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

BOWERS COMPANIES, INC., d/b/a BOWERS AMBULANCE

Employer

and Case 31-RC-104784

UNITED EMERGENCY MEDICAL SERVICE WORKERS/
AFSCME-AFL-CIO

Petitioner/Union

HEARING OFFICER'S REPORT
AND
RECOMMENDATIONS

This report contains my findings of fact, conclusions, and recommendations regarding the Union's objections to the election held in the above matter.

For the reasons contained in this report, I recommend that the Union's objections be overruled, and that a Certification of Results be issued. In brief summary of the recommendation, I have concluded that the record contains insufficient evidence of objectionable conduct.

I. Procedural Background

The petition in this matter was filed by the Union on May 9, 2013.[1] Pursuant to a Decision and Direction of Election which issued on May 31, a mail ballot election was conducted [2] among the employees in the units found appropriate for collective-bargaining.[3] The

[1] All dates are 2013.
[2] A *Sonotone* election was conducted exclusively by mail ballot.

ballots were mailed to employees on June 26, and were due in the Region's office by the close of business on July 15.

The mail ballots were opened and counted on July 16. Each party was furnished with a tally of ballots. With regard to UNIT A, the Tally of Ballots showed that of approximately 251 eligible voters, 127 cast ballots, of which 50 were cast in favor of the Petitioner and 72 were cast against the Petitioner, no void ballots were cast, and 5 ballots were challenged. The challenged ballots were not sufficient in number to affect the results of the election. A majority of the valid votes cast in Unit A were **not** cast in favor of the Petitioner. With regard to UNIT B, there were approximately 14 eligible voters; 8 cast ballots, of which 4 ballots were cast for inclusion with the non-professional employees, and 4 against inclusion. There were no void or challenged ballots. A majority of the valid votes cast in UNIT B were **not** cast in favor of inclusion with the non-professional employees. A second Tally of Ballots for UNIT B showed that out of approximately 14 eligible voters, 8 employees cast ballots, of which 4 ballots were cast in favor of the Petitioner and 4 ballots were cast against the Petitioner. There were no void or challenged votes cast. A majority of the valid votes cast in Unit B were **not** cast in favor of the Petitioner.

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[3] (UNIT A): Included: All full-time and regular part-time EMTs, Paramedics, RTs (Respiratory Therapists), and Field Training Officers employed by the Employer at or out of the following locations: Long Beach Station, 3355 E. Spring Street, Suite No. 301, Long Beach, California 90806; Lancaster Station, 1055 W. Columbia Way, Suite No. 108, Lancaster, California 93534; and North Hollywood Station, 12638 S. Saticoy St., North Hollywood, California 91605; Excluded: Office clerical employees, all other employees, RNs, including CCT RNs, confidential employees, dispatchers, mechanics, fleet technicians 1 and 2, couriers, crew chiefs, guards and supervisors as defined in the Act, as amended.

(UNIT B): Included: All full-time and regular part-time RNs, including CCT RNs, employed by the Employer at or out of the following locations: Long Beach Station, 3355 E. Spring Street, Suite No. 301, Long Beach, California 90806; Lancaster Station, 1055 W. Columbia Way, Suite No. 108, Lancaster, California 93534; and North Hollywood Station, 12638 S. Saticoy St., North Hollywood, California 91605; Excluded: Office clerical employees, all other employees, EMTs, Paramedics, RTs, Field Training Officers, confidential employees, dispatchers, mechanics, fleet technicians 1 and 2, couriers, crew chiefs, guards and supervisors as defined in the Act, as amended.

The Petitioner timely filed objections to the conduct of this election and/or conduct affecting the results of the election. The Regional Director investigated the objections and, on August 7, issued and served upon the parties her Supplemental Decision on Objections, Order Directing Hearing and Notice of Hearing in which she concluded that Petitioner's Objections Nos. 1 through 6 could best be resolved by a hearing.

Pursuant thereto, a hearing on the Petitioner's objections was held before the undersigned Hearing Officer in Los Angeles, California, on August 26.[4] All parties were given a full opportunity to be heard, to examine and cross-examine witnesses, to present evidence and oral argument, and to submit briefs pertinent to the issues.

