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

ORTHO-MCNEIL-JANSSEN
PHARMACEUTICALS, INC.

Employer

and Case No. 22-RC-12970

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 68, 68A, 68B, AFL-CIO

Petitioner

Patrick T. Gilrane, Business Representative/Organizer
(International Union of Operating Engineers
Local 68-68A-68B)
for the Petitioner
Michael E. Lignowski, Esq.
(Morgan Lewis & Brockius, LLP)
for the Employer

RECOMMENDED DECISION ON OBJECTIONS

MINDY E. LANDOW, Administrative Law Judge. Upon a petition filed on October 30, 2008, by the International Union of Operating Engineers, Local 68-68A-68B (Petitioner or Union) and pursuant to a Decision and Direction of Election, an election was held on January 8, 2009 in the following unit of employees employed by Ortho-McNeil-Janssen Pharmaceuticals (the Employer):

> All full-time and regular part-time employees employed in the Employer's facilities and utilities departments including: HVAC mechanics, senior HVAC mechanics, electricians, senior electricians, pipefitters, senior pipefitters, mechanics, senior mechanics, stationary engineers, chief stationary engineers, senior stationary engineers, shift stationary engineers, multi-crafted mechanics, senior multi-crafted mechanics, facility technicians, senior facility technicians, water treatment technicians and group leads employed by the Employer at its Raritan, Somerset and Bridgewater, New Jersey facilities excluding all office clerical employees, managerial employees, guards and supervisors as defined in the Act.

The ballots were impounded on the day of the election to allow the Board to consider the Employer's Request for Review of the Decision and Direction of Election. Following the denial of the Request for Review, the ballots were counted. The tally of ballots, which was served on the parties on January 27, 2009, showed that of approximately 42 eligible voters, 35 cast votes for the Petitioner, 5 voted against Petitioner and there were no void or challenged ballots.

On February 3, 2009, the Employer filed timely objections to conduct affecting the results of the election. On February 13, 2009, the Regional Director issued a Report on Objections and Notice of Hearing (Report on Objections) in which he found that the objections raised substantial and material issues which can best be resolved on the basis of record testimony at a hearing.

On March 25, 2009, I conducted a hearing on the objections in Newark, New Jersey. At the inception of the hearing, the Employer withdrew Objections 1 and 2. The objections which remain before me, as set forth in the Report on Objections are as follows:

Objection No. 3

In its Objection No. 3, the Employer alleges that the Union through its agents created an atmosphere of confusion which restrained employees in their Section 7 rights and tainted the results of the election. This included, but is not limited to, the solicitation of support by Union agent Rick Quinn for an "election" for shop steward. These solicitations made in the period immediately preceding the election vote, had the intent and effect to confuse voters regarding the status of the Union and the purpose of the Board-sponsored election. Mr. Quinn was present at the election polls as the Union's observer, further creating an atmosphere of confusion.

Objection No. 4

In this objection, the Employer asserts that the Union through its agents defaced at least three copies of the official NLRB Election Notice posted in the Employer's workplace, including by marking the "Yes" box on the sample ballot shown on the notices.

Objection No. 5

In its Objection No. 5, the Employer alleges that the Board interfered with the proper conduct of the election by refusing the Employer's request to conduct the election at a date later than January 8, 2009. It is the Employer's assertion that the request was based on the limitations on the Employer's ability to properly campaign in the period immediately preceding the election, caused by the substantial absence of employees from the workplace during the two-week holiday period falling during the two weeks prior to the election.

Objection No. 6

In its Objection No. 6, the Employer alleges that the totality of the conduct in all of its objections destroyed the laboratory conditions necessary for a fair and free election.

Based upon the record[1] and the briefs filed by both parties I make the following recommended decision.

