JD(ATL)–38–07
Memphis, TN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

PRAXAIR, INC.
Employer

and **CASE 26-RC-8530**

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, HELPERS, MISCELLANEOUS AND PUBLIC EMPLOYEES LOCAL UNION 667, INTERNATIONAL BROTHERHOOD OF TEAMSTERS
Petitioner

Tamra Sikkink, Esq., for the Regional Director.
Steven L. Rahhal, Esq., for the Employer.
Samuel Morris, Esq., for the Petitioner.

ADMINISTRATIVE LAW JUDGE REPORT
AND
RECOMMENDATION ON OBJECTIONS

MARGARET G. BRAKEBUSCH, Administrative Law Judge.

I. Preliminary Statement

On August 1, 2007, Teamsters, Chauffeurs, Warehousemen, Helpers, Miscellaneous and Public Employees Local Union 667, International Brotherhood of Teamsters (the Petitioner or Union) filed a representation petition with Region 26 of the National Labor Relations Board (the Board or NLRB), docketed as Case 26-RC-8530, seeking to represent certain employees of Praxair, Inc. (the Employer).

On August 14, 2007, the Regional Director for Region 26 approved a Stipulated Election Agreement directing an election to be held in the following unit of the Employer's employees (the Unit):

> All truck drivers employed at the Employer's 5055 Old Millington Road, Memphis, Tennessee facility and the 3587 Paul R. Lowery Road, Memphis, Tennessee facility; excluding all office clerical employees, warehousemen, mechanics, salesmen, guards and supervisors as defined in the Act.

Pursuant to the Stipulation Election Agreement, a secret ballot election was conducted on September 7, 2007. The results of the election, as disclosed by the Tally of Ballots served upon the parties at the conclusion of the election, were as follows:

Approximate number of eligible voters:	16
Number of void ballots	0
Number of votes cast for the Union	10
Number of votes cast against participating labor organization	6
Number of valid votes counted	16
Number of challenged ballots	0
Number of valid votes counted plus challenged ballots	16

The challenges were not sufficient in number to affect the results of the election.

On September 14, 2007, the Employer filed timely objections to conduct affecting the results of the election. On September 27, 2007, the Regional Director for Region 26 of the Board issued a Notice of Hearing on Objections, finding that the Employer's objections raise substantial and material factual issues which may best be resolved on the basis of record testimony. The Regional Director's Order directed that a hearing be held on the Employer's Objections and that the designated hearing officer prepare and cause to be served upon the parties a report resolving questions of credibility, and containing findings of fact and recommendations as to the disposition of the issues. A hearing was held and conducted on October 24, 2007 consistent with the Regional Director's September 27, 2007 order.

All parties were represented at the hearing and were afforded full and complete opportunity to be heard, to examine and cross-examine witnesses, and to present evidence pertinent to the issues.

In accordance with the Regional Director's Order, and based upon the record as a whole, and after considering the arguments by the parties, I make the following findings of fact and credibility resolutions[1] and issue this report with recommendations to the Board.

II. The Objections

A. The Text of the Objections

The text of the Employer's Objections is as follows:

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[1] In making credibility determinations, I have considered the weight of the respective evidence, the demeanor of the witnesses, inherent probabilities, and reasonable inferences drawn from the total record evidence.

1.

The NLRB, through its Board Agent, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions by creating the impression of an unsupervised and otherwise unfair election process. Such conduct includes, but is not limited to, a Board agent leaving a ballot box and blank ballots unattended during the period when access to the ballot box and ballots was possible.

2.

The NLRB, through its Board agent, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions by creating confusion and misinformation.

3.

The Union and its agents, representatives and/or supporters interfered with the fair operation of the election process and destroyed the necessary laboratory conditions by misusing the offices of the NLRB to create confusion and misinformation.

B. Background Facts

The employees included in the stipulated unit are truck drivers who transport the Employer's products from one of two sites in the Memphis area. Such products as hydrogen, nitrogen, oxygen, and argon are transported to various customers engaged in industrial manufacturing or health care. The distribution of the products is conducted 24 hours a day and seven days a week. Labor Relations Manager John Lillis testified that some of the drivers are out of the facility for as long as two to four days a week and other deliveries may require the drivers to be away from the facility for as long as 10 to 14 hours.

There were two voting periods for the September 7, 2007 election. Board Agent Christopher Roy conducted the morning session and Board Agent David Glissendorf conducted the afternoon session. Employee John DeHoff served as the Employer's observer during the election and employee Wade Shaw served as the Petitioner's observer during the election.

C. Employer Objection One

1. Facts

Lillis testified, without dispute, that Board Agent Christopher Roy arrived late for the pre-election conference. He recalled that voters were already in line to vote and that it was past the starting time for the election. Additionally, when Roy arrived, he did not bring a ballot box for the election. Employer observer John DeHoff found a coffee box in the Employer's storage room. He emptied the coffee and brought it to the pre-election conference to use for the ballot box. The box was sealed with the masking tape provided by the Board agent and a hole was added for the ballots. Election identification was placed on each side of the box. No one attending the pre-election conference objected to the use of the coffee box rather than the standard box that is normally used for elections. Lillis also acknowledged that

when he inspected the coffee box before it was used as a ballot box, the box contained no ballots.

