UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TRADER JOE'S EAST INC.,	)	
Employer	)	
and	)	Case No. 09-RC-309216
TRADER JOE'S UNITED,	)	
Petitioner.	)	

TRADER JOE'S EAST INC.'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND CERTIFICATION OF REPRESENTATIVE

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Dated: February 7, 2024

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Pursuant to Section 102.67 of the National Labor Relations Board's ("NLRB's" or "Board's") Rules and Regulations, Employer Trader Joe's East Inc. ("Employer" or "Trader Joe's") respectfully requests review of the Regional Director's Decision on Objections and Certification of Representative, dated January 17, 2024.

I. SUMMARY OF ARGUMENT

The Regional Director erroneously overruled the Employer's objections and affirmed the Hearing Officer's flawed findings and recommendations in her May 26, 2023 Report on Objections. As demonstrated in the record compiled at the four-day hearing[1] and the Employer's Objections and the Employer's Objections and Exceptions to the Hearing Officer's Report, Trader Joe's United ("Union" or "Petitioner"), through its agents, representatives, organizers, and supporters, engaged in pervasive, coercive, and intimidating conduct that precluded the conduct of a free and fair election at the Employer's Louisville, Kentucky store ("Store") on January 25 and 26, 2023. For the reasons set forth below, the Board should review the Regional Director's Decision on Objections and direct that a rerun election be conducted.

The record evidence demonstrates that the Employer's objections should be sustained. Specifically, the record evidence demonstrates that the Petitioner's agents, representatives, organizers, and supporters intimidated, coerced and publicly threatened Crew[2] during the critical period and within 24-hours of the election in a manner that interfered with their free choice in the election, and used racial appeals to impact the Crew's vote in the election.

[1] The hearing was held on March 20, 21, 30, and 31, 2023.

[2] The Employer's non-supervisory employees the Union sought to represent are referred to as "Crew." The job classification "Merchants" is also included in the Union's petitioned-for unit but the Employer does not currently employ any Merchants at the Store.

Further, the Regional Director adopted the Hearing Officer's findings that were based on an incomplete assessment of the record evidence supporting the Employer's arguments. The Hearing Officer failed to address Petitioner representative and union counsel Seth Goldstein's ("Goldstein") failure to comply with a valid subpoena and the impact of such actions on his credibility. The Hearing Officer also failed to give the proper weight to video evidence that was the best evidence of Goldstein's objectionable conduct while interacting with Crew Rebecca "Bex" Verrill ("Verrill") in the Employer's wine shop on the morning of the election. Finally, the Regional Director concluded there was no connection between the evidence of racial appeals and the union campaign election but failed to address the Hearing Officer's ruling that prevented the Employer from further developing and presenting such evidence on the record.

The Employer has met its burden to establish both that the Union's conduct created an atmosphere of fear and coercion that interfered with the laboratory conditions necessary to conduct a free and fair election and created a general atmosphere of fear and reprisal that rendered a free election impossible. Accordingly, the Board should grant the Employer's request for review and sustain the Employer's objections.

II. SUMMARY OF THE RELEVANT FACTS

A. Background and Procedural History

On December 20, 2022, the Union filed a petition seeking to represent Crew and Merchants at the Store. Bd. Ex. O-1(b). A Board-supervised election was held on January 25 and 26, 2023, and the Union won the majority of the votes—48 votes were cast for the Union, 36 votes were cast for the Employer, and there were 7 challenged ballots. Additionally, 15 Crew chose not to vote. On February 1, 2023, the Employer timely filed six objections to the election, all of which the Regional Director set down for a hearing. Hearing Officer Tamilyn Moore conducted the four-day hearing in this case.

B. The Hearing Officer's Decision

The Hearing Officer issued her Report on May 26, 2023. Therein, Hearing Officer Moore purported to make credibility assessments and to consider the whole of the evidence in the record. Then, the Hearing Officer recommended overruling the Employer's objections in their entirety and that an appropriate certification issue. Report at 12. As demonstrated in Trader Joe's exceptions, however, the Hearing Officer made flawed credibility determinations, failed to apply the appropriate legal standards, and ignored relevant facts in the record. Trader Joe's timely filed exceptions to the Hearing Officer's Report on Objections with the Regional Director on June 12, 2023.

