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July 11, 2012

**VIA E-FILING**

Mr. Lester A. Heltzer  
Executive Secretary  
National Labor Relations Board  
1099 14th St., N.W.  
Washington, D.C. 20570-0001

Re: *Metcalfe Foods—West, Inc. & UFCW Local 1473*  
Case No.: 30-RC-079306

Dear Board Members:

Pursuant to the National Labor Relations Board's Rules and Regulations section 102.69, this letter and the accompanying enclosures serve as Metcalfe Foods-West, Inc's exceptions to the report of Mr. Irving Gottschalk, Regional Director for Region 30, in which the Regional Director overruled Metcalfe's objections to conduct affecting the results of the June 1, 2012 election held in this matter.

The election arose from a Stipulated Election Agreement between the parties. United Food and Commercial Workers Local 1473 sought to organize certain employees who work in Metcalfe's meat department. The results of the election were five (5) votes to three (3) in favor of the Union.

After the June 1 election, Metcalfe discovered that the Union (or individuals whom it believes spoke on the Union's behalf) made false and/or misleading statements to employees in the proposed bargaining unit regarding the Union pension plan. Specifically, Metcalfe submitted evidence to Attorney Renee Medved, the investigator appointed by the Regional Director, showing that the Union told at least one Metcalfe employee that he was required to work in a union shop to collect his UFCW pension, and that he was required to work no more than five (5) or ten (10) hours per week to collect pension benefits. Neither of these statements is true. These threatening (and false) comments were intended and indeed did impact the results of this election.

Metcalfe filed timely objections with the Regional Director on June 8, 2012, specifically objecting that the Union's false and/or misleading statements about the conditions for receiving UFCW pension benefits affected the results of the election. The Regional Director overruled all of

National Labor Relations Board  
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Metcalfe's objections without ordering an investigation into the allegations underlying Metcalfe's objections. Metcalfe now files these exceptions to the Regional Director's overruling of Objections 1, 2, and 4. Metcalfe is not appealing the Regional Director's overruling of Objection 3.

Metcalfe's objections merit investigation for several reasons. First, the Board has previously held that deliberate, material misrepresentations of fact regarding pension plans are sufficient to set aside an election. Cleveland Trencher Co., 130 NLRB No. 59, 47 LRRM 1371 (1961). Second, if the Board requires additional information to determine whether the Union made deliberate, material misrepresentations to employees regarding its pension plan, the appropriate course of action is for the Board to investigate all the allegations underlying the objections, not to overrule the objections outright. The Board has recognized that there are "practical difficulties which may confront an objecting party in securing the voluntary cooperation of employee witnesses." Health Care & Retirement Corp., 313 NLRB No. 655, 146 LRRM 1218, 1218 (1994). By contrast, employees will likely be more willing to talk to a neutral Board agent than to their employer about the issues the Regional Director raised in his report, *i.e.*, timing of the Union's misrepresentations about the pension plan; the names of the individuals who made the representations; and those individuals' relationship to the Union.

Although the Regional Director concludes that Midland National Life Insurance Company, 263 NLRB 127 (1982), bars Metcalfe's objections, it is not certain that this is so. Unlike this case, by the time the Board issued its decision in Midland National Life, it had already conducted an investigation and a hearing. *Id.* at 127. Additionally, the Board held in Midland National Life that it would continue to intervene "in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is." *Id.* at 133. Regardless of the presence or absence of forged documents in this case, the concern regarding voters being "unable to recognize propaganda for what it is" is clearly present. The UFCW pension plan is—mildly stated—a complex document. The Board should not assume that an employee can readily distinguish fact from fiction when it comes to statements regarding that pension plan. Moreover, misrepresentations regarding an employee's livelihood during his retirement years "interfere[] with employee free choice." *Id.*

The June 1 election was decided by one vote. The Union should not be allowed to secure a narrow victory by misrepresenting the conditions of participating in its pension plan. For the reasons stated in this letter, and based on the evidence submitted with Metcalfe's original objections (enclosed), Metcalfe respectfully requests that the Board reject the Regional Director's Conclusions and Recommendations and order an investigation into Metcalfe's objections.

Thank you for your consideration of these matters.

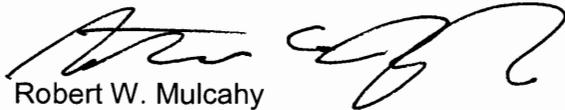
# MICHAEL BEST

& FRIEDRICH LLP

National Labor Relations Board  
July 11, 2012  
Page 3

Sincerely,

**MICHAEL BEST & FRIEDRICH LLP**



Robert W. Mulcahy

Steven A. Nigh

RWM:san

Attachments

cc: Mr. Tim Metcalfe (via e-mail w/atts.)  
Mark Sweet, Esq. (via e-mail w/atts. and via certified mail w/encls.)  
Mr. Grant Withers, UFCW (via e-mail w/atts. and via certified mail w/encls.)  
Mr. Irving Gottschalk, NLRB Regional Director, Region 30 (via e-mail w/atts. and via e-filing w/atts.)

# MICHAEL BEST

& FRIEDRICH LLP

National Labor Relations Board  
July 11, 2012  
Page 4

bcc: Charles B. Palmer, Esq. (via e-mail w/atts.)  
Steven A. Nigh, Esq. (via e-mail w/atts.)



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June 8, 2012

Irving E. Gottschalk  
Regional Director  
National Labor Relations Board  
Region 30  
310 West Wisconsin Avenue  
Suite 700  
Milwaukee, WI 53203-2211

Re: Metcalfe Foods-West, Inc. v. UFCW, Local 1473, AFL-CIO  
Case No. 30-RC-079306

Dear Mr. Gottschalk:

I have enclosed for filing an original and five (5) copies of the Employer, Metcalfe Foods-West, Inc.'s, Objections to Conduct Affecting the Results of the Election in the above-referenced case. I am serving a copy of the same on Grant Withers, Secretary/Treasurer Local 1473, by copy of this letter.

Sincerely,

**MICHAEL BEST & FRIEDRICH LLP**

A handwritten signature in cursive script that reads "Robert W. Mulcahy".

Robert W. Mulcahy

RWM:gmm

Enclosure

cc: Charles B. Palmer, Esq. (via e-mail)  
Steven A. Nigh, Esq. (via e-mail)  
Mr. Grant Withers (via U.S. Mail)

065474-0028\11446674.1

NATIONAL LABOR RELATIONS BOARD  
REGION 30

Metcalfe Foods-West, Inc. ("Metcalfe West"),  Employer,  vs.  United Food & Commercial Workers, Local 1473, AFL-CIO,  Union.	Case No. 30-RC-079306
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**METCALFE WEST'S OBJECTIONS TO CONDUCT AFFECTING THE RESULTS OF  
THE ELECTION**

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The Employer, Metcalfe West, objects to conduct affecting the results of the election held on June 1, 2012 by the Union ("Local 1473"), its officers, agents, employees, or affiliates.

