BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 31

In the Matter of	)	Case No. 31-RC-8826
	)	
Canoga Healthcare, Inc., d/b/a West Hills Health and Rehabilitation Center,	)	
	)	
Employer,	)	
	)	
vs.	)	
	)	
SEIU, Service Employees International Union,	)	
	)	
Petitioner.	)	
	)	
	)	

EMPLOYER'S ANSWERING BRIEF TO PETITIONER'S BRIEF IN SUPPORT OF EXCEPTIONS TO ALJ'S REPORT AND RECOMMENDATIONS

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I. Introduction.

After a campaign with regard to which there were no ULPs even filed, an election which the Union lost by a landslide 2 to 1 margin, and a hearing during which the Union presumably easily could have – but entirely failed to – produce any objective evidence regarding behavior it now claims it believed ***while it happened in plain view*** was "highly improper" and "coercive" "surveillance" - the Union now requests a new election – a mulligan. This request is made despite the complete lack of any contemporaneous objection to this alleged "surveillance," and the contrary findings of - and rejection of that request as meritless - by a neutral ALJ, following a hearing during which she observed the demeanor of witnesses and credited the Employer's witnesses over the single witness called by the Union.

The Union's three objections have now been magnified into a lengthy brief – one replete with characterizations of record evidence that tend to mislead as well as selective quotation of governing precedent. No shrinking violet, the Union also asks the Board to overrule precedent gratuitously and to ignore the credibility findings of its ALJ.

Fundamentally, the Union's objection here seems to be that the Employer's managers and invitees had the right to remain within the Employer's premises and to continue operating the Employer's business and speaking with employees outside of the "no electioneering" area during the election. As Union counsel is well aware, however, only a few years ago, in *J.P. Mascaro & Co.*, Chairman Liebman rejected precisely the kind of objection the Union brings in this case:

> In theory, the election process would be pristine if the Board prohibited all parties from observing and greeting employees at the workplace on their way to vote. ***But that is not the law.***

The Union now claims there was a coercive "gauntlet" of the Employer's managers and agents that employees had to run before voting. Never mind, of course, that by the

same logic, employees turning into the facility's parking lot on election day also to had to run a "gauntlet" of Union agents patrolling its entrance. Never mind, as well, that once an employee entered the facility through the front door (the customary entrance) and passed through the lobby, where that employee actually went after that - whether to have a cup of coffee, to punch in, to work, to talk to friends, or to vote – was anybody's guess.

Not a single employee was called as witnesses in this case to claim that he or she had been intimidated by having to run this alleged "gauntlet" – or by anything said or done to him or her on the days of the election or before. Rather, the sole testimony the Union offered in support of its objections came from a single highly interested witness - Chief Organizer Juarez - who admitted to her own embarrassment after being soundly defeated in the first campaign she was heading up for the SEIU. That same campaign, it now appears, was merely the union's opening salvo in what increasingly looks like a "death through a thousand cuts" campaign strategy designed to inflict maximum financial and reputational pain on the management company affiliated with the Employer. Hence, the frivolous requests to change law and to overrule ALJ credibility determinations advanced herein.

As even cursory attention to the record will reveal, the Union's exceptions to the findings of the neutral ALJ here are as meritless - as the ALJ found the Union's objections to the election to be in the first place. The few Board cases that have found objectionable surveillance when Employer or union agents post themselves in locations that employees have to pass before voting have numerous necessary elements not present in this case. Most critically – to engage in "surveillance" - a manger or agent also has to be able to reliably perceive from the position where employees are passing that those same employees are going nowhere other than into a polling place to vote. ***That simply could not and did not happen here and there can be no***

non-frivolous claim to the contrary. Even Ms. Juarez admitted as much in the course of her testimony.

Likewise, the cases that have found objectionable electioneering based on conversations with employees during an election – all involve discussions taking place within the prohibited "no electioneering" zone – a fact the Union conveniently ignores.

Finally, the Union's third objection - which began as one regarding a security guard "escorting" employees from their cars into the building to prevent them from speaking to union supporters - but has now morphed into an objection to the Employer's having arranged for any security presence at all during the election – is meritless. As the ALJ in this case found, the single additional unarmed security guard the Employer retained during the two-day election to secure the rear entrance to its facility during voting sessions and maintain security for residents in light of the increased number of people in and around the facility and recent reports of trespassing had no effect – coercive or otherwise – on the results of the election.

The Union's exceptions should be rejected. The ALJ's decision upholding the election should be sustained.

II. Factual Background.

A. The Facility.

The Employer operates a skilled nursing and rehabilitation center (the "Facility") in Canoga Park, California, with 145 licensed beds and approximately 140 patients (known as "residents"). [Testimony of Michael Seifert, hereinafter "Seifert Tr." 77:22-78:7.] The Facility is located on a rectangular plot of land bounded by streets on three (3) sides. [Employer's Exhibit (hereinafter "E.Exh.") 1.] The Facility is shaped roughly like two (2) connected Xs. [E.Exh. 1.]

The main entrance to the Facility is located on its northern side facing Strathern Street. [E.Exh. 1.] A person approaching this main entrance would walk from Strathern Street along a horseshoe shaped driveway toward a large glass wall with doors leading into the facility. [E.Exh. 2(A) (view of entrance area from near Strathern Street).] Inside these doors is an area referred to as the main lobby, a large open area with chairs, tables, and a reception desk. [E.Exh. 2(B-C).]

The office of the Employer's Administrator, Michael Seifert, is located in a room immediately abutting, and opening onto, the main lobby. [E.Exh. 1 (room marked "Admin"); Seifert Tr. 83:7-15.] Employees are required to pass through the main entrance and the lobby as they report to work. [Seifert Tr. 86:8-14.] There are other entrances to the Facility, but they are normally locked, and employees are expected to use the front door. [Seifert Tr. 110:13-22.]

B. The Union Petitions For An Election.

On or around July 9, 2010, the Union filed a petition for an election in a unit of CNAs, RNAs, dietary aides, cooks, and central supply employees employed by the Employer at the Facility. [Board Exhibit, hereinafter "B.Exh.," 1(A).] An election was set for Thursday, August 19 and Friday, August 20, 2010. [B.Exh. 1(A).]

There were approximately 85 eligible voters in the unit. [B.Exh. 1(A).] In the run-up to the election, Mr. Seifert received reports from several employees that a non-employee union representative had, in violation of the Employer's policy, entered the facility through one of its normally locked back doors to solicit employees regarding the Union. [Seifert Tr. 98:2-14.] Around three weeks before the scheduled election, Mr. Seifert also received a second report of union organizers having entered a locked dementia unit of an affiliated facility after hours to solicit employees. [Seifert Tr. 117:8-22.] After hearing of this second incident, Mr. Seifert

decided to hire an unarmed security guard to patrol the facility at night (from 5:00 PM to approximately 6:00 AM) on a temporary basis. [Seifert Tr. 119:5-18.]

The parties had selected a room located on the east side of the facility known as "Dining Room B" to be the polling area. [Seifert Tr. 73:17-74:2; E.Exh. A.] Also located on the east side of the facility was a doorway. [Seifert Tr. 79:8-10; E.Exh. A (door marked "EXIT" located near the words "Vasser Street," and marked with "X," hereinafter referred to as the "back" or "rear" door).] The rear door of the facility is normally kept locked and employees are not supposed to enter or leave the Facility through it. [Seifert Tr. 99:9-15.] This held true during the election as well. [Seifert Tr. 110:13-22.] Employees were expected to use the front, rather than the rear door to enter (or leave) the facility (whether they were working or had come to the facility just to vote) and to make their way to the Dining Room B voting area when and if they chose using the Facility's interior hallways. [Juarez Tr. 54:17-553; Seifert Tr. 110:13-22.]

Mr. Seifert anticipated that there would be an increased number of people in and around the facility during the election, including employees arriving in the parking lot to work or vote, as well as union organizers. [Seifert Tr. 80:21-81:9, 104:4-20.] Accordingly, and particularly in light of the previous reports of trespassing, Mr. Seifert deemed it appropriate to add a modest amount of security coverage during the election, and a single (unarmed but uniformed) security guard was retained to patrol the exterior grounds between the hours of 5:00 AM and 5:00 PM on the voting days. [Seifert Tr. 80:21-81:9; 121:6-7; Jahangani Tr. 57:4-18; 66:3-10.] The guard was specifically instructed to make sure that no one entered the facility through the rear door (near Dining Room B) during the voting sessions. [Jahangani Tr. 57:19-25.]

