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INTRODUCTION

In this case, the Board must decide whether the Employer destroyed the necessary laboratory conditions for a representation election when, without any legitimate business justification, it established an intimidating gauntlet of senior management, labor consultants, and a security guard that employees were compelled to navigate upon their arrival to work during the voting periods on the two days of the election. The ALJ recommends overruling the Union's objections, but to do so would be contrary to Board precedent. *See Transcare of New York, Inc.*, 355 NLRB No. 56 (2010); *DHL Express, Inc.*, 355 NLRB No. 144 (2010). The Board should reject the ALJ's Report and Recommendations, set aside the election results, and direct a second election.

BACKGROUND

Petitioner Service Employees International Union ("SEIU" or "Union") petitioned for a representation election among certified nursing assistants and other employees of Canoga Healthcare Inc. d/b/a West Hills Health & Rehabilitation Center ("Employer" or "West Hills"), which is operated by Longwood Management Corp. ("Longwood"). Transcript of Proceedings ("Tr."), 17:13-18:9.

An election was held on August 19 and 20, 2010.¹ Of the approximately 85 eligible voters, 78 cast ballots. Twenty-four ballots were cast in favor of the Union, and 52 were cast against the Union.

The Union timely filed objections to conduct affecting the election results. On October 26, a hearing was held before ALJ Lana H. Parke. On December 6, the ALJ issued her Report &

¹ All dates are in 2010 unless otherwise specified.

Recommendations (“Report”), recommending that the Union’s objections should be overruled. The Union timely submits exceptions to the ALJ’s Report & Recommendations, on the basis that the ALJ misapplied the governing precedents and ignored the relevant facts of record.

ARGUMENT

I. **SEIU’s Election Objections Must be Reviewed as a Whole, Applying an Objective Standard.**

The Board has long reviewed objections to the conduct of an election to determine whether the “surrounding conditions” permitted employees to register a “free and untrammelled choice” as to their representation. *General Shoe Corp.*, 77 NLRB 124, 126 (1948). Where such laboratory conditions are not present, the Board sets aside the election results and directs a new election to proceed. *Id.* at 126-27.

In determining whether the Employer’s conduct interfered with the laboratory conditions for conducting the election, the Board must apply an objective, rather than a subjective, standard: “The test, an objective one, is whether the conduct of a party to an election has the tendency to interfere with employees’ freedom of choice.” *Cambridge Tool & Mfg. Co.*, 316 NLRB 716, 716 (1995); *see also Metaldyne Corp.*, 339 NLRB 352, 352 (2003); *Cedars Sinai*, 342 NLRB 596, 597 (2005). Applying this test, “the asserted lack of purpose or actual effect on the election is not germane to whether the conduct was objectionable.” *Lake Mary Health Care Assocs.*, 345 NLRB 544, 545 (2005). The Board’s established objective standard applies not only to close elections (*see Cambridge Tool*, 316 NLRB at 716), but also to elections where the petitioner loses by a substantial margin (*see, e.g., Metaldyne*, 339 NLRB at 352 (applying *Cambridge Tool* standard to set aside results of election where petitioner lost by 2-1 margin); *Hollingsworth*

Mgmt. Serv., 342 NLRB 556, 558 & n.6 (2004) (setting aside election results where union prevailed by 30 votes, because a large number of voters were affected by the challenged conduct); *Mercy Healthcare Sacramento*, 334 NLRB 100, 108 & n.53 (2001) (setting aside election results where union lost by more than 50 votes)).

Moreover, in determining whether the Employer's conduct interfered with the laboratory conditions necessary for conducting the election, the Board must consider the objectionable conduct "taken as a whole." *Metaldyne*, 339 NLRB at 352; *see also NYES Corp.*, 343 NLRB 791, 791 n.2 (2004); *Avis Rent-a-car*, 280 NLRB 580, 581 (1986) (objectionable conduct should be considered "cumulatively"). Thus, in *Cambridge Tool*, 316 NLRB at 716, the Board set aside the results of an election based on three unrelated instances of objectionable conduct, rejecting the hearing officer's conclusion that each of those incidents standing alone could have had only a de minimis impact on the election or on employees' protected §7 activities.

II. The Continued Presence of the Employer's Administrator and Labor Consultants In the Main Entrance Area During the Shift Change Voting Periods Interfered With Employees' Uncoerced Free Choice.

Objections 1 and 2 concern closely related conduct:

Objection 1: On the day of the election, the Employer, by its managers, supervisors, and/or agents, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions by posting its managers and labor consultants at the front and rear doors of the facility during the voting periods to monitor workers as they were coming to vote.

Objection 2: On the day of the election, the Employer, by its managers, supervisors, and/or agents, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions when its managers and labor consultants were engaging workers in extended conversation as they were arriving and leaving the building during the voting periods.

The facts of record clearly support both objections. Had the ALJ correctly applied the

law, she should have sustained both objections and set aside the election results.

A. The Facts of Record – Objections 1 and 2

1. Employees Necessarily Had to Run a Gauntlet of Managers and Labor Consultants to Reach the Polling Place

a. The Layout of the West Hills Facility

The main entrance to West Hills, which has two doors to the parking lot, faces Strathern Street. Tr. 78:5-25 & Employer Exh. 1. The main lobby is immediately inside the main entrance. Employer Exh. 1. The Administrator’s office abuts the main lobby, and has a solid door without any windows in it. Tr. 103:21-22 & Employer Exh. 1.

