

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
SAN FRANCISCO, CALIFORNIA

**MANDALAY CORP., d/b/a MANDALAY BAY  
RESORT & CASINO**

**Employer**

and

Case 28–RC–6596

**INTERNATIONAL UNION, SECURITY, POLICE AND  
FIRE PROFESSIONALS OF AMERICA (SPFPA)**

**Petitioner**

**Joel C. Schochet**, Las Vegas, Nevada, for the Regional  
Director

**Scott A. Brooks**, of **Gregory, Moore, Jeakle, Heinen &  
Brooks**, Detroit, Michigan, for the Petitioner

**Harriet A. Lipkin** and **Dianne R. LaRocca** of **DLA Piper  
US, LLP**, Washington, D.C., for the Employer

**REPORT ON OBJECTIONS**

On April 17, 2008,<sup>1</sup> the Petitioner, International Union, Security, Police and Fire Professionals of America (SPFPA), filed a representation petition with Region 28 of the National Labor Relations Board seeking an election in a unit of security officers and guards at the employer's resort and casino located in Las Vegas, Nevada. After a hearing conducted on April 29, the Regional Director issued a Decision and Direction of Election on May 16.

The Director concluded that the appropriate unit was:

All full-time and regular part-time security officers, field training officers, and investigators employed by Mandalay Corp., d.b.a. Mandalay Bay Resort & Casino, a Nevada corporation [employed at its] hotel and casino at 3950 Las Vegas Boulevard South, Las Vegas, Nevada; but excluding all other employees, office clerical employees, professional employees, managers and supervisors as defined in the Act.

An election was conducted on June 13. The tally of ballots shows the following:

---

<sup>1</sup> All dates are 2008 unless otherwise indicated.

	Approximate number of eligible voters .....	269
	Number of void ballots .....	0
	Number of votes cast for Petitioner .....	110
	Number of votes cast against participating labor organization .....	123
5	Number of valid votes counted .....	233
	Number of challenged ballots .....	4
	Number of valid votes counted plus challenged ballots .....	237

The four challenged ballots were insufficient to affect the outcome of the election.

10 On June 20 the Petitioner filed nineteen objections to conduct affecting the outcome of the election, requesting that the results be set aside and the a election held. Several of the objections concerned conduct of the Board Agent who supervised the election, including an allegation that the Board Agent had left the polling place for a few minutes to go to the restroom, taking the unsealed ballot box and unmarked ballots with him. On July 8 the Director issued an order to show cause concerning this incident and, on July 17, after he had received the parties' responses, ordered a hearing on the objections. I conducted the hearing on July 30 in Las Vegas. After an extension, briefs were filed on September 3. On August 29, Petitioner's Counsel notified the parties that Petitioner was withdrawing Objections 6-11 and 17.

20 As a result of the withdrawal of seven of the objections, twelve remain. These may be divided into two groups: the first concerns allegations directed toward the Board Agent's supervision of the election itself; the second involves six incidents alleged to have affected the outcome of the election. The last is a conclusory allegation which need not be directly addressed.

25 All parties have filed timely briefs which have been carefully considered. The brief filed by counsel for the Director addresses only the issue of Board Agent misconduct. I shall begin with those issues.

30 **Board Agent Misconduct Allegations**

The petitioner's allegations are as follows:

- 35 1. The Board Agent refused to permit the Union's observer to wear a SPFPA button.
2. The Board Agent threatened to use force to remove the Union's observer's SPFPA button.
3. The Board Agent failed to secure properly the ballot box after the first voting session.
- 40 4. The Board Agent left the voting area during a voting session with the open ballot box and blank ballots with him.
- 45 5. The Board Agent's various actions on the election day individually and collectively improperly interfered with the conditions necessary for fair election.

There are three factually different areas to explore here. The first relates to what occurred during the pre-election conference concerning the so-called button. The second concerns the way the Board Agent taped the ballot box. The third focuses on the Board Agent's handling of the ballot box during the second session when he found it necessary to go to the restroom.

### A. The pre-election conference

The pre-election conference was conducted by the Board Agent at approximately 4:30 a.m. on June 13. The attendees were the Board Agent, the employer's attorney, Paul Ades, the Union's international organizing director, Steve Maritas, and two observers, Barry Gropp for the Union and an individual named Hank (last name unknown) for the Employer.

Gropp was not wearing a button, but a Union sticker. Given to him by Maritas, it measured two inches by six inches, and said "YES" in large letters. Ades objected to it being worn during the polling as prohibited electioneering. The Board Agent, Maritas and Ades then had a discussion concerning the right of an observer to wear such a sticker.

The Board Agent consulted his manual<sup>2</sup> and said that while such a sticker was not prohibited, they were discouraged. In this regard, it would appear that the Board Agent was referring to the paragraph regarding insignia to be worn by observers. It states in pertinent part:

**11326.1 Insignia Worn by Observers** -- It is required that all observers wear the official observer badge. It is preferred, but not required, that they wear no other insignia (Secs. 11310.4 and 11318.1)....

I note first that the sticker which Gropp had been given was not "an insignia" as that term is generally understood. An insignia is a distinguishing badge of some sort, usually containing a union logo or shield. They can often be seen on lapel pins, jackets, pocket protectors and the like. Often the lettering is limited to the union's initials. Petitioner's own insignia, taken from its website, looks like this:



An insignia such as this presents no problems within the meaning of the manual.<sup>3</sup> The Employer's concern was not aimed at a small insignia such as this. It was instead aimed at a sticker urging voters appearing at the polls to vote in favor of union representation. The word YES was a partisan message – electioneering – not an individual's identification with an institution. Indeed, the Board requires such identification by virtue of its official observer buttons. Each of those announces that the individual wearing the official observer button is both a representative of the party named on the button but is also to perform official duties in connection with the election itself. A party's official insignia on a pin or other item is not inconsistent with the R-Case Manual's identification requirement.

