UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

FLAMINGO LAS VEGAS
OPERATING COMPANY, LLC,

Respondent

and

Cases Nos. 28-CA-077145
28-CA-079092
28-RC-069491

INTERNATIONAL UNION, SECURITY, POLICE
AND FIRE PROFESSIONALS OF AMERICA (SPFPA)

Charging Party

and

Chris Rudy, an Individual **Case No. 28-CA—78866**

_____/

CHARGING PARTY/PETITIONER SPFPA'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION AND SUPPORTING BRIEF

Introduction:

On March 29, 2012, an election was held in the bargaining unit of security officers at the Flamingo, Bill's and O'Shea's casinos. The proposed unit consists of approximately 123 employees. The results of the election were 46 in favor of the Union and 64 in favor of the Employer. A change in the vote of only 10 voters, only 8% of the eligible voters, could have affected the outcome of the election.

The SPFPA timely filed objections, citing misconduct by the Employer which was sufficient to affect the outcome of the election. The SPFPA's Objections included, *inter alia*, that at relevant times before and during the critical period:

- The Employer offered increased benefits to employees;

- The Employer solicited employee complaints and grievances and offered to remedy them;
- The Employer conducted surveillance on employees who supported the Union;
- The Employer mocked, demeaned and otherwise brought negative attention to employees who supported the Union;
- The Employer interrogated its employees about their Union support;
- The Employer implemented and enforced overly-broad and discriminatory work rules;
- The Employer threatened employees with discipline and/or discharge if they supported the Union;
- The Employer improperly offered and/or granted employees breaks to vote while on duty;
- During the election, the Employer's observers improperly wore the Employer's insignia and uniforms; and
- During the election, the area and table at which the NLRB Agent and observers sat was adorned with the Employer's insignia;

The Objections were combined for hearing with a consolidated unfair labor practice complaint.

On July 31, and August 1-3 and 21-22, 2012, a hearing was held before Administrative Law Judge Gerald A. Wacknov in Las Vegas, NV. Several of Petitioner's objections were based on unfair labor practice charges filed by Petitioner against the Employer stemming from the Employer's anti-organizing campaign. While some of these charges were tried before Judge Wacknov, many of the charges previously were heard by Administrative Law Judge Gregory Z. Meyerson in cases 28-CA-069588 and 28-CA-073617. Judge Meyerson issued his Decision in

those cases on June 25, 2012. (GC 7). In his Decision, Judge Meyerson found that the Employer had violated the Act in several respects both prior to and following the filing of the subject Petition, and that those violations were directly related to Petitioner's organizing efforts. The Employer timely filed exceptions to the Decision and the cases are currently on appeal to the Board.

On December 18, 2012, the ALJ Wacknov issued his Decision addressing the Consolidated Complaint and Petitioner's Objections to the Election. In his Decision, ALJ Wacknov found that the Employer had committed unfair labor practices, but also recommended overruling in their entirety all of Petitioner's Objections. The Administrative Law Judge ruled that the Objections be dismissed as he concluded that the Employer's actions were insignificant or were not capable of affecting the unit employees' vote preference, or otherwise occurred outside the critical period.[1]

Contrary to the findings of the Administrative Law Judge, the record established at the hearing substantiates and validates SPFPA's Objections. That evidence establishes that a substantial and significant number of employees were disenfranchised by the fact that the laboratory conditions required for NLRB election were not present in this case.

Exceptions

The International Union, SPFPA files these Exceptions to Administrative Law Judge Wacknov's Decision:

- The Administrative Law Judge ignores or misapplies the record evidence that establishes that the lack of laboratory conditions in the election process

[1] After review of the evidence adduced at the hearing, after the hearing Petitioner withdrew Objections 14, 20 and 23-27.

disenfranchised a significant number of employees and affected employees' vote preference.

- The Administrative Law Judge's dismissal of Petitioner's Objections raises substantial questions of law or policy because of the absence of or departure from Board precedent.
- The Board should reconsider existing precedent.

