Cedars-Sinai Medical Center *and* California Nurses Association. Case 31–RC–8180

July 28, 2004

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

The National Labor Relations Board, by a three-member panel, has considered objections to an election held December 11, 12, and 13, 2002, and the administrative law judge's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 695 votes for and 627 against the Petitioner, with 10 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs and has decided to adopt the judge's findings[1] and recommendations only to the extent consistent with this Decision and Direction of Second Election.

Introduction

The Employer filed timely objections to the election, numbered from 1 through 19, with multiple subparts. In Objection 1, the Employer alleged, inter alia, that the Petitioner, by its agents or supporters, made anonymous telephonic threats to antiunion bargaining unit employees during the "critical period" between the filing of the petition for election, on October 30, 2002,[2] and the election itself.

The judge found that, in the months and weeks preceding the election, agents of the Petitioner made several threatening telephone calls to antiunion employees Christine Foxon and Scott Barnes; she also found that these threats were disseminated to other employees in the bargaining unit. However, applying the Board's standard for party conduct, the judge concluded that the threats did not have the tendency to interfere with employees' freedom of choice. She therefore recommended that the portions of Objection 1 relating to the threats to Foxon and Barnes be overruled.[3]

The Employer excepts, inter alia, to the judge's recommendation to overrule Objection 1, and contends that the threats to Foxon and Barnes require that the election be set aside. For the reasons set forth below, we find merit in the Employer's exceptions as they pertain to the threats to Barnes.[4] Accordingly, we sustain the portion of Objection 1 relating to these threats, set aside the election on this basis, and order that a new election be held.[5]

Background

The relevant facts are as follows. During the Petitioner's organizing campaign at the Employer, emergency room nurses Foxon and Barnes were among the most active opponents of the Petitioner's organizing efforts. In this regard, they were involved in recruiting other nurses who opposed the organizing efforts to attend antiunion meetings; in handing out antiunion flyers and information; and in cofounding an antiunion organization called "One Voice, Our Voice."

Beginning sometime in August and spanning through October or November, Foxon began to receive a series of threatening anonymous telephone calls.[6] The first three calls essentially warned Foxon to "back off" her opposition to the Petitioner and that she "needed to be careful" about opposing the Petitioner. After receiving the third call, Foxon dialed "*69," and the individual who an-

[1] The Employer has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] All dates herein are in 2002, unless otherwise noted.

[3] In addition, the judge ultimately recommended that Objection 1 be overruled in its entirety.

[4] As explained further below, we find that the Employer has failed to show that the threats to Foxon took place during the critical period; thus, we rely on those threats only to the extent that they add meaning and dimension to the threats to Barnes. *See Dresser Industries*, 242 NLRB 74, 74 (1979).

[5] In light of our finding that the threats to Barnes, standing alone, warrant setting aside the election, we find it unnecessary to pass on the Employer's exceptions to the judge's recommendation to overrule Objections 2 through 19 and the portions of Objection 1 that do not relate to these threats.

Although Member Walsh agrees that the election should be set aside on the basis of the threats to Barnes, and that the threats to Foxon should be relied upon as background evidence, he would adopt, rather than find it unnecessary to pass on, the judge's recommendation to overrule the remaining objections, except Objection 3, as he finds that they are without merit. He joins Member Schaumber in finding it unnecessary to pass on the portions of Objection 3 relating to the vandalism of antiunion employees' vehicles.

Chairman Battista would also find that the vandalism of the cars of three antiunion nonunit employees was objectionable. News of the vandalism was widely disseminated among unit employees. This vandalism, when coupled with the other conduct found objectionable, created a general atmosphere of fear and reprisal.

[6] The record does not reflect the specific dates that these calls occurred. It indicates only that Foxon spoke to the Petitioner's lead organizer, David Monkawa, about the calls shortly after what turned out to be the final call, and that this discussion took place in November. However, there is no indication as to when the final call took place in relation to this discussion.

swered the telephone said, "California Nurses."[7] During the fourth and final call, the caller told Foxon that he or she knew that Foxon had two young daughters and that she needed to "think about [her] family and [her] girls and back off."

In November, Barnes also began to receive threatening anonymous calls. Barnes, a pet owner and animal lover, received a total of 7 to 10 calls in which the callers variously told him to "stop fucking with the Union"; that "little kittens look good in frying pans;" that they would stab his dogs; and that "wouldn't it be terrible if [his] Corgis were run over."[8] These calls stopped at the end of November, about 2 weeks before the election.

Barnes credibly testified that he discussed these threats with Foxon, employee Suzanne Geimer, and other coworkers; he also told 20 to 30 other nurses about the threats at an emergency room department meeting.[9] In addition, there is evidence in the record that the threats had been widely discussed outside of this context, as news of the threats had reached a number of other unit employees with whom Barnes had not spoken. In this respect, several unit employees, who did not even know Barnes, testified that they had heard about the threats.

Analysis

In evaluating party conduct during the critical period, the Board applies an objective standard, under which conduct is found to be objectionable if it has "the tendency to interfere with the employees' freedom of choice." *Cambridge Tool & Mfg. Co.*, 316 NLRB 716, 716 (1995). In deciding whether such interference has occurred under this standard, the Board considers: (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; (9) the degree to which the misconduct can be attributed to the party. See, e.g., *Taylor Wharton Division*, 336 NLRB 157, 158 (2001); *Chicago Metallic Corp.*, 273 NLRB 1677, 1704 (1985), enfd. 794 F.2d 527 (9th Cir. 1986).

As noted above, the judge, applying the above standard,[10] concluded that the threats to Foxon and Barnes did not have "the tendency to interfere with employees' freedom of choice" and was therefore not objectionable. In so concluding, the judge reasoned that, even though the calls were menacing and intimidating, and were likely disseminated to more than 34 voters,[11] anonymous threats such as these are viewed as less likely to be executed than direct threats; and, she observed that the calls targeted only two members of the bargaining unit. The judge further stated that employees in the unit would have no reason to believe that the callers who had threatened Foxon and Barnes had the power to effectuate violence on a significant segment of the bargaining unit; thus, she found that the threatening calls would not objectively cause fear among employees in the unit who had heard about the calls but did not receive them. In addition, the judge found that the calls ended 2 weeks before the election, and it was reasonable to assume that information of their cessation was disseminated, and that the calls did not persist in the minds of voters. As discussed below, we disagree with the judge's findings as they relate to the threats to Barnes.

Contrary to the judge, we find that the threats to Barnes constituted objectionable conduct under the standard for party conduct.[12] At the outset, we find that the judge erred in positing that these threats were somehow less "threatening" because they were made anonymously rather than directly. Conversely, we believe that, in these circumstances, the anonymous threats were potentially even *more* menacing than a direct threat might have been, given that the callers, through some unexplained means, knew specific details about Barnes' life—including the type, and even breed, of pets he owned—and Barnes could not take definite measures to protect himself and his pets against individuals whose identities he did not know. Threats such as these are certainly quite severe; and where, as here, they are tied to an employee's antiunion stance or activities, the threats are reasonably calculated to interfere with his freedom of choice. See, e.g., *G.H. Hess, Inc.*, 82 NLRB 463, 465

[7] At the hearing, the judge took notice of the fact that the "*69" procedure allows the recipient of a call to be automatically connected with the last caller.

[8] "Corgis" referred to the breed of dogs Barnes owned.

[9] Apparently, all of these individuals were unit employees.

[10] Although it is not clear from the record that the Petitioner's agents made these threats, the judge nonetheless applied the standard for party conduct since, in her view, based on all the circumstances, unit employees who heard about the threats to Foxon and Barnes could have reasonably attributed them to the Petitioner. Neither party has excepted to the judge's application of this standard.

[11] The judge reasoned that, even though the actual margin between votes for and against the Petitioner was 68, a "swing" of only 34 votes could have changed the results of the election.

[12] We apply the standard for party conduct here because, as noted above, there are no exceptions to the judge's application of this standard.

(1949) (recognizing that statements made to employees by union representatives that are reasonably calculated to interfere with the employees' exercise of freedom of choice exceed the permissible bounds of preelection activities). These threats would tend to cause the employees who had heard about them to reasonably assume that the Petitioner was willing to physically harm any employee—or the loved ones of any employee—who opposed it or voted against it in the election. The threats to Barnes are even more disturbing when viewed in the context of the threats to Foxon, which similarly involved threats of bodily harm to Foxon and her two young daughters.[13]

Further, the threats were disseminated to a determinative number of unit employees. As noted above, Barnes testified that, prior to the election, he personally told 20 to 30 unit employees about the threats; thereafter, the threats were widely discussed throughout the unit, as evidenced by the fact that a number of employees with whom Barnes had not spoken had also heard about the threats. As the judge noted, a relatively narrow "swing" of only 34 votes could have changed the results of the election;[14] and, based on this evidence, it appears that at least 34 unit employees—if not many more—had, in fact, heard about the threats prior to the election.

Moreover, the effect of the threats was not diminished by the fact that they ended 2 weeks before the election, as the judge found. The evidence in the record indicates that the threats were discussed by unit employees in the intervening period between their cessation and the election. In any event, the serious nature of the threats was such that they would tend to linger in the minds of employees who had heard about them for weeks after the threats themselves had ended. Thus, it is reasonable to assume that the threats were still fresh in the minds of these employees at the time of the election.[15]

In sum, for all of the foregoing reasons, we find that the threats to Barnes tended to interfere with the free choice of a determinative number of unit employees. Accordingly, we do not view the election as reflecting the employees' free choice, and we therefore sustain the portion of the Employer's Objection 1 relating to the threats to Barnes, set aside the election, and direct a second election.

[Direction of Second Election omitted from publication.]

Allen J. Gross, Mark A. Wasserman, and, *Cheryl Kopizke, Attys. (Mitchell, Silberberg & Knupp LLP),* of Los Angeles, CA, for the Employer.

