

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

J&D TRANSPORTATION

Employer

and

Case No. 22-RC-13090

**TEAMSTERS LOCAL UNION NO. 469, affiliated with
INTERNATIONAL BROTHERHOOD OF TEAMSTERS**

Petitioner

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for the Employer*

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for the Petitioner*

RECOMMENDED DECISION ON OBJECTIONS

Mindy E. Landow, Administrative Law Judge: Upon a petition filed on March 23, 2010¹ by Teamsters Local No. 469 a/w International Brotherhood of Teamsters (Petitioner or Union) and pursuant to a Stipulated Election Agreement, an election was held on May 4 in the following unit:

All full-time and regular part-time drivers employed by the Employer at its Neptune, New Jersey facility, but excluding all office clerical employees, guards and supervisors as defined in the Act.

The Tally of Ballots showed that of approximately 50 eligible voters, 23 cast votes for the Petitioner, 16 votes were cast against the Petitioner and there were no challenged ballots. J&D Transportation (the Employer) filed timely objections to conduct affecting the results of the election.

On May 26, the Acting Regional Director issued a Report on Objections and Notice of Hearing in which she found that the Employer's objections raised substantial and material issues of fact which can best be resolved on the basis of record testimony at a hearing.

¹ All dates herein are in 2010 unless otherwise specified.

The objections before me allege that the Petitioner engaged in objectionable conduct, as follows:

- 5 1. Having its election observer, in the polling area while the voting was ongoing, using her cellular telephone and/or personal digital assistant, in violation of the Instructions to Election Observers. . . Moreover, the observer was contacting eligible voters via her cellular telephone and or personal digital assistant during the polling times. The attached instructions specifically prohibit such actions. This objectionable activity occurred continuously throughout the voting process and this discriminatory tactic was
10 disseminated among the bargaining unit members; and
- 15 2. Refusing to abide by the directive of the Board agent, who conducted the election and who directed the Local 469 observer to turn off her cellular telephone and/or personal digital assistant on at least four (4) separate occasions; and
- 20 3. Violating the prohibition against election campaigning by repeatedly having its agent, i.e. the Local 469 observer, transmit text messages and/or e-mails to the employees informing said employees to vote while the Local 469 observer was serving as the observer for Local 469 and was seated in the polling area in violation of *Peerless Plywood*, 107 NLRB 427, 429 (1953). This objectionable activity occurred continuously throughout the voting process and this discriminatory tactic was disseminated among the bargaining unit members.

25 In addition to the above-enumerated objections, the Employer further alleges that the Petitioner's observer engaged in objectionable conduct by making comments about and holding conversations with prospective voters as they entered the polling site.

30 A hearing was held before me in Newark, New Jersey on June 11. Based upon the record and my observation of the demeanor of the witnesses and the closing arguments presented by both parties,² I make the following Recommended Decision.

Findings of Fact

35 The Employer presented two witnesses, Caroline Hardwick, who served as the Employer's observer during the election, and Purnell Wharton. The Petitioner presented no witnesses.

40 Hardwick is employed as a driver with the Employer and, as noted above, served as the Employer's observer during the election which was held on May 4 during the hours between 1:00 pm and 4:00 pm. She arrived at the polling location at 12:30 pm, and was followed shortly thereafter by the Union's observer, who is referred to in the record as Jan Rosenfeld.³ Prior to the election, the observers were given a set of written instructions⁴ which lists their principal functions, duties and contains a list of behavior which observers should not engage in. Such behavior includes the use of any electronic device, including cell phones, laptop computers,
45 personal digital assistants, mobile e-mail devices and wired or wireless data transmission and

² The parties waived the filing of post-hearing briefs.

50 ³ Hardwick referred to the Petitioner's observer only as "Jan." Her last name was identified by Counsel for the Employer.

