

Ryder Memorial Hospital and Union Insular de Trabajadores Industriales y Construcciones Electricas, Inc., Petitioner. Case 24–RC–8370

September 28, 2007

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

The National Labor Relations Board, by a three-member panel, has considered objections to an election held April 23, 2004, and the hearing officer's report (attached as appendix B) recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement and in four units, designated as units B, C, D, and E, respectively. The tally of ballots for unit C shows 181 for and 88 against the Petitioner, with 1 void ballot and 39 challenged ballots, an insufficient number to affect the results. The tally of ballots for unit E shows 164 for and 101 against the Petitioner, with 49 challenged ballots, an insufficient number to affect the results.¹

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings² and recommendations as explained below, and finds that a certification of representative should be issued for units C and E.

This case involves, inter alia, an election objection based on a party's distribution of an altered sample ballot during its preelection campaign.³ For the past 25 years, the Board, on a case-by-case basis, has examined allegedly objectionable altered sample ballots to determine whether they would have a tendency to mislead voters into believing that the Board favors one party over another in the election. As explained in detail below, we are today revising the Board's official election ballot, so that it will now include language that asserts the Board's neutrality in the election process and disclaims the Board's participation in the alteration of any sample ballot. As we believe that this disclaimer language will preclude any reasonable impression that the Board endorses

¹ In units B and D, neither election resulted in a majority of votes for the Petitioner, and the Regional Director certified the results of both elections in the absence of objections.

² The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

³ Emp. Objection 2 concerns both the defacement of Board election notices, discussed *infra*, and the Petitioner's distribution of an altered sample ballot.

a particular choice in the election, we will cease to evaluate altered sample ballots on a case-by-case basis.

The Board's Historical Treatment of Altered Sample Ballots

The Board's primary concern in cases involving altered sample ballots is that a party's reproduction and use of an official Board document as campaign propaganda might mislead employees into believing that the altered document represents an official statement of the Board and, consequently, that the Board endorses that party in the election. To address this concern, the Board initially adopted the position that if a party reproduced and *in any way* altered the Board's election ballot, the Board would set aside the election upon the losing party's objection. See *Allied Electric Products*, 109 NLRB 1270 (1954). Subsequently, in *SDC Investment*, 274 NLRB 556, 557 (1985), the Board determined that the *per se* rule adopted in *Allied Electric* failed to take account of employees' ability to recognize altered sample ballots as campaign propaganda and to evaluate them as such; consequently, the *Allied Electric* rule resulted in the needless invalidation of Board elections.⁴ Accordingly, the Board modified its approach, explaining that the critical inquiry in these cases is whether the altered ballot at issue "is likely to have given voters the misleading impression that the Board favored one of the parties to the election." *SDC*, 274 NLRB at 557. To aid it in its resolution of this question, the Board adopted a two-part analysis. The Board first examines whether the altered ballot on its face clearly identifies the party responsible for its preparation; if it does, the Board will find that the ballot is not objectionable, as the employees would know that the document emanated from a party and, consequently, they would not be led to believe that the party had been endorsed by the Board. If, however, the altered ballot does not on its face clearly identify its source, the Board further evaluates the nature and contents of the document to determine whether it would have a tendency to mislead employees into believing that the Board favors one party over another. *Id.* The Board in *SDC* stated that the second part of this standard would require a case-by-case analysis of the altered sample ballots. At the same time, however, the Board observed that a party desiring to

⁴ The Board's determination in *SDC* was premised on its decisions in *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), and *Riveredge Hospital*, 264 NLRB 1094 (1982), in which the Board held that it would no longer set aside elections on the basis of a party's misleading statements, or a party's misrepresentations of Board actions, respectively, made during election campaigns. The Board's holdings in those cases, in turn, were premised on the recognition that employees are "mature individuals who are capable of recognizing campaign propaganda for what it is and discounting [its claims]." *Midland*, 263 NLRB at 132 (citation omitted).

avoid the uncertainties inherent in such a case-by-case analysis could simply refrain from using altered Board ballots or, alternatively, clearly identify itself as the source of the altered ballot. *Id.*

The *SDC* Board may have expected that parties rationally would choose to avail themselves of one of those options rather than risk the possibility of a re-run election based on their use of unattributed altered ballots in their election campaigns. Subsequent experience, however, has not borne out that expectation. Following *SDC*, parties have continued to use unattributed altered sample ballots as campaign propaganda,⁵ and the Board and the courts have continued to find it necessary to scrutinize the documents and the circumstances of their distribution⁶ on a case-by-case basis. The ultimate result has been to draw out postelection litigation and to compromise the finality of Board elections.

In an effort to curtail altered sample ballot litigation, the Board in 1993 revised its official notice of election to include language expressly disavowing the Board's participation in the alteration of any sample ballot and proclaiming the Board's neutrality in the election process.⁷ Shortly thereafter, confronted with an election objection based on a party's defacement of the sample ballot contained within the notice of election, the Board, in *Brookville Healthcare Center*, 312 NLRB 594 (1993), concluded that the disclaimer language on the revised notice of election was sufficient to preclude a reasonable impression that the Board favors or endorses any choice in

the election, and that the *SDC* analysis would no longer be required in cases involving defacement of the notice of election (including the sample ballot portion of the notice).⁸

Notwithstanding the disclaimer language on the Board's election notices, parties have continued to file objections on the basis of altered sample ballots that have been disseminated to employees in connection with a party's preelection campaign. Those separately distributed sample ballots, in contrast to the sample ballot contained on the notice of election, often do not include the Board's disclaimer language. The absence of the disclaimer language on those sample ballots can be attributed, at least in part, to the graphical layout of the notice of election and the placement of the disclaimer language. Although the disclaimer appears in large, bold-print lettering, it is printed along the bottom of the Board's 14 by 25 inch notice of election, spanning all three of the panels constituting the notice.