DeHoff testified that at least twice during the morning voting session, he observed Board Agent Roy leave the room where the election was being held. The ballot box and the unmarked ballots remained in the voting area. DeHoff recalled that while Roy told the observers that he was leaving to go to the restroom, he did not give them any instructions as to what they needed to do while he left the room. Roy did not tell the observers how long he would be gone when he left the room.

Employer observer DeHoff testified that he understood that his role as an observer was to ensure that "no hanky panky" or "cheating" occurred. Despite his testimony that the Board agent left the voting area during the election, DeHoff testified that no "hanky panky" occurred during the election. During the time that the Board agent was out of the room, both he and the Petitioner's observer watched the ballot box. He also confirmed that there was no indication that anyone other than an eligible voter cast a ballot during the election.

Wade Shaw testified that he did not recall that Board Agent Roy left the polling area at any time during the election.

2. Discussion

The Employer cites the Board's decision in *Austill Waxed Paper Co*., 169 NLRB 1109 (1968) in its assertion that Board agent conduct is sufficient to set aside the September 7, 2007 election. The circumstances in *Austill* involved an unattended ballot box. In setting aside the election, the Board noted:

> We do not believe that we should speculate on whether something did or did not occur while the box was left wholly unattended. The Board, through its entire history, has gone to great lengths to establish and maintain the highest standards possible to avoid any taint of the balloting process; and where a situation exists which, from its very nature, casts a doubt or cloud over the integrity of the ballot box itself, the practice has been, without hesitation, to set aside the election.

Although the Board found that an unattended ballot box constituted a sufficient basis for setting aside the election, the crucial dynamic was the fact that the box was left wholly unattended. Because of an altercation that occurred outside the polling area, all election officials left the polling area and the ballot box was left totally unattended for two to five minutes. The facts in this case are clearly distinguishable. There is no evidence that the ballot box was ever left wholly unattended. The Employer's observer testified[2] that the Board agent left to go to the restroom twice during the morning voting session. The Petitioner's observer does not recall that the Board agent left the room. Despite his assertion that the

[2] Inasmuch as the Board agent did not testify and the Petitioner's observer did not refute DeHoff's testimony, I credit DeHoff's testimony that the Board agent left the room as alleged.

Board agent left the room for a brief time during the voting session, the Employer's observer nevertheless confirms that there was no irregularity that occurred in the Board agent's absence.

In considering the issue of ballot box security, the Board has tended to view the overall circumstances and existent conditions of the polling area as well as the parties' assertions. In *Dunham's Athleisure Corporation*, 315 NLRB 689 (1994), the Employer claimed that the ballot box was left virtually unattended for two-thirds of the voting period because the box was obscured from the employer's observer by the continuous line of voters. The Board noted that there was no evidence that the box was hidden totally from view at all times and any obstruction occurred only intermittently when groups of employees were released from work to vote. Perhaps more importantly, however, was the Board's observation that there was no evidence that the ballot box had been "stuffed" because there was no discrepancy between the approximate number of eligible voters and the total number of votes that were cast. Additionally, there was no evidence of misconduct or interference with the voting process by any of the employees waiting in line to vote.

In an early case, the Board dealt with circumstances involving a Board agent's taking the ballot box with him to the restroom during the election period. In *Filtrol Corporation*, 91 NLRB 93 (1950), the Board agent, with the ballot box and blank ballots in his possession, went to the restroom and remained outside the polling area for five minutes. Only the employer's observer accompanied him. Upon investigation, the Regional Director determined that there had been no interference with the ballot box during the Board agent's absence from the polling area. The Board adopted the Regional Director's conclusions, finding that the intervenor's objections were speculative in nature and substance and that the objections merely alleged that there might have been outside interference with the ballot box.

In its decision in *Anchor Coupling*, *Inc.*, 171 NLRB 1196, fn. 2 (1968), the Board noted that even if it were to accept as competent evidence, an employer's officer of proof relating to a Board agent's temporary absence from the polling area, there would be an insufficient basis for setting aside the election. The Board specifically noted that unlike the situation in *Austill Waxed Paper Co.*, above, the ballot box was not left totally unattended. Additionally, the employer did not allege that the box had been tampered with and both of the employer's observers certified that the ballot box was protected in the interest of a fair and secret election.

I find it significant that the number of ballots cast in the September 7, 2007 election correspond to the observer's check off on the Excelsior List for the 16 eligible voters.[3] Thus, there is no evidence that any extra ballots were cast. There is no evidence that anyone voted or even tried to vote while the Board agent was out of the room. Although the Board agent may have briefly left the room, there is no evidence that either election observer was ever left alone with the ballot box or blank ballots.[4] Additionally, I note that representatives of both

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3 *Queen Kapiolani Hotel*, 316 NLRB 655 (1995).

4 *Sawyer Lumber Co*., 326 NLRB 1331 (1998).

the Petitioner and the Employer signed the Tally of Ballots, certifying that the secrecy of the ballots had been maintained and that the results of the election were as indicated on the document. In this case, no party submitted a Certificate of Conduct signed by the observers at the conclusion of the election. I note, however, that both observers testified in the proceeding and neither testified that they had declined to sign such certification.

In order to fully evaluate the integrity of the election process, there must be an assessment of whether the facts indicate that a reasonable possibility of irregularity inhered in the conduct of this election. *Peoples Drug Stores, Inc*., 202 NLRB 1145 (1973). The Board has further noted that in order to set aside an election on the grounds of Board agent misconduct, it must be presented with facts suggesting a reasonable possibility of a violation of the integrity of the ballot box. *Ashland Chemical Co*. 295 NLRB 1039, fn. 2 (1989*); Niagra Wires, Inc*., 237 NLRB 1347, fn. 2 (1978).

