JD–09–08
Bridgeton, NJ

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

CORRECTIONAL MEDICAL SERVICES,
Employer

and

Case No. 4-RD-2117

SANDRA B. IVANICK,
Petitioner

and

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 152,
Union

Cynthia K. Springer, esq.,
of Indianapolis, Indiana for the Employer
Sandra B. Ivanick, an individual,
of Greenwich, New Jersey for the Petitioner
Robert F. O'Brien, esq.,
of Northfield, New Jersey for the Union

ADMINISTRATIVE LAW JUDGE DECISION AND RECOMMENDATION ON OBJECTIONS

Eric M. Fine, Administrative Law Judge. I heard this matter on September 27, 2007, in Philadelphia, Pennsylvania. Based on the evidence as a whole, including my observation of the demeanor of the witnesses,[1] I make the following findings and conclusions.[2]

The petition for a decertification election was filed by Sandra B. Ivanick (Ivanick) on June 25, 2007.[3] Pursuant to a Stipulated Election Agreement, approved by the Acting Regional Director on July 6, an election was conducted on August 9, in the following unit:

> All full-time, regular part-time and per-diem Registered Nurses, and Nurse Practitioners, and all full-time, regular part-time and per diem Licensed Practical Nurses, Infection Control Nurses, Med Aides, Discharge Planners, and Ombudsman employed by Correctional Medical Services, Inc. at its South Woods State Prison, Bayside Prison and Southern State Prison facilities. Excluding all other employees, Health Service Technicians, Med Techs, and

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[1] In making the findings herein, I have considered all the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corporation,* 179 F. 2d 749, 754 (C.A. 2), reversed on other grounds 340 U.S. 474 (1951). Further discussions of the witnesses' testimony and credibility are set forth below.

[2] I have considered the Union and Employer's post-hearing briefs.

[3] All dates are in 2007, unless otherwise stated.

Certified Nursing Assistants, confidential employees, guards and supervisors as defined by the Act.

During the election 41 ballots were cast for the Union, 45 were cast against it, and there 4 challenged ballots. The number of challenged ballots was not determinative of the results of the election. The Union filed timely objections to the election.

On August 28, the Regional Director issued a Notice of Hearing on Objections to Election. The parties litigated at the hearing Union objections 1, 2, and 3, which read:

1. The Employer improperly attempted to interfere and influence the outcome of the decertification election by requiring union observers, Judy Aubin, Colleen Black and others, to take a personal day, vacation day, or otherwise take the day of the election off in order to serve as observers. At the same time, however, the Employer compensated its own observers, Joan Davis, Carrie Pierra and others, for the time spent observing the election. In other words, as opposed to those observers who were selected by the Union, the observers selected by the Employer were "on the clock" and were not required to take a personal day, vacation day or otherwise take time off in order to serve as observers.
2. The Employer further interfered with and coerced the employees in the free exercise of their rights guaranteed by the National Labor Relations Act when on July 18, 2007, the Employer circulated a letter amongst bargaining unit employees which contained coercive and misleading information. In its letter, the Employer promised that, if Local 152 lost the election, the employees would continue to receive annual wage increases in the range of 2.5% to 4% based on merit, implying that Employer's potential wage increase would be better than the increases negotiated by the Union. This was particularly the case because, in a bullet pointed portion of its letter, the Employer stated that the Union's stipulated raises "end(ed) all merit pay raises". In this regard, it appeared as though the employer was offering something to the employees in addition to what the contract would have offered in terms of pay increases. It is only on the second page of the letter, embedded in a paragraph, that the Employer vaguely advised that, should the Union be defeated, the practice of annual evaluations with wage increases, based on merit, would continue. The Employer never advised the bargaining unit employees in straightforward language that, in the event the Union was defeated, raises were wholly within the Employer's discretion, and the amount of any such raises could be substantially less that what the Union negotiated.
3. In addition, all in its letter of July 18, 2007, the Employer advised bargaining unit members that, should the contract be adopted, the members would have to "pay Union dues or be fired." (emphasis added). This language clearly put the bargaining unit members under coercion and duress. Moreover, the Employer falsely set forth a veiled threat of termination in the event that the Union succeeded in the decertification election.

The parties also litigated at the hearing several matters raised in the "Notice of Hearing on Objections to the Election," in which the Regional Director stated the following:

> Pursuant to Paragraph 7 of the Agreement and Section 102.69 of the Board's Rules and Regulations, a preliminary investigation of the Objections was conducted under my direction and supervision. In Support of its Objections, the Union offered evidence as follows:

1. On an unspecified date, Steven Hicken, a representative of the Employer (Correctional Medical Services or CMS), advised the Union's election observer at the South Woods State Prison polling place that she would be required to use Paid Time Off (PT0) for time spent acting as an observer. The Employer's election observer at this location was paid twelve hours for the time he spent acting as an observer. When the Union's observer asked Hicken why she was not being paid, Hicken replied that she "had to take PTO because she was not for CMS."
2. On an unspecified date, Employer representative Christine Claudio sent the Union's observer at the Bayside State Prison polling place a written correspondence stating that the Union's observer would not be paid for her time spent observing the election. The Union's observer was told either to use PTO or to seek reimbursement from the Union for the time she spent observing the election. The Employer's observer at this location was paid for her time spent acting as an observer.
3. On an unspecified date, an unidentified Employer representative promised to take "pro-employer observers," and others who voted against the Union, out for a "party" if the Union lost the election. After the election, the Employer followed through on this promise.
4. On an unspecified date, an unidentified Employer representative promised Petitioner Sandra B. Ivanick and her husband a paid trip to Texas to "help CMS open a new facility."
5. On or about July 18, 2007, the Employer circulated a letter among employees summarizing the collective bargaining agreement that had been negotiated between the Union and the Employer. The letter compared wage increases under the agreement with "merit" wage increases the Employer intended to give employees if the Union was decertified. The letter did not inform employees that such merit wage increases were not guaranteed, and misled employees to believe that the negotiated agreement merely provided the same wages and benefits as those provided in the Employer's Employee Handbook.
6. In the same July 18, 2007 letter, the Employer threatened employees that under the collective bargaining agreement, all employees must pay Union dues or be "fired." Employees were misled to believe that the Union would "fire" employees.

Based on this evidence, I find that the Objections raise substantial and material issues of fact, which can best be resolved on the basis of record testimony taken at a hearing.[4]

A. The failure to pay union observers

The August 9, election covered a bargaining unit of employees working at three facilities, South Woods State Prison (South Woods), Bayside Prison (Bayside), and Southern State Prison (Southern State). Southern State and Bayside are located next to each other. The

[4] The Board has held that an election may be set aside on the basis of pre-election misconduct discovered by the Regional Director during the course of the investigation of objections or unfair labor practice charges, even though such conduct was not specifically alleged in the objections. See, *Senior Care at the Fountains,* 341 NLRB 1004, 1010-1011 (2004); *Seneca Foods Corporation,* 244 NLRB 558, 558 fn. 3 (1979); and *American safety Equipment,* 234 NLRB 501 (1978), enf. denied on other grounds, 643 F.2d 693 (10th Cir. 1981). Accordingly, the conduct raised by the Regional Director as a result of findings made during the course of the Region's investigation of the objections was properly before me and fully litigated during this proceeding.

balloting for the election was held at the South Woods and Bayside facilities. The morning session at each was from 6:00 a.m. to 8:00 a.m. and the afternoon session was from 1:30 p.m. to 4:00 p.m.

Elvira Maldonado (also known as Elvira Mercado) is employed by the Employer as an LPN at South Woods. Maldonado has worked for the Employer for nine years. Maldonado testified she works on the first shift hours 6:00 a.m. to 2:30 p.m. However, her time records for the pay period ending August 10, revealed that Maldonado usually ended her shift at 2 p.m. Maldonado served as a union observer for the August 9 election during the afternoon session at South Woods. There were three observers during the afternoon session at that location, the other two being: Ted McClain, for the Employer; and Sandra Ivanick, for the Petitioner.

Maldonado testified she had no conversation about being an observer with anyone from management prior to the election. However, a couple of days to a week after the election, Maldonado spoke with then South Woods Administrator Steve Hicken. Maldonado credibly testified that, "Steve told me that he paid me for that day, for the election day, for the decertification day, paid me till five o'clock, but that he had to take the money back because I was not part of CMS, that I was for the Union, not for CMS." Maldonado testified Hicken was referring to the fact that she had been paid for the time she spent as an observer during the August 9 election. Maldonado testified Hicken offered her the option of using paid time off (PTO) for the time she spent as an observer. However, Maldonado did not elect to do so, and she disputed with Hicken his statement that the Employer was going to take back the money she had already been paid for time spent as an observer. Hicken told Maldonado that he would talk to Christine Claudio, about their conversation and find out what Claudio wanted to do. Claudio is a regional manager with CMS in the Southern Region in New Jersey, which includes the South Woods, Southern State, Bayside, as well as other New Jersey facilities. Hicken never got back to Maldonado, and he subsequently found another job.

Maldonado testified that around two weeks after her conversation with Hicken, Maldonado spoke to Claudio by phone and Claudio told Maldonado she was going to deduct 2.5 hours of pay for the time Maldonado spent as an observer. Maldonado testified that $67 and some change was deducted from her pay following her conversation with Claudio. Claudio told Maldonado they had paid Maldonado, but Claudio was going to take 2.5 hours because Maldonado was not assigned by CMS to be an observer. Claudio said Maldonado was an observer for the Union. Maldonado told her to take the money out. Maldonado declined Claudio's offer to PTO for the time she spent as an observer.