The polling place for the Union election was set up in Dining Room B. *See* Employer Exh. 1. To reach Dining Room B from the main entrance lobby, an employee must walk southeast from the lobby along a diagonal corridor, then turn right at the kitchen into another corridor. *Id.* Dining Room B is the second room on the right in this corridor. *Id.* Dining Room B is less than 100 feet from the main lobby. Tr. 100:23-112:16.

b. The Employer’s Labor Consultants

For this Union election, the Employer retained a labor consulting firm. Three labor consultants – Fernando Rivera, Jim Needles, and Carlos Ortiz – were present at West Hills over a period of several weeks before the election. Tr. 115:3-116:14, 122:16-123:3, 132:8-11. During that time period, the three consultants conducted meetings with employees, and met with employees individually or in small groups to provide information about the Union organizing campaign. Tr. 115:3-116:14. Employees knew who the labor consultants were and understood that their purpose was to help communicate the Employer’s message to “vote no” in the Union

election. Tr. 116:6-14, 120:5-124:2.

c. Employees Had to Pass by the Managers and Labor Consultants to Reach the Polling Place

The three voting periods were conducted over shift changes, at 1:00 to 4:00 p.m. on August 19; 10:00 p.m. to midnight on August 19; and 1:00 to 4:00 p.m. on August 20. Tr. 11:3-10, 20:15-23, 129:20-25. It is undisputed that throughout these three shift change voting periods, West Hills Administrator Michael Seifert, the Administrator from Longwood's Crenshaw nursing home, and the three labor consultants – singly or in combination – were present in the front entrance lobby of the facility and immediately outside the front entrance. Union organizer Claudia Juarez recalled all four of these individuals being visible at the entrance or in the lobby area throughout the voting periods. Tr. 23:23-24:9.²

Administrator Seifert admitted that he was regularly in the lobby area during the voting periods; and even when he was not in the lobby, he was in his office, which abuts the lobby, with his door open. Tr. 83:7-20, 84:2-85:4, 106:1-9, Employer Exh. 1. He also admitted that the Employer's three labor consultants were present in the lobby during most of the voting periods and that at least one of the labor consultants frequently stood outside the main entrance. Tr. 105:11-25, 108:19-109:1; *see also* 134:11-23. Mr. Rivera, the only one of the Employer's labor consultants who testified, admitted that during the voting periods he was in the lobby and was also frequently outside the main entrance, smoking five or six cigarettes for five to ten minutes at a time or sitting on a bench next to the front doors. Tr. 85:6-13, 123:17-23, 124:18-25, 125:18-

² Although she was outside the building on the public sidewalk on Strathern St. during the voting periods, Ms. Juarez explained that she could see inside the lobby through the tall windows in the lobby area. Tr. 26:8-11, 54:16; *see also* Union Exh. 2, Employer Exh. 1.

23, 129:5-7, 131:8-24; Employer's Exh. 2(a). Moreover, it was undisputed that the Administrator of Longwood's Crenshaw nursing home, whom Ms. Juarez had met previously, was also present in the main entrance area during the voting periods. Tr. 16:22-17:2, 17:5-6, 24:1-9. Finally, it was undisputed that the continued presence of these managers and the labor consultants at the main entrance and lobby area during the shift changes was unusual. Tr. 10:19-11:17, 19:21-20:7.

Employees use only the main entrance facing Strathern Street, not any of the other entrances to the building. Tr. 54:17-24, 65:20-22, 101:23-102:2 & Employer Exh. 1. The main entrance gives onto the lobby area where the managers and the Employer's labor consultants were stationed during the voting periods. Employer Exh. 1. Thus, any employee arriving for work at the shift change had to pass from the front entrance through the main lobby area to get to the polling area in Dining Room B:

Q: Since the rear entrance is not used by employees, is there any way to get to Dining Room B without going through the main lobby?

A: There are, but the doors are locked and they would have to be let in by another employee.

Tr. 110:13-22; Employer Exh. 1.³

Because the voting periods coincided with shift changes, employees were necessarily

³ The Employer's labor consultant, Mr. Rivera, claimed that he had seen employees on occasion use the east exit adjacent to the kitchen facing Vasser Street. Tr. 130:10-23 & Employer Exh. 1. (In her Report, the ALJ referred to that exit as the "east exit." Report at 2:49. Elsewhere in the record, that exit is sometimes referred to as the "rear entrance.") However, the security guard stationed at West Hills on the two days of the election and who guarded the east exit did not see anyone use that exit on those days. Tr. 65:20-22, 66:21-67:9. Thus, it is immaterial whether some employees might use that east exit from time to time, because they did not do so on the two days of voting.

coming and going through the front entrance, and therefore through the lobby, at those times. Workers who were not scheduled to work that day were free to come to West Hills to vote. Tr. 102:19-24. To do so, those workers necessarily would have entered through the front entrance before proceeding to the polling area. Even workers who did not vote immediately upon arriving to work would have had to run the gauntlet of Administrators and labor consultants when they arrived at work, and before they voted.

To be sure, some workers were released during their shifts to vote, and might not have had to pass through the main lobby at that time to reach the polling place in Dining Room B. However, the very purpose of scheduling votes during shift changes was to allow employees to vote immediately before or after their shifts, and not miss work time to vote. Administrator Seifert admitted that “most employees voted before they started their shift,” Tr. 102:24-25, meaning that they arrived at work during the shift change, passed through the main lobby and its phalanx of managers and labor consultants, and then went directly to vote.

Administrator Seifert admitted that he was in the lobby area frequently during the voting periods, and that at least once, he went to talk to Mr. Rivera outside the main entrance. Tr. 83:7-20, 84:2-85:4, 106:1-9. Administrator Seifert said that he lingered in the lobby because he was talking to workers, patients, family members, and his labor consultants, and because he likes to keep an eye on workers as they arrive to make sure that they are on time for work. Tr. 84:12-85:4, 106:10-12. He further admitted, however, that he could have brought family members or the labor consultants into his office to meet with them privately; and that the facility has an accurate time clock that he could have relied upon to know when employees came to work. Tr. 102:3-18, 105:11-107:25, 106:13-15. And of course, nothing prevented him from closing his

office door. *See, e.g.*, Tr. 103:18-104:3, 107:7-15. Yet Administrator Seifert did not engage in any of these reasonable measures to limit his visibility during the voting periods, despite his awareness that those time periods were highly sensitive. In fact, he admitted that he was either in the lobby area, or in his office with the door open where he was plainly visible from the lobby area, for 70% of the time during the voting periods. Tr. 84:12-23, 108:8-18.

