

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SAN FRANCISCO BRANCH OFFICE  
DIVISION OF JUDGES  
SAN FRANCISCO BRANCH OFFICE

**TERMINIX INTERNATIONAL COMPANY, LP**

**Employer**

**and**

**Case 21-RC-064769**

**COMMUNICATIONS WORKERS OF AMERICA,  
LOCAL 9586, AFL-CIO**

**Petitioner**

*Jonathan A. Siegel, Esq.*, Newport Beach, CA,  
for the Employer.

*Lewis N. Levy, Esq.*, and *Daniel R. Barth, Esq.*,  
Los Angeles, CA, for the Petitioner.

**ADMINISTRATIVE LAW JUDGE REPORT  
AND RECOMMENDATIONS ON OBJECTIONS**

**Statement of the Case**

**Gregory Z. Meyerson, Administrative Law Judge.** Pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board (the Board), the Acting Regional Director for Region 21 issued a Report on Objections and Order Directing Hearing and Notice of Hearing (the report on objections) on November 18, 2011, in which he ordered that a hearing be held on certain objections to conduct affecting the results of the election in the above captioned matter. (Bd. Ex. 1(a).) Thereafter, this matter was heard by me on December 1-2 and 20-22, 2011, in Los Angeles, California.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based on the record, my consideration of the briefs filed by counsel for the Employer and counsel for the Petitioner, and my observation of the demeanor of the witnesses, I now make the following findings, conclusions, and recommendations.<sup>1</sup>

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<sup>1</sup> The credibility resolutions made in this report are based on a review of the testimonial record and exhibits with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

## Findings of Fact and Discussion

### I. Procedural History and Background

5 On September 19, 2011, the Communications Workers of America, Local 9586, AFL-  
CIO (the Petitioner or the Union) filed a petition for election with the Regional Director for  
Region 21 (the Regional Director) among certain employees of Terminix International Company,  
LP (the Employer). Pursuant to a Stipulated Election Agreement, an election by secret ballot  
10 was conducted on October 28, 2011, at the Employer’s facility located at 5901 East Slauson  
Avenue in the City of Commerce, California under the direction and supervision of the Regional  
Director in the following unit: “Included: All full-time and regular part-time Customer Service  
Representatives, Regional Account Managers, Branch Account Managers and Pest Control  
Service Technicians employed by the Employer at its facility located at 5901 East Slauson  
15 Avenue in the City of Commerce, California; excluding all other employees, professional  
employees, guards and supervisors as defined in the Act.”

The resulting tally of ballots served on the parties at the conclusion of the election  
showed that of approximately 40 eligible voters, 39 cast ballots, of which 20 were cast in favor  
of the Petitioner, and 19 were cast against the Petitioner. There were no void ballots or  
20 challenged ballots. Thereafter, the Employer filed timely objections to conduct affecting the  
results of the elections. After an investigation, the Regional Director determined that the  
Employer’s Objection Numbers 1-8, and 10-15 could best be resolved by a hearing. Following  
the issuance of the Regional Director’s report on objections, the undersigned conducted that  
25 hearing.<sup>2</sup>

The Employer provides residential and commercial pest control services. At issue in this  
case is its branch office located in the City of Commerce, California, which branch was during  
the hearing frequently referred to as “LA Commercial.” The branch is comprised of a sales  
department, service department, and an administrative department. The Pest Control Service  
30 Technicians (the technicians) spend a significant amount of time out of the office servicing  
clients in the field. The technicians are required to wear a uniform, which is comprised of tan  
pants and a white shirt. However, non-technicians, including supervisors sometime wear similar  
clothing. The technicians typically drive white, Ford 150 pick-up trucks, or similar vehicles, in  
the performance of their duties.

35 In 2008, there was an election held between the Employer and the Union at the LA  
Commercial branch involving a similar bargaining unit. The Union lost that earlier election.

### II. Legal Principles

40 In representation proceedings where, as here, no unfair labor practice allegation or  
finding exists, a party seeking to have a Board-supervised election set aside because of  
objectionable conduct during the critical period (the time between the filing of the petition and  
the election) carries a heavy burden of proof. The objecting party must show the conduct in  
45 question had a reasonable tendency to interfere with the employees’ free and uncoerced choice  
in the election. *Quest International*, 338 NLRB 856, 857 (2003). In determining whether the  
conduct has “the tendency to interfere with the employees’ freedom of choice,” the Board  
applies an objective standard and considers nine factors: (1) the number of incidents; (2) the

50 <sup>2</sup> As is reflected in the Regional Director’s report on objections, he approved the Employer’s  
request to withdraw objection numbers 9 and 16.

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 subject to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists 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 to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. See *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004), citing *Taylor Wharton Division Hrasco Corporation*, 336 NLRB 157, 158 (2001), et al.; *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

Prior to discussing the individual objections, it is necessary to address the theory of agency raised by the Employer. In its written objections, during the hearing, and in its post-hearing brief, counsel for the Respondent asserts that three bargaining unit employees, Jose Valdez, Janisio Vera, and Emiliano Caballero were agents of the Union, or acted on behalf of the Union under a third party standard. Counsel argues that these three individuals had the requisite authority, either actual or apparent, to act on the Union's behalf. However, I find to the contrary that these individuals were neither agents of the Union nor acting on its behalf, except for the limited period of time during which they served specifically as observers for the Union during the election.

The case law is clear that the burden of proving an agency relationship is on the party asserting its existence. *Millard Processing Services, Inc.*, 304 NLRB 770, 771 (1991). The determination of whether this burden has been met requires an analysis of the facts under common law agency principles. *Tyson Fresh Meats, Inc.*, 343 NLRB 1335, 1336-1337 (2004). An individual is deemed the agent of a principal when he/she has either actual or apparent authority to act on the principal's behalf. Actual authority is created "by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account." *NLRB v. L & J Equipment Co., Inc.*, 745 F.2d 224, 232-233 (3<sup>rd</sup> Cir. 1984). On the other hand, apparent authority results from "conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." *Id.*

After reviewing the record, I am of the opinion that it is devoid of any credible, probative evidence as would establish that Valdez, Vera, or Caballero were generally agents of the Union, either actual or apparent, or that they acted on behalf of the Union under a third party standard.<sup>3</sup> To begin with, each of these three individuals was a regular, full time employee of the Respondent who apparently performed his/her normal full time duties on behalf of the Respondent satisfactorily during the critical period. None of the three were employed by the Union. They were, by their own admission, very active in the Union's organizing campaign. This included speaking with employees, at work, at organized events, and in employees' homes, about signing authorization cards and voting in favor of the Union. Vera, Valdez, and Caballero also served as a limited conduit for information between the Union and other unit employees. However, these three employees who supported the Union through their role as bargaining unit members were clearly distinguishable from the professional union organizers employed by the Union, namely Yvonne Melton, Union Vice President, and Victor Serrano, Union Organizer. From the collective testimony of employees at the hearing, it is apparent that

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<sup>3</sup> As will be discussed later in this decision, Vera and Caballero served as observers for the Union during the election. I have determined that in that specific capacity, and for that limited time period only, they functioned as agents of the Union.

no unit employee would confuse the role of fellow employees who were merely actively supporting the Union with that of the professional union organizers.