Other paragraphs of the manual also concerned the Board Agent. For example, there is a rule specifically prohibiting official observers from engaging in electioneering. See the section prohibiting observers from electioneering, 11326.2, which states:

<sup>2</sup> The manual itself, known as the R–Casehandling Manual, can be reviewed on the internet at this URL: [http://www.nlr.gov/publications/manuals/r\\_-\\_casehandling\\_manual\\_\(II\).aspx](http://www.nlr.gov/publications/manuals/r_-_casehandling_manual_(II).aspx). It is generally referred to as the "R-Case Manual." "R" case is a docket shorthand for a "representation case"; the R-Case manual therefore describes the guidelines to be followed by Regional Office personnel when processing representation cases such as this one.

<sup>3</sup> Nor would a larger version such as those often stenciled or embroidered on an article of clothing.

5 Election observers may not electioneer during their hours of observer duty, whether at or away from the polling place. In order to remove any possibilities of electioneering, an observer away from the polling place for any reason during his/her duty hours should be accompanied by observers representing the other parties. Observers should not be permitted to engage in unnecessary conversation with incoming voters.

And, the Board Agent specifically referenced that paragraph in his testimony.

10 Nevertheless, Maritas insisted that a Board decision, *Pillsbury Co. (Larkwood Farms)*, 178 NLRB 226 (1969) gave the Union the right to direct its observer to wear such a sticker. He also says he asserted that the employer could file objections to it later. Eventually, the Board Agent took Maritas's personal copy of the decision, while also saying he was unfamiliar with it. He placed it in his case file where it remained until this hearing. <sup>4</sup> As instructed by yet another  
15 provision in the manual, Paragraph 11326.4, the Board Agent also made some notes about the claim of electioneering and other contentions made by Ades and Maritas. He later typed them and put them in the case file as well. <sup>5</sup>

20 There is no credible evidence that the Board Agent threatened to use force to remove the sticker from the petitioner's observer's person. The observer, Gropp, testified only that the Board Agent instructed him to remove it and he did so. At no point does Gropp contend that force was threatened. Furthermore, the Board Agent credibly denied making such a statement. The only testimony in support is that of Maritas who said:

25 [Witness MARITAS] ...[The Board Agent] said that the button -- the sticker had to be removed. I objected once again and, at that point, [the Board Agent] said that, if your observer does not remove that button or the sticker, that, when I left the room, he would remove it from my observer.

Q [By MR. BROOKS] Okay. So what happened then?

30 A At which point I objected and I said, well, you know, based on that, you know, I took it off my observer.

35 Gropp does not corroborate Maritas's version. Gropp said that the Board Agent simply asked him to remove the sticker and, after some discussion, he complied. He does not agree with Maritas that Maritas removed it. The Board Agent, of course, said he only asked that the sticker be removed, noting that it might constitute objectionable conduct; he thereafter consulted the manual and a discussion about the applicability of the manual ensued.

### B. Objections Pertaining to the Election

40 The first election period was between 5 a.m. and 10 a.m. At the end of the first session the Board Agent secured the box by taping over the ballot deposit slot. The observers signed the tape and elsewhere on the box.

45 \_\_\_\_\_

<sup>4</sup> Maritas testified that the Board Agent did not accept his proffer of a copy of the case. Clearly his testimony is incorrect.

<sup>5</sup> The notes are not fully understandable by anyone other than the Board Agent who considered them a memory aid. He describes them as 'graduate school' type notes – meaning they are significantly abbreviated. They are not verbatim of anything, but were intended only to jog his memory in the event they needed to be expanded for an internal report.

5 It is here where Petitioner's objection that the Board Agent failed to properly secure the ballot box is focused. Maritas gave some unusual testimony on the point. It should be noted first that before the polls opened, the Board Agent, with the observers watching, had taken the corrugated cardboard box, then in an unused knocked-down/flat state, opened it, demonstrated that it was empty and then folded the flaps, taped the edges with plastic shipping tape and later placed it in the polling area to be used by the voters. One side has a precut slot through which the ballots are to be dropped.

10 At the end of the first polling session, according to Maritas, the Board Agent did two things: first, he allowed Maritas to review the voting eligibility list and he determined that 125 employees had voted; second, he says he observed that the ballot box was not properly sealed. He testified that ballots were escaping from the sides. He says he picked up the box in order to investigate further and five or six ballots began to fall out so he pushed them back inside. He went on to contend that he complained to the Board Agent about the state of the box, but the Board Agent was resistant, asserting that the edges were properly closed and, besides, he did not have any more tape. Maritas says in response he asked the Board Agent to request the Employer to provide some additional tape. Maritas says that the Board Agent continued to refuse to make any correction, again asserting that the box was "sealed fine."

20 On its face, there is much that does not compute regarding Maritas's testimony. First, Maritas says the Board Agent permitted him to review the voter eligibility list used by both him and the observers and he determined that about 125 voters had cast ballots. If that is the case, it would be a highly unusual circumstance, as Board agents are instructed not to permit anyone to monitor that list during the election. But Maritas went on to say that of the roughly one thousand elections he has attended, Board agents have permitted him to do so it half the time. Frankly, his testimony is highly suspect. While I think it within the realm of probability that one or two board agents, perhaps inexperienced, might have permitted him to do that, the rest would not. The integrity of the election mechanics is a high priority with the Agency and board agents, usually field examiners but sometimes field attorneys, know they have been charged with disallowing any non Board person to have direct contact with any of the election equipment and paperwork. Allowing individuals to handle the election eligibility list would risk that the individual could make checkmarks on the list and deprive an employee entitled to vote from exercising that right. In my view a board agent who permitted an outsider to handle that material would be a rarity. Indeed, it is likely that such misconduct would put his job in jeopardy.

