

**Reliable Trucking, Inc. and Teamsters Local 853,
International Brotherhood of Teamsters. Case
32–RC–5367**

April 23, 2007

DECISION AND CERTIFICATION
OF REPRESENTATIVE

BY CHAIRMAN BATTISTA AND MEMBERS KIRSANOW
AND WALSH

The National Labor Relations Board, by a three-member panel, has considered challenges in and objections to a mail-ballot election held between August 10 and 30, 2005, and Administrative Law Judge Clifford H. Anderson's attached supplemental report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 43 votes for and 38 votes against the Petitioner, with 6 challenged ballots, a sufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the judge's findings¹ and recommendations,² and finds that a certification of representative should be issued.

¹ The judge was sitting as a hearing officer in this representation proceeding. The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

We have corrected the judge's report to reflect the correct first names of the Employer's agents, Brown and Fuller, as "Russell" and "Trony," respectively.

² Although six ballots were initially challenged, the Petitioner and Employer withdrew two challenges. In the absence of exceptions, we adopt pro forma the judge's sustaining of the remaining four challenges and his recommendation not to open and count the two ballots as to which the challenges have been withdrawn because those ballots are no longer determinative.

Members Kirsanow and Walsh, applying the factors set forth in *Phillips Chrysler Plymouth*, 304 NLRB 16 (1991), agree with the judge that the Employer has not met its burden of showing that the election should be set aside on the basis of a single incident in which the Union interrupted the Employer's offsite meeting with employees. In so concluding, however, they disagree with the judge's finding that the Union's actions were likely to cause fear among the employees, particularly given that the Union did not direct any threats towards employees, and one employee stood up and directly challenged the Union by stating, "Reliable is paying us to be at this meeting, pay us or get out." Because the incident was unlikely to cause fear, Members Kirsanow and Walsh find that any persistence of the incident in the minds of employees (as the judge found) would not reasonably tend to interfere with employee free choice. In addition, there was no evidence that news of the incident was disseminated among unit employees. Members Kirsanow and Walsh further find that although the incident happened the day before ballots were mailed, the 3-week lapse of time

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Teamsters Local 853, International Brotherhood of Teamsters, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time drivers employed by the Employer at or out of, its Northern California facilities and other locations of operations, including but not limited to those located in Stockton, Pleasanton, Redding and Woodland, California; excluding all managerial and administrative employees, mechanics, salespersons, office clerical employees, all other employees, guards, and supervisors are defined in the National Labor Relations Act (the Act).

CHAIRMAN BATTISTA, dissenting in part.

Contrary to my colleagues, I find merit to Employer Objections 6–9, and I would set aside the election.¹ Specifically, I find that the Petitioner's agents' intrusion into the Employer's August 9, 2005 election meeting constitutes objectionable conduct under *Phillips Chrysler Plymouth*, 304 NLRB 16, 16 (1991) (union agents engaged in objectionable conduct by invading employer's premise and repeatedly and belligerently rejecting employer's lawful directives to leave).

The Employer conducted a meeting on August 9, the day before ballots were mailed to unit employees. The meeting, held in a private hotel meeting room rented by the Employer, was attended by 15–20 unit employees. During that meeting, when the room was darkened, and a slide presentation was underway, seven or eight agents of the Petitioner, headed by Petitioner's secretary-treasurer, Rome Aloise, defied the Employer's directive and barged into the meeting. Once inside, these union agents disrupted the meeting and yelled at, and exchanged profanities with, employees and the Employer's representatives. Both the Petitioner's and the Employer's witnesses testified that the meeting degenerated into a shouting match. Even after hotel security was summoned and requested that the union agents leave, the latter belligerently refused to do so. Instead, they insisted on remaining in the meeting room until the police arrived and escorted them out.

The judge found that the invasion of the Petitioner's agents and the subsequent chaotic shouting session caused apprehension and fear among employees at the

between the misconduct and the end of the mail-ballot period further militates against setting aside the election.

¹ In light of my dissent, I find it unnecessary to reach the merits of the Employer's Objections 1–5 involving the Board agent's conduct during the ballot count on August 31, 2005.

meeting. The judge also found that these employees reasonably would remember the forcefulness of the incident throughout the mail-ballot election period.² The outrageous and trespassing conduct was committed by seven to eight union agents. The sheer number of the agents, who were engaged in this conduct in a small room, was surely enough to intimidate the 15–20 employees who observed it. Notwithstanding these findings, the judge and the majority concluded that this conduct was unobjectionable. I disagree.

The union agents’ belligerent conduct conveyed to the employees at the meeting that the Employer was powerless to enforce its own right to conduct the meeting and to control the premises. Even the hotel’s agents were unable to enforce the hotel’s property rights. The union agents left only after the police arrived and led them out. The fact that the conduct occurred “offsite” at a hotel, rather than the Employer’s premises is immaterial. The Employer had rented the hotel meeting room for the purposes of the meeting, and the union agents blatantly invaded that space and disrupted the meeting. Further, the fact that the union agents did not punctuate their substantial misconduct with direct threats or physical altercations does not undercut the severity of their conduct. In refusing to leave, the union agents effectively communicated to the employees an equally coercive message that the Employer was unable to prevent the intrusion or to adequately protect its own legal rights in a confrontation with the union agents.

Nor does the fact that this conduct occurred only once eliminate its coercive effect. Given the timing and persistence of the Petitioner’s misconduct, its outrageousness, and the sheer number of Petitioner’s agents who participated in it, such misconduct would be indelibly imprinted in the employees’ memories throughout the voting period. Finally, the lack of dissemination of the Petitioner’s conduct is immaterial. The 15 to 20 employees witnessing the Petitioner’s conduct constituted a significant percent of those casting votes, and were far more than enough to have affected the election, where a swing of only three to seven votes could have been determinative.³

Accordingly, applying the factors of *Phillip Chrysler Plymouth*, supra, I find the conduct objectionable.

Michelle M. Smith, Esq., for the Regional Director.
Spencer H. Hipp, Esq. (Littler Mendelson), of Fresno, California, for the Employer.

² There were no exceptions to these findings.

³ The election result was 43–38 in favor of the Union, with 6 challenges.

Lisa W. Pau, Esq. (Beeson, Tayer, & Bodine), of Oakland, California, and *Stuart Helfer*, Petitioner’s Business Representative, of San Francisco, California, for the Petitioner.

SUPPLEMENTAL REPORT AND RECOMMENDATIONS
 ON CHALLENGES AND OBJECTIONS

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard this case in Oakland, California, on August 21 and 22, 2006. The matter arose as follows:

On July 14, 2005, Teamsters Local 853, International Brotherhood of Teamsters (the Petitioner or the Union) filed a representation petition with Region 32 of the National Labor Relations Board (the Board), docketed as Case 32–RC–5367, seeking to represent certain employees of Reliable Trucking, Inc. (the Employer).

On July 22, 2005, the Acting Regional Director for Region 32 approved a Stipulated Election Agreement directing an election be held in the following unit of the Employer’s employees (the unit):

All full-time and regular part-time drivers employed by the Employer at or out of, its Northern California facilities and other locations of operations, including but not limited to those located in Stockton, Pleasanton, Redding and Woodland, California; excluding all managerial and administrative employees, mechanics, salespersons, office clerical employees, all other employees, guards, and supervisors as defined in the National Labor Relations Act (the Act).

The agreement provided: the payroll period for voter eligibility as the payroll period ending immediately preceding July 20, 2005; that all procedures after the ballots were counted would conform to the Board’s Rules and Regulations; the agreement further provided that the election would be by U.S. mail and asserted that ballots would be mailed by the Region to employees at 5 p.m. Wednesday, August 2005. Ballots were to be returned by mail to the Board’s Region 32 offices by August 30, 2005. The agreement stated: “Ballots will be co-mingled and counted at the [Board’s Region 32 offices] at 11:30 a.m., Wednesday, August 31, 2005.”