C. The Regional Director's Decision

The Regional Director issued their Decision on Objections and Certification of Representative on January 17, 2024, affirming the Hearing Officer's recommendations. The Regional Director wholly adopted the Hearing Officer's flawed credibility determinations and credited Petitioner witness and counsel Goldstein despite his failure to comply with a valid subpoena *ad testificandum*. RD Decision at 3–4. Relatedly, the Regional Director failed to assess whether the Hearing Officer's initial acceptance of the Employer's offer of proof after Goldstein failed to appear, despite being validly subpoenaed to testify on the first day of hearing, or the Hearing Officer's subsequent reversal of her decision to accept an offer of proof, was appropriate. RD Decision at 3. Further, the Regional Director failed to give the appropriate weight to the undisputed video evidence of Goldstein's misconduct. RD Decision at 4–5. The Regional Director similarly failed to give the appropriate weight to the evidence of Petitioner's agent Connor Hovey's ("Hovey") and Goldstein's interactions with Crew on paid time and while performing job duties within 24 hours before the election. RD Decision at 5. With regard to the Petitioner's and its agent's harassing and intimidating behavior on social media and text

messages, the Regional Director erred by concluding that such messages did not create a threatening atmosphere during the critical period leading up to the election. RD Decision 6–7. Finally, the Regional Director erred by failing to consider the relevance of the Petitioner's racial appeals utilized during the Union's campaign. RD Decision at 7–8.

III. ARGUMENT

A. Standard of Review.

According to the Board's Rules and Regulations – Part 102, a request for review may be granted upon one or more of the following grounds:

> (1) That a substantial question of law or policy is raised because of:
>
> (i) The absence of; or
>
> (ii) A departure from, officially reported Board precedent.
>
> (2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
>
> (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
>
> (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

See §102.67(d).

Board review is appropriate here based on the Regional Director's failure to apply applicable law concerning (a) Goldstein's failure to comply with a valid subpoena, (b) the Petitioner's and its agents' threatening text and social media messages toward Crew during the critical period, and (c) the Petitioner's use of racial appeals during the Union's campaign, and failure to properly consider (a) video evidence of Goldstein's objectionable conduct and (b) the impact of Goldstein's and Hovey's interactions with Crew during paid time and while performing job duties. Board review is further necessary based on the multiple erroneous

findings of the Regional Director on substantial factual issues, which prejudicially affect Trader Joe's rights.

B. The Regional Director Erred in Failing to Find That Goldstein's Failure to Comply with a Valid Subpoena Warranted Evidentiary Sanctions and Impacted His Credibility.

A. *Goldstein Intentionally Defies a Lawfully Issued Subpoena.*

The Regional Director erred in adopting the Hearing Officer's rejection of the Employer's argument that Union Attorney and statutory agent Seth Goldstein's intentional failure to comply with a validly served subpoena *ad testificandum* warranted evidentiary sanctions. The Employer properly served Goldstein on March 16. Goldstein neither communicated with the Employer regarding his availability to testify, nor filed a petition to revoke before the Hearing opened.

Hearing Officer Moore properly denied the Union's petition to revoke. Tr. 18:15-16. Without any legal basis for doing so, Goldstein contumaciously refused to appear. Tr. 54:21-22. Goldstein had no valid justification for his noncompliance, as the collective-bargaining negotiations he claimed he needed to attend in Minneapolis, Minnesota – the alleged scheduling conflict on which the Union repeatedly relied – were not scheduled to begin until the following day, March 21. Tr. 21:12-13.