Upon the entire record of the hearing and my observation of the witnesses, their demeanor and testimony, I make the following findings of fact, conclusions, and recommendations:

II. Preface

This report is, unless otherwise noted, based on a composite of the credited aspects of the testimony of all witnesses, unrefuted testimony, supporting documents, undisputed evidence, and careful consideration of the entire record, including each party's briefs.[5]

Although each iota of evidence, or every argument of counsel, is not individually discussed, all matters have been considered. Omitted matter is considered either irrelevant or superfluous. To the extent that testimony or other evidence not mentioned might appear to contradict the findings of fact, that evidence has not been overlooked. Rather, it has been rejected as incredible or of little probative value. Unless otherwise indicated, credibility resolutions have been based on my observations of the testimony and demeanor of witnesses at

[4] The cover page of the printed version of the transcript incorrectly states that the case number is 31-RC-104787. The correct case number is 31-RC-104784.
[5] The parties declined to argue orally at the hearing.

hearing. NLRB v. Brooks Camera, Inc., 691 F.2d 912, 915, 111 LRRM 2881, 2881 (9th Cir. 1982); NLRB v. Ayer Lar Sanitarium, 436 F.2d 45, 49, 76 LRRM 2224, 2226 (9th Cir. 1970). Failure to detail all conflicts in testimony does not mean that such conflicting testimony was not considered. Bishop and Malco, Inc., d/b/a Walkers, 159 NLRB 1159, 1161 (1966). Further, the testimony of certain witnesses has been only partially credited. Kux Manufacturing Co. v. NLRB, 890 F.2d 804, 810-811, 132 LRRM 2935 (6th Cir. 1989); NLRB v. Universal Camera Corp., 179 F.2d 749, 754, 25 LRRM 2256 (2nd Cir. 1950), *rev'd on other grounds*, 340 U.S. 474, 27 LRRM 2373 (1951).

III. The Objections

The Petitioner's objections *verbatim* are as follows:

Objection No. 1

During the critical election period, the Employer, by its agents, withheld benefits from bargaining unit employees in order to influence the vote.

Objection No. 2

During the critical election period, the Employer impliedly made promises of benefits if the employees rejected the Union in the election.

Objection No. 3

During the critical election period, and in order to coerce employees' expression of their free choice with regard to representation, the Employer materially misrepresented its legal obligation in a memorandum to bargaining unit employees by stating that Petitioners' filing of the election petition meant that the Employer was required to disclose employees' names and addresses to a union not involved in the NLRB case. Notably, the named union, NEMSA, has been the subject of recent litigation and media coverage for being corrupt and anti-democratic.

Objection No. 4

During the critical election period, the Employer posted a "countdown clock" that inaccurately asserted the last time that bargaining unit employees could mail their ballots and still have it counted.

Objection No. 5

During the critical election period, the Employer solicited bargaining unit employees' grievances, impliedly or actually promising to remedy those grievances.

Objection No. 6

By the foregoing and similar coercive tactics used during the election campaign, the Employer prevented an election in which the employees could freely express their wishes concerning representation.

IV. The Evidence

In support of its objections, the Petitioner presented Justin Ausman, Emergency Medical Technician (EMT), and Charles Lundy, its Area Organizing Director. The Employer presented the following witnesses: Paul Cloward, Divisional Manager; Able Zavalza, Paramedic Crew Chief; Cole Reutgen, Field Supervisor; Kelly Henry, Human Resources Manager; and Ken Kaufman, Operations Manager.

A. Background

The Employer, Bowers Companies, Inc., is engaged in the business of providing emergency medical services (EMS) in Los Angeles County. Although Rural/Metro, the entity that currently owns Bowers,[6] provides private firefighting services, as well as EMS nationwide, Bowers' business is limited to the provision of EMS in Los Angeles County.

The Employer employs approximately 250 field employees who work on the ambulances, including EMTs, paramedics, nurses[7] and RTs (respiratory therapists). The Employer also employs individuals who do not work in the field, including fleet mechanics and administrative staff, but the petition involves just the field employees. Approximately 30% of the field employees work part-time. When employees work part-

[6] Rural/Metro purchased Bowers effective December 9, 2011.

[7] Bowers' nurses are sometimes referred to as Critical Care Transport (CCT) nurses.

time, their work schedules are akin to per diem employees in that they work complete shifts but work fewer shifts than full-time employees.