Mr. Rivera, the only one of the labor consultant who testified, was unable to explain his presence or that of the other labor consultants in the main entrance and lobby areas during the shift change voting periods. Mr. Rivera testified that his assignment on the day of the vote was limited to assisting the Administrator, “ensur[ing] the rules were respected,” and keeping supervisors away from the polling place in Dining Room B. Tr. 128:16-21. When asked how his time spent in the main entrance and lobby areas related to his assignments for the day, Mr. Rivera could come up with no explanation:

Q: How was your time spent in the lobby or the smoking area outside [] related to your assignment that day?

A: Because it’s the area that we had agreed to be at.

Tr. 129:8-10. When asked whether the labor consultants considered staying in the Administrator’s office with the door closed, Mr. Rivera said they had not, because the Administrator has an “open door policy.” Tr. 129:11-16. When asked whether the labor consultants considered staying away from West Hills altogether during the voting, Mr. Rivera said they had not, because “It’s customary that we stay inside the building” during a vote. Tr. 130:4-6. In sum, Mr. Rivera could give no reason why he should be in the building at all while voting was taking place, much less why he should station himself in the lobby area, where he

knew all employees would pass as they arrived to work. Tr. 129:17-130:3.

2. The Administrator and Labor Consultants Engaged Dozens of Voters in Conversation.

Ms. Juarez saw at least 25 workers stopping to talk to Administrator Seifert or the labor consultants during the shift change voting periods. Tr. 24:1-25:12, 51:15-25. Moreover, she recalled that the workers appeared confused and fearful. Tr. 24:20-26:1, 51:8-14, 51:22-23.⁴

Ms. Juarez's testimony regarding the number of workers who stopped to talk to the labor consultants or Administrator Seifert was fully corroborated by the Employer's witnesses. Administrator Seifert and the labor consultants spoke with many employees as they were arriving during the shift change voting periods. Tr. 109:2-5, 126:24-127:1, 132:8-13. Mr. Rivera, the labor consultant, admitted speaking to some 20 to 30 workers himself during these periods. Tr. 126:24-127:1. He recalled that at least three or four of these conversations were longer than mere greetings, and (contrary to the ALJ's finding, *see* Report at 4:11-12) one of his conversations with a worker was an extended discussion about the voting itself. Tr. 124:12-17, 126:14-127:4, 131:25-132:7. The Employer's other two labor consultants also spoke to workers in the lobby area during the shift change voting periods. Tr. 109:6-24, 132:8-17. Administrator Seifert admitted that he too was talking with workers in the lobby area during the shift change voting periods. Tr. 109:2-5.

⁴ The ALJ erroneously rejected this testimony as "too subjective" to permit any inference to be drawn from it. Report at 4 n.5. However, this testimony was supported by Ms. Juarez's description of the body language from which she had concluded that employees appeared fearful. Tr. 25:20-26:1, 51:8-23. Lay witnesses are permitted to offer opinions based on their perceptions. *See, e.g., Service Garage Inc.*, 247 NLRB 943, 944 n.8 (1980); Fed. R. Evid. 701.

B. The ALJ Erred in Applying the “Electioneering” Analysis Rather than the “Surveillance” Analysis to the Continued Presence of the Managers and Labor Consultants in the Main Entrance Lobby Area During the Voting Periods.

The ALJ’s first major error was in analyzing Objection 1 under the “electioneering” framework set forth in *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118, 1119 (1982). *See* Report at 3:26-32, 4:6-16 (describing and applying *Boston Insulated Wire* electioneering framework). That analysis examines whether the “electioneering” took place in or near the polling place or a designated “no-electioneering” zone; the extent and nature of the “electioneering”; whether it was conducted by a party to the election or by employees; and whether it contradicts any instructions of the Board agent. *Boston Insulated Wire*, 259 NLRB at 1119.

The *Boston Insulated Wire* analysis does not apply indiscriminately to all election objections regardless of the conduct objected to, but rather applies only to “electioneering” objections. For example, in *Boston Insulated Wire* itself, the conduct objected to was union organizers passing out leaflets and talking to employees as they entered the building on their way to vote – classic “electioneering.” 259 NLRB at 1118.

Objection 1, by contrast, does not concern “electioneering,” but rather concerns the stationing of senior managers and the Employer’s labor consultants at a place where employees would have to pass to reach the polling place. The Board has repeatedly explained that this sort of objection, which the Board characterizes as “surveillance,” is *not* properly analyzed under the “electioneering” framework of *Boston Insulated Wire*.

In *J.D. Mascaro & Sons*, the petitioner objected to the company president pacing outside

the main entrance of the employer's facility during the voting. 345 NLRB 637, 637 (2005). The ALJ analyzed this objection as if it involved "nonverbal . . . electioneering." *Id.* at 642. On review, the Board explained that the evidence did not establish that the employer had engaged in "electioneering" at all, and therefore the *Boston Insulated Wire* analysis did not apply. *Id.* at 638-39. Rather, the Board explained that the "surveillance" line of cases applied, and concluded that under that analysis the company president's conduct was not objectionable because he was far removed from where employees would have to pass to reach the polling place. *Id.* at 639. Likewise in *Transcare of New York, Inc.*, 355 NLRB No. 56, slip op. at 1 (2010), the Board recently reversed a Regional Director's decision to overrule a similar objection without a hearing based on the Regional Director's erroneous application of the "electioneering" analysis rather than the "surveillance" analysis.

The ALJ here made the same error made by the ALJ in *Mascaro* and the Regional Director in *Transcare*: she conflated two lines of cases that apply to different kinds of objections. Objection 1 does not allege that the managers and labor consultants were engaging in "electioneering," nor would the facts support such an allegation. Objection 1 alleges that the managers and labor consultants engaged in "surveillance" as defined by *Transcare*. Accordingly, *Transcare* and its numerous predecessor decisions should apply to this objection, not *Boston Insulated Wire*. As we demonstrate below in Sections II.C and D, when those "surveillance" decisions are properly applied, the election must be set aside.