Metcalfe West's objections are as follows:

1. A representative of Local 1473 or of the Trustees of the United Food and Commercial Workers Unions and Employers Pension Fund ("the Fund") falsely told Metcalfe West employees (Mr. David Taylor and possibly Mr. Daniel Palzkill) that they were required to work in a unionized workplace in order to collect their pension from the Fund. To the contrary, Mr. Taylor and Mr. Palzkill could work at Metcalfe West in the absence of a collective bargaining agreement covering that location and still refrain from engaging in "Prohibited Employment" that would otherwise bar them from collecting pension benefits from the Fund.
2. Metcalfe West also objects that a representative from either Local 1473 or the Fund falsely told Mr. Taylor and possibly Mr. Palzkill that they must work no more than five (5) or ten (10) hours per week to collect pension benefits. To the contrary, regardless of whether Metcalfe West was covered by a collective bargaining agreement, Mr. Taylor and Mr. Palzkill could work up to forty (40) hours in a month and still refrain from engaging in "Prohibited Employment" that would otherwise bar them from collecting pension benefits from the Fund.
3. Metcalfe West also objects that on the day of the election, June 1, 2012, and while the balloting was being conducted, the union observer was engaged in conversations and contact with eligible voters.

4. Any and all other objectionable acts by Local 1473, its officers, agents, employees, or affiliates that has not yet been discovered and evidence of which is currently unavailable to Metcalfe West.

Based upon the foregoing objectionable conduct, the Employer believes that the Union's threats and misconduct herein affected the results of the election held on June 1, 2012. Metcalfe Foods-West, Inc. respectfully requests that the Board set aside the results of the June 1, 2012 election; issue any and all orders to correct the objectionable conduct described above; and rerun the election.

Dated this 8th day of June, 2012.

**MICHAEL BEST & FRIEDRICH LLP**

By: 

Robert W. Mulcahy, SBN 1017022  
Charles B. Palmer, SBN 1001322  
Steven A. Nigh, SBN 1081346  
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Attorneys for Employer  
Metcalfe Foods-West, Inc.



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June 15, 2012

VIA E-MAIL [renee.medved@nrlrb.gov](mailto:renee.medved@nrlrb.gov)

Renee Medved, Esq.  
National Labor Relations Board  
310 West Wisconsin Avenue, Suite #700  
Milwaukee, WI 53203-2211

Re: Objections to UFCW Conduct  
Metcalf Foods-West, Inc. Election June 1, 2012  
Case No. 30-RC-079306

Dear Ms. Medved:

#### Background

On June 1, 2012, the NLRB conducted an election at the Metcalfe West location in Madison. The NLRB agent was Renee Medved. The Company observer was Annie Zutter and the Union Observer was Thomas Cluney. The results of the election were 5 to 3 with no challenged ballots.

At the post-election vote count, the parties were informed by the Board Agent of the incident involving Objection 3 regarding employee Daniel Palzkill.

By way of background, the Metcalfe West Store opened on January 11, 2012. It had previously been a Cub Food Store represented by the UFCW Local 1473. Two of the former Cub Meat Cutters were hired by Metcalfe West (Dave Taylor and Mr. Palzkill). As we understand it, both of these employees have vested under the UFCW Pension Plan.

#### *Facts Relating to Objections 1 and 2*

Metcalf West's Objections 1 and 2 relate to statements made to Mr. Taylor and Mr. Palzkill regarding their ability to receive pension benefits from the UFCW Pension Plan. In full, those objections state:

1. A representative of Local 1473 or of the Trustees of the United Food and Commercial Workers Unions and Employers Pension Fund ("the Fund") falsely told Metcalfe West employees (Mr. David Taylor and possibly Mr. Daniel Palzkill) that they were required to work in a unionized workplace in order to collect their pension from the Fund. To the contrary, Mr. Taylor and Mr. Palzkill

Renee Medved, Esq.

June 15, 2012

Page 2

could work at Metcalfe West in the absence of a collective bargaining agreement covering that location and still refrain from engaging in "Prohibited Employment" that would otherwise bar them from collecting pension benefits from the Fund.

2. Metcalfe West also objects that a representative from either Local 1473 or the Fund falsely told Mr. Taylor and possibly Mr. Palzkill that they must work no more than five (5) or ten (10) hours per week to collect pension benefits. To the contrary, regardless of whether Metcalfe West was covered by a collective bargaining agreement, Mr. Taylor and Mr. Palzkill could work up to forty (40) hours in a month and still refrain from engaging in "Prohibited Employment" that would otherwise bar them from collecting pension benefits from the Fund.

The UFCW Plan provides that pension payments will be suspended for any month in which the participant engages in "Prohibited Employment." But working in a non-union shop is not always Prohibited Employment. If the employee works less than forty (40) hours per month "for an employer which does not have a collective bargaining agreement with a Union[.]" then that employment is not Prohibited Employment and the employee remains eligible to collect pension benefits from the Plan. (See Attachment A, Am. 15.)

Additionally, the Plan allows employees to work up to a certain hour threshold and still refrain from engaging in Prohibited Employment. For example, if an employee's prior employer closed its facility, an employee can work up to eighty (80) hours per month at a union shop and not engage in Prohibited Employment. (See Attachment A, Am. 15.)

### *Facts Relating to Objection 3*

Objection 3 states in full:

3. Metcalfe West also objects that on the day of the election, June 1, 2012, and while the balloting was being conducted, the union observer was engaged in conversations and contact with eligible voters.

The facts underlying this objection relate to the conduct of Union observer Thomas Cluney and Mr. Palzkill. Mr. Palzkill brought a camera into the voting area. When he entered, he told Mr. Cluney that he had some fishing pictures to show him. At that time, the NLRB agent told Mr. Palzkill that Mr. Cluney was not allowed to speak with him or to look at any pictures. The NLRB agent also instructed Mr. Palzkill to put the camera away. Mr. Palzkill persisted in trying to get Mr. Cluney to look at his pictures on his camera. The NLRB agent then instructed Mr. Palzkill to put the camera away a second time and he finally did.

# MICHAEL BEST

& FRIEDRICH LLP

Renee Medved, Esq.

June 15, 2012

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Although Mr. Cluney made no statements to Mr. Palzkill during this exchange, it appeared to Ms. Zutter that Mr. Cluney was able to see the pictures on Mr. Palzkill's camera from where he was seated.

## Statement of Position

### *Objections 1 and 2*

The Board has held that "where a party deliberately makes material misrepresentations of fact in circumstances in which employees are unable to evaluate the assertions for truth or falsity," the Board will set aside an election. Cleveland Trencher Co., 130 NLRB No. 59, 47 LRRM 1371 (1961); Calidyne Co., 117 NLRB No. 145, 39 LRRM 1364 (1957). This is because when employees cannot evaluate the truthfulness of campaign propaganda, and the opposing party is unable to correct false propaganda, the election "does not reflect the free desires of the employees." Calidyne Co., 39 LRRM at 1365.

The Board has also recognized that misrepresentations regarding fringe benefits, such as employee pension plans, are "like basic wage rates, [in that they] are matters of vital concern to employees voting in the election." Cleveland Trencher Co., 47 LRRM at 1371-72. In fact, the Board and the Courts of Appeal have set aside elections based on a union's misrepresentation of fringe benefits. See id. (setting aside election because of misrepresentations regarding cost-of-living increases, and health and accident insurance benefits); see also NLRB v. Snokist Growers, Inc., 91 LRRM 3055, 3055-56 (9th Cir. 1976) (setting aside election involving alleged misrepresentation regarding pension benefits because "the most controversial issue in the propaganda battle preceding the election was the extent of pension coverage"); NLRB v. Houston Chronicle Publishing Co., 49 LRRM 2782 (5th Cir. 1962) (union misrepresentations regarding pension benefits affected election results).