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

I. Findings of Fact

A. The Employer's Operations

The Employer is a pharmaceutical company with its principal place of business located in Raritan, New Jersey. The eligible voters here are employed as part of the Employer's Workplace Site Operations (WSO) group, which provides a wide range of services such as space planning, housekeeping, technical infrastructure, cafeteria services and maintenance and operations for most of the Employer's pharmaceutical facilities in Pennsylvania and New Jersey. Two of the facilities involved in this matter are referred to in the record as Ortho Clinical Diagnostics (OCD) and Ortho McNeil Pharmaceuticals (OMP).

Joe Galant is the Director of Maintenance and Utilities for the New Jersey region of the WSO. The facilities under his supervision comprise about 3 million square feet and have approximately 5,000 employees. He supervises 53 employees of whom 41 were eligible to vote in the election. These are mechanics, utility operators, pipe fitters, electricians and general service technicians. The maintenance employees under Galant's direction are generally scheduled to work 40 hours over five days per week. Due to the nature of their work, and the need to provide continuous coverage under state regulations, certain other employees, in particular utility operators and stationary engineers, are scheduled on 12 hour shifts, 24 hours per day, 7 days per week.

Timothy Lorah, who is the Manager of Maintenance, and reports to Galant, is the direct supervisor of the OCD Facilities Team. The majority of the employees under his supervision work what is known as "first shift." That is, their work day begins some time in the morning between 6:00 a.m. and 7:00 a.m. and concludes eight hours later, five days per week. One employee works "second shift," beginning work at 2:00 p.m. James Driscoll oversees the OMP Facilities Team. Of the 11 employees who report to him, 10 were eligible to vote in the election. These are maintenance, air conditioning/refrigeration and heating employees, pipe fitters, mechanics and electricians. These employees all work first shift, Monday through Friday.

B. General Legal Principles

As the Board has held:

> [r]epresentation elections are not lightly set aside. In assessing whether to set aside an election, the Board looks to all of the facts and circumstances to determine whether the atmosphere was so tainted as to warrant such action. In making that determination on the basis of a party's conduct, the root question is whether the conduct had a reasonable tendency to interfere with employees' free choice to such an extent that it materially affected the results of the election.

Madison Square Garden Ct., LLC, 350 NLRB 117, 119 (2007), (internal quotations and citations omitted).

The Board has also held that, "the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one. The objecting party must show, inter alia, that the conduct in question affected employees in the voting unit and had a reasonable tendency to affect the outcome of the election." *Delta Brands, Inc*., 344 NLRB 252, 253 (2005) (internal quotations omitted). The burden of proof is particularly heavy where the margin of victory is significant. *Avis-Rent-A-Car System*, 280 NLRB 580, 581, 582 (1986). In evaluating whether a

party's misconduct has "the tendency to interfere with employees' freedom of choice," the Board considers: (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; (9) the degree to which the misconduct can be attributed to the party. See *Taylor Wharton Division*, 336 NLRB 157, 158 (2001).

C. The Objections

Objection No. 3

This objection deals with certain pre-election conduct of an employee and alleged agent of the Union named Rick Quinn. Quinn is a mechanic on the OMP Facilities team and reports to Driscoll. He served as the Union's observer in the election. Manager of Maintenance Lorah testified that on January 6, two days prior to the election, a group leader under his supervision named Jim Vergos came to him "visibly upset" and informed Lorah that he had received an e-mail from Quinn stating that he was "running for shop steward." Lorah did not request a copy of the e-mail from Vergos. Quinn did not testify herein. Daniel McConnell, who works on the OMP Facilities Team, and was called to testify by the Union, acknowledged that he had received an e-mail from Quinn regarding his interest in the shop steward's position. McConnell further testified that the Union did not appoint any employee of the Employer as an agent, that the Union did not suggest that employees campaign for the shop steward position on the job or off the job and that Quinn's actions did not cause confusion on the job regarding the election process.[2] No further evidence in support of this objection was presented at the hearing.