Certainly, the preferred process would have been for the Board agent to remain in the room with the ballot box for the entire session. Although the Board agent in charge of the election did not retain personal physical custody of the ballot box and the blank ballots at all times, the security given these items was such that there was only the most remote possibility of interference with the election process during the Board agent's absence from the room. There is no evidence of any security breach involving the ballot box or the ballots.

The evidence presented in this case presents no indication of tampering, fabrication, loss of ballots, stuffing of ballots, or any factual issue concerning the accuracy of the tally of ballots.[5] Considering the extreme improbability of any violation of the ballot box, and in the absence of any affirmative evidence of tampering, there is no reasonable possibility of irregularity inherent in the conduct[6] of the election as alleged in the Employer's objection one. Moreover, there is no evidence that the integrity of the election was compromised in any way by the conduct of the Board agent. *Polymers, Inc*., 174 NLRB 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970). Accordingly, I recommend that this objection be overruled in its entirety.

D. Employer Objection Two

1. Facts

a. Background and Undisputed Facts

Labor Relations Manager John Lillis recalled that he arrived at the Employer's

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5 *Allied Acoustics*, 300 NLRB 1181 (1990).

6 While the Employer does not specifically allege the use of the non-traditional ballot box as objectionable conduct, there is no dispute that the Board agent used a modified coffee box as an official ballot box. The record reflects that no one attending the pre-election conference objected to the use of the box and the Employer's representative inspected the box before the election. Election identification was placed on each side of the box. There was no record evidence that any voter was confused by the box or discouraged in the voting process by the use of this non-traditional ballot box. Thus, there is insufficient evidence that the use of the converted coffee box tended to create doubt as to the official character of the election, or otherwise interfered with the conduct or results of the election. *Westinghouse Electric Corp*., 91 NLRB 955, 960 (1950).

Memphis facilities shortly after the petition was filed on August 1, 2007. With the exception of weekends, he conducted the Employer's election campaign and remained continuously at the Memphis facilities until the September 7, 2007 election. Prior to the September 7, 2007 election, the Employer conducted both employee group meetings and sent out written communications to its employees concerning the election. Lillis estimated that he conducted approximately ten one-on-one meetings with employees prior to the election. He explained that he selected employees for one-on-one meetings on the basis of whether they were likely to be swayed by the Employer's campaign information. During the election campaign, the Employer spoke with employees about the National Labor Relations Act, the Petitioner's constitution and bylaws, and the effects of a strike. The Employer also discussed the process of collective bargaining with the employees. Lillis testified that the Employer told employees that collective bargaining was a risky proposition with no guarantees. The Employer told the employees that as a result of collective bargaining, employees could end up with more, less, or the same. The Employer's campaign materials specifically informed employees that the NLRB does not guarantee employees that collective bargaining will begin with their current wages and benefits. The written campaign materials cited Board cases in which benefits were lost during the collective bargaining process.

It is undisputed that on September 4, 2007, employees Lee Livingston and Demetrius Collins contacted the Board's Regional office in Memphis and spoke with Board Agent David Glissendorf, who was serving as the Region's Information Officer for that day. Both employees asked questions relating to the September 7, 2007 election.

b. The Employers' Interaction with Employees

At approximately 3:00 p.m. on September 4, 2007, Lillis spoke with Supervisor David Dean. During the conversation, Dean mentioned that he had spoken with employee Booker Sherrill, who had indicated that he thought that the Employer had lied to the employees about the collective bargaining process. After his conversation with Dean, Lillis spoke with Demetrius Collins. He asked Collins if he had any questions. Collins replied that he did not. Lillis then inquired; "Are you aware that people are saying that the Company is being untruthful in what it's saying?" Collins replied that "Yes" he was aware and that he had heard such from employee Lee Livingston. Collins explained that Livingston had told him that the Employer was not telling the truth and that he had spoken with "the Board" and that "the Board" had said that the Employer was not telling the truth.

Lillis testified that on Wednesday morning, September 5th, he met with Lee Livingston sometime between 3:00 a.m. and 4:15 a.m. at the Employer's River Port facility. Lillis began the conversation by asking if Livingston had any questions. Livingston replied that he did not. Lillis told Livingston that he had heard from another driver that he (Livingston) had said that the Employer was not telling the truth. Lillis asserted that Livingston then explained that when he had spoken with the Board's office, he was told that the Employer was not telling the truth because the employees could not get less unless the Employer was in financial troubles or in bankruptcy. Livingston said that he was told that during negotiations employees would only end up with the same or more. Lillis reminded Livingston that the Employer had provided information about collective bargaining and that employees could end up with less.

Lillis testified that Livingston responded that he had spoken with the Board and "the Board was like talking with the Supreme Court." Livingston did not identify the individual with whom he had spoken at the Board's office. Later in the day, Lillis contacted Steven Rahhal; the Employer's attorney. Rahhal suggested that Lillis obtain the name and telephone number of the Board agent who had spoken with Livingston.

During a later conversation with employee John DeHoff, Lillis obtained a name and telephone number for a Board agent at the Board's office. DeHoff had received the information from employee Wade Shaw. Lillis then gave the Board agent's name and telephone number to Rahhal.

