercive and lawful pre-election polling by Petitioner. The Hearing Officer found no evidence that team members were told that they "must sign up to vote" or that they "must vote 'yes'" in the election.

Petitioner's Exceptions

In its exceptions, the Petitioner contends that the Hearing Officer erred in finding that the Committee Leaders should be deemed special agents of the Petitioner for the purposes of soliciting the information as to whether and when team members intended to vote, or had voted. The Petitioner therefore takes further exception to being "deemed responsible for representations or statements made when its committee leaders asked team members on their respective sign-up sheets when they intended to vote or whether they had voted" under the standard of *Davlan Eng'g, Inc.*, 283 NRLB 803 (1987). (Report p. 13.) However, the Hearing Officer ultimately found no unlawful representations or statements by Committee Leaders engaged in soliciting employees about their intentions to vote.

The record and Board law cited by the Hearing Officer support his conclusion that Committee Leaders were special agents of the Petitioner for the purposes of polling team members regarding whether or when they intended to vote, and to report that information back to the Petitioner, using the sign-up sheets created by the Petitioner for that purpose. But as the Hearing Officer found, and I affirmed, committee leaders made no objectionable statements in the course of that conduct. Therefore, I do not need to rely on the Hearing Officer's statements regarding the *potential* scope of the Petitioner's vicarious liability for Committee Leaders' statements and representations, or determine whether *Davlan* presents the proper standard for such evaluation. *Id.* Nor do I need to determine whether any such statements were "in furtherance of the principal's interest and within the general scope of authority" under more general agency principles. *Pratt (Corrugated Logistics)*, 360 NLRB 304, 304 (2014) (cited by the Employer). Therefore, I affirm the Hearing Officer's findings and adopt his recommendation overruling Employer's Objection 1 without passing on the Hearing Officer's reliance on *Davlan.*

Employer's Exceptions

In its exceptions to the Hearing Officer's findings in connection with Objection 1 (Exceptions 1, 4-6, 8-12 and 30 [2]), the Employer asserts that the above activities amounted to impermissible list-keeping and monitoring of employees that had the tendency to create the coercive impression among voters that they were required to vote, and that the Petitioner was monitoring whether they did.

In Exceptions 4 and 5, the Employer challenges the Hearing Officer's limitation of a witness' testimony regarding alleged pre-petition misconduct including coercion in card solicitation. The Hearing Officer viewed this primarily as an untimely attempt to litigate the showing of interest and precluded extensive questioning on that issue as being beyond the scope of the objections and issues set for hearing. The Employer is correct that unlawful pre-petition misconduct may be considered in order to give "meaning and dimension" to ambiguous post-petition conduct, *Dresser Indus.*, 242 NLRB 74, 74 (1979), or where it is "sufficiently serious to have affected the results of the election." *Harborside Healthcare*, 343 NLRB 906 (2004). I have carefully reviewed the Hearing Officer's ruling as well as the Employer's offer of proof on the record and the witness testimony in question. I find the testimony and offer of proof regarding pre-petition card solicitation involved conduct that was not sufficiently related to

[2] The Employer's Exception 30 is a "catch-all" exception to the Hearing Officer's recommendation to overrule all of the Objections in their entirety.

objectionable conduct occurring within the critical period, to have had an ongoing impact on the election. Therefore, the Hearing Officer properly limited the scope of testimony to factual issues reasonably related to those objections set for hearing in the Notice of Hearing. *See Precision Products Corp*, 319 NLRB 640, 641 (1995) (hearing officer lacked authority to consider an objection that had been withdrawn and that was therefore not "reasonably encompassed within the scope of the objections"); *Iowa Lamb Corp.*, 275 NLRB 185 (1985) (hearing officer erred by considering statements and issues "wholly unrelated" to the issues set for hearing).

The Employer asserts in Exception 11 that the Hearing Officer erred in disregarding testimony by an employee that she was "told" to identify the date and time she was going to vote, and also "told" to text another team member to find out if they were going to vote. The Employer regards this as evidence that the Committee Leaders coerced employees, including this employee, into providing this information, and created the impression that the Petitioner was monitoring their voting. Contrary to the Employer's assertions, the Hearing Officer did not disregard this testimony. Rather, he discussed it at some length (Report p.14, fn. 8), taking into account the brevity of the encounter, the witness' demeanor in recounting it, and issues with translation. He found that, unaccompanied by any threats of reprisal, the witness' conclusory choice of the word "told," standing alone, was insufficient to support a finding that the Committee Leader obtained information from her through coercion. I find no basis to reverse the Hearing Officer on this point.