The Employer, relying upon *Picoma Industries*, 296 NLRB 498, 499 (1999), argues that under the objective standard applied by the Board, Quinn's conduct had the effect of confusing, misleading and/or intimidating voters. As noted above, as the objecting party, the Employer bears the burden of proof to establish that the alleged misconduct had a reasonable tendency to interfere with employee free choice to the extent that it materially affected the outcome of the election. As an initial matter, the hearsay testimony as set forth by the Employer and the record as a whole fails to show that Quinn acted as an agent of the Union in his apparent attempt to solicit support from his coworkers for the position of shop steward prior to the election. As the Board has held, the burden of proving an agency relationship is on the party asserting its existence. *Cornell Forge Company*, 339 NLRB 733 (2003) (citing *Millard Processing Services*, 304 NLRB 770, 771 (1991)). Moreover, the agency relationship must be established with regard to the specific conduct alleged to be improper. Id. (citing *Pan-Olston Co*., 336 NLRB 305, 306 (2001)). Additionally, there is no evidence that the Union imbued Quinn with either actual or apparent authority. In this regard, the Board has found that an employee cannot make himself an agent of the union solely by virtue of his own statements. *Cornell Forge Co*., 339 NLRB at 734 (citing Restatement 2d, *Agency*, Sec. 285 (1958))(employee did not make himself agent of union by telling employees that he would be department steward after union was certified).

It is well established that the conduct of pro-union employees who have no actual or apparent authority to act for the union is evaluated under the third party conduct standard.

[2] Quinn, Vergos and McConnell were all eligible voters in the election.

Corner Furniture Discount Center, 339 NLRB 1122 (2003). Thus, Quinn's alleged misconduct is properly evaluated under the standard set forth in *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); that is "whether the misconduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." In contrast to the situation presented in *Picoma Industries*, supra, here the Employer has failed to show that Quinn's conduct met such a stringent standard, or even that it reasonably tended to interfere in the election. There is no evidence or even a suggestion of threats or other similar misconduct on the part of Quinn prior to the election.[3] There is similarly no evidence that Quinn acted improperly in connection with his role as the Union's observer in the election.[4]

Moreover, the Employer has pointed to no probative evidence that would establish that Quinn's attempt to seek support for the shop steward position, coupled with his acting as the Union's observer in the election, reasonably would have had any impact on employees in terms of misleading or confusing them or intimidating them with regard to what was at issue in the election. Respondent's apparent contention that employees would have conflated Quinn's e-mail solicitation seeking support in connection with a shop steward "election" with the Board-conducted election is nothing more than speculation, without any evidentiary support. In this regard, I note that voter turnout was extremely high in the election and, further, that the margin of victory for the prevailing party was significant. As noted above, both these factors militate against a finding that there was interference in the election sufficient to warrant it being set aside. *Delta Brands*, supra; *Avis-Rent-A-Car System*, supra.

Accordingly, I recommend that Objection 3 be overruled.

Objection No. 4

In support of this objection, the Employer introduced into evidence three of the Board's notices of election which had all been posted in varying locations at the Employer's facilities prior to the election.[5] One of these notices was posted in the office of the OMP plant, an area which is frequented by the stationary engineers, on the evening of December 31. On January 6, after an afternoon town hall meeting held by the employer regarding the election campaign, utility manager Jed Richardson and Galant went to the room where the notice was posted to convey the substance of what had been discussed at the meeting to the stationary engineer who was on duty and therefore unable to attend the meeting. At that time, Galant noticed that marks had been placed on the sample ballot contained in the notice of election. Both the "yes" and "no" boxes were marked. The "yes' box was marked with a large red "X" and the "no" box with a similarly sized black "X." After the managers finished their discussion with the stationary

[3] Compare *Picoma Industries*, supra, cited by the Employer, where the Board found that numerous "threats to blow up the Company and physically to injure those employees who did not support the Union and to damage their property, would reasonably tend to create a general atmosphere of fear and reprisal rendering a free election impossible." The Board further relied, in part, upon the fact that the threats were not directed to specific individuals, but involved any unit employee who did not support the Union, and further cited to the closeness of the election.