Thus, the International Union, SPFPA hereby excepts to ALJ Wacknov's recommended dismissal of Objections 1-7, 9-13, 15-19, and 21-22.[2]

In addition, Charging Party/Petitioner SPFPA adopts and incorporates herein the January 15, 2013 Exceptions and Brief filed by Counsel for the Acting General Counsel.[3]

STATEMENT OF FACTS

Caesars Entertainment, Inc. operates hotels and casinos in Las Vegas, NV. At the subject locations, they employ a bargaining unit of approximately 123 security officers.

On November 23, 2011, International Union, SPFPA filed a Petition for Representation with respect to the bargaining unit described above. On March 29, 2012, the Election was conducted. Following a tally of the ballots, the Petitioner filed its Objections and a hearing was ultimately held.

In his Decision, the Administrative Law Judge made certain findings of fact resolving disputes between the respective documentary exhibits and witnesses with conflicting testimony. Although Petitioner does not necessarily agree with the Judge's determinations of fact, Petitioner recognizes the Board's great deference to a Judge's factual determinations. Accordingly, in

[2] Petitioner hereby withdraws Objection 8.

[3] With respect to these Exceptions to the ALJ's findings regarding the unfair labor practice charges, Charging Party/Petitioner incorporates and relies upon the content of the Exceptions and Brief filed by Counsel for the Acting General Counsel.

filing and supporting these Exceptions, except as noted below where the Judge made clearly erroneous findings, Petitioner relies upon the factual record as determined by the Judge within his Decision, supplemented with factual assertions that are part of the record that the Judge ignored or otherwise did not discredit in his Decision.

Unfair Labor Practices

ALJ Wacknov rightly held that on October 14 and October 27, 2011, the Employer violated the act when Security Director Golebiewski warned employees "about a freeze in pay" as well as "his inability to afford employees protection from suspension or discharges, and other similar unspecified adverse consequences resulting from selecting the Union as the employees' collective-bargaining representative . . . ." (Decision, p. 10-11). Despite these findings, Judge Wacknov declined to order a new election.

Objections to the Election

Objection 1: The Employer offered and/or granted employees breaks to vote while on duty.

Witnesses Eric Golebiewski and Janice Miller testified that unit employees were permitted to vote in the election while on duty. Employees would call through dispatch for permission for a break. Some posts are fixed posts that require constant security; those employees would have to be relieved from duty in order to take the break.

Prior to the election, the SPFPA objected to the Employer's unilateral decision to permit employees to vote while on duty. The SPFPA requested that the Region, in setting up the election, not permit the employees to vote on duty or in the alternative negotiate mutually acceptable parameters governing voting rather than permit the Employer to unilaterally set its terms. The Region declined and the SPFPA was informed by the Region that any issues that

arose would be addressed as necessary through the objection to the election process. Petitioner Exhibit 2.

In a recent case involving security officers at a casino, the Board held that it was objectionable conduct to permit the employer to grant employees a break to go vote while on duty. ***Holdings Acquisition Co. LP d/b/a Rivers Casino,*** 356 NLRB No. 142 (2011). The Board observed that the employer's actions in granting breaks to employees to permit them to vote on duty raised concerns regardless of "whether the conduct is characterized as a grant of benefit or as an infringement on the neutrality of the election process" as "there was an impermissible impact on employee free choice." (356 NLRB No. 142 at p. 3).

Judge Wacknov overruled Objection 1 on the premise that ***Rivers Casino*** was distinguishable from the current case. (Decision, p. 11). According to the Judge, whereas the employer and union in ***Rivers Casino*** "had entered into a well-publicized agreement specifying that employees were to vote during their breaktime . . ." (*Id.* citing ***Rivers Casino***), the employees in the instant matter were notified that they were "free to vote at any time the polls are open." (*Id.* at 11, fn. 13). Although he provided little by way of analysis, Judge Wacknov appears to have held that the absence of a prior agreement between the Employer and Petitioner afforded the Employer complete discretion as to the procedure for voting while officers were on duty. Judge Wacknov further indicated that because dispatchers, and not supervisors, were responsible for granting officers relief to vote, and because all officers who desired to vote were given the opportunity to vote, the objection should be overruled. (*Id.* at 12).