Judith Aubin is an RN on the night shift at Southern State, hours 10 p.m. to 6:30 a.m. Aubin served as a union observer during the morning shift at the Bayside for the August 9, election. Aubin did not get paid by the Employer for the time she served as an observer. Aubin testified Claudio called Aubin the day before the election and told her that she understood Aubin was going to be an observer for the Union. Claudio asked Aubin if she wanted the night before the election off. Aubin agreed since she was scheduled to work 48 hours that week.

Aubin testified she thought she was going to receive 42 ½ hours pay that week, instead of 40 hours, the extra time for the period she served as an observer. On the night of August 9, after the polls for the election were closed, Aubin submitted a slip asking to be paid for the time she spent as an election observer. However, Aubin was not paid for her time as an observer. Shortly before payroll, but after the election, Aubin received an envelope posted on the nurses' door and this was when she first learned she was not going to be paid for being an observer. There was a note from Claudio in the envelope dated August 10, stating: "Judy- You were at the voting polls for the union. You may use PTO if needed for time away from the site or you may

ask the union to reimburse you for your time. Christine." Aubin testified she did not discuss her not being paid any further with management. She testified she had given up eight hours of overtime to serve as an election observer and she only received 40 hours of pay. Aubin testified she lost about $71.57 for the two and one half hours she served as an observer. She admitted that no one required her to give up the remainder of her shift to serve as an observer.

Claudio testified the company observers for August 9 election were Ted McClain and Jane Davis for the morning and afternoon. The Employer paid McClain and Davis for the time they spent as observers. Claudio testified the Petitioner's observers were Ivanick and Carrie Pereira. The Union's observers were: Stephanie Kudla, Colleen Black, Maldonado, and Aubin. Claudio testified that the Employer did not pay the Union or the Petitioner's observers for time spent as observer. She testified that Maldonado was initially paid in error. Once they Employer discovered the error, they informed Maldonado and took the pay back. Claudio testified that each of the Union and Petitioner's observers were given the option of taking PTO or taking unpaid leave. She testified they were all given the option of working whatever portion of their shift they could work and still be an observer. They were contacted beforehand to give them the option of taking time off to be an observer so the company could cover the schedule.

Claudio testified that union observer Colleen Black talked to Claudio, prior to the election, and asked whether the company would pay her for the time she spent as a union observer. Claudio told Black, at that time, she would need to take PTO time for the time, or she could take unpaid time. Black chose to take PTO for the whole shift.

1. Analysis

In *Delta Brands, Inc.,* 344 NLRB 252, 252-253 (2005), it was stated that:

> It is well settled that "[r]epresentation elections are not lightly set aside." *NLRB v. Hood Furniture Mfg. Co.,* 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Thus, "[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." Id. Accordingly, "the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one." *Kux Mfg. v. NLRB,* 890 F.2d 804, 808 (6th Cir. 1989) (internal citation omitted). The objecting party must show, inter alia, that the conduct in question affected employees in the voting unit, *Avante at Boca Raton,* 323 NLRB 555, 560 (1997) (overruling employer's objection where no evidence that unit employees knew of alleged coercive incident), See *Antioch Rock & Ready Mix,* 327 NLRB 1091, 1092 (1999), and had a reasonable tendency to affect the outcome of the election. Id.[5]

In *American Red Cross Missouri-Illinois Blood Services Region,* 347 NLRB No. 33, slip op. at 7 (2006), the Board majority disagreed with the judge's finding that the respondent employer engaged in objectionable conduct. The Board noted that the employer compensated its election observers and alternate observers for attending two meetings the day before the election. The Board majority in finding the employer's conduct not to be objectionable stated, "Respondent's statements that employees would have to use PTO if they wished to serve as observers did not preclude those employees from also working on election day." The Board stated, "nothing in the Respondent's statements prevented a union observer from serving as a

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[5] See also, *William B. Patton Towing Company*, 180 NLRB 64, 65 (1969), where it was found that "such postelection conduct could not have destroyed the laboratory conditions for which the Board strives in the conduct of elections, or, in fact, have influenced or affected Orme's vote."

union observer during a scheduled shift, using PTO to cover the time spent observing, and working the remainder of the scheduled shift." The Board stated, "we do not view the Respondent's conducting a meeting for only its observers, but not the Union's observers, to be objectionable." id. at 7. The Board majority noted, "there were no objections based on the Employer's paying its own observers and not paying union observers." id. at 8, fn. 19.

While in *American Red Cross,* the Board did not specifically reach the issue of an employer's paying its own observers but not the union's for time spent as an observer during the election, the Board clearly found that it was not objectionable to compensate employer observer's for time spent at election related meetings, while not similarly compensating union observers in kind. More to the point, in *Golden Arrow Dairy,* 194 NLRB 474, 478-479 (1971), it was held that an employer's failure to pay an employee for time spent as a union observer while the employer compensated employees serving as employer observer's was permissible conduct. It was noted that employees selected by the respondent employer to act as observers at the election were performing a service for the employer and were paid for that service. Similarly, in *United Sanitation Services,* 262 NLRB 1369, 1378 (1982), in dismissing an employer's objections, the judge stated as follows:

> This objection is not made more convincing simply because an agent of the Union, …, said his union does compensate employee observers when they lose work pay because of such services to the Union. ….And I assume the employer also, if it asks a man to act as its observer, will pay for time lost from work. If in fact the employer did not do so in this case, I think there would be nothing improper in its doing so the next time, if there is a next time.

See also, *Easco Tools, Inc.,* 248 NLRB 700 (1980), where it was held that, "A labor organization participating in a representation election is entitled to have observers to represent its interest and to pay them." It was noted there that in a prior case the Board declined to set aside an election where payments to union observers were not "grossly disproportionate to the employees' usual pay rate or to the reasonable value of their work as observers." [6]

There was no contention by Aubin or Maldonado that they were told prior to the election that they would not be paid for the time they spent as union observers. Maldonado was in fact initially paid for the time spent, and was first apprised that she would have to refund the money a couple of days to a week after the election. Maldonado worked the remainder of her shift the day of the election and was compensated for that time. Similarly, Aubin was not informed until after the election that she would not be paid for the time she spent as an observer. Aubin admitted that she voluntarily took the remainder of her shift off the day of the election and was not required to do so. Thus, the failure to pay Aubin and Maldonado could not have interfered with the laboratory conditions of the election since they did not learn of it until after the polls were closed.

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[6] I do not find *Jewish Home for the Elderly of Fairfield County,* 343 NLRB 1069 (2004) or *Big Three Industrial Gas & Equipment Co.,* 181 NLRB 1125 (1970), enf. denied 441 F.2d 774 (5th Cir. 1971), cited by the Union, where an employer's refusal to permit the union's observers to work on the day of the election, while permitting its own observers to work was found to violate the Act to be applicable here. Refusing to allow an individual to work the remainder of a day solely because they serve as a union observer is clearly retaliatory conduct simply because they engage in union activity. It is another matter, not to pay someone who is rendering services for the union for that time spent as a union observer while compensating company observers for the time spent on behalf of the company.

Claudio testified that union observer Black talked to Claudio, prior to the election, about whether or not the company would pay her for the time she spent as a union observer. Claudio told Black, at that time, she would need to take PTO time for the time, or she could take unpaid time. Black chose to take PTO for the whole shift. Claudio credibly testified that each of the Union and Petitioner's observers were given the option of taking PTO or taking unpaid leave. She testified they were all given the option of working whatever portion of their shift they could work and still be an observer. While Black was informed prior to the election that she would not be paid by the Employer for time spent as a union observer, she nevertheless served as an observer for the Union while taking PTO time. Thus, I have concluded that it is highly unlikely that the Employer's failure to pay her impacted on her loyalties or the manner in which she voted. There is no evidence that Black informed any other bargaining unit employee that she was not being paid. Noting that the Employer also did not pay the Petitioner's observers, I find that the employer engaged in permissible conduct by paying company observers and not those of the Petitioner and the Union. See, *American Red Cross Missouri-Illinois Blood Services Region,* 347 NLRB No. 33, slip op. at 7 (2006); *Golden Arrow Dairy,* 194 NLRB 474, 478-479 (1971); *United Sanitation Services,* 262 NLRB 1369, 1378 (1982); and *Easco Tools, Inc.,* 248 NLRB 700 (1980). Accordingly, I recommend that Union's objection 1 be denied, and I find no merit to the matters described paragraphs 1 and 2 raised by the Regional Director's investigation on objections.

B. The Employer's July 18, letter to employees

The Union and the Employer negotiated a collective-bargaining agreement with effective dates of October 31, 2006 to October 31, 2009. The collective-bargaining agreement was rejected by the bargaining unit employees during a contract ratification meeting.[7]

The rejected collective-bargaining agreement contains a union security clause, which requires employees who were members to retain their membership "in good standing as of the date the Employer is notified that this Agreement has been ratified by the union membership" and that they had to do so "as a condition of continued employment." The union security provision contains a 30 day membership requirement, again as of the date the Employer was notified that the agreement had been ratified by the union membership, for all those employees not previously members or for new hires from the date they were hired, and required the maintenance of membership "in good standing as a condition of continued employment." Membership in good standing was defined in the clause as the tendering of dues and initiation fees uniformly required as a condition of employment. The article further provides that an employee "who has failed to maintain membership in good standing as required by this Article, shall, within twenty (20) calendar days following receipt of a written demand from the Union requesting his/her discharge, be discharged if, during such period the required dues and initiation fee have not been tendered."

