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

GALAXY CONDOMINIUM ASSOCIATION, INC.
Employer

and Case 22-RC-13150

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION 966
Petitioner

and

INTERNATIONAL UNION OF JOURNEYMEN AND ALLIED TRADES, LOCAL 124
Intervenor

Michael L. Kingman, Esq., (Diktas Schandler Gillen)
Cliffside Park, NJ for the Employer.
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New York, NY for the Petitioner.
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Elmsford, NY for the Intervenor.

RECOMMENDED DECISION ON OBJECTIONS

Statement of the Case

Steven Fish, Administrative Law Judge: Pursuant to a Petition filed by International Brotherhood of Teamsters, Local Union 966, herein called Petitioner or Local 966, on August 16, 2010,[1] the parties[2] entered into a Stipulated Election Agreement on September 2 providing for an election to be conducted on September 24 among all full-time and regular part-time service employees, maintenance employees, garage attendants, master mechanics, concierges, doormen, porters, handymen, security guards and hall persons, employed by the Employer at its 7000 Boulevard East, Guttenberg, New Jersey facility.

The election was conducted and thereafter a Tally of Ballots was duly served upon the parties, which showed the following:

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[1] All dates subsequently referred are in 2010 unless otherwise indicated.

[2] The parties included International Union of Journeymen and Allied Trades, Local 124, herein called the Intervenor, who was the incumbent representative of the employees employed by Galaxy Condominium Association, Inc. (the Employer).

Approximate number of eligible voters	75
Void ballots	0
Votes cast for International Brotherhood of Teamsters, Local Union 966 (Petitioner)	23
Votes cast for International Union of Journeymen and Allied Trades, Local 124 (Intervenor)	41
Votes cast against participating labor organization	0
Valid votes counted	64
Challenged ballots	1
Valid votes counted plus challenged ballots	65

Challenges are not sufficient in number to affect the results of the election.

A majority of the valid votes counted plus challenged ballots has been cast for International Union of Journeymen and Allied Trades, Local 124 (Intervenor).

On October 1, the Petitioner timely filed objections to conduct affecting the results of the election.

On October 18, the Director issued a Report on Objections and Notice of Hearing, in which he concluded that Petitioner's Objections 1-7 and 9 raised substantial and material issues, which can best be resolved on the basis of record testimony at a hearing.[3]

Accordingly, a hearing was held before me on November 8 in Newark, New Jersey. Briefs have been filed by the Petitioner and the Intervenor and have been carefully considered. Based upon the entire record, including my observation of the demeanor of the witnesses, I issue the following:

I. The Objections

The Objections filed by the Petitioner are set forth below:

OBJECTIONS TO ELECTION FILED
ON BEHALF OF I.B.T. LOCAL UNION NO. 966

Petitioner, I.B.T. Local Union No. 966 ("Petitioner" or "Local 966"), submits the following Objections to the Election that took place on September 24, 2010:

1. The employer, Galaxy Towers Condominium Association (the "Employer" or "Galaxy Towers") destroyed the laboratory conditions necessary for a fair election and engaged in unlawful conduct by providing unlawful assistance to Labor Organization IUJAT, Local 124 ("Local 124").

2. The Employer and Local 124 destroyed the laboratory conditions necessary for a fair election by threatening members

[3] Petitioner withdrew Objection 8 during the course of the processing of the objections.

throughout the bargaining unit that they would lose their jobs if Local 124 lost the election.

3. The Employer and Local 124 destroyed the laboratory conditions necessary for a fair election by threatening members throughout the bargaining unit that they would lose their jobs if Local 966 won the election.

4. The Employer destroyed the laboratory conditions necessary for a fair election by allowing agents of Local 124 to enter the property and speak with workers, and prohibiting agents of Local 966 from entering the property to speak with workers.

5. The Employer destroyed the laboratory conditions necessary for a fair election by condoning, adopting and/or ratifying threats made by the agents [of] Local 124 to members of the bargaining unit that if the members did not vote for Local 124 and/or against Local 966, that they would lose their jobs.

6. The Employer and Local 124 destroyed the laboratory conditions necessary for a fair election by making promises of employee benefits and payments of cash to members of the bargaining unit only if Local 124 won the election.

7. The Employer destroyed the laboratory conditions necessary for a fair election by condoning, adopting and/or ratifying promises of employee benefits and payments of cash made by Local 124 to members of the bargaining unit if Local 124 won the election.

8. By these and other acts that will be revealed in the investigation into these objections, the Employer and Local 124 engaged in conduct during the critical period which precluded the holding of a fair election in this bargaining unit.

9. The NLRB Agent who was to serve as the translator for Spanish-speaking bargaining unit members was one hour late to the polling place depriving Spanish-speaking members who wanted to vote between the hours of 5:30 a.m. and 6:30 a.m. of a fair and informed vote.

Date: October 1, 2010
New York, New York

II. Objections 1-5 and 7

The Petitioner introduced no evidence pertaining to any of these objections. Therefore, I recommend that Objections 1-5 and 7 be overruled.

III. Objection 6

This objection alleges that the Employer and Local 124 destroyed laboratory conditions

necessary for a fair election by making promises of employee benefits and payments of cash to members of the bargaining unit only if Local 124 won the election.

To the extent that this objection alleges that the Employer made promises of benefits and payments of cash to unit members, Petitioner presented no evidence that the Employer engaged in any such conduct. Indeed, Petitioner does not so contend in its brief. Accordingly, the portion of this objection that so alleges is overruled.

The objection also alleges that Local 124 made promises of cash payments to employees in order to influence their vote. It adduced no evidence of such conduct. Thus, this portion of the objection must also be overruled.

Petitioner did adduce evidence concerning Local 124's conduct with respect to the promise and grant of a dental benefit, which is encompassed by this objection, and which I shall now consider.

In this regard, the evidence discloses that Local 124 and the Employer were parties to a collective bargaining agreement that ran from June 1, 2006 to May 31, 2009. The agreement provides that the Employer shall contribute to the "Local 124 Welfare Plan (which includes the Local 124 Dental Plan and the Local 124 Prescription Plan) the following monthly contributions for each employee."