The election by mail ballot was held consistent with the agreement from August 10 to 30, 2005. The tally of ballots served on the parties at the conclusion of the August 31, 2005 meeting showed the following results:

Approximate number of eligible voters	111
Number of void ballots	0
Number of votes cast for Petitioner	43
Number of votes against participating labor organization	38
Number of valid votes counted	81
Number of challenged ballots	6
Valid votes counted plus challenged ballots	87

The challenged ballots were determinative of the results of the election. Thereafter, both the Petitioner and the Employer filed timely objections to the election which were served on all parties.

On May 31, 2006, the Regional Director issued a Report and Recommendations on Objections and Challenged Ballots, order

consolidating cases and notice of hearing (the Director's report). The Director's report, inter alia, directed that a hearing be held on the Petitioner's challenged ballots of Todd Alan Andreason, Tim Neal, Everett Strathorn, Ricky Finance, and the challenged "No" vote that was marked on the sample ballot from the notice of election mailed to the voter.¹ Thus, five ballots are under unresolved challenge. The Regional Director directed that a hearing be held on these five challenges.²

The Director's report directed that a hearing be held on the Employer and the Petitioner's objections and, further directs that the hearing officer prepare and cause to be served on the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of the challenges and objections.

On July 26, 2006, the Acting Regional Director for Region 32 issued an order severing cases and amending the May 31, 2006 Report and Recommendations on Objections and Challenged Ballots (the amending order). That amending order announced certain matters had been separately dealt with and were severed from the instant proceeding. The amending order, inter alia, specifically limited the instant hearing directed in the earlier report to the challenged ballots of Todd Alan Andreason, Tim Neal, Everett Strathorn, and Ricky Finance, as well as the disputed "NO" vote marked on a sample ballot from the Notice of Elections as earlier described and the issues raised by the Employer's Objections 1-9 and the Petitioner's Objections 8 and 9.

The matter was thereafter assigned to me for hearing and was held consistent with the Regional Director's Report and Recommendations on Objections and notice of hearing. At the hearing, without objection from any party, the Petitioner, with my approval, withdrew its Objections 8 and 9. The merits of those two objections are therefore not further addressed herein. On brief, the Petitioner withdrew its challenge to the ballot of Rickey Finance. I approve the Petitioner's withdrawal of the challenge. The merits of that challenge will therefore not be further addressed herein. I find Finance's vote eligible. That finding and conclusion will be reflected in the specific findings and conclusions below.

¹ The Director's report recites that the Employer initially challenged the submitted sample ballot, but subsequently withdrew its challenge to this ballot.

² The Director's report also noted that the Employer had challenged the ballot of Robert Campbell on the ground that his ballot was received in the Regional Office on August 31, 2005, while the ballots were in the process of being counted. The Employer subsequently withdrew its challenge to Campbell's ballot. The parties stipulated at the hearing that the ballot of Campbell has been found eligible by the Regional Director but that it has not been opened and counted, awaiting the resolution of the instant matters. The Regional Director's report does not direct a hearing respecting the challenged ballot of Campbell. This factual recital respecting Campbell is immaterial to the instant hearing save that Campbell's challenged ballot may be arithmetically relevant to a finding respecting whether or not the remaining challenged ballots are determinative of the results of the election.

FINDINGS OF FACT

Upon the entire record herein, including scholarly and helpful briefs from the Employer and the Petitioner submitted on August 29, 2006, I make the following findings of fact.³

I. THE CHALLENGED BALLOTS

The Regional Director in his report charged me with resolving five challenged ballots which had not as of the time of its issuance been resolved. Rickey Finance's challenge was withdrawn with my approval as discussed, *infra*. Thus, four challenges remain for resolution. Those challenges were made by the Petitioner to the following individuals: Todd Alan Andreason, Tim Neal, and Everett Strathorn, and to a sample ballot. The challenges are best addressed separately save for the circumstances of Neal and Strathorn who are considered jointly.

A. *The Challenge to the Ballot of Todd Alan Andreason*

The Petitioner challenged the vote of Andreason on the basis that he was not in the bargaining unit. The record establishes that Andreason worked for the Employer as a mechanic or mechanic's helper through the payroll period ending on August 4, 2005, at which time he became a driver. The Employer's records establish unambiguously that Andreason did not work as a driver until after July 20, 2005. As noted above, the payroll period for voter eligibility was the payroll period ending immediately preceding July 20, 2005. It is therefore clear and I find that, while Andreason may have been a driver during the period of the voting, he was not during the payroll period for voting eligibility. Rather, I find he was a mechanic or mechanic's helper during the eligibility period, a nonunit position.

The Employer, on brief, does not dispute the above facts but rather argues that since Andreason has become a driver and became one before the election balloting began, his vote should be found eligible and counted. The Petitioner argues Andreason is simply ineligible by virtue of his eligibility period non-unit employment under the terms of the Stipulated Election Agreement and longstanding Board law.

The Board has long maintained a voter eligibility requirement or "prework" rule requiring unit employment during the established eligibility period in addition to requiring unit employment during the voting period. As the Board explained in *CWM, Inc.*, 306 NLRB 495, 495-496 (1992):

It is settled that, to be eligible to vote in a Board-conducted election, the employee must be employed and working on the eligibility date. . . . The Board's so-called prework rule has two purposes: it operates as a prophylactic against an employer's manipulation of an election by hiring employees favorable to its position just prior to the election, and it provides a simple and fair means of determining whether newly hired employees are part of the bargaining unit. *Tom Wood Datsun*, [767 F.2d 350 (7th Cir. 1985),] at 352.

³ The findings herein are based on the record as a whole comprising the transcript of testimony and exhibits augmented by the stipulations of counsel at trial and the findings contained in the Regional Director's report and in his amending order.

The Employer has not been able to marshal any recognized exception to this rule which fits Andreason. I therefore find he was ineligible to vote based on his nonunit employment in the eligibility period. The challenge to his ballot is therefore sustained.

B. The Challenge to the Ballots of Neal and Strathorn

The Petitioner challenged the ballots of Neal and Strathorn as not being in the bargaining unit. The two individuals do not have the title of driver but rather are referred to by the Employer as “yard loader” or “load out” person and by drivers as yard employees. The record establishes that the Employer receives product by rail to its yards where that product is unloaded by Neal and Strathorn. Each also loads the trailers with product that the drivers then haul. Drivers are compensated based on a percentage of the designated load values of the products they haul. Neal and Strathorn are hourly paid. Neither Neal nor Strathorn haul product in company vehicles to other locations.

The Employer argues that the two employees have a community of interest with the drivers. The Petitioner argues that community of interest is irrelevant because the two were specifically excluded from the bargaining unit which includes all drivers and excludes all other employees.

As noted supra, the unit herein was established based on the parties’ agreed upon unit. That unit is:

All full-time and regular part-time drivers employed by the Employer at or out of, its Northern California facilities and other locations of operations, including by [sic] not limited to those located in Stockton, Pleasanton, Redding and Woodland, California; excluding all managerial and administrative employees, mechanics, salespersons, office clerical employees, all other employees, guards, and supervisors as defined in the National Labor Relations Act (the Act).

There was no evidence offered by the parties respecting their intentions in agreeing to the specific unit language involved herein.