Steven Rahhal testified that on Wednesday, September 5, 2007, he telephoned Board Agent David Glissendorf and left a voice mail message. Later that same day, Rahhal telephoned Glissendorf again and explained his concerns. Rahhal testified that he told Glissendorf that he was extremely displeased with the fact that he (Glissendorf) had spoken with eligible voters. Rahhal also testified that he told Glissendorf that he did not think that it was appropriate and that he believed that Glissendorf had jeopardized the Board's impartiality and neutrality in this process. He testified that he told Glissendorf, "I don't think that this can be overcome, but I am going to put your name out and number and say people can call you because they believe you've been telling them that the Company is lying. And I've got to do whatever we can to try to correct that situation."

During the 24-hour speech[7] to employees on September 5, 2007, the Employer provided additional information about the collective bargaining process. The Employer provided specific information about other companies where the employees ended up with less after a union organizing effort and contract negotiations. Lillis also testified that he may have also had four to five one-on-one conversations with employees during the 24 hour period prior to the election.

During the meeting with employees on September 5, 2007, the Employer distributed the following written notice to employees:

DAVID GEFFENDORF

NLRB Board Agent

(901) 544-0011

Praxair encourages employees to contact
him concerning the law and to reaffirm that
collective bargaining is risky
You could get more,

[7] Under the Board's ruling in *Peerless Plywood Co.*, 107 NLRB 427 (1953), the Employer is prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election. Hence, the last speech to assembled employees is termed the 24-hour speech.

You could get the same or
You could get less

In addition to distributing the notice to the employees, the Employer also posted the notice at the Employer's facility. Rahhal testified that his telephone conversation with Glissendorf was the genesis of the notice that was posted and distributed. He recalled that he told his client that he had contacted the Board agent and had told him that the Employer was going to give out his name and number. Although Glissendorf's name was misspelled in the notice, there is no dispute that Board Agent David Glissendorf is the individual with whom Livingston, Collins, and Rahhal spoke.

c. Employees' Contact with the Board Office

Employee Booker Sherrill testified that employees Lee Livingston and Demetrius Collins[8] told him that they had contacted the Board offices prior to the September 7, 2007 election. Sherrill recalled that during a telephone conversation on September 4, Livingston told him that the Employer had lied to the employees concerning whether employees would get more, less, or the same during collective bargaining. Sherrill testified that Livingston told him that when he had spoken with someone from the Board's office, he was told that in collective bargaining, employees would start with what they had and they would not lose anything. Livingston did not reveal with whom he had spoken at the Board. Sherrill acknowledged that he did not know if Livingston relayed this same information to any other eligible voter.

Sherrill testified that upon hearing this from Livingston, he contacted his supervisor; David Dean and reported what Livingston had told him. Sherrill explained that he had done so because he wanted to learn the truth about everything before the election. Sherrill also recalled that after his reporting this information to Dean, Lillis spoke with him and explained that Livingston was incorrect. Sherrill also explained that after he viewed the Employer's film on September 5, he could see that employees could gain, lose, or stay the same in bargaining. He confirmed that the Employer's film had answered his questions.

Demetrius Collins recalled that he also spoke with Lee Livingston on September 4, 2007. Collins recalled that Livingston told him that the Employer had lied about whether employees could lose benefits. Collins described Livingston's comments in the following way:

> Said he talked to the Labor Board guy. He said that basically they start out with a blank sheet where you were at and you couldn't – you rarely ever went back in negotiations or something like that. In order for you to go back in negotiations, the Company had to prove that they were - - had financial problems, I guess, or it had to be recorded or something like that.

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8 Although Sherrill testified that Demetrius Collins told him that he had contacted the Board's office, Sherrill did not testify as to whether Collins told him anything about his conversation with the Board agent.

Collins also recalled Livingston's telling him that based upon his conversation with the Board agent, the Employer could not bring in contract drivers to take work from the employees. Collins recalled that while Livingston identified the first name of the Board agent as "David," he could not recall the agent's last name. Livingston gave Collins the telephone number and suggested that he telephone the Board agent if he wanted to do so. Collins had no knowledge as to whether Lee Livingston gave the Board agent's number to any other employees. Collins also had no knowledge as to whether Wade Shaw gave the Board agent's number to any other employees.

Collins testified that he later telephoned the Board agent and asked questions. Collins recalled that he gave his name to the Board agent and explained that he worked for the Employer and that there was to be an election the following Friday. At the beginning of the conversation, the Board agent told him that he didn't want to interject himself into the voting process and that he represented no one. The Board agent also explained that he represented neither the Employer nor the Petitioner and that he was simply in the middle. Collins testified that he asked the Board agent if employees could lose benefits or their jobs during contract negotiations. Collins testified that the Board agent told him:

> There's no regression in contract talk or something, hardly ever. You just start out with a blank sheet of paper. He gave me that analogy that you either start out where you're at or you go on forward.

During that day, Collins spoke with Lillis about his conversation with Livingston and with the Board agent. Collins testified that after recounting his conversations, Lillis simply replied "okay" and then left. Collins had no further conversation with Lillis or any other supervisor prior to the election.

Collins confirmed that he saw the Employer's film on September 4; although he didn't remember the substance. He also acknowledged that during the campaign, the Employer provided campaign literature telling employees that during negotiations, the employees could get more, less, or the same. Collins also confirmed that he had seen the Employer's notice on the bulletin board informing employees that they could contact David Glissendorf for information. He also acknowledged that he believed the portion of the notice stating that "Collective bargaining is risky."