In light of Goldstein's blatant disregard of the valid subpoena and the Hearing Officer's denial of the petition to revoke, the Employer's counsel requested that Hearing Officer Moore, as an appropriate sanction for that misconduct, draw an adverse inference based on Goldstein's failure to appear. Tr. 112:2-7. At that point, Hearing Officer Moore properly granted the Employer's request to make the following offer of proof:

> If Mr. Goldstein had been here to testify, he would have testified to the fact that on the morning of January 25th, 2023, which was the first day of the election, he entered the Trader Joe's wine shop at about 10:30 a.m. with Connor Hovey.

> And after walking through the wine store for about 45 seconds, Mr. Hovey and Mr. Goldstein began to exit the wine shop through the doors that are next to the registers. And as he exited the – or as he began to exit the wine shop, he turned to crew member Bex, Rebecca Verrill, raised his first above his head, and shouted at her, 'Solidarity.'
>
> Bex – well, Bex will testify about what happened. Bex responded that she's not with them, or words to that effect, to which Mr. Goldstein replied, 'Oh, you're one of them.'
>
> That same day, Mr. Goldstein and Mr. Hovey were in the grocery store before the election began, and they were walking through the store, talking with crew members. And in particular, they were in the grocery aisle talking to a group of between three and five crew members while they were on the clock and at work as part of the product team. Those conversations took place in that work area for more than a minute.

Tr. 114:22-115:20. The Hearing Officer accepted this offer of proof as a sanction for Goldstein's failure to appear: "I will allow the Employer to make an offer of proof on the record regarding what Mr. Goldstein's testimony would've been about." Tr. 113:16-19.

When the hearing reconvened on March 30, Hearing Officer Moore improperly reversed course and ruled the Employer's offer of proof invalid because "the party representative who made the offer was speaking as to what a witness of the opposing party would testify to." Tr. 282:25-283:4. Over the Employer's objection, Hearing Officer Moore proceeded to call Goldstein as a witness as he was present at the hearing as Union's counsel. Tr. 279:6-7, 286:22-24. The Employer maintained

> that given Mr. Goldstein's failure to appear in response to a valid subpoena that was not revoked at the time he was required to appear [and] entitled the Employer to make that offer of proof, and it should remain on the record, and then any other negative adverse inferences from Mr. Goldstein's failure to appear should be applied.

Tr. 284:19-25.

In addition to the arguments made on the record, in its post-hearing brief the Employer asserted that Hearing Officer Moore improperly ruled on the record that its offer of proof as to Goldstein's conduct the morning of the election was invalid. Er. Brief at 10. Further, the Employer argued that Goldstein's untimely appearance at the March 30 hearing date does not excuse his noncompliance because the time for compliance was on the first day of the hearing when Hearing Officer Moore denied the Union's petition to revoke and when Trader Joe's planned to cross-examine him. Er. Brief at 10-11.

B. *Goldstein's Deliberate Misconduct Warrants Evidentiary Sanctions.*

Goldstein simply chose to defy a lawful Board-issued subpoena, which was properly served and enforced by the Hearing Officer. The Regional Director, in refusing to issue sanctions, improperly focused only on the fact that Goldstein ultimately appeared to testify. RD Decision, at 3. The Regional Director's decision to simply excuse Goldstein's misconduct is both erroneous and prejudicial, as the Board has held that a valid subpoena "is not an invitation to comply at a mutually convenient time," meaning that Goldstein is not empowered to decide if and when to comply with a valid subpoena. *McAllister Towing & Transportation Co., Inc.,* 341 NLRB 394, 396 (2004).