B. Withholding of Benefits and Implied Promise of Benefits (Objections Nos . 1 and 2)

1. The Appraisal Process and Merit Increases

In support of both of these objections, the Union presented evidence regarding the Employer's deferral of merit increases during the critical period. For years, all field employees, whether part-time or full-time, have received appraisals annually on their anniversary dates, and merit increases based on their appraisal scores.[8] Employees are evaluated in five categories: attendance, documentation, response criteria, professionalism and professional development. Supervisors assign the employees numerical ratings for each category. The Employer's witnesses testified that these categories contain subjective, as well as objective, elements. For example, when rating an employee for attendance, in addition to reviewing the number of absences and tardies, the supervisor considers, among other things, how much in advance the employee reports the absence and tardiness. Similarly, when rating an employee for documentation, in addition to reviewing whether the employee fully completes patient care records, the supervisor considers the legibility and quality of the narrative on the records on the records the employee completes. Once the supervisor awards the employee numerical ratings for all categories, a total is computed. The employee receives a merit increase of a percentage of the employee's hourly pay within a set range based on that total.

[8] Although Paramedic Crew Chief Zavalza testified that part-time employees are evaluated biannually, Human Resources Manager Henry testified that all employees, whether full-time or part-time, are evaluated annually. However, both testified that whereas full-time employees receive merit increases every year, part-time employees receive them every other year.

At the beginning of each fiscal year, the Employer decides on the range for merit increases for the year. The Employer's fiscal year begins on July 1 and ends on June 30 of the following year. Thus, for the fiscal year that ended June 30, 2013, the range of merit increases was set at from 0% to 1.5%. Employees who received below a certain score on their appraisals received no merit increase, whereas employees with scores above that minimum received increases of varying percentages within the set range. Although the Employer's records show that many employees received the maximum 1.5% increase in the fiscal year ending June 30, 2013, the records show that many also received increases ranging between .9% and the maximum 1.5%.

Several Employer witnesses testified that while the Employer strives to give employees increases on their anniversary dates, it usually doesn't succeed, and employees frequently receive merit increases months after their anniversary dates. Although supervisors are supposed to complete appraisals so that field employees receive their merit increases in the first pay period following their anniversary dates, they are often late, according to Human Resources Manager Henry. While often late, the Employer's witnesses uniformly testified that the Employer's practice has always been to pay the employees the merit increases retroactive to their anniversary date.

2. Merit Increases During the Critical Period

After the Employer became aware of the petition, which was filed on May 9, it decided to defer merit increases until after the election. It was also decided to continue with the appraisals, even determine the amount of the merit increases for each employee, and share the appraisal with the employee, but not the amount of the increase until after

the election. The Employer's goal was to make known to employees within a month of the election the amount of increase the employee would be receiving.

3. The Employer's Communication Regarding Merit Increases

On May 30, Operations Manager Ken Kaufman notified all employees by email of the Employer's decision to defer merit increases. When employees logged in to the Employer's intranet, which they had to do regularly, to record their time, among other things, they received Kaufman's message. The subject line was "Evaluations/Merit Increases." Kaufman wrote:

> Some of you have been asking questions about your evaluations, which are supposed to take place around an employee's anniversary date. The questions have revolved around not just the evaluations but also any merit increases that might be awarded based on performance.
>
> With the filing of the petition by AFSCME, we are in what is sometimes called as a critical period, when employers are not supposed to make any changes that might influence the outcome of the election. If we implement the raises, we could be accused of interfering with the election.
>
> As a result, we have decided that, while we will complete the evaluations, we will defer determinations as to merit increases, which are discretionary, until after the election. Employees who were granted merit increases before the petition was filed will have them applied to the first full pay period following their anniversaries, as is the customary practice.
>
> If you have any questions about this decision, please feel free to contact me.

Kaufman's email went to every employee.

Employees did not receive any written communication regarding the status of merit increases during the election campaign besides Kaufman's email. Employee Ausman testified that he understood from Kaufman's email that wages would be frozen until after the Union election, and that he did not know what would happen after the

election. At meetings the Employer held with employees before the election, Divisional Manager Cloward explained to employees that if the Union won the election, the impact on wages would depend on discussions with the Union.