Judge Wacknov's dismissal of Objection 1 raises substantial questions of law and/or policy because his ruling stands in direct contradiction to the principles outlined in ***Rivers Casino***. As the Judge cited in his Decision, the Employer in ***Rivers Casino*** was held to be in

violation of the Act because "employees would have understood that they had been given an extra break on election day solely as a matter of the Employer's beneficence and discretion and that the break was intended to facilitate their voting." In this case, the Petitioner was precluded by the Region and the Employer from providing any input on the matter of whether employees should be allowed to vote during work hours. The decision to allow officers an otherwise unscheduled break to vote was promulgated solely by the Employer. The fact that dispatchers were involved in the process is irrelevant to the determination of whether allowing such breaks was a violation of the Act. To be sure, dispatchers could not grant the breaks without first being directed by the Employer to do so. Ultimately, there are no significant differences upon which to distinguish the current matter from ***Rivers Casino***. That is, in both cases the Employer unilaterally granted additional break time to facilitate voting thereby negatively impacting employee free choice.

The facts and the law are not in dispute. The Employer's actions violated the Board's direction in ***Rivers Casino*** and constituted objectionable conduct. As a result, the election must be re-run.

Objection 2: The Employer's observers wore Employer insignia.

Objection 3: The Employer's observers wore Employer uniforms.

Objection 4: The table cloth and/or skirt behind which the NLRB Agent and observers sat and employees checked in to vote was adorned with Employer insignia.

Judge Wacknov disagreed with Petitioner's contentions and dismissed each of these Objections. In so doing, the Judge referred to section 11310.4 of the Casehandling Manual for the proposition that "regular employer identification badges, the wearing of which is required by the employer. . . ." may be worn by observers during the election. Judge Wacknov also

summarily dismissed the notion that allowing observers and Board agents to sit at a table covered with a tablecloth adorned with the Employer's insignia could improperly impact employee free choice. Without further discussion, and seemingly without considering how the tablecloth together with the observers wearing the Employer's badges might affect the Election, Judge Wacknov simply concluded that "it is highly unlikely that the table cloth would have any effect on the voters' free choice." However, his ruling on these objections runs afoul of the Board's longstanding policy for ensuring that the election process is not tainted by such identifiers.

"[T]he Board goes to great lengths to assure the parties of the integrity of the election process so the manner in which its elections are conducted raise no reasonable doubt as to their fairness and validity. See, *e.g.*, ***Peoples Drug Stores***, 202 NLRB 1145 (1973), and ***Polymers, Inc.***, 174 NLRB 282 (1969).

The facts supporting these Objections are uncontroverted: The Employer's observers to the election (1 each voting period) were in full uniform including security patches. Prior to the start of the election the SPFPA protested but the Employer insisted that the observer would be so dressed. The NLRB agent and observers sat behind a table with a table cloth displaying the name and logo the Employer's parent company, Caesar's Entertainment.

Employees coming to vote observed the official NLRB agent conducting the election sitting behind a table displaying the Employer's name and logo. This is not the sense of neutrality the NLRB must deliver at a voting location. Employees could be confused as to who was conducting the election, the NLRB or the Employer? Or the NLRB at the Employer's direction? Employees might wonder if the truly was a neutral vote, why the Employer's name and logo were displayed but not the Union's?

Further, among the last images the employees saw before voting was the Employer's name and logo. This constitutes electioneering at the polling place, prominently displaying the Employer's name and logo and not the Union's. This is the image the employees' took into the voting booth as they made their decision.

It is admitted that the Board's procedures discourage but do not strictly prohibit an observer from wearing insignia other than the official observer badge. Casehandling Manual, 11310 and 11326.1. However, in this case the circumstances are different, as these observers sat with the Board Agent behind a table displaying the Employer's name and logo. Combined with the improper table cloth insignia, the image of an observer sitting in full uniform and patch could lead voters to believe that the Employer was in control of the process, not the NLRB.