[4] Moreover, objections to particular persons acting as observers must be made at the pre-election conference or they are waived. See e.g. *Liquid Transporters, Inc*., 336 NLRB 420 (2001)(objection to use of statutory supervisor as observer waived when not raised at pre-election conference). Inasmuch as the Employer was aware of Quinn's solicitation of support for the shop steward position prior to the election, any objection as to the potentially confusing, misleading or intimidating nature of his service as the Union's observer should have been made at that time.

[5] There is no evidence as to how many notices of election were actually posted at the Employer's facilities.

engineer, they consulted with counsel who instructed them to remove the defaced notice and replace it with a clean copy. Galant testified that he did not place the markings on the sample ballot and did not know who did.

The second defaced notice of election entered into evidence had originally been posted by Lorah on December 31. It was placed in the basement facilities work area where employee computers are located. The sample ballot portion of the notice of election contains check marks in both the "yes" and "no" boxes. Lorah testified that such marks were not on the notice of election when it was posted by him. Lorah stated that he noticed the markings some days later, but could not be specific. Initially, he did not do anything with the notice, and it appears from his testimony that it remained posted until after the election. [6] Lorah further testified that he did not make the marks and did not know who did.

Similarly, Driscoll testified that a notice of election was posted in the OMP Facilities Team office on December 31. The sample ballot portion of the notice contains markings in both the "yes" and "no" boxes. The "yes" box contains a red check mark and the "no" box bears a black "X." Driscoll testified that he did not make the marks and did not know who did. Driscoll first observed that the notice had been defaced in the late afternoon on January 6. He removed it, and replaced it with a clean copy. He also ripped the defaced notice up and threw it in the trash. He subsequently decided to retrieve the document, and taped the pieces back together.

The testimony of the various witnesses further establishes that on the date of the election, the board agent present inspected at least one notice of election which, at the time, did not appear as though it had been tampered with.

On cross-examination Galant acknowledged that it is possible that an employee uninvolved in the election could have defaced the notices of election, as they were all posted in rooms where other employees had access. There is no evidence that the Union or any of its agents were involved in the defacement of the notices.

The Employer contends that inasmuch as the notices of election clearly prohibit defacement on their face, the tampering with and vandalism of these notices had the effect of confusing and misleading eligible voters as to the purpose of the election and the role of the NLRB in the process. The Union argues that the notices were placed in unsecured areas not exclusive to the maintenance staff and that, inasmuch as there are approximately five thousand employees in the facility, an employee uninvolved with the process could have put the markings on the sample ballots.

This objection deals solely with the defacement of the Board's official notice of election, and not the reproduction and distribution of Board documents for campaign purposes. As the Board has explained, in an effort to curtail altered sample ballot litigation, the Board in 1993 revised its official notice of election to include language expressly disavowing the Board's participation in the alteration of the sample ballot and proclaiming the Board's neutrality in the election process. See generally *Ryder Memorial Hospital*, 351 NLRB 214, 215 (2007).[7] In

---

[6] As Lorah testified: "Actually, I didn't do anything with it at the time but when we had a meeting with Joe at one time during the week somebody mentioned that their posters were marked and I mentioned, saying that ours were too, so that's – that was the extent of it and I was asked to, once the election was over, to take it down and save it."

[7] The revised notice of election specifically states, in large, bold lettering:

Continued

Brookville Healthcare Center, 312 NLRB 594 (1993), the Board announced that the inclusion of such language, clearly stating that there is no Board involvement in the defacement of any notice, made it unnecessary to consider whether the defaced notice or sample ballot at issue "is likely to have given voters the misleading impression that the Board favored one of the parties to the election." Id. [8] As the Board announced:

> Rather, we deem the new language itself as sufficient to preclude a reasonable impression that the Board favors or endorses any choice in the election, whether or not an "X" appears on the sample ballot. Given the prominence of the bold large-print "warning," we think it extremely unlikely that an employee would overlook the disclaimer of Board involvement in any markings; in fact, we think an employee would be at least as likely to see the "warning" as any marking such as that involved in the instant case.