C. Threatened Disclosure of Employees' Names and Addresses to NEMSA (Objection No. 3)

In support of this objection, the Union presented evidence regarding a communication from Kaufman to employees that incorrectly identified the Union as NEMSA. About a month after the petition was filed, and about two weeks before the ballots were mailed, Kaufman sent an email to employees explaining the Board's requirement that the Employer was obligated to provide the Board with the names and addresses of all eligible voters, commonly known as the Excelsior list, which is then made available to the Union. On June 6, in a memorandum addressed to all employees, the subject of which was "Confidential Information," Kaufman wrote:

> The National Labor Relations Board has ordered an election for field employees to decide whether you want to be represented by UEMSW/AFSCME, AFL-CIO for purposes of collective bargaining. We still do not know the date of the election. However, now that the election has been ordered, federal law requires that Bowers provide your name and address to the National Labor Relations Board no later than June 7, 2013 so that the NLRB may give this information to NEMSA. WE DO NOT GIVE THIS INFORMATION OUT VOLUNTARILY BUT ARE REQUIRED BY TO DO SO BY LAW. This is just one example of how your personal privacy and confidentiality may be compromised with a union. If the union wins the election, the union has the right to ask for, and, if it is requested, then Bowers will have to give the union, information that you might want to keep confidential. This information could include your rate of pay, performance evaluations, disciplinary records, and records related to requests for leaves of absence (including leaves of absence you might request to care for family members or for your own personal reasons). We know UMS/AFSCME has already obtained a copy of a Bowers employee list and has been contacting employees at home. Once UEMSW/AFSCME has the new list, we expect that they will continue to do so. You have a legal right to tell them no thanks or not interested or t bother me at home. After all, it is your

> decision whether you want to invite someone into your home. I apologize for any inconvenience this may cause. Please remember that Bowers does not have a choice in this matter and we are required by law to provide this information to the NLRB.

Employee Ausman testified that he was upset to learn from Kaufman's memorandum that his contact information would be given to NEMSA because he knew "nasty things" about NEMSA from his family and co-workers. Among other things, he heard NEMSA was corrupt, that NEMSA dues weren't being used appropriately, and that the head of NEMSA bought a Hummer for his wife. Paul Cloward, Divisional Manager, testified that the reference to NEMSA was "an accident" that was "an outtake from a similar information shared in the prior year's campaign" when in 2012 NEMSA sought to represent communications staff. Cloward also testified that no employee asked him about the reference to NEMSA, and that he was not aware of it until recently.

D. The Countdown Clock (Objection No. 4)

In support of this objection, the Union presented evidence that the countdown clock on the Employer's website incorrectly stated that the deadline for returning ballots was over 18 hours earlier than it actually was. After the Employer learned of the Union's petition, the Employer created a website, www.bowerschoice.com, which it publicized widely, to communicate with employees regarding the election and its view of it. The Employer also maintained a bulletin board where it posted all the information about the union campaign, including the Board's Notice of Election. Cloward testified that, in addition to a video of him, the website contained contact information for the management team, as well as every document the Employer shared with employees about the union campaign, and every communication received from the NLRB.

Cloward further testified that in order to keep the website interesting, relevant and current, sometime in June a countdown clock was added, purporting to count down to the deadline the precise time ballots were due in the Region. With regard to the accuracy of the countdown clock, Cloward testified that when it was first posted on the website, it needed an adjustment, and he arranged for it to be corrected. No other evidence was presented about the accuracy of the countdown clock until the day before ballots were due in the Region. Union Organizer Lundy testified that the evening before ballots were due, specifically at 10:50 p.m., on Sunday, July 14, he noticed that the countdown clock incorrectly stated that ballots were due in 1 hour and 9 minutes, or at 11:59 p.m.[9] In fact, ballots were not due in the Region until the close of business the following day, or 18 hours and 10 minutes later. Accordingly, at 1:46 a.m. on July 15, the countdown clock showed that the time to vote had run out.[10] No evidence was presented that the Employer knew of the problem with the countdown clock or that any employees saw the countdown clock with incorrect times.

E. Solicitation of Grievances (Objection No. 5)

In support of this objection, the Union called EMT Ausman. Ausman testified that he attended a meeting about the election conducted by the labor consultant hired by the Employer. Before the meeting started, his supervisor, Paramedic Crew Chief Zavalza, asked if there were any questions. According to Ausman, Zavalza asked if there were any concerns and asked what the company could do to change things and improve things. Before the union campaign, he could not recall being asked by any supervisor or manager what the company could do to improve things. On the other hand, Zavalza testified that he attended several meetings conducted by the labor consultant. He further

[9] The record contains a screenshot of the countdown clock on July 14 at 10:50 p.m.
[10] The record contains a screenshot of the countdown clock at this time as well.

testified that although he did not ask employees at these meetings either how the company could improve things or what their issues were, he did ask employees if they had any questions. He said that when he greeted the employees as they went into the meetings, he explained that the consultant's purpose was to explain labor laws, and that if employees had any questions, they should ask the consultant.