5 The Respondent presented no evidence that there existed any express or implied agreement through which Vera, Valdez, or Caballero were granted authority to act generally on the Union’s behalf. They were not compensated for their pro-union activities by the Union and were never authorized to speak on the Union’s behalf. Thus, they were clearly not agents with actual authority.

10 Regarding their alleged apparent authority, Board case law is clear that playing an active or even leading role as a unit employee in the Union’s efforts to organize an employer is not sufficient to establish agency. See *United Builders Supply Co.*, 287, NLRB 1364, 1364-1365 (1988). See also *Crown Coach Corp.*, 284 NLRB 1010 (1987); *Advanced Products Corp.*, 304 NLRB 436 (1991). This is especially true, as in the case at hand, where the union has its own professional spokespersons and organizers directly involved in the campaign as a conduit for information and who have overall control of the campaign. *Corner Furniture Discount Center, Inc.*, 339 NLRB 1122, 1122-1123 (2003);

20 Regarding the argument of counsel for the Respondent that certain alleged misconduct on the part of Vera, Valdez, and Caballero, even if they were acting simply as union adherents, destroyed the laboratory conditions necessary for a fair election, such that would require the voiding of the election, this issue will be addressed later in this decision.

### 25 III. The Objections

#### 25 A. Objections 1, 2, and 3

30 Objection 1: “During the critical, pre-election period, the Communication [sic] Workers of America, Local 9586, AFL-CIO (‘Petitioner’ or ‘Union’), through its authorized agents, representatives and individuals acting on its behalf and/or with its implied endorsement, harassed and/or coerced voting unit employees who expressed opposition to unionization;”

35 Objection 2: “During the critical, pre-election period, the Union, through its authorized agents, representatives and individuals acting on its behalf and/or with its implied endorsement, threatened voting unit employees that they would lose their job if they did not vote ‘Yes’ in the election;” and

40 Objection 3: “During the critical, pre-election period, the Union, through its authorized agents, representatives and individuals acting on its behalf and/or with its implied endorsement, threatened voting unit employees that they would be fired by the Employer and Petitioner would not be able to help them unless Petitioner won the election.”

45 These first three objections are grouped together as they all essentially raise the allegation that during the critical period, between the time the petition was filed and the election was held, agents of the Union, or employees acting on the Union’s behalf, threatened employees with some adverse employment related action unless they supported the Union in the election. However, in my view, the Respondent has offered scant evidence in support of these objections.

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Josue Perez, an employee and eligible voter, testified that he was invited to a union meeting at a local Starbucks prior to the election. Both union agents Serrano and Melton were present for this meeting.<sup>4</sup> According to Perez, Serrano informed the employees who attended the meeting that during the previous election, 13 employees who voted “yes” got fired for voting “yes.” This was apparently a reference to the election held in 2008 between the parties, which election the Union lost. Perez testified that he was “shocked” by Serrano’s statement. For his part, Serrano testified that what he actually said at the Starbucks during the meeting was, “Isn’t it a coincidence that the same people that voted no for the Union were fired, even though they supported the company’s message.”

In my view, it does not matter whether Serrano said or implied that following the last election the Employer fired a number of Union supports or whether he said or implied that the Employer fired Union opponents. Neither statement would constitute a threat of something that the Union might do if it won or lost the election. No reasonable employee would think that the Union had the authority to carry out such an action, or that the Union had any influence over what the Employer might do. Serrano’s statement, regardless of which version is accurate, should certainly not have concerned any reasonable employee that the Union would take some adverse employment action against him or that the Union could influence some adverse employment action in which the Employer might engage.

The proper test for evaluating the conduct of a party is an objective one, namely whether it has “the tendency to interfere with the employees’ freedom of choice.” *Cambridge Tool & Manufacturing, Co.*, 316 NLRB 716 (1995). Objectively, Serrano’s statement about what action the Employer had taken in the past should not have been construed by Perez or other employees as a threat that the Union might take some adverse action against them, or influence what action the Employer might take.

Gabriel Perez, an employee and eligible voter, testified that two weeks prior to the election, he received a “write-up” from the Employer because a customer had made a complaint about him. According to Perez, after leaving the office where he had apparently received a written warning from management, he was approached by employee Jose Valdez. Perez alleges that Valdez said to him, “You either vote yes or you could probably kiss your job goodbye.” Perez’ testimony is somewhat confusing, and it difficult to know whether this conversation occurred during a telephone call, or whether it was in person and there was a later phone call. In any event, Perez also testified that Valdez said, “You’re going to have to vote yes or else you’re going to be gone like the rest of us.” Perez claims that his “mind just was racing....thinking like, well maybe he’s right. You know, maybe I will lose my job....it still crossed my mind.”

As I concluded earlier, Jose Valdez was not an agent of the Union. He was a rank and file employee. He did not represent anybody but himself. The fact that he was a supporter of the Union in the election is undisputed. However, his conversation or conversations with Perez regarding the consequences of Perez having received a written reprimand did not constitute any sort of threat or coercion. A reasonable employee would have understood the comment by Valdez to mean that if the Union were successful in the election, employees would have greater protection against adverse employment actions by the Employer, and, so, Perez should vote yes, in favor of the Union. Such a comment by Valdez certainly did not constitute some sort of “third party” conduct as would have the tendency to threaten, coerce, or interfere with the

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<sup>4</sup> During the hearing, the parties stipulated that both Yvonne Melton and Victor Serrano were agents of the Union.

employees' freedom of choice." This was an innocuous, harmless comment from a fellow employee, and nothing more than that.

