

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3

ORCHARD MANOR ALP, LLC,	:	
d/b/a Orchard Manor Rehabilitation & Nursing Center	:	
	:	
Employer	:	
	:	
and	:	Case No. 03-RC-110739
	:	
CSEA, LOCAL 1000, AFSCME, AFL-CIO	:	
	:	
Petitioner	:	

**EMPLOYER’S EXCEPTIONS TO HEARING OFFICER’S REPORT ON
OBJECTIONS TO ELECTION with supporting argument included**

Orchard Manor ALP, LLC d/b/a Orchard Manor Rehabilitation & Nursing Center, the Employer in the above-captioned matter (hereinafter, “Orchard Manor”), pursuant to 29 CFR § 102.69(d)(1)(iii) (relating to exceptions), hereby files its Exceptions to the Hearing Officer’s Report on Objections filed in this matter on November 22, 2013 (hereinafter “Report”), with supporting argument included (no separate supporting brief is being filed). Orchard Manor excepts to the following particulars:

1. To the Report’s statement of undisputed facts relating the July 6, 2010 Minute of Board Action attached to Exhibit J-1 (Report at page 3). The Minute of Board Action says what it says and the Report’s addition of

facts to the Record is improper and unsupported by the Record. The Report is incorrect when it states that: “it is undisputed that a duly constituted Board subsequently ratified and adopted the two member Board’s original appointment.” Exhibit J-1 makes no such statement of fact and there is no such statement of fact in the Record. Orchard Manor’s position on this question was stated in its Supporting Information for Objections to Election, filed October 17, 2013, pursuant to extensions of time granted because of the Government Shutdown, which the Report, as supplemented by its October 29, 2013 Reconfirmation of Objection No. 1 to Election and Request for Continuance of Hearing, submitted after the Regional Office provided Orchard Manor with a copy of the Minute of Board Action after Orchard Manor was required to submit its Supporting Information. The Report’s statement that Orchard Manor’s position is not supported by any decision of any reviewing tribunal (Report at page 3) ignored and overlooked the citation in the October 17, 2013 submittal (at page 2) to Garcia ex rel. NLRB v. Fallbrook Hospital Corp., 2013 WL 3368979 at *13 (S.D. Cal., Case No. 13-CV-1159, June 7, 2013), *citing* Technicolor Govt. Servs. v. NLRB, 739 F.2d 323, 327 (8th Cir. 1984), as well as the statements of the former Solicitor General of the United States addressed to the Supreme

Court of the United States in the New Process Steel case questioning the ability of the Board to ratify en masse any such prior actions, which were part of the Record in this matter pursuant to 29 CFR § 102.69(e)(1)(i).

2. To the findings and conclusions relating to waiver of Objection No. 1 in the Report (at page 4-5). The Report ignores the rulings of the Supreme Court of the United States in Freytag v. CIR, 501 U.S. 868, 878 (1991), and the discussion of the waiver issue in Garcia ex rel. NLRB v. Fallbrook Hospital Corp., 2013 WL 3368979 at *13 (S.D. Cal., Case No. 13-CV-1159, June 7, 2013), which were noted in Orchard Manor's October 17, 2013 submittal, as well as the determination by the Regional Director in her own Order Directing Hearings on Objections and Notice of Hearing, signed on October 30, 2013, that a hearing was required for the disposition of this Objection, even after the Union argued that it was waived in its Response of October 3, 2013 to Orchard Manor's Objections. Any waiver of a right to a pre-election hearing, whether by a Stipulated Election Agreement or otherwise, does not bar Orchard Manor from contesting the authority and appointment of the Regional Director in Objection No. 1. The Regional Director did not so find; and, IIOOF Home of Ohio, Inc., 322 NLRB 921 (1997) (which deals with the preservation of unit clarification issues), cited in the Report at page 6, is

not otherwise. The Report concedes (at page 6) that there is no contrary Board precedent.