The altered sample ballots examined by the Board in objections cases have usually been photocopies of the sample ballot contained on the middle panel of the Board's trifold notice of election.⁹ See, e.g., *Oak Hill*, supra; *Softitel*, supra; *Dakota Premium Foods*, supra; *3-Day Blinds*, 299 NLRB 110 (1990). Given the placement of the Board's disclaimer language on the election notice, photocopies of the sample ballot frequently either fail to capture any of the disclaimer appearing several inches below or, alternatively, incorporate only truncated portions of the disclaimer language, i.e., the words appearing on the middle panel of the election notice. See, e.g., *Oak Hill*, supra.

When the Board's complete disclaimer language does not appear on separately distributed altered sample ballots, we are concerned that employees might perceive the ballots to be official Board documents that endorse one party or another. Accordingly, the Board has generally been reluctant to conclude that the disclaimer language on the notice of election—which may not be immediately accessible to the employees as they are reading and evaluating the altered sample ballots—would preclude

⁵ See, e.g., *Oak Hill Funeral Home & Memorial Park*, 345 NLRB 532 (2005); *Softitel*, 343 NLRB 769 (2004); *Dakota Premium Foods*, 335 NLRB 228 (2001); *Systrand Mfg. Corp.*, 328 NLRB 803 (1999); *Comcast Cablevision of New Haven*, 325 NLRB 833 (1998); *Archer Services*, 298 NLRB 312 (1990); *Baptist Home for Senior Citizens*, 290 NLRB 1059 (1988); *BIW Employees Federal Credit Union*, 287 NLRB 423 (1987); *Worths Stores Corp.*, 281 NLRB 1191 (1986); *NLRB v. Streicher Mobile Fueling, Inc.*, 138 Fed. Appx. 128 (11th Cir. 2005); *Hospital General Menonita v. NLRB*, 393 F.3d 263 (1st Cir. 2004); *VIP Health Care Services v. NLRB*, 82 F.3d 1122 (D.C. Cir. 1996).

⁶ In *3-Day Blinds*, 299 NLRB 110, 111 fn. 7 (1990), the Board expanded the second step of the *SDC* analysis to include the examination of extrinsic evidence, including the circumstances under which an altered sample ballot was distributed.

⁷ The revised notice of election specifically states, in large, bold lettering:

WARNING: THIS IS THE ONLY OFFICIAL NOTICE OF THIS ELECTION AND MUST NOT BE DEFACTED BY ANYONE. ANY MARKINGS THAT YOU MAY SEE ON ANY SAMPLE BALLOT OR ANYWHERE ON THIS NOTICE HAVE BEEN MADE BY SOMEONE OTHER THAN THE NATIONAL LABOR RELATIONS BOARD, AND HAVE NOT BEEN PUT THERE BY THE NATIONAL LABOR RELATIONS BOARD. THE NATIONAL LABOR RELATIONS BOARD IS AN AGENCY OF THE UNITED STATES GOVERNMENT, AND DOES NOT ENDORSE ANY CHOICE IN THE ELECTION.

⁸ Specifically, the Board stated: "Given the prominence of the bold, large-print 'warning,' we think it extremely unlikely that an employee would overlook the disclaimer of Board involvement in any markings; in fact, we think an employee would be at least as likely to see the 'warning' as any marking such as [the "X" marking in the box indicating a choice for the petitioning union] in the instant case." *Id.*

⁹ The sample ballot that appears on the middle panel of the Board's notice of election is the official election ballot that will be used in the particular election at issue. The Board's regional offices type the names of the employer(s) and union(s) involved in an election onto the Board's ballot form, and then photocopy that official election ballot onto the notice of election.

any reasonable impression that the Board favors one party's cause in the election.¹⁰ Consequently, in cases involving separately distributed defaced or altered sample ballots, the Board has continued to apply the *SDC* analysis, while citing the disclaimer language contained on the notice of election as one factor that may be considered. See, e.g., *Oak Hill Funeral Home & Memorial Park*, 345 NLRB at 534; *Sofitel*, 343 NLRB 769, 770–771 (2004); see also *VIP Health Care Services v. NLRB*, 82 F.3d 1122 (D.C. Cir. 1996).

The Board's Revision of Election Ballots
and the Prospective Treatment of Altered
Sample Ballot Objections

Upon consideration of our prior efforts to deal with this issue, we are now persuaded that a simple modification to the Board's official election ballot will not only eliminate the need for a case-by-case evaluation of altered sample ballots—and thereby minimize postelection litigation—but will additionally accomplish the principal objective of ensuring that employees clearly understand that the Board does not endorse any choice in elections. Accordingly, we are revising the Board's official election ballot to include the following language, taken from the disclaimer language on the notice of election, which specifically asserts the Board's neutrality in the election process and disavows any Board involvement in the defacement or alteration of any sample ballots:¹¹

The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.

This explicit disclaimer language will appear on both the actual ballots cast by employees in the election and the sample ballot contained on the notice of election, and is in addition to the existing disclaimer language on the bottom of the notice of election. We believe that this modification to the ballot will effectively preclude any reasonable inference that the Board favors or endorses any choice in the election. That is, as any actual reproduction of the Board's sample ballot will necessarily include the foregoing disclaimer language, employees will not reasonably be misled into believing that the Board supports a particular party, whether or not the reproduced ballot contains additional markings or promotes that party's cause.¹² As such, the

case-by-case analysis of the nature and contents of altered sample ballots developed in *SDC* will no longer be required. Rather, we will decline to set aside elections based on a party's distribution of an altered sample ballot, provided that the sample ballot is an actual reproduction of the Board's sample ballot, i.e., that it includes the newly added disclaimer language.¹³

In our view, this approach has the advantage of establishing clear guidelines for parties who choose to utilize sample ballots in their preelection campaigns. In addition, and more importantly, this approach both will ensure that employees are not misled into believing that the Board favors a particular party to an election, and will reduce the likelihood of postelection litigation, thereby enhancing the finality of Board elections.

Application of the *SDC* Analysis to this Case

Although our revision of the Board's official election ballot and notice of election, explained above, renders unnecessary the application of the *SDC* two-part analysis in all future cases involving election objections based on altered sample ballots, the employees in the instant case did not have the benefit of those revised Board documents, and the altered sample ballot at issue here did not include the new disclaimer language. Accordingly, our resolution of this case, as well as any other arising before the new sample ballot and notice of election are in use, requires application of the standard articulated in *SDC*.