Employee John DeHoff recalled that during a Union meeting with employees, Union President Henry Perry told employees that if they believed that he was wrong in what he told them, they should contact an individual at the Board. While he had given them a name, DeHoff could not recall it. He recalled that the meeting occurred on Saturday or Sunday before the Friday election. Employee Victor Johnson testified that he attended a meeting at the union hall on the Sunday prior to the election. Johnson recalled that while President Perry told employees to call the NLRB if they had questions, he did not give them a Board agent's name or number.

DeHoff also confirmed that in a voice mail message left on his cell phone, employee Wade Shaw identified the name and telephone number of a Board agent that DeHoff could

contact. DeHoff recalled that in the message, Shaw stated that Lee Livingston had spoken with the agent and that Livingston believed that the Employer had lied to the employees. DeHoff also recounted a personal conversation with Livingston in which Livingston gave him the same name and number of a Board agent that he could contact. Livingston also told him that the Employer's "personnel guy" might have been untruthful. DeHoff explained that he had not contacted the Board office because he had not felt that he needed to do so. He testified that he had no doubt whatsoever that the Employer had been truthful in telling employees that their wages could go up or down during bargaining.

While DeHoff maintained that he had heard other employees discussing telephoning the Board prior to the Employer's last meeting with employees on September 5, he could not recall with certainty the names of the employees.[9] It was his understanding, however, that it was permissible to contact Glissendorf after the Employer posted the notice to employees about calling the Board agent.

d. Contradictory Testimony

Employee Lee Livingston was called by the Employer as a witness pursuant to subpoena. Livingston confirmed that on Tuesday, September 4, 2007, he contacted the NLRB office. He found the telephone number for the Board office in the telephone directory. When he telephoned the Board office, he explained that he had questions and the person answering the phone referred him to someone else who did not identify himself. Livingston told the individual to whom he had been referred that there was campaign literature informing employees that with a union, employees can get more money, the same money, or less money. He asked the individual with whom he was speaking at the Board office if that was true. The individual confirmed that it was true. Livingston also recalled that he asked if the Employer could take away the employees' bonus as retribution for their voting for the Petitioner. Livingston recalled: "Well, he really didn't express much about the bonus money." Livingston recalled that his third question in the conversation had dealt with whether the Employer could bring in contract labor to replace striking employees. The Board agent told him that the Employer could not fire the employees and bring someone in to replace them unless there had been a previous plan to contract the work. Livingston denied that the individual told him that the Employer was lying. He had simply answered Livingston's questions. Livingston denied that he ever told Sherrill or DeHoff that the Employer was lying because he had not spoken with them about his call to the Board office.

Livingston acknowledged that he later told Demetrius Collins that he had spoken with someone at the Board's office. He explained that he told Collins that the Employer had not told the whole truth and he could contact the NLRB if he wanted additional information. He denied, however, that he ever gave the Board agent's name and telephone number to Collins, Sherrill, or DeHoff. Livingston testified that because he had not known the name of the individual with whom he was speaking at the Board office, he could not have given such information to any other employee. Additionally, although Livingston acknowledged that he spoke with Lillis about telephoning the Board office, he denied that he ever told Lillis that the

[9] He speculated that employees "Booker" and "Stanley" may have been present during such conversation.

NLRB was like the Supreme Court.

Pursuant to the Employer's subpoena, employee Wade Shaw also testified in the proceeding. Shaw testified that while he recalled leaving the Board agent's name and number in a voice mail message for DeHoff, he could not recall from whom he had received the name and telephone number. While Shaw recalled hearing Booker Sherrill speaking with someone about having the Board agent's name and number, Sherrill did not give that information to Shaw. He acknowledged that he may have given the same information to another person. Shaw confirmed that he did not personally contact the Board office.

e. Board Agent Glissendorf's Testimony

Consistent with the requirements of Section 102.118 of the Board's Rules and Regulations and within the specific limitations imposed by the General Counsel's written authorization of October 17, 2007, Board Agent David Glissendorf testified concerning his telephone conversations with employees on September 4, 2007. Glissendorf explained that as Regional Compliance Officer, he has occasion to act as the Region's Public Information Officer on a rotating basis. In that role, Glissendorf responds to inquiries from members of the public.

On September 4, 2007, Glissendorf received telephone inquiries from employees Lee Livingston and Demetrius Collins. Both conversations were documented in the Region's case activity tracking system that records contacts with the public through the Information Officer Program. Glissendorf recorded that Livingston told him that during the election campaign, the Employer told employees that the parties will start with a blank sheet in negotiations and could begin with less than what employees were currently receiving. Livingston asked if this was true and legal. Glissendorf recorded that gave a brief explanation and explained that it depended upon the context in which it was said and the facts. He suggested that it was best to take notes if he were concerned about the Employer's statements. With respect to whether the Employer could withhold employee bonuses if the Petitioner won the election, Glissendorf discussed not only past practice, but also whether the Employer might have documentation to establish that a decision was made to discontinue bonuses prior to the election campaign.

