

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALBERT LEA SELECT FOODS, INC.,

Employer,

and

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 6,

Petitioner.

Case 18-RC-17746

**EMPLOYER'S EXCEPTIONS TO THE
REGIONAL DIRECTOR'S REPORT ON OBJECTIONS**

Lawrence J. Casazza
Kenneth F. Sparks
Mark L. Stolzenburg
Vedder Price P.C.
222 North LaSalle Street
Suite 2600
Chicago, Illinois 60601-1003
(312) 609-7500

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Albert Lea Select Foods, Inc. (“ALSF”) excepts to the Regional Director’s dismissal, without hearing, of its two objections regarding conduct affecting the results of an election that occurred on March 11, 2011, and the Region’s decision not to refer the objections to an Administrative Law Judge or another Region and to dismiss them based upon an administrative review even though the objections raised questions regarding the Region’s own alleged conduct in the election.

I. BACKGROUND

United Food and Commercial Workers Union, Local 6 (the “Union” or the “UFCW”) filed a petition to represent certain ALSF employees on January 31, 2011.¹ On February 8, the Regional Director for Region 18 approved a Stipulated Election Agreement, pursuant to which an election was held on March 11. In a unit of approximately 449 eligible voters, consisting of production and maintenance employees working at ALSF’s facility in Albert Lea, Minnesota, the Union received 215 votes, 206 employees cast ballots against representation, and two ballots were challenged. Approximately 28 eligible voters failed to cast ballots. ALSF filed timely objections on March 18.

ALSF’s objections focused on two issues. The first was the potential and/or actual disenfranchisement of non-English speaking voters – a majority of ALSF’s workforce – who are functionally illiterate in any language printed on the ballot. As more fully set forth below, ALSF alleged in its first objection that the Region denied voters the laboratory conditions necessary for a free and fair election by:

- failing to provide interpreters for non-English speaking voters during polling times and/or refusing to allow multilingual observers for the parties to act as interpreters for voters

¹ All dates are in 2011 unless noted otherwise.

who sought to ask questions in the voting area, and/or would have asked questions had translation services been available;

- refusing to permit more than one observer per side in the polling area so that observers could have acted as interpreters in all languages spoken by non-English speakers who were eligible to vote;
- promulgating an express English-only rule on verbal communications in advance of the election date and again during the pre-election conference; and/or
- failing to translate the ballot into Thai, in addition to other languages spoken in the workplace.

ALSF's second objection alleged that the Union gave clothing and other items of value to eligible voters during the critical period.

Even though the first objection alleged that acts and omissions of the Region interfered with the conduct of the election, the Region nonetheless investigated and made a decision as to that issue itself. On April 8, without the benefit of an evidentiary hearing, the Regional Director issued a Report and Recommendation on Objections and Recommendation That Certification of Representative Issue ("Report"). As the Report indicates, the Regional Director administratively dismissed both of ALSF's objections.

II. THE REGION'S PROMULGATION OF AN ENGLISH-ONLY RULE DURING THE ELECTION AND REFUSAL TO PROVIDE TRANSLATORS, IN ADDITION TO THE REGION'S REFUSAL TO TRANSLATE THE BALLOT INTO THAI, DEPRIVED EMPLOYEES OF A FREE AND FAIR ELECTION

A. Background About the Voting Unit

As might be apparent from the nature of the objections, ALSF's workforce is diverse.² A large portion of its employees are from Southeast Asia, of Thai, Burmese and Karen heritage. The latter group of employees – those of Karen descent – comprise about 40 percent of the workforce. They speak two dialects of the Karen language, known as Poe Karen and Skul Karen. The Karen are political refugees who have spent the majority of their lives in remote jungle villages or refugee camps in Thailand and Burma (Myanmar). Another significant group of ALSF employees are of Hispanic descent and speak only Spanish.

As shown by ALSF's evidentiary submission, at least 70 voters – roughly 16 percent of the voting unit – do not speak or otherwise understand English, and could not read the ballots or election notices provided by the Region in other languages because they are functionally illiterate in the language that they speak. As to the Karen employees specifically, one-third to one-half of Karen-speaking employees do not have functional reading or writing skills in Karen. Almost none of the Karen employees can understand spoken or written English.

B. Communications with the Region About Language Issues with the Voting Unit

Before and after execution of the Stipulated Election Agreement, ALSF's counsel informed the Regional Office of the cultural and language issues faced by the voting unit. More

² Because the Region administratively dismissed Objection 1 without an investigation or hearing, ALSF's statement of facts regarding this Objection must necessarily take the form of an offer of proof as set forth in its evidentiary submission to the Region. In addition, ALSF requested that any hearing about Objection 1 take place before an Administrative Law Judge because it involved the Region's own conduct.

specifically, ALSF's counsel informed the Region of the need for translation assistance on several occasions.

For instance, on February 7, when submitting the Stipulated Election Agreement to the Region, ALSF's counsel informed the Region that the voters spoke at least four languages – two dialects of Karen, as well as Burmese, Thai and Spanish – and the voters understood little to no English and many were illiterate. (Exhibit A.³)

On February 8, the Region requested additional information about the way that ALSF communicates with its employees. (Exhibit B.) ALSF's counsel responded later that same day that the Company uses interpreters and posts notices in several languages to communicate with employees. (Exhibit C.) Counsel spoke to the Region's representative about these issues as well.

The Region responded nine days later, on February 17, stating that it would provide notice postings in English, Burmese, Thai, Spanish and two dialects of Karen. However, despite widespread illiteracy among the workforce, the Region refused to provide translators for the election. The Region further stated that, for purposes of voting, employees would be released by other employees who would read notices in the various languages spoken in the workplace under the supervision of a Board Agent. Despite the language issues explained at length by ALSF's counsel, the Region expressly declined to provide mixed-language ballots. (Exhibit D.)