For these reasons, the Region should not have allowed the Employer to run roughshod over the election process and instead should have required that either the tablecloth be removed or that the observers wear no identifying clothing. As it stands, the Region failed to ensure that no reasonable doubts arose over the fairness and validity of the election process. Therefore, the election should be set aside in favor of a truly fair and truly independent election procedure.

Objection 5: The Employer conducted surveillance on employees who supported the union.

Despite Judge Wacknov's rulings to the contrary, the Employer improperly surveilled the protected concerted activities of Francis Bizzarro on several occasions. Surveillance of employees' union activities is a violation of the Act. Although a supervisor's routine observation of employees engaged in Section 7 activity on employer property may not constitute unlawful surveillance, an employer violates the Act when it surveils employees engaged in Section 7 activity by observing them in a way that is out of the ordinary. ***Aladdin Gaming, LLC***,

345 NLRB 585 (2005); ***Sands Hotel & Casino, San Juan***, 306 NLRB 172 (1992), enfd. sub nom mem. ***SJRR, Inc. v. NLRB***, 993 F.2d 913 (D.C. Cir 1993).

In February 2012, two employees were asked by the Employer to make a written statement of Mr. Bizzarro's pro-union activities, including detailing what Mr. Bizzarro stated to them in relation to the Union organizing campaign. Exhibit GC 38g and 38h.

The Employer's supervisors kept written track of Mr. Bizzarro's concerted activities. See GC 22(b)(November 28, 2011). The Employer tracked Mr. Bizzarro's activities with his co-workers to the extent that the lack of activity at the security picnic combined with his failure to attend was observed and communicated up the line to the highest levels of management.

Security Director Golebiewski wrote and forwarded to high-level managers a lengthy e-mail of Mr. Bizzarro's statements during the 4 hour meeting that took place on October 14, 2012.[4] GC 22h. The e-mail details Mr. Bizzarro's statements during the meeting. It does not seek to record and report on the statements of any other employee during this extended 4 hour meeting.[5]

Judge Wacknov ultimately overruled the objection on the basis that (1) other employees were not aware of the emails concerning Mr. Bizzarro's union activities and (2) asking employees to submit written statements with respect to those employees' complaints about Mr. Bizzarro's union activities "would not have reasonably caused them to believe, under the circumstances, that the Employer was keeping Bizzarro's activities under surveillance." (Decision, p. 13).

However, Judge Wacknov's assessment misses the mark. Through Objection 5, Petitioner asserts that the Employer improperly conducted surveillance of Mr. Bizzarro's

[4] At least it started on October 14th but continued into October 15th.
[5] It is acknowledged that this meeting took place prior to the filing of the Petition. See discussion *infra* as to why pre-petition events should be considered.

activities, not only that the Employer created the impression of surveillance. In order to prove that the impression of surveillance was created, Judge Wacknov's analysis would be applicable – as other employees would necessarily have to know about the Employer's actions so that the impression of surveillance could be communicated. Pursuant to this objection, however, the Employer need only engage in surveillance to violate the Act. Put another way, it is immaterial whether other employees were aware of the Employer's actions. The record supports a finding that the Employer engaged in impermissible surveillance of Mr. Bizzarro's union activities simply by its actions and thus the election should be set aside.

Objection 9: The Employer mocked, demeaned and otherwise brought negative attention to employees who supported the Union.

Judge Wacknov dismissed Objection 9 solely on the basis that it occurred prior to the filing of the petition. (Decision, p. 13). No further analysis was provided. As discussed in greater detail below, the Judge's ruling raises substantial questions of law and/or policy because it misstates and/or misapplies applicable Board precedent.

