

UNITED STATES OF AMERICA  
BEFORE THE  
NATIONAL LABOR RELATIONS BOARD  
REGION 28

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In the matter of: )  
)  
ST. CATHERINE HEALTHCARE AND )  
REHABILITATION CENTER, LLC )  
)  
Employer, )  
)  
and )  
)  
DISTRICT 1199NM, NATIONAL UNION )  
OF HOSPITAL AND HEALTHCARE )  
EMPLOYEES, AFSCME, AFL-CIO )  
)  
Petitioner. )  
\_\_\_\_\_)

Case No. 28-RC-6661

EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE’S REPORT  
ON CHALLENGED BALLOT AND OBJECTIONS

Pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board (“Board”), St. Catherine Healthcare and Rehabilitation Center, LLC (“St. Catherine” or “Employer”), by and through its undersigned counsel, hereby files Exceptions to the Administrative Law Judge’s Report on Challenged Ballot and Objections (“Report”) issued on September 28, 2009, as follows:

1. To the finding by the Administrative Law Judge (“ALJ”) that “[i]n the “No” box the voter placed a ‘/’ accompanied by some smudging as if the voter then attempted to erase at least part of that marking.” (R. 2:31-34.)<sup>1</sup>
2. To the ALJ’s finding the “smudging” on the ballot in question could not have been “created by something other than the voter’s attempt to erase the mark, such as the folding or other handling of the ballot” and the Employer’s argument that it could have been was “entirely speculative.” (R. 3:9-11.)

<sup>1</sup>“(R. \_\_)” references the Report by page and line numbers.

3. To the ALJ's finding the "smudging" on the ballot in question could not have been "created by the by something other than the voter's attempt to erase the mark" because "that smudging is not present in the 'YES' box" and the "pencils in the voter's (sic) booth had erasers." (R. 3:9-13.)
4. To the ALJ's conclusion the voter on the ballot in question "made an attempt to erase the mark he or she placed in the 'NO' box." (R. 3:12-13.)
5. To the ALJ's conclusion the "intent of the voter can be discerned and that the voter intended to vote in favor of the petitioner." (R. 3:14-15.)
6. To the ALJ's conclusion Petitioner won the election and should be certified as the collective bargaining representative of the unit employees. (R. 3:16-18.)
7. To the ALJ's failure to refer to, recognize or weigh the uncontradicted record evidence that the the ballot was written in English and Spanish only, and the Employer employed eligible voters whose primary language was Tagalog or Russian, or were mentally disabled. (R. 2:26-3:18.)
8. To the ALJ's failure to refer to, recognize or weigh the uncontradicted record evidence that prior to the election, Andujo met with eligible voters and advised them to not make any stray or identifying marks on the ballot, and if they made a mistake, that they ask the Board Agent for a new ballot. (R. 2:26-3:18.)
9. To the ALJ's failure to refer to, recognize or weigh the uncontradicted record evidence that the YES box contained a curved diagonal from the bottom left corner to the upper right, similar to the one in the NO box. (R. 2:26-3:18.)
10. To the ALJ's failure to refer to, recognize or consider the Employer's argument that the "smudging" in the NO box could have been the result of the voter erasing the original mark leaving a smudge, and then re-writing a second diagonal in the same place. (R. 2:26-3:18.)
11. To the ALJ's failure to refer to, recognize or consider case law holding that the intended erasure or obliteration of a second marking requires more than a smudge. See, e.g., Osram Sylvania Inc., 325 NLRB 758, 758-759 (1998); Mediplex of Connecticut, Inc., 319 NLRB 281, 300 (1995); J.L.P. Vending Co., Inc., 218 NLRB 794, 794-795 (1975) (R. 2:26-3:18.)
12. To the ALJ's finding Lauterborn "announced that any party had the right to challenge his interpretation that the ballot was void." (R. 4:39-40.)
13. To the ALJ's finding Lauterborn "revised the tally of ballots to show that there was one determinative challenge and therefore the final results of the election had not yet been decided." (R. 4:42-43.)

14. To the ALJ's finding Lauterborn did not solicit the Petitioner to challenge the ballot. (R. 4:46-48; 5:19-21.)
15. To the ALJ's finding Petitioner could have filed an objection to the Lauterborn's interpretation of the ballot. (R. 4:48-5:1.)
16. To the ALJ's conclusion that Respondent's argument Petitioner did not intend to challenge the ballot was "speculative." (R. 5:1-3.)
17. To the ALJ's conclusion Solvent Services, Inc., 313 NLRB 645 (1994) should be distinguished from this case. (R. 4:45-46.)
18. To the ALJ's conclusion Galli Produce Co., 269 NLRB 478, 478 FN 1 (1984) should be distinguished from this case. (R. 5:5-19.)
19. To the ALJ's conclusion Fresnius USA Mfg., Inc., 352 NLRB 679 (2008) should be distinguished from this case. (R. 6:1-8.)
20. To the ALJ's conclusion Austill Waxed Paper Co., 169 NLRB 1109 (1968) should be distinguished from this case. (R. 6:15-18.)
21. To the ALJ's conclusion Tidelands Marine Services, Inc., 116 NLRB 1222 (1956) should be distinguished from this case. (R. 6:21-25.)
22. To the ALJ's conclusion that Lauterborn did not engage in objectionable conduct by failing to follow the Casehandling Manual. (R. 6:9-11.)
23. To the ALJ's conclusion that Lauterborn secured the ballot in question "in a way to assure against tampering, mishandling or damage." (R. 6:11-14.)
24. To the ALJ's conclusion that the legal standard for whether a Board Agent engaged in conduct sufficient to overturn an election is if they failed to "assure against tampering, mishandling, or damage" to the challenged ballot. (R. 6:4-14.)
25. To the ALJ's conclusion Respondent's Objection Nos. 5 and 9 be dismissed. (R. 5:19-23; 6:27.)
26. To the ALJ's failure to conclude Lauterborn's conduct interfered with the fair operation of the election process and engaged in conduct affecting the result of the election. (R. 4:28-6:26.)
27. To the ALJ's failure to refer to, recognize or weigh the uncontradicted record evidence that the Union did not challenge the ballots after Lauterborn announced the results, shook the Employer's representatives' hands, and congratulated them. (R. 4:28-6:26.)

