UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TCGPLAYER, INC. **Employer** **and** **COMMUNCIATION WORKERS OF AMERICA** **Petitioner**	**Case No. 03-RC-310876**

RESPONDENT'S REQUEST FOR REVIEW OF THE REGION'S DECISION AND DIRECTION OF ELECTION AND DECISION OVERRULING OBJECTIONS AND CERTIFICATION OF REPRESENTATIVE

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I. INTRODUCTION

TCGplayer, Inc. ("TCGplayer" or "Company") files this Request for Review of National Labor Relations Board ("NLRB" or "Board") Region 3's February 23, 2023 Decision and Direction of Election ("DDE") and March 22, 2023 Decision Overruling Objections and Certification of Representative ("DOO").

In response to the Communication Workers of America's ("CWA" or "Union") filing of the underlying petition and demand to represent a unit that included TCGplayer's Operations Leads, the Company requested Region 3 determine whether the Operations Leads are supervisors under Section 2(11) of the National Labor Relations Act ("NLRA" or "Act"). 29 U.S.C. § 152(11). TCGplayer proffered voluminous evidence that Operations Leads (14 in number) are indeed supervisors under Section 2(11) and cannot legally be in the petitioned-for unit along with their direct reports (e.g., generalists). Specifically, the Company asserted the Operations Leads (a) are involved in interviewing and recommending generalists for hire; (b) regularly assign work to the generalists and determine the work flow of the facility using their independent judgment; (c) direct generalists how to perform their functions and, accordingly, the Operations Leads' personal compensation is directly affected by the performance of the generalists who report to them; (d) are involved in counselling the generalists and recommending their discipline; (e) have a starting pay that is 33% more than that of the generalists; (f) are held out to the workforce as leaders and are often the only members of management working on a shift or on a given day; and, (g) attend leadership meetings and receive specialized training on managing their team's performance. Given their supervisory status, TCGplayer requested the Region render a determination as to the Operations Leads' voter eligibility status before the election because "how can a generalist and inventory specialist know the real contours of who is going to be in a potential unit when their

supervisors are also voting." (Transcript at 12-13).

Region 3 has twice failed to determine whether TCGplayer's Operations Leads are supervisors under Section 2(11) of the NLRA—as memorialized in the erroneous DDE and DOO at issue herein.

As a result of the Region's failure to determine the Operations Leads' supervisory status, eligible voters went to the polls on March 10, 2023 believing their supervisors may be in a bargaining unit along with them. The Region's failure to determine the Operations Leads' status also condoned pro-union conduct by certain Operations Leads and destroyed the laboratory conditions for a free and fair exercise of TCGplayer's employees' Section 7 rights. What's more, after the March 10, 2023 election, none of the parties to this case—not the CWA, not TCGplayer, and not the bargaining unit employees—knows whether the conditionally certified (subject to this appeal) bargaining unit includes Section 2(11) supervisors.

The Board is required to determine appropriate bargaining units in each case. 29 U.S.C. § 159(b). The U.S. Supreme Court has held that employers have no duty to bargain in a unit including supervisors. *Beasley v. Food Fair of N.C.*, 416 U.S. 653, 659-60 (1974). Including supervisors in a bargaining unit violates the structure of the NLRA; fails to allow employees the fullest freedom in selecting their representatives; fails to establish a stable bargaining relationship; deprives an employer of its right to rely on its supervisors' duty of loyalty to it; violates an employer's free speech rights under Section 8(c) of the NLRA, 28 U.S.C. § 158(c) and the First Amendment; and allows supervisors to engage in objectionable conduct supporting a union organizing drive. Region 3 erred in failing to determine the Operations Leads' status, which denied TCGplayer of its rights and TCGplayer's employees of their Section 7 rights. All of this could have been avoided had Region 3 adhered to its statutory mandate and precedent of affording TCGplayer an opportunity

to present evidence during a pre-election hearing on unit issues and post-election hearing on objections, yet Region 3 refused to do so, instead choosing expediency to conditionally certify an unlawful bargaining unit comprised of Section 2(3) employees and Section 2(11) supervisors.

For the reasons set forth below, Region 3 committed several reversible errors in issuing the DDE and the DOO, including misapplying NLRB Rule & Regulation ("R&R") Section 102.64(a), abusing its discretion in deferring a determination of supervisory status to after the election, and applying an impermissibly high standard to TCGplayer's Objections and Offer of Proof in denying a hearing on those Objections. TCGplayer therefore respectfully requests that the Board grant this Request for Review ("RFR"), vacate the DDE and remand this case to another region for a pre-election hearing and re-run election, provided the Union's showing of interest remains valid in light of supervisory taint. Alternatively, TCGplayer requests that the Board vacate the DOO and remand the matter to another region for a post-election hearing on TCGplayer's Objections and the supervisory status of its Operations Leads.

In the alternative, this case presents an important issue requiring reconsideration of the Board's approach to supervisory status issues in cases like this one, where the parties have raised questions regarding the supervisory status of certain employees, those issues were deferred to after the election, but the challenged ballots were insufficient to change the election results. Rather than leaving the parties in limbo as to the status of this group of employees, the Board should resolve these issues in a post-election hearing. Although deciding these issues does not alleviate TCGplayer's position that such issues should be decided before the election, it at least resolves the issues in a way that sets the parties up for a more productive and stable bargaining relationship and allows the parties to properly order their affairs in light of the structure of the Act and U.S. Supreme Court precedent.

II. GROUNDS FOR REVIEW

NLRB Rule & Regulation Section 102.67(d) provides that the "Board will grant a request for review only where compelling reasons exist therefor." That section permits review when: (1) a substantial question of law or policy is raised because of the absence of or departure from officially reported Board precedent; (2) 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) the conduct of any hearing or any ruling made in connection withthe proceeding has resulted in prejudicial error; or (4) there are compelling reasons for reconsideration of an important Board rule or policy. 29 C.F.R. §§ 102.67(d)(1)-(4). There are compelling reasons for Board review of the DDE and DOO, including the presence of substantial questions of law or policy, departure from officially reported Board precedent, the Region's clearly erroneous decisions on factual issues that prejudice TCGplayer's rights, and compelling reasons for the Board to reconsider its approach to the determination of the supervisory status of employees where the such issues have been deferred to after an election and challenged ballots are insufficient to change the results of an election.

III. PROCEDURAL HISTORY

The CWA filed an election petition seeking to represent certain employees of TCGplayer on January 25, 2023.[1] TCGplayer timely filed a statement of position asserting, *inter alia*, that its Operations Leads should be excluded from the unit as Section 2(11) supervisors. The CWA timely filed a responsive statement of position asserting that Operations Leads are not Section 2(11) supervisors and should be included in the unit.

[1] All dates are in 2023 unless otherwise noted.