312 NLRB at 594.

Thereafter, in *Ryder Memorial Hospital*, supra, a case which involved the distribution of campaign literature bearing a facsimile of a sample ballot, the Board announced that it was modifying its official sample ballot, including the sample ballot reproduced in the notice of election, to include language taken from the disclaimer language on the notice of election to specifically assert the Board's neutrality in the election process and disfavor any Board involvement in the defacement or alteration of sample ballots as follows:

> The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.[9]

As the Board stated in *Ryder Memorial Hospital*, supra, pursuant to such modification, "we will decline to set aside elections based on a party's distribution of an altered sample ballot, provided that the sample ballot is an actual reproduction of the Board's sample ballot, i.e., that it included the newly-added disclaimer language."

Inasmuch as the defaced notices of election herein all set forth the requisite assertions of the Board's neutrality, both in the body of the notice and the reproduced sample ballot contained therein, I see no basis on which to sustain this objection. Accordingly, I recommend that it be overruled.

Objection No. 5

As noted above, the Regional Director's Decision and Direction of Election issued on December 10, 2008. On December 13, counsel for the Employer sent an e-mail to the board

---

WARNING: THIS IS THE ONLY OFFICIAL NOTICE OF THIS ELECTION AND MUST NOT BE DEFACED BY ANYONE. ANY MAKRINGS THAT YOU MAY SEE ON ANY SAMPLE BALLOT OR ANYWHERE ON THIS NOTICE HAVE BEEN MADE BY SOMEONE OTHER THAN THE NATIONAL LABOR RELATIONS BOARD, AND HAVE NOT BEEN PUT THERE BY THE NATIONAL LABOR RELATIONS BOARD. THE NATIONAL LABOR RELATIONS BOARD IS AN AGENCY OF THE UNITED STATES GOVERNMENT, AND DOES NOT ENDORSE ANY CHOICE IN THE ELECTION.

[8] Thus, the Board held that an analysis pursuant to *SCD Investment*, 274 NLRB 556, 557 (1985) would no longer be required. In that case, the Board rejected a per se rule and held that the critical inquiry where sample ballots are altered is whether the ballot at issue "is likely to have given voters the misleading impression that the Board favored one of the parties to the election." *SDC*, supra at 557.

[9] Such disclaimer language appeared on the sample ballot portion of the notices of election herein.

agent handling the election which provides, in pertinent part, as follows:

> You requested the Employer's position on an appropriate election date for the above-referenced matter. I understand from you that the Board's preference would be to hold the election no later than 1/9/09. The Employer requests that the Board hold the election no earlier than 1/9/09, but also requests that the election be held during the following week, preferably on 1/16/09.
>
> The reason for this request is that most of the maintenance and service employees will be on vacation during the last two weeks of December and the first two days of January, which period also includes four company holiday dates. During this period the company operates with a minimal crew, primarily to handle emergency issues. During the first full week of January and into the following week, these employees will be occupied with catching up on substantial work order backlogs and completing year-end projects – as such, the distraction and disruption of an election will negatively impact the business. Accordingly, the employer requests that the election be held during the latter part of the week.

Galant testified the Employer was concerned about its ability to conduct an election campaign given the time frame of the election, the requirements of year-end maintenance and service activities and the holiday and vacation schedules of employees. During the two-week period from December 22 to January 2, the Employer had four company-wide holidays (December 25, December 26, January 1 and January 2), leaving six regular business days, including Christmas Eve and New Year's Eve. Further, numerous employees had planned vacations scheduled for one or more days during this period.[10] According to Galant, this left the Employer short-staffed and in an operational situation where it was dealing with emergencies which arose, scheduling preventative maintenance and certain year-end activities generally performed during holiday periods when the attendance of other associates was less likely to interfere with such work. Galant asserted that while this was the Employer's busiest time it was also one of the two periods where the vacation schedule was heaviest (the other being July).