28. To the ALJ's failure to refer to, recognize or weigh the record evidence that Union representative Henry Santana appeared surprised after Lauterborn looked at him and asked, "I assume you are going to challenge." (R. 4:28-6:26.)
29. To the ALJ's failure to refer to, recognize or weigh the uncontradicted record evidence that Blackburn was not authorized to conduct NLRB elections. (R. 4:28-6:26.)
30. To the ALJ's failure to refer to, recognize or weigh the uncontradicted record evidence that after Lauterborn sealed the ballot outside of the parties' presence, he was going to sign the envelop before administrative assistant Stephanie Blackburn told him, "I believe the parties should be signing over that tape as well." (R. 4:28-6:26.)
31. To the ALJ's failure to refer to, recognize or weigh the uncontradicted record evidence that Lauterborn left the ballot in question alone with administrative assistant Stephanie Blackburn for several minutes. (R. 4:28-6:26.)
32. To the ALJ's failure to refer to, recognize or weigh the uncontradicted record evidence that Lauterborn may have placed the challenged ballot with his checked luggage and clearly could not firm he maintained possession of the ballot at all times. (R. 4:28-6:26.)
33. To the ALJ's failure to apply the applicable legal standard that a Board Agent may not make challenges on behalf of a party. See Solvent Services, Inc., 313 NLRB 645, 645 (1994); Galli Produce Co. Inc., 269 NLRB 478, 478 FN1 (1984); see also NLRB Casehandling Manual Sections 11338.2(b), 11340.7. (R. 4:28-6:26.)
34. To the ALJ's failure to refer to, recognize or apply the applicable legal standard that the appearance or possibility of irregularity by a Board Agent is sufficient to overturn the results of an election. See Paprikas Fono, 273 NLRB 1326, 1328 (1984); Hook Drugs, Inc., 117 NLRB 846, 848-849 (1957) (R. 4:28-6:26.)
35. To the ALJ's failure to refer to, recognize or apply the applicable legal standard that a Board Agent's violation of the NLRB's established procedures in its Casehandling Manual can be sufficient grounds for determining Board Agent misconduct. Madera Enterprises, Inc., 309 NLRB 774, 774 (1994); Glacier Packing Co., 210 NLRB 571, 573 (1974) (R. 4:28-6:26.)
36. To the ALJ's failure to refer to, recognize or apply the legal standard that a Board Agent's multiple breaks in the chain of custody in handling a determinative challenged ballot is sufficient to overturn the results of an election. (R. 4:28-6:26.)
37. To the ALJ's conclusion the Regional Director did not err in correcting Lauterborn's misconduct by reissuing the Tally of Ballots. (R. 7:1-3.)
38. To the ALJ's conclusion Respondent's Objection Nos. 7 and 10 be dismissed. (R. 7:1-3.)

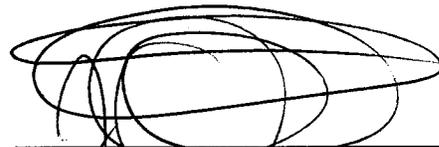
39. To the ALJ's failure to conclude the Regional Director's conduct interfered with the fair operation of the election process and engaged in conduct affecting the result of the election. (R. 6:28-7:3.)
40. To the ALJ's failure to refer to, recognize, or apply the Employer's argument the Regional Director improperly reinstated the Union's challenge and permitted a post-election challenge. (R. 6:28-7:3.)
41. To the ALJ's recommendation the challenged ballot be counted as a vote in favor of representation by the Petitioner, Respondent's Objections Nos. 5, 7, 9 and 10 be dismissed, and Petitioner be certified as the bargaining unit's collective-bargaining representative. (R. 10:17-20.)

Accordingly, for the foregoing reasons, and the reasons set forth in the Employer's Brief in Support of Exceptions to the Report on Challenged Ballot and Objections, the Employer respectfully requests its Exceptions be sustained.

Respectfully submitted this 13<sup>th</sup> day of October, 2009.

JACKSON LEWIS LLP

BY: \_\_\_\_\_



Bradley W. Kampas, Esq.  
John A. Ontiveros, Esq.  
JACKSON LEWIS LLP  
Attorneys for Employer  
199 Fremont St., 10<sup>th</sup> Floor  
San Francisco, CA 94105  
Phone: (415) 394-9400  
Fax: (415) 394-9401

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Case No. 28-RC-6661

**EMPLOYER'S BRIEF IN SUPPORT OF ITS EXCEPTIONS**  
**TO THE ADMINISTRATIVE LAW JUDGE'S REPORT**  
**ON CHALLENGED BALLOT AND OBJECTIONS**

Bradley W. Kampas, Esq.  
John A. Ontiveros, Esq.  
JACKSON LEWIS LLP  
Attorneys for Employer  
199 Fremont St., 10th Floor  
San Francisco, CA 94105  
Phone: (415) 394-9400  
Fax: (415) 394-9401

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## **I. INTRODUCTION**

St. Catherine Healthcare and Rehabilitation Center, LLC (“St. Catherine” or “Employer”) submits this Brief in Support of its Exceptions to the Administrative Law Judge’s Report on Challenged Ballot and Objections (“Report”). Administrative Law Judge William G. Kocol (“ALJ”) issued the Report on September 18, 2009.<sup>1</sup> In the Report, the ALJ concluded the intent of the voter was clear and recommended the National Labor Relations Board (“Board” or “NLRB”) overturn the Board Agent’s voiding of the challenged ballot. (R. 2:8-18.)<sup>2</sup> He also recommended the Employer’s objections be denied.<sup>3</sup> (R. 5:19-23, 6:27, 7:1-3, 10:17-20.) Accordingly, he recommended District 1199NM National Union of Hospital and Healthcare Employees, AFSCME, AFL-CIO’s (“Union” or “Petitioner”) be certified as the collective-bargaining representative of the unit employees described below. (R. 10:17-20.)