On February 14, a Hearing Officer held a representation hearing via videoconference in which he identified the only outstanding dispute as being the inclusion of certain classifications in the bargaining unit, including whether Operations Leads are Section 2(11) supervisors. He further stated at the outset of the hearing that the Regional Director "determined that it is appropriate to defer litigation" on the inclusion issues because those issues did not "significantly impact the size or character of the unit." (Trans. at 9). Having stated this decision, the Hearing Offer then allowed TCGplayer's counsel to make an Offer of Proof with respect to the eligibility of certain voters, including whether Operations Leads are supervisors. Without considering the Company's pre-election Offer of Proof, the Hearing Officer reiterated that, "The Regional Director ordered me to defer." (Trans. at 13).

Following this hearing, Acting Regional Director Cacaccio issued her DDE on February 23. Relying on non-binding comments to the 2019 version of R&R Section 102.64(a), she held that determination of the supervisory status of TCGplayer's Operations Leads should be deferred to after the election. In reaching this conclusion, without relying on the Offer of Proof or receiving actual evidence, she stated that the disputed categories of employees constituted less than nine percent of the voting unit. The Acting Regional Director therefore directed an election "in the unit found appropriate above," but nowhere in the DDE did she identify that unit beyond identifying those who would vote subject to challenge. (DDE at 3-4).

The Notice of Election identified the following bargaining unit:

> All full-time and regular part-time employees in the classifications of Fulfillment Center Generalist, Fulfillment Center Generalist—Advanced, Fulfillment Center Generalist—Legend, Inventory Specialist, Inventory Specialist—Advanced, and Inventory Specialist—Legend employees by the Employer at its Syracuse, New York facility who were employed during the payroll period ending Friday, February 17, 2023.

The Notice of Election goes on to state:

OTHERS PERMITTED TO VOTE:

> The parties disagree as to whether individuals in the classifications of Operations Lead, Operations Lead—Advanced, and Operations Lead—Legend, R&D Specialist—Legend, R&D Lead—Legend, Training Facilitator, Training Specialist, Machine Technician, Quality Auditor, Compliance Specialist, and Seller Compliance Specialist, should be included in the bargaining unit. **The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.**

The election occurred on March 10. Of approximately 240 eligible voters,[2] 136 votes were in favor of representation, 87 votes were against representation, there was one void ballot, and there were 26 challenged ballots (10.7% of the total number of eligible voters). (DOO at 1). TCGplayer timely filed Objections to the election on March 17 together with an Offer of Proof in support of same. Five days later, on March 22, and without holding an evidentiary hearing, the RD denied the Company's Objections.

IV. ARGUMENT

A. Request for Review with Respect to the DDE: The Acting Regional Director Applied the Wrong Standard and Abused Her Discretion by Failing to Determine the Supervisory Status of TCGplayer's Operations Leads Prior to the Election.

For the following reasons, the Acting Regional Director erred by applying the wrong standard in determining that the supervisory status of TCGplayer's Operations Leads should be deferred to after the election.

1. Regardless of Which Version of R&R Section 102.64(a) Was in Effect on February 23, the Acting Regional Director Misapplied It.

As stated above, during the February 14 pre-election hearing, the Hearing Officer related the Regional Director's decision to defer election eligibility issues, including the supervisory status

[2] The tally of ballots and the DOO incorrectly identify the number of eligible voters as 246. The voter list should be used to determine the number of eligible voters.

of Operations Leads, until after the March 10 election without taking any evidence. In her February 23 DDE, the Acting Regional Director affirmed the Hearing Officer's decision, expressly relying on the 2019 version of R&R Section 102.64(a) and comments to it in the Federal Register. (DDE at 3-4). Assuming the Acting Regional Director correctly relied on the 2019 version of R&R Section 102.64(a), she misapplied it. If the 2019 version of R&R Section 102.64(a) was not in effect on February 23, then the Assistant Regional Director erred in relying on it. Either way, because both versions of R&R Section 102.64(a) vest Regional Directors with discretion, because the exercise of such discretion must be explained, because the Acting Regional Director failed to adequately explain her decision to defer litigating the supervisory status of the Operations Leads until after the election, and because supervisory status issues must normally be decided prior to an election regardless of which version of R&R Section 102.64(a) is in effect,[3] her DDE should be vacated, the election set aside, and the matter remanded to a different region for hearing.

a. The Acting Regional Director Misapplied the 2019 Version of R&R Section102.64(a).

The Acting Regional Director relied on the 2019 version of R&R Section 102.64(a) in issuing her decision. (DDE at 3) (quoting and relying on Federal Register comments to the 2019 rule). The 2019 version of R&R 102.64(a) states:

> The primary purpose of a hearing conducted under Section 9(c) of the Act

[3] TCGplayer recognizes that courts have upheld the 2014 version of R&R Section 102.64(a) as a result of facial challenges to it. *Associated Builders & Contractors of Tx., Inc. v. NLRB*, 826 F.3d 215, 221-23 (5th Cir. 2016); *Chamber of Commerce of the U.S. v. NLRB*, 118 F. Supp.3d 171, 195-203 (D.D.C. 2015). The Company also recognizes that the Board has denied requests for review attacking the 2014 version of the rules. *See, e.g., Pulau Corp*., 363 NLRB 96 (2015). In so doing, courts and the Board rejected arguments that supervisory status must always be decided before an election occurs. For the reasons stated herein, TCGplayer respectfully submits that these cases were wrongly decided and seeks to preserve this issue for review. In the alternative, under the specific facts of this case, the supervisory status issue should have been resolved prior to the election even if voter eligibility issues are "ordinarily" deferrable to after the election. In the further alternative, the Board should establish a new policy stating that where supervisory status issues have been deferred and challenges are insufficient to change the election results, supervisory status issues must nonetheless be resolved in a post-election hearing.

> is to determine if a question of representation exists. A question of representation exists if a proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining or concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative. **Disputes concerning unit scope, voter eligibility and supervisory status will normally be litigated and resolved by the Regional Director before an election is directed.** However, the parties may agree to permit disputed employees to vote subject to challenge, thereby deferring litigation concerning such disputes until after the election. If, upon the record of the hearing, the Regional Director finds that a question of representation exists, the director shall direct an election to resolve the question.

(emphasis added). Under the plain text of the 2019 rule, absent some abnormal circumstance, the Region was required to litigate and resolve voter eligibility and supervisory status issues before directing an election.