C. The Board's Recent Decision in *Transcare* Squarely Controls.

In *Transcare of New York, Inc.*, 355 NLRB No. 56 (2010), the Board recently addressed an election objection that was strikingly similar to SEIU's Objection 1. In *Transcare*, the Board

considered whether a Regional Director should have ordered a hearing on objections where the petitioning union offered to present evidence that “various managers and supervisors [were observed] standing on street corners approximately 150 feet from the facilities where voting was to occur.” *Id.*, slip op. at 3 (Member Schaumber, dissenting in part); *see also id.* at 4 n.11 (Member Schaumber, dissenting in part). These street corners were places that “all voters had to pass on the way to the polling place,” even though they were outside the buildings where the votes would be held. *Id.* at 1.

The ALJ here refused to apply *Transcare*, instead reading that decision exceedingly narrowly:

Transcare [], cited by the Petitioner, is inapposite. The only issue in *Transcare* was whether the objecting union had proffered sufficient prospective evidence to warrant a hearing. The proffered evidence was that employees were “required” to pass a senior manager in order to enter and exit the polling place. Even assuming *Transcare* stands for the proposition that routing voting employees past a manager warrants setting aside an election, the evidence here does not involve such a situation.

Report at 4 n.6. Examination of *Transcare*, however, reveals that the ALJ misunderstood *Transcare* and failed to properly apply it to the facts presented here.

First, in *Transcare*, the Board expressly decided that the facts as proffered *would* require the election to be set aside, not merely that such allegations warranted further exploration. Reversing the Regional Director, the *Transcare* Board ordered a hearing to be held on the petitioner’s objection because the union “met its burden of establishing that it could produce specific evidence at a hearing that, *if credited, would warrant setting aside the election.*” 355 NLRB No. 56, slip op. at 2 (emphasis added); *see also id.* (“Petitioner has alleged sufficient facts that, *if established at a hearing, would distinguish this case from J.D. Mascaro,*” in which the

election results were upheld) (emphasis added). Similarly, Member Schaumber, in dissent, recognized that the stakes were greater than merely whether a hearing should be held. He dissented from the Board's order directing a hearing to be held because, in his opinion, the proffered evidence could not possibly have required the election results to be set aside. *Id.* at 4 (“the Acting Regional Director was clearly on firm ground in finding that the facts alleged by the Petitioner in its position statement were insufficient, even if credited, to warrant setting aside the election in this case”) (Member Schaumber, dissenting in part). Thus, in *Transcare*, the issue before the Board was whether the facts as alleged, if true, would *require* the election to be set aside – an issue of substantive law, not merely one of procedure.

Second, contrary to the ALJ's finding that “the evidence here does not involve such as situation” as was presented in *Transcare*, *Transcare* is directly on point on its facts. In distinguishing *Transcare*, the ALJ appears to have relied on her finding that “[w]hile the main entrance/lobby was the normal work entrance for employees, once employees reported to work they did not have to pass the main entrance/lobby to enter the polling place.” Report at 4:9-11. However, here, as in *Transcare*, the supervisors were visible to the employees as they entered the facility during shift changes at a place they would have to pass on their way to vote, *even if the employees were not heading directly to the polling place as they arrived to work.* 355 NLRB No. 56, slip op. at 2; *id.* at 3 (Member Schaumber, dissenting in part) (“there is no representation . . . that [the supervisors] were otherwise positioned to ascertain whether the employees entering the facility were doing so to vote rather than for job related or other purposes”). Here, Administrator Seifert admitted that every employee would have to pass through the main lobby before voting. Tr. 110:13-22; *see supra* at 6.

If anything, *Transcare* concerned *less* troubling conduct than the Employer's conduct here. In *Transcare*, the supervisors were standing on street corners some 150 feet away from the entrance to the building inside which the voting would take place. *Id.* at 3 (Member Schaumber, dissenting in part). Here, by contrast, the managers and labor consultants were stationed right in the main entrance lobby of the nursing home, at a spot where employees had no choice but to pass as they arrived during the shift change voting periods.

Applying *Transcare*, the record evidence clearly supports Objection 1. Objection 1 should be sustained, and the election results should be set aside.

D. Even If the ALJ Had Properly Interpreted *Transcare* as Being Concerning Only With When a Hearing Should be Held, Rather Than With the Substantive Law of Surveillance, the ALJ Still Erred in Overruling the Objection to the Employer's Surveillance During the Voting Periods.

When *Transcare* is properly applied, the Union's Objection 1 must be sustained. Moreover, *Transcare* is squarely in line with an unbroken five-decades-long line of decisions requiring election results to be set aside based on surveillance by the employer or its agents during the voting periods. Thus, even if the ALJ had been correct in her crabbed reading of *Transcare* as concerning only procedure and not substantive law, the ALJ still should have concluded under the earlier authorities that the Employer's election day surveillance requires the election results to be set aside.

As early as 1952, the Board recognized that the presence of top managers at a place where employees must pass to reach the polling place is inherently coercive. *See Belk's Dept. Store*, 98 NLRB 280 (1952). In *Belk's*, the polling place was located in a warehouse some 35 feet from the back door of the Employer's retail store. *Id.* at 281 n.3. During the voting period, the store

manager and other supervisors stationed themselves at the back door of the store, and the manager paced in the area between the back door and the warehouse. *Id.* at 281 & n.3. This conduct warranted setting aside the election:

We are also convinced that, even though the supervisors were at some distance from the actual polling place, and apparently said nothing calculated to restrain or coerce the employees, their presence in the area where the employees were gathered while waiting to vote tended to interfere with the employees' freedom of choice of a bargaining agent. In particular, we regard as improper Galloway's conduct in walking back and forth in the space which the employees were required to traverse to go to the polling place.

Id. at 282.