M. Jane Lawhon, (Law Offices of James Eggleston), Oakland, CA, for the Petitioner.

ADMINISTRATIVE LAW JUDGE REPORT AND RECOMMENDATIONS ON OBJECTIONS

LANA PARKE, Administrative Law Judge. Pursuant to a petition filed on October 30, 2002 [1]and a Stipulated Election Agreement entered into by the parties, an election by secret ballot was conducted under the direction and supervision of the Regional Director of Region 31 of the National Labor Relations Board (the Board or NLRB) on December 11, 12, and 13 in the unit agreed appropriate:

> All full-time, regular part-time Clinical Nurses I, II, III, and staff nurses per diem in positions requiring a current registered nurse (RN) license, including registered nurses in the above classifications who serve as relief charge and/or charge nurses, who are employed by the Employer at the Max Factor Building, the main towers [North and South], Thalians Building, Spielberg Building, 310 Surgery Center, in the Neurosurgical Institute, Prostate, Skull Base Institute, GI Motility, IBD (Inflammatory Bowel Disorder) Clinic, Pituitary Center, and Imaging departments of the Medical Office Towers, and in the Pain Center, ISD (Institute for Spine Disorders), Pediatrics and Medical Genetics Clinics, Cardiology Rehab, OB-GYN-Antenatal Testing, and Imaging departments of the Mark Goodson Building; excluding all other employees.

On December 20, the Employer filed timely objections to conduct affecting the references are not available for results of the election. On January 17, 2003, the Regional Director issued a Report on Objections, Order Directing Hearing and Notice of Hearing.[2]The Report on Objections states that the tally of ballots showed that of approximately 1481 eligible voters, a total

[13] As to the threats to Foxon, we note that, because there is no definitive evidence in the record indicating that she received any of the threatening calls on or after October 30, the date the petition for election was filed, the Employer has failed to show that these threats occurred during the critical period. As a general rule, the period during which the Board will consider conduct as objectionable (i.e., the "critical period") is the period between the filing of the petition and the date of the election. *Ideal Electric & Mfg. Co.*, 134 NLRB 1275, 1278 (1961). However, the Board has held that this rule does not preclude the consideration of prepetition conduct where it "adds meaning and dimension to related postpetition conduct." *Dresser Industries*, 242 NLRB 74 (1979). Thus, we rely on the prepetition threats to Foxon only to the extent that they add meaning and dimension to the threats to Barnes, which occurred in the postpetition period. In this regard, we find that the threats to Foxon were sufficiently similar in nature, and related to, the threats to Barnes to warrant such reliance under the principles set forth in *Dresser Industries*, supra.

[14] See generally *Cambridge Tool & Mfg.*, supra at 716, in which the Board noted that, in making its determination as to whether conduct has the tendency to interfere with employees' freedom of choice, it considers, *inter alia*, the closeness of the election.

[15] Further, there is no evidence in the record to support the judge's assumption that the news of the cessation of the threats was disseminated to unit employees.

[1] All dates refer to 2002 unless otherwise indicated.

[2] The report sets forth the Employer's objections. Each objection includes multiple subparts, which the Employer represented were supporting offers of proof supplied at the request of Region 31. In order not to confuse the supporting offers of proof with offers of proof made at the hearing, I will refer to them herein as "subparts."

of 1332 employees cast ballots, of which 695 were cast in favor of the Petitioner (also referred to as the Union or CNA), 627 were cast against the Petitioner, two ballots were void, and 10 ballots were challenged. [3] The challenged ballots were not sufficient in number to affect the results of the election. All of the Employer's objections—1 through 19—were set for hearing before the undersigned. At the hearing, the Employer withdrew Objection 8.[4] The Employer did not specifically withdraw Objection 7.[5] Inasmuch as the content of Objection 7 is essentially the same as Objection 8, the subparts for Objection 7 are grouped with those for Objection 8, and as no evidence was adduced in support of Objection 7, I also do not consider Objection 7 in this report. Accordingly, objections 1 through 6 and 9 through 19 are before me. I conducted a hearing in Los Angeles, California on February 4 through February 14, 2003.

On the entire record,[6] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Employer and the Petitioner, I make the following

FINDINGS OF FACT AND DISCUSSION

I. THREATS AND VANDALISM: OBJECTIONS 1 THROUGH 3 AND OBJECTION 5

Objections 1 through 3 (with subparts) involve allegations that the Union, through agents, officials, or supporters, confronted, intimidated, threatened, and committed violence against individual employees and supervisors and their families and committed acts of vandalism on their property based upon their refusal to support the Union.[7] Objection 5 (with subparts) alleges that the Union, by its agents, officials, or supporters, intimidated and threatened employees by targeting individuals and/or groups for scorn and opprobrium.

A. Anonymous telephone calls to Cristine Foxon

During the union campaign, Cristine Foxon (Ms. Foxon) was an openly antiunion unit employee and part of an ad hoc antiunion employee group called "One Voice, Our Voice."[8] Between August and October, Ms. Foxon, who has two young daughters, was the object of four anonymous telephone calls.[9] Ms. Foxon's child-caregiver took the first two calls. The caregiver reported to Ms. Foxon that the callers warned that Ms. Foxon needed to be very careful about opposition to CNA. Ms. Foxon took the third call, and a voice she did not recognize asked why she was opposed to CNA and warned her to back off. After hanging up, Ms. Foxon pressed Star-69.[10] She then heard either an electronic answering system or a live voice say, "California Nurses . . ." whereupon she interrupted the greeting by disconnecting. Sometime in September through October, a fourth call was made to Ms. Foxon's cell phone while she was driving home from work. A voice she did not recognize told her to be careful with her involvement in One Voice, Our Voice, saying that the caller knew Ms Foxon had two little girls, that she needed to think about her family and her girls, and that she needed to back off. These anonymous calls unquestionably constitute threats of harm to Ms. Foxon and her children.

Following the last call, Ms. Foxon told antiunion employees Suzanne Geimer (Ms. Geimer), Tina Tyner (Ms. Tyner), Scott Barnes (Mr. Barnes), and other nurses of the threatening calls. Shortly thereafter, Ms. Foxon called the Petitioner's Glendale office and spoke to David Monkawa (Mr. Monkawa), lead organizer.[11] Ms. Foxon expressed her outrage at the threatening telephone calls. Mr. Monkawa denied that the Petitioner was involved, pointing out that Ms. Foxon could not prove CNA's involvement. Ms. Foxon asked Mr. Monkawa how he would like it if she put out a letter to nurses about CNA's threatening phone calls. According to Ms. Foxon, Mr. Monkawa said it would not be in Ms. Foxon's best interest to do that.[12] Ms. Foxon answered, "Fine. Then it is understood. Stop making the threatening phone calls to my friends and to myself. Leave me alone and we will leave it at that." At some point during the conversation, Mr. Monkawa invited Ms. Foxon to meet with CNA supporters as a group or one-on-one, which she declined. Thereafter, Ms. Foxon received no further threats. Although her testimony on this point is somewhat unclear, Ms. Foxon said

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[3] As the Employer points out, the tally numbers, as stated in the Report on Objections, do not accurately compute.

[4] Objection no. 8 reads: The Union, by its agents, officials, or supporters, unlawfully used supervisors to create the impression of support for the Union. Two subparts set forth the specific conduct supporting the objection.

[5] Objection 7 reads: The Union, by its agents, officials, or supporters, used supervisors to unlawfully influence employees to support the Union.

[6] Petitioner's unopposed post hearing motion to correct the transcript is granted. The motion and enclosed corrections are received as ALJ Exh. 3.

[7] At the hearing, the Employer withdrew subpart 8 of Objection 1 and subpart 2 of Objection 3, both of which related to a hit-and-run accident.

[8] Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, and/or unchallenged credible evidence.

[9] Ms. Foxon was somewhat inconsistent as to the timing of the telephone calls. At one point, she said the calls occurred between August and November, later she said they were between September and October. Within either time frame, the calls began and ended well in advance of the election.

[10] That procedure permits a telephone call recipient to be connected with the last caller.

[11] Mr. Monkawa's testimony, which I accept, placed this call sometime in November.

[12] Mr. Monkawa denied making any such statement. While I found Mr. Monkawa's testimony to be generally more reliable than that of Ms. Foxon, I find it unnecessary to resolve credibility in this instance. Although Ms. Foxon testified that she felt threatened by Mr. Monkawa's alleged statement, there is nothing in the tenor of the conversation as she related it, reasonably or objectively to suggest any threat. The statement is susceptible of a nonthreatening meaning. Given Mr. Monkawa's assertion that Ms. Foxon could not prove the origin of the calls, the statement, even if made, may have related to the imprudence of making ill-founded accusations. Mr. Monkawa denied making any such statement. While I found Mr. Monkawa's testimony to be generally more reliable than that of Ms. Foxon, I find it unnecessary to resolve credibility in this instance. Although Ms. Foxon testified that she felt threatened by Mr. Monkawa's alleged statement, there is nothing in the tenor of the conversation as she related it, reasonably or objectively to suggest any threat. The statement is susceptible of a nonthreatening meaning. Given Mr. Monkawa's assertion that Ms. Foxon could not prove the origin of the calls, the statement, even if made, may have related to the imprudence of making ill-founded accusations.

she became an outspoken opponent of CNA after receiving the last call in which her children were mentioned.

B. Anonymous telephone calls to Scott Barnes

Mr. Barnes was an active opponent of unionization, making and distributing antiunion flyers and co-founding One Voice, Our Voice. He was also a fond animal owner. Beginning in November, Mr. Barnes received seven to ten anonymous threatening telephone calls prior to the election. The callers, both men and women, told Mr. Barnes, variously, to stop f_____ with the union, that little kittens looked good in a frying pan, and that it would be terrible if his Corgis were run over. One caller made reference to stabbing his dogs. These anonymous calls unquestionably constitute threats of harm to Mr. Barnes' pets and, by extension, to him.

Mr. Barnes told Ms. Geimer, Ms. Foxon, and various other coworkers of the threats, and related them to 20 to 30 employee attendees at a staff meeting of the emergency room department. Sometime toward the end of November, at the emergency room nurses' station, Mr. Barnes asked Ms. Foxon, whose husband was a sergeant with the Beverly Hills police department, how to trace telephone calls through the police. Thereafter, Mr. Barnes received no further threatening calls. He reported their cessation to Ms. Foxon and Ms. Geimer.

C. Anonymous telephone calls to Suzanne Geimer

In the 2 months prior to the election, Ms. Geimer, a vocal opponent of the Petitioner, received ten or more phone calls in which the caller hung up when the phone was answered. On two occasions, lengthy musical recordings were left on her answering machine. Ms. Geimer told other unit employees that "different ones of us" had gotten "strange" telephone calls and "threatening" telephone calls and that Ms. Foxon was concerned because she had two children. Viewed objectively, the telephone calls to Ms. Geimer were annoying and even unsettling. However, I cannot find that receipt of merely annoying telephone calls can reasonably constitute any threat.