Although the Acting Regional Director properly relied on the 2019 version of R&R Section 102.69(a) pursuant to the D.C. Circuit's decision in *AFL-CIO v. NLRB*, 57 F.4th 1023, 1043-45 (D.C. Cir. 2023),[4] she erred by not resolving the supervisory status of Operations Leads before directing an election, and her reasons for failing to do so do not pass muster. She initially stated, "The Board's 2019 rule expressly allowed for the continuation of the longstanding practice that Regional Directors retained discretion to defer inclusion and exclusion issues." (DDE at 3). But

[4] In *AFL-CIO v. NLRB*, 57 F.4th 1023, 1043-45 (D.C. Cir. 2023), which was decided on January 17, more than a month before the Acting Regional Director issued her DDE in this case, the D.C. Circuit held that the 2019 version of R&R Section 102.64(a) was validly promulgated. There is court authority holding that this decision was binding as soon as it was issued. *See, e.g., Norsoph v. Riverside Resort and Casino, Inc*., 611 F. Supp.3d 10581074 (D. Nev. 2020) (quoting *In re Zermeno-Gomez*, 868 F.3d 1048, 1052 (9th Cir. 2017) and *Gonzalez v. Ariz*., 677 F.3d 383, 389 n.4 (9th Cir. 2017) (en banc) and stating that "a published circuit court decision 'constitutes binding authority which must be followed unless and until overruled by a body competent to do so.'"). In reaction to the D.C. Circuit's decision, on March 10 the NLRB stayed implementation of the 2019 rules until September 10, 2023, likely on a theory that the D.C. Circuit's decision did not become binding until its mandate issued. 88 Fed. Reg. 14913; *see Heartland by-Prods., Inc. v. U.S.*, 223 F. Supp.2d 1317, 1333 (Ct. Int'l Trade 2002) (stating that the ruling of a lower court remains binding until a reviewing court issues its mandate). If the *Norsoph* decision is correct, the D.C. Circuit's decision became binding when issued and the 2019 version of R&R Section 102.64(a) went into effect until it was stayed on March 10. It was therefore in effect when the DDE issued.

the 2019 rule simply says that voter eligibility and supervisory status issues "will normally be litigated and resolved…before an election is directed." R&R § 102.64(a). Thus, the Acting Regional Director was required to explain why this was an abnormal situation where deferral of this issue better served the purposes of the Act. She failed to offer an adequate explanation.

Relying on Federal Register interpretive guidance rather than the plain text of the rule, the Acting Regional Director asserted that the disputed classifications constituted less than ten percent of the bargaining unit and concluded that such a percentage justified deferring resolution of the eligibility issues until after the election. (DDE at 3).[5] This conclusion was clearly erroneous. First, the Acting Regional Director does not state what evidence she relied on to reach this conclusion and, in fact, the conclusion is not supported by adequate evidence in the record. Indeed, it appears that the Acting Regional Director relied on assertions in the parties' statements of position, but, as TCGplayer pointed out in its offer of proof, the total number of voters (as well as the total number of employees voting subject to challenge) could and did in fact change. (Trans. at 11). Consistent with the Company's offer of proof at the February 14 hearing, the evidence will show there were approximately 240 eligible voters and 26 challenged ballots—10.7% of the voting unit.

Second, the Federal Register commentary to the 2019 rule states that Regional Directors should be encouraged to resolve all inclusion or exclusion issues prior to an election. 84 Fed. Reg. 69540 at n.66. It also describes the myriad of complications that result from leaving supervisory status issue unresolved. 84 Fed. Reg. 69540-69541. Many of those "post-election complications" are present in this case, including allegations of supervisory solicitation of authorization cards,

[5] Moreover, where a rule is clear and unambiguous adjudicative bodies should not rely on such guidance. *Mercy Catholic Medical Center v. Thompson*, 380 F.3d 142, 152-153 (3d Cir. 2004) ("an agency's interpretation of its own regulations is not entitled to substantial deference by a reviewing court where an alternative reading is compelled by the regulation's plain meaning . . . at the time of the regulation's promulgation.") (internal citations omitted).

supervisors being present in the no-electioneering area on election day, on-going supervisor support for organizing efforts, and lingering questions about whether supervisors are or are not included in the bargaining unit, which places the appropriateness of the unit into question. As more fully discussed below with respect to the relationship between an employer and its supervisors, these are all reasons why supervisory status should be determined before an election regardless of which version of R&R Section 102.64(a) is in effect. Accordingly, the proper result here is to set the election aside and remand the case to another region for a hearing on and determination of the supervisory status issues raised by TCGplayer.

b. In the Alternative, the Acting Regional Director Erred by Applying the Wrong Version of Section 102.64(a).

In the alternative, if the 2019 version of R&R Section 102.64(a) was not in effect when the Acting Regional Director issued her DDE, then she committed reversible error by relying on it. In fact, nowhere in the DDE did she mention the 2014 version of the rule, which states in relevant part:

> Disputes concerning individuals' eligibility to vote in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted.

The Union may argue that this error is harmless because the result would be the same either way, but not so. The 2014 rule is materially different than the 2019 rule. Moreover, the 2014 rule also gives Regional Directors discretion to consider unit eligibility and supervisory status issues before an election given that it states such issues "ordinarily" (but not always) may be resolved after an election. It is up to the Region in the first instance to explain its decision, including why the Region chose to exercise its discretion in the way that it did, with respect to voter eligibility issues in light of the in-force rules and applicable authority. *See* 29 U.S.C. § 153(b) (allowing for delegation of the Board's powers under Section 9 to Regional Directors); *see, e.g., LeMoyne Owens Coll. v. NLRB*, 357 F.3d 55, 61 (D. C. Cir. 2004) (in the absence of an adequate explanation,

"the totality of the circumstances can become simply a cloak for agency whim or worse.") (Roberts, J.); *Power Inc. v. NLRB*, 40 F.3d 409, 423 (D.C. Cir. 1994) ("It is, of course, a fundamental principle of administrative law that agencies must give reasoned justifications for their actions"). To the extent that the Acting Regional Director applied the wrong rule, her decision should be vacated, the election set aside, and the matter remanded for appropriate proceedings, including an adequate explanation of why the supervisory status issues in this case should be litigated after rather than before the hearing.

2. Regardless of Which Version of the Rule Applies, the Acting Regional Director Abused Her Discretion in Refusing to Litigate and Decide the Supervisory Status of Operations Leads Prior to the Election.

Next, the Acting Regional Director abused her discretion by not determining the supervisory status of the Operations Leads before the election. Regardless of which version of the NLRB's rules were in effect at the time of the DDE, or what those rules say about when such determinations should be made in the normal course, the structure of the NLRA and employer and employee rights under it require this determination in advance of an election. This is especially true in light of the facts of this case.

a. Employers are Entitled to the Loyalty of Their Supervisors, and Failure to Determine Such Status Prior to the Election Deprived TCGplayer of this Important Right.

The U.S. Supreme Court has held that "an employer is entitled to the undivided loyalty of its representatives." *NLRB v. Yeshiva Univ*., 444 U.S. 672, 682 (1980). That is why Congress chose to exclude supervisors from NLRA coverage under Section 2(11) of the Act. As the Supreme Court stated in *Beasley*, 416 U.S. at 659-60:

> Employers [are] not obligated to recognize and bargain with unions including or composed of supervisors because supervisors [are] management obliged to be loyal to their employer's interests, and their identity with the interest of rank-and-file employees might impair that loyalty and threaten realization of the basic ends of federal labor legislation.