ALSF's counsel responded, expressing disappointment in the Region's refusal to provide translators for the election, but proposing an alternative – allowing an equal number of multilingual election observers for each party to answer questions that employees might have about the election process under the direction of the Board Agent. (Exhibit E.)

³ The exhibits referenced in this brief were attached to ALSF's submission of evidence to the Region, which the Regional Director included with the Report as an Appendix.

On February 25, the Region reversed its decision regarding mixed-language ballots and informed ALSF's counsel that the ballots would be translated into each language spoken at the facility except Thai. (Exhibit F.)

On March 1, as the parties continued to work on the election details, the Region decreed that it would allow only one observer for each party to be present during the election sessions. However, the Region allowed each party to have six total employees to release other employees to vote by reading a release notice in English and the five other languages. (Exhibit G.) Counsel for ALSF responded by e-mail later that day, continuing to request that some interpreters be present for the election. As an alternative, the Company's counsel again proposed that the Region allow multi-lingual observers in the election room during voting hours who could translate for the Board Agents and help the Board Agents assist voters who did not speak or otherwise understand English. ALSF explained that, by allowing both sides to have observers who were fluent in several languages, the Region's concerns about electioneering or other irregularities would be mitigated. (Exhibit H.)

The Region responded by e-mail later that day and made clear the full breadth of its intentions not to aid or allow others to aid non-English speaking voters:

The Region has decided that each party will have only one observer in the voting area. *The observers in the area are to only speak English. No other language will be spoken in the voting area.* The Region has concluded that we will remain uniform.

(Exhibit I) (emphasis added). While such a rule might be reasonable for a literate or bilingual workforce, the Region did not even attempt to explain why it would apply such a rule to an illiterate workforce.

ALSF's counsel objected to the Region's edict, responding both by phone and in e-mails that many illiterate voters who speak little or no English may have questions about the voting

process. For instance, counsel reminded the Region in a March 1 e-mail that “Many of the Karens in particular spent years in refugee camps and have never voted in any type of election.”

(Exhibit J.)

After further discussions about the issue of translation assistance in the voting area, the Region brushed aside any concerns and reiterated its position in a March 2 e-mail:

The Region determined that if we provide a translator for one language then we will need to provide a translator for all languages. *The Region determined that English will be the only language spoken in the voting room.* Even if voters have questions - we will do our best to answer them in English. Our purpose is to make sure the employees’ name is on the excelsior list, show them where to vote and show them where to place their ballot.

(Exhibit K) (emphasis added.) In response to the Region’s position, ALSF’s counsel responded that he was “deeply concerned about English-only decrees from a government agency.”

(Exhibit L.)

The Region’s response was terse, unyielding and unambiguous:

. . . The Regional Director has decided that there will be no other language in the polling area other than English. This will prevent any unlawful coercion in language unknown to the Board Agents. There will not be a re-consideration of this decision. The Region is providing notices in all languages, ballots in five of the six languages and is making the release announcement in all languages. This is how the Regional Director intends to have this election run.

(Exhibit M) (emphasis added.)

The Region refused to further consider the impact of its rule on the electorate or discuss the issue with ALSF’s counsel.

C. The Evidence That ALSF Offered to Present

ALSF presented substantial evidence in support of its objection regarding the adverse effects of the Region's decision not to provide proper translation support.⁴ ALSF offered to present six witnesses in support of its objection regarding the Region's failure to provide translators during the election and the Region's refusal to translate the ballot into Thai. Had the Regional Director ordered a hearing on the objection, the witnesses would have testified to the facts set forth below.

1. Counsel of Record for This Election and Two Previous Elections

The first witness that ALSF offered was counsel of record for the current election in addition to two previous elections in which the Union sought to represent ALSF employees. This witness would testify that, for the two prior elections, the Region was aware of language issues among ALSF employees. As a result, the Region provided interpreters at the elections to ensure that the Region could address any questions or issues raised by employees with literacy and/or language issues. This witness was also prepared to testify about remarks made by Union representatives during the preelection conference on March 11. Specifically, the Union representatives expressed surprise that the Region did not allow for interpreters and mandated that only English be spoken during the election, and objected at the pre-election conference that the Region's decision would impair the ability of non-English speakers to vote. The witness reiterated ALSF's objections to the Region's edict, as well.

⁴ ALSF made an offer of proof in its March 25 submission of evidence to the Region, as permitted by Board precedent. *Heartland of Martinsburg*, 313 N.L.R.B. 655 (1994). The Region did not request to take affidavits from any of the witnesses identified in ALSF's submission regarding Objection 1.

2. ALSF's General Manager

The second witness offered by ALSF was its General Manager. He led the majority of ALSF's group meetings with employees regarding the Union's organizing petition. The General Manager is also familiar with the workforce, the fact that an overwhelming majority of employees – many of whom were hired since the two prior NLRB elections – do not speak English, are unfamiliar with elections and are illiterate even in their own languages.

The General Manager was also prepared to testify about ALSF's methods of communication with the voting population. For instance, when the Company hired many of the Karen employees after the last two elections, it had to communicate with most of them through pictorial form and through hands-on training with interpreters. Attempts to train and communicate using written materials only were unsuccessful. For instance, the General Manager created pictorial postings to train employees on the use of indoor toilets and hand washing. (Exhibits N and O.)