3. To the findings and conclusions (Report at page 4) that the Regional Director's appointment was "reaffirmed by a Board that constituted a quorum" and "that all actions taken in this matter occurred following this re-affirmation." The Minute of Board Action says was it says and does not use the term "reaffirm." The Report's conclusion is an error of law that fails to consider the relevant authority, including that presented by Orchard Manor. The Union and the Regional Director presented no evidence on this Objection other than the Minute of Board Action. The conclusion is contrary to requirements for ratification of prior actions established by the Supreme Court of the United States in FEC v. NRA Political Victory Fund, 513 U.S. 88, 98 (1994), as noted in Orchard Manor's October 29, 2013 submittal, which was ignored and overlooked in the Report. The post-hoc ratification by a different Board of prior appointments done without legal authority by a prior Board is inconsistent with the Appointments Clause, Art. II, Section 2, Cl. 2, of the U.S. Constitution and with the requirements of Section 4(a) of the NLRA, which require the Board to actually appoint Regional Directors and precludes appointments or ratification of appointments prior to the date the Department Head (the

Board) is authorized by law to make the appointment, where, as here, the prior actions involved were *void ab initio*. See: FEC v. NRA; New Process Steel, L.P. v. NLRB, 130 S.Ct. 2635 (2010); Noel Canning v. NLRB, 705 F.3d 490, 493 (D.C. Cir. 2013) (order under review would be *void ab initio*) (analyzing New Process Steel), *cert. granted and pending as Case No. 12-1281*, 133 S.Ct. 2861 (2013).

4. To the conclusion and findings in the Report (at page 5) presuming that any agreement entered into by Orchard Manor provided that the Regional Director involved in this matter had the authority to take any further action with respect to this matter and that Orchard Manor was required to protest any and all actions on the Union's Petition in order to preserve the issue of the Regional Director's authority. Such findings are not supported by the Record and are contrary to law, *supra*.
5. To the Report making any recommendation on Objection No. 1, since the Hearing Officer (Report at page 4) stated that he had "no authority, or inclination, to rule that a personnel action taken by an undisputed duly constituted Board was improper." On November 5, 2013, Orchard Manor requested that all further actions by the Regional Director in the matter be stayed and was advised by the Board's General Counsel that the matter was referred to the Board for determination (Tr. 15-16). The

Hearing Officer stated that Board action granting the stay would nullify his Report (Tr. 16). Orchard Manor pressed its objection to further proceedings at the Hearing (Tr. 16). Orchard Manor notes that the Report (at page 1 FN1) and the October 30, 2013 Order Directing Hearing on Objections direct Orchard Manor to file its Exceptions with the Board rather, as stated in 29 CFR § 102.69(d)(1)(iii) with the Regional Director. The Regulation requires the Regional Director to “decide the matter upon the record or make other disposition of the case.” The Regulation would present the Regional Director at issue with the question that Hearing Officer stated he had no authority to determine. Orchard Manor is filing these Exceptions both with the Board and with the Regional Office as a precaution.

6. To the Report’s conclusion that Objection No. 1 is without merit (Report at page 5). Objection No. 1 should be sustained for the reasons stated in Orchard Manor’s submitted transmittals on Objection No. 1, there being no additional evidence on the issue in the Record and because it is correct as a matter of law for the reasons stated in the transmittals in the Record.
7. To the Report’s referral of Objection No. 1 to the Regional Director for determination pursuant to 29 CFR § 102.69(d)(1)(iii). The question of the authority of the Regional Director to take any further action in this

matter is currently before the Board and the Board should determine the issue in the first instance as indicated by the Report (at page 4-5).

8. To the Report's findings and conclusions with respect to Objection 2 as to the whether the September 17, 2013 Facebook post (Report at page 6) (Exhibit E-2 at page 20), i.e., 2 days before the Election held on September 19, 2013, constituted misconduct by the Union that requires a re-run given the closeness of the election results. The Hearing Officer's finding that the post did not constitute an objectionable threat is not supported by the Record. The Report's reliance (at page 9) on Underwriters Laboratories, 323 NLRB 300 (1997) and Pacific Grain Products, 309 NLRB 690 (1992) is misplaced and ignores and overlooks the distinguishing facts in this case, made plain in the post, that Orchard Manor was alleged to have already taken such action against Union supporters that was known to the electorate being addressed; and, ignores the principle that conduct is objectionable where, as admitted in the Report (at page 8 – "Although, the Petitioner is legally responsible for Frasier's September 17 posting...") it comes from the Union, if it has a tendency to interfere with employees' freedom of choice. Cedars-Sinai Medical Center, 342 NLRB No. 58 (2004). Since the election conducted on September 19, 2013 was a close one, even minor misconduct cannot

270, 278-279 (1973) (finding that Unions and Employers must be held to similar standards of conduct under the Act) (also holding that any Union misconduct that interferes with employee rights to refrain from union activities does not comport with “free and fair choice of bargaining representative” principles inherent in Section 9 of the Act). The parties stipulated (Tr. 13) that, if there was something objectionable on the site, that there would have been sufficient dissemination that it could have arguably impacted a determinative number of voters. The Record includes testimony that the post was seen by Orchard Manor employees and had effects on voting (Tr. 85, 99-100). The kind of statements involved in the FACEBOOK post is inherently coercive. Underwriters Laboratories, Inc. v. NLRB, 65 F.3d 176 (9th Cir. 1995); Valley Bakery, Inc., 1 F.3d 769 (9th Cir. 1993).