C. The Conduct Of The Employer's Managers, Consultants, And Security Guard During The Election.

During the two (2) days of the election, Administrator Seifert maintained his usual routine. [Seifert Tr. 82:9-13.] This included going on "rounds" – walking about the facility and speaking with managers and staff. [Seifert Tr. 83:21-84:1.] Since his office was located immediately off the main lobby, making these rounds necessarily took him through the lobby. [Seifert Tr. 83:16-20.] Additionally, as was normally his practice, he also spent time in the main lobby necessary to perform general management functions such as talking to staff, residents, family members, and at times, the Employer's labor consultants. [Seifert Tr. 84:10-85:4.] As was his practice, he also observed when employees were coming and going during shift change. [Seifert Tr. 84:25-85:4.] Mr. Seifert estimated that he spent perhaps fifty (50%) percent of his time in his office with the door open, and another twenty percent (20%) of his time in the lobby abutting his office, which was normal for him. [84:12-85:4.][1]

The Employer had retained labor consultants to assist the Employer in providing information to employees and managers regarding their rights and obligations under the National Labor Relations Act ("NLRA" or the "Act"), and to help Mr. Seifert work with the Board's agents during the election. [Testimony of Fernando Rivera, hereinafter "Rivera Tr.," 122:24-123:3; 128:18-129;4.]

On the day of the election, three consultants were present at the facility, Fernando Rivera ("Mr. Rivera"), Carlos Ortiz ("Mr. Ortiz"), and Jim Needles ("Mr. Needles"). [Rivera

[1] Though Mr. Seifer had an "open door" policy, he testified that there were times that he did close his door, and that the labor consultants also spent time with him within his office. [Seifert Tr. 7-12.] Mr. Seifert also went outside on one occasion to the Facility's designated outdoor smoking area to deliver a message to one of the Employer's labor consultants, who was smoking in that location. [Seifert Tr. 84:2-9.]

Tr. 132:8-15.] The consultants were well aware of the fact that they could not be near the voting area while it was in use and had agreed to stay in or around Mr. Seifert's office in the main lobby during voting periods. [Rivera Tr. 123:13-124:7; 126:3-4.]

Mr. Rivera, who provided testimony at the hearing, greeted some employees as they passed through the main lobby area. [Rivera Tr. 124:8-17.] He estimated that he said hello to twenty (20) to thirty (30) employees over the three (3) voting periods and that he had longer conversations with two (2) to four (4) employees. [Rivera Tr. 126:21-127:4.]

Although he spent most of his time in and around Mr. Seifert's office abutting the main lobby, Mr. Rivera was a smoker, and so he went outside to the designated smoking area five (5) or six (6) times to smoke, with each smoke break lasting between five (5) and ten (10) minutes. [Rivera Tr. 124:14-25.] The Facility's designated smoking area was located near at a bench near Stratham Street. [Rivera Tr. 125:1-9; E.Exh. 2(D) (under the large tree behind the red car).]

During one of his smoke breaks, Mr. Rivera was approached by an employee named Anna. They greeted one another and Mr. Rivera asked her if she had exercised her right to vote – she said that she had. [Rivera Tr. 126:14-20.] Neither Mr. Rivera nor the other consultants kept lists of which employees were coming, going or voting. [Rivera Tr. 133:14-15.] Nor did they stop employees and require that they talk to them. [Rivera Tr. 125:13-15.]

As noted previously, the Employer had contracted for a single security guard to patrol its exterior grounds on the two election days. This guard, Mr. Vahid Jahangani ("Mr. Jahangani"), testified that on both days of the election, between 5:00 AM and 1:00 PM, his main concern – and where he patrolled – was the main lobby and the parking areas that extended around the Facility. [Testimony of Vahid Jahangani, hereinafter "Jahangani Tr.," 57:21-25;

63:13-21.] Once voting started, however, Mr. Janhangani's focus switched to making sure that the back door of the facility - which led to and was around a hallway corner from the voting area – remained secure. [Jahangani Tr. 57:19-25.]

In monitoring that back door, after 1:00 PM on each day, Mr. Jahangani initially testified that he had stationed himself on the north-east corner of the facility, at a point where he could observe what was going on in the front of the facility facing Strathern Street and also monitor whether anyone was improperly attempting to access the back door, which led to the voting area. [Jahangani Tr. 58:18-59:59:7; E.Exh. 1 (the "X" marked near room "18" on the map indicates Mr. Jahangani's position after 1:00).] On cross-examination, however, Mr. Jahangani conceded that he had only stationed himself at this point on the second voting day, and that on the first day of voting, he had actually stood nearer to the rear entrance – and then gone inside. [Jahangani Tr. 74:5-25.][2] Mr. Jahangani testified that he did not have or make any list of voters, nor was he instructed to make any such list. [Jahangani Tr. 60:25-61:5.] Mr. Janhangani, moreover, denied monitoring or escorting people going to and from their cars to the Facility, although on one occasion he followed someone into the building because the individual had left his car running in the parking lot. [Jahangani Tr. 60:19-24; 61:6-11.]

D. The Conduct Of The Union During The Election.

Prior to the election, the Union's senior organizer, Claudia Juarez ("Ms. Juarez"), had visited the facility between ten (10) and twelve (12) times, usually for a period of about three (3) hours. [Juarez Tr. 33:6-16.] On these occasions, she brought three (3) other organizers with

[2] Mr. Janhangani appeared reluctant to admit that he had retreated just inside the door to the rear entrance at around 2:00 p.m. due to the heat, and remained there the rest of the afternoon making sure that no one entered. [Jahangani Tr. 74:5-25] He admitted that this was not something he had been instructed to do, and testified that the next day he stayed outside in the parking lot where he "should" have been. [Jahangani Tr. 74:23-25; 75:24-76:3.]

her. [Juarez Tr. 33:6-16.] On the two (2) days of the election, in contrast, the union more than doubled its presence, stationing a total of nine (9) organizers, including Ms. Juarez, near the entrance to the facility parking lot. [Juarez Tr. 33:17-34:4.]

In particular, Ms. Juarez and the other organizers stationed themselves on the Strathern Street sidewalk near the Employer's property line. [Juarez Tr. 36:25-37:21; Union Exhibit ("U.Exh.") 1.] There they remained, except for the times when Ms. Juarez and another organizer would go inside the facility to observe the opening and closing of the polls. [Juarez Tr. 36:25-37:21.] From this spot, Ms. Juarez, just like the Employer's consultants, was able to see and speak to employees passing into or out of the facility for work or to vote. [Rivera Tr. 133:21-134:5.]

E. The Results Of The Election.

The election resulted in a resounding defeat for the Union. Of the 85 eligible voters, 78 cast ballots. Of these 78, 52 cast their votes against the union (67% of all votes cast), while only 24 voted in favor of union representation (31% of total votes). [B. Exh. 1(A).]

F. The Union Files Objections.

On August 27, 2010, the Union filed three (3) objections to the election. These objections were the following:

> Objection Number 1.
>
> On the day of the election, the Employer, by its managers, supervisors and/or agents, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions by posting its managers and labor consultants at the front and rear doors of the facility during the voting periods to monitor workers as they were coming to vote.
>
> Objection Number 2.
>
> On the day of the election, the Employer, by its managers, supervisors and/or agents, interfered with the fair operation of the

> election process and destroyed the necessary laboratory conditions when its mangers and labor consultants were engaging workers in extended conversation as they were arriving and leaving the building during the voting periods.
>
> Objection Number 3.
>
> On the day of the election, the Employer, by its managers, supervisors and/or agents, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions by posting a security guard in the parking lot to escort employees to and from their vehicles during the voting periods.

[B.Exh. 1(A) Attachment A.]

On September 17, 2010, Region 31 set the objections for a hearing. [B.Exh. 1(A).] That hearing was held before Administrative Law Judge Lana Parke on October 26, 2010. On December 6, 2010, ALJ Parke issued her decision, overruling the Union's Objections entirely.

III. Argument.

A. Legal Standards.

1. Standard of Review of ALJ's Decisions.

The Board conducts a *de novo* review of an ALJ's findings of fact based on the entire record, except where findings of the ALJ as to the credibility of witness are involved – the latter being afforded "great weight." *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3rd Cir. 1951). *A fortiori*, as to matters of law, the ALJ's decision is reviewed *de novo*. *Hedison Manufacturing Company*, 260 NLRB 1037, 1038 (1982) (reversing on the grounds that "the Administrative Law Judge has simply applied the wrong legal standard.")