35 Similarly, Maritas's testimony concerning a leaky ballot box also seems unlikely. The ballot box itself is in evidence as Employer Exhibit 1. My review of the ballot box does not suggest that any ballots could have actually fallen from it. The Board Agent does concede that corners/and or edges of ballots could be seen in the cracks between the tape and the box corners. When he shook the box, they disappeared into the interior. When I examined the box, I was unable to see how any ballot could have completely exited the box. I accept that somehow a ballot managed to insert itself in one of the cracks. Nevertheless, simple measurement demonstrates that it could not have been removed. Those ballots were usually folded in half so they would fit through the voting slot; even so they could not have passed through the cracks between the tape and the edge of the box.

The Board Agent also testified strongly and sensibly about the manner in which he dealt with the issue.

Q [By MS. LIPKIN:] As a Board Agent if you had observed [Maritas] lift the ballot box what would have been your response?

A [Witness BOARD AGENT] Stop him.

Q And why is that?

A Because the Board Agent -- we're in charge of this ballot box. This is very important to us and so at that point I would have told him no, let me -- let me secure it. Let me handle it, etc. The only thing [I've] allowed the representatives to do is to sign on top of the insert or  
5 around it. As you can see there's -- about maybe 15 different signatures are all around it, so people were very satisfied about that.

[Stoppage deleted]

Q BY MS. LIPKIN: Did Steve Maritas, the union representative, push ballots back into the  
10 ballot box?

A No.

Among other things, the Board Agent's testimony here gives the lie to Maritas's claim that he picked up the ballot box to examine it and saw five or six ballots slipping out. Not only is that scenario unlikely given the Board Agent's control of the polling place, it demonstrates that  
15 Maritas is more interested in the outcome of the election than he is over providing objective evidence concerning what actually happened in the polling place. The Board Agent's testimony as a whole concerning this incident comports with both common sense, his duty and his sense of responsibility. He would not have permitted anyone other than himself to handle the box. In addition, this kind of behavior by Maritas also casts doubt on his veracity generally. It certainly  
20 affects his testimony concerning the sticker episode, discussed above.

After securing the box, the Board Agent took the box to his automobile and returned to the Las Vegas Resident Office where the box was placed in a secure location. (I think it is fair to observe that the Board's resident office in Las Vegas is itself secure as nonemployees must  
25 gain entry through a locked door by permission of the receptionist or other Board employee.) That afternoon, the Board Agent retrieved it and brought it back to the polling place where the parties' representatives and observers examined it. There is no contention that the box was in a condition any different than it had been when it left the polling place in the hands of the Board Agent.

During afternoon session, which lasted from 3 p.m. to 8 p.m., none of the individuals having responsibility for the conduct of the election was able to stave off the need to go to the  
30 restroom. This 5-hour session was simply too long for either of the two observers or for the Board Agent -- all of them absented themselves from the polling place at least once for several moments to use the restroom which is located adjacent to this training room which served as  
35 the polling place. Although when the two observers left the polling place to use the bathroom, they did not leave simultaneously. One observer remained behind with Board Agent to secure the ballot box. There is no evidence concerning whether or not employees voted during the absence of either observer.

The Board Agent acknowledges that at some point he, too, needed to use the restroom. He took the ballot box with him and used a private stall. He also acknowledges that he took the  
40 blank ballots with him and he chose not to reseal the voting slot on the box. He says he was only gone for about 5 minutes.

The number of votes cast, as shown by the tally, is the same number of votes that were counted.<sup>6</sup> Thus, the tally shows that there were 233 ballots counted and that number matches  
45 the number of eligible employees whose names were checked off the eligibility list as they

---

<sup>6</sup> The challenged ballots had been segregated in challenge envelopes. They were not counted as they did not affect the outcome of the election. They are not of consideration here.

voted. There were no extra ballots in the box.

Despite the fact that there were no irregularities in the tally, the Petitioner nonetheless argues that the Board Agent's handling of the box raises sufficient questions concerning the integrity of the election as to warrant setting it aside and rerunning it.

As I review the evidence, I am unable to find merit in any of the Petitioner's objections concerning the Board Agent's conduct as he performed his duties.

#### Analysis Concerning the Conduct of the Board Agent

It should be clearly understood that any Board Agent conducting a Board election is obligated to maintain order both at the pre-election conference and at the polling place proper. He has the power to exclude disruptive persons and to prevent any activity which would affect the integrity of the process. In this regard, the most common behavior which would likely require Board Agent intervention would be electioneering. Casting a representation vote can be one of the more important decisions an employee ever has the opportunity to make. It is in that light that the Board takes seriously its obligation to conduct fair elections and to provide an atmosphere conducive to allowing each employee to make his or her decision without outside interference. The polling place must be free of any partisan influence which might influence a voter. It is the board agent's job to assure that atmosphere.

The Board's *Milchem*<sup>7</sup> decision is a good example of the steps the Board will take the guarantee that employees have the freedom to make their choice without any outside efforts to manipulate them during the voting process. In that case a union official stood for several minutes near the line of employees waiting to vote, engaging them in a conversation. The union official contended that the conversations were innocuous and about matters unrelated to the election. Nevertheless, the Board found "the sustained conversation with prospective voters waiting to cast their ballots, regardless of the content of the remarks exchanged, constitutes conduct which, in itself, necessitates a second election."