The balance of the Employer's Exceptions regarding the sign-up sheets, (Exceptions 6, 8-10, and 12) pertain to the Hearing Officer's findings that the Petitioner's use of the sign-up sheets in its "get out the vote" activities amounted to permissible pre-election polling by a labor organization. The Employer contends that gathering such information amounted to harassment of employees that interfered with employees' free choice in whether and when to vote. I will address issues relating to keeping track of who had voted below in connection with Objection 8. But as to the allegations of harassment and coercion in connection with the pre-election sign-up sheets, the record and Board law cited by the Hearing Officer support his conclusion that this conduct amounted to permissible pre-election polling of employees to determine the level of support the Petitioner enjoyed. *J.C. Penny Food Dept.*, 195 NLRB 921, 921 fn. 4 (1972) (union polling of eligible voters regarding how they would vote was not objectionable). In this connection, Board law supports his determination that the fact that responses were documented and reported to Petitioner to aid in its campaign does not render the polling coercive or unlawful. *Springfield Hosp.*, 281 NLRB 643, 692-693 (1986) (pro-union employees discussed the union with other employees and then marked charts maintained by the union reflecting extent of support). And, as the Hearing Officer accurately pointed out, even if Committee Leaders were "persistent," as described in the testimony of two employee witnesses, otherwise lawful solicitation does not become coercive just because "it annoys or disturbs the employees who are being solicited." *Ryder Truck Rental, Inc.*, 341 NLRB 761, 761 (2004). Thus, unaccompanied by any evidence of threats of reprisal, deception, or other circumstances rendering such questions coercive, I agree with the Hearing Officer that this objection is unsubstantiated.

Thus, having reviewed the record, the Employer's Exceptions and supporting Brief, and Petitioner's Brief in Opposition to Employer's Exceptions, I have decided to affirm the rulings

made by the Hearing Officer and to adopt his recommendation to overrule the Employer's Objection 1.

Employer's Objection 2

> [Petitioner's] agents escorted groups of eligible voters to the voting room, interfering with their right to choose to refrain from voting, was intimidating and coercive, destroyed the requirement that their vote be in-secret, voluntary, and anonymous, and demonstrated that the union was monitoring whether they voted.

Employer's Objection 3

> [Petitioner's] agents escorted voters to the voting room one-at-a-time, and departed only after the voter entered the voting room, interfering with their right to choose to refrain from voting, was intimidating and coercive, destroyed the requirement that their vote be in-secret, voluntary and anonymous, and demonstrated that the Union was monitoring whether they had voted.

As to these two related objections, the record evidence established that election observers saw a number of unidentified individuals (some wearing union buttons) arrive with one or more voters to the doors of the polling location. Some of these individuals indicated to the voters that this was where the polling area was, or directed them inside, and then left. Others remained at the location for a time, either entering to vote themselves, or waiting outside while the other team member voted. The two Committee Leaders who testified said that they walked to the polling location with another voter after being released by the chef at the same time to vote. One of the Committee Leaders also walked one voter to the polls after she was asked where the polling room was. The evidence did not reflect that any of these "escorts" engaged in any other conduct, such as holding signs, writing anything down, or talking near the polls. Further, the evidence did not reflect that the Petitioner instructed any team members or committee leaders to escort voters to the polling location. However, the evidence did reflect that on some occasions the individuals left when Board agents directed them to leave.

Employer's Exceptions

The Employer's Exception 13 challenges the Hearing Officer's findings crediting a Committee Leader's testimony that she walked an employee to the polls because she happened to be nearby and another team member asked her where the voting room was. I have reviewed the record and find no basis for overruling the Hearing Officer's credibility finding under the standard set forth in *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957).

The Employer's Exception 14 challenges the Hearing Officer's finding that the record did not establish that "escorts" were Union organizers or Committee Leaders. Having reviewed the record and the Hearing Officer's report, I find that he did not err in this regard. He accurately noted that none of the election observers or other witnesses could identify the alleged "escorts" they described in their testimony as Committee Leaders. And he found that two Committee Leaders each walked with one other team member when they went to vote, and that one of these

Committee Leaders also walked with a team member to the polling location when the team member asked where the polls were located. Ultimately, however, the Hearing Officer found that the Employer failed to prove that any of the above conduct was attributable to the Petitioner. The Hearing Officer found that Committee Leaders were not general agents of the Petitioner, and no party took exceptions to that finding, which I affirm. Further, there was no record evidence that the Petitioner instructed Committee Leaders, to escort voters to the polls on election day.