In this case, Metcalfe has reason to believe that the union or a union representative from the UFCW Pension Plan gave false or misleading information to Mr. Taylor and possibly Mr. Palzkill regarding the availability of pension benefits. Mr. Taylor told Jeff Greenheck, Metcalfe West's Operations Manager, that he spoke to a woman by phone at the Union office in Milwaukee, and that he was told he was required to work in a union shop to collect his pension benefits and that he could not work more than five (5) hours per week and still collect benefits. Unquestionably, any misrepresentations regarding pension benefits would be material to the outcome of the election. Snokist Growers, 91 LRRM at 3055-56. And the information Mr. Taylor says he was told by the UFCW Pension office in Milwaukee is untrue: there are scenarios in which an employee can collect benefits while working for a non-unionized employer, and there are also scenarios in which an employee can work up to eighty (80) hours per month (or twenty (20)

# MICHAEL BEST

& FRIEDRICH LLP

Renee Medved, Esq.  
June 15, 2012  
Page 4

hours per week) and still collect benefits. (See Attachment A, Am. 15.) Blanket statements to the contrary, such as those alleged here, are false or misleading.<sup>1</sup>

Mr. Palzkill was also involved in conversations regarding the Plan. Mr. Palzkill told Jeff Nolting, Metcalfe West's Store Director, that he spoke with a retired union member, John Anderson, who was formerly a Journeyman at Cub Foods. Mr. Palzkill's understanding of the Plan from Mr. Anderson is that employees would not be able to work more than twenty (20) hours per month and collect benefits under the Plan, and they would not be permitted to collect benefits at all while working for a non-union shop.

In sum, Mr. Greenheck's conversation with Mr. Taylor and Mr. Nolting's conversation with Mr. Palzkill show that around the time of the election, there was false or misleading information going around regarding the availability of union pension benefits. And both employees' comments suggest that the union was involved in disseminating this information. Given that this election was decided by one vote, it is clear that further investigation is warranted. Snokist Growers, 91 LRRM at 3056 (ordering new election in part because, "A shift of three votes would have changed the result.") And if the employees confirm that they were given false or misleading information about the availability of pension benefits under the Plan, this is sufficient to set aside the election. As the court in Houston Chronicle noted:

Purportedly authoritative and truthful assertions concerning wages and pension of the character of those made in this case are not mere prattle; they are the stuff of life for Unions and members, the selfsame subjects concerning which men organize and elect their representatives to bargain. We repeat for emphasis: An election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammelled choice for or against a bargaining representative.

Houston Chronicle, 49 LRRM at 2787.

The threat to cut off an employee's eligibility for his UFCW pension is a very serious threat. There is perhaps nothing scarier to an employee than the prospect of losing a benefit he has rightfully earned over the course of his career.

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<sup>1</sup> We acknowledge that Mr. Greenheck does not have personal knowledge of the conversation(s) between Mr. Taylor and whomever he spoke with at the Union's Milwaukee office. The Board, however, has found that affidavits based on hearsay are nevertheless sufficient to establish a prima facie case that warrants investigation. Builders Insulation, Inc., 338 NLRB 793, 171 LRRM 1489 (2003); Health Care & Retirement Corp., 313 NLRB 655, 146 LRRM 1218 (1994); Holladay Corp., 266 NLRB No. 113, 113 LRRM 1001 (1983). The Board allows this latitude because of "the practical difficulties which may confront an objecting party in securing the voluntary cooperation of employee witnesses . . . ." Health Care & Retirement Corp., 146 LRRM at 1218.

# MICHAEL BEST

& FRIEDRICH LLP

Renee Medved, Esq.  
June 15, 2012  
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## *Objection 3*

The NLRA mandates that employees have the freedom to choose to join—or refuse to join—a union. To implement this mandate, the Board requires that representation elections be conducted in “laboratory conditions” to ensure that the election process is fair to all involved. This “laboratory conditions” requirement is well-settled in Board law. Chicago Tribune, 326 NLRB No. 1057 (1998); Kalin Constr. Co., 321 NLRB No. 649 (1996); General Shoe Corp., 77 NLRB No. 18 (1948).

Mr. Palzkill’s attempt to cozy up to Mr. Cluney at the Metcalfe West election violated the “laboratory conditions.” The election is not the place to swap fishing pictures or engage in any kind of social activity with a Union observer. If the circumstances surrounding the election raise “substantial doubt as to whether the results of the election reflect the employee’s free choice[.]” then the election may be set aside, even in the absence of an unfair labor practice. General Shoe Corp.

## Conclusion

Metcalfe West’s employees had the right to participate in an election in which they could freely choose whether or not to vote for a bargaining representative. If the employees felt compelled to vote for the union just to preserve their pension benefits, the election clearly was not a free one for them. Therefore, Metcalfe West requests that the Board set aside the June 1, 2012 election.

Very truly yours,

**MICHAEL BEST & FRIEDRICH LLP**

/s/ Robert W. Mulcahy

Robert W. Mulcahy

RWM:ram

Attachments

cc: Mr. Tim Metcalfe (via e-mail w/atts.)  
Mr. Jeff Nolting (via e-mail w/atts.)  
Steven A. Nigh, Esq.

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 30

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Metcalfe Foods-West, Inc.,

Employer,

Case No. 30-RC-079306

vs.

United Food & Commercial Workers Local 1473,  
AFL-CIO,

Union.

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**AFFIDAVIT OF JEFF NOLTING**

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STATE OF WISCONSIN    )  
                                  ) ss  
COUNTY OF DANE        )

I, Jeff Nolting, being first duly sworn on oath, deposes and states as follows:

1. I am the Store Director for Metcalfe Foods-West, Inc. ("Metcalfe West"). I make this affidavit in support of Metcalfe West's Objections to Conduct Affecting the Results of the Election.
2. The National Labor Relations Board ("the Board" or "NLRB") conducted an election in the above-referenced matter at Metcalfe West on June 1, 2012. The outcome of the election was five (5) votes to three (3) in favor of the Union.
3. On or about June 13, 2012, I spoke privately with employee Daniel Palzkill. Mr. Palzkill read, understood, and signed a Johnnie's Poultry statement prior to our conversation. I have attached that statement as **Exhibit 1**.

4. Mr. Palzkill informed me that he had spoken to Mr. John Anderson, a retired Union member who had previously worked as a Journeyman for Cub Foods, the grocery business that Metcalfe West purchased. Mr. Palzkill told me that based on his conversation with Mr. Anderson, his understanding of the Union's pension plan was that employees may not work more than twenty (20) hours per month and collect pension benefits at the same time, and that employees may not work at a non-union shop at all and collect pension benefits at the same time.

5. Mr. Palzkill also told me about the pension benefits that another employee, Mr. David Taylor, would collect under the Union pension plan. Based on this, I believe that Mr. Taylor and Mr. Palzkill may have spoken previously about the Union pension plan.