St. Catherine hereby excepts to the ALJ’s recommendations that the Board Agent’s voiding of the challenged ballot be overturned and Employer’s Objections Nos. 5, 7, 9 and 10 be dismissed.<sup>4</sup>

The Board Agent correctly decided the voter’s intent on the challenged ballot was unclear. The voter marked both the YES and NO boxes. Under the National Labor Relations Act (“NLRA” or “Act”), dual-marked ballots are void. Although the ALJ found the voter intended to

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<sup>1</sup> All dates hereafter occurred in 2009 unless otherwise stated.

<sup>2</sup>“(R. \_\_)” references the Report by page and line numbers, “(Tr. \_\_)” references cites to the official hearing transcript page, “(Er. Ex. \_\_)” refers to Employer exhibits submitted during the hearing, “(Bd. Ex. \_\_)” refers to the Board Exhibits submitted during the hearing, and “(U. Ex. \_\_)” refers to Union exhibits submitted during the hearing.

<sup>3</sup>The ALJ also recommended the Union’s Objections be dismissed. Those recommendations are not discussed in this Brief.

<sup>4</sup> While disagreeing with the result, the Employer is not excepting to the ALJ’s recommendation regarding Employer’s Objections Nos. 2, 3, 4 and 8.

erase his or her mark in the NO box, the evidence demonstrated the voter more likely remarked the box with a diagonal after erasing it.

If the Board determines the voter's intent can be determined, it must order a rerun of the election because of the Board Agent's and Regional Director's misconduct in processing the election. The Board Agent improperly solicited the Union's challenge to the voided ballot, failed to seal the challenged ballot with the parties present, and broke the chain of custody on multiple occasions prior to putting the envelope containing the challenged ballot in the Regional Director's safe. The Regional Director furthered this misconduct by issuing a Corrected Tally of Ballots and allowing the Union to engage in an impermissible post-election challenge. The ALJ improperly rejected the Employer's Objections and failed to apply the appropriate legal standard that a rerun election should be ordered when there is the *appearance* of impropriety in the processing of an election.

## **II. PROCEDURAL BACKGROUND**

On May 8, the Union filed a petition to represent certain of St. Catherine's employees. (R. 1.) On June 19, pursuant to a Stipulated Election Agreement, Region 28 of the NLRB conducted an election at St. Catherine's facility in Albuquerque, NM. (R. 1.) There were approximately 69 eligible voters in the unit. (R. 1.)<sup>5</sup>

On the day of the election, the Board Agent counted 29 YES votes and 29 NO votes. (R. 1.) He then voided one ballot because he could not determine the voter's intent. (R. 2:27-28.) As described more fully below, the Board Agent solicited the Union's challenge to his decision.

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<sup>5</sup> Eligible voters included the Employer's full-time, regular part-time and PRN Certified Nursing Assistants, Certified Medical Assistants, Environmental Services Assistants, Activity Assistants, Maintenance Assistants, Dietary Assistants, and Social Services Assistants. (R. 1.) Excluded were all other employees including all PRN pool employees not employed by the Employer, agency employees, Nurses, Maintenance Director, Medical Records Assistant, office clerical and administrative employees, confidential employees, professional employees, managers, guards, and supervisor as defined by the Act. (R. 1.)

(Tr. 36, 87.)

On June 26, St. Catherine timely filed the Employer's Objections. (R. 2:4-5) The Employer's Objections includes two against the Board Agent and two against the Regional Director. (R. 3:19-4:11.) The Employer's relevant Objections against the Board Agent and Regional Director are the following:<sup>6</sup>

Objection No. 5:

The Board Agent interfered with the fair operation of the election process and engaged in conduct affecting the result of the election by failing to properly follow established Board procedure for interpreting ballots and for improperly permitting the union to challenge the Board Agent's interpretation of the ballot, and thereafter by failing to follow the Board's procedure for handling the improperly challenged ballot.

Objection No. 7:

The Regional Director interfered with the fair operation of the election process and engaged in conducting affecting the results of the election by failing to properly follow established Board procedure by improperly permitting the Union to engage in a post-election challenge to the interpretation of a ballot and by entertaining the Union's improperly asserted objection to the conduct of the election based upon the Board Agent's initial interpretation of a determinative ballot, and by thereafter revising the official Tally of Ballots issued by the Board Agent.

Objection No. 9:

By the above and other conduct described in paragraph (6), the Board Agent interfered with eligible voters' exercise of their Section 7 rights under the National Labor Relations Act, and violated the Board's established procedure under the NLRB Casehandling Manual ¶¶ 11340.7-11340.9. The above conduct was sufficient to unlawfully affect the results of the election.

Objection No. 10:

By the above and other conduct described in paragraph (7), the Regional Director interfered with eligible voters' exercise of their Section 7 rights under the National Labor Relations Act, and violated the Board's established procedure under the NLRB Casehandling Manual ¶¶ 11340.7-11340.9. The above conduct was sufficient to unlawfully affect the results of the election.