The General Manager was further prepared to testify that, after the Region refused to allow interpreters for voters and adopted its English-only rule, he informed employees of the Region's decision using interpreters at group meetings in early March to soften the blow and prepare non-English speaking employees for the fact that the Region would not allow them to communicate or ask questions in their own language. He would have testified that he tried to educate employees on how to mark a ballot yes or no and what each box meant. However, as he could have explained, ALSF's ability to communicate effectively on these points was hampered by the large size of the workforce (approximately 450 voters), absenteeism at meetings and the need to translate each talk from English into five other languages. As a result, many employees did not pay attention or fell asleep during meetings and he was unable to fully educate the non-English speaking workforce that was illiterate on how the ballot would look and how to mark

their choices yes and no on the ballot. That led some employees to complain that many of the Karen employees remained confused about voting procedures and what a yes and no vote meant.

3. ALSF's Human Resources Manager

The third witness offered by ALSF was its Human Resources Manager, who would have testified to many of the same facts as the General Manager. The Human Resources Manager also personally led orientation and training meetings of Karen employees and others, experiencing firsthand their inability to read in English or understand abstract concepts if not demonstrated or taught through a translator. The Human Resources Manager also personally prepared and drew pictures for employees to try and communicate with them and had to do hands-on demonstrations with interpreters present in order to communicate ideas with the employees unfamiliar with many basic aspects of American society, such as the use of toilets and washing hands and the basic skills of the workplace, including the use of time clocks and methods of recording attendance.

4. Karen Civic Group Representative

The fourth witness offered by ALSF works with a Minnesota civic group providing job placement services and other support to Karen employees. This witness personally helped place more than 100 Karen employees at ALSF and participated in the application process and orientation with most of them. The witness is Karen, having been raised among the Karen people in South Asia in the same jungle areas and refugee camps as the employees who voted in the election, and is familiar with the culture, background, and English and Karen fluency and literacy (and lack thereof) of the Karen employees who work at ALSF. The witness would have testified to the inability of virtually all Karen employees to speak or read English and the inability of 30 percent or more to read in their native Karen at a functional level. She would

have also testified to the fact that ALSF had to use her as a translator to communicate with employees, who it could not reach by other means, including written materials.

As part of her knowledge of the Karen culture, the witness would have testified to the fact that virtually all Karen employees at ALSF have no experience with voting, the mechanics of an election or use of a ballot. The witness also would have testified to the fact that Karen employees would be reluctant to attempt to communicate their uncertainties during the election and further intimidated about participating in the NLRB process due to the NLRB's refusal to allow interpreters and promulgation of an English-only rule in the voting area, which the Karen employees would view as discrimination by the Region.

5. ALSF's Election Observer

The fifth witness identified by ALSF is an employee and was ALSF's observer during polling. His name and address were on the *Excelsior* list. He is Karen and spent most of his life in the jungle or Karen refugee camps before coming to the United States. He was fortunate enough to receive more schooling than most Karens and has somewhat better English skills. Because of that, he can testify that he is often asked to read and interpret for coworkers and that his skills are often necessary for them to understand and function in settings that are familiar to other Americans, such as interactions they have at schools and with medical providers.

He would have also testified that, in his experience, virtually none of the Karen employees working at the facility speak or read English and that 30-50 percent are illiterate in their own language. He would have said that, during the campaign period after the election petition was filed, he was worried, based on what the Karen employees were saying to him and their inability to read the election notices, that many did not understand the voting process and that they planned to mark the ballot simply so they could go back to work even though they did not understand what it meant. If given the opportunity to testify, he would have said that he tried

to talk to many employees to explain the voting process, but was unable to reach most Karen employees before the vote, particularly those on the second shift, because he works on the first shift. The majority of all Karen employees at ALSF work on the second shift.

The fifth witness also attended ALSF's campaign meetings. He would have testified that meetings became long because of the need for translations. As a result, he observed many Karen employees sleeping, and they did not hear the General Manager and others explain how to complete a ballot. Many Karens were still asking him how to complete a ballot even after they received explanations on how to do so.

The fifth witness attended the pre-election conference as ALSF's observer. The Board Agents who conducted the conference told him that no one would be allowed to speak to employees in a language other than English or help the Board Agents assist non-English-speaking voters.

He would have also testified that, despite the fact employees had been told they would not be allowed to seek assistance in their own language, at least three employees of Karen nationality who he did not know by name tried to ask him questions in Karen during the voting. One was confused by the ballot and asked which box he should mark for ALSF. Another said, after receiving a ballot, that he "did not know how to do it," and indicated he was referring to the ballot. A third said he did not want to vote and tried to ask whether he was obligated to cast a ballot, but someone else in line said he was required to vote. That individual then voted. All of these comments occurred during the afternoon voting session.

6. ALSF Employee

The sixth witness offered by ALSF was an employee in the voting unit. Her name and address were on the *Excelsior* list. She is of Karen decent and grew up in Karen refugee camps. She is familiar with the fact that most Karens cannot speak or read English and that

approximately 30 percent of the workforce cannot read Karen. She was personally asked to translate both English and Karen materials for illiterate Karen employees, including Union campaign literature written in Karen. (Exhibit P.) She would also have testified that Karen employees are reluctant to admit their illiteracy. She would have also testified that the Karen employees are intimidated by attempting to function in an English-speaking country, particularly when forbidden to seek aid in their own language. She would have testified to the same subjects as ALSF's fifth witness, except for conversations in the preelection conference and voting area.