2. Standards Governing Elections.

The Board does not lightly set aside the results of an election – particularly where, as here, no unfair labor practice allegation or finding exists. *Quest International, Inc.*, 338 NLRB 856, 857 (2003). To the contrary, there is a "strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Id.* Accordingly, not only does the objecting party bear the burden of proof, its burden "is a heavy one." *Id.* Alleged election misconduct cannot be the basis for setting aside the results of an election unless the objecting party can prove not only that the conduct occurred, but also that the conduct "reasonably tended to interfere with the employees' free and uncoerced choice in the election." *Id.; Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004). The applicable test is an objective one. *Cedars-Sinai, supra*, 342 NLRB at 597.

In deciding whether objectionable conduct has occurred under the above-referenced standard, the Board considers various factors including the following:

> (1) the number of the incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party in canceling out the effect of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the union.

Cedars-Sinai, supra, 342 NLRB at 597; *Avis Rent-A-Car System*, 280 NLRB 580, 581 (1986). As the above factors suggest, in evaluating whether alleged election misconduct is sufficient to overturn an election, the Board considers whether the election was a close one. Where a change in one (1) or two (2) votes would have changed the outcome of an election, the Board will be more willing to overturn an election. *Cambridge Tool and Manufacturing Company*, 316 NLRB

716 (1995). The opposite is also true. Where (as here) one party prevails by a substantial margin, the Board is less willing to invalidate the results of an election. *Hollingsworth Management Service*, 342 NLRB 556, 558 n.6. (2004); *Avis Rent-A-Car System*, 280 NLRB 580, 581 (1986).

B. The ALJ Correctly Overruled the Union's First Objection.

1. Objection Number One.

> On the day of the election, the Employer, by its managers, supervisors and/or agents, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions by posting its managers and labor consultants at the front and rear doors of the facility during the voting periods to monitor workers as they were coming to vote.

2. The ALJ Correctly Found That The Union Failed To Carry Its Burden of Proof.

An employer can interfere with employees' free and uncoerced choice in an election when, during a representation election, a manager or supervisor is stationed at a spot from which he or she can reliably monitor, directly or indirectly, who is (and who is not) actually going into the polling area to vote. *See Performance Measurements Company, Inc.*, 148 NLRB 1657, 1659 (1964) (election objection upheld where the employer's president stood by the door to the polling area forcing each voter to pass within two (2) feet of him in order to enter).[3] This is because, when a manager is in such a spot "without any explanation," the Employer can "survey the union activities of the employee and . . . convey to the[m] ... the impression that they

[3] Unless, of course (as also happened here) the Union fails to register any contemporaneous objection to the choice of voting location and/or the location of the Employer's agents and supervisors. *See, e.g., Roney Plaza Management Corporation*, 310 NLRB 441, 447 (1993) (objection overruled where three (3) managers stood behind the hotel front desk twenty-five (25) feet from the voting area when it was customary for them to do so, the Region approved of the voting location across from the hotel front desk, and they did not interfere with employees approaching the polling place or speak to them while they were waiting to vote).

[are] being watched." *Electric Hose & Rubber Co.*, 262 NLRB 186, 216 (1982) (stationing of supervisor within 10 to 15 feet of the entrance to the voting area, and other supervisors on direct path to the voting area, objectionable).

In contrast, the mere fact that a manager or supervisor is present in the workplace where voting will occur and can observe or even talk to employees as they do (or must) pass by – even when close to a polling area – is not a basis for overturning an election. *J.P. Mascaro & Sons*, 345 NLRB 637, 640 (2005) (objection unanimously overruled, including by Member Liebman, even though Company president, who had no office at the facility where voting would take place, stood outside the entrance all day conversing and shaking hands with employees, when he did not stand in the designated no-electioneering area, he had no direct view of the polling place, the Union never objected to his presence, and there was no other objectionable conduct). This is because, in order for objectionable surveillance to occur, it has always been necessary that the supervisor be stationed where he or she can directly or indirectly reliably monitor who is actually entering the agreed-to polling location itself ***to vote***. ***The essence of surveillance is the ability of a party to know for sure who does and does not vote, and thus, to appear to be able to actually or potentially infer from election results who supported it, and who did not.***

In this case, as the ALJ correctly found, the Union failed to meet its evidentiary burden with respect to its first objection. There was no evidence whatsoever that the Employer posted any supervisors or consultants anywhere where they could reliably monitor, directly or

otherwise, the door into Dining Room B - the agreed-to polling area.[4] In fact, there was no dispute that Mr. Seifert and the Employer's labor consultants were well aware that they were not to go anywhere near the polling area - and that they did not do so. [Seifert Tr. 14-83:6; Rivera Tr. 123:24-124:7.]

Still, though it made no contemporaneous objection, the Union now complains that as Mr. Seifert and the Employer's labor consultants went about their business, waited, talked, drank coffee and smoked in and around the front entrance and lobby (the latter abutted the Administrator's office) during the election,[5] they were engaged in objectionable "surveillance."

Although employees did use the main entrance to access the facility, it was a considerable distance from the polling area.[6] An employee entering through the main entrance

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[4] At hearing the Union appeared to abandon its claim that the Employer posted its managers and labor consultants near the rear door of the facility. [Juarez Tr. 48:5-7.] And there was no evidence that they did.

[5] The Union asserts in its brief "Administrator Seifert admitted that he was regularly in the lobby area during the voting periods; and even when he was not in the lobby, he was in his office, which abuts the lobby, with his door open." (Petitioner's Brief at 5:12-14.) This kind of mischaracterization of the record evidence - through a "too clever by half" insertion of a single word "even" - is frustratingly commonplace in the Union's brief – and apparently aimed at conveying the impression that Mr. Seifert had a view of the comings and goings in the lobby ***at all times*** during the election. As close attention (or faithful portrayal) of the actual factual record will reveal, Mr. Seifert estimated that he was actually physically present in the lobby only twenty percent of the time, and in his office with the door open fifty percent of the time. At other times, he was in his office with his door closed, and at other times, not in the lobby at all, but going about his normal rounds in the facility (other than in the election area), or delivering a message to Mr. Rivera who was smoking in front of the facility (Seifert Tr. 82:9-13, 83:7-84:1-18; 106:7-9; 107:3-15; 108:8-16; Rivera Tr. 129:3-7.)

[6] There was no precise measurement of the distance between the lobby and "Dining Room B" in the record. As merely one example of the license taken by the Union with the factual record in its brief, citing "Tr. 100-23:112:16" the Union claimed (in an astonishingly matter of fact way) that "Dining Room B is less than 100 feet from the main lobby." (Petitioner's Brief in Support of Exceptions at 4, lines 13-14.) If one actually reads the testimony cited by the

had to pass through the main lobby and then make his or her way down two corridors, travelling roughly halfway through the Facility, before reaching the polling place – Dining Room B. [E.Exh. 1.] Anyone located in or around the main entrance would not be able to see the polling place or any employees lined up outside it, nor would they even be able to tell whether an employee was necessarily headed toward the polling place. Once employees passed through the lobby, they could go anywhere in the Facility, and whether and when the Employee actually voted thereafter, was effectively anyone's guess.[7] Indeed, Ms. Juarez herself agreed unequivocally that "there was no way for anyone at the front door of the facility to have any idea who was going in to vote" in Dining Room B, leaving this issue not in dispute. [Juarez Tr. 49:17-19.] Accordingly, there was no evidence of the Union having registered any kind of contemporaneous objection to the Board agent or otherwise about the presence of Mr. Seifert or

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Union at "Tr. 100:23-112:16," however, one discovers there is little if anything in the cited text having to do with the issue, much less any such matter of fact admission or measurement. Though he admitted he had not measured the distance, Mr. Seifert estimated that it was "a couple hundred" feet from the main lobby to Dining Room B and testified that due to hallway congestion it typically took him several minutes to walk the distance. [Seifert Tr. 79:4-7; 110:23-111:2; 112:14-16.] Inspection of the schematic of the facility demonstrates that if one exits the main lobby and turns left into the corridor leading most quickly to Dining Room B, one has to pass a distance approximately equal to eight patient rooms (each fifteen feet wide, i.e., 120 feet) before turning right into another corridor and then walking a further two or so patient room widths past the Employee Dining Room (i.e. another 30 feet) to get to "Dining Room B." (E.Exh. 1; Seifert Tr. 111:18-112:7.) Hence, the actual distance is more likely 150 feet than "less than 100."