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<sup>6</sup> During the hearing, the Employer withdrew Objection 6 against the Board Agent. (R. 2:43, FN 2.)

(R. 3:19-4:11.)

As stated previously, the ALJ issued the Report on September 28.

### **III. FACTUAL BACKGROUND AND ARGUMENTS IN SUPPORT OF EXCEPTIONS**

#### **A. THE CHALLENGED BALLOT**

##### **1. Factual Background**

St. Catherine is a 178-bed healthcare facility located in Albuquerque, NM. (R. 2:14-16.)

It provides long-term care and skilled rehabilitation services. (R. 2:14-16.)

St. Catherine employs approximately 132 employees. (R. 2:15-16.) Of those eligible to vote, 10 to 12 spoke Spanish, one Tagalog, and another Russian. (Tr. 17.) In addition, St. Catherine employed a mentally disabled employee. (Tr. 18.)

Jaime Andujo became St. Catherine's Administrator in May 2009. (R. 2:16.) He is in charge of managing the day-to-day operations. (R. 2:16-17.)

During the week of the election, Andujo held a meeting with all eligible voters regarding the election. (Tr. 23.) He advised employees to not make any stray or identifying marks on the ballot. (Tr. 23.) If they made a mistake, he suggested they fold the ballot and ask the Board Agent for a new one. (Tr. 23, 25.)

At 6:30 a.m. on the day of the election, Andujo met with Board Agent Johannes Lauterborn ("Board Agent" or "Lauterborn") for a pre-election conference. (Tr. 29-30.) Also present were Dionne Motal, Vice-President of Human Resources for Skilled Healthcare, Lisa Johnston, Director of Human Resources for Skilled Healthcare,<sup>7</sup> Aaron Green, the Employer's observer, Henry Santana, Union organizer, Sasha Maranda, Union Organizer, and bargaining

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<sup>7</sup> Both Motal and Johnston perform Human Resources work for St. Catherine under an administrative service contract between Skilled Healthcare and St. Catherine. (Tr. 83.)

unit employees Wendy Lahai and Hiroshi Clubs. (Tr. 30.)

During the meeting, the Board Agent instructed the parties to inspect the election booth for campaign materials. (Tr. 31-32.) There was only one booth in the room. (Tr. 31.) Andujo inspected the booth and noticed 10 to 15 pencils with full erasers lying inside. (Tr. 32; R. 2:44.)

The ballot was pink and warned voters: “DO NOT SIGN THIS BALLOT. Fold and drop in ballot box. If you spoil this ballot return it to the Board Agent for a new one.” (Bd. Ex. 4.) The ballots were translated into English and Spanish only. (Bd. Ex. 4.)

There is one determinative challenged ballot. (R. 2:4-5.) The ballot contains markings in both the YES and NO box. (Bd. Ex. 4.) In the NO box there is a light grey smudge. (Bd. Ex. 4.) There is also a diagonal that goes from the lower left corner to the upper right. (Bd. Ex. 4.) The YES box contained a curved diagonal from the bottom left corner to the upper right, similar to the one in the NO box. (Bd. Ex. 4.) There is a second, crooked diagonal that went from the upper left corner to the bottom right. (Bd. Ex. 4.)

The Board Agent voided the challenged ballot on the grounds he could not determine the voter’s intent. (R. 2:27-28.) He then solicited the Union’s challenge to his decision. (Tr. 36, 87.)

2. The Board Agent’s Voiding of the Ballot Should Be Upheld and the Union’s Challenge Dismissed Because the Clear Intent of the Voter Can Not Be Determined

It is Petitioner’s burden to establish the ballot demonstrated the clear intent of the voter. The burden of proof lies with the party seeking to enforce its challenge. Sweetner Supply Corp., 349 NLRB 1122, 1122-1123 (2007). Petitioner ultimately challenged the Board Agent’s interpretation of the ballot and, therefore, the burden lies with it.

The NLRB will give effect to a voter’s ballot, if possible. Daimler-Chrysler Corporation, 338 NLRB 982, 982 (2003), Hydro conduit Corp., 260 NLRB 1352, 1352 (1982). However, the

Board will “avoid speculation or inference regarding the meaning of atypical ‘X’s, stray marks, or physical alterations.” Daimler at 983; see also Kaufman’s Bakery, 264 NLRB 225 (1982). As the NLRB stated in Daimler:

Despite the importance of giving effect to voter intent, it is not the Board’s role to glean voter intent from ambiguous or contradictory markings on a ballot. We thus speculate neither to divine the intent of a ballot that is not clear, nor to negate the intent of a ballot that is otherwise clear.

Applying these principles, we have held a ballot must be voided where a voter has not registered a mark in either a “YES” or “NO” square, or has not otherwise made his or her preference clear. In these cases, the Board cannot determine the clear intent of the voter without engaging in speculation. It is thus not possible to give effect to the voter’s preference.

338 NLRB at 983. See also Mercy College, 212 NLRB 925, 925 (1974) (“[T]he Board does not engage in speculation as to voter intent, but requires that the intent of the voter in marking the ballot must be clearly and unequivocally expressed.”).

The NLRB has historically found where a voter marks both choices on a ballot, the ballot is void. Bishop Mugavero Center, 322 NLRB 209 (1996); Caribe Industrial & Electrical Supply, 216 NLRB 168 (1975). “Again, in these cases, [the Board will] not speculate as to which mark best represents the voter’s intent and [is] thus unable to count the ballot.” Daimler, supra at 983.