⁴ Form NLRB-722

recording devices. Observers are asked to turn off or disable these devices before entering the polling area. The instructions additionally advise observers that they are to refrain from conversations with voters in the polling area, except as instructed by the Board agent. Greeting voters as they approach to vote is considered acceptable behavior. According to Hardwick, during the pre-election conference the Board agent reiterated this point, advising the observers to keep their interactions with the voters brief.

Hardwick testified that during the course of the election, at a time when no voters were present in the polling area, Rosenfeld's cell phone rang. She asked the Board agent who was conducting the election if she could answer it, and the Board agent said that she was not supposed to do so, but to go ahead and make it quick. When asked how long Rosenfeld had remained on the phone, Hardwick testified, "I said around like five minutes, but it must have been like five, six seconds."⁵ Hardwick did not hear the telephone conversation, and does not know who was on the other end of the phone. After Rosenfeld completed the call, her phone remained in her hand. She fumbled with it and made an observation about the location of the phone's speaker.

During the initial period of the election, while waiting for voters to arrive, Hardwick commented on the fact that the Board agent bore a strong resemblance her daughter. The observers and the Board agent then engaged in what Hardwick termed "casual conversation," and showed each other photographs of their relatives. Hardwick had a picture of her daughter in her wallet, and showed it to the Board agent. Rosenfeld displayed some pictures of her grandchild which she had stored on her cellular telephone. Similarly, the Board agent showed the observers pictures of her son which were also stored on her cellular telephone.

Hardwick testified that the Board agent had instructed the observers that if they saw something they did not agree with they should state the word "recall." Hardwick initially testified that during the course of the election, she had stated "recall" on three separate occasions. The first was when Rosenfeld received the phone call, as has been described above.

As Hardwick testified, she called a second "recall" as result of Rosenfeld's comments to and about employees as they entered to vote. Hardwick testified that Rosenfeld made comments to the Board agent about almost every voter who came in. She offered the following specific examples of such comments: "This is my cousin, who is Ike Turner;" "This is our other worker, he's 890. We call him Spider;" and "Oh he just loves everybody, you know and he's always funny." According to Hardwick, after this had occurred with regard to three or four voters, she complained about Rosenfeld's behavior and the Board agent wagged her finger and said "no, no, no" as if to admonish Rosenfeld. On direct examination, Hardwick characterized Rosenfeld's behavior as "constant conversation," but offered no further specific detail about either the content or duration of any other comment Rosenfeld may have made ⁶ other than to characterize them as "casual" and to acknowledge that they did not pertain to the election.⁷

⁵ When asked about this matter on cross-examination, Hardwick initially claimed that she could not tell the difference between minutes and seconds. When pressed on this issue, she confirmed that Rosenfeld had been on the phone for seconds.

⁶ Counsel for the Employer did not seek to question Hardwick further regarding these "constant conversations."

⁷ On cross-examination, Hardwick testified that Rosenfeld had "lengthy conversations" with each voter that arrived, and even continued the conversation with one voter, referred to as Ike Turner, as he was casting his ballot. For the reasons set forth below I do not rely upon this testimony.

When asked whether other voters were present during Rosenfeld’s comments, Hardwick replied that due to the small size of the polling area, voters entered the room individually.

5 The third time Hardwick called “recall” was to challenge the eligibility of a voter. His vote was placed in a challenged ballot envelope and he was subsequently found to be an eligible voter.

10 Shortly prior to the close of the polls, Rosenfeld commented that a particular driver, referred to in the record as Leandra Story, had not yet voted. Hardwick then observed Rosenfeld holding her cell phone close to her chest and operating her thumbs as if she was “texting” or typing a message on the phone’s note pad. Hardwick could not tell if the Board agent had noticed this activity, as she was sitting off to the side and appeared to be reading. Shortly thereafter, Story came to the polling location and cast her vote. She was the final voter of the afternoon. Hardwick testified that based upon the foregoing sequence of the events, she 15 believed that Rosenfeld had used her cellular telephone to contact Story to encourage her to come and vote, but that she did not have any independent knowledge that this had actually occurred.⁸

20 Purnell Wharton, also employed as a driver with the Employer, testified that on May 4 at about 10:30 am he received a text message on his phone stating, “Please don’t forget to vote.” He then deleted the message from his phone. Wharton stated that he did not know who sent the message and does not know whether other employees had received a similar message on that day.