[7] Rather remarkably, the Union has excepted to the ALJ's factual finding that "once employees reported to work they did not have to pass the main entrance / lobby to enter the polling place." (Union' Exception No. 12.) Simple inspection of the schematic of the facility again demonstrates the accuracy of this finding – and frivolousness of this exception. Having passed through the entrance and lobby and clocked into work (the time clock is in the hallway beyond and to the left of the lobby), there were any number of ways an employee could then proceed (or not proceed) to Dining Room B without passing within the sight line of the lobby again. [E.Exh. 1; Seifert Tr. 102:7:3-10.]

the Employer's consultants - or anyone else for that matter - in and around the lobby of the facility during the election.[8]

While the record does not reflect whether any employees came to the facility purely to vote (as opposed to work), it is not unreasonable to infer that most employees would have voted before, after, or during their shifts – the voting periods were structured around shift changes for this very reason.[9] With respect to most employees, then, a person located at the main entrance would reliably be able to tell only that the employee was reporting for work. The employee's arrival and passage through the main entrance and lobby would reveal nothing about whether the employee was or was not going to vote at that time or ever, much less how they had voted.

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[8] Notably, despite the fact that she thought their presence was "highly improper" at the time – Ms. Juarez, the Chief Organizer, testified it did not occur to her to try to take any pictures using a cell phone camera or any other device (much less to register any formal objection). Ms. Juarez admitted that she had (and has) a cellular telephone with a camera. [Juarez Tr. 34:5-15.] In fact, she used it after the election to take the photographs that the union entered into evidence. [Juarez Tr. 34:5-21.] According to Ms. Juarez, however, she did not have a cell phone during the election. "My phone," she testified, "was – we were – I just didn't have it – my – they were changing carriers so we were without a cell phone." [Juarez Tr. 34:25-35:1.] Nor did it occur to Ms. Juarez to ask among her eight colleagues for a spare cell phone either. [Juarez Tr. 35:10-36:6.]

[9] Citing Mr. Seifert's testimony, the Union argues that "Mr. Seifert ***admitted***" that "most employees voted before they started their shift," "meaning that they arrived at work during the shift change, passed through the main lobby and its phalanx of managers and labor consultants, and then went directly to vote." (Petitioner's Brief in Support of Exceptions at 7:10-13.) Once again, the Union stretches the factual record beyond recognition. Although Mr. Seifert did indeed testify that he believed that most employees voted before they began their shift, the record does not reveal any non-speculative foundation for that belief - and Mr. Seifert explicitly disavowed having any non-hearsay personal knowledge on the subject. (Seifert Tr. 82:22-83:6; 102:24-25.) The record is completely silent, moreover, on the question of how far in advance of the scheduled start of their shift time people who were intending to vote actually came to work, or what they actually did after they passed through the lobby. The Union was not entirely even-handed when it came to characterizing the reliability of Mr. Seifert's testimony. (See, e.g., Petitioner's Brief at 25 n.9.)

Finally, and most importantly, the Union's evidence simply failed to establish that Mr. Seifert or any of the labor consultants were continuously posted in such a way that would reasonably tend to interfere with employees' free and uncoerced choice in the election. With respect to Mr. Seifert, the uncontradicted evidence was that his office was located off the main lobby, meaning that it would be far from unusual for him to be seen in that area. [Seifert Tr. 83:16-20.] Furthermore, it was undisputed that Mr. Seifert's normal routine involved spending about twenty percent (20%) of his time in the main lobby performing management tasks and that he normally left his door open. [Seifert Tr. 84:10-85:4, 106:7-12; Rivera Tr. 129:11-16.] Accordingly, it can hardly be said that Mr. Seifert's presence in and around the lobby and main entrance area was something out of the ordinary.[10]

With respect to the labor consultants, Mr. Rivera testified without contradiction that the consultants were informed that they were to stay away from the voting area and therefore located themselves in the area around the administrator's office. [Rivera Tr. 123:34-124:7.] They largely remained in and around the lobby – not posted outside the front door as Ms. Juarez contended. [Rivera Tr. 123:13-23; 126:3-4.] There is no evidence, or even any contention, that they kept lists of employees, took photographs, or otherwise recorded which employees were coming and going into the voting area. [Juarez Tr. 49:20-23.]

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[10] The Union also misleadingly asserts that "it was undisputed that the Administrator of Longwood's Crenshaw nursing home, whom Ms. Juarez had met previously, was also present in the main entrance area during the voting periods." (Brief in Support of Exceptions at 6:1-3.) In fact, Ms. Juarez testified that she could only recall "Matt" being present at the two voting sessions on the first day. [Juarez Tr. 46:20-27:4; 48:13-14.] Even assuming Ms. Juarez' testimony on this score was correct, there was no evidence that any of the employees at the facility had any idea who "Matt" was.

3. The Union's "Legal" Exceptions To The ALJ's Reasoning in Overruling Its First Objection Are Meritless Or Demonstrate At Most Harmless Error.

The Union first argues that the ALJ erroneously applied an "electioneering" analysis under *Boston Insulated Wire, 259 NLRB 1118, 1119 (1982),* to its evidence, rather than a "surveillance" analysis. The Union then claims that the instant case is governed by *Transcare of New York*, 355 NLRB No. 56 (2010), as well as a variety of other "surveillance" cases, and that the ALJ improperly found *Transcare* inapposite.

These contentions are meritless. First, whether the facts are analyzed using an "electioneering" or "surveillance" test is immaterial. As *J.P. Mascaro & Sons*, a case relied on by both the ALJ and Union makes clear, under either standard, the Union's claim here fails.

In *Mascaro*, the Company President stood outside – and with a clear view of - the entrance to the facility in which the voting would take place all day conversing and shaking hands with employees on occasion, this despite the fact that he had no office at the facility. The Union filed objections after it lost the election claiming impermissible electioneering and/or surveillance.

The Board unanimously overruled the Union's objections. With respect to the issue of impermissible electioneering, the *Mascaro* Board found that the behavior of the Company president had not occurred in any designated no-electioneering area and was not directed at persons waiting in line to vote. As to the issue of surveillance, despite the fact that the voting was taking place inside the facility – and the Company President could monitor who was and was not entering the building - the Board found cases in which a management representative had stationed himself within the line of sight to the entrance to the polls inapposite. It observed:

> Here, although Masacro was positioned outside the facility for most of the day, he was not, contrary to the judge, "just outside"

> the front door. Rather, Mascaro was at least 30 feet and on several occasions as far away as 54 feet from the front door of the facility. In addition, Mascaro had no direct view of the vending/snack room area. ***Although he could see who entered the facility, he had no way or knowing who was entering to vote and who was entering to perform job-related duties or to eat or drink in the vending / snack room.***

Id. at 639 (emphasis added). Concurring in the result, Chairman (then Member) Liebman pointedly observed:

> In the circumstances here – [the Company president] did not stand in any designated no-electioneering area, ***he had no direct view of the polling place from where he stood***, the Union never objected to his presence, and there was no other objectionable conduct – I would not set aside the election.
>
> In theory, the election process would be pristine if the Board prohibited all parties from observing and greeting employees at the workplace on their way to vote. ***But that is not the law.***

J.P. Mascaro & Sons, 345 NLRB 637, 640 (2005) (emphasis added).

Mascaro is on all fours with this case. Here, there is no evidence that any manager or consultant entered or conversed with employees in an agreed-upon no-electioneering area or while waiting in line to vote. Here, it is undisputed that no manager or consultant was positioned with a view so as to be able to ascertain definitively who was and who was not voting. Here, there is no evidence that the Union contemporaneously objected to the "plain view" behavior it now claims was misconduct. Finally, as will be shown below, there is no credible evidence of any other objectionable conduct.[11]

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[11] The Union argues in its brief that the ALJ erred by not examining the "cumulative" effect of the Employer's objectionable conduct. (Petitioner Brief at 33-34.) Again, even if this were true – which it was not, the Union's only evidence to the contrary being entirely speculative – the fact remains that when three zeroes are cumulated, they still equal zero.

The Union nonetheless claims that this case is governed by *Transcare* and objects to the ALJ's characterization of that case as both procedural and inapposite. The Union's gloss on *Transcare,* however, is misleading.

The Union insists that the ALJ erred in finding that *Transcare* was inapposite because it was essentially a procedural – not substantive – decision. Putting such niceties aside, whether substantive or procedural, as the ALJ found, it is still inapposite.