The Petitioner’s challenge to the ballots of Neil and Strathorn is premised on the argument that he is not a member of the stipulated bargaining unit. The Board has very recently restated from *Caesar’s Tahoe*, 337 NLRB 1096, 1097 (2002), the correct analytical approach to challenges respecting unit placement in stipulated bargaining units in *Halsted Communications*, 347 NLRB 225, 225 (2006):

When resolving determinative challenged ballots in cases involving stipulated bargaining units, the Board’s function is to ascertain and enforce the parties’ intent, provided that it is not contrary to any statutory provision or established Board policy. *Caesar’s Tahoe*, 337 NLRB 1096, 1097 (2002). To determine whether an individual is included in the stipulated bargaining unit, the Board applies a three-step test. First, the Board must determine whether the stipulation is ambiguous. If the stipulation clearly expresses the objective intent of the parties in unambiguous terms, the Board simply enforces the agreement. If the stipulation is ambiguous, the Board continues to step two and seeks to determine the parties’ intent

through usual methods of contract interpretation, including the examination of extrinsic evidence. If the parties’ intent still remains unclear, the Board will reach step three and employ its standard community-of-interest test to determine the bargaining unit. *Id.*

To determine whether the stipulation is clear or ambiguous, the Board will compare the express language of the stipulated bargaining unit with the disputed classification. *Bell Convalescent Hospital*, 337 NLRB 191 (2001) (citing *Viacom Cablevision*, 268 NLRB 633 (1984)). The Board will find a clear intent to include those classifications that match the express language, and will find a clear intent to exclude those classifications not matching the stipulated bargaining unit description. *Bell Convalescent Hospital*, supra at 191. If the classification is not included, and there is an exclusion for “all other employees,” the stipulation will be read to clearly exclude that classification. *Id.*; see also *National Public Radio, Inc.*, 328 NLRB 75 (1999); *Prudential Insurance Co.*, 246 NLRB 547 (1979). The Board bases this approach on the expectation that the parties know the eligible employees’ job titles, and intend their descriptions in the stipulation to apply to those job titles. *Bell Convalescent Hospital*, supra at 191.

Following the Board’s analytical framework, it is relevant to note that the agreed-upon unit here expressly includes all drivers and specifically excludes all other employees. From that fact, applying the above-quoted instruction, I find the parties had a clear intent to exclude Neal and Strathorn who were employed as yard and not driver employees. The Respondent’s arguments respecting community of interest do not apply for the reasons explained by the Board above. Having found that Neal and Strathorn were not in the bargaining unit at relevant times, it follows they were not eligible to vote and I shall therefore sustain the challenge to each of their ballots.

C. The Challenge to the Sample Ballot

1. Events

The circumstances relevant to the merits of the challenge to the sample ballot are set forth at some length in my discussion of the Employer’s “Board Conduct” objections, *infra*. In order to avoid needless duplication of that discussion, they will not be set forth here. The findings are relied on here to resolve the challenge to the sample ballot.

2. Analysis and conclusion

The Petitioner challenged the sample ballot as not complying with Board requirements. The Employer argues the Board has made it clear in its recent decision in *Aesthetic Designs, LLC*, 339 NLRB 395 (2003), that a sample ballot in a mail-ballot context is not rendered uncountable or subject to meritorious challenge for that reason alone and will be found eligible and counted unless other disabling factors control.

The Petitioner does not argue that the ballot is per se invalid as a sample ballot. Rather, the Petitioner argues that *Aesthetic Designs* does not apply here initially because the instant sample ballot was not anonymous, it was a different and unique color and form and was marked in a manner that distinguished it from all other ballots. While I find this is true, I do not find the

unique nature—i.e., color, shape, and size—of the sample ballot associates the ballot with a particular voter, and I further find that that was the type of voter identifying marks that the Board was concerned with in *Aesthetic Designs*. Were it otherwise, contrary to *Aesthetic Designs*, sample ballots would be found invalid in virtually all situations by virtue of their unique physical description, essentially a per se ineligibility.

The Petitioner argues further that the instant ballot is at the heart of the “ballot box stuffing” and election count irregularities that occurred at the election voter count, as discussed infra, which, it argues, require that the sample ballot under the totality of the circumstances should not be counted. The Employer argues the ballot should be found eligible in effect in spite of those circumstances which, in its objections, it argues requires a new election.

The Board agent conduct and the objections based thereon are discussed infra. In addition to its unusual and irregular use as a ballot in a Board election, the main argument raised in the instant case to the eligibility of the ballot is the irregularity and suspicion of the sample ballot’s discovery by the Board agent reputedly as under the ballot box flap at a time after the ballot count was thought to have been concluded and, after the ballot box had been shown to be empty by the Board agent to the parties at the end of the counting process. It was at least suspicious and unexplained how the ballot came to properly be placed in the ballot box since it is so significantly and noticeably differently colored and larger than the standard Board ballots and because the Board agent had opened ballot envelopes and extracted ballots placing all the ballots into the empty ballot box in the presence of the parties during the tally process.

It is also true that although the Board held that sample ballots not be found per se ineligible, it has not found that sample ballots mistakenly used as ballots are free from difficulty. The Board in *Aesthetic Designs*, supra, specifically noted in its decision that in that case there was generally no concern respecting ballot stuffing in the mail ballot process due to the key number addressee-voter designations on ballots and none was present on the facts before it. The appearance of the sample ballot in the ballot box in a manner free from doubt or suspicion is very much not the case here and the obvious irregularity of the belated appearance of the ballot distinguishes the instant case from *Aesthetic Design*. There are important unanswered questions respecting the sample ballot herein.

Considering all the circumstances and on the basis of the record as a whole, I find the question of the sample ballot’s eligibility is a close one. The parties have marshaled the Board’s many relevant cases dealing with the twin goals of counting voter ballots and of preserving the fairness and regularity of the Board’s election processes. These cases are fact specific and postelection determinations must focus on the facts in each particular case. The issue of the sample ballot’s eligibility, herein, involves yet another balancing of the important need that the Board’s processes both be honest, fair and open and be seen to be honest, fair and open against the important obligation to allow voter intentions to be considered wherever possible.

On the facts of this case I am persuaded that the twin unusual if not suspicious circumstances—the unusual coincidence of the rare casting of a sample ballot with the even more rare unex-

plained discovery of such a ballot belatedly discovered by a Board agent away from the counting area in a ballot box already determined and shown to the parties to be empty, requires that the ballot be held improper based on those suspicious and hence not be counted. Coincidences involving events as rare and infrequent as those involved herein are not to be ignored or minimized. Perhaps if either oddity occurred alone, the ballot might properly be found eligible. I find herein, however, there was simply too much irregularity in the process to allow the ballot to be found regular and tallied with the other ballots.

I am reluctant to disenfranchise any voter and do not do so here because of the fact the ballot was a sample ballot. I and the parties have read and understand the Board’s teaching in *Aesthetic Designs*, supra. Rather, I do so because the entire context of events and circumstances respecting the ballot makes it, in my view, simply too unreliable to be fairly included with the remainder of the properly poled ballots which reflect employee sentiments. The Board’s historic and continuing efforts to keep any fraud or even the appearance of fraud from undermining confidence in the Agency must take priority here. Suspicion and reluctant exclusion in this unusual set of circumstances must take preference over a trusting inclusion. I simply cannot find this ballot reliable. I shall therefore sustain the challenge of the petition to this ballot.

D. Summary and Conclusions Respecting Challenged Ballots

Two earlier challenged votes were resolved and are simply noted here. Ricky Finance has been found eligible to vote in the election and it is appropriate that his ballot be opened, counted, and included in the final tally of ballots. Robert Campbell has earlier been found by the Regional Director to be an eligible voter and the Regional Director further found it appropriate that his ballot be opened, counted, and included in the tally of ballots.

I have found Andreason, Neil, and Strathorn not to be eligible voters. I have therefore sustained the challenges to their ballots. The ballots of these individuals should not under any circumstances be opened or counted in the instant election. Finally, I have sustained the challenge to the “sample ballot vote” as described above. That ballot is not sufficiently reliable to be included in the tally of ballots herein.