Further Affiant Sayeth Not.

Dated this 15 day of June, 2012.



Subscribed and sworn to before me  
this 15<sup>th</sup> day of June, 2012.



Notary Public, State of Wisconsin

My Commission expires: 7/19/15

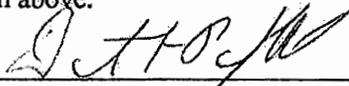


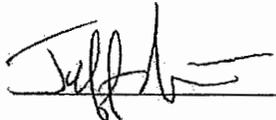
My name is Jeff Nolting. I am a representative of Metcalfe, Inc. As you may know, the National Labor Relations Board ("NLRB") on June 1, 2012 conducted an election of Metcalfe's West Town employees Meat Department.

I am here today to investigate and gather facts which we may submit to the NLRB regarding the NLRB election. Therefore, I would like to ask you a few questions and have you answer them. Before going any further, I want to advise you of some rights you have under the law.

First, the sole purpose of our conversation is to collect information which might be helpful in presenting the facts to the NLRB. Second, you are under no obligation, in any way, to answer any of my questions. Your participation in this conversation is totally voluntary on your part. You may leave now or you may leave at any time during the interview. Third, no reprisals will or can be taken against you if you choose not to talk to me. In addition, nothing you say or do will in any way affect your employment with Metcalfe.

I have read and understand the foregoing statement of my rights under the law and wish to continue the interview under the terms set forth above.

  
\_\_\_\_\_  
Date: 6-13-12

Witnessed by:   
\_\_\_\_\_

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 30

---

Metcalf Foods-West, Inc.,

Employer,

Case No. 30-RC-079306

vs.

United Food & Commercial Workers Local 1473,  
AFL-CIO,

Union.

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**AFFIDAVIT OF JEFF GREENHECK**

---

STATE OF WISCONSIN    )  
  ) ss  
COUNTY OF DANE        )

I, Jeff Greenheck, being first duly sworn on oath, deposes and states as follows:

1. I am the Operations Manager for Metcalfe Foods-West, Inc. ("Metcalf West"). I make this affidavit in support of Metcalfe West's Objections to Conduct Affecting the Results of the Election.

2. The National Labor Relations Board ("the Board" or "NLRB") conducted an election in the above-referenced matter at Metcalfe West on June 1, 2012. The outcome of the election was five (5) votes to three (3) in favor of the Union.

3. On or about June 6, 2012, I spoke privately with employee David Taylor. Mr. Taylor read, understood, and signed a Johnnie's Poultry statement prior to our conversation. I have attached that statement as **Exhibit 1**.

4. Mr. Taylor told me that he called the Union's Milwaukee office regarding his pension benefits under the Union's pension plan. He did not recall specifically with whom he spoke. Mr. Taylor told me that someone at the Union's Milwaukee office told him over the phone that he would have to work in a union shop in order to collect his pension and still work, and that he could work no more than five (5) hours per week and collect benefits at the same time. Mr. Taylor told me that he wanted to continue working full time.

5. Mr. Taylor also told me that he did not want to "rock the boat" and that he "just wanted to come to work."

Further Affiant Sayeth Not.

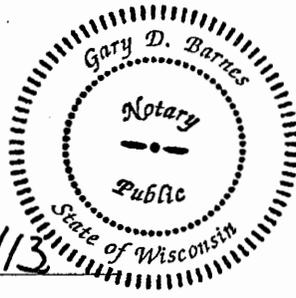
Dated this 15<sup>th</sup> day of JUNE, 2012.



Subscribed and sworn to before me  
this 15 day of June, 2012.

Notary Public, State of Wisconsin

My Commission expires: 2/17/13

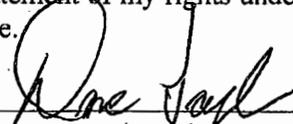


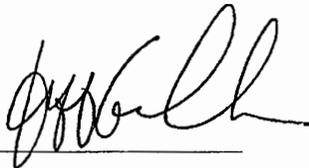
My name is Jeff Greenheck. I am a representative of Metcalfe, Inc. As you may know, the National Labor Relations Board ("NLRB") on June 1, 2012 conducted an election of our West Town employees Meat Department.

I am here today to investigate and gather facts which we may submit to the NLRB regarding the NLRB election. Therefore, I would like to ask you a few questions and have you answer them. Before going any further, I want to advise you of some rights you have under the law.

First, the sole purpose of our conversation is to collect information which might be helpful in presenting the facts to the NLRB. Second, you are under no obligation, in any way, to answer any of my questions. Your participation in this conversation is totally voluntary on your part. You may leave now or you may leave at any time during the interview. Third, no reprisals will or can be taken against you if you choose not to talk to me. In addition, nothing you say or do will in any way affect your employment with Metcalfe.

I have read and understand the foregoing statement of my rights under the law and wish to continue the interview under the terms set forth above.

  
\_\_\_\_\_  
Date: 6/6/12

Witnessed by:   
\_\_\_\_\_

065474-0025\11436217.1

UNITED FOOD AND COMMERCIAL  
WORKERS UNIONS AND EMPLOYERS  
PENSION PLAN

As Amended and Restated Effective November 1, 2002  
Including Amendments Adopted December 3, 2002  
Including Amendments Adopted May 11, 2004  
Including Amendments Adopted August 20, 2004

ATTACHMENT A

UNITED FOOD AND COMMERCIAL  
WORKERS UNIONS AND EMPLOYERS  
PENSION PLAN

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## ARTICLE V

### Eligibility Requirements for Pension Benefits

5.1 General Condition Precedent to Eligibility for a Pension. In addition to the eligibility requirements for a pension benefit set forth elsewhere herein, no Employee shall be entitled to any pension benefit under this Plan unless at least one contribution has been made to the Plan on his behalf by an Employer.

5.2 Normal Pension. An Employee shall be eligible for a Normal Pension if:

- (a) his Termination Date is on or after his Normal Retirement Date;
- (b) he is vested in accordance with the provisions of section 4.1; and
- (c) he has filed an application for a Normal Pension.

5.3 Early Pension. An Employee shall be eligible for an Early Pension if:

- (a) his Termination Date is on or after his 55th birthday;
- (b) he is vested in accordance with the provisions of section 4.1; and
- (c) he has filed an application for an Early Pension.

5.4 Vested Pension. An Employee shall be eligible for a Vested Pension if:

- (a) his Termination Date is before his 55th birthday;
- (b) he is vested in accordance with the provisions of section 4.1; and
- (c) he has filed an application for a Vested Pension.

In the event a Class M Participant who is entitled to a Vested Pension on account of his Employer having gone out-of-business earns additional Benefit Credit subsequent to the date his Employer went out-of-business, the Class M Participant will not be credited with such additional Benefit Credit unless he satisfies the requirements set forth in section 4.1(a).

5.5 Disability Pension.

(a) Eligibility. Subject to the provisions of sections 5.5(c) and (d), a Class C Participant shall be eligible for a Disability Pension if:

(i) he has 10 or more years of Vesting Service and has had a contribution made to the Plan for work performed in Covered Employment after December 31, 1998 or he has 15 or more years of Vesting Service;

(ii) he has a Disability which existed as of his last day worked for an Employer in Covered Employment or in Noncovered Employment which immediately followed Covered Employment with the same Employer and with no intervening quit, retirement or discharge; and

(iii) he has filed an application for a Disability Pension.