5 The election held on October 28, 2011,<sup>5</sup> consisted of a morning session, from 6:30 a.m. to 9:30 a.m., and an afternoon session, from 2:00 pm to 5:00 pm. Steve Sanchez, an employee and eligible voter, testified that shortly after the polls closed for the morning session, Emiliano Caballero, an employee and eligible voter, approached him and said that Oscar Medina, another employee and eligible voter, had filed a complaint against Sanchez with the Employer's Human Resources Department. Sanchez contacted the Employer's Human Resources  
10 Manager, Elvia Fernandez. He asked Fernandez whether a complaint had been filed against him, that she should be honest with him, and that he was really upset. She informed Sanchez that no complaints had been filed against him with her office. Apparently Sanchez was hoping to get a promotion and was concerned that complaints filed against him by other employees would have a negative effect on his ability to get such a promotion. Sanchez volunteered to  
15 Fernandez that he believed Caballero falsely informed him about the complaints in an effort to encourage him "to get people to vote yes for the afternoon [session]." Caballero testified that he had heard some fellow employees mention that Medina had filed a complaint against Sanchez, and Caballero simply passed the information on to Sanchez while the two men were having a cigarette together after the morning voting session ended.

20 Caballero had served as the Union's observer during the morning voting session. However, as I have previously concluded, he was not a general agent of the Union. Further, I fail to see any connection between complaints allegedly filed with human resources against Sanchez, and the Union. Obviously, employees say all sorts of things to each other that do not  
25 affect the employees' freedom of choice in an election. It may be that Caballero was simply honestly mistaken about complaints being filed against Sanchez, or perhaps he was being malicious in an attempt to upset Sanchez. But, in any event, I fail to see the nexus with the election. There is simply no probative, credible evidence that the two were in any way connected.

30 Vera, Valdez, and Caballero were not general agents of the Union. Therefore, as third parties their conduct will only justify overturning the election if it interfered with the right of employees to a free and uninhibited choice in the selection of a bargaining representative to such an extent that "it rendered a free election impossible." *O'Brien Memorial*, 310 NLRB 943  
35 (1993). The Board set forth its rationale regarding third party conduct as follows: "[C]onduct by third parties is less likely to affect the outcome of the election, and ... because unions (and employers) cannot control nonagents, the equities militate against setting aside elections on the basis of conduct by third parties. This is true even where, as here, a shift in one vote could have changed the outcome of the election." *Corner Furniture Discount Center Inc.*, 339 NLRB  
40 1122, 1123 (2003).

45 None of these first three objections establish that there was a legally cognizable threat, which could somehow be connected to the Union or the Union's success in the election. It is well established that the "subjective reactions of employees are irrelevant to the question as to whether there was objectionable conduct." *Beaird-Pouan Division*, 247 NLRB 1365, 1370 (1980), *enfd.* 649 F.2d 589 (8<sup>th</sup> Cir. 1981). Instead, the test is an objective one. *Id.* As I have noted, any fear as expressed by employees Josue Perez, Gabriel Perez, or Steve Sanchez as it related to the Union or the election was simply an unreasonable manifestation of their subjective  
50 minds. It did not serve to interfere with the employees' freedom of choice in the election to any

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<sup>5</sup> All dates are in 2011, unless otherwise indicated.

degree, and certainly not to the degree that “it rendered a free election impossible.” *O’Brien Memorial, supra*. Accordingly, I shall recommend to the Board that objection numbers 1, 2, and 3 be overruled.

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#### B. Objection 4

Objection 4: “On the day of the election, the Union, through its authorized agents, representatives and individuals acting on its behalf and/or with its implied endorsement, misled and intimidated voting unit employees by informing employees that an Employer observer was being forced by the Company to be an observer for the Employer during the election.”

From the witness testimony and the documentary evidence (Emp. Ex. 12 & 14.), it is undisputed that several days prior to the election, Vera sent text messages to a significant number of the unit employees informing them that Aldo Navarro, an employee and eligible voter, was being forced by the Employer to be the Employer’s observer during the election. However, both Human Resources Manager Fernandez and Navarro testified that Navarro’s decision to act as the Employer’s observer was totally voluntary on the part of Navarro. It is the Employer’s position that this misinformation about Navarro somehow intimidated the voting unit employees. However, counsel for the Respondent does not specifically indicate how this alleged misinformation would intimidate the prospective voters.

Again, I will note that I have found Vera not to be a general agent of the Union. However, even assuming that was the case, it has for some time been established Board policy that generally the Board will not “probe into the truth or falsity of the parties’ campaign statements” and that it will “not set elections aside on the basis of misleading campaign statements.” *Midland National Life Insurance Co.*, 263 NLRB 127, 132 (1982). Thus, even assuming that Vera’s text message contained a knowingly false statement of fact, rather than just an honest mistake, the standard articulated by the Board precludes any finding of objectionable conduct.

Of course, as simply a third party, rather than an agent, Vera’s conduct in sending the text message would be even less likely to interfere with the employees’ freedom of choice to the degree that “it rendered a free election impossible.” *O’Brien Memorial, supra*. Accordingly, I shall recommend to the Board that objection number 4 be overruled.

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#### C. Objections 5 and 6

Objection 5: “On the day of the election, the Union, through its authorized agents, representatives and individuals acting on its behalf and/or with its implied endorsement, intimidated voting unit employees by taking photographs and/or video of them as they entered and exited the Employer’s facility housing the voting area. No explanation was provided to voting unit employees for this conduct.”

Objection 6: “On the day of the election, the Union, through its authorized agents, representatives and individuals acting on its behalf and/or with its implied endorsement, intimidated voting unit employees by taking photographs and/or video of members of management and human resources personnel as they entered and exited the Employer’s facility. No explanation was provided to employees for this conduct.

These two objections are grouped together as both allege that admitted union agents Serrano and Melton drove through the Employer’s parking lot during the voting hours taking photographs of eligible voters, managers, and human resource personnel, or making it appear

that they were taking such photographs, in an effort to intimidate, coerce, and interfere with eligible voters. During the hearing, there was significant testimony regarding this alleged incident and the witnesses were asked to make reference to an aerial photograph of the parking lots surrounding the Respondent's building. (Emp. Ex. 7.)

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While the testimony of the various witnesses were all somewhat different, it is undisputed that at some point during the time that the polls were open, a silver-colored sports utility vehicle (SUV) was driven by Serrano through the Employer's parking lot with Melton as a passenger. It also is clear that the vehicle was driven at a slow rate of speed, and ultimately parked in the lot. Further, it is undisputed that Serrano took at least one photograph and held his cell phone camera as if to take more. During the hearing, Serrano was asked to hold up his cell phone and numerous witnesses identified it as the device they saw him use to take or pretend to take photographs. Serrano acknowledged that the cell phone had photographic capability, and admitted that it was the one that he used the day of the election to take at least one photograph.