The agreement then sets forth three separate amounts to be paid by the Employer to the Local 124 Welfare Plan (herein called the Fund) of $550 for single, $625 for employee + one dependent and $700 for a family.

The record also establishes that after this contract expired, Local 124 and the Employer have been bargaining for a new contract, but no agreement had been reached. It is also undisputed that despite the expiration of the contract the Employer has continued to make payments to the Fund for medical coverage as provided for in the expired agreement.

Petitioner called Local 966's President James Anderson to testify concerning the issue of dental coverage and the election. According to Anderson, in his meetings with employees of the Employer, they had complained to him about the fact that a new contract had not been obtained by Local 124, that they had not received any raises and that their dental benefit had been eliminated. Anderson also testified that the biggest issue during the campaign was the discontinuance of the dental coverage.

A few days before the election, Local 966 was conducting a meeting at a restaurant near the Employer's facility. At that meeting, employees informed Anderson that they had received a letter dated September 14, informing them that their dental coverage would be reinstated effective October 1. The letter was accompanied by a "packet" from the carrier detailing the benefits accompanied by an enrollment card. The referred to above letter was from the billing representative of Healthplex, the carrier, to Michael Pagan, Administrator of the Fund. It reads as follows:

> September 14, 2010
>
> Dear Benefits Administrator:
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> Dear Mr. Pagan,

> Please be advised that Dentcare Delivery Systems is in receipt of your request to reinstate seventy-three members effective October 1, 2010. Our October billing has been completed and as a result premiums for these members will appear on your November invoice. These members will be billed for both October and November. If you [sic] require further assistance, you may contact me at 516-542-2670.
>
> Sincerely,
>
> Jeanne Cardlin – Sr. Billing Representative

Local 124 called Pagan as its witness. He testified that he is the Fund Administrator as well as Vice-President of Local 124. He testified that once the Employer pays the sums called for in the contract to the Fund, the Fund decides how much of these amounts are used to provide the various benefits to employees, such as medical coverage and dental coverage. The dental coverage is provided by a separate carrier from the other benefits.

Pagan asserted that towards the end of 2009, the Union was having difficulty in obtaining additional payments from the Employer during negotiations. Further, the Fund was facing increases in premiums from its carriers, including a 10% increase from its dental carrier. Therefore, at a meeting between representatives of Local 124 and the Fund, it was proposed that a 6-month "freeze"[4] in dental benefits be instituted in order for Pagan to look around for a different plan that might be substituted.

According to Pagan, this decision was made jointly by the Fund and Local 124 to be effective January 1 and was communicated to and approved by unit employees at a meeting in January 2010. While Pagan was not present at this alleged meeting, he claims that he was told by Andres Ruiz, the Local 124 shop steward, that such a meeting was held and that the employees agreed to a 6-month "freeze" or "suspension" of the benefit.[5] Pagan also testified that Local 124 sent a letter to employees announcing the 6-month suspension, but no such letter was produced. Indeed, Local 124's counsel stated that he did not have such a document.

Pagan further testified that his attempt to find a cheaper alternative plan was unsuccessful as the only cheaper plans that he found had sharply reduced benefits, which were not satisfactory. Additionally, Local 124's efforts to obtain an agreement were also not successful. Thus, when the six months were up in late June, there had been no progress on either front.

The reason that the benefit was not restored as allegedly promised at that time, according to Pagan, was that James Bernadone, one of the two trustees of the Fund was in the hospital.[6] Bernadone was and is also the Secretary Treasurer of Local 124 and was Local 124's chief negotiator during its bargaining with the Employer. Pagan was uncertain about precisely when Bernadone was in the hospital and for what reason. However, Pagan testified that

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[4] While Pagan consistently referred to the term "freeze" in his testimony, it is clear that what he really meant was to suspend the dental coverage for 6 months.

[5] Ruiz was called as a witness by Local 124 to testify about other objections, but was not asked about this issue. Thus, he did not corroborate Pagan's testimony that employees had approved the temporary suspension of the benefit.

[6] The other trustee was Gene DeVito, an Employer Professional Representative.

Bernadone, sometime in late August, was in the hospital for approximately a month and left the hospital in August. Pagan adds that sometime in late August, after Bernadone got out of the hospital and after the petition was filed, the Fund met with representatives of the Union. At this meeting, Pagan contends that he recommended that the dental benefit that had been suspended be reinstated as the Union had promised the employees. Bernadone and DeVito both agreed that the dental benefit be reinstated. Pagan claims that he then telephoned the carrier and was told by the representative that it was too late to reinstate the benefit by September 1 since it was necessary to obtain enrollment information. Thus, it was decided to reinstate the benefit as of October 1.

The carrier subsequently sent the letter dated September 14 to Pagan containing the reinstatement, which as related above, was distributed to employees shortly thereafter along with enrollment forms and booklets.

Pagan also testified that shortly after September 14, he, along with Kevin Walker and Bob Suhr, business agents, meet with the employees of the Employer. Pagan testified that a number of employees at the meeting were confused by the letter, which seems to suggest that the dental benefit would only be reinstated for two months. Pagan assured them that this was not the case and that the benefit was being restored permanently. At this meeting, the pending election was discussed and the business agents for Local 124 were giving employees reasons why they felt that the employees should support Local 124 in the election.[7]

Pagan conceded that the dental benefit was reinstated even though Local 124 had not obtained any agreement for increased payments by the Employer and the Fund had not found an acceptable alternative plan, which were the reasons why the dental coverage was suspended in January. Pagan testified that the Fund absorbed the 10% increase in premiums from the carrier from its general funds. Pagan also admitted that the Union had the discretion to decide when the benefits were to be reinstated.

Pagan also conceded that neither the Union nor the Fund notified the Employer when it suspended the benefit in January or when the benefit was reinstated as of October 1.