D. The Regional Director Improperly Dismissed Objection 1

1. The Regional Director Should Have Referred Objection 1 to Another Region or to an ALJ because It Raised Issues Regarding the Region's Own Conduct in Refusing to Provide Translators or Allowing Observers to Serve in That Capacity

The Regional Director should not have considered the objection regarding his refusal to provide translators at the election or allow English to be spoken by observers while assisting the Agent. This is clear in light of the unyielding position that the Region took in its communications with ALSF's counsel. On two occasions, the Region communicated that English would be the only language spoken in the voting room; its final e-mail message unequivocally stated that "The Regional Director has decided that there will be no other language in the polling area other than English," and then stated later in that message that "There will not be a reconsideration of this decision."

Given that it is the Region's own decisions that are under attack and that the Region expressly stated that it had made up its mind and would not consider further arguments from the parties, there is no reason to believe that the Regional Director could objectively revisit his decision – even after he was presented with evidence and case authority to the contrary. He therefore erred by refusing to refer the matter to another Region or an Administrative Law Judge.

See *Engineers Beneficial Assn. District 1 (Crest Tankers)*, 274 N.L.R.B. 1481, 1482 n.5 (the NLRB’s “proceedings should be free from any appearance of partiality or bias”). This includes a “favorable or unfavorable predisposition” toward a party or its positions. *Liteky v. U.S.*, 510 U.S. 540, 554 (1994). A showing of “irritation” or “impatience” with a party’s position is also relevant. *St. Mary’s Nursing Home*, 342 N.L.R.B. 979, 980 n.6 (2004).

2. **The Regional Director Abused His Discretion by Refusing to Provide Translators at the Election or Allowing Employees to Serve**

a. **Board Precedent Requires Translation Assistance at Election When a Large Number of Employees Are Unable to Understand English or Their Native Languages**

The Board’s minimum obligation when conducting elections is to ensure that employees have a free and fair choice as to whether they wish to be represented for purposes of collective bargaining. The most basic element of free employee choice is ensuring that employees have the resources available to understand the decision they are making. That did not occur here.

As the Board explained in *Alco Iron & Metal Co.*, 269 N.L.R.B. 590 (1984), a case that is pertinent here, its role in conducting elections is to “maintain and protect the integrity of its procedures.” In *Alco*, the Board Agent administering an election allowed a bilingual observer to instruct several Spanish-speaking employees how to vote with little or no oversight by the Agent. Neither the Board Agent nor the employer’s observer spoke Spanish. The Board concluded that the Region destroyed the atmosphere of impartiality by delegating an important function, the instruction of voters, exclusively to an observer for one party with no possibility of oversight. Indeed, in his concurring opinion, Member Hunter remarked that, in instances where a Regional Office has reason to believe that a substantial percentage of voters do not speak English and the Board Agent does not speak their language, the Board’s responsibilities are broader still:

. . . [T]he Board must attempt to fulfill its responsibility to protect the integrity of the election process by supplying a Board agent, or

Regional Office-authorized or otherwise approved interpreter, capable of speaking the language of those employees so far as the particular circumstances permit.

Id. at 692.

In contending that *Alco* supports his refusal to arrange for any possible translation assistance in the election area, the Regional Director missed several important distinctions. In *Alco*, the parties had not been notified before the election that bilingual observers would be assisting the Agent running the election with translation, such that the employer had no opportunity to provide an observer who could participate and police the union's observer. That need not have been the case here. In addition, the Board's holding in *Alco* was not that use of foreign-language observers to aid a Board Agent was inappropriate under any circumstances. Rather, in that case, the Agent abdicated his duty to instruct voters by allowing the observer free rein to instruct voters without even the appearance that the observer was translating for the Agent, or at the direction of the Agent. *Id.* at 592.

The Board elsewhere has endorsed the use of observers to ensure that voters are adequately instructed provided that both parties are given notice and an opportunity to provide a bilingual observer. *The Regency Hyatt House*, 180 N.L.R.B. 489, 498 (1969) (“...it would seem clearly improper for [the Board Agent] to have allowed an observer for one of the parties to have assisted the voter in this manner [i.e., explain the ballot], in the absence of an interpreter for the other party.”) (emphasis added). Indeed, in this case, the parties did not have any concern about coercion or electioneering in the polling area. Both sides wanted observers to assist the Board Agent in order to protect voting rights. It is unclear why the Region had concerns not shared by the parties, especially in an election where it allowed employee observers from each side to serve as translators and assist in the release of potential voters under the theory that the bilingual observers from each side could police each other.

Indeed, one key point of *Alco* is the Board's endorsement of the notion that the Board must instruct voters in some fashion, whether through a written notice reasonably calculated to reach most voters or through a translator who is able to permit the Agent running the election to instruct voters and answer their questions. In this case, the Region was on notice that none of the means adopted to inform voters about the mechanics of the election had any hope of being effective. Written notice to an illiterate workforce was obviously defective. Yet, rather than make up for that problem by providing for translators or an equal number of bilingual observers who could assist the Agent, the Region elected, ostrich-like, to stick its head in the sand. It not only ignored the problem, but compounded it forbidding any observer or voter to even attempt to provide or obtain assistance in his or her own language. In the interest of free elections for all employees – not simply those who speak English or are, at a minimum, literate in their native language – the NLRB should not allow that decision to stand.

As set forth in ALSF's submission of evidence to the Region, a third or more of the employees in the voting unit of Karen descent – about 40 percent of all eligible voters – recently emigrated to the United States from refugee camps and remote jungle villages, and cannot understand English, are illiterate in their own language and are completely unfamiliar with democratic processes. Thus, having translators to answer questions and instruct voters in their native tongues was essential to having a free and fair election. Without translators, voters may not have known exactly why they were voting or how to complete a ballot that they could not read.