The findings and conclusions set forth above reduce the valid challenged ballots to two, i.e., the ballots of Finance and Campbell, with no unresolved challenges remaining for resolution. The current tally of ballots shows that the Petitioner was favored in the balloting by a vote of 43 to 38. Arithmetically the two remaining ballots of Finance and Campbell which should be considered in the final tally are too few in number to change the election result and hence are not determinative of the results of the election. Thus, if both Finance and Campbell voted for the Union, the final tally would be 45 to 38 favoring the Union. If both voted against, the tally would be 43 to 40 favoring the Union. If Finance and Campbell votes were split, the Union would prevail with a tally of 44 to 39. Thus, the Union wins by seven, five, or three votes depending on how these two individuals voted, but it wins in all circumstances. That being so, it is inappropriate and unnecessary to open and

count Finance and Campbell's ballots since no change in the election result could occur no matter how the two individuals voted.

I find and conclude that a majority of valid ballots has been cast for the Petitioner.

II. THE EMPLOYERS OBJECTIONS

The Employer's Objections 1–9 are as follows:

1. Board Agent Conduct [all bolding in original]

The Board Agents assigned to this case made the conduct of an open and fair election impossible, and/or gave the image of tainted, if not illicit, election proceedings by failing to maintain the integrity of the ballot box, by conducting the tally of ballots in a manner that allowed additional ballots to be inserted in the ballot box, and in a manner that did not account for all ballots or otherwise explain additional extraneous ballots.

2. Board Agent Conduct

The Board Agents assigned to this case destroyed the integrity of the NLRB's election proceedings and compromised the laboratory conditions for an NLRB election by not accounting for all ballots cast by eligible voters and received by the Region.

3. Board Agent Conduct

The Board Agents assigned to this case destroyed the integrity of the NLRB's election proceedings and compromised the laboratory conditions for an NLRB election by leaving the Region's election files in this case unattended, and by allowing Union representatives to rummage through the Region's election files in this case and then extract from those files numerous ballot envelopes containing ballots.

4. Board Agent Conduct

The Board Agents assigned to this case destroyed the integrity of the NLRB's election proceedings and compromised the laboratory conditions for an NLRB election by not counting and/or accounting for all ballots mailed out and received back by the Region.

5. Board Agent Conduct

The Board Agents assigned to this case destroyed the integrity of the NLRB's election proceedings and compromised the laboratory conditions for an NLRB election by losing or misplacing one or more ballots, and conducting the election, ballot count accumulation, and ballot count in a manner that it was unclear just one or another 20 ballots had been misplaced.

6. Petitioning Union Conduct

Teamsters Union Local No. 853, by and through its representatives, agents and supporters, rendered the conduct of a free and fair and uncoerced representation election impossible, and otherwise destroyed the laboratory conditions for an NLRB election, by threatening eligible voters that if they did not vote for the Union, they would not have a job anymore.

7. Petitioning Union Conduct

Teamsters Union Local No. 853, by and through its representatives, agents and supporters, rendered the conduct of a free and fair and uncoerced representation election impossible, and otherwise destroyed the laboratory conditions for an NLRB election, by barging into Company campaign meetings, threatening and intimidating company campaign organizers in front of the eligible voters, and then threatening eligible voters.

8. Petitioning Union Conduct

Teamsters Union Local No. 853, by and through its representatives, agents and supporters, rendered the conduct of a free and fair and uncoerced representation election impossible, and otherwise destroyed the laboratory conditions for an NLRB election, by threatening eligible voters with physical violence, such as we're going to break you in half next time we see you if you don't support the Union.

9. Petitioning Union Conduct

Teamsters Union Local No. 853, by and through its representatives, agents and supporters, rendered the conduct of a free and fair and uncoerced representation election impossible, and otherwise destroyed the laboratory conditions for an NLRB election, by threatening eligible voters with job loss through pressure on third party suppliers that would adversely impact the eligible voters' job performance.

While voluminous, the Employer's Objections 1–9 deal—at least to the extent that evidence was offered in support thereof—with two episodes, each occurring on separate dates in August 2005. Thus, Objections 1–5, each sub-captioned "Board Agent Conduct," complain of the conduct of the Board agent at the August 31, 2005 mail-ballot opening and counting process held at the offices of Region 32. No other evidence or argument on these objections was directed to any other event. The Employer's Objections 6–9, each sub-captioned "Petitioning Union Conduct," complain of the Petitioner's agents conduct respecting an employer campaign meeting for employees held on August 9, 2005. No other evidence or argument on these objections was directed to any other event. It is appropriate to deal separately with the two events.

A. The Objections Addressed to the Board Agent's Conduct—Objections 1–5

1. A brief review of NLRB mail-ballot election procedures

The Board's Casehandling Manual—Representation Proceedings, Section 11336.2 directs the following regarding mail ballots:

11336.2 Notification and Distribution Procedures:

The mail ballot process involves the following steps:

....

(b) Notification

Written notification is sent to the parties at least 24 hours before the time and date on which mail ballots will

be dispatched to the voters, informing the parties of the dispatch time and thus the time of the “start” of the election for application of the *Peerless Plywood* rule. *Oregon Washington Telephone Co.*, 123 NLRB 339 (1959); *Peerless Plywood*, 107 NLRB 427 (1953). The notification should also set forth a terminal time and date by which the ballots should be returned to the Regional Office, as well as the date and time of the ballot count.

For the information of the parties, a copy of Form NLRB-4175 Instructions to Eligible Employees Voting by United States Mail, which will be sent to the voters, should also be enclosed with the notification.

11336.2(c) Voter Kit

A kit is mailed to each voter, not only to those agreed to be eligible, but also to those alleged to be eligible by any party.

The kit contains Form NLRB-4175 Instructions to Eligible Employees Voting by United States Mail.

....

Also included in the kit is a ballot. Note that the instructions to voters that appear on the ballot used in a mail ballot election are unique to that election. Sec. 11306.6.

The kit further contains a blue mail-ballot envelope and a yellow postage-paid return envelope addressed to the Regional Office. The key number of the addressee should be inserted on the yellow return envelope in each case. (Pursuant to Postal Service regulations, the yellow return envelopes should be stamped by the Regional Office postage meter, with the date left blank.)

....

Returned envelopes are treated as prospective voters for purposes of identification, challenges, etc.

The Manual states further:

11336.5 Check and Count of Ballots:

(a) Parties ‘s [sic] Observers

The parties may select observers for purposes of identification, checkoff, challenges, etc. Since the ballots have already been marked at the time of receipt, the employer may designate supervisory employees as observers and the labor organization may designate union officials.

(b) Count

At the time scheduled for the count, the returned envelopes are treated as “voters” approaching the checking table. The observers at the table make their marks alongside the respective names on the list. The observers may, if they wish, challenge ballots. Challenged ballots should not be opened, but simply labeled “challenged” on the yellow outer return envelope. Sec. 11338.9.

After the yellow outer return envelopes have been checked against the list, all should be opened at once. Next, the blue ballot envelopes should be mixed thoroughly before the envelopes are opened and ballots are ex-

tracted. The ballots should be mixed again before being counted.

2. The events of August 31, 2005

a. *A brief overview of the uncontested elements of the meeting*

Pursuant to the election agreement, the tally of ballots was conducted at 11:30 a.m., Wednesday, August 31, 2005, the Board’s Region 32 offices in a hearing room, likely the room in which the instant hearing was conducted. The Board agent stood at the front of the room with a table behind him where he placed the materials to be used. In front of the Board agent was a counsel table at which the two Employer’s representatives sat facing the Board agent. At the other counsel table, facing the Board agent but further to the Board agent’s left, sat the two Petitioner’s representatives.

Two representatives of the Petitioner, Helfer and Casqueiro, and two representatives of the Employer, Brown and Askham, were present. The process was conducted by a single Board agent, Nick Tsiliacos.⁴ The representatives of the Employer and the Petitioner all testified to the events in contest. No party called or indicated it had attempted to call or intended to call as a witness, any Board agent participant in the events.