25 Analysis

In Objection No. 1, the Employer contends, in essence, that on the day of the election, the Petitioner’s observer improperly used her cellular telephone and, moreover, used it to contact eligible voters during the polling times. In Objection No. 2, the Employer contends, in 30 substance, that the Petitioner’s observer repeatedly refused to abide by the directive of the Board agent who directed the observer to turn off her cellular telephone. In Objection No. 3 the Employer contends that on the day of the election, the Petitioner’s observer violated the prohibition against election campaigning by repeatedly transmitting text messages and/or e-mails to employees during polling times. As noted above, at the hearing the Employer 35 additionally argued that the Petitioner’s observer improperly engaged voters in extended conversations at the polling site. In her closing statement, the Employer’s counsel argued that the observer “basically introduced for the whole crowd, almost like an emcee, who this person is, who that person is” and additionally “engaged in direct conversations with the voters.” Counsel for the Employer contends that such introductions and comments were not in 40 accordance with the laboratory conditions that are supposed to be met when a NLRB conducted election is being held.⁹

45 ⁸ After repeatedly testifying that she stated “recall” on three occasions, Hardwick subsequently testified that she called a fourth “recall” to this event as well. Her testimony in this regard was not entirely clear, and was frankly confusing. From the sum of her testimony, I conclude that if, in fact, Hardwick complained about Rosenfeld’s alleged “texting” it was not until after all the voters had cast their votes or after the polls had closed.

50 ⁹ In her opening statement, Counsel for the Employer additionally made reference to certain of the Board agent’s conduct during the election, in particular allowing the use of a cellular telephone to receive a phone call and to view pictures.

As an initial matter, it is clear that Rosenfeld, acting as the Union’s observer during the election was its agent and her conduct is attributable to the Union. *Detroit East, Inc.*, 349 NLRB 935, 936 (2007) citing *Brinks Inc.*, 331 NLRB 46 (2000).

5 In *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118, 1118-1119 (1982), the Board set forth certain rules to evaluate alleged impermissible electioneering which occurs at or near the polls:

10 When faced with evidence of impermissible electioneering, the Board determines whether the conduct, under the circumstances, “is sufficient to warrant an inference that it interfered with the free choice of voters.” This determination involves a number of factors. The Board considers not only whether the conduct occurred within or near the polling place, but also the extent and nature of alleged electioneering, and whether it is conducted by a party to the election or employees. The Board has also relied on whether
15 the electioneering is conducted within a designated “no electioneering” area or contrary to the instructions of the Board agent.

20 The first determination is whether impermissible electioneering or other conduct which interfered with the laboratory conditions expected for Board-conducted elections actually occurred in this instance. Here, the Employer has adduced and relies upon the following evidence: (1) the Union’s observer’s use of her cellular telephone to receive a phone call during the election; (2) the shared viewing of photographs by the observers and the Board agent during the election, some of which involved the use of a cellular telephone; (3) the comments made by the Union’s observer as employees entered the polling site to vote; (4) alleged “texting” by the
25 Union’s observer during the election and (5) the receipt of one voter of a text message on the day of the election encouraging him to participate in the election. While I conclude that certain procedural irregularities did take place during the election, and that these irregularities were conducted by a party to the election, within a designated polling area and contrary to the instructions to observers which are provided by the Board, I find that the Employer has adduced
30 insufficient evidence that these irregularities warrant an inference that the free choice of voters was compromised or were otherwise sufficient to disrupt the laboratory conditions so as to require that the election be set aside.