The NLRB has repeatedly found the clear intent of the voter cannot be determined where, as here, the voter placed an X in one selection and a diagonal in the second. See, e.g., TCI West, Inc., 322 NLRB 928, 928-929 (1997) (NLRB held a ballot with an X in one box and a diagonal in the other did not disclose the clear intent of the voter. The Board noted the voter should have requested a new ballot in light of the instructions on the ballot.); Bishop Mugavero, supra at 209 (NLRB found that dual markings with an X under the NO and a diagonal under the YES were inconclusive); Caribe, supra at 168-169 (Dual markings in ballot box, i.e. an X in the YES and a diagonal in the NO, do not clearly express the intent of the voter.). The aforementioned cases are

identical to the present matter. Here, there is an X under the YES and a clearly marked diagonal under the NO. These markings make the voter's intent ambiguous and the ballot should remain void.

Notwithstanding the aforementioned Board precedent, the ALJ erroneously concluded—without any supporting case law—the markings on the ballot revealed the clear intent of the voter. In fact, he completely ignored the fact that there was still a diagonal in the NO.

The ALJ also ignored other evidence that the voter's intent was unclear. For example, the X in the YES is not well constructed, signifying it may have not been the voter's selection. The diagonal leg of the X that goes from the bottom left of the box to upper right corner is identical to the one in the NO box. However, the other leg of the X is crooked, uneven, and lighter in color. (Board Ex. 4.)

The voter's intent is further muddled by the fact that it is unclear whether the voter understood what to do with the ballot. The ballot was written in English and Spanish only. (Bd. Ex. 4.) It is possible the voter was St. Catherine's Tagalog speaking, Russian speaking, or mentally disabled employee, and they did not understand the instructions on the ballot. Nevertheless, the ALJ also ignored this evidence.

3. The Smudge On The Ballot Did Not Demonstrate An Attempted Erasure or Obliteration Because It Appears The Voter May Have Erased a Prior Mark and Then Placed a Diagonal Back In the NO Box

The ALJ also concluded the smudge appeared to be an attempted erasure of the diagonal in the NO. (R. 3:8-18.) This is speculation. The marking in the NO looks more like the voter erased the original diagonal and then wrote in a second one. (Bd. Ex. 4.)

The Board held that “when a voter has marked both squares, and neither an erasure nor attempted obliteration of the second marking nor other markings on the ballot makes clear the

voter's preference," the ballot is void. Daimler, supra at 983. In this case, it reasonably appears the voter erased some mark and then placed a diagonal in its place. There is no erasure or attempted obliteration of this diagonal.

Employer's Exhibit 4 best demonstrates what may have occurred. As an example, Andujo testified he put a diagonal in the NO box from the bottom left to the upper right corner. (Tr. 52-54.) He erased the mark with a pencil similar to the one he saw on the day of the election. (Tr. 52-54.) His erasure resulted in a smudge, similar to the one on the challenged ballot. (Tr. 52-54; Er. Ex. 4.) He then placed a second diagonal in the NO over the smudge. (Tr. 52-54.) The markings in the NO box of Employer's Exhibit 4 are similar to the ones on the challenged ballot. (Er. Ex. 4; Bd. Ex. 4.) There is a strong possibility the voter did exactly what Andujo demonstrated on Employer Exhibit 4.

It is also possible there was no erasure of the original diagonal and the smudge is the result of some other activity. The marking was in pencil and the smudge could be the result of the voter folding the ballot or rubbing their thumb over the mark. Indeed, the voters were provided numerous pencils with full erasers. (R. 2:44, FN 3.) If the voter had actually intended to erase the diagonal, the voter would have done so.

Nevertheless, the ALJ concluded the smudge in the NO box constituted an attempted erasure. (R. 3:8-18.) He did not address the Employer's arguments. (R. 3:18-18.) Instead, he concluded, without any supporting rationale, that the voter intended to erase the diagonal in the NO. (R. 3:8-18.) This type of speculation is prohibited by Board law. Daimler, supra at 983. This is also contrary to the Petitioner's burden of proof in support of its challenge because the Board Agent declared the ballot void.

Moreover, the Board has required in cases involving the erasure or obliteration of a second marking that there be more than a shading or smudge. See, e.g., Osram Sylvania, Inc., 325 NLRB 758, 758-759 (1998) (Ballot not void where there were smudges over a diagonal line and multiple “X”s in the other selection.); Mediplex of Connecticut, Inc., 319 NLRB 281, 300 (1995) (Ballot not void where there was an attempted erasure of a light “X” in the “YES” box and a “heavy, clear, more intense” “X” in the “NO” box, with a double line on one leg of the “X.”); J.L.P. Vending Co., Inc., 218 NLRB 794, 794-795 (1975) (Ballot not void where there was attempted erasure of a diagonal line in the “NO” box and several diagonal lines superimposed on each other in the “YES” box.) The ALJ made no such finding in this case.

B. EMPLOYER OBJECTIONS NOS. 5, 7, 9 AND 10 REGARDING BOARD AGENT AND REGIONAL DIRECTOR MISCONDUCT

1. Factual Background

The Board Agent counted the ballots on June 19 after the polls closed. (R. 1.) Andujo, Motal, Santana, Maranda, Lahai and Clubs were present. (Tr. 33, 86.) At one point, the Board Agent held up a ballot, looked at it, and told the parties he was going to put it aside and continue counting. (Tr. 33-34, 86.)

At some point during the count, Stephanie Blackburn, Administrative Assistant for Region 28 of the NLRB, entered the room. (Tr. 38-39.) Blackburn is not authorized to conduct NLRB elections. (Tr. 128, 136.)

The Board Agent counted 29 YES votes and 29 NO votes. (R. 1.) He then picked up the ballot he put aside, reviewed it, consulted the NLRB Casehandling Manual several times, and declared the ballot void on the grounds he could not determine the voter’s intent. (R. 2:27-28.) The Union did not challenge the Board Agent’s decision. (Tr. 35, 86.)