Indeed, the courts have parsed *Milchem* in such a manner as to protect voters who are not yet in the polling area, but clearly in line to vote. The effort to create an influence-free zone prior to casting a ballot is recognized as an extremely important part of the process. It started with *Milchem*, ("[t]he final minutes before an employee casts his vote should be his own, as free from interference as possible," *Milchem*, 170 NLRB at 362), and has now become ingrained by the courts. E.g., *Robert's Tours, Inc. v. NLRB*, 578 F.2d 242, 244 (9th Cir.1978) ("... the purpose of the rule against electioneering at the polling place while voting is in progress is to permit voting to take place in an atmosphere permitting sober reflection and calm deliberation.")

The courts, in fact, are extremely protective of employees who are poised to vote. In *NLRB v. Carroll Contracting and Ready-Mix, Inc.*, 636 F.2d 111 (5<sup>th</sup> Cir. 1981) the Fifth Circuit refused to enforce a certification of representative where two former employees (not affiliated with any party) wearing sample ballots marked "yes" pinned to their clothing, passively urged voters standing in line to vote yes so they could get their jobs back. The court, citing *Milchem*, found the behavior to be improper electioneering. Other courts have agreed. See *Season-All Industries, Inc. v. NLRB*, 654 F.2d 932 (3d Cir. 1981) and *M & M Supermarkets, Inc. v. NLRB*,

<sup>7</sup> *Milchem, Inc.*, 170 NLRB 362 (1968).

818 F.2d 1567 (11th Cir. 1987).<sup>8</sup>

5 It is obvious that it is to the best interests of everyone, the petitioner, the employer and the Board to try to run every election in a manner which is free of objectionable behavior so that a second election based on those grounds need not be directed. Indeed, truly disruptive  
 10 behavior can lead to criminal prosecutions under §12 of the Act. In this regard, Board agents have been given a great deal of discretion to ensure that voters cast their ballots in an atmosphere free of any outside persuasion. The Board Agent, therefore, has the authority to declare a "no- electioneering" area if the facility cannot provide a closed polling area. And, the  
 15 *Milchem* rule applies to observers as well as party representatives. See *Brinks, Inc.*, 331 NLRB 46 (2000) (where an observer who said to a prospective voter "vote union" and gave him a thumbs-up sign, was found to have engaged in objectionable electioneering.) Also *Monfort, Inc.*, 318 NLRB 209 (1995) ("The observers not only represent their principals but also assist in the conduct of the election.") Therefore, the no-electioneering rule is applied to observers --  
 perhaps even more strongly than to union or management officials, for the observers are charged with official duties to assist the Board Agent and the Board must not be seen as being in any way partisan. Board agents may direct observers to behave themselves in furtherance of that goal.

20 Accordingly, I conclude that the Board Agent not only had the authority, but the duty to respond to the "YES" sticker which had been affixed to observer Gropp's person before he departed for the polls. And, it is quite clear that the Board Agent did not engage in anything remotely approaching a physical threat to remove it. Even if he had physically removed it from Gropp's clothing, it would have been within his discretion to do it so long as it did not cause  
 25 harm to the individual. Of course, here, the Board Agent did nothing more than to request that the sticker be removed. Insignia are acceptable; electioneering is not.

30 As for the allegation that the Board Agent improperly taped the ballot box and permitted ballots to fall from it, the evidence is most insubstantial. First, Maritas is not a credible witness. Among other things he appears to be disgruntled as a sore loser. He both invented and embellished. And, he did so without concern for whether others could corroborate him. One would think that if anything approaching what he contended were true, at the very least, his observer Gropp could have supported him. Yet Gropp was not asked to do so. Moreover,  
 35 Maritas's own testimony was not believable on its face. He claimed that in about 500 elections, board agents had permitted him to review the eligibility list before the polls had closed and he says that he has regularly been permitted to handle the ballot box. Both of these statements are more than simple hyperbole; they are the product of desperation and frustration. I find his testimony to be generally not credible. Therefore, his contention that the Board Agent refused to tape the box further, said he had no more tape, and refused to ask the Company for  
 40 additional tape is in doubt from the get-go. But the Board Agent testified that he had plenty of tape; indeed the roll was stored with the ballot box and he presented both when he testified.

45 Aside from that, however, the physical evidence does not support Maritas. The Board Agent conceded that one could tell the color of the ballot as an edge had been caught in a crack of the box. Yet, a simple examination of the box reveals that no ballot could have fallen from it and no ballot could have been stuffed into the box through the untaped cracks. As the Board

---

<sup>8</sup> The Supreme Court has given tacit approval to these court decisions, suggesting that it is in actuality, a Board rule. See, *Burson v. Freeman*, 504 U.S. 191, 206, n. 9 (1992). If nothing else, *Burson* has noted that all 50 states as well as the Board protect voters from outside influence as they vote.

Agent observed, the box was properly taped. This objection is without merit.

5 The last objection deals with the question of the Board Agent's handling of the ballot box when he took it with him to the restroom. It will be recalled that the afternoon session was 5 hours long and that there was only one Board Agent assigned to run the election. That a restroom break would be required, not only for the Board Agent, but for each of the observers was entirely foreseeable. Perhaps it would have been the better practice had the Regional Director assigned a second Board Agent to the election.

10 Nevertheless, the Board Agent's primary task was to protect the ballot box. The Board Agent did so in what appears to me to be an appropriate way, considering the circumstances. Earlier, he had allowed each of the observers a restroom break, instructing them to go one at a time. That allowed the Board Agent and the other observer to watch the ballot box. When the time came for him to take the restroom break, he took both the box and the packet of blank  
15 ballots with him into a private stall so he could maintain eye contact with it at all times. And, while it is true that he chose not to reseal the voting slot, there is really no showing that he was required to do so. Moreover, it is undisputed that he was only gone for about 5 minutes.