Board Agent Glissendorf recalled that his telephone conversation with Collins had been shorter than the conversation with Livingston. Glissendorf began his conversation with Collins by telling Collins that the agency did not want to interject itself into election campaigns. He explained that he was advising employees to make a note of anything that they felt was illegal by either the Employer or the Union. Glissendorf explained that he made this statement to Collins because he considered that there was a possibility that the agency might receive more calls from employees prior to the election. He recalled that Collins told him that the Employer had told employees that wages could decrease in negotiations and Collins asked if that was legal. Glissendorf testified that he told Collins that the Employer had the right to explain the consequences of bargaining and that wages and benefits can go up or down or stay the same. Glissendorf told Collins that if he believed that either the Employer or the Union was engaging in illegal conduct, he should make a note of it. Glissendorf recalled that he told Collins that he (Glissendorf) could not say whether the Employer was

engaging in anything illegal based upon the limited information provided by Collins. Glissendorf recalled that he may have told Collins that there was a line beyond which the Employer could cross; however, he didn't have sufficient information to have a judgment as to whether the Employer had done so.

Glissendorf also recalled that he had two telephone conversations with the Employer's attorney; Steven Rahhal, during that same week. In the first conversation, Rahhal explained that some employees had accused the Employer of lying after speaking with the Board's office. During the second conversation, Rahhal explained that the Employer would have a final meeting with the employees prior to the election and Rahhal asked if the Employer could use his name as a contact person for employees if they had questions. Glissendorf testified that he assured Rahhal that, if contacted, he would inform employees that it was perfectly legal for the Employer to make the statement that employee wages and benefits could go up, go down, or remain the same as a result of bargaining.

Glissendorf recalled that Rahhal opined that what he (Glissendorf) had said during the telephone conversations with employees and what the employees thought that they heard might be two separate things. Glissendorf responded by suggesting that this kind of confusion might compare to the situation in which employees believe that they have heard something contrary to what an employer purports to be a part of its speech to employees.[10]

f. Discussion

As with objection one, the Employer asserts that the action of a Board agent destroyed the necessary laboratory conditions and thus interfered with the fair operation of the election process. The Board has held that in order to set aside an election on the basis of Board agent conduct, the Board must be presented with facts raising a "reasonable doubt as to the fairness and validity of the election." *Smithfield Packing Co*., 344 NLRB No. 1, slip op. at 247 (2004); *Rheem Mfg. Co*., 309 NLRB 459, 460 (1992); *Polymers, Inc*., 174 NLRB 282 (1969), enfd. 414 F.2d 999 (2nd Cir. 1969), cert. denied 396 U.S. 1010 (1970).

The Employer asserts that Glissendorf interfered with the fair election process by the statements that he made during telephone conversations with employees in the week preceding the election. The Employer would further assert that Glissendorf aggravated the situation by conducting the afternoon session of the election. In a recent decision, the Board considered a Board agent's comments to employees as the basis of election objections. *Sonoma Health Care*, 342 NLRB 933 (2004). In *Sonoma*, the Employer filed objections to an election, asserting that the election process was impermissibly tainted by comments made by the Board agent who conducted the election. The facts of the case involved a Board agent's comments to an observer during a break in polling. The union's observer asked the Board agent why companies did not like unions. The Board agent replied "Companies don't like unions because they cannot fire or hire anyone, and they cannot take benefits from the staff." The only other person who heard the comment was the employer's observer. Later the union observer mentioned to the Board agent that the employer had paid $60,000 to a consultant and

10 Glissendorf described that portion of the conversation as involving some "frivolity."

the Board agent simply replied "whoa $60,000." No one other than the union observer heard the Board agent's response. Still later, the employer's observer asked the Board agent why he had answered the union's observer's earlier question. The Board Agent simply replied "Well, I can just give my opinion because I am not going to vote." No one heard the response other than the employer's observer.

In reaching its decision on *Sonoma Health Care,* the Board unanimously agreed that the standard to be applied is set forth in *Athbro Precision Engineering Corp.,*[11] 166 NLRB 966 (1967). A majority of the Board further interpreted *Athbro* to require that an election be set aside when the conduct of the Board agent tends to destroy confidence in the Board's election process or could reasonably be interpreted as impairing the election standards the Board seeks to maintain. Citing *Hudson Aviation Services*, 288 NLRB 870 (1988), the Board explained that confidence in the Board election process and standards can be undermined when Board agents fail to maintain strict neutrality in what they say while conducting Board elections. Although the Board issued its decision with two separate majority decisions, the Board ultimately determined that the facts of the case did not mandate setting aside the results of the election.

In the instant case, the only consistency in employee testimony is inconsistency. Essentially, one of the few undisputed facts in employee testimony is the fact that both Livingston and Collins contacted the Board's Regional office and spoke with Board Agent Glissendorf. The remaining testimony is contradictory with respect to how or whether those conversations were communicated to other employees. Both Sherrill and Collins testified that Livingston told them that based upon his conversation with the Board agent, he believed that the Employer had lied to the employees about collective bargaining. DeHoff testified that Livingston gave him the telephone number and name of the Board agent and told him that the Employer's "personnel guy" might not have been truthful. Contrastly, Livingston not only denied that he ever told Sherrill or DeHoff that the Employer was lying, but he also denied speaking with them at all. Livingston admitted only that he had spoken with Collins. Livingston acknowledged that during that conversation, he told Collins that the Employer had not told the whole truth and that Collins could contact the NLRB if he wanted additional information. Livingston denied that the Board agent ever told him that the Employer was lying. Livingston also denied that he ever told Lillis that talking with the NLRB was like talking with the Supreme Court.