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Jason Lifschultz, the Employer's Manager of Associate Engagement, testified that he observed Serrano on two occasions, once parked on a side street and once driving in the parking lot, taking either pictures or video with a smart phone device while eligible voters were present in the vicinity. Nicolas Olguin, an employee and eligible voter, testified that after he voted, he saw Serrano in the side parking lot with a camera like device with which he was apparently taking pictures or video. According to Olguin, there were a number of other eligible voters present in the parking lot at the time, some participating in their monthly truck inspections. During that day, he spoke about Serrano's conduct with several other eligible voters and several managers. He testified that Serrano's conduct made him feel "really uncomfortable." Becky Munoz, the Employer's Regional Human Resources Manager, and Anita Hovanessian, the Employer's Branch Manager, both testified that they also saw Serrano taking photographs from an SUV during the day of the election.

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The photograph that Serrano admits taking the day of the election shows four individuals standing together. (Emp. Ex. 13.) The photograph was taken from a distance, and it is too indistinct to make out the faces of the individuals, or to identify them. Serrano testified that he believed that the individuals he photographed were all managers of the Employer who he recognized as such from his time spent around the facility organizing the employees. While his testimony in this regard is not totally clear, he is apparently claiming that he took the photograph of these alleged managers in order to document any potential misconduct that could later serve as the basis for an objection. However, this testimony does not really make much sense, as the individuals in the photograph are merely standing together, and the Union does not allege that they were engaged in any misconduct. Finally, while counsel for the Respondent contends that one of the individuals must have been a rank and file employee as he is wearing the required uniform of tan pants and a white shirt, I am not able to draw that conclusion from the indistinct photograph, and, in any event, there was testimony that managers sometimes also wear such an outfit.

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Counsel for the Respondent cites *Randell Warehouse of Arizona, Inc.*, 347 NLRB 591 (2006) for the proposition that Serrano's conduct in photographing and pretending to photograph employees was objectionable conduct. In that case, the union photographed employees receiving union literature outside of the company's facility prior to the election, but provided no valid explanation for the photographs. *Id.* at 598. The Board abandoned its prior ruling that union photographing of employees engaged in Section 7 activity is nonobjectionable conduct unless accompanied by an express or implied threat or other coercion, and ruled that union photography of employees engaged in Section 7 activity is presumptively coercive, even

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in the absence of an express or implied threat or coercion. According to the Board, “[I]n the absence of a valid explanation conveyed to employees in a timely manner, photographing employees engaged in Section 7 activity constitutes objectionable conduct whether engaged in by a union or an employer.” *Id.* at 591. Also see *Pepsi Cola Bottling Co.*, 289 NLRB 736, 736-737 (1988) (one instance of a union representative appearing to aim his camera at two eligible voters constituted conduct warranting setting aside an election.)

In my opinion, Serrano failed to offer any valid explanation for taking the photograph in question. Further, I do not find his testimony credible that he only held his cell phone up for a brief period of time, and that he only took one photograph. The weight of the evidence is with those several witnesses mentioned above who testified credibly that they saw him doing so at various times during the voting period, which would indicate that he held his cell phone up for an extended period of time pretending to take photographs, or actually taking them, as he drove slowly through the Employer’s parking lot. The deliberate and obvious nature of Serrano’s actions did not go unnoticed. Employee and eligible voter Olguin, who saw Serrano using his camera phone, commented to Stephanie Schumacher, Associate Relations Manager, “Smile, you’re on camera.” Schumacher also saw Serrano driving his SUV slowly and holding up the camera.

Although there is no direct evidence that employees were engaged in Section 7 activity in the Employer’s parking lot at the time Serrano held up his camera, Serrano’s mischievous, provocative conduct occurred during the voting period. The parking lot was an active place, with employees, both rank and file and managers, coming and going, and with eligible voters passing through the area on their way to and from the polls. Further, there was apparently work in progress in the parking lot, with a number of witnesses testifying that some technicians were having their regular truck inspections during the time the polls were open.

Serrano’s conduct was intended to be noticed by employees, both eligible voters and managers. In my view, his conduct would reasonably leave eligible voters with the impression of surveillance, which would naturally serve to intimidate them. It was certainly discussed among the work force during the time the polls were open and, from the testimony of the various witnesses, seems to have created quite a “buzz.” Even if the photography was not directed specifically at employees actively engaged in Section 7 activity, the story of Serrano’s conduct was being disseminated by employees during the time the polls were open and, therefore, clearly had the potential to influence employees who had not yet exercised their Section 7 activity by voting. It served as a signal to those employees that their protected activities were under scrutiny by the Union.

I conclude that Serrano’s conduct served to coerce and interfere with the employees’ freedom of choice in the election. Accordingly, I find that objection numbers 5 and 6 have merit, and recommend that they be sustained.

#### **D. Objection 7**

Objection 7: “On the day of the election, the Union, through its authorized agents, representatives and individuals acting on its behalf and/or with its implied endorsement, gave the impression to voting unit employees that it knew how unit employees voted in the morning voting session. Based on information and belief, it then informed certain voting unit employees that they had to vote for the Union in the afternoon session.”

This objection involves the conduct of Janisio Vera, who served as the Union’s observer during the afternoon voting session. It is undisputed that prior to the start of the election, the

Board Agent who was principally responsible for conducting the election, Drew Brungard, gave to each of the observers a document, printed in English on one side and Spanish on the other, entitled “Instructions to Election Observers.” In that document, under the heading “DO NOT,” there appears a list of prohibited conduct. Next to the last bullet point on this list of prohibited

5 conduct is the following: “Use any electronic media or device, including cell phones, laptop computers, personal digital assistants (PDAs), mobile e-mail devices, wired or wireless data transmission and recording devices, etc. (Please turn off or disable these devices before entering the polling area).” (Bd. Ex. 5.) It should also be noted that the first bullet point under that same “DO NOT” heading reads: “Keep any list of individuals who have or have not voted.”

10 Vera testified that she received a copy of the above referenced document from Board Agent Brungard, and that she read it and understood it. However, she also testified that during the voting session, while acting as the Union’s observer, she used her cell phone to send a text message to employee and union supporter Jose Valdez informing him that an eligible voter by

15 the name of Curtis had not yet voted. According to Vera’s testimony, she placed her cell phone on the table that she and the Employer’s observer were sitting behind. From that position she used one hand to send the text message to Valdez. Further, she testified that she was not trying to conceal the sending of the message, and that, incredibly, she did not believe that there was anything improper about sending the message, despite the language on the instruction

20 sheet. Vera also said that she only sent the one text message while functioning as an observer in the afternoon session, and that subsequent to the election, she lost the cell phone on which she had sent that message.