The relevant facts are fully set forth in the attached hearing officer's report. Briefly, during its preelection campaign, the Petitioner distributed flyers and other literature throughout the Employer's facility. Utilizing similar distribution methods, the Petitioner also distributed reproductions of the sample ballot appearing on the Spanish-language version of the Board's notice of election, with a bold handwritten "X" marked in the "Si" box and extending well beyond the borders of that box. Those reproductions included the seals of the United States and the Board. Also included were fragmentary excerpts, some of them cut off midword, from the Board's standard disclaimer language in the notice of election (see fn. 7, *supra*). That the document was a photocopy was apparent: the image was not centered on the page, and markings from a photocopy machine were visible. The altered sample ballots bore no indication of the party responsible for their preparation.

¹⁰ See, e.g., *Sofitel*, 343 NLRB 769, 770–771 (2004); but see *Dakota Premium Foods*, 335 NLRB 228, 228 fn. 2 (2001).

¹¹ We have appended to this decision a copy of the newly revised official election ballot (appendix A).

¹² In addition, the Board's neutrality in the election process will be further reinforced in the minds of the employees as they cast their ballots in the election, given that the disclaimer language appears on the official ballot itself.

¹³ Given the layout of the new ballot, it is highly unlikely that an altered sample ballot's failure to include the new disclaimer language will be inadvertent. Therefore, if a party distributes altered sample ballots from which the disclaimer language has been deleted, we will deem the deletion intentional, and designed to mislead employees. The distribution of such altered ballots will be treated as per se objectionable.

Because the preparer of the sample ballots at issue was not identified on the ballots, *SDC* and *3-Day Blinds* require an examination of the altered ballots' nature and contents and the circumstances of their distribution. For the reasons explained by the hearing officer, we agree with her finding that the altered sample ballots were not objectionable under that precedent. The Petitioner used the same methods to distribute the altered sample ballots as it used to distribute other campaign propaganda; only fragments of the Board's disclaimer language appeared on the ballots; and the fact that the document was a photocopy was apparent from the off-center image, the cut-off words, and the copy-machine markings. Additionally, the Employer posted the Board's official notice of election in several locations throughout the facility. The language in that notice disclaimed "any markings that you may see on any sample ballot" and announced the Board's nonendorsement of "any choice in the election." Although not dispositive of the second step of the *SDC* analysis,¹⁴ the disclaimers support a finding that the sample ballots are not objectionable. In these circumstances, the hearing officer properly recommended under *SDC* that this portion of Employer's Objection 2 be overruled. See *Oak Hill Funeral Home*, supra, 345 NLRB at 534–535 (overruling objection where the altered sample ballot was openly distributed by union, included only fragmentary language from the Board's election-notice disclaimer, and displayed an off-center image and stray marks characteristic of photocopied documents).¹⁵

Remaining Objections

In addition to the objection based on the Petitioner's circulation of the altered sample ballot, discussed above, at issue are three objections (Objections 1, 5, and the remaining portion of Objection 2) filed by the Employer to conduct allegedly affecting the results of the elections in units C and E. Employer Objections 1 and 5 allege that particular actions by the Board agents conducting the elections affected the election results. As described in greater detail in the hearing officer's report, these objec-

tions relate to the Board agents' handling of questions as to whether certain respiratory-department employees should have voted in unit C or E, and the related issue of whether the election in unit E was affected by a 45-minute hiatus during the voting period while a Board agent obtained additional ballots needed to complete the election. We adopt the hearing officer's recommendation to overrule both Objections 1 and 5 because, as the hearing officer found, the number of voters potentially affected was insufficient to affect the outcome of the elections, and because the record does not show any accompanying circumstances suggesting that the Board agents' conduct at issue otherwise affected the results of either election. See *Midwest Canvas Corp.*, 326 NLRB 58, 58 (1998); *Jobbers Meat Packing Co.*, 252 NLRB 41, 41 (1980).

The remaining portion of Objection 2 concerns the defacement of Board election notices. We agree with the hearing officer's finding that the defaced election notices do not require that the elections be set aside, because the inclusion of the Board's standard disclaimer language on the notices "preclude[s] a reasonable impression that the Board favors or endorses any choice in the election." *Brookville*, supra at 594. Accordingly, we adopt the hearing officer's recommendation to overrule this part of Objection 2.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Union Insular de Trabajadores Industriales y Construcciones Electricas, Inc., and that it is the exclusive collective-bargaining representative of the employees in the following appropriate units:

UNIT C

Included: All regular full time and part time professional employees including licensed practical nurses (LPN), respiratory therapy technicians, sterile supply technicians, X-Ray technicians, operating room technicians, pharmacy assistants, occupational therapy assistants, record room technicians, magnetic resonance technicians, medical emergency technicians, cardiovascular technician, orthopedic technician, sonograph technicians, CT scan technicians, dental assistant, ophthalmic technicians, doppler technicians, EKG technicians, and mammography technologists.

Excluded: All other regular full time, part time and managerial employees including the classification[s] included in other units, physicians, register[ed] nurses, supervisors and guards as defined in the Act.

¹⁴ See *Sofitel*, supra, 343 NLRB at 770–771.

¹⁵ Consistent with his dissenting opinion in *Oak Hill Funeral Home*, supra at 536–537, Chairman Battista would find the marked sample ballots here to be objectionable. The Chairman finds *Oak Hill* indistinguishable from this case. In both cases, the ballots were exact photocopies of a sample Board ballot and contained no extraneous markings except for the "X" in favor of the petitioning union. Although, in both cases, the documents containing the marked sample ballots included stray printer markings and a portion of the standard disclaimer language, there was a reasonable concern that an employee would believe that the "X" was on the original ballot, and would be misled into believing that the Board favored a vote for the union. Accordingly, here, as in *Oak Hill*, the Chairman would find that the sample ballots were objectionable.