Further, as the House Report with respect to the Taft-Hartley amendments stated:

> Management, like labor, must have faithful agents.—If we are to produce goods competitively and in such large quantities that many can buy them at low cost, then, just as there are people on labor's side to say what workers want and have a right to expect, there must be in management and loyal to it persons not subject to influence or control of unions, not only to assign people to their work, to see that they keep at their work and do it well, to correct them when they are at fault, and to settle their complaints and grievances, but to determine how much work employees should do, what pay they should receive for it, and to carry on the whole of labor relations.

H.R. Rep.No.245, 80th Cong, 1st Sess., 16 (1947) (quoted by *Beasley*, 416 U.S. at 660).

To emphasize, situations in which supervisors are identified with rank-and-file employees "threaten the basic ends of federal labor legislation." *Beasley*, 416 U.S. at 660. Among other things, having supervisors in the bargaining unit, on whom the employer relies to maintain control and oversight of its operation, creates a significant conflict of interest. On the one hand, supervisors are tasked with carrying the authority of the employer to assign tasks, hire and discipline employees and the like to rank-and-file employees. *See, e.g.*, *Harborside Healthcare, Inc.*, 343 NLRB 906, 907 (2004) ("A supervisor is typically an employee's principal contact with management."). On the other hand, and especially in this case where the parties do not know whether supervisors are in the unit or not, such supervisors may also be in a position of trying to defend rank-and-file employees from the very actions they are tasked with carrying out. As a result, both TCGplayer and employees are deprived of the essential ability to rely on the Operations Leads to carry out their expected duties either as rank-and-file employees in the bargaining unit on the one hand, or as supervisors responsible for carrying the employer's authority to rank-and-file employees on the other. *See Wagner's Food Mart*, 146 NLRB No. 191, 1659 (1964) (excluding employees from the bargaining unit where their "interests are perforce allied to management rather than with rank-and-file employees"); *see also Sea View Industries, Inc.*, 127 NLRB No. 165, 1412

(1960) (holding that when employees "directed the work of the employees under them, they come within the statutory definition of supervisors and must therefore be excluded from an appropriate bargaining unit of rank-and-file employees.").

Thus, to protect the basic ends of federal labor law, the NLRB must ensure that the line between rank-and-file employees and supervisory employees is clearly drawn. Moreover, because voting in a union election is one of the most basic federal labor law rights, that line must be drawn before any such election occurs so that the employer, the supervisors, and the employees know which side of the line on which the contested employees fall. Otherwise, the line becomes blurred, and the parties wind up in a situation like this one in which an election has been conditionally certified pending appeal rights, no one knows whether the claimed supervisors are actually supervisors, the Region has refused to resolve the issue, and the parties are left in limbo, possibly for years, while bargaining is supposed to occur. This does not serve either the congressionally-mandated purpose of the NLRA to allow employees the fullest freedom in choosing their representatives, 29 U.S.C. §§ 151, 159(b); the purpose of ensuring stable labor relations, *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362 (1949); *NLRB v. Catherine McAuley Health Center*, 885 F.2d 341, 344 (6th Cir. 1989); or the U.S. Supreme Court-recognized right of employers to demand loyalty from their supervisors. *Yeshiva Univ.*, 444 U.S. at 682. Rather, it violates these basic tenets of law.

b. Failure to Determine Supervisory Status Prior to the Election Deprived TCGplayer of its Speech Rights.

Failure to determine supervisory status before an election also deprived TCGplayer of important aspects of its ability to exercise it free speech rights under Section 8(c) and the First Amendment. Companies, just like individuals, enjoy a First Amendment right to speak or to refrain from speaking. *See, e.g., Janus v. AFSCME Council 31*, 138 S. Ct. 2448, 2463, 201 L. Ed. 924

(2018) ("We have held time and again that freedom of speech 'involves both the right to speak freely and the right to refrain from speaking at all.'"). Congress recognized this fact when it enacted Section 8(c) of the Act, which states in relevant part that:

> The expressing of any views, argument, or opinion, or the dissemination thereof…shall not constitutes or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. § 158(c). These rights cannot be infringed by unions or the Board. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

But the Acting Regional Director's refusal to determine the supervisory status of Operations Leads infringed on TCGplayer's free speech rights by restricting its ability to demand their loyalty and communicate its message through them. In this situation, the evidence would have shown that TCGplayer relies on its Operations Leads to run its operations and to interact with rank-and-file employees on a day-to-day basis. Often, Operations Leads are the only members of TCGplayer management, and thus the only Company authority, on-site. (Trans. at 12). Because they are the primary touchpoint between the rank-and-file employees and the Company, they are the most important and sometimes only conduit of information from the Company to rank-and-file employees on all sorts of issues, including the Company's position on unionization. *See Harborside*, 343 NLRB at 907. Depriving TCGplayer of the ability to communicate through its Operations Leads on pain of possibly committing unfair labor practices if or when their status is ever determined, certainly deprives the Company of its right under 8(c) to disseminate its lawfully protected views on unionization.

c. Failing to Determine Supervisory Status Prior to the Election Creates Significant Risk of an 8(a)(2) Violation or Objections Requiring a Re-Run Election.

The Acting Regional Director's refusal to determine supervisory status prior to the election

also created a significant risk that TCGplayer violated Section 8(a)(2) of the Act through the actions of its Operations Leads or, at the very least, that Operations Leads engaged in objectionable conduct sufficient to set aside the election, as alleged in the Company's objections (discussed below). Indeed, the NLRB has held that supervisory conduct supporting a union is, in many circumstances, a violation of Section 8(a)(2). *See, e.g., Yonkers Sanitarium, Inc.*, 214 NLRB 668, 577 (1974) (*prima facie* case of a Section 8(a)(2) violation established where supervisors urged and solicited rank-and-file employees to sign union cards and to solicit signed cards from others, encouraged employees to support the union, and encouraged employees to accompany union representatives when they demanded recognition).

Moreover, supervisory conduct in soliciting authorization cards, engaging in electioneering, and otherwise supporting union activity is objectionable conduct sufficient to set aside an election. *See, e.g., Marconi, Inc.*, 251 NLRB 46 (1980) (Supervisor's conduct found objectionable and election set aside when supervisor signed authorization cards, distributed authorization cards, encouraged employees to vote for the union, said the union would improve wages and told employees the union might try to deport employees if the union did not prevail); *Lamar Electric Membership Corp.*, 164 NLRB 979 (1967) (Supervisor's conduct found objectionable and the election set aside when supervisor attended union meetings, urged employees to vote for the union and told employees they could only get something through the union). TCGplayer has filed Objections to the election based on the conduct of the Operations Leads that are discussed more fully below. Suffice to say for the purposes of the Company's Request for Review of the DDE that the only way TCGplayer can exercise control over its supervisors and take steps to avoid a Section 8(a)(2) violation or objectionable conduct by them is if it knows who they are before such conduct occurs. In this case, no one—not the union, not the

bargaining unit employees, and not TCGplayer—knows if the Operations Leads are Section 2(11) supervisors. Not only is this inefficient, but also it creates outsized risks (risks that were realized in this case) that laboratory conditions will be violated, and employees will be coerced in their legally protected decision to choose whether or not to be represented by a union. This is yet another reason why determination of supervisory status before the election is more than a procedural rule—it goes to the very heart and structure of the Act.

d. TCGplayer's Employees Have Been Deprived of their Right to Know Who Is in the Bargaining Unit.