The Employer's Exceptions 15 and 16 challenges the Hearing Officer's overall evaluation of the effect of the challenged conduct and subsequent recommendation overruling of the objections. The record and Board law cited by the Hearing Officer supports his conclusion that, even assuming "escorts" were Committee Leaders, this conduct as described in the record would not rise to the level of objectionable election interference by a third-party absent any evidence of threats or other coercion indicating that employees were being escorted involuntarily or pressured to vote. I would note further that observers testified to an absence of any electioneering (sign-holding, distribution of literature, chanting, etc.) or list keeping (e.g. writing notes or holding lists) by these purported "escorts." [3]

Thus, having reviewed the record, the Employer's Exceptions and supporting Brief, and Petitioner's Brief in Opposition to Employer's Exceptions, I have decided to affirm the rulings made by the Hearing Officer, for the reasons set forth in his report, and to adopt his recommendation to overrule the Employer's Objections 2 and 3.

Employer's Objection 6

> [Petitioner's] agents patrolled the hall immediately adjacent to the voting groom in the "no electioneering" area and frequently looked inside, maintaining an intimidating physical presence around the voting room and demonstrating that the Union was monitoring who had voted in the election, was intimidating and coercive, destroyed the requirement that the vote be in-secret, voluntary, or anonymous, and demonstrated that the Union was monitoring whether they voted. This happened on multiple occasions; on at least one occasion a Board agent exited the voting room as the individual quickly departed the "no electioneering" area ahead of the Board agent; and on at least one other

[3] In its Brief in Support of Employer's Exceptions, the Employer apparently combined discussion of Objections 2 and 3, which relate to "escorting" of voters, with Objection 6, which relates to "patrolling" and electioneering, but only referred to Objection 6 in the heading. (Exceptions Br. 12-13). In connection with Objections 2 and 3, the Employer contends in the supporting brief that Board agents repeatedly directed purported escorts to leave the "no electioneering" area during the two days of voting, and that an adverse inference should be drawn by the fact that the Region did not call Board agents to testify in this regard (Exceptions Br. 13, fn. 8). Prior to the hearing, the Employer had requested that, pursuant to Section 102.118 of the Board's Rules and Regulations, three Board agents be allowed to testify about activities at or near the polling place. By letter dated November 28, 2017, an Associate to the General Counsel stated that Counsel for the Region may present Board agents to testify if the Hearing Officer deemed it necessary. Such witnesses were not called by Counsel for the Region, and no adverse inference may be drawn in these circumstances where the Board agents were not uniquely in possession of facts that would require their testimony. The case cited by the Employer, *Leeward Nursing Home*, 278 NLRB 1058, 1084 (1986), is distinguishable in that Counsel for the General Counsel in that unfair labor practice proceeding bore the burden and was uniquely in possession of facts that would arguably have supported the Region's case. Such circumstances are not present here.

occasion a Board agent confronted an individual and directed the individual to depart from the "no electioneering" area.

The Hearing Officer found that the record evidence of this alleged surveillance and intimidation amounted to evidence that some team members walked "to and fro" in the hallway outside of the voting room, "and in doing so, looked inside." However, he noted that "no single individual "maintained a continued presence in or near the polling area or engaged in any conduct other than looking inside the room as they walked by." Further, the Hearing Officer found that the record failed to establish the identity of alleged "patrollers," or their union sentiments, let alone prove that they were Committee Leaders or Union agents. Regardless, whether or not the conduct could be attributed to Committee Leaders, he found that the Employer had failed to prove either an "atmosphere of fear and reprisal" or unlawful Union surveillance of the polls, and recommended that the objection be overruled.

Employer's Exceptions

The Employer's Exception 17 challenges the Hearing Officer's factual finding that individuals "patrolling" the hallway were not Union organizers or Committee Leaders. This challenge is based on the presumption that if the Employer had been able to identify Committee Leaders through the production of Item 1 in the quashed subpoena *duces tecum,* it might have discovered that the patrolling employees were, in fact, Committee Leaders. Having affirmed the Hearing Officer's ruling as to that subpoena request for the reasons discussed above, I find no basis to overrule the Hearing Officer based on speculation as to what that subpoena may have uncovered. The record reflects no evidence identifying "patrollers" as individuals wearing any union paraphernalia, or otherwise tending to support the Employer's speculation that employees walking through the hallway adjacent to the polling were there as Committee Leaders, or on the Petitioner's behalf. In any event, the Hearing Officer found that even assuming *arguendo* that the patrollers were Committee Leaders, the conduct presented in the record would not have risen to the level of coercive and objectionable surveillance of the polling area, under either the standard for third-party conduct of the standard for party conduct.