General Counsel 20(a), the B.Y.A. flyer, states: "We realize it's a pretty BIZARRE situation, but it looks like a small group is trying to convince all of you . . . ." Judge Meyerson, in his Decision, held that this statement in the flyer violated the Act by creating an impression of surveillance and threatened employees with reprisals for engaging in union activity. GC 7, p. 18. In addition, Judge Meyerson observed that the flyer was intended to hold up Mr. Bizzarro to ridicule and was a personally demeaning action against him because of his union activities. Judge Meyerson observed that as a result an employee would think twice before engaging in union activity.

The flyer clearly called out Mr. Bizzarro. Judge Meyerson found the Employer's claims to the contrary "preposterous" and stated that these claims "defied logic." (GC 7, p. 17) The Employer's actions in distributing this flyer sent a clear message to the employees: Get involved and not only will the Employer know, but the employer will mock, demean and otherwise bring negative attention upon you. This would serve to chill the protected concerted activities of potential union supporters. The Employer did not subsequently act to cure this clear message, even after the filing of the Petition. During the critical period employees were still aware of the results of actively supporting the Petitioner, as the Employer never took action to reassure them anything to the contrary, *i.e.* they would not be called out for supporting the Union. As a result, it was objectionable conduct.

Objections 6, 7, 10, 11, 12, 13, 15, 16, 17, 18, 19, 21 and 22

Each of these Objections was presented at the hearing before Judge Wacknov and is supported by the Decision of Administrative Law Judge Gregory Meyerson in Cases 28-CA-069588 and 28-CA-073617. Judge Meyerson made specific findings of violations of the Act that establish the Objectionable conduct. His findings of violations follow:[6][7]

Objection 6: The Employer created an impression among its employees that their Union activities were under surveillance. GZM findings: 5(f)(1), 5(i) (pps. 18, 24)

Objection 7: The Employer created an impression among its employees that employees who supported the Union and engaged in Union activities would be placed under surveillance. GZM findings: 5(f)1, 5(i), 5(m) (pps. 18, 24, 29)

[6] References are: GZM (Gregory Z. Meyerson) #letter(p#), *e.g.*, 4a(p. 4). This reference is to the violations of the Consolidated Complaint before him by paragraph of allegation, which is how he referenced his findings, then page number as found in his Decision.

[7] ALJ Meyerson's Decision is currently pending appeal before the Board.

Objection 10: The Employer interrogated its employees about their Union membership, activities and sympathies. GZM findings: 5(e)2, 5(n)(pps. 14, 30)

Objection 11: The Employer solicited employees complaints and grievances to dissuade them from supporting the Union. GZM findings: 5(e)(3)(p. 15)

Objection 12: The Employer promised its employees increased benefits and improved terms and conditions of employment to dissuade them from supporting the Union. GZM findings: 5(e)(4)(p. 15)

Objection 13: The Employer informed employees that it transferred an objectionable supervisor to dissuade them from supporting the Union. GZM findings: 5(e)(4)(p. 15)

Objection 15: The Employer threatened its employees with more strictly enforced work rules if they selected the Union. GZM findings: 5(e)(5), 5(f)(2), 5(g)(1)(pps. 16, 18, 19)

Objection 16: The Employer threatened its employees with job loss if they selected the Union. GMZ findings: 5(3)(5), 5(f)(2)(pps. 16, 18)

Objection 17: The Employer threatened its employees with discipline if they selected the Union. GMZ findings: 5(b), 5(f)(2), 5(g)(1), 5(h)(1)(pps. 9, 18, 19, 22)[8]

Objection 18: The Employer promulgated and enforced an overly-broad and discriminatory work rule prohibiting its employees from talking to co-workers because of their Union activities. GMZ findings: 5(c), 5(h)(1), 5(h)(3) (pps. 9, 22)

Objection 19: The Employer threatened its employees by informing them they were disloyal because of their support for the Union. GMZ findings: 5(h)(1)(p. 22)

[8] In addition, Petitioner relies upon the evidence adduced at the hearings before Judge Wacknov regarding the February 2012 suspension and termination of Thomas Willequer, which occurred during the critical period. Judge Wacknov ruled that the termination was not in violation of the Act. Counsel for the General Counsel has excepted to this finding. In the event that the Board grants the exception and holds that the termination of Mr. Willequer violates the Act, Petitioner relies up that putative holding as evidence that the Employer engaged in objectionable conduct warranting a new election.