The Board reached a similar conclusion in *Performance Measurements Co.*, 148 NLRB 1657 (1964). There, the Board determined that when the Employer's president stood by the door of the polling place, so that employees had to pass him in order to vote, the election had to be overturned. It did not matter that the president had a legitimate reason for being in that location during at least some of the time:

[T]he continued presence of the Employer's president at a location where employees were required to pass in order to enter the polling place was improper conduct not justified by the fact that for part of the time he was instructing supervisors on the release of employees for voting purposes. We find that by this conduct the Employer interfered with employees' freedom of choice in the election.

Id. at 1659.

In *Electric Hose & Rubber Co.*, 262 NLRB 186 (1982), the Board again invalidated an election, in part based on supervisors' unnecessary presence at places where employees had to pass in order to reach the polling place. This time, supervisors were stationed in a work area that employees would have to pass by to go vote; because the supervisors' presence there was

unexplained, the Board affirmed the ALJ's finding that it was inherently coercive. *Id.* at 216.

The Board approved the ALJ's conclusion that because there was no legitimate explanation for the supervisors' presence, it could only be concluded "that [their] purpose . . . was to effectively survey the union activities of the employees and to convey to these employees that they were being watched." *Id.*⁵

The Board again reaffirmed this line of cases in 1997, holding that where employees had to pass through a cluster of at least three senior managers at the intersection of two aisles, one of which led to the polling place, the Employer's conduct required the election to be set aside even though the supervisors were not near the polling place. *ITT Automotive*, 324 NLRB 609, 623-25 (1997). Again, the supervisors' presence in that location at that time could not be explained; there were no supervisors' desks in the area where the managers had congregated, and some first-shift supervisors had stayed in the plant during the second shift while the voting took place. *Id.*

J.D. Mascaro & Sons, 345 NLRB 637 (2005), applied the reasoning of these earlier authorities to different facts, and concluded that the employer's president's presence *outside* the employer's facility, at least 50 feet from the entrance and at a place where employees *did not* have to pass to reach the polling place, was not objectionable because "there is insufficient evidence that employees had to pass by [the president] in order to vote." *Id.* at 639 (distinguishing *Electric Hose*, *Performance Measurements*, and *ITT Automotive* on the ground that "the company officials were either much closer to the voting area . . . or employees had to

⁵ The supervisors at issue in *Electric Hose* were stationed at two different locations. One was within 10-15 feet of the entrance to the polling place. The others were located in the "quality control area," some unspecified distance from the polling place but in a part of the plant that employees would have had to pass to reach the polling place. 262 NLRB at 216.

pass the company officials as they entered the polling area”). The D.C. Circuit agrees that “*Electric Hose and Performance Measurements* seem to stand for the proposition that a party engaged in objectionable conduct sufficient to set aside an election if one of its agents is continually present in a place where employees have to pass in order to vote.” *Nathan Katz Realty LLC v. NLRB*, 251 F.3d 981, 993 (D.C. Cir. 2001).

Under these authorities, the ALJ should have concluded that the continued presence of the managers and the labor consultants in the main entrance lobby during the shift change voting periods required the election to be set aside. There was ample evidence that all employees had to pass through the main entrance lobby as they arrived to work, because that is the sole entrance used by employees. Administrator Seifert admitted as much. *See supra* at 6. Because employees could not have voted without first passing through the lobby during a shift change, and because the managers and the labor consultants were consistently stationed in the lobby or immediately outside the main entrance during the shift change voting periods, employees necessarily had to run the gauntlet of managers and labor consultants in order to reach the polling place.

Worse yet, as in *Electric Hose* and *ITT Automotive*, there was no pressing reason for these agents of the Employer to be stationed where they were during the voting periods. Administrator Seifert admitted that he spent some 70% of his time during the voting periods in the main entrance lobby or in his office, adjoining the lobby, with the door open. He admitted that much of his business in the lobby could have been conducted in his office, with the door closed. Even if Administrator Seifert likes to monitor the lobby area during shift changes to see that employees are arriving to work on time, he admitted that the Employer has an accurate time clock that he

could have relied on. Administrator Seifert made no effort to minimize his time in the lobby area during the shift changes even though he was well aware of the importance of maintaining laboratory conditions for the election. But as *Performance Measurements* establishes, it is immaterial whether Administrator Seifert had some legitimate reasons for being in the main entrance lobby some of the time during the voting periods. His continued presence where employees had to pass to reach the polling place, for longer than he conceded was necessary, interfered with the laboratory conditions for the election. *Performance Measurements*, 148 NLRB at 1659.

If Administrator Seifert had little reason to remain in the main entrance lobby during the voting periods, the labor consultants had no reason whatsoever to be there. The only explanation for the labor consultants' presence in the building at all, much less at a place where they knew all employees would have to pass on their way to the polls, was that "It's customary that [they] stay inside the building" during a vote. Tr. 130:4-6. Because there was no compelling reason for the labor consultants' presence, the only reasonable conclusion is that they were there to "convey to [] employees that they were being watched." *Electric Hose*, 262 NLRB at 216; *see also ITT Automotive*, 324 NLRB at 623-25.

Moreover, this Employer surveillance necessarily affected all employees who arrived to work during the three shift change voting periods, because every employee had to pass through the main entrance lobby to get to work. Because the Employer's conduct necessarily had a widespread effect, it further supports setting aside the election results. *See, e.g., Lake Mary Health Care Assocs.*, 347 NLRB at 545; *Hollingsworth*, 342 NLRB at 558 n.6.

Finally, the ALJ's apparent reliance on *Mascaro* and *Blazes Broiler* was misplaced.

Report at 4:15-20. Each of those cases is distinguishable on its facts. In *Mascaro*, the boss paced back and forth, at all times at least 30 feet away from the main entrance to the employer's facility inside which the election was taking place, and sometimes as far away as 54 feet. 345 NLRB at 639. The Board distinguished that scenario from those examined in *Performance Measurements*, *Electric Hose*, and *ITT Automotive* precisely because in those other cases, "the company officials were either much closer to the voting area than Mascaro was, or employees had to pass the company officials as they entered the polling area." *Id.* Likewise, in *Blazes Broiler*, employees did not have to pass by the union representative who was sitting in the restaurant on their way to vote in a banquet room. Rather, employees had the option of reaching the banquet room from another direction that did not require them to encounter the union representative at all. *Blazes Broiler*, 274 NLRB 1031, 1032 (1985) (witness testified "that she saw only one person, Rhonda, enter the banquet room, however she did not indicate whether she passed by Hughes or entered by the time clock near the kitchen") (emphasis added).