Subject to the provisions of sections 5.5(c) and (d), a Class M Participant shall be eligible for a Disability Pension if:

(iv) he has ten or more years of Vesting Service;

(v) he has a Disability which existed as of his last day worked for an Employer in Covered Employment or in Noncovered Employment with an Employer if the Noncovered Employment immediately followed Covered Employment with any Employer; and

(vi) he has filed an application for a Disability Pension.

(b) Proof of Disability. The Trustees shall require as proof of Disability, a medical examination by a doctor or clinic appointed by the Trustees or any other evidence satisfactory to the Trustees. The Trustees may, at their sole discretion, accept as evidence of Disability of a Class C Participant

whose Disability commenced after April 30, 1999 or a Class M Participant, a verification of the Participant's eligibility for a disability award from the Social Security Administration.

(c) Excluded Causes for Disability. Notwithstanding any other provision of this section, no Participant shall qualify for a pension on account of Disability if the Trustees determine that his Disability results from:

- (i) chronic alcoholism;
- (ii) addiction to narcotics;
- (iii) an injury suffered while engaged in a criminal act or enterprise;
- (iv) service in the armed forces of the United States which entitled the Participant to a Veteran's Disability Pension; or
- (v) an intentionally self-inflicted injury, provided, with regard to a Class M Participant, such injury must have been inflicted after April 30, 1999.

(d) Cessation of Disability. Disability shall be considered to have ended and payment of a Disability Pension shall cease if, prior to his Normal Retirement Date, an Employee receiving a Disability Pension:

- (i) earns more than \$750 per month in any occupation or employment for remuneration or profit (a Class M Participant must earn more than \$350 per month prior to May 1, 1999), except such employment as the Trustees consider primarily rehabilitative or not incompatible with a finding of Disability;
- (ii) sufficiently recovers, in the opinion of the Trustees based on a medical examination by a doctor or clinic appointed by the Trustees, to be able to engage in full-time Employment (or with regard to a Class M Participant, any Employment prior to May 1, 1999) and refuses an offer of Employment by an Employer; or
- (iii) refuses to undergo any medical examination requested by the Trustees, provided that a medical examination shall not be required more frequently than twice in any calendar year.

(e) Termination of Employment Required. In no event will an Employee be eligible to receive a Disability Pension prior to his Termination Date.

(f) Disability Pensioners Entitlement to Normal, Early or Vested Pensions. If payment of a Disability Pension ceases in accordance with section 5.5(d) hereof, a former Participant who had been receiving a pension benefit on account of Disability may then be eligible to receive a Normal, Early or Vested Pension and the amount of his pension benefit shall not be reduced on account of his having received a Disability Pension.

5.6 Application for Pension.

(a) General. Pension benefit payments shall commence as of the date specified in a written application filed by the Participant with the Trustees, or if later, as of the first day of the month following the filing of an application for commencement of pension benefit payments with the Trustees, provided, however, that benefits payable in accordance with section 7.4 shall be payable in accordance with the procedures adopted by the Trustees. A Participant who fails to file an application for benefits shall be deemed lost and such Participant's benefits shall be forfeited except retroactive payments may be made in accordance with the immediately following section (b) and such forfeiture shall not affect a surviving spouse's entitlement to benefits. Notwithstanding anything herein to the contrary, no pension benefit shall be payable prior to the first of the month in which the Participant attains his Termination Date.

(b) Retroactive Payments. The Plan shall only pay retroactive pension benefits in accordance with the following:

(i) General. A Participant who files an application for a pension benefit shall be entitled to retroactive payments as follows:

[a] retroactive to his Normal Retirement Date if he files his application within six months of his Normal Retirement Date; or, if earlier,

[b] retroactive to either

[i] his Termination Date if he files his application within six months of the Participant's Termination Date; or, if later

[ii] the expiration of an Employer-authorized leave of absence for medical reasons if he files his application within six months of the expiration of an Employer-authorized leave of absence for medical reasons,

provided this section 5.6(b)(i) shall only apply to a Class M Participant who files an application after April 30, 1999.

(ii) Disability Pension. A Class C Participant who files his application after April 30, 1999 or a Class M Participant will be entitled to payment of a Disability Pension retroactive to the earliest date as of which he would have been entitled to begin receiving Disability Pension payments if:

[a] he files his application for a Disability Pension within six months of such date;

[b] he applies for a disability benefit under the Social Security Act within the one year period following his last day of active work in Covered Employment or in Noncovered Employment which immediately followed Covered Employment with the same Employer and with no intervening quit, retirement or discharge and he becomes entitled to a disability benefit under the Social Security Act on a retroactive basis to a date that is consistent with a determination that his active work for an Employer terminated on account of Disability; or

[c] he submits a written medical opinion, dated within 18 months of his last day of active work in Covered Employment or in Noncovered Employment which immediately followed Covered Employment with the same Employer and with no intervening quit, retirement or discharge, from a physician who is not his regular physician, confirming that his work for an Employer terminated on account of Disability.

In no other cases will retroactive payments be allowed to either a Class C or a Class M Participant.

(c) Application After Normal Retirement Date. Except as noted in section (b) above, a Participant who files an application for pension benefits after attaining his Normal Retirement Date shall be entitled to pension benefits as of the first day of the month following the date such Participant files an application with the Trustees; provided, however, that benefits payable in accordance with section 7.4 shall be payable in accordance with the procedures adopted by the Trustees. The amount of such Participant's benefit shall be

actuarially increased for each month between the date the Participant attained his Normal Retirement Date and his benefit commencement date, provided, however, an actuarial increase shall not be made for any month in which a Participant was working in Prohibited Employment as defined in section 5.7. Such actuarial increase shall be calculated using the interest rate assumption of 7.5% and the 1983 Group Annuity Mortality Table (weighted 40% for male and 60% for female) for Class C Participants and the 1971 Group Annuity Mortality Table (weighted 60% for male and 40% for female) with male ages set back one year and female ages set back two years for Class M Participants.

5.7 Entitlement to Pension Benefits Upon Continued Employment or Reemployment.

(a) General. Pension payments shall be suspended for any month a Participant or former Participant engages in Prohibited Employment. Section 5.7(d) below, shall apply in the event a Participant who has commenced receipt of his pension benefits returns to Covered Employment which is not Prohibited Employment.