First, in *Transcare*, in its Position Statement in Support of its Objections, although the Union alleged that the supervisors were on a street 150 feet from the facilities where voting was to occur," it was also alleged (ambiguously) that the senior managers at Beth Israel, Montefiore and Mount Sinai hospitals were "in view of the employees as they entered and exited the polling sites." *Transcare*, 355 NLRB No. 56 at 2. It is not surprising that the Board majority might find (as it did) that this allegation raised "substantial and material factual issues requiring a hearing" – such as what exactly the words "polling sites" in the allegation was intended to signify – and what activity (or activities) (besides voting) were taking place at the "polling sites."[12] In ordering a hearing, moreover, the Board majority found significant that there was also a pending unfair labor practice case at the same facility alleging surveillance – and e-mail evidence demonstrating that on the first day of the election the Union had complained to the Board that the Employer at its Beth Israel facility had stationed supervisors "outside of the polling area." *Id.* at 2.

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[12] In addition, as Member Schaumber noted in his dissenting opinion, the Position Statement in *Transcare* did not even address a number of germane factual issues that a hearing could explore – such as whether supervisors had a direct view of the polling "area" - or critically - ***whether the supervisors were "otherwise positioned to ascertain whether the employees entering the facility were doing so to vote rather than for job related or other purposes."***

In rejecting Member Schaumber's dissenting view in *Transcare*, Chairman Liebman and Member Becker specifically observed:

> Furthermore, the Petitioner has alleged sufficient facts that, if established at a hearing, would distinguish this case from *J.P. Mascaro*. For example, the Petitioner alleges, and names supporting witnesses who directly observed the conduct, that employees were "required" to pass a senior manager at the Beth Israel site in order to enter and exit the polling place, and that senior managers at all three of these sites were standing outside the polling areas ***"within view of employees as they entered and exited the polling places" . . . Similarly, although the union in J.P. Mascaro never objected to the president's presence, the Petitioner in the instant case sent an e-mail to a Board agent during the manual election objecting that supervisors were standing in front of the voting sites during the election. Finally, in the case before us, unlike in J.P. Mascaro, there were other surveillance allegations set for hearing in both the unfair practice case and the objections case.***

(*Id.* at 3; emphasis added.)

The Union further cites *Belk's Dept. Store*, 98 NLRB 280 (1952); *Performance Measurements Co.*, 148 NLRB 1657 (1964), *Electric Hose & Rubber Co.*, 262 NLRB 186 (1982) and *ITT Automotive*, 324 NLRB 609, 623-25 (1997), to argue that the ALJ's decision was out of line "with an unbroken five-decades-long line of decisions requiring voting results to be set aside based on surveillance by the employer or its agents during voting periods." Each of these cases cited by the Petitioner, however, involved a situation not merely where the manager had positioned him or herself at a spot where Employees had to pass by, but also at a spot where he or she could reliably ascertain from that vantage point who was and who was not voting. ***These cases stand for the proposition that for objectionable surveillance to occur, the manager being at a place where employees must pass by before voting, although a necessary condition is still not sufficient. The manager must also be able to reliably infer from that same location***

where the employee must be going after he or she passes him. In the language of torts, both "but for" and "proximate" positioning is required.

C. The ALJ Correctly Overruled The Union's Second Objection

1. Objection Number Two.

> On the day of the election, the Employer, by its managers, supervisors and/or agents, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions when its mangers and labor consultants were engaging workers in extended conversation as they were arriving and leaving the building during the voting periods.

2. The ALJ Correctly Found That The Union Failed To Carry Its Burden of Proof As To Its Second Objection.

The Board will normally find objectionable conduct where party representatives engage voters in extended conversations while the voters are waiting in line to vote. *Milchem, Inc.*, 170 NLRB 362, 362-363 (1968). However, an employer does not engage in objectionable conduct merely by greeting or speaking to employees during an election when the employees are not actually in line to vote. *Hanson Aggregates Central, Inc.*, 337 NLRB 870, 881 (2002) (objection overruled where plant manager casually greeted employees for fifteen (15) minutes near the voting area); *Standard Products Company*, 281 NLRB 141, 163-164 (1986) (no objectionable conduct where supervisor talked with employees while walking with them towards voting area but not while they were in line to vote); *J.P. Mascaro & Sons*, 345 NLRB 637, 640 (2005) (Member Liebman concurring).

In this case, the Union's claim that Mr. Seifert and/or the Employer's consultants stopped each and every employee and engaged in prolonged conversations is simply unsupported by the credible evidence – and should be rejected. Even if it were true that such conversations occurred, however – which they did not - they would not have been unlawful, as there is no

evidence whatsoever that any of them occurred within any agreed-to no-electioneering area – or for that matter – that anything coercive was said.

a) The ALJ's Explicit Finding That Ms. Juarez' Testimony Was "Too Subjective" – And Implicit Finding That It Was Less "Credible" Than That Of Other Witnesses – Was Correct.

As a practical matter, the Union's entire case was built on an account of the two days' events given by a single witness – Chief Organizer Claudia Juarez. However, even leaving aside her clear interest in the outcome of the case,[13] Ms. Juarez' testimony was so riddled with implausibly exaggerated claims and unexplained inconsistencies, that, among other things, the ALJ found it simply too "subjective." This finding – to which the Union now excepts – is entitled to great weight -- and should be upheld. *See Standard Dry Wall, supra.*

Ms. Juarez testified that she and the other eight (8) organizers who accompanied her stationed themselves on Strathern Street roughly at the center of the Employer's northern property line. [Juarez Tr. 36:25-37:21; U.Exh. 1.] There they remained for the duration of the voting periods. [Juarez Tr. 36:25-37:21.] Ms. Juarez claimed that from this vantage point she was able to observe Mr. Needles and Mr. Rivera (two (2) of the Employer's labor consultants), and occasionally Mr. Seifert, standing at the main entrance. In particular, in response to leading questions on direct, Ms. Juarez testified (at least at first) that Mr. Needles and Mr. Rivera were outside the front entrance to the facility, and that Mr. Seifert and Mr. Ortiz were either in the

[13] Ms. Juarez had been a field organizer, but had recently been promoted to senior organizer in roughly March 2010 (about three (3) months before the organizing campaign at the facility began). [Juarez Tr. 9:21-10:3.] As senior organizer it was her responsibility to prepare for, and ultimately to win, the election for which the Union had petitioned. [Juarez Tr. 30:16-24.] Yet, the Union was dramatically rejected by nearly a two-to-one margin by the very employees Ms. Juarez was supposed to have organized. [B.Exh. 1(A).] Ms. Juarez admitted that her failure to deliver a victory in the election, particularly in light of the magnitude of the employees' rejection of the Union, was a source of embarrassment to her (and it could hardly be otherwise for the newly-minted senior organizer). [Juarez Tr. 30:25-31:7.]

lobby or outside the front entrance of the facility, the entire time ***during all three voting sessions***. (Juarez Tr. 25-18-24.)[14] Ms. Juarez further claimed that she saw them stop ***every single employee*** who came in and out of the facility and engage ***each and every one of them*** in conversation. [Juarez Tr. 23:23-25:19; 50-22-51:21.] She further claimed (at least at first) that she could see the facial expressions ***and*** body language of every employee and could tell that all "were very intimidated" and looked "confused or scared." [Juarez Tr. 25:20-26:1; Tr. 51:22-23.][15] She also claimed to be able to see the employees being further engaged in conversation inside the lobby by Mr. Seifert and Mr. Ortiz. [Juarez Tr. 26:8-17.]

At the same time Ms. Juarez was making all these observations, she also claimed that she was simultaneously able to observe employees arriving for work in their cars - and to observe the Employer's security guard's escorting ***each and every employee*** from his or her car

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[14] In contrast, on cross examination, Ms. Juarez testified that Mr. Needles and Mr. Rivera had actually been ***inside*** the lobby (not outside) during the entire evening second voting session. (Juarez Tr. 40:22-41:5.)

[15] Here, too, Ms. Juarez contradicted her initial testimony on direct that she had observed both the facial expressions and body language of every employee. She eventually admitted on cross examination that she could not observe facial expressions at night. (Juarez Tr. 50:12-18.) The Union has excepted to the ALJ's finding that this testimony was too "subjective" to be credited. In light of her shifting testimony, however, it was perfectly reasonable for the ALJ to conclude that Ms. Juarez' testimony that she could tell from the facial expressions and body language of the employees that the employees "were very intimidated" was simply "too subjective." [Juarez Tr. 25:20-26:1.] Ms. Juarez admitted that she has no special expertise on interpreting body language. [Juarez Tr. 50:10-11.] Her testimony was given at the most general level, and her testimony that every single employee exhibited the same "intimidated" body language was implausible, in light of both the distance at which she was observing events and the many events she claimed to be observing simultaneously. [Juarez Tr. 50:16-21.] Ms. Juarez admitted on cross that she could not tell what anyone was saying as they came in and out of the building. [Juarez Tr. 49:24-50:4.] Indeed, she admitted on cross that, for all she knew, they could have just been exchanging friendly greetings (which was exactly what Mr. Rivera said had occurred). [Juarez Tr. 49:24-50:4.]

to the main entrance to the Facility, engaging in conversation as he did. [Juarez Tr. 27:23-29:13.]