Local 124 contends initially that it was the Fund's decision to reinstate the dental benefit to the Employer's employees and that the actions of the Fund are not automatically attributed to the Union. *Commercial Property Services*, 304 NLRB 134 (1991).

Intervenor is correct that the Fund is a separate entity from the Union and that it will not be presumed to be acting on behalf of a Union, unless contrary evidence shows otherwise. *Commercial Property*, supra at 134-135; *Garland-Sherman Masonry*, 305 NLRB 511 fn. 1, 514-515. Thus, the trustees of a fund are acting in a fiduciary responsibility to manage the funds for the benefit of the employee beneficiaries of the funds. *Garland-Sherman*, supra at 513-515, fn. 1 at 511.

However, the Board has indentified at least three situations where the fund is deemed to be acting as an agent of a union. They are: (1) where provisions of a collective bargaining agreement remove the discretion to administer the funds solely for the benefit of the employees; (2) where the trustees' actions were in fact directed by union officials; and (3) where the trustees' acts were undertaken in their capacities as union officials rather than as trustees. *Service Employees, Local 1-J (Shor Co.)*, 273 NLRB 929, 931 (1984); *Garland-Sherman*, supra

[7] As noted, the election was held on September 24.

at 513-514.

I find here that two of these exceptions apply. I conclude that the actions of the Fund were in fact directed by the union officials and the trustees' actions were undertaken in their capacities as union officials rather than as trustees. I note initially that Pagan's own testimony admits that Local 124 had the discretion to reinstate the dental benefit and that it did so due to its promise to employees to do so after six months. Further, when the decision was made to reinstate the benefit, Bernadone, the trustee of the Fund and Secretary Treasurer of Local 124, was not acting in furtherance of the Fund objectives, but primarily as an officer of the Union.

Significantly, the ostensible reason that the Fund suspended the benefits in January was due to the inability of Local 124 to obtain additional payments from the Employer in negotiations and in order to shop around for a cheaper alternative. Yet, the decision was made to reinstate the benefit as of October 1, despite the fact that neither of the factors motivating the decision had been alleviated. Thus, no additional agreements for extra payments from the Employer had been reached, and the Fund had been unable to obtain equivalent or cheaper coverage from another carrier. Therefore, when Bernadone voted to reinstate the benefits, he was not acting in is fiduciary role as a Fund trustee, but as a representative of the Union. Indeed, the purpose of suspending the benefit initially was based on the desire of the Fund to preserve Fund assets, and this was not accomplished or effectuated by the reinstatement of the benefits. Therefore, I find that the Fund was acting as the agent for Local 124 when it reinstated the benefits for the Employer's employees effective October 1. *Shor Co.*, supra, 273 NLRB at 931 (action of trustee and union official found to be a pretextual retaliation against an employee for filing a decertification petition, not a good faith effort to preserve fund assets); *Jacobs Transfer*, 227 NLRB 1231, 1232-1233 (1977) (trustees found to be agents of union); *NLRB v. Construction & General Labors' Union*, 577 F.2d 16, 20-21 (8th Cir. 1978) (trustee agent of the union since it was acting to promote union goals and not solely in the interests if employee participants and beneficiaries). See also *L & M Carpet Contractors*, 218 NLRB 802 fn. 1 (1975) (trust fund agent for union).

In making my finding that the Fund was an agent for the Union, I also rely on the absence of any testimony from Bernadone, the key player with respect to this issue. He is the trustee/union official, who voted to reinstate the benefit. His motivation for doing so and whether he was acting in support of union interests as opposed to his role as a trustee to preserve the viability of the Fund is crucial. I note in this connection that no explanation was provided for Local 124's failure to call Bernadone as a witness, and indeed, he was in the hearing room during the trial. In these circumstances, it is appropriate to draw an adverse inference from his failure to testify, and to conclude that his testimony would not support Local 124's position on this issue. *International Automated Machines*, 285 NLRB 1122, 1123 (1987).

Accordingly, based on the foregoing analysis and authorities, I conclude that the Fund was acting as an agent for Local 124 when it reinstated the dental benefit, and that Local 124 is responsible for that action.

Turning to the issue of whether Local 124's announcement of its reinstatement of the dental benefit constitutes objectionable conduct, it is well-settled that "the Board will infer that an announcement or a grant of benefits during the critical period is coercive, but the employer may rebut the inference by establishing an explanation other than the pending election for the timing of the announcement or the bestowal of the benefit." *STAR Inc.*, 337 NLRB 962 (2002). See also *American Sunroof Corp.*, 248 NLRB 748 (1980).

It is also clear that these principles are also applicable to benefits announced or granted

by a union. *Mailing Services, Inc.*, 293 NLRB 565 (1989).

The factors considered by the Board in assessing these issues are set forth in *B & D Plastics*, 302 NLRB 245 (1991). They include: (1) size of the benefit conferred in relation to the stated purpose for granting it; (2) the number of employees receiving it; (3) how employees reasonably would view the purpose of the benefit; and (4) the timing of the benefit.

An examination of the factors set forth in *B & D Plastics* reveal that all of them support the finding, which I make, that the announcement and grant of this benefit "would tend unlawfully to influence the outcome of the election." *B & D Plastics*, supra at 245. Thus, the dental benefit was substantial, was granted to all unit employees, *B & D Plastics*, supra, *STAR Inc.*, supra at 963, and all of them reasonably would have been influenced in their voting. *STAR Inc.*, supra. In this regard, I note that the loss of the dental benefit was a major campaign issue during the pre-election period, and many of the Employer's employees stated to Petitioner's representatives that they were upset about the loss of the benefit and that this was one of the reasons that they supported Petitioner as opposed to the incumbent Intervenor, who had in fact been responsible for the elimination of the benefit.

Finally, and most importantly, the timing of the announcement and the grant of the benefit strongly supports the finding of objectionable conduct. *STAR Inc.*, supra (benefit announced and distributed two weeks before the election); *B & D Plastics*, supra (benefit granted two days before election). Here, the implementation of the dental benefit was announced on September 14, ten days before the election, effective on October 1, a week after the election.