(b) Prohibited Employment. After December 31, 2003, the term "Prohibited Employment" means the following:

(i) if more than 30 days has elapsed between the Participant's Termination Date and the Participant's or former Participant's return to work in the same industry in which Employees are employed and accruing benefits under the Plan as defined in this section 5.7(b), "Prohibited Employment" means the following:

[a] work in a month which exceeds 80 hours per month at a location of an employer covered by a collective bargaining agreement with a Union; and

[b] the completion of 40 hours or more of service as defined in 29 C.F.R. section 2530, 200b-2(a)(1) and (2) in a month (i.e., a calendar month or an employer's four- or five-week payroll period) in employment or self-employment of the type described below:

[i] in the same industry in which Employees were employed and accruing benefits under the Plan at the time pension benefits commenced or would have commenced if the Participant or former Participant had not remained in or returned to such work. For purposes of this section 5.7(b), employment or self-employment in the same industry is work

with or for an employer or business which engages, at any of its facilities, in sales to consumers of groceries, meats, prepared foods, baked goods, or other products sold by Employers whether the employer is engaged in selling a full line of these products or is a specialty retailer. Employment with an employer or business which engages in general retailing where the sales of groceries, meats, prepared foods, baked goods, or other products sold by Employers is an inconsequential part of the business when considered (i) as a whole and (ii) at each and every facility operated by the employer or business is not considered to be Prohibited Employment. Further, employment with an employer or business which is a restaurant where all but an inconsequential part of its product is consumed on the premises is not Prohibited Employment;

[ii] in the same "trade or craft" in which the Participant or former Participant was employed at any time while covered by the Plan or supervisory activities relating to such trade or craft. Trade or craft extends to any job or occupation using the same skill or skills;

[iii] in any state in which Covered Employment was performed when the Participant or former Participant's pension commenced or would have commenced but for the employment; and

[iv] for an employer which does not have a collective bargaining agreement with a Union; or

(ii) if less than 30 days has elapsed between the date of the Participant's Termination Date and the Participant's or former Participant's return to work in the same industry in which Employees are employed and accruing benefits under the Plan as defined in this section 5.7(b), "Prohibited Employment" means completion of 40 hours or more of service as defined in 29 C.F.R. section 2530.200(b)-2(a)(1) and (2) in a month (i.e., a calendar month or an employer's four- or five-week payroll period) in employment or self-employment of the type described below:

[a] in the same industry in which Employees were employed and accruing benefits under the Plan at the time pension benefits commenced or would have commenced if the Participant or former Participant had not remained in or returned to such work. For purposes of this section 5.7(b), employment or self-employment in the same industry is work with or for an employer or business which engages, at any of its facilities, in sales to consumers of groceries, meats, prepared foods, baked goods, or other products sold by Employers whether the employer is engaged in selling a full line of these products or is a specialty retailer. Employment with an employer or business which engages

in general retailing where the sales of groceries, meats, prepared foods, baked goods, or other products sold by Employers is an inconsequential part of the business when considered (i) as a whole and (ii) at each and every facility operated by the employer or business is not considered to be Prohibited Employment. Further, employment with an employer or business which is a restaurant where all but an inconsequential part of its product is consumed on the premises is not Prohibited Employment;

[b] in the same "trade or craft" in which the Participant or former Participant was employed at any time while covered by the Plan or supervisory activities relating to such trade or craft. Trade or craft extends to any job or occupation using the same skill or skills; and

[c] in any state in which Covered Employment was performed when the Participant or former Participant's pension commenced or would have commenced but for the employment.

Notwithstanding anything herein to the contrary, employment in the same industry at a store location which is located more than 40 miles distant from a store location of an Employer which is covered by a Collective Bargaining Agreement requiring contributions to the Plan shall be deemed not to be Prohibited Employment.

(c) Recalculation of Pension Benefit. Upon termination of Prohibited Employment, the pension benefits of a Participant whose pension benefits were suspended as provided herein shall be subject to the following:

(i) upon the subsequent Termination Date of a Participant who returned to Covered Employment and whose pension benefits were suspended as provided herein, the Participant's pension benefits shall be calculated based on his age upon recommencement of pension benefits and on the basis of the Benefit Credit he accumulated prior to his initial Termination Date as well as Benefit Credit he accumulated, if any, during his subsequent period of Employment, except that for a Class M Participant whose initial Termination Date occurred prior to May 1, 1999:

[a] there shall be no increase in the amount of the pension benefit payable upon his subsequent Termination Date until the product of such increase times the number of monthly pension payments made to him following his subsequent Termination Date equals the total amount of pension payments he had received following his initial Termination Date and prior to his 60th birthday (62nd birthday if Participant did not have 480 hours of contributions

or six months of contributions made to the Plan on his behalf after October 31, 1996); and

[b] that part of the pension payable to the Participant upon his subsequent Termination Date based on Benefit Credit accumulated subsequent to his initial Termination Date shall be determined under the provisions of the Plan as in effect on the date for which the last contribution is made to the Plan on his behalf prior to his initial Termination Date (subject to such subsequent amendments to the Plan as became effective for such retired Participants); provided in the event a Class M Participant accumulated two or more years of Benefit Credit during the period of Employment subsequent to his initial Termination Date and prior to May 1, 1999, the amount of his pension shall be computed by applying the benefit rate in effect on his initial Termination Date to the Benefit Credit earned prior thereto and by applying the benefit rate in effect on his subsequent Termination Date to the Benefit Credit he accumulated subsequent to his initial Termination Date; and except that for a Class C Participant;

[c] the pension benefit payable upon his subsequent Termination Date shall be based upon his age upon recommencement of pension benefits and shall also be reduced by the actuarial equivalent of any pension benefit payments he received prior to his 60th birthday. Such actuarial equivalent shall be calculated using an interest rate assumption of 7.5% and the 1983 Group Annuity Mortality Table (weighted 40% for male and 60% for female); and

[d] that part of the pension payable to the Participant upon his subsequent Termination Date based on Benefit Credit accumulated prior to his initial Termination Date shall be determined under the provisions of the Plan as in effect on the date for which the last contribution is made to the Plan on his behalf prior to his initial Termination Date (subject to such subsequent amendments to the Plan as become effective for such retired Participants); and

(ii) with regard to a Participant who was receiving his pension benefit in the form of a Level Income Option and who entered Prohibited Employment prior to attaining age 62 (a Class M Participant must also have entered such Prohibited Employment after April 30, 1999);

[a] the difference between the amount the Participant would have received under a Level Income Option prior to age 62 during the period the Participant's pension benefits were suspended; and

[b] the amount the Participant would have received prior to age 62 during the period his pension benefits were suspended if he had elected to receive his pension benefits in the form of a Monthly Income for Life Option,

shall be paid in equal installments over the number of months between the date pension benefits are recommenced and the month the Participant attains age 62, or if the Participant has already attained age 62, such difference shall be paid in a lump sum.

(d) Return to Covered Employment Which is Not Prohibited Employment. A Participant who returns to Covered Employment which is not Prohibited Employment after his benefit commencement date shall be subject to the following:

(i) Benefit Credit Earned Prior to Benefit Commencement Date. The Participant shall continue to receive his monthly pension benefits based upon the Benefit Credit earned prior to his initial Termination Date in the form elected at his benefit commencement date until death or if earlier, until the benefit payable under a Level Income Option reduced to \$0. Further, the amount of the Participant's pension benefit which is based upon Benefit Credit earned prior to the Participant's benefit commencement date shall continue to be based upon the provisions of the Plan as in effect on the date the last contribution is made to the Plan prior to his initial Termination Date (subject to such subsequent amendments to the Plan as become effective for such retired Participants) and shall not be aggregated with Benefit Credit earned after his initial Termination Date.