35 As the Board has held, “the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one. The objecting party must show, inter alia, that the conduct in question affected employees in the voting unit and had a reasonable tendency to affect the outcome of the election.” *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005) (internal quotations omitted). If the evidence is insufficient, then the objecting party has failed to meet its burden. *Consumers Energy Co.*, 337 NLRB 752 (2002). The burden of proof is particularly
40 heavy where the margin of victory is significant. *Avis-Rent-A-Car System*, 280 NLRB 580, 581, 582 (1986). It is also the case that procedural irregularities, standing alone, are not sufficient to set aside an election. *St. Vincent Hospital, LLC*, 344 NLRB 586, 587 (2006). Thus, the Board “requires more than mere speculative harm to overturn an election.” *J.C. Brock Corp.*, 318 NLRB 403, 404 (1995)(citation omitted).
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50 With regard to Objections 1 and 3, the evidence establishes that the Union’s observer used her cellular telephone while in the polling area on three occasions, two of which were apparently countenanced by the Board agent. There is no evidence, however, that Rosenfeld “continuously” used her cell phone, that she contacted prospective voters throughout the course of the election or that there was any dissemination of such alleged misconduct among employees. As to Objection 2, there is no evidence to establish that Rosenfeld defied

instructions issued by the Board agent with regard to her cell phone other than, as will be discussed below, the incident in which she allegedly contacted Story.

5 Generally, there is no evidence that the use of electronic devices for purposes of receiving a brief telephone call or to view family photographs took place within the sight or earshot of voters or otherwise compromised the integrity of election process.¹⁰ See *St. Vincent Hospital, LLC*, 344 NLRB 586, 587, 599 (2005) where the Board agreed with the recommendation of the administrative law judge overruling an objection that the Board agent allowed the union's observers to place telephone calls from the voting area while the polls were open. The evidence established that during the voting period observers from both sides received or made brief phone calls in the voting area. There, as here, there was no evidence that these calls interfered with the election. In that case, the Board additionally agreed with the judge's recommendation to overrule an objection relating, in part, to the programming of a cellular telephone by the Board agents during the voting periods as such activity took place while voters were not present. Id at 587, 601.

20 With regard to the specific allegation involving Leandra Story, I find that there is insufficient evidence to establish that Rosenfeld used her cellular phone to contact Story or otherwise electioneer while the polls were open. Hardwick admitted that she had no independent knowledge that this took place, and that she merely assumed that Rosenfeld had contacted the voter based upon a particular sequence of events. In assessing the evidence, I am mindful that the Employer, as objecting party, bears the burden of proof. I find it unwarranted to rely, without some independent corroboration, solely upon Hardwick's inference that Rosenfeld contacted Story during the election period. However, even if I were to assume that Rosenfeld had, in fact, contacted Story to come and vote in the election, I do not find that such misbehavior would be sufficient to set the election aside. In this regard, there is no evidence that any voter was present when the alleged texting took place. Further, I note that Story was the final voter of the day, and her vote would not have been determinative. Moreover, there is no evidence that any voter would have been aware that Rosenfeld had contacted Story or that Story discussed any matter regarding the election with any other potential voter at any relevant point in time. Thus, such conduct would not tend to affect the results of the election. I further conclude that there has not been a sufficient breach of the Board's election procedures to warrant setting it aside as a matter of policy.

35 As to the text message sent to Wharton at about 10:30 am on the day of the election, the Employer apparently contends that such conduct falls within the ambit of Objection 3 insofar as it is alleged that it runs afoul of the rule enunciated in *Peerless Plywood Co.*, 107 NLRB 427, 429 (1954). There, the Board prohibited election speeches held on company time to massed assemblies of employees within 24 hours prior to an election. A violation of this rule, applicable to employers and unions alike, is grounds for setting aside an election whenever valid objections are filed. As an initial matter, I note that there is no evidence as to who may have sent the text message to Wharton, and there is no evidence that it was sent to any other employee. Moreover, the message contained no statement of position as to how Wharton should vote: it was merely a reminder that he do so.