10. To the Report’s finding (Report at page 6) that the FACEBOOK page was administered only by Brian Cornelius. The parties’ Joint Stipulation states it was administered by Jill Arsencio, a CSEA communications specialist, and Mr. Cornelius.
11. To the Report’s findings and conclusion (Report at page 8) that it would be illogical that any employee would read the post to be a statement of fact. This is not supported by the Record, which includes undisputed

evidence that employees were affected by the post and the statement by the witness who made the post that it was an accurate statement of fact. This is also inconsistent with prior decisions, *supra*, that such an inference would not be illogical where, as here, employees have reason to believe that the employer had already done such acts, which the post here plainly advises to be the case and which the witness who made the post confirmed in her testimony (Tr. 145, ll. 2-19: “Q: Did you believe that was accurate? A. Yes.”).

12. To the Report’s finding and conclusion that the FACEBOOK post did not constitute objectionable conduct sufficient to require a re-run of the election (Report at page 9).
13. To the Report’s conclusion (at page 6) that none of the conduct identified by Orchard Manor in its Objection No. 2 warrants setting aside the election.
14. To the Report’s conclusion (at page 8) that Midland National Life Ins. Co., 263 NLRB 127 (1982) applies to the determination of this case. As noted in NLRB v. Enterprise Leasing Co. Southeast, LLC, 722 F.3d 609, 617 (4th Cir. 2013), the Board itself has excepted from the application of the Midland National Life presumption threats such as those involved in this case. 263 NLRB at 133.

15. To the Report's conclusion (at page 8) that Midland National Life Ins. Co., 263 NLRB 127 (1982) applies to the determination of this case. The Report overlooked or ignored the further exception to the Midland National Life presumption arising from the 6th Circuit's test in NLRB v. St. Francis Healthcare Centre, 212 F.3d 945 (6th Cir. 2000); *see also*: NLRB v. United Steel Service, Inc., 159 Fed.Appx. 611 (6th Cir. 2005). The Record here supports that, if the St. Francis test were applied, the facts meet the requirements of that test for a re-run of the election, since the post occurred on a FACEBOOK page two days prior to election, the employer could not reasonably respond, the source of the threat is admitted to be a Union-sponsored and controlled information site, and there is undisputed evidence that employees were affected by the post.
16. To the Report's conclusion (at page 8) that Midland National Life Ins. Co., 263 NLRB 127 (1982) applies to the determination of this case. The Report should have recognized and applied the principle that an election can be set aside under the facts of this case even if the alleged misconduct does not rise to the level of an unfair labor practice where, as here undisputed, it has a probable effect upon employee actions at the polls. *See*: NLRB v. Ky. Tenn. Clay Co., 295 F.3d 436, 441-442 (4th Cir.

2002), *citing* NLRB v. Urban. Tel. Corp., 499 F.2d 239, 242 (7th Cir. 1974); NLRB v. Zelrich Co., 344 F.2d 1011, 1015 (5th Cir. 1965).

17. To the Report's conclusion (at page 8) that Midland National Life Ins. Co., 263 NLRB 127 (1982) applies to the determination of this case. The Report should have recognized and applied the principle in NLRB v. Savair Mfg. Co., 414 U.S. 270 (1973) and NLRB v. A.J. Tower Co., 329 U.S. 324 (1946) that any Union misconduct that interferes with employee rights to refrain from union activities guaranteed by Section 7 of the Act does not comport with the principle of "free and fair choice of bargaining representative by employees" that is inherent in Section 9(c)(1)(A) of the Act.
18. To the Report's conclusion (at page 18) that Orchard Manor's Objection No. 2 lacks merit and should be overruled.
19. To the Report's recommendation (at page 18) that a Certification of Representative issue.
20. To the failure of the Hearing Officer to consider the entire Record, including the content of the Objections and the Supplements thereto, in making his Report, contrary to the requirements of 29 CFR § 102.69(e)(1)(i) (defining the contents of the Record).

DATED this 6th day of December, 2013.

Respectfully submitted,

BY: 

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Certificate of Service

I, Bruce G. Baron, certify that I have served this 6th day of December, 2013 a true and correct copy of the foregoing attached EMPLOYER'S EXCEPTIONS TO HEARING OFFICER'S REPORT ON OBJECTIONS TO ELECTION UPON THE FOLLOWING

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