The Employer also contends that Rudy Cole (Mr. Cole) who manages political campaigns in Beverly Hills, threatened Ms. Geimer by telling her she should pull back from her antiunion stance as it might damage her husband's political career. Even assuming the advice emanated from the Union, there is nothing in that statement that could be considered an objectionable threat. Viewed objectively, the statement is no more than a reasonable political prediction that antiunion opinions may repulse some constituents.

D. Confrontation of employees in the Employer's cafeteria

Regarding this subpart, the Employer presented evidence from employee Russell Van Stroud (Mr. Stroud). Mr. Stroud testified that on the Sunday before the election after visiting hours, he saw two unidentified women in "scrubs" in the cafeteria surrounded by a group of five to eight (also unidentified) individuals.[13] Members of the group yelled and screamed at the two women such statements as, "We need this. Our future depends on this. F___ you." The two women who had been the focus of the group hurried out of the cafeteria, and the group gathered around a table and talked. When security entered the cafeteria, the group left. The Petitioner disputes the accuracy of Mr. Stroud's account, and it is true that there are unexplained inconsistencies between his testimony and that of security officers. However, I find it unnecessary to resolve any credibility issues, as, even when viewed in a light most favorable to the Employer, I do not find any threat(s) were made. In determining whether statements amount to threats of retaliation, the Board applies the test of "whether a remark can reasonably be interpreted by an employee as a threat." The actual intent of the speaker or the effect on the listener is immaterial. *Smithers Tire*, 308 NLRB 72 (1992). Applying that test, I find that in spite of the offensiveness of the confrontational conduct by unidentified union supporters, the supporters made no menacing gestures or undertakings, and I cannot find their conduct to constitute threats. Even assuming the conduct constituted implied threats to the two employees, it is not sufficient to require setting aside the election. The Board recognizes that, as stated by the court in *Nabisco, Inc. v. NLRB*, 738 F.2d 955, 957 (8th Cir. 1984), "A certain measure of bad feeling and even hostile behavior is probably inevitable in any hotly contested election." In *Nabisco*, the Board overruled objections based on anonymous stoning of an antiunion employee's house and accompanying threat of coworker ostracism. Citing Nabisco, the Board found a coworker's warning that an employee "could just wait and see what happened to him" if he did not vote for the union did not require the election be set aside. *Cal-West Periodicals, Inc*., 330 NLRB 599 (2000).

E. Confrontation of Janice Buehler by unidentified party

Janice Buehler (Ms. Buehler) is the Employer's Director of Recruitment and Work Force Planning, a nonunit position. Prior to the election, while wearing a "No Union" button on her identification badge, Ms. Buehler was accosted in the elevator by an unidentified male. The man told her he "should pull that badge from [her]." I find the unprovoked conduct of the unidentified man to be threatening and that Ms. Buehler could reasonably infer that it related to her antiunion position. Ms. Buehler reported the incident only to nonunit employees.

F. Request for information to Imelda Pichon-Queja

CNA representative "Daphne" asked employee Imelda Pichon Queja (Ms. Queja) to give her a work schedule for the Employer's per diem nurses, which request Ms. Queja refused.[14] [] There is no evidence of any menace in the request, and I find Daphne's conduct cannot reasonably be construed as a threat.

G. Alleged threat to Concepcion Arostegui

During the month of October, unit employee and CNA supporter, Esther Wood (Ms. Wood) solicited employee signatures on a union-sponsored petition stating employee support for a

[13] "Scrubs" designates the casual medical garb worn at work by many of the Employer's nurses and other employees. Under the circumstances, it is reasonable to infer that the two targets were antiunion unit nurses and that the group was composed of union supporters. However, there is insufficient evidence to support an inference that any confronter was a union representative.

[14] The Employer also contends that this incident supports Objection 4.

pension plan. Ms. Wood solicited in all nursing departments, speaking to about 40 employees. In the second weck of October, Ms. Wood solicited the signature of employee Concepcion Arostegui (Ms. Arostegui). According to Ms. Arostegui, when she told Ms. Wood she was not interested in the petition, Ms. Wood said, in her normal tone of voice, "Well, if the Union passes through, you are going to regret this." Ms. Concepcion testified she had been "irritated" by Ms. Wood; she told coworkers she did not know what business Ms. Wood, as a per diem nurse, had talking about retirement.

Ms. Wood denied telling Ms. Concepcion she would "regret this." As a witness, Ms. Wood had an exceptionally gentle manner and soft voice. She had to be reminded repeatedly to speak up. Because of her manner and because there is no evidence any other employee complained of her solicitation methods, I credit Ms. Wood's account. I conclude that Ms. Arostegui could not reasonably have perceived any threat.

H. Alleged threats to Usa Kanchanapoomi

Prior to December, unit employee Usa Kanchanapoomi (Ms. Kanchanapoomi) was accustomed to walking from work to her parked car with the same group of coworkers. Two weeks before the election, while the group walked to the parking area, a CNA representative joined them. The representative tried unsuccessfully to interest Ms. Kanchanapoomi in the Union. When rebuffed, the representative said to Ms. Kanchanapoomi, "If you are not interested, can you do me one thing? Do not come to vote now."

Ms. Kanchanapoomi's coworkers said, "If the Union [is elected], you are going to be included in the Union. Why do you not work somewhere else [where] they do not have the Union?"As the group neared their cars, the CNA representative said, "Remember, do not come to vote."

Following the above exchange, Ms. Kanchanapoomi's coworkers no longer walked with her. I find there is nothing in the CNA representative's request to Ms. Kanchanapoomi that she not vote or in her coworkers' suggestion that she find another job and their subsequent avoidance of her to constitute any threat. See *Terry Machine Co.*, 332 NLRB 855 (2000).

Some days later, upon Ms. Kanchanapoomi's saying she had voted "no" in the election, prounion coworker "Penny" warned her to be careful what she said because the Union was "a mafia." I find Penny's statement constitutes an implied threat by a third-party. Ms. Kanchanapoomi did not mention the "mafia" statement to anyone.

I. Union dissemination of false information about Ninfa "Lana" Espejo

Sometime the week of the election, the Petitioner or its supporters widely disseminated a flyer falsely accusing Ninfa "Lana" Espejo (Ms. Espejo) of violations of federal labor law. The flyer stated:

> WARNING! nurse Alert! Lana Espejo, RN, Clin 3 . . .
>
> CNA charges Espejo with violations of federal labor law for bribery–openly soliciting "NO" votes against CNA in exchange for promotions due to her "connections" with [Human Resources]. (Incidents documented: December 2 through December 9, 2002.)

Ms. Espejo learned of the flyer on December 10. Over the following 2 days, Ms. Espejo visited every nursing unit and told employees the flyer was false. Some employees joked that they wanted their promotions, some were sympathetic, some gave her "dirty looks," and some "yelled" at her. Employee Lily Factor said in an unpleasant voice, "Well what do you have there, Lana!" During her self-vindication tour of the units, Ms. Espejo's beeper sounded eight times. When she returned the calls, she was connected, variously, with a modem, fax machines, patient room, and a phone booth. Every day after that, Ms. Espejo received at least three false beeper signals a day. While possibly libelous, I find the flyer's fabrications cannot objectively be considered threatening. I also find the obnoxious beeper misuse, while annoying, cannot reasonably have been perceived as threatening.

J. Alleged threat to Maria Basco

In early December, without her permission, the Petitioner printed a photograph of unit employee Maria Basco (Ms. Basco) as a union supporter on a union flyer. Ms. Basco circulated an open letter to coworkers expressing outrage over the Union's use of her photograph. She also confronted the coworker photographer who apologized. On December 5, Mr. Monkawa called Ms. Basco and also apologized for the unauthorized photograph. Ms. Basco scolded him; he continued to apologize and offered to send a union attorney to talk to her.[15] Ms. Basco said, "If there is going to be a lawyer, it is my lawyer against you." On the same day, Ms. Basco distributed her own flyer to coworkers stating her anger that the Union had published her photograph without her consent. While the unauthorized use of Ms. Basco's photograph might be civilly actionable, it cannot reasonably be found threatening or coercive and does not otherwise constitute objectionable behavior. See *Gormac Custom, Mfg.*, 335 NLRB 1192 (2001).

K. Alleged harassment of Scott Barnes

On November 20, the Petitioner held an open community meeting to allow unit employees to talk to political representatives about the union drive at the Employer. The Petitioner established a sign-in table outside the conference room of a local hotel where the meeting was held. Mr. Barnes gave the following account of his experience:

> Prior to the commencement of the meeting, Mr. Barnes appeared at the sign-in table carrying a box of antiunion flyers. The CNA representative conducting sign-in told him that CNA was not passing out leaflets, and they would appreciate it if he also refrained. Mr. Barnes walked a short distance away to the elevators and while there, heard the CNA representative tell someone to "call security." Shortly thereafter, a hotel security guard came to Mr. Barnes at the elevators and told him he could not stand there.

[15] In its posthearing brief, the Employer characterizes Mr. Monkawa's offer as a threat, but it appears from Ms. Basco's somewhat confused testimony that the offer of an attorney was presented as an offer to "help [Ms. Basco] out on something." Although Ms. Basco testified that Mr. Monkawa's offer both scared and upset her, there is nothing in her relation of the conversation that would reasonably justify such a reaction.

> The guard then followed Mr. Barnes as he moved about the lobby area, telling him two more times that he could not stand where he was. Mr. Barnes believed employees coming to the meeting saw his interaction with CNA and the security guards. Mr. Barnes left the hotel, telephoned the Employer's human resources hot line and reported what had occurred. Thereafter, when he returned to the hotel without his box of flyers, the hotel manager apologized to him. Mr. Barnes was told that questions would be answered at the end of the meeting and that people who wanted to ask questions were to submit them in writing. Mr. Barnes chose not to submit a written question. He asked a CNA representative if he could ask a question during the meeting; the representative told him if he had any questions, he could put them on a card and leave it on his way out. Mr. Barnes attended the meeting and saw attendees asking questions and making comments.