F. Conferring A Benefit During The Critical Period

Although not specifically alleged as an objection, the Union presented evidence that during the critical period employees were given lunch breaks more frequently than either before the petition was filed or after the election. In support of this unalleged objection, EMT Ausman testified that before the petition was filed, he received lunch breaks and rest breaks two out of five days per week. He said that it was "kind of hit or miss."[11] By contrast, after the petition was filed, and before the election, he received breaks with greater frequency. After the election, he again received breaks two days out of five but observed that the call volume had skyrocketed.

V. Discussion

Introduction and General Principles

It is well settled that "[r]epresentation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." Lockheed Martin Skunk Works, 331 NLRB 852, 854 (2000), quoting NLRB v. Hood Furniture Co., 941 F.2d 325, 328 (5th Cir. 1991). Additionally, the burden is on the objecting party to establish evidence in support of its objection. Waste Management of Northwest Louisiana, Inc., 326 NLRB 1389 (1998).

The Board's objective standard for evaluating objectionable conduct is whether

[11] In order to take a lunch or rest break, employees have to first receive the dispatcher's permission.

such conduct reasonably tends to interfere with the employees' exercise of their free choice. Cambridge Tool & Manufacturing Co., 316 NLRB 716 (1995). In determining whether misconduct warrants setting aside an election, the Board considers the number of violations, their severity, the extent of their dissemination and the size of the unit. Bon Appetite Management Co., 334 NLRB 1042, 1044 (2001). Dissemination is not presumed, and the objecting party bears the burden of proving it. Sanitation Salvage Corp., 359 NLRB No. 130, slip op. at 1 (June 5, 2013).

A. Objection Nos. 1 and 2 (Withholding of Benefits and Implied Promise of Benefits)

As a general rule, during an election campaign, an employer is required to continue to grant benefits, including wage increases, that it would otherwise have granted employees just as it would have done in the absence of a union campaign. The standard, as articulated by the Board, is "an employer should act as if no union were in the picture." Kauai Coconut Beach Resort, 317 NLRB 996, 997 (1995). Withholding benefits during a union campaign is a risky proposition. An employer may not blame the union for its failure to grant a wage increase during a union campaign. J.P. Stevens & Co., 239 NLRB 738 (1978).

The only exception to the requirement that benefits must continue is that, under certain circumstances, an employer is permitted to defer benefits. An Employer may lawfully postpone wages or benefits during an election campaign only if it assures the employees:

> (1) the benefits will be granted regardless of the election results,
> (2) the "sole purpose" of the postponement "is to avoid the appearance of influencing the election outcome," and
> (3) the "onus for the postponement" is not placed upon the union.

Earthgrains Co., 336 NLRB 1119, 1126 (2001). Thus, an employer does not act unlawfully when it tells employees "that expected benefits are to be deferred pending the outcome of an election in order to avoid the appearance of election interference." Kauai Coconut Beach Resort, supra. When an employer suspends wage increases during a union campaign, the employer must make it clear that the increases are being deferred, not cancelled, and that they are being "put on hold," "in order to avoid attempting to influence employees' votes." While there are no "magic words" an employer must use, the employer's promise to postpone increases must be "unqualified and unconditional" and must make clear to the employees that wage increases are not being postponed in order to influence employees' to vote against the union. Sam's Club, 349 NLRB 1007, 1013 (2007). Accord, American Girl Place, 355 NLRB No. 84, slip op. at 2, 15-17 (August 13, 2010).

I find that the Employer's May 30 email to employees regarding the merit increases satisfies the Board's criteria for lawfully deferring wage increases. In its email, the Employer did not advise employees that it was cancelling or permanently withholding the increases. Rather, it used the word "defer" which denotes a temporary hiatus or postponement, and does not convey a notion of finality. Unlike the employer in American Girl Place, supra, the Employer's email did not use the term "suspend" which employees might reasonably believe casts doubt that an increase will ever be restored. Similarly, unlike the employer in Promedica Health Systems, 343 NLRB 12351, 1353 (2004), the Employer's email here did not tell the employees that the wage increase would not be granted "at this time" or that employees would not be getting their

anticipated raise because the petition had been filed. All the Employer wrote was that the wage increases would be deferred.