UNIT E

Included: All regular full time and part time non-professional employees including clerks of the emergency room, operating room, medical record, admissions, laboratory, skilled nursing, X-Ray, physical therapy and home care areas, ward clerks, secretaries of the pharmacy, quality assurance, CT scan and MRI, home care, nutrition, nuclear medicine, maintenance, hospice, nursing, Ryder Academy, skilled nursing, chaplains, preventive medicine, laboratory, respiratory therapy, record room, resident projects, social service and Ryder home department, housekeeping employees, lunch room and dietary employees, transcribers, seamstress, laundry

employees, cooks, maintenance employees, dental assistance helper, assistant librarian, warehouse employees, orderlies, data entry employees of home care and materials department, lunch room, pharmacy and gift shop cashiers, drivers, teacher's assistants, record room codification officer[,] plumbers, painters, mechanics and cabinet ma[]kers.

Excluded: All other regular full time, part time managerial employees including the classifications set forth in other appropriate units, physicians, registered nurses, Human Resources office employees, secretaries to the executive director, administrator, legal counsel, medical director, and medical faculty supervisors and guards as defined in the Act.

APPENDIX A

	<p>UNITED STATES OF AMERICA National Labor Relations Board <small>FORM NLRB-707N2 (RC, RM, RD CASES) (4-84)</small></p>	
<p>OFFICIAL SECRET BALLOT For certain employees of</p>		
<p>Do you wish to be represented for purposes of collective bargaining by -</p>		
<p>MARK AN "X" IN THE SQUARE OF YOUR CHOICE</p>		
<p>YES</p> <input style="width: 40px; height: 20px;" type="checkbox"/>		<p>NO</p> <input style="width: 40px; height: 20px;" type="checkbox"/>
<p>DO NOT SIGN THIS BALLOT. Fold and drop in ballot box. If you spoil this ballot return it to the Board Agent for a new one.</p> <p>The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.</p>		

APPENDIX B

HEARING OFFICER'S REPORT AND RECOMMENDATION ON
CHALLENGED BALLOTS AND OBJECTIONS

Pursuant to a Stipulated Election Agreement approved by the Regional Director on March 26, 2004, an election by secret ballot was conducted on April 23, 2004 among four units of employees of the Employer,¹ to determine whether or not said

¹ Petitioner withdrew its original request in its Petition to represent a group of employees which covered the Employer's registered nurses (unit A). The remaining units, as described in the Stipulated Election Agreements, are:

UNIT B

Included: All regular full time and part time professional employees including pharmacists, chaplains, physical therapist, nutritionists, auxiliary service officers, programmers, quality assurance officers, accountant, teachers, medical technologist, health educator of CIS project, community specialist social workers, auditor, health advisor, nuclear medicine technologists, CPR Instructor and nursing school instructor.

Excluded: All other regular full time, part time and managerial employees including the classification included in other appropriate units, physicians, register nurses, supervisors and guards as defined in the Act.

UNIT C

Included: All regular full time and part time professional employees including licensed practical nurses (LPN), respiratory therapy technicians, sterile supply technicians, X-Ray technicians, operating room technicians, pharmacy assistants, occupational therapy assistants, record room technicians, magnetic resonance technicians, medical emergency technicians, cardiovascular technician, orthopedic technician, sonograph technicians, CT scan technicians, dental assistant, ophthalmic technicians, doppler technicians, EKG technicians, and mammography technologists.

Excluded: All other regular full time, part time and managerial employees including the classification included set forth in other units, physicians, register nurses, supervisors and guards as defined in the Act.

UNIT D

Included: All regular full time and part time business office clerical employees including billing clerks, account receivable clerks, general cashiers, auditors office, material office, accounting office secretaries, data processing system operator, receptionist, switch board operators, accounting clerk, sale specialist, registration clerks, sale specialists, registration clerk and data entry of the processing department.

Excluded: All other regular full time, part time employees including the classifications set forth in other appropriate units, physicians, registered nurses, Human Resources office employees, secretaries to the executive director, administrator, legal counsel, medical director, and medical faculty supervisors and guards as defined in the Act.

UNIT E

Included: All regular full time and part time nonprofessional employees including clerks of the emergency room, operating room, medical record, admissions, laboratory, skilled nursing, X-Ray, physical therapy and home care areas, ward clerks, secretaries of the pharmacy, quality assurance, CT scan and MRI, home care, nutrition, nuclear medicine, maintenance, hospice, nursing, Ryder Academy, skilled nursing, chaplains, preventive medicine, laboratory, respiratory therapy, record room, resident projects, social service and Ryder home department, housekeeping employees, lunch room and dietary employees, transcribers, seamstress,

employees desired to be represented for the purpose of collective bargaining by Union Insular de Trabajadores Industriales y Construcciones Electricas, Inc. (the Petitioner or the Union).

In accordance with the Stipulated Election Agreement entered into by the parties, the election in all four units was scheduled and held simultaneously on April 23, 2004, from 6 to 10 a.m. and from 2 to 6 p.m. at the Employer's lounge in the Hospital facilities in Humacao, Puerto Rico.

The tally of ballots, made available to the parties at that time, revealed the following:

Unit C

181 for the Petitioner
88 against the Petitioner
39 challenged ballots
1 void ballot.

Unit E

164 for the Petitioner
101 against the Petitioner
49 challenged ballots
0 void ballots.

As the Petitioner did not receive a majority of the votes cast in units B and D and the Petitioner did not file objections to the election, the Regional Director certified the results of the election.

On April 30, 2004, the Employer filed timely objections to the election and to conduct affecting the results of the election in units C and E.

Pursuant to the Stipulated Election Agreement, and in conformity with Section 102.69 of the Board's Rules and Regulations, the Regional Director caused an investigation to be made of the Objections to the election and on June 4, 2004, issued a Report and Recommendation on Objections overruling said objections in their entirety. The Employer filed exceptions to the Regional Director's Report and on January 26, 2005, the Board issued a Decision and Order Directing Hearing. In its Decision and Order, the Board adopted the Regional Director's Report on Objections except that it found that Employer's Objections 1, 2 and 5 raised substantial and material issues of fact and law that warranted the holding of a hearing and directed that the undeterminative challenged ballots in both units be resolved in order to determine the potential voter disenfranchisement issue raised by the Employer objections.