The Board maintains the authority to impose appropriate sanctions to "maintain[] the integrity of the hearing process." *NLRB v. C. H. Sprague & Son, Co.,* 428 F.2d 938, 942 (1st Cir. 1970). In matters of subpoena noncompliance, the Board has recognized a variety of evidentiary sanctions, including "drawing adverse inferences against the noncomplying party." *McAllister Towing*, above, at 396; *see also Rogan Bros. Sanitation, Inc.,* 362 NLRB 547, 549 fn. 9 (2015) (rejecting affidavits of respondent's witnesses after witnesses failed to comply with General Counsel's subpoena for their testimony); *United Brotherhood of Carpenters and Joiners of*

America, 328 NLRB 788, 788 fn. 2 (1999) ("it is well established that the failure of a witness to appear on behalf of a party for whom he/she would be expected to give favorable testimony may appropriately give rise to an inference that the witness's testimony would be unfavorable."). Such sanctions can be "imposed even when . . . the [requesting party] did not seek enforcement of the subpoenas." *Rogan Bros. Sanitation,* above. While a party may explain their reasons for noncompliance through a petition to revoke, it is well-established that "a party who simply ignores a subpoena pending a ruling on a petition to revoke does so at his or her peril." *McAllister Towing, supra*, at 397.

Trader Joe's subpoena was validly issued and served. Hearing Officer Moore denied the Union's petition to revoke. At that point, Goldstein was obligated to appear and testify. Goldstein refused to comply with the then-enforced subpoena. As established in the foregoing cases, Goldstein's misconduct warranted an evidentiary sanction, which the Hearing Officer recognized. The Regional Director's decision to turn a blind eye to Goldstein's misconduct both contradicts board precedent and suggests that a witness's defiance of a subpoena is acceptable. Permitting a party to brazenly defy Board-ordered subpoenas, as Goldstein did here, undermines the Board's authority under Section 11 of the National Labor Relations Act and sets a dangerous precedent for future proceedings, signaling that a party can decide for itself whether to comply with such subpoenas. The Board well knows that "[a] subpoena, whether designed to secure testimony or the production of relevant documents, is not a suggestion to appear and provide requested evidence when mutually convenient; neither is it 'an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase.'" *Joel I. Keiler*, 316 NLRB 763 (1995), *quoting Hedison Mfg. Co. v. NLRB*, 643 F.2d 32, 34 (1st Cir. 1981).

Rather than endorse Goldstein's abuse of the Board's processes, the Regional Director should have accepted the Employer's offer of proof regarding what Goldstein's testimony would have been, adopted the requested adverse inference and refused to consider Goldstein's post facto testimony. The Hearing Officer's articulated basis for reversing course on her initial (and correct) ruling on this issue was incorrect and the Regional Director should not have relied on it. Specifically, the Hearing Officer opined, *sua sponte*, that the Employer's offer of proof – accepted the day before – was invalid because "the party representative who made the offer was speaking as to what a witness of the opposing party would testify to." Tr. 282:25-283:4. Trader Joe's contends that the Hearing Officer was wrong on that point. *See generally Shamrock Foods Co. v. NLRB*, 779 F. App'x 752, 755 (D.C. Cir. 2019) (upholding the ALJ's sanctions, as they were "proportionate to [the Party's] failure to comply with the General Counsel's subpoena.").

However, that opinion is beside the point because the Hearing Officer (and then, the Regional Director) should have found an adverse inference based on Goldstein's disregard of the enforced subpoena. Courts have found when, like here, a subpoena is ignored, the Board is justified in "inferring that if produced, the evidence would have been unfavorable to the employer. *Cf. United States v. Young*, 463 F.2d 934, 939 (D.C. Cir. 1972) ("if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it permits an inference that the testimony, if produced, would have been unfavorable")." *Cmty. Hosps. of Cent. Calif. v. NLRB*, 335 F.3d 1079, 1086 (D.C. Cir. 2003). The Regional Director's adoption of the Hearing Officer's reversal on permitting the Employer's offer of proof and her failure to adopt an adverse inference constitutes reversible error. Thus, the offer of proof should be upheld, the requested adverse inference

should be adopted and the Board should direct that Goldstein's belated hearing testimony be stricken.

C. *At a Minimum, Goldstein's Failure to Comply with the Subpoena Undermines His Credibility.*

Even if Goldstein's testimony were allowed into the record, both the Regional Director and the Hearing Officer failed to consider how Goldstein's initial noncompliance necessarily impacted his credibility. The Hearing Officer uncritically relied, in part, on Goldstein's untimely testimony and the Regional Director simply affirmed the findings based on that testimony, without discussing Trader Joe's arguments to the contrary.