20 Neither of the observers gave any suspicious thought to what had transpired. Indeed, there was no reason to even consider the matter. It was not until Maritas spoke with Petitioner's afternoon observer, Pam Coleman, that he decided to make an issue of it. Coleman did not testify and we do not have the benefit of what she told him. Maritas, as we have already seen, is not a reliable witness. Nonetheless, the Board Agent has described sufficient facts to suggest that Petitioner's concerns are at least worthy of consideration.

25 Even so, there is not really much to consider. The only issue is whether the Board Agent should have resealed the ballot slot. Perhaps he should have, but the question really is whether or not his actions here have undermined the integrity of the voting process. In my opinion, they do not. First, it is his job to maintain possession and eyesight of the ballot box at all times during an election. He did so here. Second, the Board Agent has no dog in the flight. There is no showing that he was in any way biased concerning the outcome of the election. In my opinion, he has demonstrated a professional agnosticism concerning the outcome. He didn't care one way or the other. Third, the ballot box was taped with plastic shipping tape. It is  
30 common knowledge that when such tape is removed from a cardboard box, it tears the surface paper and tampering can easily be seen. An examination of this ballot box demonstrates that no such tape removal had occurred. That is important because, fourth, there is no evidence that any ballot stuffing ever occurred. The number of unchallenged voters checked off on the eligibility sheet was 233. And, there were 233 ballots counted. Any effort to stuff the box would have required the perpetrator to have determined how many ballots had been cast for each  
35 party, withdrawn an appropriate number of votes to change the outcome and substituted false ballots in the proper number. This would have required tearing the packing tape somewhere on the box. There is no evidence on the box that such thing had occurred. Furthermore, the time it would have taken to accomplish such a task would have far exceeded the 5 minutes or so that the Board Agent had the box in his possession and out of view of the observers.

45 Since there is no evidence that the box was ever tampered with, and the number of ballots matched the number of actual voters, I conclude that Petitioner's objection concerning the Board Agent's taking the box with him into the restroom is without merit. See generally *Sawyer Lumber Co.*, 326 NLRB 1331 (1998) where the Board found no reasonable doubt concerning the fairness and validity of the election where the number of individuals who cast ballots equaled the number of individuals checked off on the eligibility list. The cases cited there at 1332 are also applicable here.

The case cited by Petitioner, *Fresenius USA Manufacturing Inc.*, 352 NLRB No. 86 (2008) is easily distinguishable. In that case a colorblind Board Agent may not have been able to distinguish between different colored ballots delineating separate voting units, possibly giving them to incorrect voters; failed to permit the parties to closely view the ballot markings; and later did not show that he secured the ballots at the Board office over the weekend for later viewing. The Board said the culmination of these factors led it to conclude that there was sufficient irregularity to warrant setting the election aside and ordering a rerun, though it did not question the Board Agent's integrity. In this case, there were no irregularities, and not even the appearance of irregularity, despite Petitioner's contention that there were.

Here, this Board Agent has essentially been accused of impropriety for performing the duties expected of him. There simply were no ballot box deviations from standard procedures worthy of complaint nor was his exercise of control over possible polling place electioneering a departure from the norm. This Board Agent handled the election properly and there is no objective reason to conclude otherwise. I recommend that the Objections 1-5 concerning the Board Agent's conduct be overruled. Similarly, Objection 18 should be overruled as well. It differs from the foregoing only in that it asserts the Employer's attorney at the pre-election conference demanded that observer Gropp remove his "YES" sticker. Since the demand was directed to improper electioneering, this objection, like that aimed at the Board Agent concerning the same incident, is without merit.

### **C. Objections Pertaining to Pre-election Conduct by the Employer**

Before proceeding to the specific objections filed by Petitioner, is appropriate to bear in mind certain matters of law against which those facts must be measured. First, in general no objections will be considered unless they have occurred during the pre-election critical period. *Ideal Electric Co.*, 134 NLRB 1275 (1961). Second, the Board's current test for evaluating the conduct of a party in post-election proceedings is an objective one — whether it has "the tendency to interfere with the employees' freedom of choice." *Cambridge Tool & Mfg.*, 316 NLRB 716 (1995). In determining whether the conduct has that tendency, the Board considers nine factors: (1) The number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. See *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004), citing *Taylor Wharton Division Hrasco Corporation*, 336 NLRB 157, 158 (2001), et al.; *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986). I shall endeavor to apply these tests as the discussion of each incident occurs.

#### **Objection 12: The Employer refused to permit Union supporters to wear SPFPA or other union buttons on their uniforms.**

Petitioner's evidence in support of this objection comes from its observer Barry Gropp and security guard Brian Walsh. Gropp was unable to remember when the incident occurred, saying only that it happened the same morning he had attended a union meeting. He had obtained several buttons and had passed them out. Shortly before his daily briefing, shift manager Keith Kramer told him to remove it. There is no testimony concerning the reason Kramer gave for requiring his removal. In addition, there is no testimony that anyone observed Kramer give the direction. Indeed, there is no evidence regarding the breadth of the

dissemination of the instruction.

Walsh says that in the days shortly before the Board election, approximately June 11-13, he wore a button which had a No U-Turn symbol on it. There were no words to accompany the symbol. He testified that at 9:30 a.m. he was at the lost-and-found speaking to a fellow security guard named Carolyn Hardy. Two managers, Glenn Libirio and Will Thompson, approached him. Libirio told him to remove the button. When Walsh hesitated, Thompson insisted, saying they had been "reamed" by George Togliatti (the employer's vice president in charge of security). He went on to ameliorate, saying words to the effect that as supervisors, management was giving them inconsistent signals concerning guards wearing buttons. Walsh removed his No-U-Turn button.