Not only did Kaufman's email not use words conveying the notion that elimination of the wage increases was final or permanent, but the email did not blame the Union for the deferral. Rather, in the email the Employer attributed the decision to defer increases solely to its desire not to influence the outcome of the election. Kaufman wrote: "If we implement the raises, we could be accused of interfering with the election." Kaufman's concerns are not illegitimate because the Board frequently infers that benefits granted during the critical period of an election are coercive. E.g. United Rentals, Inc., 349 NLRB 190 (2007). Where, as here, the amount of the increase has an element of discretion, the likelihood that the increases would be considered coercive is even greater.

In support of its position that Kaufman's email is coercive, the Union cites Grouse Mountain Lodge, 333 NLRB 1322 (2001). In that case the Employer told the employees that it "could not implement any new benefits while union organizing efforts were active." Thus, unlike the Employer here, the employer in the Grouse case blamed the union's organizing campaign for the decision not to grant to benefits. Nor did the employer in the Grouse case specify that the only reason for delaying the implementation of new benefits was to avoid the appearance of influencing the outcome of the election. By contrast, the only reason Kaufman gave for the delay was to avoid being accused of election interference.

The Union also cites Earthgrains Co., supra, in support of its position that Kaufman's email is grounds for setting aside the election. In that case, the Employer

gave several reasons for not granting wage increases during the critical period. In addition to telling employees that it was denying the increase because the Union could accuse the Employer of trying to buy votes, it assured the employees that if they rejected the Union, they would receive the increase but if they voted for the union, their pay would have to be negotiated. Thus, instead of assuring employees that they would be in the same position with regard to the wage increase after the election regardless of the outcome of the election, the Employer expressly stated that the employees could lose the increase permanently if they voted for the Union.

The Employer here advised employees that the merit increases would be deferred but did not expressly advise employees that the election would have no impact on the merit increases. While the Employer did not expressly state that the wage increases would be implemented retroactively regardless of the outcome of the election, the clear implication of telling the employees that increases would be deferred conveys that impression. That conclusion is reinforced by the Employer's past practice when granting merit increases, which was to grant them late but always to grant them retroactively. The communications among the Employer's managers regarding deferral of the wage increases during the critical period confirm that the Employer's intention was to grant increases retroactively regardless of the outcome of the election.

Unlike the employer in the Grouse case who blamed the Union for its failure to grant the wage increase by telling the employees that the wage increase "could not be implemented during the Union campaign," the Employer here simply told employees that increases would be deferred. Moreover, the Employer's email did not contain any suggestion that if employees voted for the Union, they might not ever receive their merit

increases. In the Earthgrains and Promedica cases, by contrast, the employer stated that pay would be subject to negotiation if the union won.

The Union relies on Cloward's testimony that he told employees in meetings that future wages would be determined only after negotiations with the Union, if the Union wins the election to support its reliance on the Earthgrains case. Not only is Cloward's statement lawful, but unlike the employer in the Earthgrains case, Cloward's statement was not made in the context of a discussion about merit increases. The record contains no evidence that either Cloward or anyone else even mentioned merit increases at the meetings when he told employees that wages would be negotiated with the Union, if the Union won the election.

In short, while the Employer's email advising employees of its decision to defer the merit increases was brief, and did not expressly state that merit increases would be granted retroactively regardless of the outcome of the election, it did not communicate the possibility that employees might not ever receive their regular merit increases. In the email the Employer notified employees that increases were going to be deferred, not withheld or cancelled, and the Employer correctly advised the employees that its sole purpose in deferring merit increases was to avoid interfering with the election. Thus, while the email is imperfect, the Union has failed to meet its burden of proving that this email warrants setting aside the results of the election.

B. Objection No. 3 (Threatened Disclosure of Excelsior List to NEMSA)

In support of this objection, the Union relies on the Employer's email describing the Board's procedure for providing the Union with the employees' names and addresses (the Excelsior List) that at one point incorrectly identifies the Union as NEMSA. Without providing

any authority, the Union argues that by telling employees that their names and addresses would be given to NEMSA, the Employer undermined the Union's support in the unit because the Employer made it appear that the Union caused an erosion employees' privacy rights and because the Employer advised employees that an assertedly corrupt union would obtain their names and addresses.