The Board has long recognized the factors the factfinder should consider in assessing witness credibility: the context of the witness' testimony; the witness' demeanor; the weight of the respective evidence; established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group,* 3339 NLRB 303, 305 (2003); *Daikicki Sushi,* 335 NLRB 622, 623 (2001), citing *Shen Automotive Dealership Group,* 321 NLRB 586, 589 (1996). Goldstein's brazen defiance of a valid Board subpoena should have given the Hearing Officer, and the Regional Director, pause, as it demonstrated Goldstein's utter lack of respect for the Board's procedures and demonstrated his willingness to behave as he saw fit. Given that misconduct, coupled with his hostile and combative responses during the discussion of whether he would be called to testify and his subsequent inconsistent testimony, his testimony should have been accorded no weight. *See The Atelier Condominium and Cooper Square Realty, Inc*, 361 NLRB 966 (2014) (finding witness's "initial failure to appear as required by the subpoena ad testificandum issued to him demonstrates a lack of regard for Board processes which…detrimentally impacts upon his credibility."). The

Regional Director, therefore, erred in crediting Goldstein and the Board should overrule that determination.

C. The Regional Director Failed to Give Proper Weight to the Undisputed Video of Goldstein's Misconduct.

The Regional Director erred in disregarding undisputed video evidence of Goldstein threatening a Crew Member, Verrill, the morning of the election. The Board has repeatedly found that recordings can be "the best evidence of what was said." *See Leisure Knoll Ass'n, Inc.*, 327 NLRB 470, 472 (1999) (quoting *McAllister Bros.*, 278 NLRB 601, n.2 (1986)); *East Belden Corp.*, 239 NLRB 776, 782 (1978). Trader Joe's presented video evidence at the hearing showing Goldstein and Hovey enter the wine shop shortly after 10:30 a.m. on January 25, 2023. Er. Ex. 4. Shortly after they walk in, Verrill begins assisting a customer at the register. *Id*. Hovey and Goldstein are off-camera for about a minute and a half browsing through the wine shop and, on their way out the door, Goldstein is seen raising his hand in the direction of Verrill. *Id*. This video evidence corroborated Verrill's testimony that Goldstein raised his first and shouted "Solidarity" at her, before responding threateningly "Oh, you're one of those" when Verrill stated that she did not support the Union. Tr. 170:13-16. The Regional Director, however, summarily affirmed the Hearing Officer's conclusion that the video did not support Verrill's testimony, without any discussion of the video's purported shortcomings. The Regional Director's improperly failed to afford the proper weight to the video footage, a medium the Board recognizes can be "the best evidence" of what occurred, displaying Goldstein's misconduct.

The Regional Director then concluded that Goldstein's conduct did not constitute objectionable behavior because it did not occur during the polling period or near the polling location. This determination ignores the facts and established Board precedent. Goldstein

threatened and intimidated Verrill the morning of the election, a mere hour and thirty minutes before the polls opened. The Regional Director's rigid, narrow focus on the polling time aside, the facts demonstrate that Goldstein threatened Verrill immediately before the election began. Further, consistent with Board precedent, a reasonable employee would feel threatened by Goldstein's statements, which threatened potential negative impacts based on Verrill's union sentiments. *See PPG Industries, Inc.*, 350 NLRB 225, 226 (2007) (union agent's threat addressed to specific employee, objectionable, because employees would reasonably believe they would face similarly consequences if they crossed the picket line).

The Regional Director's disregard of video evidence in favor of Goldstein's dubious testimony—a witness who openly defied a Board-issued subpoena—and determination that the threats did not constitute objectionable conduct is contrary to established Board precedent and warrants reversal.

D. The Regional Director Erred by Failing to Conclude that Goldstein and Hovey's Interactions with the Crew Within 24-Hours of the Election Intimidated Voters' Choice in the Election.