Although the Region was clearly concerned about the cost and burden of providing translators in multiple languages, it had a readily available and less expensive resource that it was already using to provide translation assistance for reading release notices. As noted above,

when releasing employees, the Region approved the use of an equal number of bilingual employees representing ALSF and the Union for this purpose. In agreeing to have employees assist with releasing, the Region opined that the presence of interpreters for both sides would be sufficient to ensure that the other confined their remarks to interpreting the release script and not electioneering. On at least two occasions in the past, the Region provided translators for elections at ALSF. It therefore makes little sense that the Region declined ALSF's request this time.

Board precedent supports the use of an equal number of bilingual observers in the voting area. In *Fibre Leather Manufacturing Corp.*, 167 N.L.R.B. 393 (1967), the Board concluded that permitting an equal number of bilingual observers for each party was a permissible way of ensuring that non-English speakers could ask questions or request assistance. Having individuals present to answer employee questions took added importance in this case because it was difficult for employees to understand what they were choosing when marking their ballots. If multilingual observers were good enough for releasing employees, it makes no sense why the Region refused to allow them during the voting sessions in the face of significant literacy and language barriers raised by both parties in advance of the election.

The Region's refusal to provide translation assistance at the election raises broader questions of Constitutional import. As noted in *NLRB v. Precision Castings, Inc.*, 915 F.2d 1160 (7th Cir. 1990), a case repeatedly cited with approval by the Regional Director in his Report, the Board has chosen to make its elections more like political elections used to select government officials. *Id.* at 1162. That said, the Board did not simply decide to provide ballots only in English. Indeed, it did not decide to forgo translators. It went far beyond those steps and

expressly decreed that no one in the voting area could speak any language other than English at any time or for any reason.

English-only mandates, especially in the context of an election, are inherently suspect and generally considered to violate the Due Process and Equal Protection clauses of the Constitution. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923); *Farrington v. Tokushige*, 273 U.S. 284 (1927); *Ruiz v. Hall*, 957 P.2d 984, 1002-03 (Ariz. 1998) (state legislation mandating English-only rules in the workplace was unconstitutional). *See also Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183 (Alaska 2007) (English-only rules violated First Amendment). Indeed, there is general agreement that English-only rules warrant strict scrutiny before the courts and other adjudicative bodies. *Olagues v. Russoniello*, 797 F.2d 1511 (9th Cir. 1986), *vacated on other grounds* 484 U.S. 806 (1987) (strict scrutiny is required when reviewing governmental efforts that have the effect of discouraging voting by non-English speakers who need foreign language ballots.)

The Region's English-only rule cannot withstand even the most limited form of scrutiny. Moreover, it had the practical effect of sending a message to a particularly vulnerable subgroup of the electorate that the Board's processes were not simply indifferent to their rights, but were openly intended to favor other English-speaking and literate segments of the workforce.

b. The Region's Claim That ALSF Submitted Inadequate Proof of Actual Confusion Is Unavailing as a Matter of Law or Fact

In dismissing Objection 1, the Regional Director relied in part on a suggestion that ALSF presented no evidence of actual confusion among the electorate. (*See Report at p. 6.*) The Region's decision is erroneous for two reasons. First as a matter of law, conduct that calls the Board's election procedures into disrepute is objectionable as a matter of law without the need for evidence of the precise impact on the vote. Second, as explained above, at least two of

ALSF's witnesses were prepared to testified that voters were confused both before and during the election. In fact, one of those witnesses observed two voters trying to disobey the Region's English-only rule in the polling area so they could obtain help understanding the ballot but were ignored because they were speaking in Karen, not English, as the Region had decreed.

The Board's law is clear. Conduct tending to "destroy confidence in the election process" is objectionable, whether or not such conduct actually impacts the results of an election. *Athbro Precision Engineering Corp.*, 166 N.L.R.B. 966 (1967). For instance, in *Athbro*, the Board ordered a second election where an employee saw the Board Agent responsible for administering the election drinking with a union representative in a café during a polling break. There was no evidence that the Board Agent's conduct affected the votes of any employees. Regardless, the conduct gave the appearance of irregularity. The Board observed,

The commission of an act of by a Board Agent conducting an election which tends to destroy confidence in the Board's election process, or which could reasonably be interpreted as impugning the election standards we seek to maintain, is sufficient grounds for setting aside that election.

Id.

The Board has reached a similar finding in other cases, not only rejecting the need for actual proof of impact from a Region's errors, but affirmatively refusing to consider such evidence in favor of an objective test. Thus, in *Pea Ridge Iron Ore Co.*, 335 N.L.R.B. 161 (2001), the Board set aside an election where a Region's mistake as to the opening time of the polls could have disenfranchised five employees even though the Region obtained evidence that none of the five who failed to vote attempted to do so. In a 2-1 decision joined by Members Liebman and Walsh, the Board reasoned that it is improper for the Region even to have gathered affidavits on this point. It reasoned that the test is not whether employees were "actually disenfranchised" where the Region makes a mistake as to election mechanics. Instead, the test is

whether the “number of employees *possibly disenfranchised* thereby is sufficient to affect the election outcome.” *Id.* (Emphasis added.) In this case, even assuming that no voters made mistakes in how they cast their ballot because of the Board’s English-only rules, approximately twenty-eight employees failed to vote at all. In a vote decided by nine votes, this is sufficient to affect the outcome of the election, and a rerun should follow as a matter of law.