25 I find Vera’s testimony regarding her conduct in sending text messages to be incredible. She must have known that using her cell phone to send messages was a breach of the instructions to observers’ list. She indicated that she understood the list, but did not believe that sending text messages was improper. Obviously, this is inconsistent and the statement is simply ridiculous. Her credibility also suffers because she seemed visibly nervous and uncomfortable when trying to justify this inconsistent behavior. Since Vera is incredible as to

30 this matter, I also seriously doubt her testimony that she only used her cell phone once during this period of time, to send Valdez the message about Curtis.

35 However, even assuming that Vera only used her cell phone once, this remains a serious matter. For all practical purposes, she was keeping a list of individuals who had not voted, and, so, was also in breach of that prohibition on the observers’ list. (Bd. Ex. 5.) Prior to sending fellow union supporter Valdez the message that Curtis had not yet voted, Vera needed to consult the eligibility list used to check off the names of employees who came to vote. She was in effect sending Valdez notice that the Union should be aware that Curtis had not yet

40 voted, and, thus, there still remained a potential opportunity to influence his vote. It is unknown whether, in fact, Valdez ever contacted Curtis during this period in an attempt to induce him to vote for the Union, although such an inference can certainly be drawn.<sup>6</sup> In any event, if he did so, this conduct certainly would have indicated to at least one employee, Curtis, that the Union was monitoring his decision not to engage in Section 7 activity through the voting process.

45 During the hearing, counsel for the Union objected to the Respondent raising this entire matter of Vera’s use of her cell phone during the afternoon voting session, as objection number 7 mentioned the morning session only and not the afternoon session. However, I allowed

50 <sup>6</sup> “List keeping is a basis for a new election *only* when it can be showed or inferred from the circumstances that the employees *knew* that their names were being recorded.” (emphasis as in original) *Southland Containers*, 312 NLRB 1087 (1993).

counsel for the Respondent to offer evidence as to this matter since I believe the incident is close enough to the written objection to be encompassed by it. The polls were open in both the morning and afternoon. Vera's conduct in the afternoon session was in breach of several prohibitions on the observers' list. As the language from the objection indicates, it may well  
 5 have given "the impression to voting unit employees that [the Union] knew how unit employees voted in the morning voting session" and then also served to inform "certain voting unit employees that they had to vote for the Union in the afternoon session."

It is well established that "a hearing officer may consider an objecting party's allegations that 'do not exactly coincide with the precise wording of the objections' if the new matters are 'sufficiently related' to the objections set for hearing." *Precision Products Group, Inc.*, 319 NLRB 640, 641 fn. 3 (1995), citing *Fiber Industries*, 267 NLRB 840 fn. 2 (1983). That is the situation in the matter before me. Additionally, a hearing officer is prohibited from considering a matter at an objections hearing only when it is not "fully litigated" and "wholly unrelated" to the  
 10 issues set for hearing. *Pacific Beach Hotel*, 342 NLRB 372 (2004); *Iowa Lamb Corp.*, 275 NLRB 185 (1985); See *Hollingsworth Management Services*, 342 NLRB 556, 557 fn. 3 (2004).

In the matter at hand, the parties have fully litigated the question of Vera's conduct at the afternoon voting session. After ruling that the conduct Vera was alleged to have engaged in was closely related to objection number 7, both parties had the opportunity to call witnesses to testify, to cross-examine witnesses, and to brief this subject. Accordingly, the matter was raised at the hearing, allowed to go forward, and fully litigated by the parties. All that remains is for me to decide the issue of whether the alleged conduct is objectionable.  
 20

I am of the opinion that Vera's use of her cell phone to send a text message to a fellow union supporter who was outside the polling area during the time that Vera was functioning as a union observer constitutes a obvious breach of the Board's instructions to observers, and is a serious violation of those instructions because it warrants an inference that the activities of the eligible voters, those who voted and those who declined to vote, were being reported to the  
 25 Union. It is precisely to prevent such interference with the employees' freedom of choice in the election that the Board has specific rules prohibiting observers from engaging in objectionable conduct, such as electioneering, keeping an unauthorized list of voters, and using electronic devices. (Bd. Ex. 5, Form NLRB 722.)  
 30

Of course, the use of electronic devices is a relatively recent occurrence, and, therefore, there is a lack of reported Board decisions on the subject. However, an obvious analogy can be drawn to the Board's finding that an observer's violation of clearly stated Board instructions regarding keeping lists and electioneering constitutes grounds for setting aside an election. *International Stamping Co.*, 97 NLRB 921 (1951) (in which the Board set aside an election  
 35 where the employer's margin of victor was one vote, because the employer's observer failed to abide by the instructions in Form NLRB 722, the predecessor to the current Form NLRB 722, marked as Bd. Ex. 5, and kept a list of employees who did or did not vote.)  
 40

Further, although I have previously held that Vera was not generally an agent of the Union, it is well established by Board precedent that for the limited time that she served as the Union's observer during the election, she was acting in that capacity as the Union's agent. *Detroit East, Inc.*, 349 NLRB 935, 936 (2007) ("It is well settled that election observers act as agents of the parties that they represent at the election"); *Brinks Inc.*, 331 NLRB 46 (2000) (finding that an employee "engaged in the electioneering while acting as the union observer, and he was thus an agent of the Union at this time of misconduct"); *Monfort, Inc.*, 318 NLRB  
 45 209 (1995) ("The observers not only represent their principals but also assist in the conduct of the election").  
 50

Vera's use of her cell phone during the period of time that she served as the Union's observer to send a message to a fellow union supporter informing him that a specific employee had not yet voted was a serious breach of the Board's instructions to observers. It infringed on and interfered with the employees' freedom of choice in the election. Accordingly, I conclude that objection number 7 has merit and recommend that it be sustained.

### E. Objection 8

Objection 8: "On the day of election, Drew W. Brungard, the NLRB Board Agent, ("Board Agent") interfered with the fair operation of the election by allowing the use of ballots that were printed on paper which was too thin or transparent. Based on information and belief, this permitted the Union's observer to see how employees voted, a fact which he relayed to unit members in an attempt to coerce persons who had not yet voted to vote for the Union by implying disclosure of how they voted."