In elaborating on the latter testimony, at first, Ms. Juarez insisted that she could see ***the entire parking lot*** – which extended around the perimeter of the building – from her vantage point on the north end of the facility. [Juarez Tr. 37:22-38:2.] Under cross-examination, however, she again changed her testimony, admitting that she could not see the entire parking lot – only 90% of it. [Juarez Tr. 38:3-39:9.]

It was obvious to the ALJ – and should be patently clear to the Board now as well - that a person standing at the center of the northern border of the Facility can only see a small percentage of the Facility's exterior grounds and perimeter parking lot. [E.Exh. 1.] Indeed, the Union's own exhibits show that the view of the property from that position is dominated by the corner of the northeast side of the building, which blocks the sight-lines to the rest of the property.[16] [U.Exh. 1-3.] Even Ms. Juarez' (eventual) claim to be able to see 90% of the parking lot was contradicted by Mr. Seifert, an individual much more familiar with the facility than Ms. Juarez, [Seifert Tr. 92:1-93:17], who explained in detail how, due to the layout of the property, a person standing on the sidewalk at its north end would in fact be unable to see all but the smallest portions of the parking lot running down its side, and certainly none of the back parking lot. [U.Exh. 1-3; E.Exh. 1.]

This claim by Ms. Juarez to be able to see nearly all of the parking lot, however, was critical to the Union's third objection - that a Security Guard had been escorting ***each and***

[16] In particular, Ms. Juarez stated that Union Exhibit 3 was taken from the location where she was standing on the day of the election. [Juarez Tr. 29:14-30:12.] Although that picture does not show a wide-angle view, it is clear that the north side of the building, with its protruding wings would have blocked nearly the entire view of the side and rear parking lots.

every employee arriving for work from his or her car into the facility (a claim that the Union may now have given up, as discussed below, in light of its implausibility). That it was physically impossible for Ms. Juarez to engage in such observations apparently destroyed her credibility in the eyes of the ALJ on this critical issue - and as a witness in general as well.[17]

Perhaps even more damaging to Ms. Juarez' credibility, however, was the fact that – as she testified – despite feeling ***at the time*** that the conduct of the Employer and its agents during the election was "highly improper" -- and her understanding that she was there to observe the conduct of the election - she somehow managed not to snap a single photograph of any of the managers or consultants who were supposedly stationed outside the Facility's main entrance for the duration of the election. [Juarez Tr. 34:16-35:12; 36:10-21.] Nor did she take a single photograph of the security guard who was supposedly escorting every employees to the main entrance. [Juarez Tr. 34:16-35:12.][18] Nor, for that matter, did she apparently register any kind of objection whatsoever with the Board or its agent about any of this alleged "highly improper" conduct.

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[17] In fact, given that the north end of the parking lot was reserved for visitor parking and employees were expected to park their vehicles in the side and rear lots, it is unlikely that Ms. Juarez could have seen very many – if any – employees actually park their cars. [Seifert Tr. 93:4-22.]

[18] Ms. Juarez' excuse was that she did not have her cell-phone with her (during the first union election she was supervising) since her service was in transition. [Juarez Tr. 34:16-35:12.] As for her eight (8) colleagues, it simply did not occur to Ms. Juarez even to ask any of them whether they had a cell phone with a camera available, much less to photograph the conduct that she claims was occurring. [Juarez Tr. 35:13-36:24.] That Ms. Juarez would fail entirely to take any steps to make a record of objectionable conduct that she claims was occurring is more than curious. Furthermore, the Union chose not to call any of the eight (8) other organizers who were present with Ms. Juarez to corroborate her account – or any employees who were supposedly stopped and harangued by the Employer.

b) The ALJ Properly Found That The Credible Evidence Did Not Support The Union's Second Objection.

As discussed above, neither Mr. Seifert, nor the labor consultants engaged in prolonged conversations with employees as they arrived at the Facility. They did greet some employees who passed by if they happened to know them. [Rivera Tr. 124:8-17; 126:21-127:4.] There is nothing in the Act that prevents a supervisor from greeting an employee that he or she may encounter during an election, particularly where, as here, the encounters occurred far from the voting area and the employees involved were not in line or otherwise preparing to vote. *Hanson Aggregates, supra.*, 337 NLRB at 881; *Standard Products*, 281 NLRB at 163-164. Nor are supervisors prohibited from having conversations with employees who are not in the voting area or in line to vote. In this regard, it is significant that the Union could produce no evidence that any supervisor or labor consultant or security guard said anything to any employee that would be considered coercive or otherwise improper, much less in a no-electioneering area or while in line to vote. [Juarez Tr. 49:24-50:4.]

The Union's claim that Mr. Seifert and/or the labor consultants engaged in extended conversations with every arriving and departing employee was not credible, based as it was solely on the biased and consistently exaggerated testimony of Ms. Juarez. Both Mr. Seifert and Mr. Rivera denied having any extended conversations with employees. [Seifert Tr. 118:9-20; Rivera Tr. 126:21-127:4.] Mr. Rivera did recall a brief (few minute) conversation he had with a single employee who approached him while he was outside smoking after she had voted. This conversation – which the Union now characterizes as an "extended conversation . . . about the election"-- consisted merely of Mr. Rivera asking the employee whether she had had an opportunity to exercise her right to vote, and the employee's affirming that she had. [Rivera Tr.

126:14-20.][19] In total, he recalled that he had conversations (although not extended ones) with between two (2) and four (4) employees over the course of the voting sessions. [Rivera Tr. 126:21-127:4.]

3. The Union's Legal Exceptions To The ALJ's Reasoning in Overruling Its Second Objection Are Meritless.

Although the Union acknowledges that electioneering is only prohibited in the "customary area" "at or near the polls" as well as in any specified "no electioneering" area – rather astonishingly, it asserts now that it did not matter whether the brief discussions at issue in this case took place in the main lobby and outside the main entrance – or even in the polling place or adjacent hallway. (Petitioner's Brief at 21.) In support of this novel position, the Union cites *Pearson Education*, 336 NLRB 979, 979-980 (2001). Unfortunately, *Pearson Education* does not actually support the proposition advanced by the Union.

The Union seems to suggest (misleadingly) that *Pearson Education* held that electioneering conducted in a location where employees must pass in order to vote is objectionable, even if it occurs away from the immediate polling area. It does not so hold. Initially, the case is factually distinguishable, as it involved electioneering by means of an election poster, not the kind of brief conversations and greetings at issue in this case. More importantly, the campaign poster in question was located not merely in a location each employee

[19] The Union excepts to the ALJ's finding that there was no evidence that these brief conversations "related to the voting." Even if this single instance can be deemed a "conversation" "related to the voting" – which it should not be – the error would be immaterial and harmless, and not a basis for overturning the ALJ's decision. *Hercules Drawn Steel Corporation*, 352 NLRB 53 n.1 (2008). An Employer's encouraging its employees to vote – to the extent it "relates" to voting – is protected expression, particularly when it takes place outside of any no-electioneering zone. *General Electric X-Ray*, 74 NLRB 1083, 1085 (1947); *CBS*, 70 NLRB 1368, 1369 (1946). There was certainly no evidence that Mr. Rivera tried during this conversation – which took place after the employee had voted – to influence the employee's vote one way or another.

had to pass in order to vote, it was actually "hung within an area curtained off for the election." *Pearson Education*, 336 NLRB at 979. The Board held that, although the area had not been specifically designated as a formal "no-electioneering" area, "the poster was located in the 'customary area at or near the polls." Given the poster's location inside an area curtained off specifically for voting purposes, it is clear that *Pearson Education* involved conduct that occurred within the immediate polling area. It does not support the proposition that the "customary area at or near the polls" would extend to a lobby far from the polls, much less to the exterior of the facility.