CNA representative Elizabeth Campbell (Ms. Campbell) gave a different account. Ms. Campbell testified that Mr. Barnes told her he had campaign literature in the box. Ms. Campbell told him no literature would be distributed at the meeting and offered to store the box. She neither called hotel security nor encouraged security to follow Mr. Barnes. CNA did nothing to prevent Mr. Barnes' attendance at the meeting.

I do not find it necessary to resolve credibility between Mr. Barnes and Ms. Campbell as I find that, even if Mr. Barnes' version is accepted, it evidences no objectionable conduct. The Employer argues that the harassment of Mr. Barnes by hotel security "gave the clear impression to others that, if you were a known [employer] supporter . . . CNA would aggressively harass and intimidate you if you expressed opposition to their organizational efforts, thus violating Section 7 rights." However, there is no evidence linking hotel security's actions to the Petitioner, and, particularly in light of the fact that Mr. Barnes received an apology from the hotel manager, no evidence that knowledge of the incident would, objectively, intimidate other employees. The only conduct at the hotel reasonably ascribable to the Petitioner amounted to no more than a possibly discourteous rejection of Mr. Barnes' full participation at a union-organized meeting and cannot reasonably be construed as a threat. See *Bell Trans*, 297 NLRB 280 (1989).

L. Vandalism of employees' automobiles

Laura Weatherby (Ms. Weatherby), assistant to the nurse manager, was employed as a Clinical Nurse 4 (CN4), a classification the parties had stipulated was a supervisory position, ineligible to vote. She passed out antiunion material and explicated the Employer's union opposition to unit employees prior to the election. On December 7, upon returning to her automobile after work, she saw a two-foot long deep scratch on the driver's door. At home, she discovered a similar scratch on the trunk. On the following Monday, December 9, she reported the damage to security and her coworkers. A professional estimate obtained after the election set the damage at about $585.

Kimberly Townsend, CN4, disseminated information about the Employer's union opposition to unit employees prior to the election. On December 11, the first day of voting, she found catsup on her car. She had it buffed off at a cost of $65. She told a coworker of the incident and reported it to security. Four to five employees commiserated with her.

Cristine Luper (Ms. Luper), CN4, was openly antiunion. On the second day of the election, December 12, at about 7:10 p.m., she found her automobile damaged by a long, deep scratch on its front. A paper protruded from the hood seam of the car, on which was typed, "This is for being Pro Administration." On the following day, December 13, Ms. Luper gave the note to the Employer's counsel and told coworkers of the incident. Damage repair estimate, obtained after the election, is $1396.[16]

M. Discussion

The Board applies an objective test in evaluating party conduct during an election's critical period, i.e., whether the conduct has "the tendency to interfere with the employees' freedom of choice." *Cambridge Tool Mfg.*, 316 NLRB 716 (1995).[17] The Board considers nine factors in applying the *Cambridg*e test:

> (1) The number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit' (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. [*Harsco Corp.*, 336 NLRB 157, 158 (2001)].

The Board, accepting "the general proposition that employees reasonably are less concerned about nonagent threats than about threats emanating from the union,"[18] applies a more stringent objective test if the conduct in question is that of a third party rather than a union agent. Third party threats rise to the level of objectionable conduct only when "so aggravated as to create a general atmosphere of fear of reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). In evaluating the conduct, the Board considers the following criteria:

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[16] I rejected the Employer's offers of proof as to two additional anonymous acts of vandalism: the egging of antiunion employee Tina Tyner's car following a heated discussion with prounion employee Joao De Silva and the discovery of a nail in the tire of antiunion employee Margo Herman's car on December 13. I also rejected the Employer's offer to prove that during the first 8 months of 2002, security received no reports of damage to employees' cars but, during the critical period, received five reports of automobile vandalism.

[17] Specifically with regard to threats, the Board invokes "the familiar rule that the test to be applied is whether a remark can reasonably be interpreted by an employee as a threat." *Smithers Tire*, 308 NLRB 72 (1992).

[18] *Robert Orr-Sysco Food Services*, LLC, 338 NLRB 614, 615 (2002).

> [T]he nature of the threat itself . . . whether the threat encompassed the entire bargaining unit; whether reports of the threat were disseminated widely within the unit; whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and whether the threat was 'rejuvenated' at or near the time of the election. [Footnotes omitted.] Ibid.

The threats herein consist of those made in anonymous phone calls to Ms. Foxon and Mr. Barnes, the threat to Ms. Buehler by an unknown party, and the coworker threat to Ms. Kanchanapoomi. The latter two threats are clearly third party threats and must be evaluated under the third party standard of Westwood Horizons Hotel, supra. Neither of the threats to Ms. Buehler or Ms. Kanchanapoomi encompassed the bargaining unit and neither was disseminated widely within the unit. Since the threat to Ms. Buehler was not made to or disseminated to any unit employee, there is no basis for finding it had any impact on voter action. Antioch Rock & Ready Mix, 327 NLRB 1091, 1093 (1999). As to the "mafia" statement made to Ms. Kanchanapoomi, the coworker predicted only a speculative and objectively farfetched peril. Merely "overbearing or exuberant remarks to coworkers" do not overturn an election, *Q.B. Rebuilders, Inc*., 312 NLRB 1141, 1142 (1993), and neither should fantastic comments. Moreover, neither threat affected Ms. Buehler or Ms. Kanchanapoomi's actions with regard to the election—Ms. Buehler was not an eligible voter, and Ms. Kanchanapoomi had already voted at the time the "mafia" statement was made. Accordingly, none of the criteria being met, the threats to Ms. Buehler and Ms. Kanchanapoomi did not "create a general atmosphere of fear of reprisal rendering a free election impossible." *Westwood Horizons Hotel*, supra.

The threats to Ms. Foxon and Mr. Barnes are not so easily categorized as third-party threats. The telephone threats as well as the acts of vandalism committed during the critical period were anonymous. In an effort to identify sources of the anonymous telephone calls, the Employer subpoenaed the Union's telephone billing records. The Employer contended that telephone records of CNA representatives' cell phone use would, if they showed calls to Ms. Foxon, Mr. Barnes, or other targeted antiunion employees, create a strong inference that the anonymous calls were placed by the CNA possessor of the cell phone. While agreeing with the Employer's reasoning, I concluded that after-the-fact establishment of responsibility for the telephone calls is not relevant to the question of what impact the calls had on employees' election choice. Rather, the question is whether employees who knew of the telephone threats could objectively and reasonably infer that representatives of the Union had made them.[19] Although the threats were anonymous and therefore not clearly attributable to the Petitioner, Ms. Foxon, by employing her telephone's star-69 function, gained information that gave her reason to believe that at least one of the calls had been placed from the Petitioner's office. She and others disseminated that information along with the substance of the calls. Ms. Foxon and Mr. Barnes' calls appear to have been grouped together in the minds of the disseminators, and it is not unreasonable to infer that employees learning of the anonymous calls may have attributed them to the petitioner. I have, therefore, evaluated the threats to Ms. Foxon and Mr. Barnes under the criteria the Board has established for determining if party conduct has "the tendency to interfere with the employees' freedom of choice." *Cambridge Tool Mfg*., supra.

Ms. Foxon and Mr. Barnes collectively received fourteen anonymous telephone calls between October and the end of November. Many of the calls were menacing and intimidating, threatening harm to family and pets.[20] Although the voting complement is large--approximately 1481 eligible voters—the Petitioner won the election by a relatively small margin of 68 votes and a shift of 34 votes could have changed the election results. As the Employer contends, the election was close.[21] From the evidence presented, it is reasonable to infer that information about the telephone threats was disseminated to more than that 34 voters. However, in spite of the malice behind the calls. they were anonymous and targeted only two members of the bargaining unit. Objectively, anonymous threats are probably viewed as less likely to be executed than direct threats.[22] Further, unit employees had no reason to believe that the callers had the power or motivation to effectuate violence on "a significant segment of the bargaining unit." See Q.B. Rebuilders, supra at 1142. I find the calls would not reasonably be expected to cause general fear among employees in the bargaining unit who learned of them but did not themselves receive calls. Moreover, the threatening calls ended approximately 2 weeks before the election.[23] It is reasonable to assume that information of their cessation was also disseminated, and no evidence was adduced to show that consciousness of the misconduct persisted in the minds of unit employees. Therefore, I find that the anonymous telephone calls to Ms. Foxon and Mr. Barnes, although despicable, did not have "the tendency to interfere with voting employees' freedom of choice" *Cambridge Tool Mfg.*, supra, and do not warrant setting aside the election.

As to the acts of vandalism, there is nothing to justify attributing that conduct to the Petitioner. I have considered whether the acts of vandalism should be considered in conjunction with

[19] Accordingly, I did not require the Petitioner to furnish billing records of cell phones issued to its employees.

[20] Even when applying the third-party test, the Board has consistently considered threats of physical violence and property damage to create an atmosphere of fear and reprisal sufficient to set aside an election. *Robert Orr-Sysco Food Services, LLC*, supra at slip op. 2, and cases cited therein; *Stannah Stairlifts, Inc.*, 325 NLRB 572 (1998); *Westwood Horizon Hotel*, supra; *Electra Food Machinery, Inc*., 279 NLRB 279 (1986); *RJR Archer, Inc.*, 274 NLRB 335 (1985).

[21] The Board carefully scrutinizes objections when the vote is close. *Robert Orr-Sysco Food Services, LLC*, supra; *Smithers Tire*, supra at 73.

[22] Cases in which the Board has set aside elections based, in part, on anonymous threats generally include one or more direct threats: *Electra Food Machinery, Inc.*, supra; *RJR Archer, Inc*., supra. See also A*rmour Food Co*., 288 NLRB 1 (1988) (anonymous threatening and harassing phone calls to employees with reputations as informers not likely to cause employees to fear similar treatment simply because they did not favor the union.)

[23] See *Duralam, Inc*., 284 NLRB 1419 (1987) effects of third-party threats occurring 2 weeks before the election were dissipated by the time of the election.

the anonymous telephone threats to Ms. Foxon and Mr. Barnes. I don't find the evidence supports any such linkage. The vandalism was separate in time from the telephone threats, targeted different employees, involved actions different from those threatened in the telephone calls, and did not suggest any overlap. Therefore, I view the telephone threats and the vandalism as separate instances of misconduct, the latter being ascribable only to anonymous third parties. Evaluating the acts of vandalism under the third party test, I cannot find that the conduct was "so aggravated as to create a general atmosphere of fear of reprisal rendering a free election impossible." *Westwood Horizons Hotel*, supra, at 803. The acts of vandalism were limited in number, and there is no evidence of widespread dissemination. I find the acts of vandalism do not justify setting aside the election.