There was no dispute that the parties gathered, Board Agent Tsiliacos made introductory remarks, the envelopes mailed to the Board office were set out and the names on the envelopes were checked off by the parties on the voter eligibility list. The parties were not sure if envelopes submitted by individuals who had become ineligible or envelopes otherwise deficient were discovered and resolved, but they agreed that challenged voter’s envelopes were identified and those envelopes were segregated from the others.

The nonchallenged ballot envelopes were then each opened by the Board agent who extracted the colored ballots contained and placed them in a standard Board ballot box which had first been shown to the parties to confirm it was empty when the process began. The Board agent engaged in a disputed ballot extracting style in several instances which is discussed below. The ballots were then taken from the ballot box which, was thereafter again shown by the Board agent to the parties as now empty of ballots, and the Board agent showed each ballot to the parties and separated them into two piles of “yes” and “no” votes. No unusual, spoiled, or blank ballots were discovered. The two stacks of ballots were then counted. The parties paid close attention and it soon was discovered and discussed that the number of envelopes opened and from which the ballots had been extracted exceeded by one the number of ballots counted.

The discrepancy upset and confused all present. Ballot counts are important matters, not only to the parties but also to Board agents who desire that regularity should always obtain and the process go smoothly. Recounting occurred of both the ballots and the envelopes from which the ballots had been re-

⁴ Two other Board agents made brief appearances in the room during the count, but they were not involved in nor observed the elements of the process in dispute. No party called or attempted to call them as witnesses.

moved with the same inconsistent result—one more ballot than envelope.

At this point the Board agent announced to the parties that he was going to take advice and left the room. He took the ballot box and the counted envelopes. He was specifically observed by the Petitioner's agent, Helfer, to have taken the challenged ballots with him on each occasion he left the room. In time, the Board agent returned and announced that he was instructed to recount and that process was again undertaken with the same result. He left again bearing the materials as before. The number of times he left and returned is in dispute, two or perhaps three or four times total. The parties also dispute the Petitioner's agent's conduct during one of Tsiliacos' absences from the room.

Also contested by the parties, but of no direct consequence to the objection matters in dispute, is the precise timing and means that the late arriving ballot envelope of Campbell was delivered into the room—by another Board agent or by Tsiliacos—and precisely when another Board agent briefly arrived, consoled the parties, and left thereafter.

After Tsiliacos' final absence from the room, he returned to the room with a sample ballot marked "no" in pencil, which he announced to the parties that he had discovered under a flap in the ballot box. This announcement apparently produced disbelief and skepticism on the part of the parties who could not understand how a sample ballot—different in appearance from the normal ballots—could have been discovered in a ballot box after the box had been shown by the Board agent to the parties to be empty after all the ballots had been removed. And they wondered aloud how a sample ballot so different from the other ballots could have managed to get into the ballot box in the first place. The Board agent was not able to provide further answers or explanations. The sample ballot was challenged—see my resolution of that challenge, *supra*. The tally of ballots completed and the meeting concluded.

*b. The disputed elements of them meeting and the positions of the parties*⁵

The Employer, based primarily on the testimony of consultant Ronald Brown, an experienced participant in ballot counts including mail-ballot counts, argues several irregularities tainted the entire tally process and require a new election. His colleague, Ronald Askham, the Petitioner's vice president and a first-time observer of the tally process, was present for all events but was admittedly overwhelmed by the entire process and could not supply the informed detail of Brown. The Petitioner's witnesses contested the Employer's contentions. The disputed elements are initially discussed separately below.

While all agreed that the tally meeting started off conventionally and without apparent irregularity, when Board Agent Tsiliacos was extracting the ballots from their envelopes and inserting the ballots into the ballot box, on numerous occasions he turned his back on the parties while he was apparently extracting a ballot out of the parties' direct line of sight, then placed it in the ballot box he had carried with him as he turned

his back. There is no dispute that this occurred perhaps half a dozen times. There is also no dispute that no party said anything about it during the process and that the Board agent never made comment on his behavior. Further, insofar as the parties could observe, there was nothing untoward done by the Board agent during these events. His conduct was limited to and directed toward ballot extraction from election envelopes and the ballots' introduction into the ballot box.

The Employer argues such secretive behavior destroys the confidence of the parties and undermines the election tally process to such an extent that a new election is needed. The Petitioner's witness Helfer with the Petitioner's adoption of the argument on brief, suggested that since he noticed that during the ballot extraction process by the Board agent, in some cases, ballot markings were viewable on the ballot before it was inserted into the ballot box, the Board agent was probably simply trying to avoid disclosing such marks to the parties before the comingling occurred within the ballot box by turning his back. The Employer argues this is simple speculation by the Petitioner. The Petitioner argues that the Employer's agents never questioned or commented on the process at the time and, thus, did not afford the Board agent an opportunity to provide a simple answer and explanation of a procedure he did not know had confused any party or otherwise warranted explanation.

The Employer again, based on the testimony of Brown and Askham, argues that at all times during this process there appeared to be a stack of perhaps 15 to 20 unopened voter envelopes sitting on the Board agent's table, which Brown suspected might be seemingly ignored ballots submitted by other voters. The Employer offered evidence that the names and addresses of the approximately 111 eligible voters were reliable and had been computer printed by the Employer for the Board so that ballot envelopes should not have been lost in the mail. Since there were fewer than 90 ballots under discussion at the tally, that stack of ballots might well account for the "missing" voters. Ignoring those ballots requires a new election argues the Employer.

The Petitioner's witnesses deny that any unopened collection of ballot envelopes as described by the Employer's witnesses ever existed. Stuart Helfer testified that as the parties came together in the Board's hearing room, he asked Board Agent Tsiliacos how many ballots the Region had received and that Tsiliacos responded "86." Thus, argues the Petitioner, the Board made it clear it did not have a larger group of envelopes to address at the tally. The Petitioner argues there simply was never a large bundle of ballot envelopes received and carried into the hearing room by the Board agent only to be ignored thereafter. The Petitioner argues further that Brown in his testimony was not able to testify to his observations as creating more than a doubt in his mind as to what the stack of documents comprised. And Brown never directly raised the matter with the Board agent, a simple matter of Brown asking Tsiliacos something like: "Are the envelopes in that stack there, ballot envelopes in this matter that need to be addressed?" The Petitioner concludes the Employer's agents were simply mistaken or confused other envelopes—perhaps the challenged envelopes—or other papers into the described perception of an

⁵ The General Counsel took no position on the merits of any of the challenges or objections before me for resolution.

impossible and improbable bundle many of unaddressed, unopened, eligible voter ballot envelopes.

Brown admitted he had never directly asked questions of the Board agent about the mysterious stack of envelopes. Brown explained that this failure to do so was in part because of a desire to preserve the decorum of the process, to avoid embarrassing a Board agent employed in a position he had at one time held, to avoid providing the Petitioner's agents ammunition which might be used against the Employer's election interests and, finally, because he asked the questions indirectly by repeatedly asking the Board agent if all the ballots have been addressed and there were no others to be found.

The Employer argues that during one of the Board agent's absences from the room, Petitioner's agent, Jesse Casqueiro, left his place seated at the table and wandered over to the Board agent's materials and briefly picked up a stack of envelopes and then dropped them back in place. The Union's witnesses describe the event as one not involving actual picking up and dropping any materials and further describe the materials observed to have been opened envelopes from which the ballots had been removed and counted.

The Employer argues this misconduct and the fact of the Board agent's absence and inability to protect Board materials commands a new election be directed. The Petitioner challenges the employer witnesses' testimony and suggests there is no true dispute that anything more was involved than at most a momentary picking up and dropping of the already many times counted empty ballot envelopes the ballots from which had been taken from the room by the Board agent. Further, the Petitioner notes that no complaint was made by the Petitioner's agents to the Board agent upon his return so that the Board agent could address any concerns.