Admitted into evidence was one of the actual original ballots marked by a voter who voted in the election in this case. (Bd. Ex. 4.) At the request of the parties and the undersigned, the Acting Regional Director made this ballot available for the hearing. This ballot was selected at random. An attorney making an appearance on behalf of the Region, Ms. Hernandez, represented for the record that this ballot was the only type of ballot used in the election at issue in this case. I have examined the ballot and will take administrative notice that when the ballot, which is yellow in color, is not folded and viewed from the unprinted side, it is possible to see through to the printed side of the ballot and to determine which box as been checked, the yes or no box. Thus, it is possible in this way to determine the selection made by the voter.

It is the position of the Employer that because of the location of the ballot box, and the thin, transparent paper on which the ballots were printed, that union observers could see how the voters were voting. The evidence from the hearing established that Board Agent Brungard, who was the principal Board Agent assigned to conduct the election, placed the ballot box on an approximately 6 foot long folding table, behind which the observes sat. Witnesses testified differently as to the exact placement of the ballot box on the table, but it appears that the box was placed either between the union and the company observer, but nearer to the union observer, or at the end of the table, somewhat closer to the union observer than the company observer, and, in any event, anywhere from a foot and a half to three feet from the union observer.

At least one eligible voter, Ismael Rivas, testified that he believes that Caballero, the union observer at the morning session, was able to determine how he voted by looking at his ballot before Rivas placed it into the ballot box. Also, eligible voter Oscar Medina testified that he thought the ballot could be seen through, and for that reason he folded the ballot before depositing it in the ballot box. According to Medina's testimony, following the election he spoke with Steve Sanchez, eligible voter and company observer at the morning session, and Ismael Rivas, eligible voter, about their concerns with the alleged transparency of the ballots.

Steve Sanchez testified that at one point during the morning session, Caballero left the polling area to use the bathroom. The ballot box was sealed until he returned. According to Sanchez, Caballero had his cell phone with him when he left to use the bathroom. During examination by counsel for the Respondent, Caballero initially testified that he could not recall whether he had made any calls to other employees on his cell phone on election day, however, when shown phone records, Caballero admitted that he did in fact do so. (Emp. Ex. 21.) It is, of course, the Respondent's position that Caballero, having been able to see through the transparent ballot how employees had voted, made calls to other employees so informing them.

This allegedly resulted in the Union coercing other employees, who had not yet voted, into voting for the Union by implying to them that the Union was able to determine how employees voted. However, the Respondent offered no evidence of such coercive conduct.

5 Not surprisingly, the Union takes a different position regarding this objection. As the Union correctly points out, there was no evidence offered by the Employer to show that the ballot paper used in the election was anything other than the standard Board printing paper that has always been used by the Agency. Further, there was no objection raised to the paper used or to the location of the ballot box either at the morning pre-election conference or between the voting sessions. Also, while the paper ballots may have been somewhat transparent when not folded, after they are folded several times, it is no longer possible to determine without first unfolding the ballot how a ballot was marked. I take administrative notice of such, having closely examined the ballot in evidence. (Bd. Ex. 4.) This is important as a number of witnesses testified that Board Agent Brungard instructed eligible voters as he distributed ballots to them to mark their ballot and then to fold it prior to placing the ballot into the box.<sup>7</sup>

20 It is particularly significant to note, that of those witnesses who testified that they were concerned that the ballots were transparent, none of them indicated that they changed the way in which they intended to vote because of their concerns. Further, it seems that those voters who followed Brungard's instructions and folded their ballots before placing them into the box were much less likely to have their voting preference seen by prying eyes. The Employer has simply failed to produce any evidence to show that even one voter was influenced by the alleged transparency of the ballot, or that the Union used information that it allegedly obtained from its observers as to how voters cast their ballots, to coerce or harass those eligible employees who had yet to vote.

30 Similarly, the failure on the part of the Employer's representatives or its observers to object to the placement of the ballot box at the time of the pre-election conference or during the time between the morning and afternoon sessions would seem to show that this was not a genuine concern. See *T.K. Harvin & Sons*, 316 NLRB 510, 537 (1995) (employer's observer did not object to the location of the ballot box.); *McIndustries, Inc.*, 224 NLRB 1298, 1304 (1976) ("Presumably the [objecting party] ... approved the polling area, location of ballot box, observes, method of releasing employees to vote., prior to the election").

35 Also, while counsel for the Employer notes in his post-hearing brief that the Board's Case Handling Manual indicates at Section 11322.4 that the observers should remain at least 3 feet away from the ballot box, this recommendation does not constitute binding precedent by the Board. Even if the union observers were seated as close as one and a half feet from the box (although it seems more credible that they were three feet away), there is "no per se rule that representation elections must be set aside following any procedural irregularity." *St. Vincent Hospital, LLC*, 344 NLRB 586 (2005), citing *Rochester Joint Board v. NLRB*, 896 F.2d 24, 27 (2<sup>nd</sup> Cir. 1990)). Further, the Board has held that the rules enumerated in the Case Handling Manual, including the rules regarding the location of the ballot box, are not "binding procedural rules, rather they are merely intended to provide operational guidance in the handling of representation cases." *Avante at Boca Raton, Inc.*, 323 NLRB 555, 557-58 (1997) (holding that the Case Handling Manual "does not require or mandate that the observers remain 3 feet away

50 <sup>7</sup> It should be noted that voters were directed by Brungard to take their ballots into a portable voting booth with a cloth curtain around it where they should mark the ballots. No objection has been raised nor complaints made that others could see into the booth and determine how the voter was marking his/her ballot.

from the ballot box”). Thus, a violation of these guidelines will only justify overturning an election where there is “evidence raising reasonable doubt as to the fairness and validity of the election.” *Id.* at 558.

5 Similarly, specifically regarding Board Agent conduct, the Board has said that “[i]n order to set aside an election . . . , [it] must be presented with facts raising a ‘reasonable doubt as to the fairness and validity of the election.’” *Rheem Mfg. Co.*, 309 NLRB 459, 460 (1992), quoting *Polymers, Inc.*, 174 NLRB 282 (196), *enfd.* 414 F.2d 999 (2<sup>nd</sup> Cir. 1969), *cert. denied* 396 U.S. 1010 (1970). No such facts have been presented in this case related to Board Agent conduct.

10 In the matter before me, I am of the view there is no credible, probative evidence that the transparency of the ballot paper and/or the proximity of the ballot box to the union observers raised any reasonable doubt as to the fairness and validity of the election. There is no evidence, or even a significant suspicion, that a single eligible voter was aware of these issues  
15 before casting his/her ballot, or that it resulted in any potential voter changing his/her mind as to the choice in the election. In fact, it seems to me that this is all “Much Ado About Nothing.” Accordingly, as it did not interfere with the employees’ freedom of choice in the election, I shall recommend to the Board that objection number 8 be overruled.