Accordingly, I recommend that Objections 1 through 3 and 5 be overruled.

II. OBJECTION 4

Objection 4 (with subparts) involves allegations that the Union, by its agents, officials, or supporters, intimidated and threatened employees by acts of trespass to the Employer's property, and unlawfully created the impression that the Employer was not in control of its own facility.

A. Alleged Acts of Trespass

1. During early to mid November, nurse supervisor Michael Manasse (Mr. Manasse) and three security guards confronted a person with union literature in the conference room of floor 5 NE who was speaking to several on-duty members of the nursing staff. When asked to leave, the self-identified representative of CNA protested that the Employer was interfering with employees' right to organize but left without further discussion.

2. On the Saturday before the election, Mr. Manasse along with security guards confronted a CNA representative in the conference room of floor 5 SW A security officer told the representative that it was the fourth time they had escorted him from the Employer's premises and that if the trespass occurred again, security would call LAPD.[24] The representative protested loudly but left.

3. In November, four CNA representatives, including Fredrico "Chito" Quijano (Chito) came to Ms. Arostegui's work area and tried to give her a card and CNA literature. She told them she was not interested in the Union.

4. During the 2 months preceding the election, Sgt. Alex Acevedo (Sgt. Acevedo), employer security officer, received 50-60 reports of unauthorized CNA representative presence in areas of the Employer's premises.

5. On November 25, Sgt. Acevedo received a complaint that a CNA representative was in the employee break area of the sixth floor. On arrival on the sixth floor, Sgt. Acevedo found the representative in the sitting area and instructed him to leave. With a raised voice the representative insisted that he would not leave because he was in a public area. After about 10 minutes, Sgt. Acevedo and two other security guards escorted him out.

6. On two occasions, Sgt. Acevedo asked Mr. Monkawa to leave the plaza level where members of the public gathered. Mr. Monakawa refused, saying it was a public area.

7. In the first week of December, Sgt. Acevedo found a CNA representative sitting on the plaza level calling to nurses and handing out union flyers.

8. On December 7, after visiting hours, Wilbur Guevare (Officer Guevare), employer security officer, was called to the fifth floor where he found three to four security guards. The guards then escorted several CNA representatives from the hospital. Later that same evening, in the course of making security rounds after 9:00 p.m., Officer Guevare discovered eight CNA representatives without hospital passes talking to nurses in the cafeteria. The guards asked them to leave and after loud protests from both CNA representatives and nurses, they did. The episode lasted about 15 minutes.

9. On December 9, Officer Guevare with two other security guards confronted a CNA representative in the cafeteria who was filming with a video camera. During the confrontation, the CNA representative "kind of push[ed]" the guards. Officer Guevare asked him to leave, and the security guards "walked him out."

10. On November 14, Gary Armstrong (Officer Armstrong), employer security officer, was called to the plaza level at 7 p.m. Security officers Flores and Harris were also there. More than five CNA representatives were passing out flyers. The officers asked for the union literature, and the representatives handed it over. The officers told the CNA group they could not be there. One of the representatives, in a loud voice, asked for the guards' names. After about 10–15 minutes, the group left the plaza level and went to the cafeteria.

11. Later on the same day, November 14, Officer Armstrong witnessed a confrontation between the Administrator on Duty (AOD) and a CNA representative in the plaza area. When the AOD asked the representative to leave, she protested, asked the AOD for identification, and threatened to report her. The representative left after about 10 minutes.

12. On November 22, Officer Armstrong told three to four CNA representatives they could not be on the plaza level and directed them to the cafeteria. One of the representatives argued and protested in a loud voice. After 10–12 minutes, Officer Armstrong escorted them to the elevator.

13. On December 8, Cassius Harris (Officer Harris), employer security officer, confronted an individual on the plaza level who could not account for his presence there. The officers escorted him from the property.

14. On December 11, Officer Harris told about ten CNA representatives they were not allowed to be on the plaza level, and they left without incident.

15. On one occasion within the 2 months preceding the election, Officer Harris found CNA representatives and people both with and without employee badges in the cafeteria after hours. Security supervisor told the officers to "back off," which they did, and the group applauded.

16. Ms. Espejo testified that prior to the election, she saw CNA representatives on patient floors nearly every evening she worked. A few days before the election, between 7 to 8:30 p.m., she called security to report a CNA representative's pres-

[24] Los Angeles Police Department.

ence on her work floor (sixth floor). When security reported to the floor, the CNA representative was sitting in the sixth floor lobby.[25]

Viewed objectively, there is no basis for considering the CNA agents' unauthorized forays into unit employees' work areas to have threatened any employee. There is no evidence CNA representatives did other than solicit employee support for the union during their visits, and employees apparently felt free to call for security assistance to remove the interlopers. The Employer cites no authority for the proposition that a union's campaign techniques of trespass and even work disruption constitute objectionable conduct. An unpublished decision referred to by the Board in *Sunshine Convalescent Hospital, Inc*., 187 NLRB 688 (1971), suggests that such conduct does not warrant setting aside an election. As to the Employer's contention that the repeated trespasses created the impression the Employer was not in control of its own facility, the evidence supports a contrary impression. Although unit employees repeatedly received visits from CNA representatives during working time, they also repeatedly saw security escort the CNA representatives, sometimes under vociferous protest, from the work areas. Objectively, it is reasonable to infer that unit employees saw an ongoing demonstration of the Employer's control of its facility. The cases cited by the Employer in support of this objection are inapposite. In *Phillips Chrysler Plymouth*, 304 NLRB 16 (1991), two union organizers were present in the employer's shop area during the 45-minute period prior to the 9 a.m. preelection conference. The organizers refused the manager's request to leave the shop area and wait in the reception area until the preelection conference, engaged in a "shouting match" in front of employees, and persisted in remaining in the shop area even after police arrived. Again, the conduct set out in *North of Market Senior Services*, 204 F.3d 1163, 1169 (D.C. Cir. 2000), which warranted remand to the Board, involved election-day conduct. In that case, at the direction of the Board agent conducting the election, union agents walked through the employer's facilities, telling employees that they had been sent by the Board to tell them when the polls were open, even going so far as to walk into rooms where patients were being examined and openly rejecting a manager's instruction that employees were to use their lunch breaks to vote. The conduct in those cases involves successful flouting of the employers' property rights and is far more egregious than the Petitioner's oftenthwarted surreptitious campaign maneuvers, herein. Accordingly, I find no basis in the Petitioner's conduct in this regard for setting aside the election.

[25] I rejected, as cumulative, the Employer's offers to prove the following alleged trespass incidents: that employee Jean Eskenazi saw Chito soliciting authorization cards and/or conferring with nurses in the 8 SE patient care area three times prior to the election, the last two 1 to 2 weeks before the election, that employee Violeta Husain saw Chito conferring with nurses in the patient care area of 8 SE on three occasions prior to the election (security was not present on any of these occasions), that Marilyn Bustamante saw CNA representatives on two occasions prior to the election representatives were occasionally verbally resistant to expulsion,

B. Confrontations with employees

The Employer contends that the incidents described in Section I, subparagraphs D and E, supra, (confrontation of two employees in the cafeteria, and the threat to Ms. Buehler in the elevator) also support Objection 4 as they constitute intimidation and threats to employees and create the impression that the Employer was not in control of its facility. For the reasons set forth above, I conclude that the two incidents did not create any impression of lost facility control.

Accordingly, I recommend that Objection 4 be overruled.

III. OBJECTION 6

Objection 6 (with subparts) involves allegations that the Union, by its agents, officials, and supporters unlawfully rewarded employees who supported the Union with items of value.

A: Petitioner Provided Food to Unit Employees

During the critical period, CNA representatives brought food such as pastries and lunches to work areas of the Employer apparently when meeting or attempting to meet with employees. In *B & D Plastics*, 302 NLRB 245 (1991), the Board articulated a four-factor objective standard to determine whether a preelection grant of benefit improperly tends to influence the outcome of an election: (1) the size of the benefit conferred in relation to the stated purpose for granting it; (2) the number of employees receiving it; (3) how employees reasonably would view the purpose of the benefit; and (4) the timing of the benefit. The Board later noted that, in formulating the test, it did not overrule its "long line of cases holding that 'campaign parties, absent special circumstances, are legitimate campaign devices' and that it will not set aside an election simply because the union or employer provided free food and drink to the employees." *Chicagoland Television News*, 328 NLRB 367, 367 (1999), and cases cited therein. The Board has also noted that a petitioner's providing "free, low cost meals to attendees at its organizational meetings" is permissible. *Hallandale Rehabilitation & Convalescent Center*, 313 NLRB 835 fn.6 (1994). Here, the size of the benefit, the number of employees receiving it, and the timing neither singly nor in combination objectively suggest that Petitioner's culinary offerings tended to influence the outcome of the election. I find this conduct does not warrant setting aside the election.

The Petitioner admittedly compensated employees who served as its observers for salary lost because they served as observers. No evidence was presented that any payment was disproportionate to an observer's usual pay rate, that the Petitioner linked its payments to the way the observers would vote, or that the Petitioner intended the payments to influence the vote. See *Easco Tools*, 248 NLRB 700 (1980).[26] Indeed, several

[26] The Employer cited Eastco in support of this objection. However, the Eastco facts differ from the instant situation. There, the union informed three eligible voters that if they served as election observers for the Union they would be paid for their regular 8-hour workday even if they returned to work after the election. In *S & C Security, Inc.*, 271 NLRB 1300, 1301 (1984) cited by the Employer, the union observer was paid the equivalent of over 7 hours of work even though he acted as observer on his day off and, thus, required no reimbursement. Here,

employees who served as union observers testified that they did not know they would be compensated for time lost until after the election. Union observers who served on a day or days when not scheduled to work received no compensation at all. I find no objectionable conduct in the Petitioner's having compensated its observers for lost wages.[27]

Accordingly, I recommend that Objection 6 be overruled.