Finally, the Employer argues the unusual and highly suspect appearance of the sample ballot, discovered outside the counting room by the Board agent and asserted by him to have been discovered under a flap in the ballot box provides the final consummating irregularity which requires a new election. The Petitioner argues that the sample ballot itself is under challenge and will be resolved independently, but the process was otherwise sufficient and a new election should not be lightly directed and employees sentiments in the election set aside based on an odd result in the tally process—a process which occurred significantly after the employees had cast their ballots and which only involved a single ballot which was challenged and found ineligible and invalid, *supra*.

3. Analysis and conclusions respecting the Employer's Board agent conduct objections

Initially certain evidentiary conflicts must be resolved. There was an important conflict in the testimony regarding whether or not the Board agent had stacked on a table, in plain sight but not otherwise addressed nor spoken about, a group of unopened mail-ballot envelopes of perhaps some 15 to 20 in number. Considering the record as a whole including not only the witnesses and their demeanor but the probabilities of the scenarios described, I find there was no large group of unaccounted for unopened employee ballot envelopes in the hearing room that day. It is not necessary to find the Employer's wit-

nesses were other than honest in their testimony. Rather, I find they were simply mistaken. I find that any such stack or gathering of what was perceived to be unopened ballot envelopes were not unopened ballots but rather were the already opened envelopes from which ballots had been extracted. There is simply no other plausible explanation given the testimony and the fact that no evidence was offered to suggest that—other than the sample ballot discussed earlier—voters had mailed ballots to the Regional Office which had not been addressed in the process that day.

There is also a conflict regarding the extent of the Petitioner's agent, Casqueiro's, rummage in Board materials. I find that he did in fact momentarily pick up and then immediately drop back in position a group of already opened envelopes. In making this finding, I credit the Union's agents as to what material was involved but favor the testimony of Askham respecting the extent of the contact with materials. I specifically find that no materials were otherwise handled and that no substitution or other slight of hand occurred respecting the materials.

Turning to the specific employer complaints, it is well to consider them initially separately. First, there is the matter of the Board agent's turning of his back during the process of removing the ballot from its envelope. I agree with the Petitioner that the conduct has a benign explanation and that he was seeking to protect the confidentiality of certain apparently vulnerable ballots as he removed them from their envelopes. I also find there was simply no credible evidence of irregular handling of the envelope and ballot handling process by the Board agent other than in his turning away as described. Importantly the Employer's agents made no complaint and asked for no explanation at the time. I simply find nothing improper in the Board agent's conduct in this regard and, even were it irregular, the Employer in such a marginal matter should have raised the matter at the time and sought explanation or cessation of the activity.

The Employer's complaint about the apparent stack of 15 to 20 unopened, unit employee ballot envelopes is disposed of by my findings, above, that there was no such group and the Employer's agents were mistaken. Again, the Employer's case was further weakened by the fact that no comment, complaint, or question was raised at the time of its occurrence. I do not find Brown's indirect questions directed to the Board agent fairly raised the issue of an apparent stack of uncounted ballots.

The Petitioner's handling of the Board agent's materials was wrong but not a basis for setting the election aside because of the Petitioner's conduct during the tally process. Since the materials touched were, as I found *supra*, already opened and repeatedly counted empty ballot envelopes, I do not find that the argued misconduct by the Board agent in leaving them out on the table when he left the area after the ballot count where they might be touched by a party rises to Board agent misconduct such that a new election is needed.

Finally turning to the sample ballot issue, in many ways I agree with the Employer that this aspect of the ballot tally was unusual, suspicious, and regrettable. Clearly, the Board agent, if he felt it necessary to inspect the ballot box a final time, should have returned to the tally room and done so in the presence of the agents of the Employer and the Petitioner. I do not

find that the conduct by the Board agent requires a new election. There is simply no evidence of slight-of-hand, corruption or other misconduct on the part of the Board agent regarding the ballot box discovery. The sample ballot's appearance on the scene was indeed irregular and even suspicious, but that ballot has been considered in the section on challenged ballots, supra, and found not a valid or countable ballot.

Having considered the various elements of the Board agent misconduct allegations above: Are they sufficient in their totality to require a new election? I have reconsidered these events based on the record as a whole and the detailed argument and legal analysis of the parties. I find the whole of the Employer's complaint in these regards does not rise to a situation requiring a new election.

My earlier analysis of the parts remains valid. Further, it is important to keep in mind that the issues here arose in the context of a mail-ballot tally process which occurs well after the employees have submitted their ballots. The burden of proof lies with the objecting party, the Employer here. In the cases of the suspicions and doubts respecting the process testified to by Brown and discredited supra, the Employer is hard put to suggest that activity was seemingly suspicious when nothing was said, no questions asked, no complaints directed at the Board agent during the process now complained about. Thus, the mysterious back-turning of the Board agent, the stack of ballots which the Employer argues may have been unconsidered eligible votes in these situations are not objectively Board agent misconduct requiring a new election. The Employer's arguments are met with plausible alternatives which I have credited. The Employer did not attempt to elicit testimony from the Board agent. All of the Employer's evidence in this regard is in my view insufficient surmise and does not meet its burden of proof.

In summary, I find that no Board agent misconduct requiring a new election occurred. The Board agent probably should not have left the room; perhaps he could have had other agents relieve him in that duty. He should not have examined the ballot box anew outside the tally area. In the entire context of events, those were his failings. They are not enough to justify setting aside the expressed election sentiments of a unit of over 100 employees.⁶ I therefore find the Employer's Objections 1–5 without merit and shall recommend they be overruled.

B. The Objections Addressed to the Petitioner's Conduct—Objections 6–9

1. The events of August 9, 2005

a. The Employer's version of events

With the ballots to be mailed to employees by the Board on August 10, 2005, the Employer conducted a union election campaign meeting on August 9, 2005, in the mid-afternoon at an area hotel in the community of Pleasanton to which unit employees were invited. This meeting was one of numerous meet-

⁶ The Employer argues on brief that the failure of the Regional Director to take a position at trial or on brief respecting the Board agent conduct objections and the sample ballot challenge supports the Employer's arguments. I reject the argument. Parties' positions are only that. This case must and did turn on the record evidence.

ings that the Employer had conducted during the campaign. The Petitioner had come to be aware of these meetings and at least in some cases positioned its agents in the hotel parking lot before such employer campaign meetings where they could communicate with the arriving or departing employees respecting the Union's views concerning the upcoming election. This practice was followed by the Petitioner on August 10. After communicating with arriving employees in the parking lot, seven or eight union agents and members, as a body, headed by Rome Aloise, secretary-treasurer of the Petitioner, entered the hotel and walked to the hallway area outside the room rented by the Employer where the Employer's employee campaign meeting was underway.

Ronald Brown testified the meeting was attended by 15 to 20 unit employees and perhaps 3 consultants to the Employer respecting the election campaign. Brown testified that as the meeting had begun, he was in the hotel hallway in front of the meeting room with the meeting room doors closed. He testified:

[Mr. Rome Aloise] came down the hall with I'd say about seven union reps down the hallway, and I said, what are you doing here, and he said I want to come and address the group. I says, well, we don't come to your meetings—. . . . He said, well, you know, I don't like what's being said about the union, and I want to come in. I said, well, it's a private meeting, and you can't. He said, well, who's going to stop us. He said just try, and he proceeded to enter the room and went into the meeting.

Q. What about the other union reps that were with him?

A. They went in also.

Brown testified he left the area and managed to obtain the service of two hotel security personnel who came with him to the meeting room where the union agents, the Employer's consultants and the employees were all arguing and shouting at one another. Brown testified:

I went and got security, brought security back, entered the room with two security officers, and . . . Rome said, that's all the guys you brought and says we're not leaving. I said, well, we are going to have to get the police. He says, go get them, that's what Rome said. So, I then preceded with security out of the room, and they called the police. The police came . . . and entered the room and removed them.