Furthermore, the other cases cited by the Union actually undermine its argument. In *Bally's Park Place, Inc.*, one of the cases cited by the Union, the Board overruled objections based upon the conduct of a union agent who stood about 130 feet away from the polling area and encouraged employees to "vote yes." *Bally's Park Place, Inc.*, 265 NLRB 703, 704 (1982). The Board held that this conduct was not objectionable because it "occurred away from the polling place, outside the area designated as the no-electioneering area, and was not directed at employees waiting in line to vote." *Id.* at 704-705. Likewise, in *Boston Insulated Wire & Cable Company*, which was cited by the Union, and which was also cited in the *Pearson Education* decision, the Board overruled an objection based upon electioneering which occurred outside a doorway only 10 feet up a corridor from the door to the polling place. *Boston Insulated Wire & Cable Company*, 259 NLRB 1118, 1118 (1982). The Board held that "[m]ost significantly, voters standing in line to vote were separated from the electioneering by the set of doors, which remained closed during the balloting." *Boston Insulated* is not meaningfully distinguishable from the instant case, where, once employees passed through the lobby, they had to exit the lobby and walk through the facility corridors before even reaching the polling area.

Thus, the cases cited by the Union do not stand for the proposition that electioneering occurring away from the polling area and the hallway immediately adjacent to it may somehow fall within the Board's definition of the "customary area at or near the polls." Rather both *Pearson Education* and the other cases cited by the Union confirm that, as a general matter, electioneering that occurs away from the immediate polling area where employees are waiting to vote is not a basis for setting aside an election.

D. The ALJ Correctly Overruled The Union's Third Objection.

1. Union Objection Three.

> On the day of the election, the Employer, by its managers, supervisors and/or agents, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions by posting a security guard in the parking lot to escort employees to and from their vehicles during the voting periods.

2. The ALJ Correctly Found The Union Failed To Carry Its Burden of Proof.

An employer does not violate the Act when its supervisors or security personnel simply observe union activity in plain view at or near the employer's premises. *Fred'k Wallace & Son, Inc.*, 331 NLRB 914. Indeed, the "notion that it is unlawful for a representative of management to station himself at a point on management's property to observe what is taking place at the plant gate its too absurd to warrant comment." *Tarrant Mfg. Co.*, 196 NLRB 794, 799 (1972). It is only when such observation is effected in a manner that is out of the ordinary that it may become unlawful. *Wal-Mart Stores, Inc.*, 350 NLRB No. 71 (2007). Even conduct by an employer's supervisors and security personnel that is out of the ordinary, however, is not unlawful when legitimate circumstances justify it. *City Market, Inc.*, 340 NLRB 1260 (2003).

Thus, it is well settled that increased security patrols in response to unusual activity on or near an employer's property is not objectionable *per se*. For example, in *Quest,*

supra, the Board found no objectionable conduct where the employer retained a guard for the duration of an election campaign and added a second guard during the election to monitor the main vehicular entrance to the employer's plant and patrol the exterior grounds, when the guards did not confront or interrogate employees or patrol at the polling area. *Quest, supra*, 338 NLRB at 856-857.[20]

In this case, Mr. Seifert established a one person security patrol in response to specific and unusual circumstances – an election proceeding during which he (correctly) anticipated there would be an unusually large number of union organizers in and about the Employer's property who might be inclined to trespass. Mr. Seifert had received at least one report from his employees of non-employee union agents trespassing and entering the interior of the Facility during the run up to the election. [Seifert Tr. 98:2-14; Tr. 105:1-9; 114:1-19.] Three weeks before the election, he learned of a second trespass incident occurring after hours and involving more than one union organizer at an affiliated facility in an area that was supposed to be secured behind locked entrances – a dementia unit. [Seifert Tr. 117:8-22; Tr. 119:5-10.]

Mr. Seifert was responsible for – and needed to insure -- the security of the facility's residents – as well as the rear entrance to the facility near the voting area. [Seifert Tr. 77:17-23; 80:21-81:9; 99:2-8.] His expectation, moreover, proved correct – the Union did bring and stationed an unprecedented number of organizers near the entrance to the facility's parking lot during on the days of the election. (Juarez Tr. 33:6-22.)

As the ALJ found, Mr. Seifert's response to these unusual circumstances could hardly have been more modest – for the two weeks prior to the election, he had a single unarmed

[20] The *Quest* Board so found even though in that case the employer's unarmed guard had ***a guard-dog*** and the additional guard deployed on the day of the election was ***armed***. *Quest, supra*, 338 NLRB at 856-857.

security guard posted at night; and during the two days of the election, he added a single unarmed security guard during the day as well. [Seifert Tr. 119:12-24.] The latter guard did not patrol inside the Facility where the employees worked. Rather, he patrolled (for the most part) the exterior grounds with an eye towards keeping the rear door of the facility secure. [Jahangani Tr. 57:19-25; 63:13-21.]

At least initially, the Union appeared to be contending in its third objection not that it had been unreasonable to have a special security detail – but rather that it was objectionable for this security guard "to escort employees to and from their vehicles during the voting period." The Union's contention – at least initially – was that this guard had intercepted every single employee who arrived at the facility, escorted every single arriving employee to the main entrance of the facility, and engaged every single employee in extended conversation along the way.

As the ALJ found – and the Board should find now – that claim was simply unworthy of credence. The guard himself, who was called to testify, stated that he was not instructed to - and did not - escort employees from their vehicles or engage in conversations with them. [60:14-61:11.][21] Additionally, both Mr. Seifert and Mr. Rivera denied that any such instruction was given to the guard. [Seifert Tr. 101:8-14; Rivera Tr. 127:14-22.]

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[21] So the ALJ concluded, and in the process explicitly found Mr. Vanhanjani to be a "clear" and "candid" witness - in contrast with Ms. Juarez, who was apparently not deemed so credible. (Decision at 5:5-11.) Despite the Board's settled policy of affording credibility determinations "great weight," the Union now excepts to the ALJ's decision to credit Mr. Vahanjani over Ms. Juarez - and insists the Board should now find that he did escort employees to and from their cars into the building. (Petitioner's Brief at 30-33.) This request is frivolous. To the extent Mr. Vahanjani's testimony changed at all, it apparently did so due to an initial reluctance to admit (against his interest) that he had retreated inside the rear door and into the building (against his instructions) during his first day on patrol. The ALJ apparently found this admission against interest made Mr. Vahanjani's denial that he had been out in the parking

The only witness who claimed that the guard had been "escorting" employees was Ms. Juarez. The fact that Ms. Juarez was far from a disinterested witness and prone to exaggeration has been discussed above. The ALJ specifically found her testimony on this subject less credible than that of the security guard. – and so should the Board. Not one of the eight (8) Union representatives who supposedly saw this escorting of employees recorded this alleged conduct with a cell-phone camera or other camera. Nor was anyone but Ms. Juarez called to corroborate the Union's claim.[22] Nor was there any contemporaneous complaint.[23]

The overwhelming weight of the evidence thus demonstrated that the Union's claim that the guard intercepted and escorted employees was untrue. Rather, the guard stationed himself unobtrusively in locations where he could observe the north end of the Facility and/or the area around the rear door. This was clearly not objectionable conduct. Indeed, the

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lot "escorting" every single employee more credible. In fact, for a good part of the first day of voting, Mr. Vahanjani had not been out in the parking lot (where he testified he knew he "should" have been) at all. [Vahanjani Tr. 72:15-24; 74:21-25.]

[22] The Board has long accepted the rule that, when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding the factual question on which the witness is likely to have knowledge. *See Guardian Industries Corp.*, 319 NLRB 542 (1995). The Board has also found that an adverse inference is warranted from the failure of a party to elicit testimony about a matter concerning which its witness would normally testify. *Asarco Inc.*, 316 NLRB 636 (1995).

[23] Compounding the difficulty with Ms. Juarez' testimony was the fact that it would have been difficult, if not impossible, for a single security guard to escort each and every employee arriving at the facility during shift change. Employees are permitted to park throughout the parking lots that extend around the perimeter of the Facility (except for the front (north) parking lot, which is reserved for visitors and physicians) and all employees reporting for a shift could be expected to arrive at roughly the same time. [Seifert Tr. 93:14-17.] In order for the Union's claim to be true each employee would have had to arrive separately, with their arrival times conveniently spaced out so that the single guard would have had time to walk to each of their cars (wherever they happened to be), meet them, and escort them to the main entrance before returning for the next employee.

Employer's security coverage was actually more modest than the coverage that was found unobjectionable in *Quest*.