The Employer's Exceptions 18 and 19 challenge the Hearing Officer's overall evaluation of the effect of the challenged conduct and subsequent recommendation overruling of the objection, urging the Regional Director to consider the "totality" of Petitioner's conduct rather than considering the objections in isolation. The cases cited by the Employer in its exceptions (ER Exceptions Br. 11-12) are inapposite in that they involve patrolling and surveillance attributable to a party. *Int'l Marketplace, Inc.*, 1997 WL 33316029 (Apr. 7, 1997). Here, the Hearing Officer found no evidence identifying the alleged "patrollers" as pro-union employees, let alone Committee Leaders or union organizers. Further, having reviewed the record and Board law, including the cases cited by the Hearing Officer, I find no basis to overrule the Hearing Officer's finding that the conduct described by witnesses (individuals walking by the voting room and looking inside) would not create a general atmosphere of fear and reprisal rendering a free election impossible or prove Petitioner's agents surveilled the polling, even if some of the individuals who "looked inside the room" were Committee Leaders.

Further, the cases cited by the Employer regarding "totality of circumstances" involved incidents that, although isolated, were serious and independently constituted objectionable conduct, the cumulative effect of which demanded setting aside election. *See NLRB v. Monark Boat Co.*, 713 F.2d 355, 360 (8th Cir. 1983) (union supporters alleged to have threatened physical harm, threatened and engaged in property damage, and poisoned someone's dog); *Mercy-Memorial. Hosp.*, 334 NLRB 100 (2001) (including instances of objectionable surveillance, threats of loss of benefits, and interrogation). Here, we are presented with several instances of unobjectionable conduct. And the cumulative effect of individually unobjectionable conduct is likewise unobjectionable.

Thus, having reviewed the record, the Employer's Exceptions and supporting Brief, and Petitioner's Brief in Opposition to Employer's Exceptions, I have decided to affirm the rulings made by the Hearing Officer, for the reasons set forth in his report, and to adopt his recommendation to overrule the Employer's Objection 6.

Employer's Objection 8

> [Petitioner's] agents maintained a list of who had voted, thereby interfering with employees' rights to refrain from voting, was intimidating and coercive, destroyed the requirement that their vote be in secret, voluntary, or anonymous, demonstrated the Union was monitoring whether they voted, and related an intimidating and coercive atmosphere.

The evidence showed that during the election, Committee Leaders did observe and make some verbal reports to Petitioner's organizers that certain team members had voted, or at least told Committee Leaders that they voted. The evidence further showed that Committee Leaders told the Petitioner what they had learned and that the Petitioner electronically recorded the information. Petitioner used the information to determine which of their likely supporters had not yet voted, and then directed "get out the vote" efforts toward those voters, including calling them to remind them to vote. The record does not establish that either Committee Leaders or other team members knew whether, how, or why the Petitioner was collecting, recording, or using the information. Moreover, there is no evidence that sign-up sheets were in circulation on the days of the election, or that any lists of who had voted were made or maintained by Committee Leaders, pro-union employees, or Union organizers anywhere near the polls. The Hearing Officer found, therefore, that the above conduct did not amount to any objectionable list keeping at or near the polls.

Employer's Exceptions

The Employer's Exceptions 1, 4, 5, 7-10, and 20-30 to the Hearing Officer's findings on Objection 8 primarily take issue with his factual finding that team members were unaware, and would not reasonably infer from the circumstances, that that Petitioner was keeping track of who was voting. I have reviewed the record and the cases cited by the Hearing Officer and find no basis to overturn his findings. The Hearing Officer correctly cited and relied upon the standard, established by longstanding Board law, that list-keeping is coercive and objectionable "when it can be shown or inferred from the circumstances that the employees knew that their names were

being recorded." *Days Inn Mgmt. Co.*, 299 NLRB 735, 737 (1992). The Employer has cited no case inconsistent with that standard. The record in this case contains no evidence that a single voter was actually aware of the electronic list being maintained by the Petitioner.

Further, no circumstances were present that would reasonably alert employees that their voting was being tracked. There was no list-making behavior in physical proximity to the polls, no voters were present when Committee Leaders reported information to the Petitioner, and no witnesses testified to seeing or hearing about lists or note-taking in connection with voting. No employees testified to hearing or seeing any indications of list-keeping by any party. Even the Committee Leaders who were reporting their observations of who had voted testified they did not know what the Petitioner was doing with the information and heard nothing of anyone keeping a list. (Tr. 290-91; 613.) Employer, in Exception 24, asserts that the Hearing Officer disregarded testimony from Committee Leaders that they knew the Petitioner was keeping a list of team members who had voted. However the cited testimony only indicates that they knew other Committee Leaders had sign-up sheets involved in the pre-election polling that was the subject of Objection 1, and which were not used on election day. (Tr. 295-97; 613-14.)