The collective-bargaining agreement contains a "Past Practices" provision which states, in pertinent part, "Any such actual or alleged 'past practice(s)' not specifically incorporated into specific terms of this Agreement are therefore null and void and are of no binding force of effect

[7] John Cisternino, who works for the Union as the vice president and director of organizing, estimated the contract ratification meeting took place on June 19 or 20, 2007. Cisternino testified the normal procedure is if the unit votes the contract down, the Union notifies the company. Cisternino's dates as to the meeting were only an estimate as he admitted he was not directly involved in the ratification process.

whatsoever, except until and/or unless the Employer, in its sole judgment and discretion, selects to exercise such practice, in which event such exercise is merely incidental and not precedental with respect to any future implementation, therefore of no binding force or effect."

5 The collective-bargaining agreement contains an Article entitled "Wages and Differentials", which includes the following:

a) UFCW and CMS recognize that bargaining unit employees have continued to receive evaluations and wage increases pursuant to CMS policy from the date
10 of this NLRB's Certification of Representative to the date of final execution of this Agreement;

b) It is the intent of the parties to provide for wage increases during the first year of this Agreement to employees who did not receive an increase during the period described in subparagraph (a), above;

15 c) Across-the board wage increases for all bargaining unit members will take place in the second year of this Agreement as provided below in Section 2.

Except as otherwise provided above, bargaining unit employees who are on the payroll in a full-time or part-time capacity on the following dates(s) will receive the
20 following wage increases:

a) January 1, 2007 - 3.5%
b) January 1, 2008 - 3.75%
c) January 1, 2009 - 4.0%

25 The Employer submitted into evidence evaluations and notification letters to Union Vice-President, Business Agent Claire Galiano, showing that, between September 30, 2005 and August 13, 2007, certain bargaining unit employees received merit pay increases based on their evaluations effective on their anniversary date ranging from 2.5% to 5%. Out of close to 100 increases given, two of the employees received the 5% percent increase; the highest increase
30 for the other employees was 4%. Claudio testified that once the Union was certified, the Employer conducted performance evaluations for bargaining unit employees, then the Employer's attorney David Miller submitted the evaluations to Galiano for review, with the Employer's recommended merit increases for the individual employee. Claudio testified the Union never contacted any one from the Employer to dispute any of the wage increases that
35 were recommended. The Employer waited several days after notifying the Union prior to implementing the individual increases. Claudio testified the employees were not paid across the board wage increases, only annual merit increases on the employee's anniversary date. Claudio testified the range of the increase was 2.5% to 5% percent. Claudio testified that some of the employees received a 5 percent increase because in the beginning of 2006, the nurse
40 practitioners were found to be being paid a little bit lower than the community standard.

On July 16, the Union issued a letter to bargaining unit employees from Galiano. The letter entitled, "Contract Education Update" stated in pertinent part:

45 Prior to the contract vote, the **key** issues were **never** about money. Your proposals and concerns at all of the meetings emphasized **job security**, especially for LPN's; **just cause** discipline and terminations; and a **grievance and arbitration** procedure to provide a level playing field against nepotism and **mandatory overtime**, however we were able to obtain and secure the highest **across the board** raises **of 3.5%; 3.75% &**
50 **4%** that CMS worker's have ever received.

We accomplished all of the aforementioned and much more in this contract providing a strong foundation to continue to grow as we develop policies and procedures through the Labor/Management Committee that will benefit you the employee.

* * *

> Wages are now **equal** across the board. You are no longer at the mercy of a subjective individual. **FYI-wage increases varied from 2% to 5% disregarding ability & seniority.**

* * *

> Union dues equate to .04 cents an hour and are tax deductible. PRN dues will be pro-rata based upon hours worked.

* * *

Please understand that prior to these negotiations, everything you had was at the sole discretion of CMS. This means that anything could be modified, changed or removed at anytime. You now have a legal and binding document that ensures all of the above with a due process, which mandates employer compliance pertaining to the terms and conditions of your union contract.

On July 18, the Employer issued a letter to bargaining unit employees. The letter reads in pertinent part:

As you have probably heard, an election is scheduled for Thursday, August 9, 2007, in which you can vote for, or against, Local 152, UFCW. The election has been scheduled by the National Labor Relations Board, an agency of the federal government, because a group of your fellow employees filed a petition requesting a vote on keeping or getting rid of Local 152.

Local 152 became the legal representative of CMS' employees at Southern State, South Woods, and Bayside in May 2006….

* * *

Though the election was in May 2006, CMS and the Union did not hold any contract meetings until December 2006. Between December 2006 and May 2007, representatives for CMS and Local 152 held ten (10) negotiations sessions with the union between December 5, 2006 and May 18, 2007. In May 2007, CMS and Local 152 reached a tentative Union contract. The contract, nearly 40 pages long, includes all wages, benefits, and other terms of employment for CMS' employees. In summary, the contract states:

- ➢ A requirement that all employees pay Union dues or be fired.
- ➢ Continues CMS standard PTO benefit at current levels.
- ➢ Continues CMS' medical, dental, vision, and disability insurance at the same levels and cost as provided to all CMS employees nationwide.
- ➢ Overtime premium is paid at after 40 hours in a workweek.
- ➢ Grants two 15-minute rest breaks and one 30-minute unpaid lunch break per 8 ½ hour shift.
- ➢ Gives wage increases of 3.5% in 2007, 3.75% in 2008, and 4% in 2009 and ends all merit pay raises.
- ➢ Continues all PRN rates and shift premiums at their current rates.

In May 2007, Local 152 submitted the final Union contract, which the UFCW had accepted, to a vote of CMS' employees. The employees rejected the contract. However, this is the final contract, and it has been agreed to by Local 152 and CMS. No further contract negotiations are scheduled, and neither Local 152 nor CMS have any further contract proposals submitted to each other.

If Local 152 loses the upcoming election, the contract agreed to between UFCW and CMS is void. A vote against Local 152 is a vote to void the contract. If Local 152 wins

the upcoming NLRB election, then it is likely that at some point in the future the final contract that CMS and Local 152 agreed to will become a binding three-year agreement. The contract expires October 31, 2009.

If Local 152 loses the election, all CMS policies, wages, and benefits will continue as they currently are. Employees will continue to receive annual evaluations with wages increases in the range of 2.5% to 4% based on merit. CMS' standard insurance and PTO policies will continue to be followed, the same as with all CMS employees nationwide.

John Cisternino, who works for the Union as the vice president and director of organizing was involved in the CMS campaign. Cisternino testified the Employer's July 18 letter was brought to Cisternino's attention by one of the organizers around the day after the letter was sent out. The organizer obtained it during a home visit to one of the unit employees. Cisternino testified shop stewards also contacted him about the July 18 letter, and he was also contacted by bargaining unit employee Cindy Wands. Cisternino testified the conversation with Wands was about their being fired. He testified that the employees had a question, "they said, you know, can the union -- can we be fired for not paying dues. Well, really, it actually said can the union fire us for not paying dues." Cisternino replied that we do not fire anyone, and their response was we did not think so. Cisternino testified that he received about five or six calls from people who did not leave their name, about that particular question.

Cisternino testified the Union objections included an objection about the Employer's statement about merit increases included in the July 18 letter. He testified the collective bargaining agreement that was tentatively agreed to includes annual wage increases, but merit increases were not addressed in the contract. Cisternino testified the Union's objection to the July 18 letter was its reference to merit increases. Cisternino testified the July 18 letter states if the Union is voted in the merit increases are no longer going to exist. Cisternino testified that some of the organizers had reported to him that when they were doing home calls, the question came up as to why should the employees vote for the Union, "if we're going to get the same thing that we already have and the only thing we're not going to get is merit increases." He testified that, "The gist from what -- the impression that we were getting from the workers that when we were out home calling during the decertification election is if they basically -- it's what they're getting in money, in the collective bargaining agreement, is basically the same thing they're getting now. Except, with the union, there won't be any merit raises and with the company, if they stayed non-union, they would continue to get two and a half to four percent based on merit. They would still continue merit raises."

Maldonado testified her duties as a shop steward were to represent anyone who wanted her to represent them concerning a complaint. Maldonado testified that about half the employees on the first shift asked her about the statement contained in the Employer's July 18, letter stating that the negotiated contract contained a, "requirement that all employees pay Union dues or be fired." She testified they asked her if you do not pay union dues are you going to get fired, and that they seemed concerned when they raised that issue with her.

Maldonado also testified a lot of employees discussed with her the comment in the July 18, letter that states if Local 152 loses the election, "Employees will continue to receive annual evaluations with wage increases in the range of 2.5 percent to 4 percent based on merit." She testified they were wondering if the Union lost the election if there was going to be a pick and choose of what they were going to get, because a lot of people already were only receiving two percent wage increase with a good evaluation, while others were receiving three or four percent increases. She testified they felt they were as good as the next person who was receiving the higher increase."

As to specific conversations about the July 18 letter, Maldonado testified that Debbie Hollinger, a nurse, wanted to know if it was true if they were going to be fired for not paying union dues. Maldonado told her the statement was a lie. Maldonado testified that during the discussion they also discussed pay raises. She testified Hollinger was a 16, which meant she worked two eight hours shifts a week. Maldonado testified that Hollinger had been there for three years, but had not received a raise. Maldonado testified that at the time of the conversation Hollinger had been part time for several months. Hollinger was also a pool nurse for a about a year, and had been with the Employer for two to two and one half years at the time of the conversation. Maldonado told her the pay raise was part of having to negotiate; and the Union would be able to get her a pay raise later on. Maldonado testified Hollinger voted in the election.[8]

Maldonado testified Cathy Nettle came up to Maldonado about the July 18 letter. Nettle was pro-union and said she did not believe a lot of stuff in the letter. Nettle said she did not believe they were going to get fired if they did not pay union dues. Linda Bitter came up to Maldonado about the letter, and she said she thought it was true that they would get fired if the did not pay union dues. Maldonado told her it was not true, that was not part of their contract. Maldonado testified that, "at no time during negotiations was anything said that if you didn't pay dues you were going to get fired, so I didn't believe that." Maldonado added, "I think besides that and I think if it's done in good faith, you just can't do things like that to people and just say you're going to fire them I mean." Maldonado testified Denise Rice questioned Maldonado about the July 18, letter. Rice wanted to know if it was true that they could fire her. Maldonado told Rice that they were not able to fire you. Maldonado spoke to Stephanie Kudla, another shop steward, about the July 18 letter. Kudla just asked Maldonado if she had seen the letter. Maldonado could not remember speaking to anyone else about the July 18 letter.