Consistent with the Board's remand, on May 4, 2005, the Regional Director issued a Supplemental Report on Challenged Ballots and Objections and notice of hearing resolving a sub-

laundry employees, cooks, maintenance employees, dental assistance helper, assistant librarian, warehouse employees, orderlies, data entry employees of home care and materials department, lunch room, pharmacy and gift shop cashiers, drivers, teacher's assistants, record room codification officer plumbers, painters, mechanics and cabinet markers.

Excluded: All other regular full time, part time managerial employees including the classifications set forth in other appropriate units, physicians, registered nurses, Human Resources office employees, secretaries to the executive director, administrator, legal counsel, medical director, and medical faculty supervisors and guards as defined in the Act.

stantial number of the challenged ballots and referring others to evidentiary hearing together with Objections 1, 2, and 5. The Employer again filed exceptions to the Regional Director's Supplemental Report. On June 6, 2005, the Regional Director treated the Employer's exceptions as a motion for reconsideration and issued a Second Supplemental Report on Challenged Ballots and Objections. On June 22, 2005, the Board issued a Decision and Order adopting the Region's findings and recommendations.

Pursuant to this Order, a hearing was conducted on July 6, 7, and 11, 2005, in San Juan, Puerto Rico. The Petitioner and the Employer were present at this hearing and, with representatives of their choosing, were afforded the opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues.

The findings, conclusions, and recommendations herein are based upon the undersigned's consideration of the record as a whole and observation of the demeanor of the witnesses.²

For the reasons discussed more fully below, I find that the revised tally of ballots in units C and E reflects that the Petitioner won the election in these units by substantially more votes than the number of potentially disenfranchised voters and therefore conclude that the delay and/or confusion allegedly caused by the Board agent's decision to challenge the respiratory therapy technicians and home care employees, as well as by the lack of sufficient ballots in unit E did not affect the outcome of the election herein. Accordingly, I recommend that Objections 1 and 5 be overruled. I also find and conclude that the defaced sample ballot did not lead employees to believe that the Board favored the Petitioner in the election, and recommend that Objection 2 be overruled. I also recommend that having overruled the Employer's Objections 1, 2, and 5, that a Certificate of Representative issue in favor of Petitioner in units C and E.

I. THE CHALLENGED BALLOTS AND FINAL VOTE TALLIES

Pursuant to the Second Supplemental Report on Challenged Ballots and Objections Supplemental Decision on July 6, 2005, and before the commencement of the hearing, 74 of the 88 remaining challenged ballots in units C and E were opened and counted and a revised tally of ballots issued. With regard to the remaining 14 challenged ballots, the parties stipulated on the day of the hearing that these individuals were not eligible to

² While I have addressed the credibility of specific witnesses with regard to certain matters more fully herein, the absence of a statement of resolution of a conflict in specific testimony, or the absence of an analysis of such testimony, does not mean that such did not occur. See, *ABC Specialty Foods, Inc.*, 234 NLRB 475 (1978); *Bishop and Malco, Inc. d/b/a Walker's*, 159 NLRB 1159 (1966); *Trumbull Asphalt Co. of Delaware v. NLRB*, 314 F.2d 382, 383 (CA 71962), cert. denied 374 U.S. 8098 (1963), citing as authority *U.S. v Pierce Auto lines*, 327 U.S. 515, 529 (1946). The Board has long held that the failure of the trier of fact to detail completely all conflicts in the evidence does not mean that this conflicting evidence was not considered and he is not compelled to annotate each such finding. *Borman, Inc.*, 273 NLRB 312 (1984); *Walker's*, supra. To the extent that the particular testimony of a witness does not conform to the facts recounted herein, that testimony is discredited and found unreliable.

vote in the election.³ Thus, the final revised tally of ballots reflects the following results:

Unit C

325 eligible voters
209 votes for Petitioner
102 against the Petitioner
311 Total Valid Votes Counted

Unit E

307 eligible voters
179 votes for Petitioner
114 votes against Petitioner
293 Total Valid Votes Counted

II. FACTUAL BACKGROUND—

RYDER MEMORIAL HOSPITAL OPERATIONS

The Employer operates a non-profit acute care hospital located in Humacao, Puerto Rico⁴ where it employs approximately 1200 employees. The hospital's 162-bed facility is housed in a 5-story main building where it provides emergency care, X-ray, clinical lab, intensive care, nuclear medicine, laboratory and cardiac catheterization, and other services. Additionally, the Employer has an area for out-patient care, physician's offices, an extended health care home, a 62 bed skilled nursing facility known as "Casa de Salud" and a 96 bed unit for senior citizens. The Employer also manages seven housing projects, a hospice program, a household health program, a health insurance plan and HMO, and satellite clinics in Yabucoa and San Lorenzo, Puerto Rico.

III. THE OBJECTIONS

A. *Objections 1 and 5: The Delay in the Voting Process Had the Potential of Disenfranchising Prospective Voters*

1. Issue

Because the Employer's Objections 1 and 5 essentially relate to the same conduct, I have decided to treat them together in this decision. In essence, the Employer's Objection 1 alleges that on the day of the election, around 7:10 a.m. the Board agents conducting the election ran out of pink ballots for unit E and the election process for said unit was stopped while the agents photocopied additional ballots at the hospital mail room, thereby depriving eligible employees of the opportunity to vote for a period of 45 minutes during the morning session. The Employer's Objection No. 5 alleges that through the voting process Board Agents advised employees classified as respiratory therapists that they should vote in unit E instead of in unit C as stipulated by the parties in the description of the included classifications in unit C.

³ Although the number of challenged ballots reflected in the Revised Tally of Ballots in both units C and E is 14 challenged ballots, these pertain to the same 14 individuals whose ballots were challenged during the election of April 23, 2004. That is, the same challenged ballots were listed as remaining challenged ballots in both Tallies.

⁴ The hospital was founded by an entity known as the "American Missionaries Association" and since 1962 has been operated by a community board.

2. Findings and conclusions

Based on the record as a whole, and as more fully explained below, I find that this conduct did not have the effect of disenfranchising potential voters. Therefore, I recommend that Objections 1 and 5 be overruled.