Indeed, it is ironic here that the Region would now seek to require non-English speakers to come forward to present their concerns, when its own conduct has a tendency to force an otherwise vulnerable group of employees not to come forward. Here, ALSF’s witnesses were prepared to testify that employees were informed of the Region’s English-only rule. Having been told that the Region did not want to hear from those who did not speak English, it is natural that they would not tend to come forward after the election to say what the Region did not want to hear during polling. Moreover, the Region overlooks simple human nature. Employees who do not speak English and are illiterate would naturally tend to be embarrassed by these facts and reluctant to come forward to admit their lack of education. In a very real sense, the Region punished the most vulnerable sector of the workforce twice: once for not being able to speak English or read their native language and a second time for not being willing to come forward to admit that.

Even if actual proof of disenfranchisement is required, ALSF proposed to submit such an evidence at a hearing. As described in its summary, many of the employees in the voting unit are vulnerable. Having spent their lives in refugee camps and jungles, in areas controlled by military dictatorships, they have little or no exposure to democratic processes. The Karen employees are largely illiterate in their own language and generally have no understanding of written or spoken English. Despite the Company’s best attempts to educate them about the choice presented in the

election, that communication was difficult if not impossible because of language and cultural barriers – demonstrated by the issues that ALSF had conveying basic concepts such as personal hygiene to employees. Company witnesses were also prepared to testify that Karen employees – the largest single minority group at ALSF – were intimidated, frustrated and insulted by the failure to provide them with language assistance to educate them about the choices to be made, a decision that many Karen employees perceived as discriminatory. Even the Union complained about the Region’s edict at the pre-election conference.

In addition, ALSF’s witness who was an observer in the polling area (an employee) was able to point to two voters who tried to seek help in the voting area in their native language despite dissemination of the Board’s English-only rule. Two employees would have testified to conversations with Karen-speaking coworkers who indicated that they:

- did not understand the voting process;
- planned to randomly mark the ballot because they did not know what it meant; and
- did not understand the choices on the ballot, even after receiving several explanations.

By presenting this evidence of confusion, ALSF met the relatively low standard set forth in *Heartland of Martinsburg*, 313 N.L.R.B. 655 (1994): whether the evidence presented in support of the objections – either hearsay or direct, or in the form of sworn affidavits or a position letter – is “sufficient information to warrant a full investigation of the issues raised in the objections.” ALSF was prepared to present sufficient testimony about several instances of voter confusion from which the Board could have drawn reasonable inferences that employees were actually confused.⁵

⁵ The Regional Director commented at p. 5 of the Report that, because 94 percent of eligible voters cast ballots, there is no reason to believe that anyone was dissuaded from voting because of the lack of translators in the polling area. That argument overlooks several key facts. First,

c. **Cases Cited by the Regional Director in the Report Are Distinguishable**

The Region's Report essentially concludes that there are few, if any, circumstances when translators – or even translated ballots – are necessary. In the Region's opinion, employees must be able to protect themselves and get information on their own even if they can't read and even if they can't speak English. That is not the law. As explained below, the Regional Director overlooks key facts in the cited authority that are greatly distinguishable from those present in the case at hand. He notes that ALSF "cites no Board cases where the Board has set aside an election in circumstances similar to these." Report at 7. That is because there are no reported Board cases where a Region has refused translation assistance at elections in circumstances such as these; namely, with a workforce that (i) is widely illiterate in the employees' native tongues, (ii) cannot understand English, and (iii) is unfamiliar with democratic processes because many employees recently emigrated from refugee camps and jungles in nations that are ruled by military dictatorships. The cases that the Regional Director relies upon in the Report involved situations either where a minute portion of the workforce was affected by the lack of translation, or the voters were capable of reading and understanding the election notices, making a translated ballot unnecessary.

one of ALSF's witnesses was prepared to testify that, because employees did not understand the process, they were going to simply mark one of the choices so that they could go back to work. The Regional Director also ignores the fact that this was an election in which voters were released from their working areas to vote, and that turnout was actually down compared to the prior election with the same Union where translators were used. *See Albert Lea Select Foods, Inc., Tally of Ballots, Case No. 18-RC-17524* (issued September 1, 2007). In that proceeding, the Tally of Ballots reflects 335 eligible voters and 319 votes cast. Thus, only 16 voters failed to show up, a 95.2 percent turnout. In contrast, in this proceeding, 421 out of 449 voters cast ballots, a 93.7 percent turnout.

The Region's reliance on *Foxwoods Resort Casino*, 352 N.L.R.B. 771 (2008),⁶ is misplaced. In *Foxwoods*, the employer objected to the election results because the ballot was not translated into Chinese. Evidence in that case showed that many employees were native Chinese speakers. But the hearing showed that employees in the *Foxwoods* voting unit – casino dealers – were trained in English, required to take and pass written exams in English, and had to have a working knowledge of English to become casino dealers.

The facts here are very different. Unlike the casino dealers in *Foxwoods* who were required to understand English and communicate with customers each day in English, ALSF's employees work in a production facility. Knowledge of English is not a necessity and more often absent than not. Evidence presented by ALSF shows that it struggled to communicate with employees through pictures about basic tasks such as using toilets and washing their hands after using the restroom.

In addition, the election at ALSF was decided by a mere *nine* votes out of approximately 450 eligible voters. There would have been a material effect on the election's outcome if only a handful of voters chose not to vote because of the English-only rule in the voting area, which is precisely what ALSF's witnesses were prepared to testify about. ALSF met the relatively low standard set forth in *Heartland of Martinsburg*, *supra*, identifying several instances of voter confusion.

While the Regional Director claimed in his report that providing the names of the witnesses with knowledge of the difficulties encountered by other employees was not enough, the fact of the matter is that the witnesses observed firsthand difficulties in the voting process because assistance and voting materials were not available in the employees' native languages.