In addition, under the specific facts of this case, TCGplayer's rank-and-file employees have been deprived of their right to know who is in the bargaining unit. Situations in which employees do not know who is in or out of the bargaining unit have led to elections being set aside. *See, e.g., NLRB v. Parsons School of Design*, 793 F.2d 503, 507-08 (2d Cir. 1986) (setting aside election where Board changed scope of unit following election).

As stated above, the Notice of Election says that certain classifications are "eligible to vote" and thus doubtlessly included in the bargaining unit. But it also says that the parties "disagree" on whether certain other employees, including Operations Leads, should be included in the bargaining unit, and that the inclusion of such individuals will be resolved after the election if necessary. Rather than giving clear notice to employees about whether their supervisors, the Operations Leads, are included in the bargaining unit, this notice tells employees that nobody knows whether they are in or out of the unit. And in the current procedural posture of this case, no one may know whether they are in or out of the bargaining unit for years to come. In the meantime, the employees who voted for the CWA are left wondering whether they need to bargain from a point of view that Operations Leads are included in the unit, and TCGplayer is left wondering whether it can continue to rely on its Operations Leads to manage its day-to-day operations, or

whether it is going to have to take action to ensure it can control its business in other ways. This is the consequence of the Acting Regional Director's abuse of discretion by failing to address the supervisory status of Operations Leads before the election.

Here, eligible voters went to the polls believing their front-line supervisors, Operations Leads, were voting to be included in a CWA-represented bargaining unit with them. Similar to *Parsons*, although the numerical impact on the bargaining unit is relatively small, the potential change to the scope of the bargaining unit is especially significant in this case because, not only does it involve Operations Leads, who are often the Company's only on-site supervision, but also the evidence shows that the Operations Leads were involved in pro-union activities early in the organizing drive given their signatures on the CWA's demand for recognition. *Cf. Toldeo Hosp.*, 315 NLRB 594, 594 (1994) (distinguishing *Parsons* because the change at issue "was deemed of special significance.").[6] This creates a strong expectation in the hearts and minds of bargaining unit employees that must be addressed as soon as possible. It is inherently coercive for subordinates to be included in a bargaining unit with their superiors; thus, the Acting Regional Director's failure to address the Operations Leads supervisory status impacted the election results.

3. In the Alternative, the Facts of this Case Present an Abnormal Situation Requiring Determination of Supervisory Status Before the Election.

Finally, and in the alternative, should the Board decide that the determination of supervisory status issues ordinarily can be deferred until after the vote, this case presents the exception to this rule. Again, as TCGplayer's Offer of Proof states, the Operations Leads are often the only Company authority on-site in the workplace. In most situations, for example in a

[6] *Beverly California Corp.*, 319 NLRB 552 (1995), is distinguishable. There, the employer did not preserve a supervisory taint issue, and there is no evidence or contention that the LPNs excluded as supervisors were the only on-site supervisory authority at times. Moreover, there was a pre-election determination as to the supervisory status of the LPNs in that case unlike here, so there was a more fully developed factual record.

manufacturing and construction settings, there are other mid-level or upper-level supervisors present and there is no leadership void should a lead person or foreman be determined to be an employee rather than a supervisor, but that is not the case here. As explained above, TCGplayer is entitled to the loyalty of its supervisors, and it is entitled to rely on them to manage its rank-and-file employees. But since the determination of supervisory status was deferred until after the election, and since the Region once again refused to determine the supervisory status of TCGplayer's Operations Leads after the election, TCGplayer is left with a leadership void where the often only on-site leadership is potentially aligned with rank-and-file employees rather than management. This factual circumstance, combined with the other factors discussed above, means that this is the sort of abnormal situation where supervisory status should be decided before the election.

***

In sum, the Acting Regional Director misapplied the applicable standards under R&R Section 102.64(a) in determining that the supervisory status of TCGplayer's Operations Leads should be deferred to after the election. Moreover, the nature and structure of the NLRA, U.S. Supreme Court authority entitling TCGplayer to the loyalty of its supervisors, TCGplayer's free speech rights, and fair notice to bargaining unit employees require that this determination occur before the vote. Finally, and in the alternative, this case presents unique facts, including that Operations Leads are often then only supervisory authority on-site, that required determination of Operations Leads' supervisory status prior to the election even if it is proper ordinarily to defer such considerations until post-election proceedings. The DDE should be vacated, the election should be set aside, and this matter should be remanded to another region for a pre-election determination of Operations Leads' supervisory status.

B. Request for Review of the DOO: The Regional Director Erred by Refusing to Grant a Hearing on TCGplayer's Objections.

In the alternative, the Board should grant review of and reverse the Regional Director's DOO.[7] R&R Section 102.69(1)(ii) requires Regional Directors to hold a hearing on objections where the evidence described in the accompanying offer of proof "could be grounds for setting aside the election if introduced at a hearing." R&R Section 102.69(c)(1)(ii) (emphasis added); *accord Casehandling Manual, Part Two, Representation Proceedings*, § 11391.1 (Sept. 2020) (The Regional Director should evaluate each objection and the offer of proof to determine whether the evidence described "could be grounds for setting aside the election if introduced at a hearing"); *Casehandling Manual, Part Two, Representation Proceedings*, §§ 11392.6, 11393 (same). The only time no hearing is required on objections is if the evidence described in the offer of proof "would not constitute grounds for setting aside the election." R&R Section 102.69(c)(i).

The utilization of "could" in R&R Section 102.69(c)(ii) versus the utilization of "would" in R&R Section 102.69(c)(i) is important and intentional. In this context, "could be grounds" means that the evidence described in the offer of proof might or might not be sufficient to set aside the election; whether it is or not must be determined from the evidence at the hearing. On the other hand, "would not constitute grounds" means that with certainty there are no grounds to set aside an election. *See* Ways of Using Would vs. Could Correctly | YourDictionary, https://grammar.yourdictionary.com/vs/ways-of-using-would-vs-could-correctly.html (last accessed April 3, 2023). Because the Regional Director misapplied the applicable standards, and

[7] TCGplayer asserts that the supervisory status issues in this case should have been resolved before the election, which is the focus of its Request for Review of the Acting Regional Director's DDE. It is not seeking to litigate voter eligibility issues in connection with its request that the Board review the Regional Director's decision to deny a hearing on TCGplayer's Objections.

because TCGplayer's Offer of Proof established that there could be grounds to set aside the election, her decision should be reversed and TCGplayer's objections should be remanded to another region for a hearing. *See Casehandling Manual, Part Two, Representation Proceedings*, § 11395.1 (stating, "the primary concern of a Regional Director is to afford due process to the parties," and that "the Regional Director should simply evaluate each objection and the accompanying offer of proof to determine whether the evidence described…could be ground for setting aside the election….").