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50 ¹⁰ There is also no evidence that any voters were present when the Board agent initially instructed the election observers to keep their interactions with voters to a minimum. Similarly, there is no showing that any voters heard the Board agent admonish Rosenfeld for speaking about or to voters as they entered the polls.

In *Virginia Concrete Corp.*, 338 NLRB 1182, 1187 (2003), it was alleged that the employer violated the *Peerless Plywood* rule by sending a brief electronic “vote no” message to its driver employees over equipment installed in their trucks. The Board found that such conduct did not warrant setting aside the election. In doing so, the Board noted that in *Peerless* the Board clarified that its rule prohibiting captive audience speeches did not prohibit circulating campaign literature or “any other legitimate campaign propaganda or media.” 107 NLRB at 430. The Board considered the electronic message at issue in *Virginia Concrete* to be analogous to permissible campaign literature rather than to improper campaign speech or a sound truck broadcast in that it was not audible, and the drivers could scroll past it or delete it if they chose to do so. Based upon the foregoing principles, even if I were to conclude that the Union had sent Wharton the message at issue, which I do not, I would not find the neutral reminder to vote would amount to objectionable conduct.

With regard to Rosenfeld’s alleged comments to voters, I note that this was not specifically alleged in the Employer’s objections; nor was it referred to in the Regional Director’s Report. As such, a fair argument may be made that it is not appropriate for me to consider such allegations at this stage of the proceedings. See e.g. *Precision Products Group*, 319 NLRB 640 (1995); *Iowa Lamb Corp.*, 275 NLRB 185 (1985). Under all the circumstances, however, I conclude that the matter was fully and fairly litigated. In this regard, the issue of Rosenfeld’s comments to voters was addressed both on direct and cross-examination.¹¹ Further, both parties made arguments relating to the nature of the alleged misconduct in their closing statements. Moreover, I find that the additional allegations relating to Rosenfeld’s alleged misconduct have a sufficient nexus to the objections as filed: in particular, the issues for resolution concern themselves generally with the conduct of the Union’s observer during the time the polls were open. See *Sawyer Lumber Co.*, 326 NLRB 1331, 1332 fn. 9 (1998) (objection relating to the Board agent’s handling of blank ballots sufficiently related to other objections of Board agent misconduct to warrant consideration); cf. *Precision Products*, supra (finding that the hearing officer improperly relied upon an objection which had been specifically withdrawn by the petitioner); *Iowa Lamb*, supra (statement relied upon by the hearing officer was “wholly unrelated” to the issues set for the hearing). Accordingly, I will consider these additional allegations of objectionable conduct.

In *Milchem, Inc.*, 170 NLRB 362, 363 (1968), the Board found objectionable conduct to have occurred where, during the voting period, a union official stood for a number of minutes near a line of employees waiting to vote, engaging them in conversation. The Board found that “the sustained conversation with prospective voters waiting to cast their ballots, regardless of the content of the remarks exchanged, constitutes conduct which, in itself, necessitates a second election.” The Board, however, further noted that “our application of the rule will be informed by a sense of realism” and that a “chance, isolated, innocuous comment or inquiry” by a party to a voter will not necessarily void the election, *Id.* Objectionably prolonged conversations include those which are five to ten minutes long. *Tyson Fresh Meats, Inc.*, 343 NLRB 1335, 1338 (2004). By contrast, in *Sir Francis Drake Hotel*, 330 NLRB 638 (2000), where the observer spoke to five or six of the approximately 100 voters for a few seconds to one minute, and where the contents of the conversations were innocuous, the Board held that improper electioneering did not occur, even where the observer disregarded the Board agent’s admonitions not to talk to voters. Similarly, in *Dubrovsky & Sons, Inc.*, 324 NLRB 1068, 1096 (1997), a union observer’s reply to a voter’s inquiry as to how he was doing and his 10 to 20

¹¹ There was no objection to this line of testimony during the hearing.

second whispered response to a 30 to 40 second question from a voter were deemed to be non-objectionable.