Both Lorah and Driscoll offered similar testimony. Lorah testified that during the two-week period from December 22 through January 2 staffing was limited. The company had preventative maintenance to perform and an end-of-month deadline to perform such work or face a determination that they were non-compliant with FDA regulations. Due to such limited staff and work load, no campaign meetings were held with employees during this period of time. Driscoll testified that during this period the number of on-site employees was limited and that the OMP Facilities Team had a great deal of preventative maintenance work to perform. One day,

---

[10] The Employer introduced into evidence a chart summarizing the vacation and holiday leave of the employees in the petitioned-for unit during the period from December 22 through January 2. There are four "teams" referenced: the OMP Facilities Team, the OCD Facilities Team, the Remote Engineering Services Team and the Stationary Engineers. Among the ten employees assigned to the OMP Facilities Team, the number of additional scheduled vacation days per employee were as follows: 4, 1, 2, 0, 31/2, 2, 6, 1, 5 and 4. Of the 17 employees assigned to the OCD Facilities Team the scheduled vacation days per employee were: 5, 21/2, 6, 3, 0, 1,1, 0, 0,1, 4,1, 3 ,2, 3 ,2 and 0. The breakdown for the six employees of the Remote Engineering Services Team was: 3, 6, 4, 0, 5 and 2. The number of vacation days as scheduled by six of the eight stationary engineers was: 3, 3, 4, 6, 6 and 3. In addition, three stationary engineers were scheduled to work nights on three occasions during this period and one was scheduled for two.

Driscoll found himself obliged to call in an employee who was on leave due to the volume of work.

Driscoll further testified that employee vacations are scheduled in advance and approved by him. The Employer attempts to allow employees to spend the holiday time with their family, while ensuring that key personnel are in place. That generally means that one person from each craft is present in the event of an emergency. Typically, such vacations are scheduled a few weeks, if not more, ahead of time. Some employees give a "couple of months" notice and others only a week or so. The company policy regarding carrying over vacation from year-to-year is that it is at the discretion of management, and has to be used during the first quarter of the new calendar year. Driscoll further stated that it would have to be a "critical situation," but offered no elaboration on what he meant by that statement. On cross-examination both Lorah and Driscoll acknowledged that they had the discretion to approve or deny vacation requests based upon business needs.

The record establishes that the Employer held a meeting for its employees on the morning of Friday, December 19 to review its position regarding the campaign. Another meeting was held during the evening of December 30 which was attended by those employees, primarily stationary engineers, who had not been able to attend the prior meeting due to work or vacation schedules. Other than that, there were no organized meetings during the two-week period from December 22 to January 2. On January 6, morning meetings were held with employees at both the OMP and OCD facilities. In addition, there was a town-hall style meeting held that afternoon. No meetings were held with employees on January 7 due to the pendency of the election the following day. See e.g. *Peerless Plywood Co*., 107 NLRB 427, 429 (1954) (election speeches on company time to massed assemblies of employees within 24 hours prior to the scheduled time of an election constitute grounds for setting aside an election when proper objections are filed.)

As noted above, the Employer contends that the period between the issuance of the Decision and Direction of Election on December 10 and the holding of the election on January 8 was substantially consumed by company-wide holidays and large-scale vacations by eligible voters. Combined with limited personnel resources created by these conditions, the employer asserts that it faced numerous operational challenges during this period of time. As the Employer asserts, these factors significantly impaired the ability of the Employer to conduct a campaign and communicate with employees in connection with the election. The Union asserts that the unrebutted testimony is that the company retains the discretion to either approve or deny vacation time and therefore, that any employee shortage resulted from the exercise of this discretion.

Here, the Employer has presented insufficient evidence to meet its burden of proof to establish that the scheduling of the election somehow prevented it from communicating the Employer's position on the election to employees to the extent that it could be deemed to constitute objectionable conduct.