Here, in contrast to *Mascaro* and *Blazes Broiler*, employees had no alternative but to pass through the main entrance and lobby when they arrived at work during the shift change voting periods. Thus, employees had to run the Employer's gauntlet, whether they voted immediately upon arrival (as many did), or later in their shifts. The fact that some employees may not have voted immediately upon arriving at work does not detract from the coercive effect on employees of arriving at work on election day, during the voting periods, only to confront a phalanx of senior managers and labor consultants at the entrance.⁶

⁶ *The Broadway*, 267 NLRB 385 (1983), and *Roney Plaza Management Corp.*, 310 NLRB 441 (1993), cited by the Employer in its brief to the ALJ, are inapposite. *The Broadway* (continued...)

F. The ALJ Erred in Failing to Find that the Consultants and Administrator Engaged Employees In Extended Conversations as They Arrived to Vote.

In contrast to the ALJ's mistaken application of *Boston Insulated Wire* to the non-electioneering allegations of Objection 1, the ALJ failed to properly apply that analysis to the evidence supporting Objection 2, which showed that Administrator Seifert and the labor consultants engaged employees in extended conversations as they were arriving to vote.

First, although the ALJ correctly found that the Administrator and labor consultants had "brief conversations" with many employees as they passed through the main entrance lobby, she incorrectly found that none of those conversations concerned the election. Report at 4:6-12. Mr. Rivera admitted that he had an extended conversation with one employee about the election. Tr. 124:12-17, 126:14-20. He also admitted to having extended conversations of several minutes with several other employees. Tr. 126:24-127:4, 132:3-7.

Second, it cannot be disputed that Administrator Seifert and the labor consultants were

⁶(...continued)

held that an employer's policy of having a manager stand at an exit and bid good night to departing employees did not violate §8(a)(1) of the Act. However, in *The Broadway*, the employer was continuing in effect its practice of many years, whereas here, the Employer's stationing of its labor consultants at the main entrance during the election day shift changes was out of the ordinary; and *The Broadway* concerned employees' departure from work rather than, as here, their arrival to work on election day, when they were on their way to vote (immediately or later in their shifts). 267 NLRB at 399.

Roney Plaza concerned a representation election among hotel workers. During the voting period, several managers who ordinarily worked at the front desk were present at that location, even though it was near the entrance to the polling place. The Board affirmed the ALJ's conclusion that the managers' presence was not objectionable on the ground that the managers were at their customary work location and did not communicate with any voters. 310 NLRB at 447. Here, by contrast, the labor consultants were not at their usual work location; Administrator Seifert could have kept to his office with the door closed, but chose not to; and he and the labor consultants engaged numerous voters in conversation.

agents of the Employer. Seifert is the top supervisor at West Hills. Tr. 77:11-21. The Employer retained the labor consultants to persuade employees to reject the Union. Tr. 115:1-116:14, 120:5-21.

Third, as discussed above, these agents of the Employer had no legitimate business reason for lingering in the main entrance lobby area during the voting periods. Because the employees knew who the labor consultants were, based on their presence in the facility over the past several weeks to persuade employees to “vote no” (Tr. 115:1-116:4, 120:5-121:2), their unexplained and unnecessary presence in the main entrance lobby during the voting periods enhanced the coercive nature of their election day interactions with employees.

Fourth, Rivera admitted that he spoke to some 20 to 30 employees during the voting periods. Thus, a significant number of voters were affected by these objectionable conversations, a number that could have affected the 24-52 election outcome. This too favors setting aside the election results. *See, e.g., Cedars Sinai*, 342 NLRB at 597-98; *Hollingsworth*, 342 NLRB at 558.

Considering these factors together, the conclusion is inescapable that employees were subjected to extensive electioneering by the Employer. *Boston Insulated Wire*, 259 NLRB at 1118-19. It does not matter that this electioneering took place in the main lobby and immediately outside the main entrance, rather than in the polling place or the hallway adjacent thereto. Electioneering is prohibited in the “customary area ‘at or near the polls’” as well as in any specified no-electioneering area. *Bally's Park Place, Inc.*, 265 NLRB 703, 703 (1982). Electioneering in that “customary area” is grounds for setting aside the election. *Pearson Education, Inc.*, 336 NLRB 979, 979-80 (2001) (finding that employer’s anti-union poster displayed at a location where employees had to pass to reach the polling place was objectionable

conduct, even though the poster was outside the no-electioneering area). Here, the polling place in Dining Room B was less than 100 feet from the main entrance,⁷ and – as has already been established – every employee had to pass through the lobby to reach the polling place.

III. The Employer’s Decision to Retain a Security Guard on the Two Days of the Election was Out of the Ordinary and Lacked Any Legitimate Business Justification.

A. The Facts of Record – Objection 3

Objection 3 stated as follows:

On the day of the election, the Employer, by its managers, supervisors and/or agents, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions by posting a security guard in the parking lot to escort employees to and from their vehicles during the voting periods.

The facts of record fully support that the Employer engaged in objectionable conduct by its enhanced security presence during the two days of the election, regardless of whether the guard did or did not escort employees to and from their cars.

It is undisputed that the Employer had never stationed a security guard outside the building during the day before the two days of the election. Tr. 20:8-11, 119:19-24. The Employer did not contract for any security guard presence at West Hills at all until about two weeks before the August 19-20 election. Tr. 119:12-13. At first, a security guard was present only overnight. Tr. 119:12-18. On the two voting days, however, the Employer contracted for round-the-clock security presence. Tr. 119:19-24. On those days, the guard wore a uniform. Tr.