In the interest of a complete record, employees Collins, Sherrill, and DeHoff were permitted to testify about their conversation with Livingston concerning his conversation with Board Agent Glissendorf. I understand that the Employer presented this testimony in order to prove not only that Glissendorf made objectionable comments, but also to show that this information was communicated to other employees. While this testimony constitutes hearsay, the Board has long held that hearsay is not per se excluded in administrative hearings, but may be given "such weight as its inherent quality justifies" by the decision maker. *Alvin J.*

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11 The circumstances of *Athbro Precision Engineering Corp*, involved a Board agent who was observed drinking beer with one of the union representatives at a nearby cafe during the period between the first and second scheduled polling periods. The employer objected on the basis that the Board agent's conduct gave an appearance of irregularity to the conduct of the election and thus departed from the standards of integrity to which the Board seeks to maintain.

Bart & Co., 236 NLRB 242 (1978). Although Livingston denies that he had conversations with Sherrill and DeHoff about his contact with the Board agent, I find no basis to discredit Sherrill and DeHoff in this regard. Their overall testimony appeared straightforward and without embellishment. Thus, I credit Sherrill and DeHoff concerning their individual conversations with Livingston. The overall credible evidence supports a finding that Livingston spoke with DeHoff, Sherrill, and Collins about his telephone conversation with the Board agent and he communicated to them his belief that the Employer was not telling the truth about collective bargaining. While Livingston may have made such statements to these employees, there is no credible evidence that Glissendorf told him that that the Employer had lied to the employees or that Glissendorf accused the Employer of any unlawful conduct. The testimony of Sherrill, DeHoff, and Collins as to what Glissendorf allegedly told Livingston is out-of-court hearsay and does not constitute credible evidence that Glissendorf misinformed Livingston as alleged.[12]

Thus, while there was a significant amount of testimony about employees obtaining the name and number of a Board agent prior to the election and what was allegedly communicated by the two employees who contacted the Board's office, the fundamental question centers on what information was actually communicated to employees by Board Agent Glissendorf. Interestingly, Livingston only admitted telling one other employee (Collins) that the Employer had not told the whole truth and he suggested that Collins could contact the NLRB if he wanted additional information. Although Livingston may have also had conversations with DeHoff and Sherrill and may have also expressed to them his concern that the Employer was not telling the employees the whole truth, I nevertheless credit Livingston's description of his conversation with the Board agent. His description of the conversation tracks the notes taken by Board Agent Glissendorf and corresponds in part to Glissendorf's testimony. Finding no basis for collusion, the consistency of their individual descriptions of the conversation lends credence to both their testimonies in this regard. I therefore credit the testimony of both Livingston and Glissendorf concerning their telephone conversation on September 4, 2007.

Interestingly, Collins testified more extensively about what the Board agent allegedly told Livingston than what the Board agent told him in his telephone call to the NLRB. In fact, during direct examination, Collins only testified that the Board agent told him that he represented neither the Employer nor the Petitioner and that he did not want to interject himself into the voting process. Glissendorf's notes from his conversation with Collins also reflect that he told Collins that the agency does not wish to interject itself into the campaign.

During cross-examination, the Petitioner's counsel asked Collins if Glissendorf had said the same thing to him as he had said to Livingston. It was only at that point that Collins asserted that when he asked the Board agent if employees could lose benefits or jobs during contract negotiations, the Board agent had explained the analogy of starting with a "blank sheet of paper." It is significant to note that when an employer has used this analogy in describing bargaining, the Board has determined that this analogy must be viewed in light of

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12 *Northern States Beef*, 311 NLRB 1056, fn. 1 (1993).

the facts and surrounding circumstances of the case.[13] In his testimony, however, Collins interpreted "blank sheet of paper" as starting out with the status quo or going forward.

In assessing Collins' conversation with Glissendorf, I find Collins' later conversation with Lillis as illuminating. Later in the day after speaking with Glissendorf, Collins spoke with Lillis. Collins testified that he not only told Lillis about what Livingston had said, but he also told Lillis about what he understood from his conversation with the Board agent. He recalled that when he did so, Lillis simply replied "okay" and left. Collins confirmed that no other supervisor spoke with him again between that time and the election. I credit Collins' description of his conversation with Lillis. In his own testimony, Lillis confirmed that he had spoken with Collins on September 4, 2007. In describing the conversation, Lillis mentioned only Collins' statements about what the Board agent had told Livingston. Lillis made no reference to Collins' description of his own conversation with Glissendorf. It is reasonable that if Collins had recounted any statements by Glissendorf that were erroneous or prejudicial, Lillis would have included them in his testimony. Furthermore, he would certainly have attempted to clear up the misinformation during his conversation with Collins. The fact that Collins' explanation of his conversation with Glissendorf did not trigger further clarification at that time, or any follow-up prior to the election, would support the conclusion that there was no erroneous information communicated to Collins.

Glissendorf's notes further reflect that he told Collins that he did not have sufficient information to determine whether the Employer had exceeded what is permissible in explaining the process of collective bargaining. Based upon the record evidence as a whole, I find these notes to be a more reliable account of the conversation than Collins' gratuitous and obscure recollection that was triggered by the Petitioner's prodding during cross-examination. Thus, there is not sufficient credible evidence to support a finding that the Board agent's comments to either Livingston or Collins created the confusion and misinformation as alleged in the Employer's objection.