These factors represent a strong and compelling inference that the announcement and grant of the benefit was objectionable. Local 124 therefore had a heavy burden of establishing that the announcement and grant of the benefit was governed by factors other than the pendency of the election. *American Sunroof*, supra. I conclude that Local 124 has far fallen short of meeting its burden in this regard. Intervenor argues that it has met its burden by the testimony of Pagan, which in its view established that the reinstatement of the dental plan was effectuated pursuant to a pre-existing promise made to and approved by the employees of the Employer that the dental benefit would be suspended for six months. Pagan further testified that the reason that the benefit was not reinstated after six months as promised was because Bernadone, one of the two co-trustees, was unavailable to approve the reinstatement due to a hospitalization of approximately one month. Pagan further asserted that as soon as Bernadone left the hospital, the Fund representatives met with representatives of Local 124, and it was decided to reinstate the benefit. Further, Pagan contends that there was insufficient time to reinstate the benefit by September 1 due to the necessity of enrolling the employees and furnishing them with ID cards. Thus, it was decided that reinstatement would be effective as of October 1.

I found Pagan's testimony to be unconvincing and unpersuasive and far from sufficient to meet Intervenor's burden of proof. Notably, Pagan testified that when the dental benefit was suspended in January, it was only a six-month suspension and that employees were both notified about it in writing and approved the suspension at a meeting. However, Pagan was not present at any such meeting and the individual, who allegedly informed Pagan about the alleged approval by employees, shop steward Ruiz, did not corroborate Pagan's testimony in this regard. Significantly, Ruiz did testify with respect to another objection, but was not asked about Pagan's testimony concerning the alleged six-month suspension and the alleged approval of same by unit employees. In these circumstances, an adverse inference is appropriate, which I draw, that Ruiz's testimony would not have corroborated Pagan concerning these issues.

International Automated Machines, supra. Furthermore, Pagan testified that Local 124 sent a letter to employees announcing a six-month suspension of the benefit. However, such a document was not produced, and Local 124's counsel conceded that he did not have such a document. This further detracts from the reliability of Pagan's testimony.

Even more significant is the absence of any testimony from Bernadone, the secretary/treasurer of Local 124 and a co-trustee. I note that Bernadone was present in the hearing room, and Local 124 inexplicably failed to call him as a witness to corroborate Pagan's testimony concerning the alleged six-month suspension of the benefit and that the decision not to reinstate the benefit until October was due to Bernadone's hospitalization.

Thus, Local 124 adduced no testimony as to precisely when Bernadone went into and left the hospital, what was the nature of his illness or even why he could not approve the reinstatement even while in the hospital. Indeed, since Pagan asserted that Local 124 and the Fund had already decided to suspend the benefit for only six months, it is reasonable to argue that a new vote to reinstate the benefit was not even necessary. The failure of Bernadone to testify about any of these matters once again leads to an adverse inference that his testimony with regard to these issues would not be favorable to Local 124 and would not corroborate Pagan. *International Automated Machines*, supra.

Moreover, even apart from an adverse inference, Bernadone was the decision maker when the Fund and the Union decided to reinstate the benefit and announce it to employees two weeks before the election. Pagan, Local 124's sole witness with respect to the decision, was unqualified to testify about the reasons for the timing of the announcement and reinstatement of the benefits. Therefore, the absence of Bernadone's testimony demonstrates that Local 124 has failed to carry its burden of showing that the announcement and the granting of the benefit were for reasons "other than the pending election." *Mercy Hospital*, 338 NLRB 545, 546 (2002) (absence of testimony from decision maker as to timing of announcement of benefit crucial in finding that employer had not met its burden of proof).

Therefore, I conclude that Local 124's announcement and grant of a dental benefit to unit employees within days of the election constituted objectionable conduct that impaired the employees' exercise of free choice. *Mailing Services*, supra, 293 NLRB at 565-566 (union's announcement and subsequent provision of free medical screening to employees); *Wagner Electric Corp.*, 167 NLRB 532, 533 (1967) (union's gift of life insurance coverage to prospective voters); *Alyeska Pipeline Service Co.*, 261 NLRB 125, 127 (1982) (union' promise to provide job referrals to voters). See also *Comcast Cablevision v. NLRB*, 232 F.3d 490, 495-498 (6th Cir. 2000) citing *Owens-Illinois Inc.*, 271 NLRB 1235, 1236 (1984) (union's distribution of union jackets valued at $16.00 each to employees held objectionable).

I have found that Intervenor had fallen far short of overcoming the inference of illegality under *B & D Plastics*, and that it has not shown that the decision to announce and grant the dental benefit to employees was due to factors other than the pending election. Accordingly, based upon the foregoing analysis and authorities, I conclude that Local 124 engaged in objectionable conduct and that Petitioner's Objection 6 should be sustained, I so recommend.

IV. Objection 9

Petitioner presented its president, James Anderson, as its sole witness concerning this objection that the lateness of a Spanish interpreter required that the election be set aside.

Anderson testified that during the Petitioner's organizing campaign he met with and

spoke to approximately 50-60 of the Employer's employees. Anderson testified that he had a Spanish interpreter with him during this meeting, in which he estimated that 30% to 40% of the employees did not speak English. Accordingly, when he discussed with the Board agent the details of the election, Anderson requested that a Spanish interpreter be provided. The Board agent informed Anderson that he would "put in" Anderson's request and that he expected that an interpreter would be present.

The election was held on September 24. The polls opened at 5:30 a.m. Anderson arrived at the Employer's premises at about 5:00 a.m. Representatives from Local 124, as well as observers for all parties, were also present. However, the Spanish interpreter was not there. Anderson asked the Board agent, "Where's the interpreter?" He responded that the interpreter was "supposed to be here." At 5:30 a.m., the polls were opened without the presence of the interpreter.

Anderson left the polling place and sat in his car in the parking lot from where he could see who entered the facility, where the election was being conducted. Anderson further testified that about 45 minutes to an hour after the polls opened, he noticed someone walking around the garage area looking lost. Anderson approached that individual and asked if he was the translator for the Board. He replied "yes" and told Anderson that he had a car accident on the way over to the polls and had gotten a ticket. Anderson directed the interpreter to the polling area.