Objection 21: The Employer threatened its employees with discharge because they supported the Union. GMZ findings: 5(e)(5), 5(h)(1), 5(h)(2)(pps. 14, 22)

Objection 22: The Employer threatened its employees with layoff if they engaged in Union activities. GMZ findings: 5(e)(5), 5(f)(2)(pps. 14, 18)

The Board's policy "is to direct a new election when an unfair labor practice is committed during the critical period, because 'conduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammeled choice in an election.' The only exception to this policy is for violations as to which it is virtually impossible to conclude that they could have affected the election results." ***Wayne County Neighborhood Legal Services, Inc.***, 333 NLRB 49 (2001).

In this case, there are numerous findings of unfair labor practices committed, by Judge Meyerson. The facts underlying these unfair labor practices establish objectionable conduct requiring a new election. The Employer has excepted to these findings and the matter is currently before the Board.

Unfortunately and without explanation, Judge Wacknov failed to address Employer conduct that without dispute fell within the critical period and that Judge Meyerson held to be in violation of the Act. For example, Judge Meyerson ruled that on December 2, 2011, the Employer issued an improper "threat of a changed condition of employment in which past leniency would be eliminated . . ." due solely to the "existence of a union contract." (GC 7, p. 19). Additionally, Judge Meyerson found that in mid-January of 2012, the Employer publicly threatened Bizzarro "with termination because of his union sympathies and activities." (*Id.*, p. 22). During that same conversation, Judge Meyerson concluded, the Employer also "promulgated and enforced an overly-broad and discriminatory rule that the security officers had

to follow the chain of command to resolve their complaints." (*Id.*). As Judge Meyerson rightly noted, "[t]he promulgation of such a rule would reasonably be construed by employees as prohibiting Section 7 activity." (*Id.*). Lastly, Judge Meyerson held that, through comments made by a member of management in late January of 2012, the Employer created an unlawful impression of surveillance of its employees' union activities. (*Id.*, p. 23-24). Again, although evidence of these violations was presented to him, Judge Wacknov did not provide any analysis of these violations that occurred during the critical period, let alone acknowledge their existence.

The Board should overrule ALJ Wacknov and should direct a new election, based on the conduct alleged and proven in the hearing before him. In addition, the Board should find that if it affirms Judge Meyerson's findings, in whole or in part, then that conduct also requires a new election. In this manner, assuming *arguendo* the Board finds objectionable conduct in the record, the parties do not need to wait for the Board to rule on the exceptions to Judge Meyerson's Decision for a rerun election to be held.

Timeliness of Objectionable Conduct

Generally, the Board looks to conduct within the critical period for determining whether a new election should be held. In this case, there is considerable and ample evidence of events that took place after the filing of the Petition in support of objections. Consider, *e.g.*, Objections 1-4 which all occurred on the day of the election, as well as the post-Petition cited evidence supporting Objections 5 and 8. In addition, Judge Meyerson found post-Petition events that were considered violations of the Act, including the December 2, 2001 conversation between Messrs. Golebiewski and Rudy (Complaint ¶5(g)(1), GC 7, pps. 18-19), the January 2012 confrontation between Messrs. Bizzarro and Baker (Complaint ¶¶s 5(h)(1) and 5(h)(3), GC 7, pps. 21-22), the

January 2012 impression of surveillance (Complaint ¶5(i), GC 7, pps. 23-24) and the mid-November 2011 Beer Pong incident[9] (Complaint ¶5(n), GC 7, pps. 29-30).