5 In *Vista Hill Hospital*, 239 NLRB 667 (1978), enfd. 639 F.2d 479 (9th Cir. 1980), there were six brief conversations, some involving the election. The Board did not set aside the election and the court agreed, finding that the conversations did not “present in the aggregate the ‘prolonged conversations’. . . found in *Milchem* to present a ‘potential for distraction, last minute electioneering and unfair advantage.’” *NLRB v. Vista Hill Foundation*, supra. In *Amal. Serv. & Allied Ind. Joint Board v. NLRB*, 815 NLRB 222, 229-231 (2d Cir. 1987), the union representative had a two to three minute conversation with an employee at the polling place. 10 The court, agreeing with the Board, found that this did not require voiding of the election. In addition, the union observer had three conversations with voters lasting approximately 30, 30 and 90 seconds in length. As these conversations were in Spanish, which the employer’s observer did not understand, the content of the conversations was not known. The employer 15 argued that the cumulative length of all the conversations, which took place while about 17 employees were waiting to vote, was sufficient to void the election under *Milchem*. The Board, however, declined to set aside the election because the observer’s conversations were brief and isolated, and the court agreed, noting that while it would have “been better had the Board agent prevented the challenged conversations . . . the failure of a Board agent to prevent all 20 misconduct does not automatically warrant setting aside an election.” Nor did it “impugn the integrity of the election.” 815 F.2d at 231.

Here, the Employer has presented specific evidence regarding three brief comments, all 25 unrelated to the election, made by the Union’s observer about employees who appeared to vote. The remainder of Hardwick’s testimony regarding this matter consisted of non-specific assertions to the effect that the Union’s observer engaged in conversations with voters throughout the voting process.

30 Although I believe that Hardwick endeavored to testify truthfully to the best of her recollection and ability, I find that her testimony is not sufficiently reliable to meet the Employer’s burden of proof here. Hardwick was at times an erratic witness, who had to be reminded to listen to the question, confine her answers to what was asked of her and to avoid extemporaneous commentary. She also demonstrated a tendency toward improbable hyperbole; asserting, for example, that she was unable to make a distinction between minutes 35 and seconds, when it was readily apparent that she was able to do so. She also offered inconsistent testimony regarding the number of times she called “recall” during the election. I further note that, other than the specific examples of comments discussed above, Counsel for the Employer made no attempt to test Hardwick’s recollection or elicit additional detail about what Rosenfeld may have said to employees during the election. 40

Given the manner and context of Hardwick’s testimony I find it likely that her general description of the Union’s observer’s conduct at the election was overstated. My conclusions in this regard are supported by the fact that during the election Hardwick, who did not strike me as someone who would be reticent to voice her objections, and who apparently took her 45 responsibilities as observer to heart,¹² raised the issue of Rosenfeld’s comments to employees on only one occasion. Further, she offered specific testimony regarding only a single instance where the Board agent cautioned Rosenfeld to refrain from discussions with voters. I find it inherently likely that, had Rosenfeld persisted in making unwarranted comments to voters to the

50 ¹² Hardwick testified that she felt “very backstabbed” by the fact that, while she followed the instructions to observers, Rosenfeld did not.

extent as has been asserted, and in particular, while they were casting their ballots, the Board agent would have made further attempts to discourage her from engaging in such conduct.¹³ Thus, for the foregoing reasons I do not credit Hardwick’s testimony in its entirety and find it is not sufficiently reliable to support the Employer’s allegations regarding the nature and extent of Rosenfeld’s alleged misconduct. See *Operative Plasterers’ and Cement Masons’ International Union, Local 394 (Burnham Brothers, Inc.)*, 207 NLRB 147, 147 (1973) (“A trier of fact need not accept uncontradicted testimony as true if it contains improbabilities or if there are reasonable grounds for concluding that it is false. It is well settled that a witness’ testimony may be contradicted by circumstances as well as by statements and that demeanor may be considered in such circumstances.” (Footnotes and citations omitted))