(ii) Benefit Credit Earned Subsequent to his Benefit Commencement Date. Upon his subsequent Termination Date, the Participant shall be entitled to an additional monthly pension benefit based upon the Benefit Credit earned after the Participant's initial Termination Date, subject to the following:

[a] if his initial benefit commencement date was prior to his Normal Retirement Date, the Participant shall be allowed to elect any of the optional forms of pension benefits described in section 7.10 with regard to the pension benefit attributable to the additional Benefit Credit which he earned after his initial benefit commencement date;

[b] if his initial benefit commencement date was on or after his Normal Retirement Date, the pension benefit attributable to the

additional Benefit Credit earned by the Participant after his initial benefit commencement date shall be payable in the same form of benefit as elected by the Participant at the time of his initial benefit commencement date;

[c] shall be based upon his age as of the first day of the month following his subsequent Termination Date; and

[d] shall be based upon the provisions of the Plan as in effect on the date the last contribution is made to the Plan on his behalf prior to his subsequent Termination Date.

Amendment No. 15  
to the  
United Food and Commercial Workers  
Unions and Employers Pension Plan

Effective September 1, 2009,

Section 5.7 (b)(ii) is amended to read:

if less than 30 days has elapsed between the date of the Participant's Termination Date and the Participant's or former Participant's return to work in the same industry in which Employees are employed and accruing benefits under the Plan as defined in this section 5.7(b), "Prohibited Employment" means (1) work in a month which exceeds 80 hours per month at a location of an employer covered by a collective bargaining agreement with a Union provided the Participant's Employer at or immediately prior to the Participant's retirement closed its facility and the Participant left Covered Employment due such closure, and (2) completion of 40 hours or more of service as defined in 29 C.F.R. section 2530.200(b)-2(a)(1) and (2) in a month (*i.e.*, a calendar month or an employer's four- or five-week payroll period) in employment or self-employment of the type described below:

[a] in the same industry in which Employees were employed and accruing benefits under the Plan at the time pension benefits commenced or would have commenced if the Participant or former Participant had not remained in or returned to such work. For purposes of this section 5.7(b), employment or self-employment in the same industry is work with or for an employer or business which engages, at any of its facilities, in sales to consumers of groceries, meats, prepared foods, baked goods, or other products sold by Employers whether the employer is engaged in selling a full line of these products or is a specialty retailer. Employment with an employer or business which engages in general retailing where the sales of groceries, meats, prepared foods, baked goods, or other products sold by Employers is an inconsequential part of the business when considered (i) as a whole and (ii) at each and every facility operated by the employer or business is not considered to be Prohibited Employment. Further, employment with an employer or business which is a restaurant where all but an inconsequential part of its product is consumed on the premises is not Prohibited Employment;

[b] in the same "trade or craft" in which the Participant or former Participant was employed at any time while covered by the Plan or supervisory activities relating to such trade or craft. Trade or craft extends to any job or occupation using the same skill or skills;

[c] in any state in which Covered Employment was performed when the Participant or former Participant's pension commenced or would have commenced but for the employment; and

[d] for an employer which does not have a collective bargaining agreement with a Union.

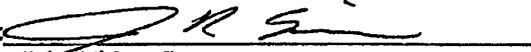
Notwithstanding anything herein to the contrary, employment in the same industry at a store location which is located more than 40 miles distant from a store location of an Employer which is covered by a Collective Bargaining Agreement requiring contributions to the Plan shall be deemed not to be Prohibited Employment.

Approved by the Board of Trustees on August 19, 2009

Attest:

  
David Gerdes, Chairman

Attest:

  
John Eiden, Secretary

**METCALFE WEST'S WITNESS LIST**  
**Case No. 30-RC-079306**

1. Ms. Annie Zutter  
Ms. Zutter was present at the June 1, 2012 election and has personal knowledge of the facts underlying Objection 3.
2. Ms. Renee Medved  
Ms. Medved was present at the June 1, 2012 election and has personal knowledge of the facts underlying Objection 3.
3. Mr. David Taylor  
Mr. Taylor is an employee who voted in the June 1, 2012 election. He has personal knowledge of his conversations with Union officers, members, or agents; Union Trustees of the UFCW Pension Plan; and Mr. Palzkill. Mr. Taylor's personal knowledge relates to the facts underlying Objections 1 and 2.
4. Mr. Daniel Palzkill  
Mr. Palzkill is an employee who voted in the June 1, 2012 election. He has personal knowledge of his conversations with Mr. John Anderson and Mr. Taylor regarding the UFCW Pension Plan. Mr. Palzkill's personal knowledge relates to the facts underlying Objections 1 and 2.
5. Mr. Jeff Nolting  
Mr. Nolting is a member of management at Metcalfe West. He has personal knowledge of the June 1, 2012 election and his conversations with Mr. Palzkill after the election regarding the UFCW Pension Plan. Mr. Nolting's personal knowledge relates to the facts underlying Objections 1 and 2.
6. Mr. Jeff Greenheck  
Mr. Greenheck is a member of management at Metcalfe West. He has personal knowledge of the June 1, 2012 election and his conversations with Mr. Taylor after the election regarding the UFCW Pension Plan. Mr. Greenheck's personal knowledge relates to the facts underlying Objections 1 and 2.
7. Mr. Daniel Ford  
Mr. Ford is a Union Meat Cutter at Metcalfe's Hilldale store who reported conversations regarding the UFCW Pension Plan to Mr. Greenheck.

JUN 28 2012

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

**METCALFE FOODS – WEST, INC.**

**Employer**

**and**

**Case 30-RC-079306**

**UFCW (UNITED FOOD AND COMMERCIAL WORKERS),  
LOCAL 1473**

**Petitioner**

**REPORT AND RECOMMENDATION ON OBJECTIONS TO  
CONDUCT AFFECTING THE RESULTS OF THE ELECTION**

Pursuant to a petition filed on April 23, 2012 and a Stipulated Election Agreement approved by the Regional Director on May 2, 2012, on June 1, 2012 an election was conducted among employees in the following unit:

All full-time and regular part-time employees of the Employer at its 7455 Mineral Point Road, Madison, Wisconsin location, who work in the meat department and are involved in the handling and selling of meat products, excluding all other employees, confidential employees, guards, and supervisors as defined in the Act.

The results of the election, as set forth in the tally of ballots served on the parties on the day of the election, show that there were approximately eight eligible voters, five cast ballots for, and three cast ballots against Petitioner. There were no challenged ballots to affect the results of the election.

On June 8, 2012, the Employer filed timely objections, a copy of which was served on the Petitioner, and is attached as Appendix A.

Acting pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the undersigned has investigated the issues raised by the objections and reports as follows:

## **THE OBJECTIONS**

### **Objections 1 and 2**

The Employer's first two objections relate to alleged misrepresentations regarding pension benefits made to two employees.<sup>1</sup> The Employer provided no evidence as to when these alleged misrepresentations occurred but for the purposes of this Report, I will assume they occurred during the critical period. In support of its contentions, the Employer provided a copy of the applicable articles of the United Food and Commercial Workers Unions and Employers Pension Plan ("the Plan") and submitted Employer-prepared affidavits from certain of its managers or supervisors.