During this 45-60 minute period prior to the appearance of the interpreter, he asserts that he observed 8-10 employees enter the facility to vote. Anderson did not know how many of these employees were Spanish-speaking or in need of an interpreter. After the polls closed, Anderson asked Petitioner's observer, Jose Collazzo, about the absence of the interpreter. According to Anderson, Collazzo informed him that "a couple" of people that didn't speak English voted in the beginning. Collazzo did not inform Anderson that there were any problems when these employees, who allegedly did not speak English, voted.[8]

Anderson also testified that the polls were opened for 3 or 4 hours during the morning session and for a "couple" of hours in an afternoon session. Anderson also testified that both the ballots and the notices were in Spanish and English.

Intervenor called Ruiz, its observer, as well as its shop steward, as a witness with respect to this issue. Ruiz, who testified in English,[9] testified that the interpreter arrived 40-45 minutes late. Ruiz asserted that during the 40-45 minutes that the interpreter was not present, 10 employees voted. Ruiz recalled some of the names of these 10 employees. They were Kevin McCann, Jimmy Lopez, David Moran, Hector Peña, Mario ____, Roy Borella, Jose Collazzo (Petitioner's observer) and himself.

Ruiz also testified that all of these 10 employees "pretty much spoke both English and Spanish."

Ruiz further testified that when the voters arrived, the Board agent showed them a ballot and instructed them that they should place a check mark in the box of their choice, either for 966, 124 or no union. The Board agent asked the employees if they understood his instructions. All of the employees responded "yes" in English. The Board agent also asked if they had any

[8] Collazzo did not testify.

[9] Ruiz testified that he does not speak Spanish, but understands Spanish.

questions or needed any translation help. Each of the employees responded "no" in English.

I find the testimony of Ruiz, which was essentially not disputed, to be believable and I credit his testimony in its entirety. To the extent that Anderson's hearsay testimony that Collazzo told him that a "couple" of the 10 voters, who voted prior to the interpreter arriving, "did not speak English," is inconsistent with Ruiz's testimony, I do not find Anderson's testimony persuasive or probative. I note that Collazzo did not testify to corroborate Anderson or to provide firsthand testimony, which differed from Ruiz's version of events. I also note that even Anderson's testimony of Collazzo's report to him of the events prior to the interpreter arriving indicates that Collazzo told Anderson that "there were no problems" with the voting.

I find, therefore, as Ruiz testified, that during the voting prior to the arrival of the interpreter, the 10 employees, who voted, were all able to speak and understand English and all of them understood the instructions provided by the Board agent.[10]

Petitioner argues that the interpreter's conduct in arriving late to the election tended to destroy confidence in the Board's election procedures and "could reasonably be interpreted as impugning the election standards we seek to maintain." *Glacier Packing Co.*, 210 NLRB 571, 573 (1974); *Gory Associated Industries*, 275 NLRB 1303 (1985). I disagree.

Petitioner's contentions are based on the principles in *General Shoe Corp.*, 77 NLRB 124, 126 (1948), where the Board concluded that conduct that may not be coercive or constitute an unfair practice may nonetheless be sufficient to warrant setting aside an election. The Board enunciated its "laboratory conditions" standard, which had been utilized in numerous subsequent cases:[11]

> In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.

I do not agree with Petitioner's assertion that the "laboratory conditions" standard has been violated by the mere fact that the Spanish interpreter arrived late to the election. While there are a number of Board cases that set aside elections based on translation or language issues,[12] there is only one case that did so based on such lateness. That case, *Gory*

[10] My findings crediting Ruiz's testimony is buttressed by the fact that some names of the employees, who voted in that time period, such as Kevin McCann and David Moran, suggest that these individuals are likely to speak English as their first language. Further, Collazzo, who was the observer for Local 966, also voted during that time. I find it unlikely that Local 966 would select an observer, who was not able to speak English. Further, Anderson testified that he did not speak Spanish and that he spoke to Collazzo after the vote about what went on during the voting. Presumably, that conversation was in English. Thus, I find Collazzo was able to speak and understand English.

[11] See, for example, *Fred Meyers Stores*, 355 NLRB #93 slip op at 3 (2010).

[12] *Kraft Inc.*, 273 NLRB 1484, 1485 (1985); *Alco Iron and Metal Co.*, 269 NLRB 590, 591-

Continued

Associated, 275 NLRB 1303 (1985) is heavily relied upon by Petitioner and requires extensive discussion.

I find that Petitioner's reliance on *Gory Associated* to be misplaced for several reasons, more fully explained below. I believe than this decision was wrongly decided and is contrary and inconsistent with both prior and subsequent Board decisions. Although it has not been expressly overruled, it has not been favorably cited or followed in any subsequent decisions, and in the only case where it has been cited,[13] it was distinguished, and in my view, implicitly overruled.

Gory Associated involved objections filed to an election, where the tally of ballots showed 73 votes for and 43 against the union and 3 challenged ballots. The basis of the objections was the lateness of a Haitian Creole interpreter.

The director conducted an investigation and issued a report recommending that the election be set aside. The director found that due to the number of Spanish and French surname employees in the unit,[14] the parties agreed that the election materials (notices and ballots) be printed in English, Spanish and Haitian Creole. The election was conducted by a bilingual (Spanish and English) Board agent and the Miami Resident Office contracted with a translation service to provide a Haitian Creole interpreter. The election was held from 6:00 a.m. to 9:00 a.m. The interpreter arrived at approximately 7:30 a.m.

Based on the above facts, the director relying on *General Shoe*, as well as the cases cited below, plus *Paprikas Fono*, 273 NLRB 1326 (1984), found that the "election herein was not conducted with due regard to the needs of Haitian Creole speaking employees," and that the "requisite laboratory conditions for free expression of voter preferences were not present here."