I find that the Employer's email regarding confidentiality that incorrectly identifies the Union as NEMSA does not constitute objectionable conduct. In Midland National Life Insurance, 263 NLRB 127 (1982), which was decided decades ago, the Board announced that it would not set aside elections based on false or misleading campaign statements. Here, most of what the Employer wrote in the email regarding the Excelsior List and its obligation to provide the Union with information requested about bargaining unit employees is true. Even if the Employer had misstated Board law, which it did not, that would not be grounds for setting aside the election. Virginia Concrete Corp., 338 NLRB 1182, 1186 (2003).

The Employer's incorrect identification of the Union as NEMSA is also not a basis for setting aside the election. The Board does not view confusion over the identity of a party to the election as a misrepresentation to be analyzed under Midland National Life Insurance, supra. Rather, the Board considers whether the misidentification rendered it unclear whether employees were confused over the identity of the labor organization seeking to represent them. Nevada Security Innovations, 337 NLRB 1108-1109 (2002). In the Nevada Security Innovations case, an affiliated local union referred to the petitioning union by a name that was different from, but somewhat similar to, the Union's actual name. In overruling the objection, the Board relied on the fact that the ballot, as well as the Notice of Election, referred to the petitioning union by its correct name. In this case, like the Nevada Security Innovations case, the ballot and the Notice

of Election correctly named the Union. Indeed, except for the one reference to NEMSA in the email, all of the Employer's communications referred to the Union by its correct name. Accordingly, the single reference to NEMSA in the email regarding confidentiality does not provide a basis for setting aside the election results.

C. Objection No. 4 (Incorrect time on Countdown Clock)

In this objection the Union argues that the election results should be set aside because the countdown clock on the Employer's website notified employees that ballots were due over 18 hours before they were actually due. False or misleading statements by a party, as explained *infra*, are not a basis for setting aside an election. Even when a party misrepresents Board actions, the Board does not find the misrepresentation objectionable because the misrepresentation is only one party's characterization of Board action, and the Board's actions speak for themselves adequately. TEB/LVI Environmental Services, Inc., 326 NLRB 1469 (1998). Only when Board documents are altered, and the forgery cannot be discerned, does the Board set aside an election. Mt. Carmel Medical Center, 306 NLRB 1060 (1992).

Applying these principles, I find that the incorrect time on the countdown clock does not warrant setting aside the election results. Viewed as a false campaign statement, the fact that the time on the countdown clock was incorrect does not afford a basis for setting aside the election. As the Board noted in the Nevada Security Innovations case, the controlling documents regarding Board elections are the Board documents, not a party's campaign statements. The Notice of Election, which was mailed to all employees along with the ballot, and also was posted on the Employer's bulletin board, as well as on the same website where the countdown clock was located, provided employees with sufficient notice of the correct time that ballots were due in the Region.

Although the Union did not provide evidence that any employees even saw the countdown clock, even if they had, it is unlikely that they would have been misled. The countdown clock stated that ballots were due at the Region's offices on Sunday, July 14, at 11:59 p.m. The standard for evaluating objections is an objective one, and the Board looks to whether the conduct would have reasonably interfered with employees' free choice. Cambridge Tool & Manufacturing Co., *supra*. Here, reasonable employees, even if they had seen the countdown clock, would not have relied on a clock stating that ballots were due at a federal government office so late in the evening, on a Sunday.

In support of its position that the incorrect time on the countdown clock constitutes objectionable conduct, the Union relies on, *inter alia,* Whatcom Security, 258 NLRB 985 (1981), a case in which a third party inadvertently locked one of the doors that provided access to the polling area for 50 minutes. The Board rejected a regional director's reliance on polling of nonvoters showing that the locked door actually prevented only two employees from voting. The Board held that reliance on subjective evidence from eligible voters is improper. Rather, where the election irregularity is an "essential condition of an election" and a determinative number of eligible voters fail to vote, the election should be set aside. The similarity between the Whatcom Security case and this case is that in both a determinative number of eligible voters did not cast ballots. However, in the Whatcom Security case, unlike this case, the irregularity concerned "an essential condition of the election." This case, by contrast, involves a single false statement about the time ballots were due in the Region. The Notice of Election, which was distributed to all employees, as well as posted, notified employees of the correct time. Accordingly, I recommend that Union's Objection No. 4 be overruled.