⁷ Although Administrator Seifert originally testified that the polling place in Dining Room B was some 100 feet from the main entrance, and that it would take “several minutes” for an employee to cover that distance, he later admitted that the distance was probably less than 100 feet, and that he had overstated how long it would take for an employee to cover that distance. Tr. 110:23-112:16; *see also* Employer’s Exh. 1.

28:5-13, 64:12-13.

Not only was the guard's presence during the daytime shift changes on the two days of the election unusual, he behaved in a manner calculated to interfere with employees' §7 rights. The guard was stationed at a point between the employees' parking area and the main entrance, where all employees would have to pass to reach the main entrance. Tr. 93:9-20; Employer Exh.

1. Ms. Juarez observed that the security guard's presence in the employee parking lot effectively prevented any workers from talking to her or the other Union organizers present on the election days. Tr. 28:14-18.

Ms. Juarez also saw the guard walking workers from the employee parking lot to the front entrance. Tr. 28:14-29:7.

B. Applying the Board's Standard Analysis for Enhanced Security Cases, the ALJ Should Have Sustained the Union's Objection.

Under the well-established Board law regarding enhanced security during election campaigns, the Employer's enhanced security presence at West Hills on the two days of the election warrants setting aside the election results because it was "unusual, out of the ordinary and unconnected to any legitimate concerns of the [Employer]." *DHL Express, Inc.*, 355 NLRB No. 144, slip op. at 1 n.2 (2010); *see also City Market, Inc.*, 340 NLRB 1260, 1276 (2003); *Villa Maria Nursing Center & Rehab. Center*, 335 NLRB 1345, 1353 (2001); *Parsippany Hotel Mgmt.*, 319 NLRB 114, 126 (1995); *Sands Hotel & Casino*, 306 NLRB 172, 172 (1992). In *DHL*, to take the most recent example, the Board affirmed the ALJ's finding that an employer's decision to station its security guards in the midst of employee handbillers constituted unlawful surveillance because the guards did not typically patrol that area of the employer's property and

because there was no evidence of any legitimate business concern that justified this novel deployment of the guards. 355 NLRB No. 144, slip op. at 1 n.2; *see also id.* at 8-9 & n.6.

Here, the ALJ ruled, in conclusory fashion, that the facts of *DHL* were “distinguishable from this case.” Report at 5 n.7. However, the ALJ never engaged in the analysis required by *DHL* and its numerous predecessors, namely, to determine whether the employer’s enhanced security presence on the two days of the election was out of the ordinary and justified by legitimate business concerns. *See id.*; *see also* Report at 4:35-5:19. Had the ALJ conducted that analysis, as she should have done, it would have been impossible to avoid the conclusion that the Employer’s deployment of the daytime security guard on the two days of the election was objectionable.⁸

Here, it is undisputed that the Employer retained a uniformed security guard during the day shifts for the first time on the two days of the Union election. Accordingly, by any measure, the decision to retain the daytime guard for the shift change voting periods on the two days of the election was “unusual [and] out of the ordinary.” *DHL*, 355 NLRB No. 144, slip op. at 1 n.2.

Likewise, there was no legitimate business reason for the guard’s presence during the afternoon shift change voting periods. *DHL*, 355 NLRB No. 144, slip op. at 1 n.2; *Villa Maria*,

⁸ To be sure, the Union’s Objection 3 was couched in terms of the Employer’s use of the security guard “to escort employees to and from their vehicles” to the facility’s main entrance. However, the mere presence of the security guard on the two days of the election is closely related to the use of the guard to escort employees from their cars to the main entrance; and the ALJ was not free to ignore such objectionable conduct that was established on the record and that would warrant setting aside the election. *See American Safety Equipment Corp.*, 234 NLRB 501, 501 (1978). The record here contained ample evidence why the guard’s mere presence was objectionable; the Union briefed the issue of the security guard’s presence under *DHL* and the other security guard decisions discussed herein; and the ALJ should have considered and addressed those arguments in her Report.

335 NLRB at 1353. Although Administrator Seifert testified that he was concerned about an organizer supposedly having trespassed at West Hills, he conceded that the incident that so troubled him occurred in *June*. Tr. 98:2-8, 113:24-114:15. Yet West Hills did not contract for *any* security guard presence until two weeks before the August 19 and 20 election, and then only at night. Tr. 114:20-23, 119:12-18. Administrator Seifert admitted that he did not even call the police after this alleged trespassing incident (Tr. 114:20-23), notwithstanding his role in ensuring the security of West Hills' residents (Tr. 80:23-81:4, 99:6-8). Had the Employer been truly concerned about incursions onto the West Hills property after this alleged incident, surely it would have acted with greater urgency, increasing its security presence promptly after that incident (and calling the police). Instead, the Employer waited nearly two months, until just before the Union election, even to retain a guard at night, and then did so supposedly in response to another rumor Administrator Seifert heard about an alleged Union trespass at another Longwood facility. Tr. 117:8-22, 119:5-13. Even then, however, Administrator Seifert only felt it was necessary to post a guard overnight, not during the daylight hours. Tr. 119:5-13. Thus, the supposed Union trespassing on Longwood property cannot have been a legitimate business justification for the Employer's decision to deploy a guard during the daytime shift changes on the two days of the election. *Cf. Villa Maria*, 335 NLRB at 1353 (rejecting employer's claim that enhanced security was needed in response to vandalism where guards were not deployed where vandalism had occurred).⁹

⁹ It must be noted that the record contains no credible evidence of any trespassing by Union representatives at West Hills or any other Longwood facility, only unsubstantiated rumors asserted by Administrator Seifert, who lacked any first-hand knowledge of the subject. Tr. 114:1-13; 117:8-14. Claudia Juarez testified, without contradiction, that neither she nor any of
(continued...)