Applying the *Ideal Electric* rule, it is entirely unclear when Kramer told Gropp to remove the union button. It is the Employer's burden to demonstrate that objectionable conduct occurred during the pre-election critical period — which began April 17. Gropp's testimony is entirely inadequate to the point. Beyond that, the incident seems entirely isolated. Even Walsh's testimony suggests that some buttons prior to the election were permitted. Whatever Kramer told Gropp, it does not seem to have become well known by others. In my view, the incident described by Gropp is insufficient to support the objection.

Insofar as Walsh's testimony is concerned, the button he was wearing has not been shown to have been perceived as a union-sponsored button. It is true that Walsh understood the button to mean "Don't back down," but there is no evidence that anyone in management understood that. Indeed, it has not been shown that management knew the No-U-Turn button was aimed at supporting the Petitioner. It was Petitioner's duty to provide such evidence. It did not. Petitioner argues that the employer has shown no rule prohibiting buttons on the guards' uniforms. However, absent a showing that the Employer knew the No-U-Turn button was a union button, it was free to prohibit it or any unprotected button from the uniforms of its security guards.

Accordingly, I conclude that the evidence is insufficient to support this aspect of the objection. Objection 12 should be overruled.

**Objections 13-16, 19: the Employer improperly solicited grievances, changed working conditions, and offered increased benefits in an attempt to improperly influence the outcome of the election**

These objections are a kind of hodgepodge which procedurally were somewhat difficult to follow and which the Employer complains deprived it of due process because it came to the hearing without knowing what the objections truly aimed at. While I am sympathetic in some respects to the Employer's circumstance, I can only point out that this is not an enforcement proceeding under §10 of the Act. Instead, it is an investigation being conducted under § 9 and issues of due process are not cognizable under that section of the Act.

From a purely practical aspect, however, the Employer's position is not without merit. The Regional Director chose not to perform a prehearing investigation where transparently nonmeritorious objections could have been administratively dismissed. As a result, he did not issue a report on objections which could have more properly focused the issues to be presented at this hearing. I do not second-guess his decision, however, considering that the first five objections were aimed at the conduct of his field examiner. From a professionalism point of view, it was best to protect the integrity of the investigation by sending it all to a hearing before an administrative law judge. Nevertheless, it had the effect of permitting evidence to move in

unforeseen directions.

5 As redefined in Petitioner's brief, there is an overarching contention that following the filing of the petition the Employer held an "unprecedented series of meetings. . . In which it solicited employee grievances. . ." and which resulted in approximately four significant changes in the working conditions. These were: a. relaxing the grooming policy; b. offering increased overtime opportunities; c. returning the vacation policy to the more favorable policy which had existed previously; and d. promising to repair a parking lot booth where some bargaining unit employees were stationed. I shall take each of these issues in order. By way of limited record background, it appears that the Employer became a part of MGM Mirage sometime in 2005. It is against that background that the events described below occurred.

15 The Grooming Policy Petitioner's evidence on this issue comes principally from Gropp. Routinely, prior to each shift there is a preshift briefing during which daily assignments are issued and items deemed newsworthy to the guards are read or discussed. Gropp worked on the graveyard shift so his preshift meetings took place in the late evenings.

20 When Gropp was asked about the grooming policy he was not given the opportunity to testify in a direct manner concerning dates and the discussions he would describe. Instead, counsel led him, without objection:

Q BY MR. BROOKS: Prior to the filing of the petition, in the security department, did the Employer have a grooming policy with respect to facial hair?

A [Witness GROPP] Yes, sir, it did.

25 Q And can you tell us what that pre-petition grooming policy was?

A Yeah. No facial hair, other than mustaches and the mustaches had to -- couldn't be great big ones like I have and they had to end at the lip line, the corners of the mouth. No other facial hair. And, also, haircuts couldn't be over the ear or reach the collar and you couldn't have shaved heads.

30 \* \* \*

Q After the union filed the petition on April 17th, 2008, were any changes communicated to you with respect to the grooming policy?

35 A Yes. We were told that the grooming policy for us which in the past had been more strict [than] for other employees not in security was the same as all other employees in the -- in the resort and we could have facial hair.

Q And now when was this communicated to you?

40 A After we started to organize the union. I don't remember when, the date. I don't remember when it was.

45 Frankly, the leading seen in the first part of the quote must be mistrusted. Gropp was far from an ideal witness in terms of his recall of events and may have been unable to provide a foundation for his testimony, causing counsel to resort to leading. Yet what this testimony leads to is uncertainty, for it is internally inconsistent. The only thing Gropp was certain about was that the changed grooming policy was announced sometime after the employees began to organize a union. That leaves an unclear time frame. Obviously, union organizing began weeks, if not months, before the petition was filed on April 17 and would continue thereafter all the way to the election date in June. Therefore, it cannot be determined with any certainty from his testimony whether the change occurred during the pre-election critical period. Based on that uncertainty, I cannot conclude that his evidence is sufficient to make a finding that the change

did occur during the pre-election critical period.

Walsh's testimony was only a little better. He gave testimony regarding the timing, yet he had to correct himself at least twice. He first stated that the employee meetings in which the Employer solicited grievances occurred in March. He then corrected himself to say they occurred before the petition was filed in mid-April. On the third try, he decided that most of it happened in April after the filing of the petition – finally supplying a date within the pre-election critical period. In addition, he too, had the benefit of some leading by counsel:

5

10

Q [By Mr. BROOKS] Okay. Now I'm going to ask you some questions with respect to the grooming policy that applies to security officers at the facility and, first, I'd like to ask you questions about the policy that was in effect prior to the union's petition being filed in, say, mid-April, 2008. Are you familiar with what policy was in effect then with respect to grooming?

15

A [Witness WALSH] Yes.