The Employer, in its Exceptions also asserts that the Hearing Officer erred in concluding that list-keeping is only objectionable near the polls (Exception 22), focusing "exclusively" on whether employees were aware of the "ministerial act" of list keeping (Exception 25), failing to consider whether "oral lists" were objectionable (Exception 26), and considering the "purported intent behind seeking information...rather than the objective impression it would create" (Exception 27). I find no such errors in the Hearing Officer's report, and instead find that he considered all overt conduct and circumstances from which employees could possibly infer that the Petitioner was maintaining a list of who had voted. Further, I note that the Employer has cited no Board case, and I am aware of none, where employees reasonably inferred list keeping away from the polls based exclusively on being asked by a co-worker if they had voted, which is all the evidence here establishes. C.f. *Medical Ctr. Of Beaver County, Inc.*, 716 F.3d 995 (3d Cir. 1983) (committee members stood by the employee entrance of hospital checking off names with a clipboard and making audible comments including "did you get that one, has she voted, do you know if we've gotten her" etc.) Finally, the Hearing Officer appropriately determined not to consider pre-petition conduct when he found that the questioning of employees about whether they had voted was not coercive or threatening (Exception 29). As stated above, the testimony and offer of proof concerning pre-petition conduct was not sufficiently related to alleged objectionable conduct occurring within the critical period. I further affirm the Hearing Officer's finding that based on the record such conduct by employees did not rise to the level of coercive or threatening conduct. Therefore, I find no basis to reverse the Hearing Officer's finding that the Employer failed to show that team members or committee leaders knew, or reasonably would infer from the circumstances, that the Petitioner was maintaining a list of who had voted.[4]

[4] I do not need to rely on the Hearing Officer's finding that employees reasonably believed the Petitioner was actually engaged in permissible electioneering instead of list keeping, as that finding is extraneous to the analysis (Exception 23).

Thus, having reviewed the record, the Employer's Exceptions and supporting Brief, and Petitioner's Brief in Opposition to Employer's Exceptions, I have decided to affirm the rulings made by the Hearing Officer, for the reasons set forth in his report, and to adopt his recommendation to overrule the Employer's Objection 8.

IV. CONCLUSION

Based on the above and having carefully reviewed the entire record, the Hearing Officer's report and recommendations, and the exceptions and arguments made by the Employer and Petitioner, I overrule the objections, and I shall certify the Petitioner as the representative of the appropriate bargaining unit.

V. CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for the **Local Joint Executive Board of Las Vegas, affiliated with UNITE HERE International Union**, and that it is the exclusive representative of all the employees in the following bargaining unit:

> **INCLUDED:** All regular full-time and regular part-time and regular on-call Banquet Bartenders, Banquet Porters, Banquet Servers, Bar/Beverage Porters, Bartenders, Bell Captains, Bell Persons, Beverage Servers, Bus Persons, Concession Workers, Catering Beverage Porters, Cooks, Cook's Helpers, Counter Attendants, Food Servers, Gourmet Hosts/Cashiers, Host/Cashiers, IM Porters, Kitchen Runners, Kitchen Workers, Lead Banquet Porters, Lead Counter Attendants, Lucky VIP Attendants, Lucky VIP Bartenders, Pantry Workers, Pantry Workers 11, Resort Guest Room Attendants, Resort Housepersons, Resort Steakhouse Cooks, Resort Suite Guest Room Attendants, Room Runners, Service Bartenders, Sprinters, Status Board Operators, Steakhouse Captains, Stove Persons, Sushi Cooks, Team Member Dining Room Attendants, Turndown Guest Room Attendants, Utility Porters, VIP Attendants, VIP Bartenders, VIP Lounge Bartenders, VIP Servers employed by the Employer at Green Valley Ranch Resort Spa Casino.
>
> **EXCLUDED:** All other employees, including all front-desk employees, valet parkers, gaming employees (dealers, slot attendants, cage cashiers), inspectresses, engineering and maintenance employees, office clerical employees, confidential employees, and all guards, managers and supervisors as defined by the Act.

VI. REQUEST FOR REVIEW

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by April 6, 2018. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

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

Dated: March 23, 2018

Paula Sawyer

Paula Sawyer, Regional Director
National Labor Relations Board
Region 27