3. Statement of relevant facts

The evidence relating to these objections is essentially undisputed. Various witnesses⁵ testified that the election was held on April 23, 2004, at the Employee Center from 6:00 to 10:00 am, and from 2:00 to 6:00 pm. The election was conducted by four Board agents. One of the Board agents was located at the entrance door controlling the employees' access to the voting area and responsible for searching the name of potential voters in the four lists of eligible voters and directing the voters to the appropriate unit voting table. The other three Board agents were supervising the voting process within the polling area.

At about appropriately 7:10 in the morning, one of the Board agents noticed that they were running out of the pink ballots utilized for unit E and began making phone calls to the Region's office without being able to contact anybody. Another Board agent also began making phone calls⁶ and shortly thereafter the voting process for unit E was halted for about 45 minutes to an hour due to the lack of pink ballots. At that point, the Board agent located at the door was instructed to inform unit E employees to return later during the voting process until additional ballots were obtained.⁷ The voting process for the other units continued during this period. The voting process for unit E was resumed at approximately 8 or 8:10 a.m.

The pink ballots for unit E were photocopied at the hospital's photocopying machine in the Hospital's internal mailroom which is located near to the voting area. A Board agent came to the mailroom office accompanied by the Employer's in-house counsel to make the copies, and several minutes later another Board agent came to the mailroom to pick-up the ballots. Both Board agents were wearing the NLRB badges. Because it was payday and the employees' payroll was distributed in the mailroom, there were an unspecified number of employees waiting in line to pick up their checks at that time. According to witness Delgado, he overheard several unidentified employees making comments about the election process, such as the lack of organization and confusion among the Board agents.

Witnesses Felicita Agosto Delgado, Laura Aviles Santana and Luis J. Sepulveda testified that during the voting process several employees in the classification of respiratory therapist

⁵ Employer witnesses Felicita Agosto Delgado, billing officer of "Casa de Salud" and observer during the election process for unit D, Laura Aviles Santana, observer for unit E, Luis J. Sepulveda, licensed practical nurse and observer for unit C, Jorge Berrios Berrios, director of the billing and collection department, and Daris Delgado Delgado, supervisor of the billing and collection department, testified on behalf of the Employer essentially with regard to the election process.

⁶ There were employees inside the voting area while the board agents were making the phone calls.

⁷ According to Luis Sepulveda Morales, the Board agent located at the door was instructed to inform the voters that belong to unit E to return later, within the following 2 hours or in the afternoon.

and Home Care employees were instructed by a Board agent to cast their vote under challenged ballot in unit E.⁸ The evidence also established that the Employer's observers argued with the Board agent about these employees being required to vote in the wrong unit given their academic preparation. According to these witnesses the situation caused some unspecified delay in the voting process. Nevertheless, it is undisputed that all the employees that entered at the polling area during the voting period were allowed to vote.

The proper standard for determining whether delays caused by Board Agent conduct in the opening of polls warrant setting aside an election is whether the number of employees possibly disenfranchised is sufficient to affect the election outcome, not whether those voters, or any voters at all, were actually disenfranchised. *Wolverine Dispatch, Inc.*, 321 NLRB 796 (1996); *Pea Ridge Iron Ore Co.*, 335 NLRB 161 (2001). The Board has made it clear that this objective standard not only safeguards the choice of the majority of employees voting in the election, but also is necessary to protect the integrity of the election process itself. *Midwest Canvas Corp.*, 326 NLRB 58, 59 (1998).

The evidence revealed that all the voters that entered the voting area were allowed to vote⁹ and that all valid challenged ballots, including those of the respiratory therapist and home care employees who voted under challenged ballots, were opened and counted in the revised tally of ballots issued in both units C and E. The evidence also revealed that by virtue of the Second Supplemental Report on Challenged Ballots and the Stipulation of the parties, all challenged ballots were resolved.

With regard to unit C, the evidence reflects that 325 out of 346 of the approximate number of eligible voters actually voted in this bargaining unit. Thus, the delay and/or confusion allegedly caused by the Board agent's decision to challenge the respiratory therapy technicians and home care employees, as well as by the lack of sufficient ballots in unit E, potentially caused 21 voters to be disenfranchised from voting in unit C. On the other hand, the revised tally of ballots reflects that the Petitioner won the election in this unit by 107 votes or 86 more votes than the number of potentially disenfranchised voters.

As noted, the revised tally of ballots of unit E reveals that 307 out of 337 of the approximate number of eligible voters actually cast their vote in this voting unit.¹⁰ Thus, only 30 of the 337 eligible employees did not exercise their right to vote and therefore, the delay caused by the lack of sufficient ballots in unit E, potentially caused 30 voters to be disenfranchised from voting in unit E. On the other hand, the revised tally of ballots in this unit reveals that Petitioner won the election in this unit by 65 votes. Consequently, the Petitioner received 35 more votes than the 30 potentially disenfranchised voters. Accordingly, as the number of potentially disenfranchised voters

⁸ The situation arose because the names of some of the employees in these classifications were not included by the Employer in any of the four eligibility lists.

⁹ In addition, the Employer failed to present evidence at the hearing to establish that any eligible voter was actually disenfranchised because of the 45 minutes delay in the voting process during the morning session caused by the lack of pink ballots in unit E.

¹⁰ [Nonexistent footnote in original document.]

is insufficient to affect the outcome of the election in units C or E, I recommend that Objections 1 and 5 be overruled. *Wolverine Dispatch, Inc.*, supra; *Pea Ridge Iron Ore Co.*, supra.

B. Objection 2: The Defaced and/or Altered Sample Ballot Misled Voters into Believing that the Board Favored Petitioner

1. Issue

In essence, Employer's Objection 2 alleges as objectionable conduct the distribution of a defaced and/or altered sample ballot with an X mark in the "Yes" box; and the defacement of the sample ballot with an X mark in the "Yes" box in two of the official Board Notices of Election.

2. Findings and conclusions

Based on the record as a whole, and as more fully explained below, I find that the distribution of the defaced and/or altered sample ballot does not constitute objectionable conduct under the circumstances of this case. Therefore, I recommend that Objection No. 2 be overruled.