D. Objection No. 5 (Solicitation of Grievances)

In support of this objection, EMT Ausman testified that at the beginning of an anti-union meeting conducted by a labor consultant hired by the Employer, his supervisor, Paramedic Crew Chief Zavalza, asked him if he had any concerns and asked him what the company could do to improve things. However, Ausman testified that before the petition was filed, the Employer had never solicited grievances from him. Solicitation of grievances can constitute objectionable conduct. American Freightways, Inc., 327 NLRB 832 (1999). Evidence that a company generally asked for a second chance does not suffice. "Generalized expressions of this type, asking for 'another chance' or 'more time,' have been held to be within the limits of permissible campaign propaganda." To constitute objectionable conduct, the evidence must demonstrate that the Employer made a specific promise to remedy a particular complaint. E.g. Noah's New York Bagels, 324 NLRB 266, 267 (1997). Accord, American Freightways, Inc., supra.

The evidence presented by the Union, who has the burden of proving objectionable conduct, is insufficient. Ausman's testimony was denied by Zavalza, and I credit Zavalza because he did testified that he made the same statement to employees at the beginning of many meetings. Although Zavalza could not recall the specific meeting attended by Ausman, Zavalza testified that he attended several meetings and that he did not ask the employees before any of the meetings what the company could do to improve things. Rather, before each meeting started, he told the employees that if they had any questions about the election, they should pose them to the labor consultant at the meeting. The Union did not present any witness to corroborate Ausman. Considering that Zavalza did not deny that he asked employees if they had any questions (but told the employees to pose them to the consultant) and that he testified that he

made the same statement to employees at several meetings, Zavalza's testimony appears more credible.

Even if Ausman's testimony were credited, Zavalza's offer to "improve things," which is all Zavalza said, according to Ausman, is too general to provide a basis for overturning the election results. Ausman did not testify that Zavalza promised to remedy specific complaints. Like the evidence of the employer's conduct in the Noah's Bagel case, Ausman's testimony establishes only that the Employer generally offered to improve things, and the Board views this evidence as insufficient to warrant overturning election results. Thus, I recommend that Objection No. 5 be overruled.

E. Unalleged Objection (Conferring Benefits During the Critical Period)

The Union presented testimony that the Employer increased the frequency with which employees were permitted to take breaks during the critical period. This evidence is not related to any of the specifically alleged objections and was not presented to the Region by the Union when it filed its objections to the election. Because the Union did not present this evidence to the Region when it filed objections to the election, and it is not related to any of the specifically alleged objections, I cannot consider it. None of the objections concern conferring benefits during the critical period. While Objections Nos. 1 and 2 involve benefits, they involve the withholding of merit increases during the critical period, not the grant of benefits. Objection No. 6 is a catch-all for "similar coercive tactics," and the conferring of benefits would not be considered a "similar coercive tactic." Not only is the conferring of benefits, as testified to by Ausman, not similar to the withholding of benefits that is alleged in Objections Nos. 1 and 2, it is not similar to the threatened disclosure of Excelsior List to NEMSA that is alleged in Objection No. 3, the incorrect time on the countdown clock that is alleged in Objection No. 4, or the solicitation of grievances that is alleged in Objection No. 5.

More importantly, even assuming *arguendo* that the conferring of benefits is subsumed within one of the numbered objections, this evidence will not to be considered because the Union did not present it to the Region in support of any of its specifically alleged objections prior to the hearing. The Board does not consider evidence of misconduct unrelated to objections unless the

"objecting party demonstrates by clear and convincing proof that the evidence is not only newly discovered but was also previously unavailable." Rhone-Poulenc, Inc., 271 NLRB 1008 (1984). The Union did not proffer any evidence at the hearing that Ausman's testimony regarding the Employer's changed practice of granting breaks during the critical period was either newly discovered or previously unavailable. Accordingly, I recommend that this unnumbered objection and Union's Objection No. 6 be overruled.

VI. Summary of Recommendations

Having made the above findings and conclusions with respect to the Union's objections, viewing the alleged objectionable conduct both individually and cumulatively, and upon the record as a whole, I recommend that the Union's objections be overruled and that a Certification of Results be issued.

VII. Right to File Exceptions

Pursuant to the provisions of Section 102.67 and 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001.

Procedures for Filing Exceptions: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by the close of business on **November 1, 2013**, at **5:00 p.m. (EDT)**, unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically**. If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon

good cause shown, the Board may grant special permission for a longer period within which to file.[12] A copy of the exceptions must be served on each of the other parties to the proceeding, as well as to the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, select the E-Gov tab, and then click on the E-filing link on the pull down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

DATED at Los Angeles, California, this 18th day of October, 2013.

/s/ Jean C. Libby
Hearing Officer, Region 31
National Labor Relations Board

[12] A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.