In assessing the extent to which the laboratory conditions may have been affected by the employees' contact with the Board's office, I find it significant that the Employer became aware of employee conversations with Glissendorf on the same day in which they occurred. Upon learning of Livingston's alleged remarks to Sherrill, Lillis immediately began talking with employees to determine the extent to which employees doubted the Employer's explanation of collective bargaining. Within a period of 12 to 13 hours, Lillis spoke with both Collins and Livingston and had the opportunity to answer any of their questions and to clarify the Employer's position. Lillis also spoke with Sherrill and attempted to clarify any misunderstanding that he had concerning the collective bargaining issue.

As evidenced by the testimony of the Employer's attorney, the Employer was concerned that employees had been influenced by their telephone conversations with Glissendorf. In order to negate any adverse effect or improper influence, the employer then took specific actions. The issue of collective bargaining was again addressed in the Employer's 24-hour speech to employees on September 5, 2007. Sherrill, in fact, testified

[13] *Coach and Equipment Sales Corp*., 228 NLRB 440, 441 (1977).

that after seeing the Employer's film on September 5, he fully understood that employees could lose, gain, or stay the same in collective bargaining. He further acknowledged that the film sufficiently answered his questions.

Most significant, however, is the fact that the Employer took affirmative measures to have employees recontact Glissendorf for further clarification and information. The Employer not only told employees during the September 5, 2007 meeting that they should contact Glissendorf if they had questions, the Employer also posted his name and number at its facility.[14] DeHoff testified that after the Employer posted the notice to employees about calling Glissendorf, he understood that the Employer thought that it was permissible for employees to contact Glissendorf. DeHoff went on to explain, however, that he had not felt a need to contact the Board office because he had no doubt whatsoever that the Employer had been truthful in telling employees that their wages could go up or down during bargaining. Thus, there is insufficient evidence to indicate that any perceived misinformation remained in existence sufficiently prejudicial to justify setting aside the election. *Alladin Plastics, Inc*., 182 NLRB 64 (1970). Additionally, there is no evidence to demonstrate that any misinformation distributed by either Livingston or Collins was the result of Glissendorf's erroneous or bias statements to Livingston or Collins. Accordingly, I recommend that this objection be overruled in its entirety.

E. Employer Objection Three

In the Employer's final objection, the Employer alleges that the Petitioner and its agents, representatives and/or supporters interfered with the fair operation of the election process and destroyed the necessary laboratory conditions by misusing the offices of the NLRB to create confusion and misinformation. DeHoff testified that during a meeting with employees, Union President Henry Perry told employees that if they believed that he was wrong in what he told them, they should contact an individual with the Board. While DeHoff believed that Perry had mentioned a specific name, he could not recall the name. With respect to the same meeting, employee Victor Johnson testified that while President Perry told employees to call the NLRB if they had questions, he did not give them a Board agent's name or number.

Union observer Wade Shaw acknowledged that while he recalled giving a Board agent's name and telephone number to two eligible voters, he could not recall from whom he had received the name and number. While Shaw specifically recalled that he left the Board agent's name and number on DeHoff's voice mail, he opined that he may have given this same information to one other person. DeHoff testified that in Shaw's message to him, Shaw stated that Livingston had spoken with the Board agent and that Livingston believed that the Employer had lied to the employees.

Thus, there is no evidence that any representative or agent of the Petitioner gave

[14] While Lillis and attorney Rahhal both testified that they were surprised that Glissendorf appeared to conduct the afternoon voting session, there is no allegation that he said or did anything objectionable during the course of the voting period. Additionally, there is no evidence that any eligible voters coming to vote in the afternoon election spoke with Glissendorf about the election campaign or even knew that the election Board agent was the same Board agent with whom Livingston and Collins had spoken.

misleading information to employees or misused the offices of the NLRB to create confusion or misinformation. The undisputed evidence is that President Perry told employees to call the NLRB if they had questions or if they doubted what the Petitioner was telling them. There is no credible evidence establishing that he specifically gave Glissendorf's number to the employees as the person to be contacted. Livingston, who was the first employee to contact the Board office, credibly testified that he obtained the Board's number from the telephone directory. He also testified that he had not known the name of the agent with whom he had spoken. The fact that employee Wade Shaw provided Glissendorf's name and number to DeHoff at some point prior to the election is not significant. Inasmuch as the Employer gave Glissendorf's name and telephone number to employees and told them to call him if they had any questions, there is no import to the fact that Shaw provided the same name and number to DeHoff in a voice mail message. While DeHoff recalled that Shaw added that Livingston believed that the Employer had lied to the employees, such comment does not support that the Petitioner engaged in the objectionable conduct as alleged. Accordingly, I recommend that this objection be overruled in its entirety.

III. Summary of Conclusions

As discussed above, the record evidence does not support a finding that there was conduct by either agents of the NLRB or agents of the Petitioner that destroyed the laboratory conditions or interfered with the holding of a free and fair election among employees on September 7, 2007. Accordingly, I recommend that the Employer's objections to conduct affecting the results of the election be overruled in their entirety. Furthermore, I recommend[15] that the Petitioner be certified as the duly elected representative of all employees in the stipulated bargaining unit.

Dated at Washington, D.C. December 6, 2007

Margaret G. Brakebusch
Administrative Law Judge

[15] Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, Exceptions to this Report may be filed with the Board in Washington, DC within 14 days from the date of issuance of this Report and recommendations. Exceptions must be received by the Board in Washington by December 20, 2007.