1. The Regional Director Misapplied the Applicable Standards for Granting a Hearing on TCGplayer's Objections.

First, the Regional Director erred by misapplying the applicable standards and holding TCGplayer to an impermissibly high burden for granting a hearing on its Objections. The Regional Director first stated that the burden to establish facts sufficient to set aside a secret ballot election is a heavy one. (DOO at 2). However, R&R Section 102.69(c)(1)(i) and (ii) say nothing about the burden of proof to set aside an election. Rather, these rules state when the Regional Director must grant a hearing, which hearing, in turn, would determine whether TCGplayer has met its burden of proof for setting aside the election. Since the Regional Director purported to apply the "heavy burden of proof" to set aside an election at the preliminary stage of determining whether a hearing is needed, she erred and her decision should be reversed.

The Union may respond that in the second paragraph of her "Appropriate Standard" section, the Regional Director cited R&R Section 102.69(c)(1), relied on case law and thus properly stated that a hearing should be held only if the objecting party has established that the evidence "would warrant setting aside the election." (DOO at 2) (citing *Transcare N.Y., Inc.*, 355 NLRB 326, 326 (2010) among other cases). But that is not what Section 102.69(c)(1)(ii) says. Rather, Section 102.69(c)(1)(ii) says that TCGplayer need only submit evidence that "could be"

(but might not be) sufficient to set aside an election. And this is where the distinction between the words "would" and "could" is important. *See Mercy Catholic Med. Ctr.*, 380 F.3d at 152-53 (stating that an agency's interpretation of its own regulations is not entitled to deference where an alternative reading is compelled by the regulation's plain meaning). By raising the standard from one of possibility to one of certainty, the Regional Director imposed an improperly high burden on TCGplayer for presenting an offer of proof, and her decision should be reversed on this basis alone. Moreover, to the extent that case law imposes a burden on employers to establish in their offers of proof that there "would be" as opposed to "could be" facts allowing the set-aside of an election, those cases misapply the rule and should be overruled.

2. TCGplayer's Objections Demonstrate that there Could be Grounds to Set Aside the Election and thus a Hearing was Required.

Applying the proper standards, it is clear that TCGplayer's Objections and Offer of Proof presented sufficient evidence to demonstrate that there could be grounds to set aside the election. As a result, the Regional Director erred in denying TCGplayer a hearing on its Objections. Her decision should be reversed and this matter remanded for a hearing.

a. The Regional Director Erred in Failing to Order a Hearing on Objections 1, 2, 3 and 6.

The Regional Director erred by not ordering a hearing on TCGplayer's Objections 1, 2, 3 and 6. These objections state:

OBJECTION 1

> Region 3's failure to determine the Section 2(11) supervisory status of the Operations Leads before the March 10, 2023 election was inherently coercive of eligible voters' Section 7 rights because such voters were led to believe Operations Leads, to whom they directly report, may be included in the bargaining unit with them.

OBJECTION 2

> Region 3's failure to determine the Section 2(11) supervisory status of the

> Operations Leads before the March 10, 2023 election prevented eligible voters from exercising their Section 7 rights knowing the scope of the potential bargaining unit.

OBJECTION 3

> Region 3's failure to determine the Section 2(11) supervisory status of the Operations Leads before the March 10, 2023 election denied TCGplayer of its statutory and constitutional speech rights in violation of Section 8(c) of the National Labor Relations Act and the First and Fifth Amendments of the U.S. Constitution without Due Process.

OBJECTION 6

> Region 3 abused its discretion in not conducting a pre-election hearing that would have determined the Section 2(11) supervisory status of the Operations Leads.

For all of the reasons discussed above in connection with the DDE, the Regional Director erred in failing to order a hearing on these objections, at the very least to determine the supervisory status of the Operations Leads. Without waiving any of the foregoing arguments, it is noteworthy that the Regional Director relied on certain Federal Register comments to the 2014 version of R&R Section 102.69(a) (unlike the Acting Regional Director's DDE, which relied on comments to the 2019 rule), but those comments do not have the force and effect of law, and the Regional Director must still explain her decision and why she exercised her discretion in the way she did based on the facts and the law. *See Power Inc.*, 40 F.3d at 423. Here, she did not have any facts on which to rely because the Region never allowed TCGplayer to present evidence during a hearing. This in and of itself violates TCGplayer's right to present evidence and receive a determination on a disputed unit appropriateness issue in connection with a question concerning representation—namely whether the Operations Leads are supervisors and have a duty of loyalty to the Company or are not supervisors and thus are properly aligned with rank-and-file employees. *See* 29 U.S.C. §159(c)(1).

It also is noteworthy that the Regional Director relied on commentary to the 2014 rule to

answer the concerns asserted in Objections 1 and 2 that rank-and-file employees would not know who is in the unit with them. The Regional Director concluded that this was not a significant concern because employees were fully informed of the bargaining unit through the Notice of Election. (DOO at 4). But as explained above, the Notice of Election in this case clarifies nothing about who is or is not included. Rather, it says that some employees, including the Operations Leads, may or may not be included, and that the NLRB may or may not clarify this issue at some time in the future. As of today, the Region has conditionally certified a bargaining unit (subject to appeals) and the parties still do not know which employees and classifications are included or excluded, or whether the certified unit includes supervisors, thus potentially obviating the requirement that TCGplayer bargain in the certified unit. *See Beasley*, 416 U.S. at 659-60. Hence, contrary to the non-binding guidance on which the Regional Director relied, voting employees were not, are not and never have been "fully informed" as to the description of the bargaining unit or with who their interests align or diverge.

b. The Regional Director Erred by Failing to Order a Hearing on Objection 4.

The Regional Director next erred by failing to grant a hearing on Objection 4, which states:

OBEJCTION 4

> Region 3's personnel engaged in election misconduct by permitting Operations Leads, who are Section 2(11) supervisors, to be in the no-electioneering area and voting area in the presence of eligible voters during the polling periods on March 10, 2023.