The Board majority of Chairman Dotson and Member Hunter affirmed the director's decision and set aside the election as follows:

> Contrary to our dissenting colleague, we conclude that the circumstances of this election raise a substantial doubt as to whether the voters were afforded an effective and informed expression of their preferences. Prior to the election, the parties agreed that this electorate required Haitian Creole election materials and a Haitian Creole interpreter…The Petitioner's exceptions do not refer to any specific evidence rebutting this proof. Consequently, there are no substantial and material factual issues warranting a hearing and the election must be set aside. Our dissenting colleague apparently agrees with us about the existence of a prima facie case, or else she would advocate overruling the Employer's objection without any hearing.

The Board also cited *Kraft*, supra and *Paprikas Fono*, supra in support of its decision. Member Dennis dissented, noting that there was no showing that the lateness of the interpreter

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592 (1984); *Rattan Art Gallery, Ltd.*, 260 NLRB 255, 256-257 (1982); *Flo-Tronic Metal Mfg.*, 251 NLRB 1546 (1980).

[13] *Arthur Sarnow Candy Co.*, 311 NLRB 1137 (1993), enfd. 40 F.3d 552, 558-561 (2nd Cir. 1994).

[14] The director noted that the eligibility list showed two Spanish surname employees and 15 French surname employees.

affected the conduct of the election and would have granted the request of the union for a hearing in order to determine whether the late arrival of the interpreter actually affected the conduct of the election.

In my view, both the Board majority and the director's decision are flawed due to several critical errors in their reasoning. Although the evidence suggested that 15 employees may have been Haitian Creole speakers,[15] no evidence was adduced or cited as to how many of these 15 Haitian Creole speakers voted during the period when the interpreter was not present. This critical omission from the evidence renders the Board majority's view that *prima facie* proof of "an objectionable failure to assure the effective and informed expression by all employees of their voting desires" has been established to be suspect and contrary to established precedent.

In analogous circumstances, the Board has observed in *Colgate Scaffolding Corp.*, 354 NLRB #76 slip op at 1 (2009):

> It is well established that the failure of a poll to open precisely at the scheduled time, or to be open for the full duration of the scheduled voting period, does not by itself require that the election be set aside. A rerun is only required where one of three additional factors is present: (1) where the votes of those employees "possibly excluded" by the defect could have been determinative; (2) where there are "accompanying circumstances that suggested that the vote may have been affected"; or (3) where "it was impossible to determine whether such irregularity affected the outcome of the election." *Midwest Canvas*, 326 NLRB 58 (1998*); Celotex Corp.*, 266 NLRB 802, 803 (1983); *Jobbers Meat Packing Co.*, 252 NLRB 41 (1980); *Jim Kraut Chevrolet*, 240 NLRB 460 (1974).

Thus, where the Board agent fails to open the polls on time or closes the polls too early, it is not automatically objectionable. Rather, the Board inquires into the possibility that voters were disenfranchised by the late opening or early closing, and if so, whether the number of such employees, who could have been disenfranchised, would be determinative of the election results.

It seems to me that the failure of the Board agent to adhere to the scheduled opening and closing times is a more serious transgression than the interpreter coming late since the former defect raises the possibility of disenfranchising voters altogether, while the latter defect merely raised the possibility of confusion among the voters, who did vote, but who perhaps might have benefited from the presence of an interpreter to answer any questions they might have or to explain the election procedures to them. Therefore, I conclude that at minimum a *prima facie* case of objectionable conduct, where an interpreter is late, requires a showing that employees in need of the interpreter's service actually voted during the period (or perhaps declined to vote because there was no interpreter present) and that the number of such employees were sufficient to affect the results of the election.

As noted, neither the Board nor the director in *Gory Associated* made any analysis of

[15] I note that even this finding is questionable since it is apparently based primarily on the director's assumption that 15 individuals on the eligibility list had French surnames. Significantly, no evidence was adduced that these 15 individuals could not read or understand English.

these issues, and in the absence of any evidence of how many Haitian Creole speakers voted during the interpreter's absence, the decision cannot be reconciled with Board precedent.

Nonetheless, the decision has not been overruled. However, as I observed above, it has not been followed or favorably cited in any subsequent case. It was cited and distinguished in *Arthur Sarnow Candy*, supra and in my view was implicitly overruled. In *Arthur Sarnow Candy*, the parties agreed that the ballots and notices would be printed in English, Spanish, Portuguese and Haitian Creole. The *Excelsior* list contained 24 names, four or five of which "appeared to be of French origin." The employer requested that Spanish, Portuguese and Haitian Creole interpreters be made available during the election. The Region administratively determined that the employer had not demonstrated a need for a Haitian Creole interpreter and did not supply one although it did supply Spanish and Portuguese interpreters.

The election results revealed that the petitioner won the election by one vote.

The employer filed objections based on the failure of the Board to supply a Haitian Creole interpreter citing *Gory Associated*. The director issued a decision overruling the objection and certifying the petitioner. The director distinguished *Gory Associated* on the grounds that there the parties had agreed prior to the election that a Haitian Creole interpreter was necessary to assist voters. The director also found that the employer in *Arthur Sarnow Candy* provided no evidence that any eligible voter was unable to read Haitian Creole or that any eligible voter was unable to speak English, Spanish or Portuguese (the language where a Board agent or interpreter could give instructions during the election). Thus, the director concluded that "the record in this matter contains no evidence that any eligible voter was affected by the absence of a Haitian Creole interpreter." 311 NLRB at 1138.

The director, therefore, overruled the objection and certified the union.

A request for review was filed and the Board unanimously denied the request for review and included the following footnote:

> In addition to the reasons given by the Regional Director for overruling the Employer's election objection, which we adopt, we note that there is no evidence that the electorate was confused by the voting procedures or unable to make an informed choice in the election. See *NLRB v. Precise Castings*, 915 F.2d 1160 (7th Cir. 1990); *Bridgeport Fittings*, 288 NLRB 124 (1988), enfd. 877 F.2d 180 (2nd Cir. 1989).
>
> *Id* at 1137.