3. Statement of relevant facts

The evidence¹¹ established that during the Petitioner's pre-election campaign it distributed flyers and other literature throughout the facility. In this regard the hospital's Executive Director José Feliciano testified that union literature was placed on the windshields of employees' cars and on the hospital's roof ledges with the obvious intent of having them fly off ubiquitously in the hospital's premises. Besides the usual distribution of leaflets the Petitioner also posted stickers, flyers and other campaign propaganda on the hospital's walls.

Security guard Pedro Lleras Arroyo testified that several days prior to the election¹² he saw a copy of a defaced sample ballot marked with an "X" in the "Yes" box that descended from the higher hospital floors to the ground. He also saw several of these same flyers in the employees' parking lot strewn on the ground, a copy posted on the wall of the hallway leading to the image center, and one on the Employer's bulletin board located in the hallway between the Employee Center and the main building. Witness Ismael Medina Campos also testified that approximately 3 days before the election he observed several defaced sample ballots on the floor of the yard where the employees' center is located behind the cafeteria. That he observed that said flyers were falling from the third floor ledge of the hospital main building, and when he arrived to the third floor he observed that there were more copies of a defaced sample ballot lying on the ledge.

Jose Joaquin Morales, the Employer's security general supervisor, testified that during the first week of April, he saw a copy of the same defaced sample ballot posted on the outer

portion of the glass encasement containing the hospital's bulletin board next to where the official Board notice to election was posted, on the second and third floor bulletin boards, and at the entrance door of the Intensive Care Unit on the fourth floor. Human Resources Director Maria del Rosario Figueroa Lopez testified that she posted the official election notices sent by the Board in several areas of the Hospital and that she had to replace two of the notices (one in the area of the Hospital's lobby and the other at "Casa de Salud") because they were defaced with a handwritten X mark in the "Yes" box. She also testified that she replaced both notices immediately.

The standard for evaluating altered Board documents was announced in *SDC Investments*, 274 NLRB 557 (1985). The two-part analysis set out in *SDC Investments*, supra, requires a determination of whether the source of the defacement is clearly identified on the face of the document. When the source of the altered document is not clearly identified, it becomes necessary to examine the nature and contents of the material in order to determine whether the document has the tendency to mislead employees into believing that the Board favors one of the parties to the election. Such determination must be made on a case by case basis, and "bright line" distinctions are difficult to draw in this area.

In *Brookville Health Care Center*, 312 NLRB 594 (1993), the Board held that it would no longer require the *SDC Investment* analysis to be applied in cases involving the defacement of the sample ballot in the notice of election, because the Board revised notices of election included language specifically disavowing Board's participation or involvement in any defacement, as well as specifically asserting its neutrality in the election process. Accordingly, the Employer's contention as to the defacement of the sample ballot in two of the notices to election is without merits. First of all, the evidence established that the Employer posted several notices in different locations of the Hospital, which contained language that made it clear that the Board as an Agency of the United States Government does not endorse any choice in the election.¹³ Additionally, the Employer did not submit the two alleged defaced notices of election into evidence.¹⁴

With regard to the distribution of defaced sample ballots as campaign propaganda, the Board has held that where the notice of election includes language that there is no Board involvement in any defacement of its notices, there is no longer a need to determine whether altered or defaced ballots could reasonably mislead employees into believing that the Board favored

¹¹ The evidence consists of the undisputed testimony of Employer witnesses Jose Feliciano, Pedro Lleras Arroyo, Ismael Medina-Campos, Jose Joaquin Morales and Maria del Rosario Figueroa-Lopez concerning the Petitioner's pre-election campaign. Additionally, Employer witnesses Felicita Agosto Delgado, Laura Aviles Santana, Luis J. Sepulveda, and Daris Delgado testified Employer about the election itself. The Union did not present any witness.

¹² He saw the defaced sample ballot on the 21 or 22 of April 2004, and several weeks before during the month of April.

¹³ "WARNING: THIS IS THE ONLY OFFICIAL NOTICE OF THIS ELECTION AND IT MUST NOT BE DEFACED BY ANY PERSON. ANY MARKS THAT YOU MAY SEE IN ANY SAMPLE BALLOT OR ON THIS NOTICE HAS BEEN MADE BY SOMEONE OTHER THAN THE NATIONAL LABOR RELATIONS BOARD, AND HAVE NOT BEEN PUT THERE BY THE NATIONAL LABOR RELATIONS BOARD. THE NATIONAL LABOR RELATIONS BOARD IS AN AGENCY OF THE UNITED STATES GOVERNMENT AND DOES NOT ENDORSE ANY CHOICE IN THIS ELECTION."

¹⁴ Even crediting the testimony of Figueroa the evidence presented by the Hospital established that the defaced notices were replaced shortly after they were discovered.

one of the parties to the election. *Dakota Premium Foods*, 335 NLRB 228 (2001). *Comcast Cablevision of New Heaven*, 325 NLRB 833 (1998), *Brookville Healthcare Center*, 312 NLRB 594 (1993). In *Dakota Premium*, supra, the Board held that the language on the Board's revised notices effectively disclaims any participation by the Board in the preparation of the sample ballot and sufficiently reassured employees of the Board's neutrality in the election.

If the Board had continue to adhere to the principles of *Dakota Premium*, supra, the Employer's objection regarding the distribution of a copy of a defaced sample ballot marked with an X in the "Yes" box, should be overruled without further analysis. However, in *Sofitel San Francisco Bay*, 343 NLRB 769 (2004), the Board departed from prior Board's precedent in this area and resolved that the disclaimer contained in the Board's revised notice no longer serves to validate "per se" all defaced sample ballots. Therefore, it becomes necessary to examine the sample ballot in controversy in this case in light of the two-part analysis established in *SDC Investment*, supra.

The leaflet at issue in this case is a white "8-1/2 by 10" paper that contains a sample ballot with an X in the "Yes" box.¹⁵ The X mark is a bold handwritten mark crossing from side to side the "Yes" box area. Because the leaflet does not identify the source of origin of the defaced sample ballot it become necessary here to examine the nature and contents of the document.

Referring to the leaflet's nature and contents, the same is a reproduction of the Spanish version of the sample ballot with the seal of the United States and of the National Labor Relations Board. In the bottom portion of the leaflet there are three incomplete sentences, which is an excerpt of the disclaimer language of the Board's Official Notice.¹⁶ The language includes only the central portion of the disclaimer with the right and left margin cut-off respectively. Some of Spanish words are incomplete.¹⁷ Unlike the official sample ballot contained in the official Notice, these facsimiles do not include the following words: "For Certain Employees of Hospital Ryder Memorial."