#### 20 **F. Objections 10, 11, 12, 13, 14, and 15**

Objection 10: “On the day of the election, the Board Agent interfered with the fair operation of the election by leaving the voting area during the first voting period to instruct human resource personnel and members of management in the back parking lot that they had  
25 to go to the side parking lot. This also indicated to voting unit employees that the Board Agent was not an impartial third party but was instead acting on behalf of the Union.”

Objection 11: “On the day of the election, the Board Agent interfered with the fair operation of the election by leaving the voting area during the first voting period to instruct human resource personnel and members of management in the front parking lot that they had  
30 to stay away from the doors to the facility and the building. This also indicated to voting unit employees that the Board Agent was not an impartial third party but was instead acting on behalf of the Union.”

Objection 12: “On the day of the election, the Board Agent interfered with the fair operation of the election by leaving the voting area during the first voting period to instruct supervisors and human resource personnel that interior doors to work areas had to remain closed. This also indicated to voting unit employees that the Board Agent was not an impartial  
35 third party but was instead acting on behalf of the Union.”

Objection 13: “On the day of the election, the Board Agent interfered with the fair operation of the election by instructing the Employer to comply with the Union’s requirement that doors to work areas and supervisor’s office be kept closed during the election. This indicated to voting unit employees that the Board Agent was not an impartial third party but was instead  
40 acting on behalf of the Union, particularly since such requirements had not occurred in the 2008 election with the same union, in the same facility, using the same location as the polling location.”

Objection 14: “On the day of the election, the Board Agent interfered with the fair  
50 operation of the election by repeatedly leaving the polling area during voting times.”

Objection 15: “On the day of the election, the Board Agent interfered with the fair operation of the election by walking through the Employer’s facility during election times, including throughout the interior areas of the facility and external parking lots, and instructing supervisors and employees on their conduct, while acknowledging that their conduct was not unlawful. This indicated to voting unit employees that the Board Agent was not all [sic] impartial third party but was instead acting on behalf of the Union.”

These 6 objections are all grouped together as they each allege misconduct on the part of one of the employees of the Board who was conducting the election. As was noted above, the principal employee of the Board who conducted the election was “Board Agent” Drew Brungard (Brungard).

Prior to the hearing, the Employer issued a subpoena ad testificandum for the appearance of Brungard (Emp. Ex. 2, Exhibit A.), which subpoena was the subject of a Petition to Revoke Subpoena Ad Testificandum filed by the representative of the Regional Director. (Emp. Ex. 2.) Attached to that Petition to Revoke was a letter from Anne Purcell, Associate General Counsel of the National Labor Relations Board. (Emp. Ex. 2, Exhibit B.) In her letter, Ms. Purcell denies a previous request by counsel for the Respondent to allow Brungard to testify in this proceeding. She states that, “[a]bsent a showing of unusual circumstances, it is the established policy of the Office of the General Counsel not to permit Board agents to testify as witnesses with respect to the processing of unfair labor practice and representation cases. *Laidlaw Transit, Inc.*, 327 NLRB 315, 316 (1998).... Your request does not present unusual circumstances warranting a deviation from this policy....[T]here are other witnesses available to the employer who can testify about these [objections]....For these reasons, I must deny your request under Section 102.118 of the Board’s Rules and Regulation...”

At the hearing in this matter, for the reasons stated in Ms. Purcell’s letter, I granted the Petition to Revoke filed by the Regional Director, and I revoked the subpoena ad testificandum issued to Brungard. Clearly, under the provisions of Section 102.118(a)(1) of the Board’s Rules, an agent of the Board may not testify in any matter before the Board without the written consent of the General Counsel. Said written consent was denied. Accordingly, Mr. Brungard did not testify at this proceeding.

Preliminarily, it should be noted that Mr. Brungard was not the only “Board Agent” present on the Respondent’s property on October 28 to conduct the election. Counsel for the Respondent is simply being disingenuous when he suggests or argues otherwise. “Board Agent” is a term of art, but it is not a job title. It refers to any employee of the National Labor Relations Board. In his post-hearing brief, counsel states that, “Board Agent Brungard left the polling area unattended with only a translator in the room, not another Board Agent.” In fact, virtually all the witnesses who were questioned about this matter testified that there were two employees of the Board who conducted the election, one male and the other a female. It is completely immaterial what specific job position the second Board employee held within the Agency, and whether she was a translator or not. The salient fact is that this second employee of the Agency was also a “Board Agent.”

Further, there is absolutely no credible evidence that Brungard ever left the polling area “unattended.” To the contrary, witnesses who were asked about this indicated that whenever Brungard was absent from the immediate voting area, walking around the perimeter of the polling area, the second Board Agent remained in the immediate voting area. Specifically, Steve Sanchez, the Respondent’s observer at the morning session, testified in response to my questions that Brungard was accompanied by a female Board Agent. He was asked whether there was ever a period of time during which Brungard was out of the voting room as well as the

female Board Agent, to which he responded, “No Sir.” Further, he was asked if whenever Brungard was gone the female Board Agent was present, to which he responded, “Yes.”

5 Accordingly, I am of the view that the contention that Brungard left the voting area “unattended” during the election is simply frivolous and completely without merit.

10 There was considerable evidence offered that Brungard left the immediate voting area at times during the election to patrol or inspect the perimeter of the area. The evidence indicated that he spoke with management personnel and asked them to leave the back parking lot and move to a side lot, that he asked managers to move away from the front of the building, that he instructed managers that certain interior doors to work areas and supervisors’ offices needed to be closed, and that he generally walked through the interior areas of the facility and the external parking lots. Counsel for the Respondent argues that this conduct on the part of Brungard left eligible voters with the impression that Brungard was doing the Union’s bidding and that the  
15 Agency was biased in favor of the Union.

20 Rather, it seems to me that Brungard was doing exactly what he should have been doing, and what the Agency would have expected of him, namely patrolling the perimeter of the voting area to ensure that there was no misconduct occurring, which could have affected the results of the election. His actions should not have reasonably indicated to any eligible voter that Brungard personally or the Agency as an institution was in any way biased towards the Union. The Board’s position is clear that an election will only be overturned because of alleged Board Agent misconduct when the objecting party presents facts that raise a “reasonable doubt as to the fairness and validity of the election.” *Polymers, Inc.*, 174 NLRB 282 (1969), enf’d. 414  
25 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970).