TCGplayer offered to prove not once but twice that its Operations Leads are supervisors. Thus, during the videoconference hearing and again in its Offer of Proof, TCGplayer offered to prove that Operations Leads interview and recommend hiring decisions, regularly assign work to other employees based on exercise of their independent judgment, responsibly direct employees in their work functions, have compensation that is directly impacted by the performance of

generalists who report to them, are involved in counseling and effectively recommend discipline of other employees and the like. (Trans. at 12-13; Offer of Proof at 2-4, 5-6). TCGplayer further identified at least twelve witnesses who would testify as to the supervisory status of the Operations Leads (Offer of proof at 2, 3). Finally, TCGplayer offered to prove that Operations Leads "spent time" in the no-electioneering area and identified witnesses who could prove their presence and conduct by direct evidence.

The offer to prove that Operations Leads "spent time" in the no-electioneering area is materially different than the way the Regional Director characterized it, namely that the Operations Leads were merely "in" the voting area, possibly in connection with their efforts to vote subject to challenge. (DOO at 5). Moreover, as the NLRB recognized in *Harbor Healthcare*, 343 NLRB at 906-907, it does not matter whether the Operations Leads were for or against the Union with respect to this allegation. Either way, if they were supervisors, they were in a position to improperly surveil workers and engage in other objectionable conduct. In fact, the NLRB has found that a Regional Director improperly failed to direct a hearing where the objections were that supervisors were present in eyesight of a voting area, even though they were outside of the no-electioneering area. *See Transcare New York*, 355 NLRB at 326.

Critically, it is impossible for TCGplayer to know the specific facts that the Regional Director required, including precisely how long the Operations Leads were in the no-electioneering area or the conduct in which they engaged while there because TCGplayer did not have any other Company representatives in the no-electioneering area, and its observers were observing the election in the voting room. Simply put, the Regional Director required TCGplayer to assert facts in its Offer of Proof that it could not know and that could only be adduced at a hearing. The mere fact that claimed supervisors spent time in the no-electioneering area means that objectionable

conduct sufficient to set aside the election could have occurred, and the Regional Director erred by denying a hearing on this issue. *See id.*

c. The Regional Director Erred in Denying a Hearing on Objection 5.

The Regional Director also erred by not ordering a hearing on Objection 5, which states:

OBJECTION 5

> Operations Leads, who are Section 2(11) supervisors, engaged in pro-union conduct that reasonably tended to coerce or interfere with employee free choice in the March 10, 2023 election.

In support of this objection, TCGplayer offered to prove that Operations Leads solicited multiple union cards, signed the Union's demand for recognition (which was attached to the Offer of Proof as Exhibit A), and engaged in pro-union messaging through various social media sites.[8] TCGplayer offered to call thirteen witnesses to prove these facts.

(1) TCGplayer's Offer to Prove Supervisory Solicitation of Authorization Cards Warranted a Hearing.

In *Harborside Healthcare*, 343 NLRB at 911, the Board held that "absent mitigating circumstances, supervisory solicitation of an authorization card has an inherent tendency to interfere with the employee's freedom to choose to sign a card or not." When supervisors solicit authorization cards, employees may be reluctant to ask for them back, and such supervisory solicitation could cause employees to feel obligated to carry through on their stated intention to support the union, and the cards themselves could "paint a false portrait of employee support during its election campaign." *Id.* at 911-12.

TCGplayer offered to prove that multiple supervisors solicited authorization cards and

[8] TCGplayer identified specific Operations Leads who were engaged in this conduct in its Offer of Proof, to which the Board has access in the case file. TCGplayer is not attaching hereto the Offer of Proof given the procedure is intended to shield the offered evidence until a hearing is conducted.

offered to call witnesses to establish such solicitation. Because supervisory solicitation of authorization cards is inherently coercive, TCGplayer offered sufficient evidence to warrant a hearing on this issue. In rejecting a hearing on Objection 5, the Regional Director said that TCGplayer did not offer to prove the supervisory status of the Operations Leads involved in the solicitation or what conduct they undertook to be "involved" in the solicitation. (DOO at 6). But this mischaracterizes the totality of the Objections and the Offer of Proof. TCGplayer offered to prove that multiple pro-union Operations Leads actually solicited cards. (Offer of Proof at 5). This offer goes well beyond the assertion that only one Operations Lead was "involved" in such solicitation. The Company also repeatedly offered to prove the supervisory status of all of its Operations Leads, including the specifically named Operations Lead who solicited authorization cards.

Furthermore, the Regional Director's effort to deny TCGplayer of a hearing on the basis that its Offer of Proof was deficient is unsupported. In that regard, the Regional Director said TCGplayer failed to "describe with sufficient particularity any conduct that would necessitate a hearing" such as "the nature of the individual's involvement, including failing to demonstrate that the Operations Lead in question actually solicited authorization cards from bargaining unit employees, how many cards were allegedly solicited, or when any such solicitation took place. (DOO at 6). Of course, cards were solicited from TCGplayer employees; otherwise, there is no reason to solicit cards. As to the number of cards and where such solicitation occurred, the Company could not know such details absent unlawfully surveilling union activity. For all of these reasons, TCGplayer was entitled to a hearing on this issue.

(2) TCGplayer's Offer to Prove Other Pro-Union Conduct Sufficient to Upset Laboratory Conditions Warranted a Hearing.

The Company's offer to prove that supervisors signed the Union's demand for recognition

and engaged in widespread pro-union messaging via various social media sites in a manner sufficient to upset laboratory conditions also is deserving of a hearing. Pursuant to *Harborside Healthcare*, 343 NLRB at 909, the Board evaluates two factors and several subfactors in determining whether pro-union supervisory conduct was objectionable. The first factor is whether the supervisory pro-union conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election, including (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the conduct; and (b) an examination of the nature, extent and context of the conduct in question. The second factor is whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory; (b) whether the conduct was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct become known; and (e) the lingering effect of the conduct.

With respect to the first factor, as repeatedly explained herein, TCGplayer has offered to prove the supervisory status of its Operations Leads, including the Operations Leads who solicited authorization cards, signed the Union's demand for recognition, and engaged in widespread dissemination of pro-union messages. TCGplayer also provided to the Region a copy of the Union's January 25, 2023 demand for recognition, which stated that the Union had received a "supermajority" of authorization cards and was signed by 206 employees, including five out of fourteen Operations Leads. The fact that this many Operations Leads signed the demand for recognition is strong evidence of their widespread involvement in organizing and, given their ability to control the day-to-day terms and conditions of employees and the fact that they often are the only supervisory authority on site, and thus their uninhibited ability to engage in coercive conduct towards the rank-and-file employees, it is strong evidence that their conduct upset the

requisite laboratory conditions necessary to conduct a fair vote. *Cf. Sewell Mfg. Co*., 138 N.L.R.B., 66, 70 (1962) (discussing laboratory conditions); *Nassau & Suffolk Contractors' Ass'n, Inc*., 118 NLRB 174 (1957) (discussing ills of supervisory involvement in union affairs). Indeed, the fact that at least five out of fourteen Operations Leads signed this very public and widely disseminated letter, a primary purpose of which was to galvanize support for the unionization effort, is just as coercive and upsetting of laboratory conditions as solicitation of authorization cards.