⁶ Notably, the Regional Director in *Foxwoods* referred the objections regarding translation issues to an Administrative Law Judge who sat as a hearing officer.

That alone should have been enough for the Regional Director to conduct an investigation and direct a hearing before an Administrative Law Judge or a hearing officer from a different Region.

The Regional Director's Report also relied heavily on *NLRB v. Precise Castings, Inc.*, *supra*, for the proposition that the Board has discretion in determining whether to provide translators and/or translate ballots. The Regional Director emphasized language from the Seventh Circuit's decision that, during the course of a campaign, an employer and a union generally attempt to inform employees of how to make choices in an election, and with that, employees receive all of the instruction they need. 915 F.2d at 1162.

While that may be true in many cases, it was not here. As explained above, ALSF attempted to do so, but those attempts failed because of logistical difficulties. Simply put, ALSF's attempts at educating employees about the voting process were unsuccessful because of the large workforce, absenteeism from meetings where the voting process was discussed and the need to translate each meeting into five separate languages. It certainly did not help that ALSF also had the awkward task of informing employees that English would be the only language that the Board would permit to be spoken in the voting area, a position that was certainly disheartening to many employees and arguably discriminatory.⁷ Combined with the fact that a significant percentage of ALSF's employees have never before participated in democracy, ALSF had no reasonable method of instructing its employees in the mechanics of voting.

⁷ The Regional Director noted at p. 6, n.5 of the Report that "The Employer does not allege that the Board Agents assigned to this matter at some point prior to the election communicated with employees to tell them that there would be no assistance in their own language at the polling place[.]" The Regional Director's Report is only half right. The Agent communicated to the parties, then ALSF communicated that fact to employees in its presentation in an effort to get them to listen to the Company's explanations of how the voting process worked. As discussed above, unfortunately its efforts were not universally successful.

The Regional Director observes at p. 8, n.6 of his Report that the Region was not required to provide translators at the election because ALSF's attempts at educating employees were unsuccessful. But that ignores the Board's purpose during elections. As noted in *Precise Castings*, "[The Board] may concentrate (as it does) on giving [employees] a reasonable opportunity to vote intelligently, without taking all possible steps to ensure that they do so." 935 F.2d at 1163 (emphasis supplied).

In this case, the employees were denied that reasonable opportunity. As ALSF's evidentiary statement explained, despite being told not to ask questions other than in English, at least two employees attempted to ask questions in their native tongue in the voting room but were ignored due to the Region's English-only directive. It is impossible to say how many employees were dissuaded from asking questions or coming forward because of the Region's English-only rule, but the nature of the problem is sufficiently clear for the Board to act.

Contrary to the Region's March 2 e-mail (Exhibit K), the Board's responsibilities go beyond merely checking names off the *Excelsior* list, pointing employees in the direction of where to vote and instructing them where to place their ballot when done. It was also incumbent upon the Board to explain the mechanics of voting to employees and where necessary, to show illiterate employees how to mark their ballots. *Alco*, 269 N.L.R.B. at 592. In other words, the Board should have been actively assisting the electorate, not sitting idly while employees with little or no exposure to democratic processes were left to make a decision that they likely did not understand and could not ask questions about. The election that occurred on March 11 therefore was not the "reasonable opportunity to vote intelligently" to which the Seventh Circuit alluded in *Precise Castings*.

Finally, the Regional Director relied on *Superior Truss and Panel*, 334 N.L.R.B. 916 (2001) to support his conclusion that his decision not to provide translators at the election was justified. In *Superior Truss*, the Region translated election notices into Spanish. The Board affirmed the hearing officer's conclusion that, in those circumstances, translated ballots were unnecessary. However, there was again a significant fact present in *Superior Truss* that is not present here: employees in that case were *literate* and could fully understand the election notices. Because they understood the instructions presented in the Spanish notices, there was no need for a bilingual ballot. *Id.* at 919.

d. The Regional Director Erred in Dismissing the Portion of Objection 1 Regarding Refusal to Translate the Ballot into Thai

Until February 28, the Region refused to translate the ballot into any of the languages spoken by ALSF employees. When the Region finally reversed course, it agreed to translate the ballot into all languages except Thai. Given the significant language barriers and cultural differences described above, the Region's failure to translate the ballot into Thai also impeded employees' rights to a free, fair and fully informed election.

III. THE REGIONAL DIRECTOR IMPROPERLY DISMISSED THE OBJECTION REGARDING THE UNION'S GIFTS OF SUBSTANTIAL VALUE TO VOTERS

A. Facts

ALSF's second objection alleged that Union agents gave clothing and items of value to eligible voters during the critical period before the election. ALSF identified an employee witness in support of the objection, who provided sworn testimony to the Region regarding the objection.

Relevant text from the employee's affidavit is included in the Report at pp. 10-11. The employee testified to a number of important facts:

- the employee knew of three other employees who were offered gifts from the Union, and at least one of the employees accepted those gifts;
- the gifts given by the Union were scarves and gloves;
- a Hispanic agent of the Union offered gifts to at least one employee;
- Union agents visited the apartment of another employee to present her with gloves and a scarf; and
- all of this conduct occurred prior to the March 11 election.

In dismissing the objection, the Regional Director accepted the witness's affidavit testimony as true.⁸ Regardless, he concluded that ALSF had not met its *prima facie* burden of showing that the conduct described in the witness's testimony raised issues that might have affected the outcome of the election. Moreover, at page 10 of the Report, the Regional Director described ALSF's request to subpoena records regarding the Union's expenditures on gifts for employees as a "fishing expedition" – despite receiving sworn testimony from an employee that she had direct knowledge of employees receiving gifts from Union representatives, and that the Union would be in possession of the relevant records.