Brown testified that no arrests occurred and that the union agents left when the police requested they do so. At that point, he recalled the meeting simply broke up. Neither the hotel security staff nor the police were called to testify by any party.

Tony Fuller, a sales representative of the Employer, testified he attended the August 9 campaign meeting to set up the conference room and to provide food for the participants. He testified he left the meeting and observed the conversation between Brown and Aloise, essentially corroborating Brown. When Brown left and the union agents entered the meeting room, Fuller followed them in. He described the events:

There was a film or slide presentation going on, I'm not sure which. The lights came on, there was a lot of

yelling and screaming back and forth between union representatives—

Q. If you know, who turned on the lights?

A. I'm not for certain because I came in afterwards. From where the light switch was and the way the union reps had entered, I believe they did, but I'm not for certain.

Q. That's okay. When you said there is a lot of screaming going on, can you describe that, what you heard and saw?

A. Yes. The reps came in and they lined up along the wall closest to the doorway. Rome introduced himself to the drivers and said he would like to debate. He had a pamphlet.

Q. What did he say when he introduced himself?

A. He said my name is Rome [Aloise], I'm with Local 853. I want to debate with Mr. Brown's consultants.

Q. What happened then?

A. They declined. There was a lot of yelling and profanities back and forth. A driver stood up and said, Reliable is paying us to be at this meeting, pay us or get out. They said we're not leaving this meeting.

Q. What happened then?

A. Lots of yelling back and forth, debating about wages.

....

Mr. Brown came back into the room with security guards.

Q. How many?

A. Two.

Q. What happened then?

A. They still refused to leave.

Q. Why do you—what happened that makes you believe that the union reps refused to leave?

A. Because security asked them to leave.

Q. You heard that?

A. Yes.

Q. What was their response if any from the union reps?

A. We are not leaving until the police come.

....

Q. Did the Pleasanton [police] arrive that day?

A. Yes, they did. . . . One of the police officers came and spoke with myself and the management. The rest of them went down the hallway some short time later, I seen the union reps, the police officers, and Mr. Brown exiting the hotel area.

b. The Petitioner's version of events

Jesse Casqueiro, organizer for the Petitioner, testified he was with the group of the Petitioner's agents and supporters that entered the Employer's meeting room. While he did not hear the earlier conversations in the hallway, he testified that he was present in the meeting room during the entire period. He recalled that there was a large amount of shouting and tumult. The Employer consultants were shouting for the union agents to leave, Aloise was speaking "over" the consultants to employees

seeking to debate the Employer. Employees were also speaking loudly. Casqueiro recalled that the group left when hotel security arrived and resumed their activities in the parking lot. He added that there was no physical contact or threatened contacts between and among the parties and the employees were not threatened and did not appear to perceive themselves as threatened.

Stuart Helfer, the Petitioner's business representative and organizer, like Casqueiro, was at the back of the group of Petitioner's agents and supporters and did not hear any of the conversations that occurred before the Union entered the meeting. There he noted that the movie or medial presentation was stopped and a cacophony ensued with union officials soliciting employees and arguing with employer consultants. He testified that the employees reacted with apparent: "amazement, bewilderment, entertainment, curiosity" and anticipation of events. He denied that any threats or physical touching of any kind occurred. The event ended when hotel security arrived and the Union left voluntarily on request.

2. Analysis and conclusions respecting the Employer's "Petitioner's Conduct" objections

a. Basic case law

The factual situation in dispute involves labor organization agents' actions on an employer's property or on property in use by the employer. In *Phillips Chrysler Plymouth*, 304 NLRB 16 (1991), the Board set forth the standard to be applied to such conduct:

[The two individuals involved] are both union agents. Therefore the test to be applied is whether their conduct "reasonably tend[ed] to interfere with the employees' free and uncoerced choice in the election." *Baja's Place*, 268 NLRB 868 (1984). In deciding whether the employees could freely and fairly exercise their choice in the election, the Board evaluates the following factors: (1) the number of incidents of misconduct; (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 time; (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 the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party in canceling out the effect 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. *Avis Rent-A-Car System*, 280 NLRB 580, 581 (1986).

In *Phillips*, supra, a Board panel of Members Devaney, Oviatt, and Raudabaugh considered an employer's objection to two union agents conduct in entering into the employer's work areas some 75 minutes ahead of the beginning of the election, refusing an employer agent's request that they leave the area, starting a shouting match in front of the employees respecting their right to be present and ultimately not leaving the area even when the police had arrived and had spoken to the two.

The Board panel held, with Member Devaney dissenting, that the union agents had no legal right to be where they were

and repeatedly and belligerently refused to leave the area. The Board found that the confrontation which they called a direct challenge to the Employer's property rights would have been directly seen by or quickly learned of by all the 10 unit employees who were to commence voting 75 minutes later. The election turned on a single vote. Given all these factors, the Board found that the union's conduct reasonably tended to interfere with employees free and uncoerced choice in the election.

The Board reached a different result in *Station Operators, Inc.*, 307 NLRB 263 (1992), dealing with the interruption by a union's representatives of the employer's campaign meeting on its premises 2 weeks before the election. The Board distinguished *Phillips*, supra at 263:

In adopting the Regional Director's recommendation to overrule the Employer's objection relating to the interruption by the Petitioner's representatives of the Employer's campaign meeting on its premises 2 weeks before the election, we agree with the Regional Director's finding that this case is distinguishable from *Phillips Chrysler Plymouth*, 304 NLRB 16 (1991). [Footnote omitted.] In *Phillips*, the Board set aside an election based on the refusal of two union representatives to stop talking to unit employees and to leave the employer's shop area approximately 75 minutes before the election. The Board relied on the fact that the union representatives "repeatedly and belligerently refused to heed requests of the employer's president to leave" the premises, even after the police were summoned and 75 minutes before the election. The Board found that the union agents' conduct conveyed to employees the message that the employer was powerless to protect its own legal rights in a confrontation with the union. The Board also observed in *Phillips* that the impact of the incident was especially significant because a shift of one vote could have changed the outcome of the election. In contrast, here the Petitioner's representatives' confrontations with the Employer's officials during the employee meeting occurred 2 weeks before the election, and the results of the election were not close. In addition, unlike in *Phillips*, the Petitioner's representatives left the premises when told to do so by the Employer's officials, after being on the scene for approximately 5 minutes in each of three instances. [Footnote omitted] Accordingly, this is not a situation in which the Petitioner's representatives directly challenged the Employer's property rights in a manner that would tend to interfere with employees' free and uncoerced choice in the election.

The Board has in more recent cases used the *Phillips* and *Station Operator's* decisions' standards against which conduct is judged with situations more apposite to *Phillips* found objectionable and those closer to *Station Operators* found to be not objectionable. See, e.g., *Champaign Residential Services*, 325 NLRB 687 (1998). The Board also considers carefully the conduct of the union agents and the employer's agents in the entire context of events to determine if the result of the event was to demonstrate to employees that the employer could not stop the force of the union and was therefore powerless to resist or whether, to the contrary, the conduct of the union in the context of events would not reasonably have been perceived by the

employees as a demonstration of employer weakness but rather of poor union conduct which was an embarrassment. *Chrill Care, Inc.*, 340 NLRB 1016 (2003).

b. Analysis and conclusions

Initially it is appropriate to apply the above-quoted *Phillip's* factors to the instant case. Several of the factors are not in dispute. Thus, here there was but a single intrusion at issue. There were approximately 15 to 20 unit employees at the meeting at issue. The event occurred on August 9, 2005, 1 day before mail ballots were mailed to the employees by the Board and, thus, at the beginning of a voting period that extended to August 30, 2005. The Union prevailed in the election by 7, 5, or 3 votes depending on how the votes of the two eligible but nondeterminative challenged voters would have cast their ballots. There is no doubt that the Union was responsible for the conduct of its official and the agents and supporters that joined with him in the event.