20

I do think it is fair to say that Walsh's testimony regarding the facial hair issue and the time it occurred is somewhat more persuasive than Gropp's. Gropp was most hazy on details; there were simply too many things that he did not know, but should have, including the nature of the official observer button which he had been given. Nevertheless, on balance I am unable to conclude that Walsh's testimony is a significantly better quality than Gropp's. One correction is understandable; two suggests tailoring. As with Gropp, I find that Walsh's testimony is insufficiently precise to ensure that he was testifying about incidents occurring after April 17. Therefore, I find that the grooming change issue has not been shown to have occurred during the pre-election critical period.

25

30

However, even on the merits, there is doubt about the validity of this of this objection. Assuming that Mandalay Bay had a strict grooming code prior to the 2005 takeover by MGM Mirage, and assuming that the code was relaxed in early 2008, there does not seem to be any nexus to the election process. For the grant to have been a benefit intended to influence employees in the manner in which they would vote, Petitioner must show, under *Cedars-Sinai Medical Center*, supra, "a tendency to interfere with the employees' freedom of choice." Frankly, I am at a loss to see how such relaxation could do so. Personal preferences concerning the nature of one's mustache or beard, or the length of one's hair hardly seem the basis for influencing the outcome of a union representation election. Indeed, Gropp himself had been sporting a "great big" mustache beyond the rules for over 40 years, the last 8 of which had been with the Employer. It is hard to see how the change realistically had any impact on individuals like him. Connecting it to the Union's appearance on the scene seems to be a stretch.

35

40

All in all, the evidence presented in support of this aspect of the Objections is unimpressive. I recommend that this portion be overruled.

45

Offering Increased Overtime Opportunities According to Gropp, over the years overtime had been allocated to full-time security guards through the use of sign-up sheets. This system had apparently been in use since before the MGM Mirage takeover. The full-time security guards could review the sheets for upcoming shifts and sign their names to shifts which needed coverage. He said that in January 2008 the employer decided to reduce overtime by hiring part-time security guards and assigning them to what had previously been overtime opportunities for the full-time guards. The overtime sheets disappeared. Unsurprisingly, this met with resentment from the full-time staff. According to Gropp the complaints began almost immediately during the shift briefings. He specifically remembers guards Brett Humphries, Pam

Coleman and Barbara Shein making such complaints and at just about every shift briefing thereafter. At some point, apparently in June as the election neared, the matter came to some sort of head, although no specific date has been described. Gropp recalled a morning meeting he attended which had been scheduled after his shift ended. It was conducted by the  
 5 Employer's CEO, Bill Hornbuckle and Executive Vice President Chuck Bowling together with the regular complement of shift managers and other supervisors. Gropp remembers Hornbuckle saying "it was a failed strategy to bring in a large number of part-time officers and it was being addressed and looked at." Gropp could not remember anything else that Hornbuckle said about the issue. In another meeting a short time later, Bowling repeated Hornbuckle's remark, again  
 10 not amplifying it any further. Nevertheless, a short time later, the previous system resumed. Curiously, it is not clear from the testimony that the system resumed before the election. Aside from timing, there is no evidence that any manager connected the resumed overtime system to the pending election. And, as noted, the testimony does not clearly say that the change occurred before the election, only that the statements were made before the election.

15 It is difficult to characterize the statements made by Hornbuckle and Bowling, and some additional statements to the effect that they "had made mistakes," as implied promises to grant the benefit of resuming overtime to influence the outcome of the election. In some respects, again taking the timing into account, one might reach that conclusion. Absent more, however,  
 20 to do so here would be a reach. Petitioner needed to adduce more than mere suspicion. It did not do so. Accordingly, I recommend that this aspect of the Objections be overruled.

Returning to a Previous Vacation Policy Again, Gropp was the principal source for the claim that the Employer reverted to an earlier vacation plan which was more generous than the  
 25 one which had come into being after MGM Mirage took over the resort. The leading continued, yet Gropp said this:

Q [By Mr. BROOKS] Let's shift gears and talk about vacations and vacation accrual within the bargaining unit. Before the union petition was filed, were there any recent changes that  
 30 management had made with respect to the vacation accrual policy in the security department?

A [Witness GROPP] Yes. I had been told by various officers that I worked with that the vacations had been changed. They had asked me how many weeks I was getting and when  
 35 I started getting them. I was always getting three weeks vacation because I had seven years there and they told me that they were now not going to get three weeks until ten years and there were a lot of people who were upset because the vacation policy had been changed.

Gropp is clearly relying on information he had received, not from management, but from  
 40 his fellow security guards. His statement: "I had been told by various officers that I worked with. . . ," rather than being made aware of information coming from a responsible Employer source, such as the human resources department or his own supervisor, highlights the weakness of his testimony. Frankly, I am unpersuaded that he knew whether his vacation  
 45 benefits had been changed. Keep in mind that MGM Mirage appears to have taken over the operation almost three years earlier in 2005. Surely Gropp would have had actual experience with any new vacation policy during that period of time.

Whatever the state of his knowledge was at the time the election was pending, Gropp then gave some testimony which rather clearly demonstrates that no such change had ever been applied to the members of the security guards voting unit. I quote it at length:

Q BY MR. BROOKS: Let me start this way. Do you recall how the issue of vacations came up

during this meeting?

A One of the officers, I don't recall who, I'm sorry, mentioned the fact that the vacations were changed. This was during a discussion that we were express -- I specifically expressed my disappointment in the fact that we had looked forward to MGM coming in and taking over  
5 Mandalay and that we thought things -- we anticipated that things were going to get better and, instead, they got worse, and people started to interrupt me and mention things. They would mention things like vacation, health benefits, overtime. There was a lot of things that were mentioned. That's why I don't remember specifically who said what as far as the officers go.