TCGplayer's Offer of Proof and the other evidence available to the Regional Director also demonstrates the Operations Leads' conduct interfered with employees' freedom of choice. First, a change of just 25 votes would have reversed the election outcome. Given the size of the bargaining unit involved, this factor weighs in favor of setting the election aside. Similar to *Harborside Healthcare*, where the union won 58% of the counted ballots, here the Union won 60% of the counted ballots. But also, as in *Harborside*, if the 26 challenged ballots were cast against union representation, a shift of just twelve ballots would have changed the outcome. *See Harborside Healthcare*, 343 NLRB at 914. And the status of those votes must be assessed in light of the evidence that Operations Leads supported the unionization effort. As the *Harborside Healthcare* Board stated, "employees may be induced to support/oppose the union because they fear future retaliation, or hope for preferential treatment, by the supervisor." 343 NLRB at 907 (citing *Wright Mem. Hosp. v. NLRB*, 771 F.2d 400, 404 (8th Cir. 1985)). Proof of express coercion is not required; rather, it is the inherent authority of the pro-union supervisory conduct that creates the risk of upsetting laboratory conditions. *See id*.at 908.

TCGplayer's Offer of Proof also demonstrates that the Operations Leads' pro-union conduct was widespread, well-known and continued throughout the organizing process. Again, five Operations Leads made very public statements of support for organizing by singing the

demand for recognition on January 25. TCGplayer's Offer of Proof also shows that multiple Operations Leads were engaged in soliciting authorization cards and were engaged in posting pro-union messages all the way up to the day of the vote. (Offer of Proof at 5). Given that the Operations Leads' pro-union conduct was widespread, well known, ongoing and occurred even on the day of the election, the lingering effects of such conduct cannot be gainsaid. Ultimately, regardless of whether TCGplayer's Offer of Proof on Objection 5 proves that the election "would be" set aside as a result, it certainly proves that the election "could be" set aside and that is enough to warrant a hearing on this objection. *See* R&R Section 102.69(c)(1)(ii).

In her final effort to avoid a hearing on this objection, the Regional Director concluded that because there was no evidence as to precisely what the pro-union messages said and because TCGplayer did not provide written copies of the statements, the objection must fail without a hearing. But this conclusion misses the forest for the trees. The Operations Leads' pro-union conduct must be evaluated as a whole, and in light of their actual supervisory status. The same holds true for the entirety of TCGplayer's objections. *See Swing Staging, Inc. v. NLRB*, 994 F.2d 859, 863 (D.C. Cir. 1993) ("The Board is required to make an overall judgment as to whether the atmosphere in the plant…was so poisoned as to materially impair the election results") (quoting *Amalgamated Clothing and Textile Workers v. NLRB*, 736 F.2d 1559, 1569 (D.C. Cir. 1984)) (internal quotation marks omitted). TCGplayer offered to prove that pro-union supervisors actively solicited authorization cards, signed the Union's public demand for recognition which signaled to all other employees their support for the Union, and posted pro-union messages throughout the course of the campaign. Thus, this case presents a stronger case of upset laboratory conditions based on supervisory conduct than does *Laguna College of Art & Design*, 362 NLRB 965 (2015), which involved much more passive and limited conduct.

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To summarize, the Regional Director applied the wrong standard to determine that TCGplayer was not entitled to a hearing on its Objections. She effectively required TCGplayer to prove that the election "would be" set aside if its Offer of Proof were true, but the standard under R&R 102.69(c)(1)(ii) is lower, requiring only that TCGplayer establish through its Offer of Proof that the election "could be" set aside. She also mischaracterized the nature and scope of TCGplayer's Objections and Offer of Proof. Her DOO should be vacated, and TCGplayer's Objections should be remanded to another region for hearing.

C. The Board Should Establish a Rule that if Supervisory Status Issues Are Deferred Until After the Election, They Must Be Decided in a Post-Election Hearing Upon Request.

Finally, and in the further alternative, this case presents an important issue of policy involving determinations of supervisory status. Without waiving TCGplayer's position that supervisory status issues normally should be resolved prior to an election, the factual situation in this case presents an opportunity for the Board to clarify how supervisory status issues should be handled when such issues have been deferred to after an election. Here, the supervisory status issues were deferred, but the number of challenged ballots were insufficient to impact the results of the election. The Regional Director therefore refused to resolve the supervisory status issues, leaving the parties in limbo and depriving TCGplayer and its employees of certainty as to who the supervisors are, whether certain employees are included in or excluded from the bargaining unit, and often having such disputed employees be the only supervisory authority on site while, at the same time having such employees be aligned with rank-and-file employees.

Under these circumstances, and it light of the Supreme Court's repeated holdings that employers are entitled to the loyalty of their agents, the nature and structure of the NLRA excluding supervisors from coverage, and the fact that employers are held responsible for the acts

of their supervisors, the Board should issue a rule requiring that where supervisory status issues are not resolved prior to an election, they must be resolved in a post-election hearing upon the filing of proper and timely request. Such a rule would not be dissimilar to the Board's longstanding *Sonotone* election procedures, which address the congressional mandate that the Board not deem any unit appropriate that includes both professional and non-professional employees unless a majority of such professional employees vote for inclusion. 29 U.S.C. § 159(b); *Sonotone Corp.*, 90 NLRB 1236 (1950). Requiring resolution of supervisory status issues in proceedings immediately after the election promptly resolves any disputes regarding unit appropriateness and sets a proper stage for a stable bargaining relationship.

Again, TCGplayer does not waive its position that supervisory status issues should normally be resolved prior to an election, but assuming the Board does not agree, it remains incumbent on the Board to resolve this issue before bargaining begins to ensure that employees can exercise the fullest freedom to select bargaining representatives of their choosing and to further ensure that a stable labor relations dynamic is established as soon as possible following certification of a representative.

V. CONCLUSION

In conclusion, for all of the foregoing reasons, the DDE in this case should be vacated, the election should be set aside, and the matter should be remanded to another region for a pre-election determination of the supervisory status of TCGplayer's Operations Leads. In the alternative, the DOO should be vacated and the case should be remanded to another region for a hearing on TCGplayer's Objections, including a determination of the Operations Leads' supervisory status. Finally, and in the further alternative, assuming that the Board continues to hold that supervisory status issues ordinarily may be deferred to after an election, it should establish a rule requiring that such status be resolved through a post-election hearing upon request by any party in order to ensure

that employees can exercise their fullest freedom to select representatives of their choosing, to ensure that employers receive the loyalty of their supervisors, and to establish stable labor relations dynamics at the outset of bargaining.

Dated: April 5, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Request for Review of the DDE and DOO was e-filed on April 5, 2023, through the Board's website and served as follows:

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