Maldonado testified that she reviewed the contract that was tentatively agreed to between the Union and the Company, including the union security clause. Maldonado testified she believed the contract was also mailed to employees after the Union and Company had reached agreement on it. Maldonado testified there were also copies of the contract at the Union's contract ratification meeting.[9]

The Union responded in writing to the bargaining unit employees to the Employer's July 18 letter, by a letter dated July 26, under the signature of Galiano. Galiano states, in pertinent part, "The letter is filled with half-truths in an attempt to mislead you into voting no on August 9, 2007." The letter went on to state:

Please allow for the truth:

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[8] The Employer merit raise summary covering the period of September 20, 2005, to August 13, 2007, fails to list Hollinger as receiving a merit raise. (Emp. Exh. 9)

[9] Maldonado was unsure to the sequence of events. She estimated the decertification election took place around two to three weeks after the employees voted down the contract. She testified that when they reviewed the contract, the petition for signatures for the decertification election was already being circulated. She also testified she did not know when the petition was actually filed. Maldonado testified that as of the time of the July 18, letter, the employees had already voted down the contract. She then testified that she did not recall if they had done so. While I found Maldonado credible as to her substantive testimony, as set forth above, she was a poor historian, and I do not credit her testimony as to the timing of the events listed in this footnote.

- When the majority of employees vote for a union, it is incumbent upon that union's negotiating committee to provide Union Security language. This means that you work in a Unionized facility and are a dues paying member in good standing so there is no threat of temporary workers taking your jobs. Years of service – Seniority is respected. Unions do not terminate employment management does.
- Your VP of Operations has substantiated what we have said to you all along; there were inequities taking place, only the wage percentages actually ranged from 2% to 5% based on merit. His letter also states that without the Union, all CMS policies, wages and benefits will stay the same. Are you not tired of the same old status quo? The reason you sought out a union was to end nepotism, unfair treatment and inequities.

* * *

- Union Dues. There are many questions surrounding dues. Please be informed that dues paid to the Union have many returns on your money. As a Union member you have Union Representatives available to serve you, a team of attorneys to serve your legal needs, Union Plus has low interest mortgage loans, home equity loans, auto loans, credit cards and much, much more. The tax deductible dues structure will be as follows:[10]

1. Positions of the Parties

The Union contends in its brief that the Employer misstated the contract in that merit increases were not addressed in the contract one way or the other. The Union contends the July 18 letter misstated the contract by indicating indicated that the employees were not going to be getting merit increases any longer if the Union was voted in, but they would continue to get 2 and ½ to 4 percent increases if they stayed non-union. The Union contends the Employer misled the employees to believe that somehow they were going to get four percent increases, which under the union contract did not take place until the third year of the contract.

The Union states in its brief that, since the Employer's letter issued some three weeks prior to the election, the Union is not contending that it did not have enough time to respond to the Employer's letter. However, the Union contends that the statement in the letter about being fired for not paying union dues was one that was not capable of being rebutted even in a timely fashion. The Union contends placing the statement in the letter informing employees that a firing would occur for not paying union dues tainted the atmosphere for a free and fair election.

The Employer contends that is it lawful and unobjectionable for an employer to promise to maintain the status quo with respect to wages and benefits if the union loses the election. The Employer maintains concerning wages that no misstatement about wages was made, and even if there was one the Union had ample time to explain its side of the story. As to the statement in the letter that employees must pay union dues or be fired, the Employer contends there is no reference in the statement to the Union being able to fire employees, and that the employees must have known, since CMS is the Employer, that only CMS could fire them. The Employer contends that its statement regarding employees being required to pay dues or be fired under the collective-bargaining agreement was true and therefore not objectionable conduct.

[10] Union dues amounts were contained in the Union's letter.

2. Analysis

a. General principles

5 In *Midland National Life Insurance Company,* 263 NLRB 127, 133 (1982), the Board stated:

> In sum, we rule today that we will no longer probe into the truth or falsity of the parties' campaign statements, and that we will not set elections aside on the basis of 10 misleading campaign statements. We will, however, intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is. Thus, we will set an election aside not because of the substance of the representation, but because of the deceptive manner in which it was made, a manner which renders employees unable to evaluate the forgery for what it is. As was the case 15 in *Shopping Kart,* we will continue to protect against other campaign conduct, such as threats, promises, or the like, which interferes with employee free choice. (footnotes omitted.)

In the *Levy Co.,* 351 NLRB No. 85, slip op. at 3 (2007), the Board stated that, "It is well settled 20 that an employer 'is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.*' NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618 (1969)." The Board applies an objective standard to determine whether conduct warrants setting aside an election. It is not necessary to show that the conduct was intentional 25 or actually had an effect on the election. The inquiry is whether the conduct has a tendency to interfere with employees' free choice. The Board considers an Employer's statements from the view point of a reasonable employee. See, *Lake Mary Health & Rehabilitation,* 345 NRLB 544, 544-545 (2005).

30 *b. The Employer's July 18 statement that it would maintain its system of merit raises and benefits if the Union lost the election*

In *Weather Shield Mfg.,* 292 NLRB 1, 2 (1988), enf. denied on other grounds 840 F.2d 52 (7th Cir. 1989), the Board stated:

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> We agree with the judge that the promises to maintain existing pay and fringe benefits made by the Respondent's president, Schield, and superintendent, Selk, at its meetings with groups of employees were nothing more than a promise to maintain the status quo and, hence, were neither objectionable or nor violative of Section 8(a)(1). *Crown* 40 *Chevrolet Co.,* 255 NLRB 826, fn.3 (1981); *El Cid, Inc.,* 22 NLRB 1315 (1976)[11]

I do not find the Employer made misstatements concerning the negotiated contractual wage rates here. The clear import of the contract was that merit increases were to cease upon the effective date of the contract, in that only employees who had not received a merit increase 45 during the first year of the contract were entitled to an across the board wage increase for that year of the agreement.[12] Galiano's July 26 letter confirms this conclusion by stating that the across the Board increases the Union had negotiated ended the inequities of the merit

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[11] See also, *Crown Electrical Contracting, Inc.,* 338 NLRB 336, fn. 3 (2002).

50 [12] The collective-bargaining agreement also contained a provision eliminating past practices not referenced in the agreement.

increases. Since the employer did no more than promise to maintain the current wage and benefit structure if the Union was defeated in the election, I do not find that it engaged in objectionable conduct here.[13] Accordingly, I recommend that Union's objection 2 be denied, and I find no merit to the matters described in paragraph 5 raised by the Regional Director's investigation on objections.

c. The Employer's July 18 statement that the proposed contract contained a requirement that all employees pay union dues or be fired

In *Office Depot,* 330 NLRB 640, 642 (2000), the Board stated:

> Similarly, we find nothing unlawful in the Respondent's statement that the employees would have to pay Union dues if they selected the Union. It is an economic reality that unions may collect dues from the employees they represent. The Respondent's statement about dues simply conveys to employees this reality. It does not convey any explicit or implicit threat of reprisal against employees for exercising their statutory right to select a union as their exclusive collective-bargaining representative. Even if the Respondent's statement could be considered untruthful, in that not all employees in union-represented units "have" to pay union dues, it is still nothing more than a misrepresentation about unions' ability to enforce payment of dues and not a threat of adverse action by the Respondent. We, therefore, find that the Respondent's statement about Union dues does not violate Section 8(a)(1) of the Act. *New Process Co.,* 290 NLRB 707, 707 (1988), enfd. Mem. 872 F.2d 413 (3d Cir. 1989) (Footnote omitted.)[14]

In *New Process Co.,* supra. at 707 the Board majority stated:

> Other statements made by NPC spokesmen to assembled groups of employees during the first week of June 1981 were found by the judge to constitute threats. Statements were made to the effect that the Union was likely to seek a contract provision requiring union membership as a condition of employment, and, under such a provision, if employees for any reason then lost their union membership, they would also lose their jobs. In section IV,B,5, of his decision, the judge found that these statements constituted threats of loss of job security. We disagree. The statements were an inaccurate account of the law, but they did not amount to a threat that the employees would be fired if they

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[13] While nurse Hollinger apparently did not receive a merit raise under the Employer's old system, I do not find that the Employer's July 18 letter promises a new benefit to employees in her situation. As Hollinger would have been aware, as described by Maldonado, that Hollinger was in a special work category, and that if the Employer's merit raises had not applied to her in the past in that category there was a likelihood that they would not apply to her in the future while she was only working 16 hours a week. The July 18 letter only states that employees will continue to received what they had already been receiving.