10 Q After an officer raised the issue of vacations, did anyone from management who you're already identified respond?

A At that time, the only responses that any of the managers, senior managers, were saying was we hear you, we get it, give us a year, we hear you, we get it. It was refrains that were repeated often.

15 Q Now in this particular meeting do you remember who among these individuals you've identified?

A Well, I remember specifically Ms. White saying that --

Q White? Who's Ms. White.

20 A Oh, excuse me. Debbie Wootan. It's Debbie Wootan-White. [Executive vice-president for Human Resources.] I'm sorry. Debbie Wootan-White.

JUDGE KENNEDY: Okay. White?

THE WITNESS: Yes, sir. I'm sorry. She had a name with a hyphen in it for a while and that's why I got confused.

JUDGE KENNEDY: Okay.

25 Q BY MR. BROOKS: Okay. And what do you recall her stating?

A I recall her saying that she was going to look into it. She didn't know the specifics herself of the vacation and any changes that might have occurred, but she was going to look into it herself.

30 Q Okay. Do you recall anything else being discussed during this first focus group meeting with respect to vacations?

A No. Just the fact that they all got it.

Q All right. Now was there a second focus group that was held later that you attended that there was also a discussion of vacations?

35 A It was a meeting that was after our shift. We were held over. They had a meeting with the oncoming day shift, which I did not attend. When day shift finally came out, we were held over and they had a meeting then and I recall Ms. --

Q Before we get there, was this a meeting held for the entire grave shift -- the graveyard shift that was working that night?

A Yes.

40 Q Okay. And do you know the date of this meeting?

A No.

Q Was it before or after this first focus group meeting you had talked about?

A It was after.

Q Okay. And was it before the union election?

45 A Yes.

Q Okay. Do you know where the shift was -- where the meeting was held?

A Yes. It was in the security briefing room.

Q And who was there on behalf of management or supervisors that you remember?

A Well, all our supervisors who were working that shift were there --

Q Do you know who they were?

A -- the assistants and the manager. I don't recall which of them were there, but there's generally three.

Q Okay.

A And then I recall that Debbie White was there.

Q Okay. This is the same Debbie Wootan --

A Debbie Wootan-White.

5 Q Okay. Do you recall any other management personnel there?

A I believe Mr. Hornbuckle was there and Mr. Bowling was there.

Q And how did the subject of vacations arise during this meeting?

10 A **As I recall, Ms. White told us that she had looked into the vacations and she had discovered that the vacation policy had been changed, but that security had not been included in that change, that it was changed for everybody else who worked at Mandalay Bay, but not security, so our vacation and the way we earned our vacation and the years we had to have would remain the same.**

Q Did she make any statements as to who why security was not included in this property-wide change that had taken place before?

15 A No.

[Bolding supplied]

20 As can be seen from the bolded testimony, Gropp quotes the executive vice president for human resources as stating that the vacation policy concerning the guard unit was still the same as it had been before MGM Mirage took over the resort. Full credit was still being given to all employees for the length of their tenure as it related to vacation eligibility. In other words, no change had ever been made.

25 Based on Gropp's own testimony, I am unable to conclude that there is merit to that portion of Petitioner's objections. I recommend that it be overruled.

30 Promising to Repair a Parking Lot Booth A number of security guards were assigned to parking control. The employer has a number of locations where customers may park. At least one of those locations is an outside parking lot where security guards work from a booth. Gropp testified that at one of the meetings previously described, one of the security guards complained that a particular booth was in disrepair. Gropp was unable to recall what the nature of the problem actually was. He did testify that no manager responded meaningfully. Nevertheless, he says that a few meetings later, vice president for security Togliatti announced that the booth was under repair and would be up and running shortly.

35 40 Once again, this testimony is unimpressive. Indeed, it is nothing more than an announcement that some routine maintenance on a guard booth was taking place. No promise had preceded the notice and it was not connected in any way to the union organizing drive or the election. Indeed, Gropp was unable to say whether it occurred during a routine pre-shift briefing or whether it occurred at one of the focus meetings which supposedly were aimed at the election. Either way, his description is that from the crowd, one of the bike officers had made a complaint about the booth, but it evoked no response. The only reply came sometime later when Togliatti, in what must be perceived as a routine communication, advised that the booth was under repair and would soon be usable again.

45 Even assuming that the complaint and the announcement occurred at one of the focus meetings, the connection to the election is tenuous at best. This booth, apparently in the south parking lot, was to enable officers to man that lot and to do so while being shielded from the desert sun. When a facility like that fails, it is not a grant of benefit for the employer to perform the maintenance work necessary to make it operable again. Petitioner's argument here would logically lead to some absurd results in other contexts. For example, if some plumbing fixture failed during the course of the pre-election time frame, the argument would be that the employer

is not permitted to fix it without running the risk that the action would be perceived as improperly influencing the election. Clearly such a repair is not the grant of a benefit. No one would seriously consider such an argument. The same is true for repairing the booth. Accordingly, I shall not consider it here. Accordingly, I recommend that this portion of the Objections be rejected as well.

### CONCLUSION

Having reviewed the evidence presented in support of all of the remaining objections, and determining that none of them played any role with respect to influencing the outcome of the election or had an effect on integrity of the election, much less the appearance of a failure of integrity, I recommend that they be overruled in their entirety and that the Board issue a certificate of results.<sup>9</sup>

---

James M. Kennedy  
Administrative Law Judge

Dated, Washington, DC: October 2, 2008

---

<sup>9</sup> Pursuant to the provisions of §102.69 of the Board's Rules and Regulations, Series 8, as amended, within 14 days from the date of issuance of this Recommended Decision, either party may file with the Board in Washington D.C. an original and eight copies of exceptions thereto. Exceptions must be received by the Board in Washington by October 16, 2008. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof upon the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may adopt this Recommended Decision.