According to the Employer's evidence, one employee told one of the managers or supervisors that based on his conversation with a retired member of Petitioner, he understood that he could not work more than 20 hours per month and collect pension benefits at the same time and that employees may not work at a non-union shop while collecting pension benefits. Another employee reported to one of the managers or supervisors that he had called the Petitioner's Milwaukee office and spoke with an unidentified woman who told him that he had to work in a union shop in order to collect his pension benefits and still work and that he could not work more than five hours per week and collect pension benefits at the same time. The Employer asserts that both statements misrepresent the Plan's terms which allow employees to

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<sup>1</sup> Both employees had previously been employed by Cub Foods, which closed prior to the Employer's opening, and were participants in the United Food and Commercial Workers Unions and Employers Pension Plan.

work up to forty hours per month for a non-union shop, without being disqualified from receiving pension benefits.<sup>2</sup> Petitioner denies that any such misrepresentations took place and that had anyone called its office inquiring about pension benefits, they would have been directed to the United Food and Commercial Workers Unions and Employers Pension Fund office, given the complex nature of the Plan.

It is well settled that representation elections are not lightly set aside. *Affiliated Computer Services, Inc.*, 355 NLRB No. 163 (2010). The burden is on the objecting party to show by specific evidence that there has been prejudice to the election. *Id.* citing *NLRB v. Mattison Machine Works*, 365 U.S. 123, 123-124 (1961). As a preliminary matter, there is no contention or evidence that the retired member of Petitioner acted as an agent of the Petitioner or that he was speaking on behalf of Petitioner. Regardless, I do not find that the alleged misstatements, made by the retired member and the unidentified woman, rise to the level of objectionable conduct. The Board “will no longer probe into the truth or falsity of the parties’ campaign statements,” and “will not set elections aside on the basis of misleading campaign statements.” *Midland National Life Insurance Co.*, 263 NLRB 127 at 133 (1982). In this matter, both statements allegedly made by the unidentified woman and the retired member are akin to the misrepresentation which the Board held in *Midland National Life Insurance Co.*, would not be sufficient to set aside an election. For this reason, I recommend that these objections be overruled.

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<sup>2</sup> The Plan provides in Article 5.7 entitled “Entitlement to Pension Benefits Upon Continued Employment or Reemployment” that “Pension payments shall be suspended for any month a Participant or former Participant engages in Prohibited Employment.” Amendment No. 15 of the Plan, states that “Prohibited Employment” means “...completion of 40 hours or more of service...in a month in employment or self-employment of the type described below... [d] for an employer which does not have a collective bargaining agreement with a Union.”

### **Objection 3**

In its third objection, the Employer asserts that a prospective voter brought a camera into the voting area and told Petitioner's observer that he had some fishing pictures to show him. At that time, the NLRB agent conducting the election told the prospective voter that Petitioner's observer was not allowed to speak with him or to look at any pictures and that he should put the camera away. The prospective voter persisted in trying to get Petitioner's observer to look at the pictures and the NLRB agent again instructed the prospective voter to put the camera away a second time, which he did. The Employer argues that this violated the "laboratory conditions" for an election. Petitioner, while confirming that an employee did approach its observer in an attempt to show him pictures, asserts the brief interaction between its observer and voter did not interfere with a free and fair election. There is no evidence that any other voters were present during this interaction.

In deciding whether the "laboratory conditions" of an election were violated, the standard is whether "the conduct reasonably tends to interfere with the employees' free and uncoerced choice in the election." *Baja's Place, Inc.*, 268 NLRB 868, 868 (1984). The objecting party has the burden of proving interference with the election. See *Jensen Pre-Cast*, 290 NLRB 547 (1988). Because there is no evidence that the voter attempting to show Petitioner's observer his fishing pictures had a tendency to interfere with the employees' freedom of choice, I recommend that this objection be overruled.

### **Objection 4**

The Employer supplied no evidence in support of this "catch all" objection. I therefore recommend that it be overruled.

## CONCLUSIONS AND RECOMMENDATIONS<sup>3</sup>

Based on the foregoing, I recommend that the Employer's objections be overruled in their entirety. I further recommend that a Certification of Representative issue.

Signed at Milwaukee, Wisconsin on June 27, 2012.

  
Irving E. Gottschalk, Regional Director  
National Labor Relations Board  
Thirtieth Region  
310 West Wisconsin Avenue, Suite 700W  
Milwaukee, WI 53203

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<sup>3</sup> Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington, DC. Exceptions must be received by the Board by July 11, 2012. Under provisions of Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits which a party has timely submitted to the Regional Director in support of its objections, and which are not included in the Report, are not a part of the record before the Board unless appended to the exceptions or opposition thereto which the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Report shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). *Once the website is accessed, click on File Case Documents, enter the NLRB Case Number, and follow the detailed instructions.* The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

NATIONAL LABOR RELATIONS BOARD  
REGION 30

Metcalfe Foods-West, Inc. ("Metcalfe West"),  Employer,  vs.  United Food & Commercial Workers, Local 1473, AFL-CIO,  Union.	Case No. 30-RC-079306          RECEIVED NLRB 2012 JUN -8 PM 13 MILWAUKEE, WI REGION 30
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**METCALFE WEST'S OBJECTIONS TO CONDUCT AFFECTING THE RESULTS OF  
THE ELECTION**

The Employer, Metcalfe West, objects to conduct affecting the results of the election held on June 1, 2012 by the Union ("Local 1473"), its officers, agents, employees, or affiliates.

Metcalfe West's objections are as follows:

1. A representative of Local 1473 or of the Trustees of the United Food and Commercial Workers Unions and Employers Pension Fund ("the Fund") falsely told Metcalfe West employees (Mr. David Taylor and possibly Mr. Daniel Palzkill) that they were required to work in a unionized workplace in order to collect their pension from the Fund. To the contrary, Mr. Taylor and Mr. Palzkill could work at Metcalfe West in the absence of a collective bargaining agreement covering that location and still refrain from engaging in "Prohibited Employment" that would otherwise bar them from collecting pension benefits from the Fund.
2. Metcalfe West also objects that a representative from either Local 1473 or the Fund falsely told Mr. Taylor and possibly Mr. Palzkill that they must work no more than five (5) or ten (10) hours per week to collect pension benefits. To the contrary, regardless of whether Metcalfe West was covered by a collective bargaining agreement, Mr. Taylor and Mr. Palzkill could work up to forty (40) hours in a month and still refrain from engaging in "Prohibited Employment" that would otherwise bar them from collecting pension benefits from the Fund.
3. Metcalfe West also objects that on the day of the election, June 1, 2012, and while the balloting was being conducted, the union observer was engaged in conversations and contact with eligible voters.

4. Any and all other objectionable acts by Local 1473, its officers, agents, employees, or affiliates that has not yet been discovered and evidence of which is currently unavailable to Metcalfe West.

Based upon the foregoing objectionable conduct, the Employer believes that the Union's threats and misconduct herein affected the results of the election held on June 1, 2012. Metcalfe Foods-West, Inc. respectfully requests that the Board set aside the results of the June 1, 2012 election; issue any and all orders to correct the objectionable conduct described above; and rerun the election.

Dated this 8th day of June, 2012.

**MICHAEL BEST & FRIEDRICH LLP**

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