[14] In *California Saw & Knife Works,* 320 NLRB 224, 233 (1995), the Board held "that when or before a union seeks to obligate an employee to pay fees and dues under a union-security clause, the union should inform the employee that he has the right to be or remain a nonmember" and that nonmembers have the right (1) to object to paying for union activities not germane to the union's duties as bargaining agent and to obtain a reduction in fees for such activities;…" Thus, the Board held that a union acts arbitrarily and in bad faith, in breach of its duty of fair representation and in violation of Section 8(b)(1)(A), when it fails to inform employees of their *Beck* rights before it obligates them to pay union dues. Id. See also, *Teamsters Local Union No. 579 (Chambers & Owen, Inc.),* 350 NLRB No. 87 (2007)

> voted for the Union or that unionization would result in the employees' losing their jobs. Moreover, the possibility of job loss was predicated on the Union's first terminating the employees' union membership, an event beyond the control of NPC. In *Metropolitan Life Insurance Co.,* 266 NLRB 507 (1983), the Board held unobjectionable an employer's election campaign statement that employees who continued to work during a strike could be fined by the union, even if they were not members of the union. That the statement constituted a misrepresentation of the law did not warrant finding it to be objectionable conduct. The Board did not discuss whether the statement constituted an unlawful threat, but in finding the statement unobjectionable the Board implicitly rejected such a view. We find similarly that NPC's statements here, although a misrepresentation of the law, did not constitute objectionable conduct or an unlawful threat. We therefore dismiss the allegation that they violated Section 8(a)(1). See *John W. Galbreath & Co.,* 288 NLRB 876 (1988).[15]

In the current case, on July 18, three weeks prior to the August 9, election, the Employer sent a letter to bargaining unit employees comparing the terms of the negotiated collective-bargaining agreement that they had refused to ratify, with the terms and conditions in place at the Employer without the contract. In the letter the Employer stated the contract included "A requirement that all employees pay Union dues or be fired." I do not find that the letter suggested, as contended herein, that the Union could fire employees. However, the employees could reasonably construe it to mean that missing one dues payment could result in their termination. Yet, the contract required a written demand for termination by the union, and a 20 day grace period to become current before an employee would be terminated. Moreover, as set forth above, under *California Saw & Knife Works,* supra., an employee has a right to refrain from being a union member under a union security clause, and in certain circumstances may pay a lower rate than the full dues amount without being terminated. The Employer's letter did not inform the employees of these rights, but just stated that "all" employees had to pay union dues or be fired. However, under Board law, which I am required to follow, it appears that while the Employer's statement may not be completely accurate, it is not the type of statement that constitutes objectionable conduct. See, *Office Depot,* 330 NLRB 640, 642 (2000); and *New Process Co.,* 290 NLRB 707, 707 (1988), enfd. Mem. 872 F.2d 413 (3d Cir. 1989). Moreover, the Union had time prior to the election and issued a response to the Employer's letter to the bargaining unit employees by letter on July 26. The Union failed to inform the employees of any of the safeguards the Employer had omitted from its July 18, letter, nor did the Union inform the employees that they could not be fired for the non-payment of dues. Rather, the Union merely sought to justify to employees the need for a union security clause and the reasons they should pay dues. In these circumstances, I do not find the Employer's statement that all employees would have to pay dues or be fired to constitute objectionable conduct. Accordingly, I recommend that Union's objection 3 be denied, and I find no merit to the matters described paragraph 6 raised by the Regional Director's investigation on objections.

C. The Alleged Post Election Party

Claudio testified when the polls closed on August 9, all the ballots were taken to South Woods for counting. By the time the votes were counted and the paperwork signed with the NLRB agent, it was approximately 6:00 p.m. and people hanging around decided to go to a local restaurant for dinner. Claudio went along with about 12 other people including Ivanick. Some

[15] See also *Air La Carte,* 284 NLRB 471, 473 (1987) where a union business agent's remarks pertaining to union membership and job loss pertaining to a union security clause were found to be lawful.

were from management and some were bargaining unit employees. Claudio did not specifically ask anyone to go. Claudio did not know who initiated the idea to go out to eat. Claudio testified that the company did not pay for the people's meals that attended, and that Claudio paid for her own meal. Claudio testified that, "As far as I know, everyone paid for themselves." Claudio was not aware of any prior plan to go out to eat after the August 9, 2007 election. The Union withdrew the allegation concerning the post-election party at page 4 of its post-hearing brief. I concur that there is no merit to this matter described in paragraph 3 raised by the Regional Director's investigation on objections as there was no evidence presented of a promise of post-election party by the Employer as a quid quo pro for the Union's losing the election.

D. Ivanick's trip to New Mexico

Claudio is the regional manager of the Employer's Southern Division. It encompasses Southern State, Bayside, South Woods, New Jersey State Prison in Trenton, and Riverfront in Camden. Claudio testified that when CMS is awarded a state contract anywhere in the country, they often ask for volunteers to help start up the operation.

Claudio testified that on June 7, a memo from CMS clinical programs administration issued asking for site assistance for a New Mexico start up project. The memo was from Kathleen Amico, senior vice president clinical administration and it was addressed to site and regional operations management. The memo states, "The New Mexico statewide contract will begin on July 01, 2007. We are seeking experienced Managers, Administrative Assistants, Medication Nurses, Pharmacy Technicians, or experienced RN's and LPN's to assist these new sites during the initial transition period." The memo states two different travel times, the first for the week of July 1, for which people should plan to travel to New Mexico on Friday, June 29. It states they plan to be on site on June 30, and that "It may be necessary to work late into the night to assure supplies and medications are ready for July 1st. We request that staff plan to stay through July 05, 2007 and travel home on July 06, 2007." A second week of travel was suggested in the memo for July 8, 2007 through July 13, 2007. Another email, dated June 7, was copied to Claudio, from David Meeker, vice president of operations, stating it was a high priority for "Mentors Needed-State of New Mexico." It stated "Due By: Friday, June 8, 2007 6:00 AM." The memo stated, "Do you have anyone that can support the start-up in New Mexico? We begin operations there on July 1st. July is the primary focus month." It states, "We need Nurse Leaders, RM's, HSAs, AAs. Would like a minimum of a one week commitment but prefer two weeks." The memo states, "Please give this serious consideration so I do not have to tap people on the shoulder and send them." Claudio testified an RM is a regional manager, HSA is a health service administrator, and AA's are administrative assistants. Claudio testified administrative assistants are not bargaining unit positions but are secretarial in nature and work as assistants to administrators.

A memo was sent to Meeker on June 7, at 4:35 PM, stating, "Below are the names who have been honored to go to New Mexico to assist in the start up." For the week of July 9, Mari Knight, statewide clinical services manager, Steve Hicken, HSA; Sandra Ivanick the ICN at SWSP. For the week of July 16, Shelly Wilson Howard, HSA; Lynn Kwap, DON, and Jennifer Storicks, AA, and for the week of July 23: Tom Mullarney, DON and Sue Onal-Springler, Acting DON. Meeker forwarded the list on June 7, stating these are the "people you can use from New Jersey Contract for start-up." By memo dated June 13, there was a schedule change including Ivanick's trip being moved to the week of July 16. However, Hicken remained scheduled for the week of July 9, and Kwap the week of July 16. Hicken and Kwap were the two individuals in addition to Ivanick who were sent from the three bargaining unit facilities. Unlike Ivanick, they were both supervisors and not members of the bargaining unit.

Claudio testified the memo came out on June 7 asking for assistance, and Ivanick's name was submitted on June 7, which according to Claudio meant that Ivanick had been selected to go on the trip. Claudio testified she consulted with Ivanick on June 7, before submitting Ivanick's name, and Ivanick agreed to go at that time. Claudio testified the final schedule was made on June 13, for Ivanick to go the week of July 16.[16] Claudio testified that from the three facilities that voted in the election no other bargaining unit members were sent besides Ivanick. Claudio was not aware of whether anyone, prior to Ivanick, who worked in the bargaining unit was ever sent on any of these trips. While Claudio testified there was another infection control nurse sent from a non-bargaining facility, the person she identified, Sue Onal-Springler, was listed on the June 13 memo as "Acting DON," which I have concluded is short for acting director of nursing.

Claudio explained that no other bargaining unit employees besides Ivanick at the three CMS facilities could be spared as it was the middle of the summer; and they were dealing with vacations. They were able to send Ivanick because South Woods had two infection control nurses, of which Ivanick was one. Claudio testified the other South Woods infection control nurse was not asked because he was a father with small children. Claudio testified when she received the June 7 memo, she identified people who could be gone from the sites for a week whose absence would not hurt site operations. Claudio testified she thought Ivanick worked with the Employer a minimum of five years.[17] Claudio estimated that Ivanick had 10 to 15 years nursing experience. Claudio testified she did not review Ivanick's file before asking her to go to New Mexico. Claudio testified the decision was based on non essential positions and an infection control nurse is almost a non essential position.

Claudio testified that about 50 to 55 people from CMS from around the country went to New Mexico for the start up, and CMS paid expenses for each of those individuals. Claudio claimed the Employer does not look on sending people out for start-ups as being a benefit to the selected employees. She testified, "Everybody who has done start-ups then runs and hides, and doesn't want to do them again." Claudio testified that employees work 12 to 16 hour days when assigned to the start up projects.

Steven Hicken, at the time of his testimony, worked for the Employer as a PRN at New Jersey State Prison. Hicken has worked in that capacity since September 7. Prior to that, Hicken was the health services administrator (HSA) at South Woods, a position he held for a little over a year. As HSA, Hicken's responsibilities included ensuring the institution was running smoothly in terms of quality assurance, scheduling, reviewing financial statements, budgeting, payroll, and human relations.

Hicken testified he received an email requesting he go to New Mexico and there were several other people on the list. Hicken testified it was something he wanted to do and that, "It would be a very good learning experience." Hicken testified, "I would hope to enjoy myself out there. I mean you're going out there to work, so you're expected to, you know, do your job." Hicken testified that when he went to New Mexico, they were expected to work at least eight hours a day. He testified, "I would go into work like around seven-thirty and then get done, you know, around four o'clock, three-thirty." He testified he would do sightseeing in the evening if he did not get out of work late. He testified that he was there five days and probably worked late two days. He testified that the two days he worked beyond 4 p.m. that he probably worked until about 5:30 p.m. Hicken testified, "I flew in I believe it was on a Sunday and then I left I believe it

[16] Ivanick's expense report shows she actually traveled from July 7 to 14.

[17] However, Ivanick testified she had only been with the Employer about 3 and ½ years.

was Friday." He testified he had Sunday to himself and then started on Monday. Hicken did not go to the same location as Ivanick.

Ivanick is an RN and works as an infection control nurse with the Employer. Ivanick testified she has been a nurse since 1972. Ivanick testified Claudio asked her to participate in the New Mexico trip. Claudio said there was a start up, that they had a new contract for prisons in New Mexico, and asked if Ivanick would be willing to participate. Ivanick testified, "I said it sounded interesting and, yes, I would be willing to think about it." Ivanick did not recall the date she was asked to participate in the New Mexico trip, but she thought it was a Friday. She testified she responded right away that she would be interested but that she would get back with them the following week. [18] Ivanick was told to keep records of her expenses and that she would be reimbursed. Ivanick testified that she thought she did not put in for gas mileage and that she and her husband paid for the hotel for one night at the end of the trip. However, Ivanick's expense report with the Employer showed a claim for seven nights at the hotel from July 7 to 13, a per diem claim of $35 a day for meals for eight days, a claim for a rental car, and for auto mileage. The travel report shows she left the Philadelphia airport on Saturday, July 7, and returned there on Saturday, July 14. Claudio testified that Ivanick and some other individuals brought a spouse along on the trip. Claudio testified Ivanick was reimbursed for car rental, lodging, meals, and airfare, tolls and airport parking. Claudio testified the Employer did not pay for Ivanick's husband's airfare, or his other expenses. The personnel that went on the start up assignment were also paid their regular wages.

Ivanick testified she worked at least an eight hour day while she was in New Mexico. She testified she thought she worked 8 a.m. to 4:30 p.m. most days. She testified there might have been one time where she had to stay closer to 5:30 p.m. Ivanick denied telling anyone she was going to New Mexico for a vacation. Ivanick testified she did not have time to do sight seeing during the day time. She was assigned to a location in Las Cruces, New Mexico. There were no direct flights there from Philadelphia so she flew to Dallas and from there she flew to El Paso. She then rented a car and had about an hour's drive to Las Cruces.

Maldonado credibly testified that before the election there was a rumor, just everyone talking, that, "Sandy got a vacation to New Mexico." Maldonado was referring to Ivanick. Maldonado credibly testified she did not remember who told her about it, but, "I did see the calendar on the wall and it said New Mexico." Maldonado credibly testified the handwriting on the calendar said "Sandy to New Mexico." Maldonado testified the calendar said when Ivanick was going, which Maldonado estimated was the second week of the month in which the trip was listed, and it contained an arrow showing when she was supposed to return.[19]

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[18] There is a discrepancy between Claudio and Ivanick's testimony here as Claudio testified she asked Ivanick to go on June 7, and Ivanick agreed to go on the same day she was asked. I credit Claudio here. She impressed me as someone who paid attention to detail, and I do not believe a memo would have been sent on June 7 stating Ivanick had been selected for the trip unless Ivanick had agreed to go prior to the memo's issuance. Moreover, June 7 was a Thursday, not a Friday, making it highly unlikely that Ivanick did not give a final response until the following week as she reported during her testimony. .

[19] Maldonado's testimony vacillated as to what was written on the calendar. She initially testified it was, "it said vacation to New Mexico, Sandy Ivanick." Maldonado later testified that the calendar, "said New Mexico." She testified, "I know it said New Mexico." She testified it said, "New Mexico," but was not sure what else it said about the trip. Maldonado testified Ivanick's name was on the calendar. I have credited Maldonado's testimony as set forth above that the calendar listed Ivanick as going to New Mexico. However, I have concluded the

Continued

Maldonado testified she saw the calendar after the paperwork had gone through for the petition to decertify the Union, but before the election. Maldonado testified that Ivanick and an employee named Ron were sending out paperwork to have a decertification vote. Maldonado testified the calendar was not Ivanick's personal calendar; rather, "It was just a calendar on the board." When asked what the calendar was used for, Maldonado replied, "You can just write anything on there, you know." Maldonado testified that Fran Green, a nurse practitioner used the office, and that Ivanick uses the office, and that all the nurses use the office when they needed to use a computer which was located on a desk in the office. Maldonado saw the calendar on the wall next to the computer. Maldonado thought the notation on the calendar about Ivanick going to New Mexico was in Green's handwriting. Green is Maldonado's nurse practitioner. Green is a member of the bargaining unit. The calendar was about a foot by a foot, and it had a month to month display. Maldonado testified it was a small office, about six feet by eight feet. Maldonado testified when she sat down in the office at the desk to use the computer she read the calendar. Maldonado testified Ivanick was away from the facility for the week posted on the calendar. Maldonado testified she spoke to Hicken and he told her that he had gone to a jail in New Mexico, which she thought was a new area for which the Employer was obtaining locations.

Maldonado estimated Ivanick had worked at the facility for about four or five years. Maldonado had been there for nine years, but had never taken a trip to any other of the Employer's facilities. Maldonado testified it was unusual for an employee such as an infection control nurse to go to another company facility. Maldonado thought that normally a nursing supervisor would go. Maldonado testified that to her knowledge no other bargaining unit employees, besides Ivanick, had gone to other facilities for a start up project.

1. Analysis

There was no specific objection raised by the Union as to Ivanick's trip to New Mexico, rather the Regional Director in her Notice of Hearing stated, "On an unspecified date, an unidentified Employer representative promised Petitioner Sandra B. Ivanick and her husband a paid trip to Texas to "help CMS open a new facility."

In *Lexus of Concord, Inc.,* 343 NLRB 851, 852 (2004), the Board majority stated, "We agree with the judge that the Respondent's placement of employee Burman in the 'installer' position without bargaining with the Union violated Section 8(a)(5) and (1)." The Board majority stated that, "In Lee Lumber II, the Board noted that 'in cases involving unfair labor practices other than a general refusal to recognize and bargain, there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support.'" The Board majority stated:

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calendar did not mention anything about a vacation, although I have credited Maldonado that there was a rumor amongst employees that Ivanick was going on a vacation. Maldonado, considering her demeanor, impressed me as a truthful witness whose memory was somewhat hazy as to dates. Considering the whole of her testimony and the specificity she provided with respect to the calendar, its location, and the author of the handwriting, I have credited her as to the calendar and its contents as set forth above in the body of the decision. I further note that Ivanick did go to New Mexico, during the second week of July, and did not deny the existence of the calendar or its content, although Maldonado testified Ivanick, as did other nurses, used the computer in the office next to where the calendar was posted.

> The criteria for determining whether a causal relationship has been established include: '(1) the length of time between the unfair labor practice and the withdrawal of recognition; (2) the nature of the violation, including the possibility of a detrimental or lasting effect on employees; (3) the tendency to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union.' (Citation omitted.)

In concluding that the placement of Burman in the installer position did not taint the withdrawal of recognition, the Board majority noted that "Although the Respondent placed Burman in the installer position 3 months before withdrawing recognition, there was no showing that Burman's transfer had a detrimental or lasting effect on employees. The Union previously had approved the installer classification, so it was not a newly created position." id. at 852. The Board majority stated that the work that Burman performed in the position was abundant and disliked by many technicians in the shop. Thus, he was not taking any work away from bargaining unit employees. The Board majority stated:

> The nature of the unfair labor practice also militates against a finding of taint. It was not the Respondent's placement of Burman in the installer position but, rather, the Respondent's failure to bargain over such placement that was unlawful. There is no evidence that unit employees knew that the respondent implemented the transfer without notice to the Union. Moreover, the Respondent had a past practice of hiring installers from the ranks of its own employees, so Burman's transfer was not unusual, and would not have signaled anything out of the ordinary to unit employees.
>
> The Respondent introduced undisputed evidence showing that the unit employees' disaffection from the Union arose well before Burman's transfer. id. at 852.

In the *Bohemian Club,* 351 NLRB No. 59, slip op. at 2-3 (2007), the Board held that requiring cooks to work an extra 30 minutes per day to accomplish new cleaning tasks constituted "a material, substantial, and significant change in the cooks' work assignments" in violation of Section 8(a)(1) and (5) of the Act. The Board also held that the Respondent implemented the change to the cooks' assignment without giving the union an opportunity to bargain. The Board noted that the respondent employer did not discuss any of the changes with the union prior to the implementation, and the union learned of the change one week after it happened. While one of the employees who received the assignment was a shop steward, the Board stated that even if the steward's knowledge of the change was imputed to the union, he acquired knowledge only when he was assigned the new tasks, which by definition was after the change was implemented, thus the union was presented with a fait accompli.

In *Christopher Street Owners Corp.,* 294 NLRB 277, 277, (1989), enfd. 926 F.2d 1215 (D.C. Cir. 1991), the Board held:

> The judge found that Respondent violated Section 8(a)(5) by unilaterally changing one of the porter's job duties. We agree. The "Job Responsibility Memo" that the Respondent distributed to unit employees in May 1987 "materially, substantially, and significantly" altered the porter's duties to include the regular distribution of post office and United Parcel service packages to tenants. That fact that the porter testified that he performs these additional duties only twice a week is not determinative. There is no guarantee that the frequency of this distribution will not increase; indeed, it likely will on a least a seasonal basis. In any event, the nature of the unilateral change, and not the frequency of its performance, triggers the bargaining obligation.

In *Pan-Oston Co.,* 336 NLRB 305, 306 (2001), the Board explained the test for determining agency status:

> The Board's test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management. *Waterbed World*, 286 NLRB at [425] 426-427 [(1987)] (and cases cited therein). The Board considers the position and *duties* of the employee in addition to the context in which the behavior occurred. *Jules V. Lane,* 262 NLRB 118, 119 (1982). Although not dispositive, the Board will consider whether the statement or actions of an alleged employee agent were consistent with statements or actions of the employer. The Board has found that such consistencies support a finding of apparent authority.

The credited evidence reveals that on June 7, the Employer generated two memos requesting site assistance for a New Mexico start up project. A memo was sent in response on June 7, at 4:35 p.m. The response memo states, in pertinent part, "Below are the names who have been honored to go to New Mexico to assist in the start up." Ivanick, along with Hicken, were listed for the week of July 9. Claudio testified the memo came out on June 7 asking for assistance, and Ivanick's name was submitted on June 7, which according to Claudio meant that Ivanick had been selected. Claudio testified she consulted with Ivanick on June 7, before submitting Ivanick's name, and Ivanick agreed to go at that time. Claudio testified that from the three facilities that voted in the election no other bargaining unit members were sent besides Ivanick. Claudio was not aware of whether anyone, prior to Ivanick, who worked in the bargaining unit was ever sent on any of these trips. The two other people from the three bargaining unit facilities who were sent on the trip were supervisors, Hicken an HSA and Kwap, a director of nursing.

There is no claim that the Union was ever notified that there was an opportunity for bargaining unit employees to attend a start up trip to New Mexico. I find, in view of the timing of an offer to and acceptance by Ivanick on June 7, that the Union was never notified or offered an opportunity to bargain about whether unit employees should go on the trip. I find the Union was also never offered to bargain over how employees should be selected for such an assignment, and the working conditions or compensation for said assignment. Clearly, the Employer's selection of Ivanick involved direct dealing with an employee, and a failure to bargain with the Union in general about a work assignment available to unit employees on a first time basis. See, *Bohemian Club,* 351 NLRB No. 59, slip op. at 2-3 (2007); *Lexus of Concord, Inc.,* 343 NLRB 851, 852 (2004); and *Christopher Street Owners Corp.,* 294 NLRB 277, 277, (1989). Unlike *Lexus of Concord, Inc.*, supra, this was not a situation where the Union had already bargained about unit employees performing this type of work. Here, the Employer bypassed the Union about unit employees performing the work in the first instance as well as the selection process for unit employees.[20]

The testimony of Claudio and Maldonado, a long time employee, revealed that there was no recent history of bargaining unit employees attending such a trip. While Claudio down

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[20] Regardless, of the Employer's bargaining obligation, the June 7 promise to Ivanick of a preferential job assignment is a clear promise of benefit. See, *W.R. Grace & Co.,* 230 NLRB 259, 263 (1977); and *Red Ball Motor Freight, Inc.,* 157 NLRB 1237, 1255 (1966), enfd. 379 F.2d 137 (D.C. Cir. 1967), relating to preferential assignments. The promise here, coming as it did just three weeks prior to Ivanick's filing of the decertification petition suggests a causal link between the promise of benefit and the filing itself.

played the trip as a benefit, Hicken, an Employer witness, described it another way. Hicken testified it was something he wanted to do and that, "It would be a very good learning experience." Hicken testified, "I would hope to enjoy myself out there." Hicken testified that when he went to New Mexico, they were expected to work at least eight hours a day. He testified, "I would go into work like around seven-thirty and then get done, you know, around four o'clock, three-thirty." He testified he would go sightseeing in the evening if he did not get out of work late. He testified he probably worked late two days. Hicken testified, "I flew in I believe it was on a Sunday and then I left I believe it was Friday." He testified he had Sunday to himself and then started on Monday. He testified the two days he worked beyond 4 p.m., that he probably worked until about 5:30 p.m.

Ivanick testified Claudio asked her to participate in the trip. Claudio said there was a start up, that they had a new contract for prisons in New Mexico, and asked if Ivanick would be willing to participate. Ivanick testified, "I said it sounded interesting and, yes, I would be willing to think about it." While the trip, as evidenced by Hicken's testimony was for only five days of actual work, Ivanick's expense report with the Employer showed a claim for seven nights at the hotel including July 7 to 13, a per diem claim of $35 a day for meals for eight days, for a rental car, and for auto mileage. The travel report shows she left the Philadelphia airport on Saturday, July 7, and returned there on Saturday, July 14. Ivanick testified she did not submit a claim nor was she reimbursed for her husband's expenses. Nevertheless, she took her husband along, and obviously he stayed at the hotel for free, and had free use of a rental car at the Employer's expense. Despite Claudio's protests to the contrary, I find the trip was clearly viewed as a benefit by those who went, as well as by the bargaining unit employees. Maldonado, by way of her testimony was clearly upset that Ivanick, a relatively short term employee got to go on the trip, and she credibly testified there was a rumor among the bargaining unit employees that Ivanick went on a vacation to New Mexico. Maldonado credibly testified that she spoke to Hicken about the trip when he returned, and that in her experience only supervisors were allowed to go on start up projects at other facilities.

Maldonado credibly testified that she saw a calendar posted on the wall of the nurses' office showing that Ivanick was to go to New Mexico. Maldonado testified that she saw the calendar and that the calendar was in plain view of the nurses as they used a computer in the office, and the computer was available to all of the nurses who worked in that area, including Ivanick. Maldonado saw the calendar posted during the month that Ivanick was scheduled to go on the trip, and testified calendar showed that Ivanick's trip was scheduled for the second week of that month. Ivanick went on the trip from July 7 to July 14, so I have concluded that the calendar was posted notifying employees of Ivanick's trip during the month of July. Maldonado testified Ivanick was away from the facility for the week posted on the calendar. Maldonado testified that she saw the calendar after the paperwork had gone through for the petition to decertify the Union, but before the election.

Thus, on June 7, Claudio approached Ivanick and Ivanick agreed to go to New Mexico for a start up project. On June 25, less than three weeks after she was offered the New Mexico assignment, Ivanick filed a petition to decertify the Union with the Board. In July, a calendar posted in a nurse's office, in plain view of employees, stated that Ivanick was going to New Mexico during the second week in July. There was a rumor amongst employees that Ivanick's trip was a vacation. Ivanick did go to New Mexico July 7 to 14 on a start up project at the Employer's expense. Ivanick was the only bargaining unit employee to attend. The other two individuals from bargaining unit locations were members of management, one being a director or nursing, the other being a health services administrator. On July 18, the Employer sent out a letter to all employees comparing the benefits in place with those in the rejected collective-bargaining agreement. The Employer announced in the letter that the employees would retain

their current benefits and merit wage increases if the Union lost the August 9, election, and stated that if the Union won the election all employees would have to pay Union dues or be fired. The Employer was clearly pleading its cause as to why the employees should vote against the Union. Ivanick served as an observer at the August 9, election, which the Union lost 45 to 41.

In sum, the Employer bypassed the Union and awarded Ivanick with an assignment to New Mexico just three weeks before Ivanick filed the decertification petition. Bargaining unit employees became aware of Ivanick's trip which took place shortly after she filed the decertification petition. The trip was an unusual occurrence for bargaining unit employees, and viewed as a benefit by the individuals who participated including Hicken and Ivanick, and by those who did not such as Maldonado. In fact, other trip participants from the bargaining unit facilities were members of management. Moreover, Ivanick's position in wanting to decertify the Union is closely aligned with that of the Employer's. The timing of her actions are clearly suspect, and could only serve to send a signal to employees that the Employer would extend special privileges to those who aligned themselves against the Union. As such, I have concluded the Employer's conduct in selecting and then sending Ivanick on the New Mexico assignment, the latter occurring during the critical period, that is after the petition was filed but before the election, constituted objectionable conduct warranting setting aside the relatively close August 9, election.[21]

Moreover, I do not find another election warranted here, but have concluded that the Employer's direct dealing and promise of the trip to Ivanick directly lead to the filing of the decertification petition. In *Priority One services, Inc.,* 331 NLRB 1527, 1527 (2000), the Board majority affirmed the Regional Director's administrative dismissal of a decertification petition. The Board majority stated:

> In affirming the dismissal, we emphasize that "(a) unilateral change not only violates the plain requirement that the parties bargain over 'wages, hours, and other terms and conditions,' but also injures the process of collective bargaining itself." *NLRB v. McClatchy Newspapers,* 964 F.2d 1153, 1162 (D.C. Cir. 1992). "It is well settled that the real harm in an employer's unilateral implementation of terms and conditions of employment is to the Union's status as bargaining representative, in effect undermining the Union in the eyes of the employees." *Page Litho, Inc.,* 311 NLRB 881 (1993) (citing *NLRB v. C & C Plywood Corp.,* 385 U.S. 421, 430 fn. 15 (1967)). This is so because unilateral action by an employer "detracts from the legitimacy of the collective bargaining process by impairing the union's ability to function effectively, and by giving the impression to members that a union is powerless." *Carpenter Sprinkler Corp. v. NLRB,* 605 F.2d 60, 64-65 (2d Cir. 1979) citing *NLRB v. General Electric Co.,* 418 F.2d 736, 748 (2d Cir. 1969), cert. denied, 397 U.S. 965 (1970)).

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[21] The Employer selected Ivanick to travel to New Mexico prior to her filing of the decertification petition. However, the Union was never notified of the selection. After she filed the petition and during the critical period prior to the election Ivanick actually went on the trip. In these circumstances, it is appropriate to consider the Employer's pre-petition conduct of bypassing the Union and promising a preferential assignment to Ivanick as a basis for over turning the election because it directly related to conduct occurring within the critical period, her actual taking the trip, which I have also found to be objectionable. See, *Dresser Industries,* 242 NLRB 74 (1974). See also, *Gibson's Discount Center,* 214 NLRB 221, 222 (1974), where a union's pre-petition conduct consisting of promises to waive initiation fees was considered objectionable because it impacted on the very filing of the petition.

In *Saint Gobain Abrasives, Inc.,* 342 NLRB 434, 434 (2003), the Board majority reversed the Regional Director's administrative dismissal of a decertification petition. The Board majority stated:

> We recognize that the Board has applied *Master Slack* in the context of a representation case, so as to dismiss a decertification petition without hearing. (FN 3) Here, however, the alleged unfair labor practice is a single unilateral change on a single subject and, as indicated above, there are significant fact issues as to the impact of that change. In such circumstances, it is not appropriate to speculate, without facts established in a hearing, that there was a causal relationship between the conduct and the disaffection. To so speculate is to deny employees their fundamental Section 7 rights. Surely, a hearing and findings are prerequisites to such a denial. (FN 4).
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> FN3. See, e.g., *Overnight Transportation Co.,* 333 NLRB 1392 (2001); *Priority One Services,* 331 NLRB 1527 (2000).
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> FN4. Our dissenting colleagues say that the change had the "inherent tendency" to undercut the Union's support. As indicated above, the real test is whether there is a causal nexus between the change and the loss of support for the Union. The use of a conclusionary phrase can be no substitute for an evidentiary inquiry into this matter. To the extent that *Priority One Services* is to the contrary, it is overruled.

In *Saint Gobain Abrasives, Inc.,* supra, the Board majority remanded the matter for the Regional Director to hold a hearing to establish to establish whether "there was a causal relationship between the conduct and the disaffection." The Board majority stated, "After the hearing, the Regional Director will render a decision, and we will obviously give due consideration to whatever decision the Director reaches."

In *Truserv Corp.,* 349 NLRB No. 23, slip op. at 1 (2007), the Board majority stated, a decertification petition may not be processed, if "(b) the Regional director finds that the petition was instigated by the employer or that the employees' showing of interest in support of the petition was solicited by the employer:..". The Board majority stated, "an employer who is found to have instigated an employee petition will not achieve the result sought. A petition will be dismissed on traditional grounds if it is instigated by the employer. See *Canter's Fairfax Restaurant,* 309 NLRB 883, 884 (1992)." id. slip op. at 5.

As found above, I have concluded that Claudio approached Ivanick on June 7, and offered her an assignment on a start-up project in New Mexico. In doing so, Claudio by-passed the Union, dealt directly with an employee, and promised the employee a preferential assignment. Ivanick circulated a decertification petition amongst and employees, and less than three weeks after being approached by Claudio, on June 25, Ivanick filed a petition to decertify the Union. In view of the timing, I have concluded that there is a strong causal link between Claudio's actions in terms of Ivanick's motives for filing the decertification petition. As evidenced by the Employer's July 18 letter to employees, there was a strong desire on the part of the Employer to have the Union decertified. Moreover, Ivanick's selection for the trip served to closely align her with management, as the Mexican start-up was largely staffed by members of management. In particular, only Ivanick and members of management went from the bargaining unit at issue.

Claudio explained that no other bargaining unit employees besides Ivanick at the three CMS facilities could be spared due to summer vacation schedules, and they were able to send Ivanick because South Woods had two infection control nurses. Claudio testified the other South Woods infection control nurse was not asked because he was a father with small

children. Claudio testified when she received the June 7 memo, she identified people who could be gone from the sites for a week whose absence would not hurt site operations. Claudio did not review Ivanick's personnel file before selecting Ivanick.

It has been long held that the Board is not required to accept self-serving declarations of a respondent's witnesses. See, *Shattuck Denn Mining Corp., v. NLRB,* 362 F.2d 466, 469 (1966). What was discussed between Claudio and Ivanick during the meeting in which Ivanick was selected to go on the New Mexico assignment is known only to them. However, Claudio, considering her demeanor, did not impress me as the most credible of witnesses. She exaggerated the number of hours per week that employees would have to work on the New Mexico start-up project and whether or not employees would view the project as a favorable assignment. In this regard, as set forth above, her testimony was undercut by both Hicken and Ivanick. Moreover, according to Claudio's testimony, Ivanick was the only person out of a bargaining unit of about 90 employees who could have been spared for the assignment. The odds of the decertification petitioner being the only person available are therefore about 90 to 1. Given the timing of the filing of the petition and the Employer's anti-union stance during the election campaign, I do not find the odds cut in the Employer's favor. Accordingly, I have concluded the Employer's unilateral action and promise of benefit, not only undercut the Union, but served as a direct impetus for Ivanick's filing the petition. Thus, I have concluded there was a quid pro quo between the assignment on June 7, and Ivanick's filing the June 25 petition.

The Board has held decertification petitions can be dismissed as a result of an administrative investigation by a Regional Director. See, *Saint Gobain Abrasives, Inc.,* 342 NLRB 434, 434 (2003); *Overnight Transportation Co.,* 333 NLRB 1392 (2001); *Priority One Services,* 331 NLRB 1527 (2000). This is particularly so if the investigation shows that the filing of a decertification petition is found to be instigated by the Employer's conduct. See, *Truserv Corp.,* 349 NLRB No. 23, slip op. at 1 (2007); and *Canter's Fairfax Restaurant,* 309 NLRB 883, 884 (1992). Here, the hearing on Ivanick's trip assignment was directed by the Regional Director as part of her investigation of the Union's objections to the election. A hearing was held as required by the Board majority in *Saint Gobain Abrasives, Inc., supra,* and as result I have concluded there was a causal link between the Employer's improper conduct and the filing of the decertification petition. I have therefore concluded the decertification petition was tainted and that it should be dismissed, rather than requiring the Union to go through a second election. See, *Gaylord Bag Co.,* 313 NLRB 306, 307 fn. 5 (1993) holding that "the Board may treat the election as a nullity when an employer has engineered the filing of a decertification petition and thereby abused the Board's electoral processes. *Ron Tirapelli Ford v. NLRB,* 987 F.2d 433, 443 (7th Cir. 1991)." See also *River City Elevator Co.,* 339 NLRB 616, 616 (2003). This is not a situation where the Union was aware of Claudio and Ivanick's June 7 conversation wherein Ivanick was promised the July New Mexico assignment. Thus, the Union had no basis to challenge the showing of interest or claim the petition was tainted to the Region as of the June 25 filing date. Accordingly, since I have concluded there was a causal link between Ivanick's promised New Mexico assignment and her circulating and filing the decertification petition, I find the petition was tainted, and therefore I recommend that the petition be dismissed.[22]

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[22] Maldonado served as an acting shop steward. However, I do not view Maldonado's seeing Ivanick's name designated on a nursing room calendar for a trip to New Mexico sometime in July, as imputing knowledge to the Union that Ivanick was given the New Mexico assignment prior to her leaving for the trip. Maldonado credibly testified there was a rumor among employees that Ivanick's was going on a vacation to New Mexico. Maldonado knew of no specifics of the trip from the posting or that the trip was actually a job assignment. The handwriting on the calendar mentioning the trip was recognized by Maldonado as that of a

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CONCLUSIONS

Based on the forgoing, I recommend that the Union's Objections 1, 2, and 3 be denied and I find no merit to the matters described in paragraphs 1 2, 3, 5 and 6 raised by the Regional Director's investigation on objections. However, based on the matters raised in paragraph 4 of the Regional Director's investigation on objections, I recommend that the results of the August 9, 2007 election be overturned, that the decertification petition be dismissed, and that the Union continue to be recognized by the Employer as the collective bargaining representative of the employees in the collective bargaining unit described herein. Accordingly, this matter is remanded to the Regional Director to take the action recommended[23] herein.

Dated, Washington, D.C. February 11, 2008

Eric M. Fine
Administrative Law Judge

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bargaining unit employee. Thus, Maldonado never received formal notification from the Employer of Ivanick's assignment or of the specifics thereof. From the description of her steward's duties, Maldonado was not charged with being a conduit to union officials of changes in job assignments. Moreover, Claudio's testimony revealed the Employer knew Maldonado was not the individual vested with the responsibility of negotiating or reporting changes in terms and conditions of employment to the Union. In this regard, Claudio testified once the Union was certified, the Employer did performance evaluations with wage increase recommendations. The evaluations were forwarded to the Employer's attorney, who then tendered them to Union Vice-President and Business Agent Galiano for review prior to implementing the recommended wage increase. No such procedure was followed here concerning Ivanick's assignment. Given, Maldonado's limited role and limited knowledge of Ivanick's actual assignment before it took place, I do not impute constructive knowledge of that assignment to the Union before such time as it was a fait accompli. Moreover, I have found that it was in the June 7 meeting where the direct dealing with and promise of the trip to Ivanick that instigated the filing of the decertification petition. Bargaining unit employees became aware of Ivanick's going to New Mexico during the critical period. This was a substantial benefit conferred on the petitioner which could only serve to further undermine the Union's support.

[23] Under the provisions of Sectoin 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 February 25, 2008.