As the Board has held, "[f]or many years, it has been the Board's customary practice to leave the selection of the time and place of elections, held pursuant to its direction, to the discretion of the Regional Director." *Manchester Knitted Fashions, Inc*., 108 NLRB 203 (1954). Various courts have also recognized that the Board has wide discretion in scheduling elections. See *Beck Corp. v. NLRB*, 590 F.2d 290, 293 (9th Cir. 1978). When such discretion has been challenged, courts have looked toward whether there has been an abuse of discretion which denies employees the opportunity to vote. See e.g. *Daylight Grocery Co. v. NLRB*, 678 F.2d 905, 910 (11th Cir. 1982), citing *NLRB v. Sauk Valley Mfg. Co*., 486 F.2d 1127, 1132 (9th Cir.

1973).

Applying the foregoing principles here, I find that the Employer has not made a showing that the Regional Director's exercise of his discretion in the scheduling of the election interfered with employee free choice or in any other way impaired the fairness of the election or reasonably tended to affect its outcome. The election was held 29 days after the issuance of the Decision and Direction of Election, squarely within the Board's well-established guidelines.[11] Out of approximately 42 eligible voters, 40 participated in the election, so the date on which the election was conducted obviously had little, if any, effect on voter participation. The Employer asserts that the scheduling shortened the time it had to campaign; however, I do not find that the record establishes any significant impairment in the Employer's ability to conduct its campaign through meetings with employees or in any other manner. In this regard, I note that the record establishes that the Employer held meetings with its employees both prior and subsequent to the two-week period from December 22 to January 2. Moreover, there is no evidence that the Employer was precluded from using other means to communicate with employees during the pre-election period. Further, to the extent that employees were not present at the worksite, or otherwise unavailable due to holiday plans, the Union was affected by these exigencies as well, so the Employer can hardly argue that it was uniquely prejudiced by the selection of the election date by the Regional Director. Thus, the Employer has failed to show that its ability to participate in a pre-election campaign was compromised by the election date to the extent that would have resulted in employee confusion, interfere with employee free choice or otherwise materially affect the election results.

Accordingly, I recommend that Objection No. 5 be overruled.

Objection No. 6

In support of this objection, the Employer argues that all of the conduct described above interfered with the conduct and results of the election based upon the "totality of the circumstances."

While it is the case that the Board will examine the totality of the circumstances and may find, under certain circumstances, that the cumulative effect of acts of misconduct will be sufficient to have interfered with employee free choice, the Employer still bears the "heavy" burden of establishing interference with the election. In the instant case the Employer has failed to prove any instance of objectionable misconduct, and has further failed to establish that the conduct found to have occurred during the pre-election period reasonably could be construed to have affected the employees in the voting unit so as to have had a reasonable tendency to materially affect the outcome of the election. Accordingly, I recommend that Objection No. 6 be overruled.

[11] Section 101.21(d) of the Board's Statements of Procedure provides in pertinent part that after the filing of a request for review of a decision and direction of election, "[t]he Regional Director's action is not stayed by the filing of such a request or the granting of review, unless ordered by the Board. Thus, the Regional Director may proceed immediately to make any necessary arrangements for an election, including the issuance of a notice of election. However, unless a waiver is filed, the Director will normally not schedule an election until a date between the 25th and 30th day after the date of the decision, to permit the Board to rule on any request for review which may be filed."

II. Conclusions and Recommendations

As set forth above, insufficient evidence has been adduced to prove that the Union or the Board engaged in objectionable conduct as alleged. Accordingly, I shall recommend that Objections 3, 4, 5 and 6 be overruled and that a Certification of Representative be issued.[12]

Dated: Washington, D.C. May 8, 2009

Mindy E. Landow
Administrative Law Judge

[12] Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington, D.C. within 14 days of the date of issuance of this report and recommendations. Exceptions must be received by the Board in Washington by May 22, 2009. Immediately upon the filing of such exceptions, the party filing them shall serve a copy on the other parties and shall file a copy with the Regional Director of Region 22. If no exceptions are filed, the Board may adopt this recommended decision.