Extrinsic evidence such as the circumstances of the document distribution could be considered in analyzing whether the document has the tendency to mislead employees into believing

¹⁵ Emp. Exh. 3.

¹⁶ DO NOT SIGN THIS BALLOT. Fold it in half and deposit it in the election box. If you damage this ballot return it to the Board Agent and ask him for a new one.

... AND MUST NOT BE MUTILATED BY ANY PERSON. WAHTSOEVER...
... TO THE NATIONAL LABOR RELATIONS BOARD, AND CANNOT...
... THE GOVERNMENT OF THE UNITED SATES AND DOES NOT ENDORSES ANY...

¹⁷ NO FIRME ESTA PAPELETA. Dóblela y deposítela en la urna electoral. Si usted daña esta papeleta devuélvala al Agente de la Junta y pidale una nueva.

... N [sic] Y NO DEBE SER MUTILADO POR NINGUNA PERSONA. CUALESQUIE (sic)...
... ENAS [sic] A LA JUNTA NACIONAL DE RELACIONES DE TRABAJO. Y NO P (sic)...
... EL GOBIERNO DE LOS ESTADOS UNIDOS Y NO ENDOSA A NINGUNA...

that the Board favors one of the parties to the election. *3-Day Blinds, Inc.*, 299 NLRB 110, 111 (1999); *Baptist Home for Senior Citizens*, 290 NLRB 1059, 1060 (1988). Although there is no evidence that the Petitioner is the author of these altered ballots, given the circumstances of the distribution of the altered ballot which was the same used to distribute all other Union campaign propaganda,¹⁸ the employees receiving these documents could reasonably concluded that this was campaign propaganda and that came from the Petitioner.¹⁹ Under these circumstances, the ballots were not likely to mislead employees into assuming the Board prepared the leaflet and that it endorsed the Petitioner.

An examination of the physical appearance of the document further supports the conclusion that the material is not misleading. It is clear that the sample ballot has been photocopied from a form of a notice of election and the X marking added. Moreover, the document does not appear "official," thus the printed material in the bottom portion is incomplete and not centered on the page, and markings from the photocopy machine are evident.

In any event, in this case the employees could reasonably conclude that the altered and/or defaced sample ballots were campaign propaganda as these documents omitted the name of the Employer and contained an excerpt of the same disclaimer language used by the official notice of election that was posted in the various hospital locations. As noted, the disclaimer specifically advises employees that any marks that are seen on any sample ballot or on the notice has been made by someone other the National Labor Relations Board. It also further advises that the National Labor Relations Board does not endorse any choice in this election. The excerpt included in the defaced sample ballot partially included the official disclaimer. The fact that the language of the disclaimer is incomplete will reasonably lead the employees to conclude that the document was not made by the Board. It is unlikely that once employees saw the altered sample ballot which had incomplete language in the disclaimer portion would be misled to believe that it is an official document prepared by the Board. Rather, it is more probable than not, that it would remind them of the disclaimer language contained in the official notice of election.²⁰

While recognizing the Board's ruling in *Sofitel*, supra, the facts of the instant case are somewhat different, specifically because the defaced ballot in controversy in this case partially contains the disclaimer language, which provides sufficient basis to negate the involvement of the Board in the production of the leaflet. Reaching a different conclusion would require one to conclude that a government agency, such as the Board, would produce and distribute a document which from its face is defective and incomplete. I'm unwilling to reach this conclusion. Rather, I find that under the totality of circumstances in

¹⁸ Employer's witnesses stated all other Union's propaganda was distributed in the same manner than the defaced sample ballot.

¹⁹ Employer's witness Jose Joaquin Lebron referred to the altered sample ballot as propaganda. Specifically he called it "illicit propaganda." I further note that no evidence was presented at the hearing to show that any employee was in fact misled into believing that the Board prepared the defaced sample ballot and /or that it favored the Petitioner.

²⁰ Posted by the Employer in different locations of the Hospital.

this case, the eligible employees are more apt to reasonably concluded that the leaflet with the defaced ballot was originated and distributed by some other persons rather than the Board. Further, I note that the nature of the marking appearing in the "Yes" box, which are large, wide and disproportionate to the printed material on the reproduced sample ballot leave the observed with the reasonable impression that said marks were added to the sample ballot and not part of it as originally issued by the Government. See *Taylor Cadillac*, 310 NLRB 639 (1993).²¹

Consequently, I conclude that employees were not led to believe that the Board favored the Petitioner in the election, and recommend that Objection 2 be overruled. In reaching this conclusion, I note that during the period the official notices were posted in different place of the hospital.²²

²¹ In *Taylor Cadillac*, supra, the Board found that the large bold marking in the "Yes" box was sufficiently distinct from the Board's standard preprinted sample ballot so as to preclude a reasonable impression that the markings emanated from the Board. Citing *Rosewood Mfg. Co.*, 278 NLRB 722, (1986).

²² This seems to be under *Sofitel*, supra a factor to be examined in the analysis of a defaced sample ballot.

RECOMMENDATION

Having recommended that the Employer's objections be overruled in their entirety it is recommended that the Board issue the corresponding Certification of Representative to Union Insular de Trabajadores Industriales Y Construcciones Electricas, Inc. as the exclusive collective-bargaining representative of the employees of the Employer in units C and E.²³

²³ Any party may, within fourteen (14) days from the issuance of this report, file with the Board an original and eight (8) copies of its exceptions to this report in accordance with Section 102.69 of the Board's Rules and Regulations. Exceptions are due September 9, 2005. The exceptions should be filed with the Executive Secretary of the Board, National Labor Board, and 1099 14th Street, N.W., Washington, DC 20570. Copies of the exceptions should also be immediately served upon each of the parties and the Regional Director.

Under the provisions of Section 102.69(g) of the Board's rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and which are not included in the Report, are not part of the record before the Board unless appended to the exceptions or opposition thereto which the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the report shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding.