

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

FJC SECURITY SERVICES, INC.
Employer

and

JOSE GUTIERREZ, et al.
Petitioner

Case No. 2-UD-366

and

ALLIED INTERNATIONAL UNION
Union

Elizabeth A. Baker and Katchen Locke, Esqs.
(Service Employees International Union, Local 32BJ)
New York, NY, for the Petitioner

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DECISION AND RECOMMENDATION ON OBJECTIONS

Statement of the Case

MINDY E. LANDOW, Administrative Law Judge. Pursuant to Section 9(e) of the National Labor Relations Act, the petition in this matter was filed by Jose Gutierrez, Patricia Perry, Mary Gethings, Geraldine Peterson, Marion Moore and Anthony Session (collectively referred to herein as Petitioner).¹ These individuals are employees of FJC Security Services, Inc. (herein FJC or the Employer), pursuant to FJC's contract with the New York City Human Resource Administration (herein HRA). FJC provides security guard services at more than 70 HRA locations throughout the five boroughs of New York City. The sites are administrative offices and centers where HRA administers public assistance, food stamps, Medicaid and other entitlement programs. Employees of FJC at these HRA sites are represented for purposes of collective bargaining by Allied International Union (herein AIU), which admits only guards to membership. FJC and AIU are parties to a collective bargaining agreement, effective from June 1, 2006 to May 31, 2009 (the CBA), which covers all "full-time and part-time security officers, shift supervisors and fire safety directors at the Unit sites."

On February 1, 2008,² the Regional Director of Region 2 issued a decision directing an

¹ The petition seeks a "deauthorization" election; that is, an election to withdraw a union's authority to make and enforce a union-security clause.

² All dates herein are in 2008, unless otherwise specified.

election in the unit set forth above. The voter eligibility period was the payroll period ending January 27. The list of eligible voters in the election (the *Excelsior* list) had already been submitted to the Region, and that list was transmitted by the Region to the parties on February 1. In accordance with the Regional Director’s Direction of Election, an election was held by mail ballot and conducted between February 15 and March 7.

On March 10, the ballots were opened and counted at the Regional Office, Region 2. Of approximately 915 listed eligible voters, 299 voted in favor of and 67 voters voted against deauthorization. There were 44 void ballots and 36 non-determinative challenges. The Petitioner, therefore, failed to obtain majority support for deauthorization.³ Thereafter, the Petitioner timely filed objections to the election and the Regional Director issued a Notice of Hearing on Objections. A hearing in this matter was held before me on June 3, 4, 5, 19 and 20 in New York, New York. Based upon the testimony at the hearing, my assessment of the credibility of the witnesses and their demeanor,⁴ the documentary evidence and the entire record before me, as well as the briefs submitted by the Petitioner and the AIU,⁵ I make the following findings, conclusions and recommendations.

1. Background

There are three elected officers of the AIU: President Peggy Vanson, Vice-President Mary Beth Stafford and Secretary-Treasurer Joseph Glennan. Sergio “Jay” Diaz and Paul Rodriguez were employed as full-time organizers and Lacey Curry was employed as a part-time organizer for AIU during the period from January to March. During all relevant times, Tara Pamulo has been AIU’s Contract Coordinator.

After the petition was filed, Stafford and Diaz coordinated most of the campaigning against deauthorization. Stafford testified that she visited approximately 30 of the HRA job sites to distribute campaign literature and explain the deauthorization process, spending approximately 50 percent of her work time on this campaign. Diaz testified that, during the period from late-January through March he visited between three and eight sites a day to distribute literature and speak with employees.

As will be discussed in further detail below, during the course of the election campaign, and in particular during four or five weeks in February to early March, AIU distributed a number of fliers to employees which are alleged to be objectionable. Some were mailed to employees at their home address and others distributed at work sites. There is no dispute that this campaign literature was widely disseminated among employees in the voting unit.

In addition, during the pre-election period both HRA and FJC distributed memoranda to employees placing various restrictions on their right to engage in workplace solicitation and

³ A majority of the employees eligible to vote must vote in favor of deauthorization in order to withdraw a union’s authority to make and enforce a union-security clause. *Romac Containers*, 190 NLRB 238, fn. 1 (1971).

⁴ Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or because it was inherently incredible or unworthy of belief.

⁵ While FJC made an appearance at the hearing, and one of its Field Inspectors testified for Petitioner pursuant to subpoena, it did not file a brief and has not otherwise put forward any evidence or statement of position regarding the conduct alleged to be objectionable herein.

distribution of literature. The FJC memorandum also contained a prohibition on the wearing of non-company issued pins and other insignia. Again, there is no dispute that these memoranda were widely disseminated to employees in the unit.

5 2. SEIU Local 32BJ

10 It appears from the record that, commencing in 2007, certain FJC employees became involved in an organizational campaign on behalf of SEIU Local 32BJ (Local 32BJ). Local 32BJ is not a party to the election or to these proceedings, but the evidence adduced from the record establishes that Local 32BJ actively campaigned in support of deauthorization, and distributed campaign literature to employees urging them to vote to deauthorize the union security provision of the CBA.⁶ There is also evidence that Local 32BJ had its non-employee organizers visit work sites and that lapel pins for “SEIU Local 32BJ” were distributed to employees during the critical period.

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3. Contentions of the Parties

20 Petitioner contends that, both individually and in sum, the alleged objectionable behavior of AIU, HRA and FJC requires that the election be set aside and a new election held. Petitioner asserts that AIU committed objectionable behavior by mailing and delivering campaign literature which threatened that, if employees voted for deauthorization, the union would withhold representation and that employees would lose the terms and conditions of employment set forth in the CBA. Petitioner further argues that individual AIU agents reiterated these threats to employees during visits to work sites. Petitioner asserts that FJC, in conjunction with HRA, 25 promulgated a series of overbroad and objectionable bans on employee solicitation and distribution of literature and that FJC prohibited employees from wearing insignia demonstrating their support for Local 32BJ, while permitting other employees to wear other non-company issued insignia. Petitioner additionally contends that FJC did not provide a timely or accurate list of eligible voters pursuant to its obligations under *Excelsior Underwear, Inc.*, 156 NLRB 1236 30 (1966), and argues that this failure, together with resulting confusion regarding the number of eligible voters, requires that the election be set aside.

35 The AIU initially notes that the Petitioner lost this election by a significant number of votes, and argues that the Petitioner failed to adduce credible evidence to meet its heavy burden of proving that the alleged objectionable conduct affected the election. The AIU argues that, as regards the conduct of its agents, Petitioner has established, at best, a few isolated instances of unobjectionable, garden-variety campaign propaganda and electioneering that does not warrant setting aside the election. With regard to the alleged objectionable conduct of FJC and HRA, AIU contends that employees’ organizational activities on behalf of Local 32BJ 40 are not equivalent to campaigning in support of deauthorization and any conduct allegedly interfering with such organizational activities does not constitute objectionable conduct interfering with this election.⁷ AIU further argues that the policies relating to access to HRA facilities, solicitation and the distribution of literature and the wearing of buttons and pins by

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⁶ For example, campaign literature bearing the Local 32BJ logo and watermark, distributed to FJC employees, urges employees to “Open the ballot and vote YES to De-Authorize Allied and to stop paying \$15 monthly;” and that, “It’s time to get serious about our rights. It’s time to join with 32BJ. It’s time to vote YES.” Employees were also invited to a meeting, sponsored by and held at Local 32BJ headquarters scheduled for February 16, one day after the mail ballot election commenced.

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⁷ The AIU further argues that, in any event, Local 32BJ had ample opportunity to promote its position favoring deauthorization to unit members.

uniformed unit members were not disparately enforced and, further, that none of these policies materially affected the outcome of the election. As regards the objections pertaining to the alleged deficiencies in the *Excelsior* list, AIU maintains that while the initial list was incomplete, largely as a result of the Employer’s failure to include shift supervisors and fire safety directors, the parties --the AIU, FJC and Petitioner--worked diligently and in good faith to complete the list and that there was no prejudice demonstrated toward the Petitioner.

4. General Analytical Framework

I will discuss and analyze the Petitioner’s objections in terms of the alleged misconduct of AIU, HRA and FJC, respectively, (corresponding to their numerical order), applying the following general principles. As the Board has held, “the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one. The objecting party must show, inter alia, that the conduct in question affected employees in the voting unit and had a reasonable tendency to affect the outcome of the election.” *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005) (internal quotations omitted). The burden of proof is particularly heavy where the margin of victory is significant. *Avis-Rent-A-Car System*, 280 NLRB 580, 581, 582 (1986). In evaluating whether a party’s misconduct has “the tendency to interfere with employees’ freedom of choice,” the Board considers: (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; (9) the degree to which the misconduct can be attributed to the party. See *Taylor Wharton Division*, 336 NLRB 157, 158 (2001).

The Objections

1. Alleged Objectionable Conduct of AIU

The alleged objectionable conduct of AIU is set forth in Objection One, as follows:

The incumbent union [AIU] engaged in widespread unfair labor practices and objectionable conduct beginning in about January 2008 and continuing during the Mail Balloting Period in order to coerce and intimidate employees from 1) participating in the mail ballot election and 2) from voting “yes” in support of deauthorization. [Such alleged objectionable conduct includes]:

- The distribution of coercive flyers and mailings;
- Coercive and threatening phone calls to unit members; and
- Visits to employee work sites by AIU representatives in which employees were coerced and threatened.

In these coercive and unlawful communications, unit employees were threatened, inter alia,

That while AIU would continue as the unit’s collective bargaining representative, it would deny representation and/or fail to represent the unit if employees voted in support of deauthorization;

With the loss of their collective bargaining agreement (“CBA”) if employees voted in support of deauthorization;

With the loss of the their jobs and benefits;

With the denial of wage increases if employees voted in support of deauthorization

With lawsuits in retaliation for protected concerted activity in support of deauthorization and/or in support of [SEIU Local 32BJ]

That employees would be disciplined for wearing pins in support of deauthorization and/or SEIU Local 32BJ and that AIU would not represent them to grieve said discipline, and

That their activities in support of deauthorization and/or SEIU Local 32BJ were being monitored by AIU and would lead to reprisals.

2. Evidence in Support of Objection One

A. Alleged Threats to Deny or Withhold Representation and that Employees Would Lose Their Collective Bargaining Agreement

In support of this aspect of its objection, Petitioner relies upon fliers mailed by AIU to employees at their home addresses and/or distributed at the worksite. For example, a flier entitled, “Will the Lies Never End,” states, in relevant part:

Deauthorizing Allied is the same as having no union until the end of your contract. Even after the contract expires, 32BJ cannot have an election to represent you!

A leaflet entitled “FIGHT vs. FRIGHT” states, in part,

If 32BJ really stood for Security and Social Justice, they would be standing along side Allied Union in fighting for your rights and what you truly deserve at City Hall! Instead they choose to lie to you and mislead you into leaving yourself without a Union! DON'T FALL FOR IT.

An AIU leaflet featuring and bearing the photograph of part-time organizer Lacey Curry, states as follows:

I am Security Officer Curryand thanks to 32BJ I have NO Union and NO Job!!

When I worked for Allied Barton (TriStar Security), 32 BJ came around to my site, (just like they come around to your HRA site now) and asked us to sign cards and papers so we could get more information.

We got informed all right . . . *when 32BJ got involved at our job, 1200 of us lost all our benefits, our Sick Time, our Vacation and our Seniority that we had with Allied International Union!*

32BJ claimed they would get us fifteen dollars an hour, and all kinds of sick time and vacations . . .just like they tell you!! But the truth is, they lied! They cost us our Union and

they cost me my job! They didn't even help me! The truth of the matter is they can't help me and they can't help you because they can't even get certified at the Labor Board to represent security guards!!!!!!! Call the Labor Board and ask for yourself!

5 Do not fall for their double talk and lies. Stick with Allied International and help them fight for more money in your paycheck, better benefits and job protection you can count on. Vote "NO" to De-Authorizing your contractSay "NO" to 32 BJ.

10 Petitioner further contends that certain of the AIU leaflets impermissibly threatened employees that they would lose their collective bargaining agreement if they voted for deauthorization. A leaflet entitled, "Where do you really want to be?" urges employees to:

15 Tell 32BJ to hit the road with their lies and half truths....by Voting "no" on your upcoming ballot, you will keep in the fight with Allied International in getting better wages, better benefits and keep your guaranteed contract in writing! Do you want to travel to Long Island to drop off your dues each month?....We didn't think so.

20 VOTE "NO" ON DE-AUTHORIZING YOUR CONTRACT, AND LET ALLIED UNION FIGHT FOR YOU.

25 During the first week of the election period, AIU issued a "sample ballot" flier to employees which bore the message: "Vote 'NO' to keep your contract intact" and "just say "NO" . . . To Deauthorizing your contract."

30 The campaign literature distributed by the AIU did not specifically advise employees that the union might disclaim interest in representing the unit if it lost the deauthorization vote. Stafford offered general testimony that she "may" have described to employees that the union might have to consider walking away from the contract and disclaim interest in representing employees if they lost dues for 900 employees. As she stated:

35 I may have spoken to them about the consequences of a deauthorization and what may happen in the future, which would have been that Allied would have had to have considered walking away from this contract if we were deauthorized. . . . I would have described it where if we lose dues for 900 people, that to enforce a contract it costs a lot of money. We have to hire business reps to go out and service the people. And it's very costly. And that might be a consideration for Allied somewhere down the line that we may have to disclaim interest.

40 Stafford offered no specific testimony, however, regarding any discussion to such effect with employees.

45 Petitioner argues that the statements contained in AIU's campaign literature created a coercive atmosphere that was the subject of discussion among employees. In support of that contention, Petitioner relies upon testimony from Petitioner Patricia Perry, who testified that she spoke with about five employees who expressed that they did not understand what was taking place and didn't know how to vote. They were concerned about signing their names to the ballot because of the "job issue." Perry also testified that she understood what was at issue in the election and tried to assist her coworkers to understand that as well. Employee Geronimo Figueroa said his coworkers expressed to him that they felt threatened by AIU literature.
50 According to Figueroa, he told his coworkers that he had not received any such letter and asked that they show it to him, which they never did. Petitioner Anthony Session testified that in about January he had six to eight discussions with coworkers who had assumed that by voting "yes"

they would be losing health benefits. He could recall, however, only one name of a fellow employee to whom he had spoken. Employee Desiree Morrell testified that after the leaflet bearing Curry’s picture was distributed, “everyone got kind of scared.” Because Curry had lost his job, she worried about losing her job.

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B. Alleged Threats by AIU Organizers to Deny Representation

Petitioner further contends that AIU representatives made in-person threats to employees, by offering specific examples of how the AIU would deny them representation.

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Employee Godfrey Bruen testified that in late-January or early-February, two representatives of the AIU approached him in the lobby of the building where he was working. At the time, Bruen was wearing a Local 32BJ pin and one of the representatives told him that he should not be wearing a pin for Local 32BJ because the AIU represents him. Bruen further testified that one representative told him that, “we shouldn’t be wearing the 32BJ because 32BJ don’t win the case or whatever and what not. That they won’t be representing us.” Bruen stated that in this circumstance the union agents were referring to AIU. Bruen was also told that he could get written up and suspended but was not provided with an explanation for what would cause him to receive such discipline.⁸ No one else was present on this occasion but Bruen testified that he later spoke with some of his coworkers about what the AIU representatives had told him. Bruen also testified that he also had a conversation with five of his coworkers who told him that they were not going to vote for 32 BJ because of what the AIU representatives had said.

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Morrell testified about a conversation she had with AIU representatives Diaz and Curry at her work site, about one week prior to receiving her ballot. Curry noticed Morrell’s pin and asked her why she was wearing it. Morrell replied that she was wearing it because she wanted to. According to Morrell, she and Curry got into a “spat.” Diaz told Morrell that she was not supposed to wear the pin on her uniform, and said she should not ask for his help if she got into trouble. This conversation took place while Morrell was on duty and in the presence of three coworkers. Morrell conceded that neither Curry nor Diaz brought up the issue of the election during this discussion. Morrell did not remove her pin at the time, but was later told by her supervisor that she was not supposed to wear pins anymore.

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Sometime during February, AIU Vice President Stafford, accompanied by a HRA police sergeant, was at Petitioner Perry’s work site. At the time Perry was wearing a SEIU Local 32BJ pin and a “Vote Yes” pin. According to Perry, Stafford said, “I see what side you’re voting with on account of your pin. You know you’re voting not to have a union.”

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C. Alleged Threats of Discipline and Discharge

Josue Torres testified that sometime in the latter part of February, Diaz told him that he could not wear a Local 32BJ pin, as it was not part of his uniform. According to Torres, Diaz told him, “You have to take it off. Otherwise I will get a supervisor and you will be terminated.” Torres admitted, however, that he did not take off the pin then, or later. At this time, Diaz gave Torres some campaign literature, including a list of employees who had filed lawsuits against Local

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⁸ The FJC restriction on the wearing of pins and other forms of insignia on uniforms is discussed below.

32BJ.⁹ Diaz generally denied having conversations with employees at the work site where Torres was employed.

5 Petitioner further cites to one campaign stop made by Stafford and Curry where Stafford told employees that Curry had lost his job because of Local 32BJ.

D. Alleged Promises of Benefits

10 In its brief, Petitioner alleges that the AIU made improper promises of benefits to employees. I note that while its objection relating to AIU conduct contains numerous allegations of improper conduct, promises of benefits is not one of them. Accordingly, an argument can be made that it would be improper for me to consider these allegations. Nevertheless, such alleged misconduct was litigated at the hearing and is, in my view, sufficiently related to the extant allegations of coercion and interference to warrant discussion. See *Pacific Beach Hotel*, 342
15 NLRB 372, 373 (2004).

20 Employee Halcion Dinchong testified that AIU Vice-President Stafford made two visits to her work site during January and February. During the first visit, in late January, Stafford was accompanied by Curry. Stafford approached Dinchong while she was on duty in the building lobby and, in the presence of two other unit members, introduced Curry as someone who had lost his job due to Local 32BJ. Stafford stated that “she was going to help him.” During a second visit, in February, Stafford mentioned that Dinchong’s son, who also worked for FJC, had spoken to Stafford about taking the fire safety director course. Stafford said that she could help him get a job.¹⁰ Dinchong also told Stafford that she had not received her birthday pay. Stafford
25 told her to wait until her next paycheck and to contact her if Dinchong had still not received it.

30 Petitioner additionally contends that an AIU representative “offered” to make Petitioner Jose Gutierrez a shop steward at his location to enlist his support, and also promised to get him compensation for serving in that position. Gutierrez was employed at a building location on 34th Street, where his immediate supervisor was Juan Alvarez. Gutierrez testified that about two to three weeks prior to the election, an AIU representative came around, and introduced himself as Jose Rodriguez. Gutierrez replied that Rodriguez was the first person he had ever met from the union and he wasn’t too interested in talking to him. Rodriguez said that the union was going to have new personnel and that things were going to change, and get better. Gutierrez complained
35 that he had not yet been paid for two sick days to which he was entitled, and Rodriguez said he would take care of the issue. Gutierrez then told Rodriguez that when there are problems no one from AIU came to help, and that the facility did not have a shop steward. Rodriguez replied, “Oh, you need a shop steward?” Gutierrez reiterated that they needed someone from the union because there was no one to help employees with their problems. Rodriguez asked how many employees worked at that location, and when he was told that 17 employees worked there, he agreed that the site needed a shop steward. At this point in time, Gutierrez’s supervisor, Alvarez, joined in the conversation. Alvarez stated that he thought that Gutierrez would be a
40 good candidate for shop steward because everyone liked him and he used to be a shop steward at another job.

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⁹ Torres also described an event which took place the same day, where Diaz used a guard’s radio to attempt to remove Local 32BJ representatives from the work site. Torres testified that he heard Diaz say into the radio, “Take them out, take them out. They don’t belong here. They shouldn’t be here.”

50 ¹⁰ Under the collective-bargaining agreement, fire safety director is a more highly compensated position than security officer.

Rodriguez then asked Gutierrez if he would like to be a shop steward, and he replied, “it depends.” Rodriguez gave Gutierrez some health plan information and stated that on the following Monday he would be around with one of his supervisors to approve Gutierrez as shop steward. He also stated that he would bring copies of the collective-bargaining agreement for Gutierrez to distribute to employees.

Rodriguez failed to show up on Monday, but did come by a few days later. Gutierrez told Rodriguez not to speak with him at that time because one of his supervisors had told him that he could get into trouble for speaking with people from the union. Rodriguez stated that he would wait and speak to Gutierrez when his shift was over at 4:00 p.m. At that time, the two men met and walked toward the train station. Gutierrez asked why Rodriguez had not come by on Monday, as promised. Rodriguez stated that Gutierrez had been supposed to call him, but that he was there now. Gutierrez mentioned to Rodriguez that when he had previously been a shop steward he had earned some additional money for serving in the position. Rodriguez replied that FJC would not increase his compensation but “we’ll get you some.” Rodriguez then told Gutierrez he would be in touch, but he never contacted Gutierrez again. Just prior to leaving Gutierrez at the station, Rodriguez asked him if he had received his ballot. Gutierrez replied that he had not, and that maybe it was because he had moved.¹¹

According to Stafford, the procedure for selecting shop stewards is to go to the job site and ask if anyone is interested in the position. If only one individual is interested, then he or she is appointed. If more than one employee indicates interest, there is an election. Employees who serve as shop stewards receive a small dues rebate. The selection of a shop steward can be approved by Stafford, President Vanson or Secretary-Treasurer Glennan

E. Alleged Fraudulent Phone Calls

Employee Sadrun Noor testified that on February 18, which was the President’s Day holiday, he received a telephone call from someone using AIU’s telephone. According to Noor, this individual stated, “I’m calling from FJC. Don’t give the vote to 32BJ.” Noor asked who was on the line, and the caller hung up. Noor reported this occurrence to Petitioner Gutierrez. According to Gutierrez, Noor stated that he told the person who called him that he knew he was from Allied, not FJC.

Stafford testified that on the day in question two off-duty FJC security guards, Terry Simmons and Anthony Evans, were at the AIU office and provided assistance with the deauthorization campaign by making telephone calls to employees. According to Stafford, many of these attempts were fruitless, as phone numbers were disconnected. Stafford testified that she overheard the guards introduce themselves by saying, “We’re security officers with FJC, and we’re asking you to vote no in the deauthorization election.” Stafford further testified that she heard Simmons and Evans explain to employees that this was not an election between AIU and Local 32BJ.

3. Analysis and Conclusions Regarding Objection One

A. Alleged Threats to Withhold or Deny Representation and the Loss of the Contract

¹¹ Gutierrez did not receive a ballot in the mail. He went to the Regional Office to pick one up. It does not appear, however, that he was an eligible voter in the election in any event.

Petitioner contends that the AIU improperly threatened employees with loss of representation and their contract in retaliation for supporting deauthorization, and that this constitutes objectionable conduct. As discussed above, the campaign literature distributed by the AIU advised employees that a vote for deauthorization was the “same as having no union until the end of your contract,” and that employees should not let Local 32BJ “mislead you into leaving yourself without a union.” The Curry leaflet claims that, because of Local 32BJ, he and others lost their sick leave and vacation and seniority benefits and were “left with no union and no job.” Employees are encouraged to “vote no to deauthorizing your contract.” Other literature urged employees, in part, to “vote no to keep your contract intact and to “just say no. . . to deauthorizing your contract.”

Petitioner contends that by such statements, AIU threatened to deny or withhold from its members proper union representation and to cancel their collective bargaining agreement if they voted for deauthorization. In support of this argument, Petitioner relies upon the fact that the AIU failed to specifically state that, as a consequence of a deauthorization vote, it would disclaim interest in the representation of unit employees.¹² AIU contends that, at most, the statements contained in its campaign literature were misstatements of law and fact which are not objectionable under *Midland National Life Insurance Co.*, 263 NLRB 127, 131-133 (1982) and *John W. Galbreath & Co.*, 288 NLRB 876 (1988). The AIU further contends that under Board law, a union may respond to the filing of a deauthorization petition by informing its members that it might disclaim its role as collective bargaining representative. *Chicago Truck Drivers Local 101 (Bake-Line Products)*, 329 NLRB 247 (1999), and that this is what was done in this instance.

As Petitioner notes, in *Hospital Employees 1115 Joint Board (Pinebrook Nursing Home)*, 305 NLRB 802 (1991), the incumbent union told unit employees that, if they voted in favor of deauthorization, it would disclaim interest in representing them. While the Board assumed that a union could cease representation of employees if it became economically infeasible to represent them, and could inform employees of this possible economic consequence, the Board went on to find in that case that the union had both violated the Act and engaged in objectionable conduct because it had failed to provide objective evidence that deauthorization would render representation economically unfeasible. Then-Chairman Stephens concurred that a violation of the Act had occurred, but only because the union had threatened employees that it would remain as their bargaining representative but would not properly represent them if they voted for deauthorization.

Subsequently, in *Bake-Line Products*, supra, the Board expressly overruled *Pinebrook* and found that the respondent therein neither violated the Act nor engaged in objectionable conduct. In that case, the administrative law judge, affirmed by the Board, found that during a deauthorization election campaign the respondent union told employees that if it lost the election by a decisive margin it would consider disclaiming recognition and that this would leave the employees unrepresented and would void the collective-bargaining agreement. The judge also found that the respondent union told employees that in the absence of the contract the employer might not give them a wage increase and would be free to fire employees without good cause.

In reaching its conclusion that the union in *Bake-Line Products* had neither violated the Act

¹² I agree with the Petitioner that Stafford’s non-specific testimony that she “may” have explained the fact that the union would have to disclaim interest in representation to be insufficient to prove that this explanation was proffered to a significant number of employees.

nor engaged in objectionable behavior, the Board adopted the rationale of Chairman Stephens, as set forth in *Pinebrook*. There, he stated:

5 Nothing in the Act necessarily prevents a union from abandoning its role as collective-bargaining representative or informing employees that it will no longer act as their bargaining representative should the employee[s] decide to revoke the union-security provisions of the contract.

10 In a companion case, *Trump Taj-Mahal Associates*, 329 NLRB 256 (1999), the Board found that union statements about what would ensue if employees voted in favor of deauthorization, in particular a threat that the union would cease to represent the employees, did not interfere with the conduct of the election. In that case, the union had advised employees that if it lost the election it would “not be economically feasible” for the union to continue as the collective bargaining representative. In that case, the Board additionally found that a
15 communication to employees that by voting for deauthorization they could, “sacrifice your continuation in the union’s pension fund and could jeopardize a secure retirement pension . . .” was not objectionable. The Board found, rather, that “this was not a threat to retaliate against employees but a permissible statement about the consequence of a termination of the collective bargaining relationship between the [union] and the Employer.”

20 Here, the AIU campaign literature did not explain to employees how a deauthorization vote might affect it economically; nor did it inform employees in so many words that it might disclaim interest in further representation. I find that its statements to employees, and in particular the repeated references to “deauthorizing your contract” advised them, in essence,
25 that a vote for deauthorization would result in a loss of the CBA, and contract benefits. In other literature, employees were told that deauthorization would be the same as having “no union.” However, in disagreement with Petitioner, I do not find that the AIU told employees that it would withhold or deny representation, or that AIU “made clear that [it] intended to remain as the Unit representative if deauthorized, but that it would refuse to properly represent Unit members,” as
30 Petitioner asserts in its brief.

35 Although *Bake-Line Products* specifically involved a statement of disclaimer, neither that case nor *Trump Taj- Mahal Associates*, *supra*, elaborate a requirement that a union use certain “magic words” or explicate all the consequences of a deauthorization vote in its communications to employees. Rather, what is required is that a union’s statements to employees be consistent with the “objective reality of representation.” And, as the Board has found, “there is full symmetry between cessation of representation statements and the decision to cease representation in the deauthorization context.” *Bake-Line Products*, *supra* at 249.¹³

40 The cases cited by the Petitioner are distinguishable. For example, in *Bell Security*, 308 NLRB 80 (1992), the incumbent union threatened employees that if they voted for the petitioning union, their health and welfare coverage under the incumbent’s contractual plan would

45 ¹³ I note that, in other contexts, the Board has held that statements of possible consequences of actions taken by employees, even when incomplete, are not objectionable when they do not misrepresent the nature of the rights and remedies available to those employees under the law. See e.g. *Eagle Comtronics*, 263 NLRB 515, 516 (1983) (employer does not engage in objectionable conduct when addressing the issue of striker replacements without informing employees of the full scope of their reinstatement rights under *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enfd.* 414 F.2d 99 (7th Cir., 1969, cert. denied 397 U.S. 920 (1969), as long as employees are not threatened that they will be deprived of their
50 rights in a manner inconsistent with extant law.)

terminate and they would have no benefits under any plan sponsored by the petitioner union for at least 2-1/2 years since it would take at least that long for the Board's certification to become final. As there was no evidence that such coverage would cease by operation of law should the petitioner prevail, employees could reasonably infer that the incumbent was threatening to terminate their coverage during the hiatus between the election result and a final certification, if the petitioner won. Such a specific threat to terminate benefits was found to be unlawful. Similarly, in *Willey's Express*, also relied upon by Petitioner, an agent of the union took steps toward termination of dental and vision insurance plans that had been extended to unrepresented employees from another unionized location, and advised the unrepresented employees that they could retain such benefits only if they voted for the union.

Here, the AIU did not threaten employees that if they voted for deauthorization the AIU would not represent them properly or would act to withdraw certain contract benefits. Rather, its statements to employees envisaged a loss of representation and the collective-bargaining agreement which is consistent with the requirement that a disclaimer of interest in representation be unequivocal and not for an improper purpose. *Dycus v. NLRB*, 615 F.2d 820, 826 (9th Cir. 1980), enfg. sub nom. *Teamsters Local 42 (Grinnell Fire Protection)*, 235 NLRB 1168 (1978). As was noted in *Pinebrook*, a disagreement with unit employees over whether a union should remain the collective-bargaining representative following cancellation of a union security clause is not an improper purpose. (Stephens concurring opinion at fn. 2, citing *NLRB v. Circle A & W Products*, 647 F.2d 924, 926-927 (9th Cir. 1981) cert. denied 454 U.S. 1054 (1981)). And, unlike those circumstances presented in *Bell Security*, supra and *Willey's Express*, supra, the AIU did not specifically threaten employees with a withdrawal of benefits, but described what could occur as a consequence of action that it is lawfully entitled to take. Accordingly, I find that such statements do not constitute objectionable conduct.

Petitioner further asserts that AIU agents conveyed objectionable threats that if deauthorized, it would refuse to properly represent unit members. The evidence in support of this assertion involves the situation, discussed above, where Diaz told Morrell, in the presence of three coworkers, that she was not supposed to wear a Local 32BJ pin on her uniform and that she should not ask for his help if she got into trouble for doing so. Although it is the case that FJC had promulgated a ban on the wearing of non-company insignia, I find that, under the circumstances here, Diaz's comment could reasonably be construed by employees to constitute a threat of inadequate representation for taking a contrary position in the election campaign.¹⁴

Petitioner further relies upon Bruen's testimony that he was told that "we shouldn't be wearing the 32BJ because 32BJ don't win the case or whatever or what not. That they won't be representing us." It is not entirely clear to me, given the context of Bruen's testimony, that the reference to "they" who would not be representing employees denoted AIU, rather than Local 32BJ. Nevertheless, even if I were to assume, as Bruen testified, that the AIU representative was referring to the incumbent union, I find that Bruen's testimony is insufficient to establish that the AIU representative was making a threat of improper representation as a consequence of a vote for deauthorization rather than a more general statement of disclaimer. Accordingly, I find that Petitioner has failed to meet its burden to demonstrate that this AIU agent engaged in objectionable misconduct in this instance.

¹⁴ The cumulative effect of demonstrated instances of objectionable conduct on the part of AIU agents is discussed below.

B. Alleged Threats of Discipline

In support of this aspect of Objection One, Petitioner relies upon two instances where employees were allegedly threatened: once with suspension and once with discharge. Both
 5 involve employees who wore Local 32BJ pins on their uniforms. In one instance, Bruen was told by unnamed AIU agents (as a continuation of the conversation discussed above) that he could get written up and suspended. Although Bruen could not state with certainty what such
 10 comments referred to, I infer from the surrounding circumstances that they referred to his wearing a pin showing support for Local 32BJ. However, such comments fail to state and, in my view, do not imply that the AIU agents would take action to encourage the Employer to issue discipline to this employee. I find therefore, that such comments do not rise to an improper threat of discipline.

In the second incident cited by Petitioner, Diaz allegedly told Torres that if he did not
 15 remove his Local 32BJ pin, Diaz would get a supervisor and that Torres would be terminated. I credit the specific testimony of Torres over Diaz's general denials. The Board has held that a union's threat to have an employee punished for opposition in an organizational campaign is a threat that a reasonable employee could believe. See e.g. *Randell Warehouse of Arizona*, 347 NLRB 591, 594 (2006) (and cases cited therein). There is, however, no evidence that this
 20 threat was disseminated to other unit employees.

C. Alleged Promises of Benefits

In support of these assertions, Petitioner relies upon the conversation between Stafford
 25 and unit employee Dinchong regarding her son. Stafford, who was on a site visit accompanied by Curry, told Dinchong that she was going to help Curry, (who in campaign literature and in visits to employee work sites had attributed his job loss to the organizing attempts of Local 32BJ).¹⁵ Petitioner points to Stafford's comments that she could help Dinchong's son, a unit member at another site, obtain a position as a fire safety director as an objectionable promise of
 30 benefits. I find, however, that Stafford's comments could as easily be construed as an unobjectionable attempt by the AIU to seek employee support by demonstrating that it will advocate on behalf of, or otherwise assist employees. In particular, there was no explicit promise made; nor was there an express connection between Stafford's assertion that she could help Dinchong's son and any solicitation for support in the election.¹⁶

Petitioner has also asserted that an AIU representative improperly "offered" to make
 35 Petitioner Gutierrez a shop steward and to provide him with additional compensation. The record evidence establishes, however, that it was Gutierrez who initially broached the issue of the need for a shop steward at his work location, and it was his work supervisor who suggested that Gutierrez should be selected, as he had performed that function with a prior employer. Moreover, the issue of additional compensation was initiated by Gutierrez.¹⁷ Taking all these
 40 circumstances into account, I do not find that Petitioner has shown that the AIU made an objectionable promise of benefits to an employee in this instance.

45 ¹⁵ In disagreement with Petitioner, I do not find Stafford's comments at a campaign stop to the effect that Curry had lost his job because of Local 32BJ to constitute an objectionable threat of job loss to employees.

¹⁶ As for the issue of Dinchong's birthday pay, I note that Dinchong brought the issue to Stafford's
 50 attention. Moreover, Stafford was advising Dinchong that she would take steps to ensure that she received a contractual benefit that was owed her. I do not find this to be objectionable conduct.

¹⁷ As noted above, Stafford testified that shop stewards receive a dues rebate.

The evidence presented by Petitioner in support of Objection One fails to support those allegations which contend that the AIU threatened employees that they would lose their jobs and benefits;¹⁸ that they would be denied a wage increase; that they would be subject to lawsuits in retaliation for protected concerted activity in support of deauthorization and/or support of SEIU Local 32BJ¹⁹ and that their activities in support of deauthorization and/or SEIU Local 32BJ were being monitored by AIU and would lead to reprisals.

D. Cumulative Effect of Demonstrated Instances of AIU's Objectionable Conduct

In sum, to the extent I have found that it has been proven that individual agents of the AIU have engaged in objectionable misconduct, the impact was on a very small fraction of the voting unit, and there is little, if any, evidence of dissemination. Accordingly I find that Petitioner has failed to meet its burden to show that this alleged misconduct had a reasonable tendency to affect the election results.²⁰ See *Werthan Packaging, Inc.*, 345 NLRB 343 (2005); *Caron International*, 246 NLRB 1120 (1979).²¹

Accordingly, I recommend that Objection One be overruled.

4. Alleged Objectionable Conduct of HRA

There are four objections specifically relating to the conduct of HRA. They are as follows:

¹⁸ In particular, I do not find that the Curry leaflet, which purports to describe his experience from a personal point of view, and contains statements of opinion regarding the relative merits of AIU and Local 32BJ, can be viewed as an objectionable threat of job loss.

¹⁹ In support of this aspect of Objection One, Petitioner presented evidence from employee Eddie Zurita who testified that Diaz told him that if he voted for deauthorization, AIU would take him to court and sue him. Zurita then testified that Diaz showed him his picture on a Local 32BJ poster and said the he was "going to take us to court because we took the picture without his authorization." Diaz denied making any such threat to Zurita. According to Diaz, he was in the security office with Zurita and four other employees when a coworker displayed a Local 32BJ poster which contained Zurita's picture. Zurita complained that it had been used without his authorization, and Diaz offered to draft a statement for him, which he signed. I note that Petitioner does not cite to Zurita's testimony about Diaz's alleged threat in its brief, and, in any event, I find it to be highly unreliable. On cross-examination, Zurita claimed repeatedly that there were many things on his mind and could not remember what had been said. He admitted that he had told Diaz that Local 32BJ had used his picture without his authorization and that he felt it had been an invasion of privacy, and, further, that he had signed a written statement to such effect. He also admitted that Diaz had "probably" told him that he could take Local 32BJ to court for using his picture without authorization. On whole, I find Diaz's account of events to be consistent with the record evidence, and therefore credit it.

²⁰ Even if I were to afford the Petitioner the benefit of every doubt and further find that Bruen was threatened with a loss of union representation for his obvious support for Local 32BJ and that Stafford made an improper implied promise of benefits to Dinchong I would reach the same result.

²¹ As for the issue of the alleged fraudulent phone calls, Petitioner claims that by posing as FJC representatives and instructing members to vote against deauthorization, AIU agents lead employees to believe that FJC favored deauthorization and that employees who supported it could therefore face discipline. Crediting Noor's testimony as to what he was told on the phone, I note that there was no mention of deauthorization in that brief exchange. Nor were any express or implied threats or promises made. There was no evidence presented regarding any actual or implied threat or promise made to any other employee. Accordingly, I do not find these phone calls to be objectionable.

Objection Two:

5 Beginning in or about late-January and continuing during the Mail Balloting Period, employees of [HRA], including HRA police officers, coerced and threatened unit employees to deter them from deauthorizing AIU and organizing with SEIU Local 32BJ.

Objection Three:

10 Beginning in February 2008 and continuing during the Mail Balloting Period, HRA representatives, including HRA police officers, denied access to persons acting on behalf of or in concert with Petitioners to meet with employees in non-work areas on non-work time, while permitting AIU representatives access to HRA facilities to meet with employees regarding the election, including access to work areas on employees' work
15 time.

Objection Four:

20 On or about February 21, 2008, HRA promulgated a ban on the distribution of any union-related literature at any time, including in non-work areas on non-work time, and threatened officers that they would be terminated by their Employer, FJC Security Services for violation of this rule.

Objection Five

25 Beginning in February 2008 and continuing during the Mail Balloting Period, HRA representatives, including HRA police officers, instructed unit employees to remove buttons and pins in support of deauthorization and/or SEIU Local 32BJ.

30 During the first week of the election, HRA Assistant Deputy Commissioner Dexter Freeman met with HRA Administrative Captain Victor Granados and members of his staff. Freeman distributed a copy of a memorandum which had been issued by FJC (the FJC no-solicitation rule),²² and directed that instructions reflecting the substance of this rule be written and distributed to HRA facilities where FJC employees were employed. Thereafter, on or about
35 February 21, Granados distributed the following memorandum entitled "Contract Guard Labor Union Access to HRA Facilities" (the HRA Directive):

Security guards who are posted at HRA facilities may not have visitors while on duty.

40 FJC Security Services, Inc. has an existing policy which states that "only authorized visitors are allowed on FJC and customer properties . . . [FJC] employees as well as persons not employed by FJC may not post, solicit or distribute literature in the workplace at any time for any purpose" and that "Violations of this policy are grounds for disciplinary action, up to and including termination."
45

Pursuant to the above policy, representatives of labor unions may not solicit or do business with contracted security guards who are on duty at HRA facilities.

50 ²² FJC had previously distributed a memorandum entitled, "Visitors and Solicitations at the Workplace" which set forth rules regarding solicitation, distribution and the wearing of union and other insignia. This policy is discussed in connection with Objection Six, below.

Representatives of labor unions seeking to solicit or do business with contracted security guards are not permitted within HRA facilities, and should be advised to conduct union business outside of working hours and outside of the HRA facility.

5

The HRA Directive was not only distributed to unit sites, but FJC also included a copy along with employee paychecks. Stafford testified that pursuant to this announced policy, she was repeatedly “thrown out” of various HRA facilities. Similarly, Diaz testified that after this Directive issued he was prevented from entering HRA facilities; however, there is also evidence that he was granted admission to various facilities and distributed campaign literature during this period.²³

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On February 29, counsel for the AIU wrote to HRA requesting amendment of the HRA Directive so as to not bar access to AIU as the exclusive bargaining representative for employees at HRA sites. Attached to this letter was a copy of the union visitation provisions of the CBA. On March 19, HRA issued a revised Directive which provided access to those representatives of labor organizations who establish that they are the representative of the collective-bargaining agent which currently represents all contracted security guards at the facility. The revised Directive left unchanged, however, those provisions setting forth the FJC policy regarding the posting, solicitation and distribution of literature in the workplace at any time for any purpose.

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None of the eleven employee witnesses who testified herein, including three who were named in the petition, presented any evidence that they, or any other employee, was prevented from entering or evicted from HRA facilities when trying to campaign in the election.

25

5. Analysis and Conclusions Regarding the Alleged Objectionable Conduct of HRA

The Petitioner contends that HRA is a joint employer with FJC. That issue, however, was apparently not raised during the course of the underlying representation case proceeding and is not appropriate for litigation here. The document which is, in essence, the agreement between FJC and HRA for the provision of guard services provides in relevant part that: “All persons performing work under this contact shall at all times be recognized as the Contractor’s employees and under the Contractor’s control and supervision. However, the Contractor and employees shall, in the performance of the work, comply with written and/or verbal instructions received from the Human Resources Administration . . .” In addition, Granados testified that based upon a request from HRA, an employee may be transferred or removed from the work site.

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Thus, it is clear that the supervision and control of FJC contract guards is, at least, coordinated with HRA. While HRA is not a party herein I find that HRA was acting in concert with FJC when it issued and distributed the HRA Directive to employees. I find it appropriate, therefore, to consider HRA as an agent of FJC for these purposes, rather than undertaking an analysis under the standard employed by the Board for evaluating the alleged misconduct of third parties.

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45

With regard to Objection Two, which alleges that HRA officers “coerced and threatened

²³ I also note, however, that Gutierrez testified that his supervisor had informed him that he should not speak with AIU representative Rodriguez, and that Rodriguez waited until Gutierrez was off duty before meeting with him.

50

unit employees to deter them from deauthorizing AIU and organizing with SEIU Local 32BJ,” I find that Petitioner has failed to provide any specific evidence in support of this objection. In general, the few instances where the actions of HRA officers are even implicated herein are so isolated I cannot conclude that any such misconduct, had it been proven, would reasonably have tended to interfere in the election. I recommend, therefore, that this Objection be overruled.

Objection Three alleges that HRA representatives denied access to persons acting on behalf of or in concert with Petitioners to meet with employees in non-work areas on non-work time, while permitting AIU representatives access to employees. There is, however, no evidence that HRA officials denied access to or otherwise caused the removal of any employee campaigning in the election from non-work areas during non-work times.²⁴ To the extent representatives of the AIU were granted access to facilities during this period, I note that as the incumbent union they had a contractual right to such access.²⁵ I recommend therefore, that Objection Three be overruled.

In Objection Four, Petitioner alleges that HRA engaged in objectionable conduct through its issuance of the HRA Directive which incorporated certain aspects of the FJC no-solicitation policy by reference. There is no doubt that the HRA Directive, distributed with the assistance of FJC during the election period, was widely disseminated throughout the unit.

In general, if a rule explicitly restricts Section 7 activity, the rule is invalid. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004); *Our Way*, 268 NLRB 394 (1983). If there is no express prohibition of Section 7 activity, a rule may nonetheless be objectionable if employees would reasonably construe its language to prohibit Section 7 conduct or if the rule was promulgated in response to union activity or to restrict protected conduct. See *Longs Drug Stores California, Inc.*, 347 NLRB 500 (2006).

The HRA Directive, by its express terms, advised employees that: “[FJC] employees . . . may not post, solicit, or distribute literature in the workplace at any time for any purpose.” The directive further advised employees that “[v]iolations of this policy are grounds for disciplinary action, up to and including termination.” In this regard, HRA was acting with, at least, apparent authority in enforcing the FJC no-solicitation policy, at least insofar as it was described in the HRA Directive distributed to employees.

This policy prohibits employees from distributing literature in the “workplace at any time” and, therefore, prevents employees from distributing literature in non-work areas during non-work time. Such a rule is presumptively overbroad. *Pacific Beach Hotel*, 342 NLRB 372, 374 (2004) (policy stating that “no employee shall distribute or circulate any written or printed literature at any time while on Company property” found to be overbroad and to constitute objectionable conduct.) See also *Mercy General Hospital*, 334 NLRB 100, 107 (2001),

²⁴ In this objection, Petitioner makes reference to certain unidentified “persons acting on behalf or in concert with Petitioners.” Assuming that, by such reference, Petitioner is referring to nonemployee organizers acting on behalf of Local 32BJ, it is well established that, except in certain circumstances not present here, an employer may exclude nonemployees from engaging in union activity on its property. *Lechmere, Inc., v. NLRB*, 502 U.S. 527, 537 (1992); *Raley’s*, 348 NLRB 382, 386 (2006).

²⁵ The exception to the general *Lechmere* rule which involves discriminatory access provided to the nonemployee organizers of one of two rival unions, both of which are seeking to represent the employees is not implicated in this deauthorization proceeding.

(interference with employees' right to distribute literature in non-work areas during non-work time found objectionable).

5 As the Board has explained, the mere maintenance of an overbroad rule can affect election results because employees may reasonably construe the provision as a directive from their employer that they refrain from engaging in permissible Section 7 activity. *Freund Baking Co.*, 336 NLRB 847, fn. 5 (2001). More recently, in *Delta Brands, Inc.*, supra, the Board declined to set aside an election, concluding that there was no proof that maintenance of a presumptively overbroad rule affected the election result. There, the rule which prohibited vending, solicitation or collecting contributions for any purpose without management approval, 10 was contained in a 36-page policy manual and was not adopted in reaction to the union campaign. Only one employee was given the manual during the critical period although all employees received a copy of the manual. Moreover, there was evidence that the rule was not enforced. The Board held that the mere maintenance of the overly broad provisions of the policy 15 manual, standing alone, was insufficient to set aside the election.

Here, by contrast, I find that, based upon all the inherent circumstances, the HRA Directive was promulgated in response to the deauthorization campaign,²⁶ and there is no dispute that it was widely disseminated during the critical period. Thus, it is possible to conclude 20 that the maintenance of such a rule could have affected the election results. *Pacific Beach Hotel*, supra at 374. For these reasons, I find that HRA engaged in objectionable conduct. See *Gayfers Department Store*, 324 NLRB 1246 (1997) (no solicitation, no distribution rule promulgated to employees of subcontractor found to be overly broad and presumptively invalid).

25 Accordingly, I recommend that Petitioner's Objection Four be sustained.²⁷

Objection Five alleges that HRA representatives improperly instructed unit employees to remove buttons and pins in support of deauthorization and/or SEIU Local 32BJ. The evidence presented in support of this allegation concerns an instance (discussed in additional detail 30 below in conjunction with Objection Six), where HRA Sergeant Crispin supported an order given by a FJC supervisor to three employees to remove Local 32BJ pins. Crispin told these employees that wearing such pins constituted an improper solicitation. There is one other instance cited by Petitioner regarding employee Eddie Zurita. Zurita initially testified that HRA Sergeant Wilson directed him to remove his Local 32BJ pin; he later stated that he removed the 35 pin because of comments made by two coworkers. Zurita subsequently returned to his initial account of events. For reasons described elsewhere herein, I do not find Zurita to be a reliable witness.

40 ²⁶ Officer Granados testified that he could not recall any policy restricting distribution of union materials in break areas or during break time prior to the election.

45 ²⁷ Even if I were to consider HRA's conduct under the more stringent third party standard, I would recommend that Objection Four be sustained. In general, third party conduct rises to the level of objectionable conduct where it is "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). In determining whether a third party's conduct requires setting aside an election, the Board considers (1) the nature of the threat itself; (2) whether the threat encompassed the entire bargaining unit; (3) whether reports of the threat were widely disseminated; (4) whether the person making the threat was capable of carrying out the threat; and (5) whether the threat was rejuvenated at or near the time of the election. *Id.* Because the facially overbroad rule was widely distributed to employees during the critical period and 50 employees were advised that they could be disciplined for violation of the rule, I find that HRA's conduct meets the more restrictive standard applied to third parties to an election.

Petitioner has presented no other specific evidence in support of this Objection, and cites to none other in its brief.²⁸ Assuming that instructing employees to remove pins indicating support for Local 32BJ would constitute objectionable conduct in this election, I find that the one credited instance of such conduct on the part of HRA officers which Petitioner has adduced is insufficient to reasonably have a tendency to affect its outcome. Accordingly, I recommend that Objection Five be overruled.

6. Alleged Objectionable Conduct by the Employer

Objection Six addresses conduct by FJC as follows:

During the Mail Balloting Period, the Employer, through its supervisors and agents, coerced unit employees by, inter alia, promulgating a rule prohibiting employees from wearing buttons and pins, threatening employees with discipline if they did not remove buttons and pins in support of deauthorization and/or SEIU Local 32BJ, promulgating a ban on the distribution of any union-related literature at any time, including in non-work areas on non-work time, and threatening that officers would face discipline and termination for violations of this ban. By these acts, unit employees were intimidated from participating in the mail ballot election and their rights to a free and uninhibited choice in the election were undermined.

The evidence establishes that FJC requires prospective employees to sign a form containing “Terms and Conditions of Employment” providing, in relevant part: “Distribution of literature, of any description, is prohibited in the workplace at all times.” In addition, beginning in late-January, FJC promulgated another memorandum, entitled “Visitors and Solicitations at the Workplace” (the FJC no-solicitation rule) which stated, inter alia:

In an effort to ensure a productive and harmonious work environment, employees as well as persons not employed by FJC may not post, solicit, or distribute literature in the workplace for any time for any purpose. . . . Examples of impermissible forms of solicitation includes [sic]:

The collection of money, goods, gifts for religious or political groups.

The sale of goods, services, or subscriptions outside the scope of official organization business.

The circulation of petitions.

The distribution of literature not approved by FJC

The solicitation of memberships, fees or dues.

No wearing of unauthorized pins or insignia.

It appears from the record that this memorandum was widely disseminated in the weeks prior to and during the election. Field Inspector Sheila Mack, who supervises 17 sites in Manhattan, acknowledged that this policy was distributed throughout Manhattan, and recalled seeing it posted at three locations where she supervises employees. Her testimony corroborates that of several witnesses testifying for the Petitioner, who recalled receiving the document in and around the time of the election. In addition, Stafford testified that FJC first promulgated this policy in early 2008 during the campaign.

²⁸ In this regard I note that the HRA Directive was silent on the issue of pins.

Petitioner contends that this rule is, on its face, objectionable and that the policy was also discriminatorily applied to prohibit the Petitioner and supporters from wearing Local 32BJ insignia in the weeks leading up to the election.

5 Perry testified that, on one occasion, she was in the office with a coworker named McAllister, and was wearing three or four pins. FJC Field Supervisor Mitchell, who was at the time accompanied by HRA Sergeant Crispin told her that employees are not supposed to wear pins for Local 32BJ. McAllister disputed Mitchell, and said that employees could wear the pins. Mitchell replied that Local 32BJ is not authorized or does not have the right to represent
10 employees. Several days later, Field Supervisor Mitchell directed Perry, McAllister and one other employee to remove the pins, and Crispin, who was again present, stated that they had to remove the pins because they constituted a prohibited solicitation. In response to Perry's questioning, Crispin stated that HRA was prohibiting the solicitation. According to Perry, she said that the pins showed unity. The two went back and forth, and she ultimately dropped the issue. Similarly, employees Richard Pinnock and Edward Strain were instructed by their FJC
15 site supervisor to remove Local 32BJ pins. In February 2008, a FJC site supervisor told employee Geronimo Figueroa that he had to remove his pin because Field Inspector Mack was on her way to the site with HRA Director Davis, and that she did not want to see anyone with pins on.

20 Mack acknowledged that during the month of February she directed employees at approximately seven locations to remove Local 32BJ pins. She told employees that if they did not comply with this directive they would be disciplined. According to Mack's testimony, the prohibition applied to other pins worn by employees as well. Petitioner disputes this and points
25 to Mack's acknowledgement that employees wear non-company issued tie clips without threat of discipline. Petitioner further cites to testimony that certain employees have been allowed to wear pins with the letters "SP" on their collar.²⁹ Mack, however, also testified to one occasion when she observed that an employee under her direction was wearing a Yankee or Mets pin. She told this employee that it is not part of his uniform, and if she saw it again she would write the employee up. Mack additionally testified that she has seen employees wearing "American
30 Flag" pins, and has instructed them to take such pins off.

The most recent version of the FJC employee handbook, promulgated in 2006, contains provisions relating to "Security Uniform," "Dress Code," and "Personal Appearance and
35 Hygiene." None of these specifically prohibit the wearing of pins or other forms of insignia.

7. Analysis and Conclusions Regarding Objectionable Conduct by FJC

40 As noted above, during the critical period, FJC distributed a memorandum to employees stating that its employees may not post, solicit, or distribute literature in the workplace at any time for any purpose. As examples of prohibited behavior, FJC cited, inter alia, the circulation of petitions; the distribution of literature not approved by FJC; and the solicitation of memberships, fees or dues.
45

Such a rule is overbroad in that it expressly prohibits a wide range of protected Section 7

50 ²⁹ In particular, Petitioner cites to testimony that: one employee at a Harlem site was permitted to wear an "SP" pin; that an FJC site supervisor at a 10th Avenue site wore an "SP" pin and a non-company tie clip; that "American Flag" and "SP" pins have been worn at the Metrotech Center site and that a unit employee wears a tie clip with writing on it at a work site located on Thornton Street.

conduct, even during non-work times in non-work areas. For the reasons discussed above in connection with Objection Four (regarding the HRA Directive) I find that the FJC no-solicitation rule, distributed to employees during the critical period, shortly prior to the commencement of the election is objectionable. *Freund Baking Co.*, supra; *Pacific Beach Hotel*, supra; see also
 5 *Opryland Hotel*, 323 NLRB 723, 728-729 (1997) (employer may not lawfully require employees to seek prior approval for solicitations).

With regard to the issue of FJC’s prohibition on pins or other insignia, I note that the Board has, with Court approval, long held that the wearing of union buttons or other insignia is
 10 activity that is protected under the Act absent “special circumstances.” *Republic Aviation Corp. v. NLRB*, 324, U.S. 793 (1945). Special circumstances may include the need to maintain production or discipline or insure safety. *Kendall Co.*, 267 NLRB 963, 965 (1983). The Board has also found in some cases that the need to present a general image to the public, under
 15 particular circumstances, may justify a prohibition on wearing of union insignia. *United Parcel Service*, 195 NLRB 441, 449-450 (1972). A rule based upon special circumstances, however, must be narrowly drawn to restrict the wearing of union insignia only in areas or under circumstances which justify the rule. *Sunland Construction Co.*, 307 NLRB 1036 (1992). In these proceedings, FJC offered no evidence to establish such special circumstances. Moreover,
 20 an express prohibition on non-company insignia does not appear in the FJC employee handbook. This suggests that it was issued in response to the deauthorization campaign. See *Longs Drug Store California*, supra. Accordingly, I conclude that the FJC blanket prohibition on wearing unauthorized pins or other insignia is overbroad and constitutes objectionable conduct here. See e.g. *Air 2, LLC*, 341 NLRB 176, 189 (2004).³⁰

25 Accordingly, for the foregoing reasons, I recommend that Petitioner’s Objection Six be sustained.

8. The Excelsior List Objections

30 Objections Seven through Nine concern alleged omissions and inaccuracies regarding the list of eligible voters pursuant to *Excelsior Underwear*, 156 NLRB 1236 (1966) (the *Excelsior* list), which was initially sent to the parties on February 1, as well as various alleged consequences of such omissions and inaccuracies.

35 Objection Seven:

[The Excelsior List] was incomplete and erroneous. These errors, which included omissions of eligible employees, the inclusion of ineligible employees, and incorrect
 40 addresses, were prejudicial to Petitioners in that they prevented Petitioners from communicating with potential voters prior to the commencement of balloting. These

³⁰ I do not agree, however, that Petitioner has met its burden of showing that this ban was objectionable insofar as it was applied in a discriminatory manner. Petitioner has adduced testimony relating to instances where employees were instructed to remove pins indicating support for Local 32BJ.
 45 In addition, however, I found Mack to be a credible witness, with a straightforward demeanor, and credit her testimony that she applied the prohibition on insignia to other sorts of pins as well. I do not find the Employer’s apparent acceptance of tie clips to be evidence of discriminatory enforcement. Further, while Petitioner did adduce testimony of certain instances where employees wore “SP” pins on their collars, such proven instances were few. These proven occasional lapses in enforcement of a generally uniformly applied policy are not sufficient to prove discrimination against the Petitioner that would tend to have an
 50 impact upon the results of the election. See *Hertz Rent-A-Car*, 305 NLRB 487, 488 (1991) (and cases cited therein).

errors also interfered with and, in numerous cases, prevented employees' receipt of mail ballots.

5 It is undisputed that the Excelsior list contained 738 names but omitted the names and addresses of *at least* 120 eligible employees. Even when both Petitioners and AIU notified the Region and the Employer of the number of employees whom they believed were omitted from the Excelsior list, the Employer did not provide information regarding employees' work status until February 14, 2008, less than twenty-four hours before the mail balloting period commenced. Even then, it did not provide any information regarding those employees' addresses.

10 In addition to the omission of eligible employees from the Excelsior list, the Employer improperly included employees on the list who were not active unit employees during the eligibility period, and who had no reasonable expectation of return to the unit. Furthermore, the Employer did not notify the Region or the parties regarding employees whose employment in the unit ended after the January 27, 2008 payroll eligibility period, thereby making them ineligible to vote.

20 Finally, in numerous instances, the Employer either provided incorrect addresses or, as noted above, failed to provide any address at all. The prejudice arising from the list inaccuracies and lack of address information from the Employer was borne almost exclusively by the Petitioners.

25 Further, erroneous addresses delayed and/or impeded many employees' receipt of mail ballot kits. As a result, many voters did not receive ballot kits until the final days of the Mail Balloting Period, and they had little time to vote and return their ballots before the deadline. Other employees never received ballots kits.

30 Objection Eight:

The Region's estimation in the vote tally that there were 915 eligible voters was erroneous. The Region's estimation included at least several dozen ineligible voters and duplications of voters. These errors stemmed in large part from the Employer's failure to provide an accurate Excelsior list and the lack of any updated information from the Employer regarding employees who subsequently became ineligible to vote because their unit placement had ended due to separation or transfer.

40 Objection Nine:

The numerous errors in the Excelsior list and the ensuing confusion regarding the list of eligible voters causes several employees' exclusion from the election altogether because they were not included in the Region's list of voters to whom ballots were sent.

9. Evidence in Support of the *Excelsior* List Objections

45 As noted above, the Region sent the *Excelsior* list to the parties on February 1. At that time, the list contained 738 names and addresses. As the evidence adduced at the hearing showed, there were approximately 841 employees employed in the unit and on the Employer's certified payroll during the week ending January 27, which was determined to be the voter eligibility date. Thus, there was a greater than 100-person discrepancy between the number of employees apparently employed in the unit as of the eligibility date and those named in the *Excelsior* list initially submitted to the Region.

On February 6, Petitioner’s counsel wrote to the Region and the other parties and provided the names and addresses of approximately 90 employees whom Petitioner believed had been omitted from the *Excelsior* list. Petitioner requested that FJC confirm the omitted employees’ eligibility and to provide their current address. Thereafter, on February 8, Petitioner wrote again to the Region listing seventy-four names included on the *Excelsior* list, which the Petitioner asserted it was unable to confirm as unit employees. Petitioner requested that FJC establish these voters’ eligibility by showing date of hire and work location and to provide confirmation that the employee was active during the relevant period.

On February 12, counsel for AIU sent an e-mail to the Region and the other parties enclosing a list of 157 employees whom it claimed had been omitted from the *Excelsior* list. AIU included the addresses of all but five employees.

Thereafter, on February 14, FJC sent a communication to the Region and the other parties, confirming that 60 of the 90 employees on Petitioner’s February 6 list and 118 of the 157 employees on the AIU’s February 12 list were eligible voters. In sum, accounting for duplication of names in the Petitioner’s and AIU’s lists, it appears that approximately 120 eligible voters had been omitted from the initial *Excelsior* List, and that these employees were largely employed in the classifications of shift supervisors and fire safety directors.³¹ Approximately 118 of these employees were thereafter included on a revised *Excelsior* list and sent mail ballots.

10. Analysis and Conclusions Regarding Excelsior List Objections

The AIU argues that any initial confusion regarding the *Excelsior* list does not warrant setting aside the election. The AIU argues that the Employer acted in good faith with the Region and the other parties to arrive at an accurate and complete list. The AIU further argues that many of the employees on the February 6 list submitted by the Petitioner were, in fact, not eligible to vote, and Petitioner thereby added to the confusion through the submission of their names. The AIU contends that the number of inaccuracies in the voter list is small. Crediting the Petitioner’s claim that only 841 employees were eligible to vote (based upon the certified payroll for the week ending January 27) the mistake rate would amount to approximately eight percent. In this regard, the AIU argues that to the extent the list was over-inclusive it presented the potential for much less prejudice to any party than if the list were under-inclusive and omitted employees. Finally, the AIU contends that even if there were only 841 eligible voters, rather than 915, the margin of defeat for Petitioner was still “overwhelming.”

Under the Board’s *Excelsior* rule, an employer must file with the Regional Director an election eligibility list containing the names and addresses of all eligible voters within seven days after approval by the Regional Director of an election agreement or after a Direction of Election and no extension of time is granted except in extraordinary circumstances. *Excelsior Underwear*, supra. The Board has made clear that the *Excelsior* requirement applies to all elections. *Alcohol & Drug Dependency Services*, 326 NLRB 519, 520 fn. 8 (1998). It is true, as

³¹ According to Petitioner, a comparison of FJC’s certified payroll for January 27 with the list it later submitted to the Region shows that an additional five eligible voters were omitted from the *Excelsior* list. In addition, Petitioner contends that certain employees who were initially on the Petitioner and AIU lists had left employment by the time of the election, and were therefore ineligible to vote. Further, according to Petitioner, there are approximately 25 employees who were on the initial *Excelsior* list who do not appear to have been employed during the relevant period. These employees did not vote in the election.

the AIU asserts, that the Board has stated that it does not apply the *Excelsior* rule mechanically, *Teletonic Instruments*, 173 NLRB 588, 589 (1968). It is also the case that the Board has held, “it is extremely important that the information in the *Excelsior* list be not only timely but complete and accurate. . . .” *Mod Interiors*, 324 NLRB 164 (1997). The *Excelsior* rule is not intended to
 5 test employer good faith or “level the playing field” but to achieve important statutory goals by ensuring that all employees are fully informed about the arguments concerning representation and can freely and fully exercise their Section 7 rights. *Id.*; *North Macon Health Care Facility*, 315 NLRB 359, 360-361 (1994).

10 The AIU argues that this is not an instance where a small group of employee petitioners attempting to communicate with a large membership had a particular need for a flawless eligibility list to communicate with voters. Rather, Local 32BJ had been attempting to organize the unit for over one year, and brought the full weight of its organization to bear on the election. However, as the Board has held, the issue of actual access to employees is irrelevant to the
 15 application of the *Excelsior* rule. *Mod Interiors*, *supra* at 164. In this regard, the Board has long held that to look beyond the issue of substantial compliance and into the additional issue of whether employees were actually informed about election issues would “spawn an administrative monstrosity.” *Sonfarrel, Inc.*, 188 NLRB 969, 970 (1971). The Board has also held that an ability to communicate with employees by means other than the eligibility list does
 20 not govern the determination of whether an employer has substantially complied with its *Excelsior* obligations. *Thrifty Auto Parts*, 295 NLRB 1118 (1989).

In *Woodman’s Food Market*, 332 NLRB 503 (2000), the Board set aside an election where the *Excelsior* list omitted the names of 6.8 percent of eligible voters. The Board noted
 25 that it has consistently viewed the omission of names from the eligibility list as a serious matter because a party that is unaware of an employee’s name suffers an obvious and pronounced disadvantage in communicating with that person by any means. 332 NLRB at 504. ³² Thus, the harm from omissions is sufficiently great to warrant an approach which encourages a conscientious effort by employers to comply with *Excelsior* requirements. *Id.* (citing *Thrifty Auto*
 30 *Parts*, *supra.*) ³³ *Id.* Here, based upon the submissions of the parties to the Region in the pre-election period, it appears that the names of approximately 120 eligible voters were initially omitted from the list submitted to the Region.

In *Alcohol and Drug Dependency Services*, *supra*, the Board addressed the issue of the
 35 timeliness of the list. In that case, the Board held that an election be set aside when the union, as a result of errors committed by the regional office, did not receive the *Excelsior* list until five days before the election. The Board rejected the employer’s argument that the union needed to provide specific evidence that it was prejudiced by the late receipt of the list.³⁴ In that case, the Board also relied upon the fact that unit employees were dispersed over five locations, the unit
 40 was relatively large and the vote was extremely close.

³² In that case, the Board announced that it would not look solely at the percentage of omissions from the list but would consider other factors including whether the number of omissions could be
 45 determinative as well as the employer’s explanation for the omissions.

³³ In this regard, *Women in Crisis Counseling*, 312 NLRB 589 (1993), and other cases relied upon by the AIU, are distinguishable. In those cases, the errors in the *Excelsior* lists stemmed primarily from inaccurate addresses rather than the complete omission of names and addresses, as is the case here.

³⁴ See also *Auntie Anne’s*, 323 NLRB 669 (1997) (Due to the ‘prophylactic’ nature of the requirement, evidence of employer bad faith or a showing of actual prejudice to a union is unnecessary,
 50 in light of a preference for a “strict rule that encourages conscientious efforts to comply,” quoting *North Macon Health Care Facility*, *supra*, at 361).

Here, the Employer did not submit a revised list until the very last moment prior to the commencement of the balloting period.³⁵ The unit is very large and widely dispersed. It is the case, as the AIU asserts, that the Petitioner failed to prevail in the election by a significant margin of votes. Nevertheless, the fact remains that the number of voters omitted from the *Excelsior* list was also quite substantial, and while it may not be possible to state with certainty that the number of omissions would have compromised the Petitioner's ability to communicate with a determinative number of voters, I do not find this factor, under the circumstances here, to be dispositive. In sum, I find that the initial omission of approximately 120 of approximately 915 (or quite possibly fewer) voters, coupled with the last-minute confirmation that these were, in fact, eligible voters, interfered with the manifest purpose behind the *Excelsior* rule.³⁶

Accordingly I find that this non-compliance with the *Excelsior* requirements had a reasonable tendency to interfere in the election and I recommend that Petitioner's Objection Seven be sustained.

In Objection Eight, Petitioner alleges that the Region overestimated the number of eligible voters. In its brief, Petitioner acknowledges that, "it is impossible to determine exactly how many voters were improperly included on the Region's Voter List because of spelling variations and name inversions between the employer's payroll documents, the parties' respective lists and the dues remittances." I agree. Petitioner identified the names of 25 employees that it asserts were improperly included on the *Excelsior* list. If that is the case, then this number would not be sufficient to affect the results of the election. This is particularly so inasmuch as Petitioner acknowledges that none of these employees voted in the election.³⁷

In Objection Nine, Petitioner asserts that employees were excluded from the election, and names five such employees, basing its findings on the fact that they were on the Employer's January 27 payroll. Again, this small number of exclusions, while clearly unfortunate, is not substantial enough to have had an impact on the election results. In any event, to the extent Petitioner is predicating its arguments with regard to Objections Eight and Nine on the failure of the Employer to submit an accurate and timely *Excelsior* list, I have determined that there was non-compliance with the *Excelsior* requirement, and any additional findings in this regard would be duplicative.

Accordingly, I recommend that Objections Eight and Nine be overruled.

³⁵ I note that the Board's policy, as set forth in Section 11302.1 of its Casehandling Manual, an election may not be held sooner than 10 days after the Regional Director has received the *Excelsior List*, see *Mod Interiors*, supra.

³⁶ I further note that the Employer has proffered no explanation for the apparent discrepancy between its certified payroll of January 27 and the list it supplied to the Region; for any other alleged omissions from the list or, for that matter, its apparent delay in responding to Petitioner and the AIU's concerns with regard thereto.

³⁷ Had such employees actually voted in the election, the issue of their eligibility would have been appropriately addressed through the Board's challenge procedure.

Recommendations

I have recommended that Objections Four, Six and Seven be sustained. Accordingly, I also recommend that the election be overturned. The case is remanded to the Regional
5 Director, Region 2 to hold a new election at a time and under circumstances deemed appropriate. The notice for the new election shall include a statement of the reason for the second election. See *Fieldcrest Cannon, Inc.*, 327 NLRB 109, 110 (1998).³⁸

10 Dated, Washington, D.C. September 23, 2008

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Mindy E. Landow
Administrative Law Judge

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³⁸ Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, Exceptions to this Report may be filed with the Board in Washington, DC within 14 days from the date of issuance of this Report and recommendations. Exceptions must be received by the Board in Washington by October 7, 2008.