Other *Phillip's* factors are in dispute herein and are worthy of separate consideration. Respecting the severity of the incident and whether it was likely to cause fear among the employees in the bargaining unit the parties differed. The Employer emphasizes the blatancy of the trespass which was designedly intended to disrupt the Employer's union campaign meeting as well as the intimidating size and number of the union agents who ignored the Employer's agent's denial of permission to enter, their mass entrance into a darkened room interrupting an ongoing employer media campaign presentation to employees, their initiation of a shouting match among all present and their subsequent refusal of Employer's consultants that they leave. The Petitioner suggests that the entire matter was reportedly viewed by employees as amusing entertainment, denies that any threats of violence or reasonable apprehension of violence occurred and notes that the agents soon left the meeting room and the innards of the hotel.

There was a factual dispute whether or not the Union's agents left after being requested to do so by the hotel security agents or the local police. I credit the testimony of the Employer's agents that the agents left only after the arrival of local police. The Union denials concerning these events were simply far more vague than the Employer's witnesses' specific recitation of events. The Union's secretary-treasurer, the main actor for the Union, did not testify and no contention he was unavailable was made. The two individuals who did testify for the Union concerning these matters were not privy to the initial hallway conversation and were less specific and clear about the events at the meetings end.

I find the incident was a significant one.⁷ The Petitioner's agents or at least some of them are men of substantial size and they barged into a darkened room where employees who had already passed by the Petitioner's parking lot campaign in opposition to the Employer were watching a media presentation. There was no question why the Petitioner's agents were there

⁷ The Petitioner argues on brief that since the events occurred at a hotel, the Board's property intrusion cases are distinguishable. I disagree. The Employer contracted for the space involved, therefore the meeting room became the Employer's property for the relevant period of time as if it has owned the property involved.

and no even arguable claim of right that they could be there under the circumstances. The meeting was disrupted as it was essentially certain to be given the Union's intrusion. The transportation industry is not filled with employees who are timid or feint of heart. Nonetheless, the invasion—for that was what it was—of the Petitioner's agents and the subsequent shouting session with all its chaos through to the subsequent departure of the union agents, must be considered in the context of circumstances to have reasonably⁸ caused apprehension and fear among at least some of the employees. I so find.

I find there is no question that the employees involved would still have the incident in their memory when their mail ballot arrived and through the period ending in late August during which the employees decided if and in whose favor they should cast their ballots. There is no evidence that drivers at the meeting disseminated the misconduct prior to the balloting among unit members not present. The record suggests the drivers do not regularly congregate as might an industrial unit on a common lunchbreak. There is no direct evidence of any employer misconduct which may be considered in canceling out the effect of the original misconduct save the agreement of the Employer that, in the event it ultimately prevails in the current balloting, the election results would be set aside and a new election be directed based on a settlement between the General Counsel and the Employer which includes the noted agreement.⁹

Considering all the above and the approach the Board has taken as noted in part in the cases discussed and in the numerous citations by the parties on brief, I find the question is a close one. Elections are serious matters with important consequences to all parties and the employees. The Board has from its inception striven to insure that voters are able to vote free of adverse influence. Yet, voters are reasonable and may not be taken to collapse or have their vote controlled or even influenced by each and every minor conflict or dispute in the campaign.

Given all the above, I do not believe that the Petitioner's conduct on August 9, 2005, as described above, in the context of the entire sequence as revealed by the record as a whole, may be found to have so unsettled the employees that this case should fall within the *Phillips* category. Rather, I find this case falls within the *Station Operators* category where the conduct

⁸ The standard is a reasonable one: "What would a reasonable truck driver perceive?" and not a subjective one: "How did these particular drivers react?"

⁹ The Employer and the General Counsel entered into a settlement of certain unfair labor practice charges that had previously been consolidated with the instant matter and were then severed. That settlement recites that the General Counsel and the Employer agree that Petitioner's Objections 1, 2, 3, 4, 6, and 7 would be a basis to cause any employer victory in the instant election to be set aside and that the settlement includes an agreement to set aside any such election result should it ultimately be found to have occurred. The entry into a settlement agreement does not constitute an admission of wrongdoing nor may acts of wrongdoing be found based on such a settlement. I find, however, that an agreement to set aside an election on the basis of the other parties objections should that party lose the election is a relevant factor for consideration in determining objection issues.

does not require a new election be carried out.¹⁰ The limited number of employees involved as a percentage of the entire unit, the absence of evidence of further dissemination of the Union's conduct among employees and the fact that the Petitioner won the election—given my findings herein—by a total of 43 to 38 not including the votes of the two eligible voters, as discussed supra, whose votes have not been opened and counted, and the numerous Board cases of the *Station Operators* type, convince me the Board will not lightly set aside an election such as this based on a single incident of property intrusion into an employer's election campaign meeting that did not involve threats, physical altercations and at the end of which the Union left without further incident at the request of public authority.

Given my findings, I shall recommend that the Employer's Objections 6 through 9 be overruled.

III. SUMMARY OF CONCLUSIONS

A. Challenges

The challenge to the ballot of Robert Campbell was resolved by the Regional Director prior to the instant hearing. His ballot was found eligible for opening and counting. I accepted the Petitioner's withdrawal of its challenge to the ballot of Rick Finance. No longer under challenge, I find his ballot is eligible for opening and counting.

I have considered and sustained the Petitioner's four challenges to the following three individuals: Todd Alan Anderson, Tim Neal, and Everett Strahorn. I have also sustained the Petitioner's challenge to the sample ballot. All outstanding challenges have therefore been resolved. The above findings may be summarized as follows: two individuals' ballots are valid and all other challenges have been sustained.

Since the current tally shows the Union favored by a vote of 43 to 38, the two additional eligible ballots not yet counted are not determinative of the results of the election. I have further recommended that these two ballots remain unopened and it be found that the Union has received a majority of the valid votes cast.

B. Objections

I considered the Employer's objections in two groups each group directed to a different event and circumstance. I have found that the Employer's Objections 1–5 directed to the Board agent's conduct at the August 31, 2005 ballot count, are without merit and should be dismissed. I have further found that the Employer's Objections 6–9 directed to the Petitioner's conduct at the Employer's August 9, 2005 campaign meeting of employees are also without merit and should be dismissed. I shall recommend therefore that the Employer's objections be dismissed in their entirety.

¹⁰ Relevant to this conclusion, I further conclude that I would reach the same conclusion even if there was no evidence of employer misconduct as discussed in the footnote above. Thus, my ruling on the relevance of that misconduct was not determinative of my conclusion respecting the need for a new election based on the events of August 9, 2005.

C. Recommendations to the Board

Based on all the above I make the following:

Recommendations to the Board¹¹

Respecting Challenges

I recommend that the Board sustain the Petitioner's challenge to the ballots of Todd Alan Andreason, Tim Neal, and

¹¹ The Board's Rules and Regulations Sec. 102.69(e) provides in part concerning a hearing officer's report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues:

[A]ny party may within 14 days from the date of issuance of the report on challenged ballots or on objections, or on both, file with the Board in Washington, D.C., exceptions to such report, with supporting brief if desired. Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further period as the Board may allow, a party opposing the exceptions may file an answering brief with the Board in Washington, D.C. If no exceptions are filed to such report, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case.

Everett Strahorn, in each case because the voters were not in the bargaining unit at required times.

I recommend the Board find the ballots of Robert Campbell and Rick Finance eligible to be opened and counted.

I recommend that the Board find that the ballots of Robert Campbell and Rick Finance are not determinative of the results of the election and decline to direct their ballots be opened and counted.

I recommend that the Board find that the Petitioner has received a majority of valid votes in the election.

Respecting Employer's Objections

I recommend the Board dismiss the Employer's objection in their entirety.

Final Recommendation

Based on the above recommendations, I further recommend the Board certify that the Petitioner is the representative of a majority of the employees in the bargaining unit.