3. The Union's Legal Exceptions To The ALJ's Ruling Regarding Objection Three Are Meritless.

Given the weakness of the Union's evidence in support of its "escorting" claim, the Union's objection has apparently morphed into something new – a claim that even if Mr. Vahanjani was not escorting employees to and from their cars - his mere presence in the parking lot on the day of the election to secure the back entry constituted objectionable "enhanced security." Even if it were proper to consider this objection so re-characterized – which it should not be[24] - this new claim is meritless as well.

In the circumstances of this case, the ALJ found the "modest" security measures adopted by the Employer unobjectionable, citing, *inter alia*, *Quest International*, 338 NLRB 856, 857 (2003), and distinguishing a case relied on by the Union, *DHL Express, Inc.*, 355 NLRB No. 144 (2010).[25] So should the Board.

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[24] It is fundamental to due process that the Employer be advised of the actual nature of a Union's objections if it is to adequately prepare for a hearing on them. *Precision Products Group, Inc.*, 319 NLRB 640, 641 (1995) (noting the "lack of authority of a hearing officer to consider issues that are not reasonably encompassed within the scope of the objections that the Regional Director set for hearing."). See also 5 U.S.C. § 554(b) "[p]ersons entitled to notice of an agency hearing shall be timely informed of . . . the matters of fact and law asserted.") Nowhere in the Union's objections - or position statement in support of those objections - did the Union indicate that it was claiming that the employer's deployment of security in and of itself was objectionable. Rather, what was alleged to be objectionable was specific behavior of a security guard. Had the Employer been aware that the retention of a security guard in and of itself was going to be at issue, it could and would have prepared and presented additional witnesses to explain more comprehensively the reasons for additional security.

[25] The Union insists that *DHL* – a case involving the attempted arrest of union organizers off of the Employer's premises - with the active involvement of the Employer's security guards – demonstrates that the security guard here was engaged in objectionable behavior. *DHL* and the instant case are nothing alike. Here, there was no claim, much less proof of, attempted arrests, either on or of the Employer's premises. Likewise, there was no claim, much less proof, that the

The Union excepts to the ALJ's reliance on *Quest* – or alternatively, urges that it be overruled. Whether in reliance on *Quest* or not, the Board should find the ALJ's conclusion here fully consistent with the law. Thus, this case is hardly the vehicle for the Board to overrule *Quest*.

In *Quest*, in the week or so lead up to an election, the Employer had taken the unprecedented security measure of deploying an unarmed security guard (accompanied during shift changes by a 90-100 pound Rottweiler) to patrol the perimeter of its facility. On the day of the election, it added an armed policeman dressed in a security company uniform. After the Union lost the election by a wide margin, it filed an objection claiming that these enhanced security measures tainted the result. *Id.* Observing (as did the ALJ here) that "the objecting party must show the conduct in question had a reasonable tendency to interfere with the employees' free and uncoerced choice in the election," *id.* at 857, a three member panel of the Board (including Member Walsh) disagreed, and overruled the Union's objection.

The Union nonetheless argues that *Quest* - a unanimous bipartisan decision of the Board - must now be overruled as inconsistent with five other cases it cited to the ALJ,[26] as well

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Employer's security guard here even attempted to approach the Union organizers on the Strathern Street sidewalk. The cases are nothing alike.

[26] In addition to *DHL Express*, the Union cited *Parsippany Hotel Mgmt.*, 319 NLRB 114 (1995); *6 West Limited Corp.*, 330 NLRB 527, 528 (2000); *Villa Maria Nursing & Rehab. Center*, 335 NLRB 1345, 1353 (2001), *Mercy Healthcare Sacramento*, 334 NLRB 100 (2001) in its brief to the ALJ as cases justifying its objection on an enhanced security basis. These cases are inapposite. *Parsippany* and Mercy Healthcare Sacramento were both cases in which it was claimed – and proven – that employees were being stalked or followed by security personnel. See 319 NLRB at 117-118; 334 NLRB at 104. The judge here found no such behavior had occurred. *6 West Limited Corp.*, was an unfair labor practice case in which it was alleged that the Employer had added off duty policemen purportedly to address "harassment" and "violence" against its employees (even though no employee had complained of harassment). In this case, in contrast, it was Mr. Seifert's employees who alerted him to the union trespassing on the Employer's premises that caused him to hire security. See 330 NLRB at 28. Finally, In *Villa*

as six additional cases it now bring to the attention of the Board for the first time.[27] The Board should decline this invitation.

Even if *Quest* were wrongly decided – which it was not – its facts are distinguishable from this case since in *Quest*, an armed guard was involved. It is on that basis, apparently, that the Union argues that "as the line of cases from *Marine Welding* to *Sprain Brook* makes clear, the Board has long reasonably recognized that an employer's unjustified decision to hire ***armed*** guards during a union election campaign is inherently coercive and intimidating." (Petitioner's Brief at 30; emphasis added.) As there is no claim or controversy here about the use of "armed" guards, this is hardly an appropriate vehicle for overruling *Quest*.

Here, in contrast with other cases where the same ALJ had found enhanced security measures unacceptable, the ALJ here found that the security measures the Employer in

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Maria Nursing & Rehab. Center, the ALJ found the additional security unjustified because the number of security personnel observing the activities of union organizers actually exceeded the number of union organizers – and thus was intended to intimidate them. See 335 NLRB at 1353. (In contrast, the ALJ in *Villa Maria* acknowledged, like the ALJ here, that an employer has "the right to watch . . . union representatives to ensure that they [do] not trespass on its property . . . or block traffic." *Id.* at 1352.

[27] In addition, the Union now cites a half dozen cases it never brought to the attention of the ALJ, including *City Market, Inc.*, 340 NLRB 1260 (2003), *Sands Hotel & Casino*, 306 NLRB 172 (1992); *Shrewsbury Nursing Home*, 227 NLRB 47 (1976); *Marine Welding & Repair*, 174 NLRB 661 (1969) and *Sprain Brook Manor Nursing Home*, 351 NLRB 1190 (2007). These cases do not support the Union's position. The ALJ in *City Market* found, as the ALJ did here, that the Employer's hiring of a single security guard during an organizing campaign did not offend the Act and the Board agreed. 340 NLRB at 1277. *Sands Hotel* was an unfair labor practice case involving an organizing drive in which there had been numerous terminations and proof of surveillance of solicitation by security guards using binoculars. 306 NLRB 172 (1992). It is hardly on point. *Shrewsbury Nursing Home* involved an armed, uniformed guard in a police cruiser who being stationed in the employee parking lot the morning after union distribution first started at the facility. 227 NLRB at 47-48. Here, there was no such reaction to the union. In *Marine Welding & Repair* there were three uniformed guards carrying pistols specially hired for the election. 174 NLRB 661, 670-71. This is hardly such a case. *Sprain Brook Manor Nursing Home*, like *Shrewsbury*, involved the deployment of *armed* security guards. 351 NLRB at 1192. Again, this is not such a case.

this case had instituted on the days of the election were "limited" in nature and that there was "no evidence the security guard ever engaged in any coercive or even questionable conduct towards employees." Just as the ALJ did here, the Board should find as well that, particularly given the unprecedented number of union organizers present around the facility during the two day election, the incidents of trespassing about which he had recently heard, and the need to insure the security of the facility and its rear entrance – the "modest" security measures adopted by Mr. Seifert had no such tendency.

IV. Conclusion.

The Union's exceptions to the findings of the neutral ALJ are as meritless as the ALJ found the Union's objections to the election were. The Union's objections should be overruled and the election results upheld as valid.

DATE: JANUARY 10, 2011

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31

Canoga Healthcare, Inc. d/b/a West Hills Health and Rehabilitation Center Employer and Service Employees International Union (SEIU) Petitioner	Case No: 31-RC-8826 **PROOF OF SERVICE**

PROOF OF SERVICE

I am employed in the **County of San Francisco, State of California**. I am over the age of 18 and not a party to this action; my current business address is **555 California Street, Suite 1700, San Francisco, CA 94104-1520**.

On **January 10, 2011**, I served the foregoing document(s) described as: **EMPLOYER'S ANSWERING BRIEF TO PETITIONER'S BRIEF IN SUPPORT OF EXCEPTIONS TO ALJ'S REPORT AND RECOMMENDATIONS** on the interested parties in this action as follows:

BY ELECTRONIC SERVICE

I transmitted the document via electronic mail in pdf format, to the following person(s) at the indicated email addresses below:

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x Executed on **January 10, 2011**, at **San Francisco, California**.

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

x I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Jessi Knight

Jessi Knight