30 Ensuring that doors are closed to restrict noise, and that supervisors are not present in areas where they are in contact with eligible voters who may be intimidated by their presence is simply a prudent course of action for a Board Agent conducting an election. For example, the Board has overturned elections because of the unexplained presence of a supervisor near the polling area, which was held to have destroyed the laboratory conditions necessary for the conduct of a free and fair election. *Electric Hose and Rubber Co.*, 262 NLRB 186 (1982).

35 Further, I see nothing improper about anything said or done by Board Agent Brungard at the pre-election conference, or after the conference in implementing a suggestion made by a union agent or somebody supporting the Union. The allegation that by implementing a suggestion made at the pre-election conference from union official Yvonne Melton that the doors to management offices near the polling area be closed, that Brungard was somehow demonstrating bias in favor of the Union, is without merit. Nothing that Brungard is alleged to  
40 have said or done could reasonably demonstrate any disrespect for the Employer or support for the Union. See, e.g., *Sioux Products Inc., v. NLRB.*, 703 F.2d 1010, (7<sup>th</sup> Cir. 1983) (where even a Board Agent’s demand at pre-election conference that company observer’s “shut up” did not constitute sufficient interference with the impartiality of the election to order a new election).

45 During the time that Brungard patrolled the perimeter of the voting area there is no evidence that he engaged in any sort of fraternization with union supporters. Further, asking managers to move to another location or to close doors certainly is a reasonable request when the Board Agent is concerned with the possibility that noise or contact between supervisors and eligible voters may create conditions interfering with the integrity of the election. No evidence  
50 was offered that in the course of conducting these duties and interacting with managers that Brungard was disrespectful, arrogant, or appeared upset with management. Rather, the

evidence shows that Brungard's conduct was inoffensive and did not demonstrate any lack of impartiality.

5 Accordingly, there is no evidence that Board Agent Brungard's conduct raised a reasonable doubt as to the fairness and validity of the election, or that it interfered with employees' freedom of choice in the election. I shall, therefore, recommend that objection numbers 10, 11, 12, 13, 14, and 15 be overruled.

#### 10 **IV. Conclusions and Recommendations**

15 For the reasons that I expressed above, I have recommended that objection numbers 5, 6, and 7 be sustained. Objection numbers 5 and 6 involve the conduct of admitted union agents Serrano and Melton whereby Serrano drove slowly through the Employer's parking lot while the election was in progress taking at least one photograph with his camera phone and holding it up as if to suggest that he was taking additional photographs. Melton was a passenger in the vehicle that Serrano was driving. Objection number 7 involves the conduct of afternoon union observer Vera who, contrary to the written instructions to observers, a copy of which she was given, used her cell phone to send a text message to a fellow employee and union supporter advising him that a specific eligible voter had yet to cast a ballot.

20 In deciding whether the employees in the bargaining unit were able to freely and fairly exercise their choice in the election, I am guided by Board precedent contained in numerous cases where the Board has established a number of factors to be evaluated. *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986); *Chicago Metallic Corp.*, 273 NLRB 1677, 1704 (1985). Regarding those factors, several are of particular importance in considering those objections before me that I have determined have merit. This was an extremely close election, decided by one vote out of 39 cast. The Board has held that in a close election the objectionable conduct need not be as severe or have affected as many employees in order to warrant setting aside the election. The narrowness of the vote in an election is a relevant consideration. *Robert Orr-Sysco Food Services*, 338 NLRB 614 (2002); *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995); Also see *Avis Rent-a-Car*, *supra*.

30 As is reflected in the discussion above, Serrano's picture taking occurred while the election was in progress. One eligible voter, Nicolas Olguin, testified that after he voted, he observed Serrano taking pictures from a vehicle as Serrano drove through the parking lot. A number of supervisors testified similarly. As noted earlier, Serrano did not offer a reasonable explanation for his conduct, and I did not credit his testimony that the amount of time that he engaged in such picture taking was very limited. From the testimony of various witnesses, it appears that there were other eligible voters in the parking lot at the time that Serrano slowly drove through with his camera held up for others to see. While there was no direct evidence that any eligible voters actually observed Serrano prior to their having voted, the incident was actively talked about between Olguin and those managers who had seen it, and with others who had not. It is certainly reasonable to assume that eligible voters may have learned of Serrano's conduct prior to their having voted. The conduct was coercive in nature. Serrano may have thought it humorous, but it is unlikely that employees who found out about it would have shared his feelings. I believe that it certainly had the potential to affect employees' freedom of choice in the election.

45 Similarly, afternoon union observer Vera had engaged in conduct that had the potential to coerce employees who had not yet voted. In contradiction of the specific written instructions to observers, she had used her cell phone while the election was in progress to send a text message to a fellow union supporter advising him of the name of the one eligible voter who had

not yet cast his ballot. This meant that essentially she was keeping a list of those employees who had not yet voted. Having passed this information on to her fellow union supporter, at least the potential existed for pressure to be applied to the non-voter to cast his ballot in favor of the Union, or, if he was perceived not to be a union supporter, to not vote at all. Again, this was a very close election, decided by one vote. Had the one non-voter cast a ballot against the Union, the results of the election would have been very different.<sup>8</sup> In that event, a majority of the votes counted would not have been cast for the Petitioner.<sup>9</sup>

Based on the above, I conclude that the objectionable conduct engaged in by the Union has tended to interfere with the free and fair choice of a determinative number of unit employees. Accordingly, as the election results do not reflect the employees' free and fair choice, I recommend that the election be set aside and that this proceeding be remanded to the Regional Director for Region 21 for the purpose of conducting a second election.<sup>10</sup>

Further, and in accordance with the *Lufkin Rule Co.*, 147 NLRB 341 (1964) and *Fieldcrest Cannon, Inc.*, 327NLRB 109 fn. 3 (1998), I recommend that the following notice be issued in the Notice of Second Election: The election conducted on October 28, 2011 was set aside because the National Labor Relations Board found that certain conduct of the Union interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit, and protects them in the exercise of this right, free from interference by any of the parties.

Dated at Washington, D.C. February 17, 2012

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Gregory Z. Meyerson  
Administrative Law Judge

<sup>8</sup> As noted earlier, the tally of ballots showed there were approximately 40 eligible voters, of who 20 cast ballots for, and 19 against, the Petitioner. Apparently one eligible voter did not vote.

<sup>9</sup> This assumes no challenged or void ballots.

<sup>10</sup> Under the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, within 14 days from the date of issuance of this Recommended Decision, either party may file with the Board in Washington D.C. an original and eight copies of exceptions hereto. Exceptions must be received by the Board in Washington, DC by March 2, 2012. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof upon the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may adopt this Recommended Decision.