Regardless, the Administrative Law Judge should and can consider pre-petition conduct. The critical period rule is not a statute of limitations. ***NLRB v. Anchorage Times Publishing Co.***, 637 F2d. 1359 (9th Cir. 1981), *cert denied*, 454 U.S. 835 (1981). The Board considers pre-petition conduct in an objections context if there is "significant post-petition conduct related to or continuing from pre-petition events." ***Textron, Inc. v. NLRB***, 638 F.2d 957, 960 (6th Cir. 1981), citing ***Parke Coal Co.***, 219 NLRB 546 (1976). Pre-petition conduct may, itself, be the basis for overturning an election. See, *e.g.*, ***NLRB v L&J Equip. Co.***, 745 F.2d 224 (3d Cir 1984); ***Ron Tirapelli Ford v. NLRB***, 987 F.2d 433, 443 (7th Cir. 1993).

In this case, the Employer admits to knowledge of Petitioner's organizing drive, the distribution of showing of interest cards and the involvement of Francis Bizzarro as of October 7, 2011. At that time and as a direct result of this knowledge, it rolled out its anti-union campaign, including engaging in serious actions in violation of the Act. Consider the "4 hour meeting" on October 14th and the "Bizarre" flyer on October 16th. As noted previously, Judge Wacknov held that the Employer violated the Act on October 14th by threatening employees with harsher discipline if the union were elected. He likewise found that, on October 27th, the Employer committed unfair labor practices when it threatened an employee with a wage freeze and with less protection from discipline. These actions had long acting consequences, chilling employees from actively and publicly supporting the union. They clearly could have impacted the ultimate election results. The Employer engaged in these actions specifically to defeat the Union's organizing drive.

[9] The original petition was filed on November 4, 2011, a subsequent petition was filed on November 17, 2011 and the instant petition was filed on November 23, 2011. Jt Ex 1. This series of filing/withdrawals/filings resulted from the difficulty in finding a mutually available hearing date.

In his Decision, ALJ Wacknov held that conduct occurring prior to the filing of the petition cannot be considered per ***Ideal Electric***, 134 NLRB 1275 (1961). (Decision, p. 13). Moreover, the Judge found that the "Petitioner has not demonstrated that the prepetition conduct herein falls within any exception to the *Ideal Electric* policy." (*Id.*).

The Employer should not escape liability for its actions simply because it was able to start its illegal anti-union campaign before the Union filed the Petition. To hold such would permitted employers to act with impunity in attempting to chill employees' exercise of rights prior to the filing of a petition, simply because the petition is not yet filed. Nor were the Employer's actions here generalized; rather, the Employer's acted to thwart a specific campaign by a specific labor organization including the activities of specific employees on the organization's behalf. In the circumstances of this case, the pre-Petition conduct should be found to be independent objectionable conduct requiring a new election. To the extent that existing Board precedent is inconsistent with these findings, the Board should take action to overrule such precendent.

If the Board declines to order a new election based solely on the Employer's pre-Petition misconduct, the fact remains that the totality of the Employer's actions pre and post Petition warrant a new election. Herw, the Judge misapplied the law, as under ***Parke Coal Co.***, *supra*, and its progeny, the question is not whether the Employer's conduct prior to the filing of the Petition fits within an exception, but rather whether the Employer's post-Petition conduct is significant enough to be considered as part of an ongoing and systematic attempt to improperly combat an organizing drive.[10] In that case, "upon learning of the Union's organizational activities the Employer, [prior to the filing of the Petition], promised its employees higher wages and insurance benefits, and at the same time told the employees that it would not run a union

[10] See also ***Textron, Inc.***, *supra* at 460.

mine." ***Parke Coal Co.*** at 547. During a meeting with employees following the filing of the Petition, the Employer insinuated that the mine would close if the union were elected and also reiterated its promise of insurance benefits. *Id.* The Board found the Employer's promise to provide better benefits "in order to induce the employees to reject the Union. . . ." analogous to situations where an employer accelerates a wage increase during the critical period despite having decided to implement the increase pre-petition. *Id.* In setting aside the election, the Board cautioned that while "the rule in *Ideal Electric* . . . forbids specific reliance upon prepetition conduct as grounds for objecting to an election, such conduct may properly be considered insofar as it lends meaning and dimension to related postpetition conduct." *Id.* (citing ***Stevenson Equipment Company***, 174 NLRB 865 at 866 fn. 1 (1969)).