Thus, combining the director's decision with the Board's affirmance leads me to conclude that *Gory Associated* has been implicitly overruled. The director relied substantially on his finding that no evidence was presented by the employer in *Arthur Sarnow Candy* that any eligible voter could not read Haitian Creole or was unable to speak English, Spanish or Portuguese. Such a finding was not made in *Gory Associated* either, and the Board by adopting the reasons given by the director in *Arthur Sarnow Candy* has affirmed the director's conclusion that the absence of such evidence by the employer was critical in finding no objectionable conduct.

More significantly, the Board specifically made reference to another critical deficiency in the employer's evidence in *Arthur Sarnow Candy*, which would also apply to *Gory Associated*.

That is the absence of any evidence "that the electorate was confused by the voting procedures or unable to make an informed choice in the election." The Board cited *NLRB v. Precise Castings*, supra and *Bridgeport Fittings*, supra, which are consistent with the cases cited by both the director and the Board in *Gory Associated*. *NLRB v. Precise Castings* is a Seventh Circuit opinion, which affirmed the Board's decision to certify a union, even though the Region had refused to print ballots in all languages used in the workplace. There 10 of the 41 voters were Spanish-speaking and the Region did print the notices in Spanish as well as English. The Court upheld the Board's decision to certify the union and overrule the employer's objection. The Court's opinion observed that the employer "did not produce evidence suggesting that even one of its Spanish-speaking employees was confused." 915 F.2d at 1161. *Bridgeport Fittings*, supra, the other case cited by the Board in *Arthur Sarnow Candy*, involved objections based on alleged errors in Laotian translation on the ballots and argued "widespread confusion" among eligible employees based on the organization of the ballot, which also involved Spanish and Portuguese as well as English. The Board affirmed the acting director's decision that the errors in Laotian translation were minimal and were not sufficient to confuse Laotian voters. The decision also found the ballots did not cause general voter confusion based on its format and layout.

The Second Circuit affirmed the Board's decision agreeing that no confusion was demonstrated by the employer. 877 F.2d at 187.

Further, an examination of the cases relied upon the director and the Board in *Gory Associated* provides further support for the conclusion that *Gory Associated* can no longer be considered valid precedent.

Kraft, supra, the case relied on by both the director and the Board, involved objections asserting that a multi-language ballot in four languages contained inaccuracies in the Vietnamese and Laotian translations, plus the fact that the ballots were laid out poorly so that even English speakers would likely be confused. The Board majority found in favor of the employer's contention, agreeing that confusion was likely based on its view of the ballot and the errors in Vietnamese and Laotian translation. The Board also relied on evidence of actual confusion from affidavits of employees, who so asserted.

Notably, the Board also concluded in *Kraft* that the ballots were likely to be confusing even to English speakers. Thus, *Kraft* is consistent with *Bridgeport Fittings* and *Precise Castings* that the relevant inquiry to be made, where language issues are raised, is whether such language defects on the ballots or notices or the lack of an interpreter were likely to or did cause confusion among voters. Where as in *Kraft*, the Board can examine the ballot in question and can and will make its own determination concerning the likely confusion, that is not the case where the interpreter is not present, and in such a case, it is essential that the objecting party produces evidence of voter confusion. *Arthur Sarnow Candy*, supra.[16]

Similarly, in *Rattan Art Gallery*, supra, another case cited by the director in *Gory Associated*, the Board found the translation of the notices of election and the ballots and rights of employees into Ilocano, a Filipino dialect was "confusing and incomplete." 260 NLRB at 256.

[16] I also note that the Second Circuit in *Arthur Sarnow Candy* sustained the Board's position in this regard finding that the employer had not offered any evidence that any Haitian Creole speakers in fact were unable to understand the election notices and ballots and adduced no evidence of voter confusion due to the failure to provide a Haitian Creole interpreter. 40 F.3d at 560.

Furthermore, other Board and Court precedent, both before and after *Gory Associated*, support my conclusion that the case has been implicitly overruled. *Superior Truss & Panel Inc.*, 334 NLRB 916, fn. 2 (2001) (Board affirms hearing officer's conclusion that the use of English only ballots did not cause confusion among voters. Indeed, the hearing officer cited *Precise Castings*, supra for the proposition that the Board does not require the use of ballots in multiple languages and that absence evidence of actual confusion among voters, there is no objectionable conduct based on such a failure, even where a number of employees speak Spanish as their primary language, and that between 10 and 15 voters did not understand, speak, read or write English); *Avante at Boca Raton Inc.*, 323 NLRB 555, 559 (1997) (Board affirms hearing officer's report that the lack of translation of the words "affiliated with" in the union's name on the election notices and ballots was not objectionable since no evidence was presented that voters could not make a free election choice or were confused about their choice because certain words, such as "affiliated with" were not translated); *J.C. Brock Corp.*, 318 NLRB 403, 404 (1995) (use of separate ballots in Vietnamese and English did not create reasonable doubt about the fairness of and validity of the election. Board observes that "it requires more than mere speculative harm to overturn an election." *Id* at 404. Note that the acting director had recommended setting aside election based on *Paprikas Fono*, 273 NLRB 1326 (1984), a case also relied upon in *Gory Associated*. The standard applied in *Paprikas Fono* that a departure by the Region from established precedents creates a reasonable doubt about the fairness and validity of an election is used frequently in assessing whether Board agent misconduct warrants setting aside an election. See *Fresenius USA Mfg.*, 352 NLRB 679, 680-681 (2008). There is no "established procedure" requiring the presence of an interpreter and the cases setting aside elections based on such irregularities involve much more serious transgressions than the mere lateness of an interpreter); *King's River Pine*, supra, 227 NLRB 299 (1976) (Board dismisses objection that director failed to furnish bilingual notices and ballots since employer failed to present evidence that a substantial number of Spanish named employees could not read or understand English); *Alamo Lumber*, 187 NLRB 384, 385-386 (1970) (failure to use bilingual (Spanish-English) ballots not objectionable since employees not versed in English could indentify a ballot and were able to understand its use and how to mark in order to express their choice).