My conclusion that Rosenfeld’s comments to employees were not sufficiently egregious to warrant setting aside the election is further informed by the fact that they were not heard by any other voters waiting to vote and did not pertain to the election. In sum, therefore I conclude that they do not present the type of “prolonged conversations” which would suggest a “potential for distraction, last minute electioneering and unfair advantage under *Milchem*.” *NLRB v. Vista Hill Foundation*, supra.¹⁴

Moreover, in disagreement with the Employer, I do not find that Rosenfeld’s comments suggested to voters that it was the Petitioner, and not the Board, that was conducting the election or that the Board was endorsing any party. In this regard, I note that there is no evidence of fraternization between Rosenfeld and the Board agent during any period of time when voters were present or that the Board agent was responsive to Rosenfeld’s comments. Therefore, for the foregoing reasons and in light of the Petitioner’s significant margin of victory, I find that the Union’s observer’s remarks to voters could not have reasonably tended to affect the results of the election and are not sufficient grounds for setting it aside.¹⁵

¹³ I note that the record establishes that the Board agent specifically cautioned the observers to refrain from extended conversations with voters in the pre-election meeting. Moreover, there would have been ample time during the three-hour election, where 39 employees voted, for the Board agent to speak with Rosenfeld outside the earshot of voters. Thus, I conclude that if Rosenfeld had continued to flagrantly violate the Board agent’s instructions regarding her interaction with voters, she would have been further admonished by the Board agent.

¹⁴ The Employer has argued that I should draw an adverse inference from the Petitioner’s failure to call Rosenfeld as a witness. I do not find it appropriate to do so. Although Rosenfeld was the Union’s agent for purposes of the election, there is no evidence that she is otherwise affiliated with or an agent of the Union generally. Further, because there is no evidence that Rosenfeld is no longer an employee of the Employer, there is no basis for me to presume that she is within the control of the Union, or that her testimony would tend to favor the Petitioner in this matter. Accordingly, I decline to draw any inference from the Union’s failure to call her to testify in this matter.

¹⁵ To the extent Counsel for the Employer alluded to the issue of alleged Board agent misconduct in her opening statement, I find that this matter is not reasonably encompassed either by the objections as filed or as set by the Regional Director as set for hearing, and has not been fully litigated. Accordingly, I decline to consider this issue. *Precision Products*, supra. Moreover, even if I were to consider the evidence adduced in this record in such a light, I would find that any alleged action or inaction of the Board agent was not sufficient to disrupt the laboratory conditions of the election. In this regard, I note that the Petitioner’s observer’s brief phone call and the shared viewing of family photographs took place outside the sight and earshot of employees and there is no evidence that voters became aware of such activity at any time prior to the close of the polls. *St. Vincent Hospital*, supra. Moreover, the Board’s agent’s alleged failure to prevent Rosenfeld from speaking with voters or to engage in any other impropriety under the circumstances here is not sufficient to warrant overturning the election. *Amal. Serv. & Allied Ind. Joint Board v. NLRB*, supra.

Conclusion and Recommendations

5 Having found there is insufficient evidence to meet the Employer's burden of proof to sustain its objections, I recommend that they be overruled and the appropriate Certification of Representative be issued.¹⁶

Dated, Washington, D.C. July 22, 2010

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Mindy E. Landow
Administrative Law Judge

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50 ¹⁶ Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, Exceptions to this Recommended Decision may be filed with the Board in Washington, DC within 14 days from the date of issuance. Exceptions must be received by the Board in Washington by August 5, 2010.