The Regional Director erred by affirming the Hearing Officer's conclusion that the Petitioner, through Goldstein and Hovey, did not engage in objectionable conduct by meeting in groups with Crew while they were on paid time and performing job duties within the 24-hour period before the election. RD Decision at 5. In doing so, the Regional Director adopted the Hearing Officer's mischaracterization of the interactions between Crew and Hovey and Goldstein immediately prior to the election as permissible minor conversations. *Id*. However, this is contrary to the record evidence.

In concluding that these interactions do not constitute captive audience meetings as defined in *Peerless Plywood Co.*, 107 NLRB 427 (1959), the Regional Director ignores the Hearing Officer's misapplication of *Peerless Plywood* and ignores the circumstances in which

the interactions occurred. The *Peerless Plywood* rule states that "employers ***and unions alike*** will be prohibited from making election speeches on company time to massed assemblies or employees within 24 hours before the scheduling time for conducting and election." *Id*. at 429 (emphasis added). The Hearing Officer misapplied this rule by creating new factors under the rule—that conversations must have occurred away from an employee's workstation in order to be objectionable. Report at 8. The Regional Director adopted the Hearing Officer's analysis without clarifying this improper analysis.

Further, the Regional Director erred by declining to consider how the principles set forth in General Counsel Jennifer Abruzzo's GC Memorandum 22-04, *The Right to Refrain form Captive Audience and Other Mandatory Meetings* (April 7, 2022), are applicable to the instant matter. That the Employer was not making the speech in this case is irrelevant—what is important is the impact on the Crew and the fact that Crew would need to abandon their assigned work duties (the Crew that Hovey and Goldstein approached were on paid time and performing job duties) to avoid the speech directed at them, which is a choice that could result in discipline. This principle applies equally to the instant case and the Union's actions of addressing Crew. For these reasons, the Board should overturn the Regional Director's erroneous decision to accept the Hearing Officer's recommendation and sustain Objection No. 3(c).

E. The Regional Director Erred by Affirming the Hearing Officer's Finding That Petitioner Did Not Intimidate Eligible Voters Through Threatening and Intimidating Messages and Those Threats Were Not Disseminated.

The Regional Director affirmed the Hearing Officer's recommendation to overrule Objections 4 and 5 based on her conclusion that there was insufficient evidence that Union supporters' messages on social media and Hovey's text messages would reasonably be interpreted as a threat that would coerce employees in their election choice. RD Decision, at 6–7. This was an error.

In determining the seriousness of threats made by union supporters, the Board considers the following:

> the nature of the threats and the surrounding circumstances such as whether they encompass the entire bargaining unit, whether they were widely disseminated, whether the persons making the threats are capable of carrying them out, whether it is likely that employees acted in fear of the carrying out of the threats, and whether the threats were rejuvenated at or near the time of the election.

Crown Coach Corp., 284 NLRB 1010, 1010 (1987), *citing Westwood Horizons Hotel*, 270 NLRB 802 (1984). The Hearing Officer failed to analyze the Facebook comments from Crew and Union supporter Morgan Gillenwater ("Gillenwater") toward Crew Ruthie Knights ("Knights") under the appropriate third-party conduct standard delineated in *Westwood Horizons Hotel*. The Regional Director did little more—he acknowledged *Westwood Horizons Hotel*, but failed to even discuss, let alone apply, the requisite factors.

Properly applied, a majority of the factors under this third-party conduct standard weigh in favor of finding that Gillenwater's comments were objectionable. The comment was widely disseminated as a majority of Crew in the Store were members of the page and many Crew engaged in conversations on the page leading up to the election.[3] Gillenwater had the opportunity to carry out the threat resulting from her comment that it was dangerous for Knights to express her thoughts against unionization given that both worked at the Store and, at the time of the comment, both worked similar shifts at the Store. Tr. 233:3-17.

Further, the record testimony shows that it was likely that Crew would act in fear of Gillenwater carrying out threats and Crew did in fact change their behavior due to this fear.