IV. OBJECTIONS 9 THROUGH 11 AND OBJECTION 13

Objections 9 through 11 and objection 13 (with subparts) involve related allegations that the Union destroyed the fair operation of the election process and election laboratory conditions and interfered with the election: (1) by its use of campaign material and other communications that gave voters the impression that the federal, state and/or local government and/or the National Labor Relations Board endorsed the selection of the Union as the bargaining representative, (2) by its officials, agents, and supporters making material misrepresentations of fact and law with respect to official NLRB processes, (3) by its agents, officials, and supporters telling eligible voters they were ineligible to vote, falsely telling voters the polls were closed, and telling voters that the legal effect of not voting was the same as voting "no."

A. Union Campaign Material

The campaign material complained of and period of distribution is described below:

1. Distributed in October: flyers bearing the Union's name and logo and a photograph of several employees seated beneath the NLRB seal in what appears to be a Board hearing room.

2. Distributed in mid-November: flyers representing that a California state senator and several California state assembly members supported the Union's efforts to organize; flyers representing that California's attorney general told nurses that the "law favors unionization."

3. Distributed on December 10: flyers falsely accusing Ms. Espejo of unlawful conduct as described in Section I, subsection I, above.

4. Distributed during the week of December 9: flyers allegedly misrepresenting the results of the Union's negotiations with other employers.

5. Distributed in November and December: union flyers stating the incorrect voting time sent to some employees' homes.[28]

In *Midland National Life Insurance*, 263 NLRB 127 (1982), the Board returned to its Shopping Kart Food Marts[29] rule that it would not set aside an election because of misrepresentations unless the misrepresentations involved misuse of the Board's election process or forged documents. Even misrepresentation of NLRB action is not a basis to set aside an election so long as a Board document has not been altered to give the impression that the Board endorses an election party. The Employer argues that item 1 above showing employees seated beneath the NLRB seal falsely suggested that the NLRB favored the Petitioner. However, the Board expressly treats misstatements about Board neutrality the same as other misrepresentations. *Riveredge Hospital*, 264 NLRB 1094 (1982)[30] (stating, " we see no sound reason why misrepresentations of Board action should be on their face objectionable or be treated differently than other misrepresentations." Id at 1095); TEG-LVI 326 NLRB 1469 (1998). The misrepresentations alleged by the Employer involve neither misuse of the Board's election process nor forged documents. They fall, therefore, within the precepts of Midland National Life Insurance, supra, and do not warrant setting aside the election.

B. Direct contact with unit employees

The Employer alleges that unidentified union representatives (1) in mid-November, told antiunion employees not to vote as such was the equivalent to voting against the Union and thus deterred voters from going to the polls, (2) during the election, falsely told potential voters that the polls were closed and thus deterred voters from going to the polls, and (3) on December 13, falsely told employees they were ineligible to vote and thus deterred voters from going to the polls. I rejected the Employer's offer to present two witnesses to testify as to misrepresentations made to them of election times. Even assuming the accuracy of the proffered and alleged evidence, the Employer has cited no authority that such conduct forms a basis for overturning an election.

Accordingly, I recommend that Objections 9 through 11 and Objection 13 be overruled.

V. OBJECTION 12

Objection 12 (with subparts) involves allegations that the Union, by its officials, agents, and supporters unlawfully used official NLRB documents or facsimiles thereof, including ballots, to influence and/or alter the election results. The Employer contends that a compilation of circumstantial evidence leads to the conclusion that unofficial voting ballots were utilized in the voting. Essentially, the Employer argues that ballot box "stuffing" or tampering occurred. The circumstantial evidence the Employer relies on is as follows:

> 1. On December 12, nurse supervisor Joey Zimmerman (Ms. Zimmerman) went to dinner at Jerry's Deli with three nurses. Ms. Zimmerman could see three CNA representatives/supporters seated at another table. At some point, Ms. Zimmerman noticed one of the CNA representatives was holding about half a ream of paper. Although Ms. Zimmerman could not see what, if anything, was printed on the paper, she could see it was a green color. The following day, Ms. Zimmerman attended the vote count. She saw that the ballots used by the NLRB in the election were the same size and the same green color as

union observers who served during nonwork periods were not compensated.

[27] The Employer requests that I reverse my ruling limiting the scope of its subpoena of union documents relating to prepetition payments made to employees. In the absence of some threshold evidence to support a belief that such payments were made, the subpoena constitutes a "fishing expedition." In re *Coinmatch Laundry Corp*., 337 NLRB 1286 (2002). Therefore, I reject the Employer's request.

[28] I declined to hear testimony regarding the truth or falsity of the flyers.

[29] 228 NLRB 1311 (1971).

[30] Supplementing 251 NLRB 196 (1980), enfd. as modified 789 F. 2d 524 (7 superth Cir. 1986).

the paper carried by the CNA representative the previous evening. While serving as an observer, Ms. Tynan saw a voter come to the observer table with a green paper under her arm, but could not tell whether it was a per diem nurse assignment form, which was almost the identical shade of green, or a ballot.

2. Employer election observer, Mercedes Mendez (Ms. Mendez), on several occasions during her four observation periods, saw unused ballots left unattended on the floor, on the table and on chairs. By "unattended," Ms. Mendez apparently meant not within the actual physical possession of a Board agent, as she testified that the Board agents controlled the ballots carefully. Ms. Mendez saw no voter go to the unattended ballots. Ms. Mendez observed that when voters arrived at the polling area, they were promptly checked in by observers and were given a ballot by a Board agent within a very short period of time. Employer observer, Francis Turner, (Mr. Turner), during the December 13, 5 to 9 a.m. voting session, saw unused ballots in a loose pile on the floor by a chair in the area behind the observer tables. At times, no Board agent was nearby. Mr. Turner never saw anyone but a Board agent go to where the ballots were kept and never saw a ballot in anyone's hand but that of the Board Agent or a voter about to vote. During her stints as observer, Ms. Tyner saw ballots in an open manila envelope underneath a chair behind the area between the observer tables at times when no Board agent was within 5 feet of the ballots.[31]

3. At times only two Board agents were present to monitor the polls. There is no dispute that sometimes three Board agents were present in the voting area when the polls were open, and on other occasions, only two were present.

4. Ms. Tyner voted on December 11 at 5:15 a.m. She did not, at the time of voting, form an impression that the person who handed her a ballot was not a Board agent. Later, when she served as an observer during the 5 to 9 a.m. sessions of December 12 and 13, she recalled that she had received her ballot from a man seated at one of the observer tables who was not wearing an identifying badge. She then formed an impression that the individual was not a Board agent. Ms. Tyner's recollection in this regard was vague. In the absence of some corroborative evidence, I cannot give it any weight. I find, therefore, no evidence anyone other than Board agents handed out ballots to voters.

5. The Employer contends that discrepancies and anomalies exist in the number of ballots shown on the official tally and the number of ballots cast. The Region, after redacting names and identifying information from the eligible voter list marked by observers during the election, provided the parties with copies of the list. The parties stipulated that review of the list showed a count of 1321 or 1322 checked-off voters depending on whether the name of one voter is deemed to have been checked off. Only one mark appears next to the redacted voter name at page 38, line 7, of the copy of the voter eligibility list in evidence. After reviewing the questioned line, I conclude that although only one check mark appears on the redacted list for that name, it constitutes a valid voter check-off. The number of unchallenged checked-off voters (1322) is the same as the total of votes cast for the Petitioner (695) and the number cast against the Petitioner (627).

Considerable and varied testimony was adduced from both employer and union observers concerning the location and maintenance of unmarked ballots.

Considering the testimony as a whole, including the manner and demeanor of witnesses, except as specifically stated, I find no basis for crediting the testimony of one witness over another. Even giving weight to the testimony of the Employer's witnesses, I find the Employer presented no probative evidence that unofficial ballots were used in the voting, that the official ballots were ever out of the control of the Board agents, that the Board agents exhibited any carelessness concerning the ballots, or that the ballots were misused or tampered with in any way. See *Polymers, Inc*., 174 NLRB 282 (1969). Insofar as a discrepancy exists in the tally of ballots, the Employer does not explain, and I cannot determine, how the discrepancy could provide evidence of ballot box stuffing or tampering or that improper balloting occurred. See *Allied Acoustics, Inc*., 300 NLRB 1181 (1990). I rejected the Employer's offer to present expert statistical evidence that the vote distribution during one 50-ballot segment of the voting was—statistically—abnormally in favor of the Petitioner, as I concluded the expert opinion would not be of probative value. Without probative evidence of some misconduct relating to the ballots, neither the discrepant tally nor the proffered statistical opinion affords evidence of improper voting. In sum, the evidence shows no discrepancy or anomaly that would raise a suspicion that ballot box "stuffing" or improper voting had occurred. As the objecting party, the Employer carries the burden "to prove that there has been misconduct that warrants setting aside the election. If the evidence is insufficient, then the Employer has failed to meet its burden." *Consumers Energy Co.*, 337 NLRB 752 (2002). The Employer has not carried its burden here. Accordingly, I recommend that Objection 12 be overruled.

VI. OBJECTIONS 14 THROUGH 17

Objections 14 through 17 (with subparts) relate to conduct at the election polls. The thrust of these objections is that the integrity of the election process herein was compromised. The Employer contends that the Petitioner, by its observers, maintained its own list of voters, engaged in electioneering and inappropriate communication with voters and observers, engaged in or gave the appearance of surveillance near the voting area during voting hours, left the voting area, tracked and transmitted information to union supporters, remained in the vicinity of unattended ballots, and failed to conform to lawful election

[31] Ms. Tyner denied seeing any loose pile of blank ballots during the December 13, 5 a.m. to 9 a.m. session. Her testimony, in this regard, contradicts that of Mr. Turner. I do not credit Mr. Turner's testimony of "loose" ballots.

conduct rules.[32] The test the Board applies when the election process integrity is challenged is whether the evidence raises a "reasonable doubt as to the fairness and validity of the election." *Sawyer Lumber Co.*, 326 NLRB 1331 (1998) (and cases cited therein.)[33]

A: Voting area layout and procedures

Region 31 conducted the election herein on three consecutive days with three voting sessions each day as follows:

Wednesday, December 11	5 a.m. to 9 a.m.	11 a.m. to 3 p.m.	4 p.m. to 8 p.m.
Thursday, December 12	5 a.m. to 9 a.m.	11 a.m. to 3 p.m.	4 p.m. to 8 p.m.
5 a.m. to 9 a.m.	11 a.m. to 3 p.m.	11 a.m. to 3 p.m.	4 p.m. to 8 p.m.