In the instant matter, the Employer's conduct during the critical period was significant and was not isolated. As held by both ALJ Wacknov and ALJ Meyerson, the Employer levied improper threats of discipline after learning of the Union's organizing efforts but prior to the Petition being filed. ALJ Meyerson also found that the Employer engaged in similar conduct post-Petition in December of 2011 and January of 2012. While ALJ Wacknov dismissed any claims that the Employer engaged in surveillance of employees who supported the Union (Decision, p. 12-13), ALJ Meyerson held that the Employer created an unlawful impression of surveillance via its flier of October 16, 2011, as well as through its comments in January of 2012. Like in ***Parke Coal Co.***, since learning of its employees' union activities, the Employer has implemented a strategy, pre and post Petition, of threats and intimidation for the sole purpose of frustrating its employees' assertion of their Section 7 rights. Thus, like in ***Parke Coal Co.***, the election should be set aside.

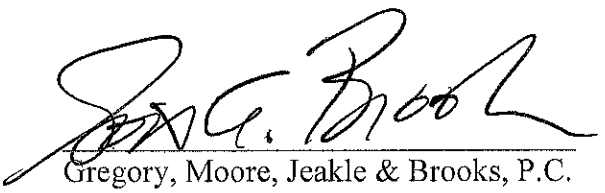
The conduct constituting the Objections both pre and post petition was extensive enough to interfere with the election. ***Archer Services***, 298 NLRB 312 (1990). "In resolving the question of whether certain employer misconduct is de minimis with respect to affecting the results of the election, the Board takes into consideration the number of violations, their severity, the extent of dissemination, the size of the unit, and other relevant factors." ***Caron International***, 246 NLRB 1120 (1979). See also ***Detroit Medical Center Corp.***, 331 NLRB 878 (2000); ***Metz Metallurgical Corp.***, 270 NLRB 889 (1984). Further, it may be presumed that considering that the issues were of paramount concern within the bargaining unit, the Employer's representatives' statements to the witnesses as detailed above were more widely disseminated. ***Springs Industries, Inc.***, 332 NLRB 40 (2000); ***Bon Appetit Management Co.***, 334 NLRB 1042 (2001).

As discussed above, the election outcome in this case could change with only 10 voters switching their ballot choice. The actions complained of were not isolated or benign and were widely disseminated within the unit of 123 employees with fewer than 10% of the voters changing their mind potentially affecting the outcome of the election. The actions complained of were numerous and pervasive, viewed separately or collectively. Furthermore, the objectionable conduct did not occur in short specific duration, but rather started during the organizing drive's infancy and continued over the entirety of the critical period. The Employer's actions violated the laboratory conditions that the Board requires to conduct an election and the election should therefore be re-run.

Conclusion:

The evidence adduced during the hearing established that the Employer engaged in numerous instances of objectionable conduct. Separately or viewed together, the Employer's misconduct, both pre- and post-petition, was sufficiently severe as to potentially affect the vote of the unit members and the outcome of the election. Accordingly, Petitioner SPFPA respectfully requests the Board to grant the Objections to the Election as described above and direct that a new election be held without delay.

Respectfully submitted,



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Dated: January 15, 2013

Certification of Service

A copy of Petitioner's Post Hearing was served on January 15, 2013 upon the following by e-mail:

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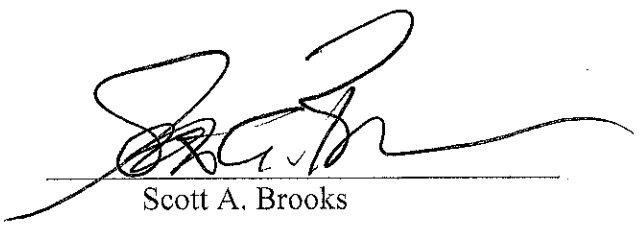

Scott A. Brooks

Dated: January 15, 2013