B. The Regional Director Erred in Dismissing Objection 2

In dismissing Objection 2, the Regional Director concluded that ALSF had not established a *prima facie* case for setting aside the election. But in so concluding, the Regional Director refused to make logical and simple inferences that are wholly supported by the sworn testimony of an ALSF employee witness identified by the Company. Moreover, the Region

⁸ At p. 10 of the Report, the Regional Director asserts that ALSF conceded that the gifts "did not have anything to do with the campaign." That is wrong. The statement in ALSF's submission was that the gifts "did not have anything to do with the Union's campaign messages." In other words, these were not gifts of clothing adorned with Union logos that were intended for a campaign messaging purpose. They were gifts intended to have personal value to the recipient.

failed to consider that most of the facts at issue were under the control of the Union and that, having raised a sufficient basis for further hearing, ALSF could have obtained further evidence from the Union's records and testimony from Union agents.

The Regional Director summarizes the affidavit testimony as an eligible voter (identified as "A") being offered a gift from the Union sometime before the election, and the gift was handed to her by a "Mexican guy." The affiant also stated that "A" refused to take the gift "because she didn't want the Union." Report at 10. That testimony all but explicitly states that the gift was offered to "A" by a Union agent. But the Regional Director refused to connect the very short distance between the dots, apparently because the employee did not explicitly say that the "Mexican guy" was a Union agent.⁹

The affiant further testified that she had direct knowledge of another employee (identified as "B") who received gloves and a scarf from the Union prior to the election. The affiant also testified about a third employee – "A's" roommate – who received gifts from the Union, as well. It appears from the Report that the Region did not attempt to speak with "A," "B" or "A's" roommate about the gifts they were offered or any other details relevant to this objection. Because of the limits on questioning employees, the Company could not force the employees to provide this same information.

The Regional Director rejected all of this evidence, reasoning that it did not establish the gifts were "nice" and because the affiant never saw the gifts. In addition, the Regional Director concluded that the affiant did not identify who gave the gifts, nor did she establish that the gifts

⁹ It is also possible that the investigating Board Agent did not ask whether the affiant knew whether the "Mexican guy" was a Union agent. The quoted text from the affidavit does not say one way or the other.

were given to employees during the critical period. The Regional Director further claimed that there was no evidence that the gift-giving was disseminated to other voting unit employees.¹⁰

In dismissing this objection, the Regional Director erred in several respects. First, the affiant identified three employees who received or were offered gifts from the Union. Despite having this knowledge, the Region did not speak with those three employees nor did it allow ALSF to do so at hearing. By failing to complete an adequate investigation, the Regional Director abused his discretion. As explained in *Aurora Steel Products*, 240 N.L.R.B. 46, 46 (1979), a Region is obligated to interview witnesses identified by an employer to determine the merits of an objection. Here, ALSF provided a witness (the affiant) who identified three individuals who actually received gifts from the Union, or were offered gifts from the Union. By speaking with these witnesses, the Region could have learned about the details it claims are missing, such as the timing of the gifts and how many other employees knew about them. That obligation assumes added importance in a close election, decided by nine employees in a unit of approximately 450 eligible voters. Following the leads provided by the affiant and the other three employees would have answered the questions raised by the Region in its report.

On these facts, ALSF's evidence met the standard set forth in *Park Chevrolet-Geo, Inc.*, 308 N.L.R.B. 1010, 1010 n.1 (1992) in support of its request to subpoena witnesses and documents, and to have the matter set for a hearing. ALSF presented evidence supporting its claim that the Union gave gifts to employees close in time to the election, and as a result, established a *prima facie* case that the election was affected by the Union's conduct. As a result, the next logical step would be to request records from the Union to determine the truth of

¹⁰ The affidavit quoted in the Report makes no mention about dissemination of the gifts to other employees, so the absence of detail about that issue begs the question of whether the affiant was even asked the question.

ALSF's allegations. *See also Heartland of Martinsburg, supra* (hearsay evidence of objectionable conduct sufficient to trigger Region's duty to investigate objections sufficiently or to hold an evidentiary hearing where the employer would have subpoena power; Regional Director abused discretion by refusing to do so).

IV. CONCLUSION

The Regional Director's dismissal of both objections should be reversed and a new election ordered with appropriate remedies to ensure that the rights of employees are protected. In the event that the Board remands the objections for an evidentiary hearing, they should be submitted to an Administrative Law Judge or hearing officer from a different Region.

Respectfully submitted,

ALBERT LEA SELECT FOODS, INC.

By: s/ Kenneth F. Sparks
One of Its Attorneys

Lawrence J. Casazza
Kenneth F. Sparks
Mark L. Stolzenburg
Vedder Price P.C.
222 North LaSalle Street
Suite 2600
Chicago, Illinois 60601-1003
(312) 609-7500
Dated: April 29, 2011

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing **Employer's Exceptions to the Regional Director's Report on Objections** was filed through the Board's electronic filing system and otherwise served on the following parties of record by the methods noted:

Mr. Patrick Neilon
UFCW Local 6
1407 Hwy. 13 N
Albert Lea, MN 56007

**VIA OVERNIGHT COURIER; TELEPHONIC NOTIFICATION OF
MOTION MADE TO UFCW LOCAL 6'S OFFICE ON APRIL 29, 2011**

Ms. Melissa Bentivolio
National Labor Relations Board, Region 18
Towle Building, Suite 790
330 Second Avenue South
Minneapolis, MN 55401
VIA E-MAIL

on April 29, 2011.

s/ Mark L. Stolzenburg