Immediately after Lauterborn announced his decision, Santana shook Andujo’s hand and

said, "Congratulations," signifying his acknowledgment that the Union had lost the election. (Tr. 35, 86.) Santana then shook Motal's hand and congratulated her. (Tr. 36, 87.) At this point, the Board Agent looked at Santana and said, "I assume you're going to challenge?" (R. 4:38-39.) Santana appeared shocked. (Tr. 87.) He paused and responded, "Yes, yes, we will." (Tr. 87.) The Board Agent then filled out the Tally of Ballots noting there was one void ballot, a majority of valid votes had not been cast for Petitioner, and the challenges were not sufficient to affect the results of the election. (R. 1.)

After completing the count, Lauterborn and the parties went to the copy room and made a copy of the ballot. (Tr. 39.)

The parties went back into the room where the election was held. (Tr. 39.) Lauterborn dismissed them and stated the election was over. (Tr. 39, 92-93.) Approximately five minutes later, Lauterborn placed the challenged ballot in a manila envelope and sealed it with tape. (R. 5:29-36.) The Employer and Union representatives were not present. (R. 5:29-36.) He was about to sign the envelope when Blackburn stopped him and said, "I believe the parties should be signing over that tape as well." (Tr. 133.) The Board Agent agreed and went to look for them. (Tr. 110; 133.) He left the ballot with Blackburn. (Tr. 111.)

The Board Agent called the Union and asked them to return. (R. 5:30-31.) He then went to Andujo's office and asked them to come back. (R. 5:30-31.) Motal and Santana returned to the room where the election was held and signed the folds of the manila envelope with the challenged ballot. (R. 5:30-31.) At no point did the Board Agent unseal the envelope and show the parties what was inside. (R. 5:29-36.)

Afterwards, Lauterborn went to the Albuquerque airport and checked luggage for his flight back to Phoenix. (Tr. 122-123.) Lauterborn testified he possibly placed the manila

envelope with the challenged ballot in his checked luggage. (Tr. 123.) He clearly did not know where the ballot was during the flight. (Tr. 123.) When he arrived in Phoenix, he went home with the challenged ballot. (R. 5:32-34.) He did not put it into the Regional Director's safe until the following day. (R. 5:32-34.)

2. If the Challenged Ballot is Not Void, the NLRB Should Order a Rerun of the Election Because the Board Agent Engaged in Misconduct by Soliciting a Challenge to His Own Interpretation of the Ballot, Failing to Seal the Challenged Ballot In Front of the Parties, and Breaking the Chain of Custody (Objections Nos. 5 and 9)

When determining whether to set aside an election on the basis of Board Agent conduct, “the Board goes to great lengths to ensure that the manner in which an election was conducted raises no reasonable doubt as to the fairness and validity of the election.” Jakel, Inc., 293 NLRB 615, 616 (1989), citing Polymers, Inc., 174 NLRB 282 (1969), enfd. 414 F.2d 999 (2<sup>nd</sup> Cir. 1969), cert. denied 396 U.S. 1010 (1970). If an irregularity occurs, the Board will set aside the election. Polymers, 174 NLRB at 282. “The Board is responsible for assuring properly conducted elections and its role in the conduct of elections must not be open to question.” New York Telephone Co., 109 NLRB 788, 790 (1954). “Where...the irregularity concerns an essential condition of an election, and such irregularity exposes to question a sufficient number of ballots to affect the outcome of the election, in the interest of maintaining [the Board's] standards,” a new election must be ordered. Id. at 790-791.

In his Report, the ALJ improperly concluded the Board Agent did not engage in misconduct because he secured the ballot “in a way to assure against tampering, mishandling, or damage.” (R. 6:4-14.) The Board does not require a determinative, challenged ballot be “tampered with or mishandled” to order a re-run election. Paprikas Fono, 273 NLRB 1326, 1328 (1984). The Board in Paprikas ordered a new election stating:

Our dissenting colleague, however, like the hearing officer, apparently would require actual evidence that the challenged ballots were tampered with or mishandled before she would reach a similar result. The dissent's approach to this issue, in our view, would detract significantly from the election standards that the Board has promulgated. Our colleague fails to recognize that, if this Agency is to maintain the public's confidence in its election processes, it is imperative that the Board act dutifully to set aside elections whenever there is any *appearance* of irregularity in the handling of ballots.

*Id.* (Emphasis added.) See also Hook Drugs, Inc., 117 NLRB 846, 848-849 (1957) (Board upheld Regional Director's decision that election should be overturned "[n]otwithstanding the absence of any evidence of impropriety...because there existed the *possibility* of irregularity."). (Emphasis added.)

The Board looks to whether the Board Agent or Regional Director violated the NLRB's established procedures in its Casehandling Manual to determine if they have engaged in misconduct. Madera Enterprises, Inc., 309 NLRB 774, 774 (1994). The Casehandling Manual serves as "procedural and operational guidance for the Agency's staff in the handling of representation cases." *Id.* The NLRB gives deference to the procedures in the Casehandling Manual noting that it was created by the Board "to assure that its role in the conduct of election is not subject to question." Paprikas, 273 NLRB at 1328, citing Glacier Packing Co., 210 NLRB 571, 573 (1974).

The Board's Casehandling Manual reads, in pertinent part:

Section 11338.2(b): Who May Challenge/Board Agent

...The Board agent will not make challenges for the parties when such parties have observers present. Galli Produce Co., 269 NLRB 478 (1984)....

...

Section 11340.7: Challenge of Board Agent Interpretation

If the intent of the voter is clear, the Board Agent should not allow the ballot to be

challenged. However, if a party's challenge to the interpretation of the ballot is based on good cause, the Board agent should segregate the ballot and the ballot should be listed on the tally as a challenged ballot....