During the preelection conference and before each voting session, Board agent, Steve Alduenda (Mr. Alduenda), who supervised the election, instructed observers not to keep notes or tallies of the voting but told them they could read books or magazines.

The election was held in the Employer's educational conference center, a room 90 to 100 feet long and 45 to 50 feet deep. Two observer tables were set up for voter identification. Signs designated one table as being for voters with last names beginning with the letters A through K and the other for voters with last names beginning with the letters L through Z. Four observers sat at each table: two for the Petitioner and two for the Employer. For most of the voting sessions, four voting booths were available to voters. The ballot box was positioned on a table against the wall opposite the observers.

Individuals arriving at the polls were asked to show their employee badges to the observers who matched and checked off names on the voter eligibility list.

B: Unattended Ballots, the Presence of only two Board Agents at the Polls, Failure of Union Observers to Wear Identifying Buttons, and Voter Instruction Given by Union Observers (Subparts 1, 15, and 16)

Essentially, this objection is that the Board agents conducting this election did not follow established guidelines for monitoring unused ballots or overseeing the polling area and observer conduct. Part of the Employer's evidence underlying this allegation is set forth at section V, herein. Other evidence includes the testimony of Lisa West Noble (Ms. Noble), employer observer at the December 11, 5 a.m. to 9 a.m. session, who testified that on two to three occasions, union observers gave instructions to voters, telling them to take a ballot into the voting booth, mark it, and deposit it into the ballot box. She also observed union observers take breaks, one of whom left for about 20 seconds and spoke to an employee just outside the polling area who had already voted. Employer observer Mercedes Mendez (Ms. Mendez) observed that Board agent, Mr. Alduenda, left the polling area for about 20 minutes, followed about five minutes later by another Board agent who was gone for 5 to 10 minutes. During that period, only one Board agent remained in the polling area. The remaining Board agent stepped briefly behind a rolling partition where a refreshment table was set up.[34] No voters appeared during the time the Board agent was behind the partition as, according to Ms. Mendez, "If someone came in, we would have alerted her." Ms. Mendez saw no voter or observer do anything with or to the blank ballots.

Board agents sometimes socialized with observers during periods when no voters were in the polling area. During one of the sessions, a Board agent reportedly felt unwell and lay down in a curtained recess for about an hour, leaving two Board agents on duty in the polling area.

Union observer Joao Da Silva (Mr. Da Silva) who served at the December 13, 5 to 9 a.m. and 11 a.m. to 3 p.m. sessions, left the session on several occasions. According to Mr. Da Silva, during his brief absences, he used his cell phone to answer pages from his wife and a friend. On one occasion, he was wearing his union observer button when he left. There is no evidence to controvert his explanation for his absences or to suggest that the voting was in any way affected by his absences or by his wearing the observer button during one of them.

In order to set aside an election on the basis of a Board agent's conduct, the facts must raise a reasonable doubt as to the fairness and validity of the election. Failure to follow guidelines will not warrant setting aside an election absent a reasonable doubt as to the fairness and validity of the election. *Consumers Energy C.o*, supra; *Rheems Mfg. Co.*, 309 NLRB 459 (1992). Here, there is no evidence of any impropriety in the Board agents' conduct as set forth above that could reasonably be supposed to affect the election or to destroy the appearance of the Board's impartiality. As to the oversight of blank ballots, there is no evidence that the location of unused ballots or the occasional presence of only two (and on one brief occasion, only one) Board agents created any doubt about the fairness and validity of the election. Several observers for both parties were always present at the polls, and it is clear that the observers, particularly the Employer's, were attentive to all aspects of the election proceedings. There is no evidence that anyone tampered with any of the unmarked ballots; indeed, there is no evidence that anyone other than Board agents touched the un-

[32] Ms. Tyner denied seeing any loose pile of blank ballots during the December 13, 5 a.m. to 9 a.m. session. Her testimony, in this regard, contradicts that of Mr. Turner. I do not credit Mr. Turner's testimony of "loose" ballots. Match the eligibility list. When the voters asked observers to check under their married names, and the names were verified, observers permitted the voters to vote without challenge. Otherwise, the objection regarding voter identification was not litigated. Accordingly, I decline to consider this newly raised objection. *Fleet-Boston Pavilion*, 333 NLRB 655, 656 (2001) (citing *Precision Products Group*, 319 NLRB 640, 641 (1995) and *Iowa Lamb*, 275 NLRB 185 (1985).

[33] Subparts 2, 3, and 4 allege, respectively, that a voter was handed a ballot by a union observer rather than a Board agent, that unofficial ballots were produced by the Union and used at the election, and that discrepancies exist between the number of voters voting and the ballots cast. These allegations are discussed in section V above.

[34] In its posthearing brief, the Employer states, "Sometimes, the Board agents left the voting room altogether." Insofar as this assertion suggests that all Board agents were absent from the voting room at some point during the voting sessions, it is inaccurate.

marked ballots until they were handed to eligible voters. The Employer's reliance on *Hook Drugs, Inc.*, 117 NLRB 846, 848 (1957), is misplaced. In that case, unlike the instant situation, the Board agent and all observers inadvertently abandoned an unsealed package of blank ballots at a polling location for some 20 minutes. Notwithstanding the absence of any evidence of impropriety, because of the possibility of irregularity, the Board set aside the election in Hook. Here, in addition to the absence of impropriety, the blank ballots were always within the oversight of Board agent(s) and observers. As to observers speaking to employees while taking breaks, there is no evidence that any exchange related to the election or was other than innocuous. See Sawyer Lumber Co., supra at 1334. Similarly, there is no evidence or basis for inference that observers instructing voters, on rare occasions, to take their ballots into the voting booth, mark them, and deposit them into the ballot box could have compromised the fairness or validity of the election.

C. Failure of Observers to Initial the Seal on the Ballot Box at the Conclusion of the Final Voting Session (Subpart 5)

Following the conclusion of the voting on Friday, December 13, the observers did not sign the ballot box. The box remained in the custody of the Board agent at all times.

Assuming that the failure of observers to initial the ballot box following the election constitutes an election irregularity, the Board has stated that possibility of irregularity alone does not "raise a reasonable doubt as to the fairness and validity of the election." *Sawyer Lumber Co*., supra at 1332. The evidence establishes that the ballot box was never unattended but was always watched over by a combination of observers and Board agent[s]. The number of ballots cast is consistent with the observers' eligibility list check-offs, showing that no extra ballots were cast. There is no evidence that anyone tampered with the ballot box or that there was any other security breach of the ballot box. In similar circumstances, the Board has concluded that the integrity of an election was not compromised. *Sawyer Lumber Co*., supra at 1332 and fn. 8. See also, *Queen Kapiolani Hotel*, 316 NLRB 655 (1995). I conclude likewise.

D. Electioneering at the Polls (subparts 6, 7, and 14)

The Employer alleges that a flyer disparaging the Employer's CEO was posted in the vicinity of the polls, that during the election, two prounion nurses cheered loudly and made victory gestures immediately after voting, and that a union observer held a union button in plain view of voters while sitting at the observers' table and attempted to engage an employer observer in a discussion about benefits.

At a time when at least ten voters were in line, Ms. Noble observed two female voters to cast their ballots and then cheer loudly, "Yeah, union. Way to go. Great!" The two voters asked Mr. Alduenda when they would know that the Union won. Mr. Alduenda said, "The election ends on Friday. Then we will be counting the ballots. We will have the results then, and you can contact the nursing office." After he answered, the two voters left the voting area.

During the December 13, 5 a.m. to 9 a.m. session, union observer, Mr. Da Silva observed to employer observer Mr. Turner that the Employer's benefits "sucked" and that there were better ones available. Mr. Turner immediately discouraged the conversation, telling Mr. Da Silva it was not the time to discuss the matter.[35] There is no evidence any voter was in the area at the time. Ms. Tyner, who served as employer observer during that session, testified that all observers stopped talking when people walked into the voting room.

The Board prohibits electioneering at or near election polls but does not apply a per se rule. The Board examines evidence of electioneering to determine whether it interfered with voter free choice, applying such factors as "whether the conduct occurred within or near the polling place . . . the extent and nature of the alleged electioneering, and whether it is conducted by a party to the election or by employees . . . or contrary to the instructions of the Board agent." *Boston Insulated Wire & Cable Co.*[36] Further, the Board's rule in *Milchem*, 170 NLRB 362 (1968) prohibits "prolonged conversations between representatives of any party to the election and voters waiting to cast ballots." The Board will automatically set aside an election for such conduct without inquiring into the nature of the conversations.

As to the cheering voters, I cannot infer that their behavior interfered with voter free choice. Although the conduct occurred within the polling area, no observer was involved, no prolonged conversation or interaction occurred, and only a small fraction of the voting complement could have observed the incident. The two voters spontaneously and briefly celebrated after casting their ballots, an unsurprising occurrence in a vigorously contested campaign and one unlikely to sway watching voters. See *Midway Hospital Medical Center*, 330 NLRB 1420 fn. 1 (2000). That is not conduct sufficient to set aside an election.

As to Mr. Da Silva's comments to a co-observer about benefits, even accepting Mr. Turner's account, there is no evidence that he engaged in any prolonged conversation with voters waiting to cast ballots, that he attempted to communicate a prounion message to voters, or that his statements interfered with employees' free choice. Ibid. Accordingly, I cannot conclude that any electioneering occurred to warrant setting aside the election.

E. Maintenance of a Separate Voting List and Observer Recordation of Voter Information (subparts 8, 9, 10, 11, and 12)

Mr. Da Silva had an electronic device called a personal digital assistant, sometimes known as a "Palm Pilot" (herein called PDA) with him during his observation session. No witness observed what was on the PDA screen, but Mr. Da Silva was observed using the stylus to touch the screen. An employer observer pointed out Mr. Da Silva's PDA use to Board agent, Mr. Alduenda, who said that Mr. Da Silva was playing computer games, which was okay. Employer observer, Mr. Turner, overheard Mr. Da Silva ask a Board agent if he could transcribe numbers from his beeper to his Palm Pilot, which the Board agent said was permissible.