[3] In her analysis of Objection No. 6, the Hearing Officer concluded that there was no evidence as to how many Crew in the voting unit had access to the Facebook group or saw Gillenwater's post. Report 11-12. The Hearing Officer ignored Knights' testimony that she discussed Gillenwater's Facebook comment with other Crew and that in fact the comment was seen by most of the Store and other Crew approached Ruthie nothing they had seen the exchange. Tr. 233-234.

Knights asked Mate Travis Todd to adjust her schedule from 2:00 pm to 10:00 pm to 11:00 am to 7:00 pm so that she would not be required to leave the Store at night at the same time as Gillenwater. Tr. 233:3-17. Crew also stopped parking in the back of the Store where there was less security and light and started using the buddy system when leaving the Store. Tr. 234:8-18. Finally, Gillenwater's comment was made at some point during the week leading up to the election. Tr. 236:14-23. Accordingly, the Regional Director erred, based on the actual application of the law, in affirming the Hearing Officer's recommendation to overrule Objection No. 4.

Finally, the Regional Director erred by upholding the Hearing Officer's conclusion that the text message sent from Hovey to Verrill would not reasonably coerce an employee in their election choice. RD Decision, at 7. Contrary to the Regional Director's conclusory determination that no reasonable person could construe the messages as threatening based on a recitation of isolated portions of the messages, Hovey threatened consequences as a result of Verrill's stated position on unionization—that she was solely responsible for putting pro-Union Crew's jobs in jeopardy. Er. Ex. 2. Again, the Regional Director did not discuss or analyze any of the *Westwood Horizons Hotel* factors. The message, however, was disseminated to multiple members of the Crew, as Verrill testified that she immediately shared the text message with Knights and another coworker at the Store. Tr. 191:6-11. For these reasons, the Board should overturn the Regional Director's erroneous decision to accept the Hearing Officer's recommendation and sustain Objection No. 5.

F. The Regional Director Erroneously Found that the Petitioner's Racial Appeals Did Not Amount to Objectionable Campaign Propaganda.

The Regional Director erred by adopting the Hearing Officer's recommendation that there was no connection between the Union's organizing campaign and the Petitioner's use of

racial appeals, specifically a known Union supporter's statement during the critical period that the Employer's management was "white, racist, Christian and republican" and graffiti in the store that the store's leadership was racist. RD Decision, at 7–8; Er. Ex. 3.

Primarily, the Regional Director concluded that "there is no basis in the record to conclude that the graffiti was related to the Petitioner's organizing campaign" and that "[t]here is no basis in the record to conclude that the statement had anything to do with the union organizing campaign." RD Decision, at 8. However, the Regional Director failed to address the Hearing Officer's ruling on the record that prevented the Employer from presenting evidence that would have further developed and shown the relevancy of the racist appeals testimony and graffiti. Tr. 477:5–11. Accordingly, testimony on this issue was hindered – had the Employer been able to fully explore this issue the record would reflect the relevance to the campaign and the extent to which this inflammatory messaging was disseminated. Tr. 488:15–16.

The Regional Director's failure to address the Hearing Officer's ruling that prevented the Employer from developing the record evidence on the Petitioner's racial appeals, the absence of which the Regional Director relied on to reach the conclusion here to overrule the objection, is an error that prejudicially effects the Employer. Accordingly, the Board should overturn the Regional Director's erroneous decision to accept the Hearing Officer's recommendation and sustain Objection No. 6.

IV. CONCLUSION

For the foregoing reasons, Trader Joe's respectfully requests that, contrary to the Regional Officer's decision, Trader Joe's objections should be sustained and the results of the January 25 & 26, 2023, election should be set aside and the election should be re-run in an atmosphere free from objectionable conduct.

Date: February 7, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Employer Trader Joe's East Inc.'s Requests for Review of the Regional Director's Decision on Objections and Certification of Representative was E-filed on February 7, 2024, and served via electronic mail on the same date, upon the following:

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