...

#### Section 11340.9(a): Determinative Challenged and Questioned Interpretation Ballots

In the event there are determinative challenged voters...and/or questioned interpretation ballots...the following steps should be part of the tally process.

Information regarding determinative challenged voters or questioned interpretation ballots should be listed on the front of Form NLRB-5126, a large envelope designed for this purpose....The determinative challenged ballot envelopes and/or the questioned interpretation ballot envelopes should then be placed, *in the presence of the parties' representatives*, into the Form NLRB-5126 envelope(s)...After sealing the Form NLRB-5126 envelope(s), the Board agent and the parties' representatives should sign their names across the flap. The flap should then be secured with transparent tape in such a manner as to ensure against accidental opening....

...

#### Section 11344.1: Determinative Challenged and Questioned Interpretation Ballots

Upon the Board agent's return to the Regional, Resident, or Subregional office, the envelope(s) Form NLRB-5126 containing determinative challenged ballots and/or questioned interpretation ballots *must be stored promptly*....

...

(Emphasis added.)

The ALJ refuted the aforementioned standard stating the "provisions of the Casehandling Manual are not binding procedural rules" and cited Correctional Health Care Solutions, 303 NLRB 835 (1991). (R. 6:9-11.) However, the Employer never argued the Casehandling Manual's rules are binding. St. Catherine instead maintained the Board Agent's repeated failure to follow the rules gave the *appearance* of impropriety. The NLRB has repeatedly overturned elections where the Board Agent's conduct violated the Casehandling Manual and gave doubt as

to the fairness and validity of the election. See Fresenius USA Mfg., Inc., 352 NLRB 679, 680 (2008); Paprikas, supra at 1328.

In the present matter, the Board Agent repeatedly failed to follow the Board's procedures. First, he solicited the Union's challenge to the ballot he declared void. The ALJ's conclusion the Employer is only speculating as to whether the Union intended to challenge the ballot is inconsistent with the record evidence. Immediately after Lauterborn declared the ballot void, Santana shook Andujo's and Motal's hands and congratulated them. (Tr. 35, 86.) He did not challenge the Board Agent's interpretation until Lauterborn asked him, "I assume you're going to challenge?" (R. 4:38-39.) Santana appeared shocked. (Tr. 87.) His actions were inconsistent with someone who intended to contest the results of an election. The ALJ failed to address these critical facts in the Report.

The ALJ also seemed to rely on Lauterborn's uncorroborated testimony that he "announced that any party had the right to challenge his interpretation that the ballot was void." (R. 4:39-40.) However, Lauterborn's self-interested testimony is not credible. It would be unnecessary for him to tell "any party" they had a right to challenge his interpretation since only the Union would benefit from the objection. It is more likely that he would look at the Union and state, "I assume you're going to challenge?" (R. 4:38-39.) Not even Santana testified that Lauterborn made this statement at the election. (Tr. 141-148.)

The Board Agent's solicitation of the Union's challenge violated the Board's long-held rule that parties' must make their own challenges. Solvent Services, Inc., 313 NLRB 645, 645 (1994); Galli Produce Co., Inc., 269 NLRB 478, 478 FN1 (1984). The NLRB incorporated this standard into its Casehandling Manual. See Section 11338.2(b), Section 11340.7.

The ALJ challenged the Employer's reliance on this case law stating it was inapplicable. However, Board law and the Casehandling Manual clearly prohibit a Board Agent from being partial and improperly assisting a party in the challenge process. When the Board Agent solicited the Union's challenge he abandoned his role as a neutral third party. The ALJ characterized this as the Board Agent "merely stating the obvious." (R. 4:46-48.) His characterization is too simplistic. Lauterobrn asked Santana, "I assume you are going to challenge?" (R. 4:38-39.) Naturally, Santana would have concluded that Lauterborn—a federal agent in charge of the election process—was signaling him to challenge the decision because he may be successful. As a result, the Board Agent became partial and gave the appearance of impropriety.

In addition, the evidence is uncontested Lauterborn made the critical error of sealing the challenged ballot outside of the parties' presence. (R. 5:29-36.) Indeed, the ALJ recognized this. (R. 5:29-31.) The Employer is unaware of the ballot's condition when Lauterborn placed it in the envelope.

Moreover, the Board Agent broke the chain of custody on multiple occasions after placing the challenged ballot in the manila envelope. The Board will order a rerun of an election where the Board Agent breaks the chain of custody of determinative challenged ballots. See e.g., Fresenius, supra; Tidelands Marine Services, Inc., 116 NLRB 1222 (1956).<sup>8</sup> First, he left the challenged ballot unattended with Blackburn—who was not a supervisor or Board Agent—for several minutes. (Tr. 111.) He then (possibly) placed the challenged ballot in his checked

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<sup>8</sup>The ALJ went to great lengths to distinguish these cases in his Report. (R. 6:1-27.) However, this case law is still relevant to establish that a break in the chain of custody in the handling of determinative, challenged ballots is grounds for the rerun of an election.

luggage. (Tr. 123.) When he arrived in Phoenix, he left the ballot at his home overnight before securing it in the Regional Director's safe. (Tr. 114.)

Nevertheless, the ALJ incorrectly found this conduct was not objectionable. He failed to address the evidence that the Board Agent left the challenged ballot unattended with the administrative secretary. He also glossed over Lauterborn's own testimony that he may have placed the challenged ballot in his checked luggage. Indeed, the ALJ did not address Lauterborn's uncontradicted testimony that he was unsure he maintained the challenged ballot with him at all times when traveling. (Tr. 123.)