[35] Mr. Da Silva's account of this conversation differs somewhat from that of Mr. Turner. Mr. Da Silva testified that he only mentioned that if he moved to Denver and got a job with benefits, he would take up skiing. He denied saying the Employer's benefits "sucked." I find it unnecessary to resolve this testimonial conflict.

[36] 259 NLRB 1118, 1119 (1982) enfd. 703 F.2d 876 (5th Cir. 1983).

When voters came into the polling area, Mr. Da Silva put the PDA away. Some employer observers recalled that Mr. Da Silva only put the PDA down when voters came to his table to have their names checked off but otherwise used the PDA while voters were in the polling area. Mr. Da Silva testified that he played video games on the PDA during the voting session but never when voters were in the polling area. I credit Mr. Da Silva's testimony and find that he did not use the PDA when voters were in the polling area.

During the course of the hearing, a technical expert examined Mr. Da Silva's PDA and provided a summary of its contents including a list of all PDA files, which summary I reviewed in camera. Nothing in the summary of findings or in the listed PDA files suggests that Mr. Da Silva kept any list or record of voters on his PDA. In fact, nothing in the summary of findings or in the listed PDA files reveals any information relevant to the objections. Consequently, there is no evidence to controvert Mr. Da Silva's testimony as to the purpose for which he used the PDA, and I have no reason to doubt his testimony. I credit his account of his PDA use while he served as a union observer during the election.

Ms. Mendez, during the December 13, 11 a.m. to 3 p.m. session, saw a union observer writing from time to time on a newspaper even when voters were in the room. Ms. Mendez could not see what the observer was writing and said nothing about it to any Board agent. This testimony probably refers to Union observer Ms. Drilon, who testified she read a newspaper and worked a crossword puzzle when no voters were in the polling area. Considering all the evidence and testimony on this subject, I specifically credit Ms. Drilon's testimony that she neither read the newspaper nor worked the crossword when she realized voters had entered the polling area. Ms. Mendez also observed another union observer named Mariano Mendoza (Mr. Mendoza) write a voter's name on a newspaper about 5 minutes after the voter had left. Ms. Mendez could not recall if any voter was present at that time.

During the session she served as union observer, Rosary C. Castro-Olega (Ms. Castro) filled out a scholastic book order form for her children. I credit Ms. Castro's testimony that she never wrote on it when she saw voters were in the room. Although employer observer Rachel Keller opined that Ms. Castro's writing was more extensive than the book order form could justify, there is no evidence that Ms. Castro kept a voter list or that any voter could reasonably have drawn that inference.

The only list of voters to be maintained in Board-conducted elections is the official voter eligibility list. The keeping of any other voter list is grounds in itself for setting aside an election if "it can be shown or inferred from the circumstances that the employees knew that their names were being recorded. And this is so even when there has been no showing of actual interference with the voters' free choice." *Days Inn Management Co*., 299 NLRB 735, 737 (1992).

See also *Cross Pointe Paper Corp*., 330 NLRB 658 (2000) and *Masonic Homes of California*, 258 NLRB 41 (1981). The Board has focused on what voters observed and whether they could reasonably have inferred that their names were recorded. Indeck *Energy Services*, 316 NLRB 300 (1995), citing *Southland Containers*, 312 NLRB 1087 (1993). In its posthearing brief, the Employer asserts, "The Union failed to establish that voters did not see Union observers recording information." However, that is not the Petitioner's burden. As the objecting party, the Employer carries the burden to prove misconduct that warrants setting aside the election. Consumers Energy Company, supra. Here, there is no evidence that any observer kept any list of persons who voted aside from the official eligibility list on which voters' names were checked off as they received ballots. There is also no evidence that employees believed their names were being recorded. The Employer points out that voter perception is critical and that some voters entering the polling area undoubtedly perceived, at least briefly, union observers Ms. Castro with a book order form, Mr. Mendoza and Ms. Drilon with newspapers, and Mr. Da Silva with his PDA. I agree it is likely some voters may have seen that. However, credible evidence establishes that each observer put aside any diversionary object as soon as they saw voters approach. Viewed objectively, it is likely that voters, including other observers, perceived the actuality: that observers whiled away down time in innocuous pursuits. There is no basis for finding that voters could reasonably have inferred that their names were being recorded on unauthorized lists. The Employer has failed to meet its burden in this regard.

G. Signaling Among Voters and Observers (Subpart 13)

Several employer observers perceived voters pound or tap the ballot box after casting their ballots as detailed in the following:

Name	Voting Session(s) and Table	Conduct Observed
Lisa Noble	Dec. 11, A K table 5 to 9 a.m.,	Fifteen voters during the course of the session rhythmically pounded or tapped the ballot box three to five taps after casing ballots. Approximately eight of those times two union observers responded, "thank you."

Erika McCormick	Dec. 11, L-Z table 11 a.m. to 3 p.m.	During times when prospective voters were in the voting area, about 40 % of the voters tapped the ballot box and then made eye contact with union observers who waved, smiled, nodded, and/or winked. Ten to Fifteen voters also gave "thumbsup" sign.[37] Ms. McCormick told a Board Agent of the tapping and that it could be understood as a signal. The Board agent said that there was not tampering, it was a problem.
Mercedes Mendez	December11, A – K table 4 – 8 p.m. Dec. 12, A – K table 11 a.m. – 3 p.m. Dec. 13, A – K table 11 a,m., - 3 p.m. L – Z table 4 p.m. – 8 p.m.	Observed that voters tapped the side or top of the ballot box two to three times when casting their ballots. The voters then made eye contact with and/or nodded to observers.
Francis Turner	Dec. 13, A – K table 5 a.m. – 9 a.m.	Saw and heard 75 – 100 voters tap the top of the ballot box after casting the ballot and then took toward the observer tables. Saw Mr. Da Silva nod or "smirk."[38] He said nothing to any Board agent about it.
Rachel Keller	Dec. 13, L – Z table 5 a.m. – 9 a.m.	Heard tapping on the ballot box after voters cast ballots and formed an impression that the voters cast ballots and formed an impression that the voters then looked over their shoulders at union observers. Did not see union observers respond.
Tina Tyner	Dec. 12, L – Z 5 a.m. to 9 a.m. Dec. 13 L - Z 5 a.m. to 9 a.m	Did not notice any tapping during the Dec. 12 session. At the Dec. 13 session, after being alerted by Rachel Keller, noticed about 50% of the voters tapping on the box as they cast their heads after casting their ballots and nodded and/or smiled. During the Dec. 13 session, noticed some tappers look at the table where Mr. Da Silva sat. Saw Mr. Da Silva "mak[e] glances toward them" and smile or smirk or nod.[39]

[37] On cross-examination, Ms. McCormick testified that union observers returned the "thumbs-up" signs. Her testimony was vague and somewhat vacillatory, e.g., she initially said both union observers had made the sign but then said she wasn't sure that both had. I find this witness' memory too tenuous to conclude that observers did, in fact, make any "thumbs-up" gestures.

[38] Mr. Turner initially testified that the tapping voters looked at Mr. Da Silva after casting their ballots but admitted, under cross-examination, that he could not tell whom the voters looked at.

[39] I give little weight to Ms. Tyner's testimony of seeing Mr. Da Silva's responses. It is unlikely that she could reliably have seen Mr. Da Silva's expression as she had to move her chair back to be able to see him, which she did not do when checking in voters.

Natividad Portugal	Dec. 11, L – Z table 5 a.m. to 9 a.m. Dec. 13, A – K table 8 a.m. to 9 a.m. as relief observer 11 a.m. to 3 p.m.	At all three sessions, noticed voters tapping on the ballot box in a pattern of one to two times when casting their votes, then smiling or grinning at the observers. Some also said "See you later."

Union observers Ms. Castro, Ms. Wood, and Ms. Drilon, heard no ballot box tapping during the sessions they attended.

The Employer contends that ballot box tapping as described by its observers constituted a concerted and conspiratorial communication among union observers and voters. That is an inference unsupported by the evidence. Although some employer observers noticed a tapping pattern among ballot casters, other union observers perceived no any such pattern, and employer observer Ms. Tynan did not notice the pattern until Ms. Keller called it to her attention. I do not discount observer testimony of hearing ballot box tapping. There were undoubtedly tapping sounds at the ballot box as voters cast their ballots, but there is no clear evidence that a general pattern of tapping occurred. There is also no evidence of any preplanned communication and no basis for supposing that voters in line noticed the tapping, or drew any inferences from it if they did, or were thereby influenced in their voting. With regard to post-voting signals, it is likely that many voters made gestures of acknowledgment to observers such as smiles or nods. The Board has stated that a "chance, isolated, innocuous comment or inquiry" between voters and observers will not "necessarily void the election." Milchem, supra at 363; Sawyer Lumber Co., supra at 1334 and cases cited therein. The brief, innocuously amiable gestures described by the employer observers herein do not rise to the level of the conduct prohibited by Milchem. Although a voter gave a "thumbs-up" sign after casting the ballot, such a gesture is no more likely to signal support for the Union than for the Employer, and was not, in any event, a communication by any party agent. See *Brinks Incorporated*, 331 NLRB 46 (2000) (union observer, in addition to other objectionable conduct, gave "thumbs-up" signals to prospective voters.)

In sum, the evidence does not establish that there were any irregularities in the conduct of this election to cast doubt on the validity of the results. None of the evidence presented in support of Objections 14 through 17, either individually or cumulatively, raises any reasonable doubt about the integrity of the election. Accordingly, I recommend that Objections 14 through 17 be overruled.

VII. OBJECTIONS 18 AND 19

Objections 18 and 19 (with subparts) relate to misrepresentations allegedly made by the Petitioner and the unauthorized use of employee photographs and statements. Those allegations have been dealt with in Sections I and IV herein. For the reasons stated in Sections I and IV, I recommend that Objections 18 and 19 be overruled

CONCLUSION

Based on the above, I recommend that the Employer's objections, in their entirety, be overruled and that this matter be remanded to the Regional Director for appropriate action.[40]

[40] Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, within 14 days from the date of issuance of this Recommended Decision, either party may file with the Board in Washington D.C. an original and eight copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof upon the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may adopt this Recommended Decision.