Accordingly, based on the above analysis, I conclude that *Gory Associated* is not viable precedent and has been implicitly overruled by *Arthur Sarnow Candy* and other cases cited.

Applying such valid precedent to the facts here requires that the Petitioner's objection be overruled. Here, as in *Arthur Sarnow Candy*,[17] as well as *King's River Pine*, 227 NLRB at 299, Petitioner has not established that any employee, who voted during the time that the interpreter was not present, was unable to read or understand English or read Spanish. Further, the Petitioner has also failed to establish that any of these voters were confused about the election or encountered any difficulties or problems when they voted due to the absence of the interpreter. *Arthur Sarnow Candy*, supra at 1137, fn. 1 and at 40 F.3d at 560; *Superior Truss & Panel*, supra, 334 NLRB at 916, fn. 2; *Avante at Boca Raton*, supra, 323 NLRB at 559; *Precise Castings*, supra, 915 F.2d at 1163-1164; *Bridgeport Fittings*, supra, 288 NLRB at 124.

These findings would be sufficient in itself to require overruling Petitioner's objections. However, this conclusion is fortified by record evidence here that in fact employees, who voted during the period of the interpreter's absence, were able to understand English, and that in fact were not confused about the ballot or the election choices and were not in need of an interpreter to enable them to make an informed decision.

[17] 311 NLRB at 1138 and 40 F.3d at 559.

Thus, I have credited the undisputed testimony of the Intervenor's observer, Ruiz, that all of the employees, who voted prior to the appearance of the interpreter, were able to speak and understand English and that all of them voted without any problem or questions. His testimony further established that the Board agent showed each voter a ballot, instructed them to place a check mark in the box of their choice, either for Local 966, Local 124 or no union. The Board agent asked if the voter understood his instructions. They all replied "yes" in English. He then asked if they had any questions or needed translation help. The employees replied "no" in English. Based on these findings of fact, I conclude that all of these 10 voters could speak and understand English, that none of them were confused about the ballot or their choices and that the absence of an interpreter had no effect on their ability to make an informed choice. *Superior Truss & Panel*, supra at 919.[18]

While as I have detailed extensively below, I believe that *Gory Associated* has been implicitly overruled by later cases, even if I am wrong about that conclusion, applying *Gory Associated* here would not result in a finding that this objection has merit. Initially, I note that in *Gory Associated*, the director concluded, and the Board agreed, that the interpreter did not appear until halfway through the election period. The director characterized this as a "substantial period of time," where the interpreter was not present. Here, however, the interpreter appeared from 45-60 minutes late during the morning polling period of three or four hours. Significantly, there was also an afternoon polling session of a couple of hours, where presumably the interpreter was present for the entire time.[19] Thus, I do not believe that the interpreter's absence here can be considered to be for a "substantial" period of time as in *Gory Associated*.

More importantly, *Gory Associated* concluded that the lateness of the interpreter resulted in "*prima facie* proof of an objectionable failure to assure the effective and informed expression by all employees of their voting desires." *Id* at 1303. However, it also added that the petitioner therein did not in its exceptions to the director's decision "refer to any specific evidence rebutting this proof." *Id*.

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[18] Fortifying the above conclusion is the fact that the 10 voters in question included voters named Kevin McCann and David Moran, as well as the observers for Petitioner (Jose Collazzo) and Intervenor (Jose Ruiz). With respect to Moran and McCann, as I observed above, it is likely that these individuals are English-speaking. While it is not conclusive that such named individuals are English-speaking, it is certainly probable. I note in this regard that the Board has made findings concerning language ability based on names. Indeed, in *Gory Associated*, supra, the director relied solely on the fact that 15 French surname employees were on the eligibility list to conclude that these employees were in need of the services of an interpreter. The Board majority accepted this finding although significantly the dissent observed that up to "15 of the 124 eligible voters may have been Haitian Creole speakers." Further, I have found that the two observers, Ruiz and Collazzo, could understand and speak English. Therefore, a finding that these four voters were unaffected by the absence of an interpreter is fortified. That reduces to six the number of employees potentially affected by the interpreter's absence, even absent Ruiz's testimony, which number is insufficient to affect the election results. The Intervenor won the election by 18 votes with 1 challenge. Thus, even discounting my findings concerning McCann and Moran, merely eliminating Ruiz and Collazzo (the observers) as employees, who could have been affected by the absence of an interpreter, warrants a finding that the election results were not influenced by the interpreter's lateness.

[19] There is no evidence to the contrary.

Here, Intervenor had adduced evidence effectively rebutting any *prima facie* case that can be found based on *Gory Associated*.

As I have detailed above, the evidence establishes that all of the voters, who voted in the absence of the interpreter, were able to speak and understand English, were not confused about the ballot and their choices and that the absence of an interpreter when they voted had no effect on their ability to make an informed choice. *Superior Truss & Panel*, supra at 919. Therefore, even assuming *Gory Associated* is still viable precedent, it does not provide support for Petitioner's assertion that objectionable conduct had been demonstrated.[20]

Consequently, I recommend that Petitioner's Objection 9 be overruled.

Conclusion

Since I have found that Objection 6 should be sustained, and this objection encompassed conduct that affected the entire unit, it is appropriate to recommended that the election be set aside, and I shall do so.

ORDER

I therefore recommend[21] that the election held on September 24, 2010 be set aside, and the case be remanded to the Regional Director to schedule a new election.

Dated, Washington, D.C. February 3, 2011

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Steven Fish,
Administrative Law Judge

[20] I note that in *General Shoe*, supra, the Board cautioned that its principles are to be applied in "rare and extreme" cases. I find that the facts do not demonstrate such a rare and extreme case, where the Board's election standards drop too low.

[21] Under the provision of Sec. 102.69 of the Board's Rules and Regulations, Exceptions to this Report may be filed with the Board in Washington, DC within 14 days from the date of issuance of this Report and recommendations. Exceptions must be received by the Board in Washington by February 17, 2011.