In addition, the ALJ failed to analyze whether the aforementioned conduct gave the appearance of impropriety. Instead, he relied on Lauterborn's supposed securing of the ballots to justify the dismissal. (R. 6:9-14.)

In the end, the Board Agent's conduct raised serious concerns regarding the fairness and validity of the election by soliciting the Union's challenge to the voided ballot, failing to seal the ballot in the parties' presence, and leaving the ballot unattended on multiple occasions.

3. The Regional Director Furthered the Misconduct By Re-Issuing The Tally of Ballots (Objections Nos. 7 and 10)

The Regional Director furthered the misconduct by re-issuing the Tally of Ballots and allowing the Union to engage in a post-election challenge. Although the ALJ expressed confusion regarding this Objection, it is straight forward. (R. 6:28-7:3.) The Board Agent filled out the Tally of Ballots stating that the ballot was void, challenges were not sufficient to effect the result of the election, and a majority of valid votes counted plus challenged ballots had not been cast for Petitioner. (Tr. 36, 88-89; Er. Ex. 3.) In essence, he declared that the election was over and Petitioner lost. By filling out the Tally of Ballots in this manner, he unilaterally erased the Union's challenge. Moreover, the Union technically withdrew its challenge by signing the

Tally of Ballots without protest. (Tr. 36, 88-89; Er. Ex. 3.)<sup>9</sup>

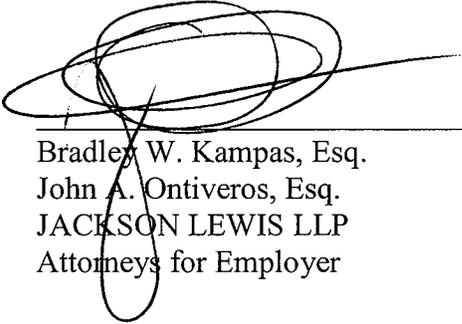
By issuing a Corrected Tally of Ballots, the Regional Director improperly reinstated the Union's challenge. Indeed, the Regional Director is permitting a post-election challenge, which is prohibited by Board law. See Solvent Services, supra at 646 (“[I]n the interest of promoting election finality, postelection challenges will not be permitted.”) citing Sears, Roebuck & Co., 114 NLRB 762, 763 (1955). By engaging in the aforementioned conduct, the Regional Director created a reasonable doubt as to the fairness and validity of the election process, and a rerun election should be ordered.

#### IV. CONCLUSION

Based upon the foregoing, the Employer requests the ALJ's recommendation regarding the challenged ballot be dismissed. In the alternative, if the Board upholds the ALJ's recommendation on the challenged ballot, it should dismiss the ALJ's recommendation regarding the Employer's Objections Nos. 5, 7, 9 and 10 and order a rerun of the election.

Respectfully submitted this 13<sup>th</sup> day of October, 2009.

JACKSON LEWIS LLP

BY: 

Bradley W. Kampas, Esq.  
John A. Ontiveros, Esq.  
JACKSON LEWIS LLP  
Attorneys for Employer

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<sup>9</sup>This is also further evidence of the Board Agent's misconduct. The Board Agent failed to follow the proper procedures for filling out the Tally of Ballots. See Section 11340.8, "Preparation of Tally of Ballots (Sample Tally of Ballots)."

**PROOF OF SERVICE**

Case Name: ST. CATHERINE HEALTHCARE AND REHABILITATION CENTER, LLC  
Case No.: 28-RC-6661

I, Cheryl Cleary, declare that I am employed with the law firm of Jackson Lewis LLP, whose address is 199 Fremont Street, 10<sup>th</sup> Floor, San Francisco, California 94105; I am over the age of eighteen (18) years and am not a party to this action.

On October 13, 2009, I served the attached documents: (1) **EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE’S REPORT ON CHALLENGED BALLOT AND OBJECTIONS** and (2) **EMPLOYER’S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE’S REPORT ON CHALLENGED BALLOT AND OBJECTIONS** in this action as follows:

Shane Youtz  
Youtz & Valdez  
900 Gold Ave SW  
Albuquerque, NM 87102  
Phone: (505) 244-1200  
Fax: (505) 244-9700  
**shane@youtzvaldez.com**

Attorney for Union

Henry Santana  
Organizer  
District 1199NM National Union of Hospital  
and Healthcare Employees, AFSCME, AFL-  
CIO  
130 Alvarado Dr NE, Suite 100  
Albuquerque, NM 87108  
**hsantana1@aol.com**

Union Representative

National Labor Relations Board, Region 28  
2600 North Central Ave., Ste. 1800  
Phoenix, AZ 85004-3099  
**nlrregion28@nlrb.gov**

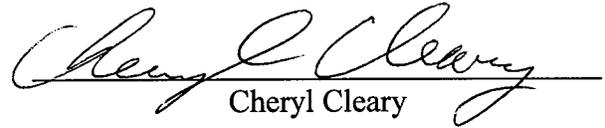
NLRB Regional Office

[X] **BY ELECTRONIC MAIL (EMAIL): I attached a full, virus-free pdf version of the documents to electronic correspondence (e-mail) and transmitted the document from my own e-mail address, clearyc@jacksonlewis.com, to the persons at the e-mail addresses above. There was no report of any error or delay in the transmission of the e-mail.**

[X] **BY OVERNIGHT DELIVERY: I placed a true and correct courtesy copy of the documents, enclosed in a sealed envelope, and caused such envelope to be delivered to Henry Santana at the above address for the union within 24 hours by overnight delivery service. Zip code verified with US postal service online. I notified Mr. Santana of the substance of the transmitted document by telephone call to (575) 405-1366.**

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 13, 2009, at San Francisco, California.

  
Cheryl Cleary