Administrator Seifert's other stated concern, that there would be Union organizers entering the building on the two election days, is similarly unpersuasive justification for the security guard's presence on those days. Tr. 104:15-20. There had been four Union organizers present outside West Hills during numerous shift changes since early June, distributing leaflets and talking to employees. Tr. 10:19-11:17, 31:9-25, 33:6-16. Organizers had even been present leafletting on multiple occasions during the nighttime shift change from 10:30 to 11:30 p.m. Tr. 10:22-11:7, 11:11-17. Yet the Employer had not found it necessary to have any security presence during *any* shift changes until two weeks before the election. Tr. 104:21-105:3.

On the days of the election itself, only one or two Union representatives entered the building (Tr. 104:9-12), and even then, the Employer tightly restricted their access without any help from the security guard. The Union representatives were not permitted to walk through the front door to reach the polling place for the pre-election conferences; instead, the Employer had a management representative escort the Union representatives around the building's exterior to the locked east exit, which was then unlocked from the inside to permit them to enter. Tr. 47:5-19, 54:25-55:9, 81:20-23, 104:9-14. Moreover, as the guard himself confirmed, there were no disturbances at all during the two voting periods while he was stationed in the parking lot. Tr. 69:1-3. The lack of any disturbance underscores that the Employer had no legitimate reason to employ the guard on the two days of the election. *Shrewsbury Nursing Home*, 227 NLRB 47, 50 (1976).

In sum, the Employer's enhanced security guard presence in the employee parking lot

⁹(...continued)

the Union's agents entered the West Hills facility through the east exit at any time (except when they were escorted there for the pre-election conferences). Tr. 32:20-33:5.

during the shift change voting periods on the two days of the election was improperly coercive under *DHL* and the authorities discussed above. The Union's Objection 3 should be sustained, and the election should be set aside on this basis as well.

C. The ALJ Erred in Relying on *Quest International*.

In concluding that the guard's unusual, unjustified presence on the two days of the election was not objectionable, the ALJ relied on *Quest International*, 338 NLRB 856 (2003). Report at 5:13-19. *Quest* held that an employer did not interfere with the election by, during the week up to and including the election, employing an armed guard and having another guard patrol the parking lot during shift changes with a 90-100 pound Rottweiler. 338 NLRB at 856-57. *Quest*, however, is distinguishable on its facts. In *Quest*, there was evidence that the employer explained to employees why it had retained the two guards. *Id.* at 856. Here, by contrast, there is no evidence that the Employer explained to employees why the guard had been retained for the days of the election only. When an employer explained to employees its reasons for deciding to enhance its security presence, employees are less likely to find the enhanced security presence intimidating or coercive. *6 West Limited*, 330 NLRB 527, 528 & n.7 (2000).

D. *Quest International* Is Wrongly Decided and Should be Overruled.

Moreover, *Quest* is out of step with the rest of the Board's case law regarding enhanced security. This case presents an excellent opportunity to overrule *Quest* and restore uniformity to the Board's enhanced security decisions.

First, the Board in *Quest* utterly failed to apply the authorities that analyze as surveillance employers' decisions to enhance their security presence during an election campaign. As discussed above, a long line of authorities culminating in *DHL* analyzes employers' enhanced

security during the preelection critical period as employer surveillance, and finds that such conduct constitutes a violation of §8(a)(1) of the NLRA and/or improper election interference when it is out of the ordinary and lacks any legitimate business justification. Nevertheless, the *Quest* Board did not discuss, or even cite, any of these decisions.

In fact, *Quest* does not cite any authorities at all for its central holding that the employer's decision in the last days before the election to deploy two guards, one armed and the other with a large Rottweiler, did not reasonably tend to interfere with the election. *See* 338 NLRB at 857. (This is ironic given the *Quest* Board's criticism of the hearing officer in that case for failing to cite any authority in support of her recommendation to set aside the election results based on the employer's beefed-up security. *Id.* at 857 n.1.) Indeed, not one of the cases cited by the Board in *Quest* for any proposition concerns an employer's enhanced security.¹⁰

Had the *Quest* Board considered any of the applicable authorities in existence at the time *Quest* was decided, it would have been compelled to conclude that the employer interfered with the election when it decided to enhance its usual security presence for the pre-election period with an armed guard and a Rottweiler. Numerous decisions predating *Quest* had set forth the two-part unusual-and-unjustified analysis for enhanced security cases. *See, e.g., Villa Maria*, 335 NLRB at 1353; *Parsippany*, 319 NLRB at 126; *Sands*, 306 NLRB at 172. Moreover, several earlier decisions had held that an employer's unjustified decision to retain armed guards during an union organizing campaign was inherently coercive. *See Marine Welding & Repair*, 174 NLRB 661, 671 (1969) (armed guards on election day; setting aside election results and directing

¹⁰ *See Quest*, 338 NLRB at 856-57 & nn.2-3 (citing *Safeway, Inc.*, 338 NLRB 525 (2002); *Baja's Place*, 268 NLRB 868 (1984); *Lockheed Martin Corp.*, 331 NLRB 852 (2000); *Avis Rent-a-Car*, 280 NLRB 580 (1986)).

second election); *Shrewsbury Nursing Home*, 227 NLRB 47, 50 (1976) (armed guards present without explanation during union leafletting).

Now, since *Quest* was decided, more recent authorities have placed *Quest* even further out of step with the Board's decisions concerning enhanced security. In *Sprain Brook Manor Nursing Home*, 351 NLRB 1190, 1192 (2007), decided several years after *Quest*, the Board held that the employer's unjustified deployment of an armed guard after the Union won a representation election was inherently coercive. As the Board explained, "the posting of the armed guard without any explanation, during a period of increased union activity and during the times of the day that that activity was taking place, was coercive whether or not any actual surveillance occurred." *Id.* at 1192 n.9.

Most recently, in *DHL*, the Board held that a far less intimidating instance of enhanced pre-election security than that at issue in *Quest* constituted improper surveillance in violation of §8(a)(1) that required the election results to be set aside. *DHL Express* held that an employer's deployment of apparently *unarmed* security guards to stand among employees who were distributing union leaflets was unlawful because it was unusual (because the employer's security guards were usually posted in a different area) and lacked any legitimate explanation. 355 NLRB No. 144, slip op. at 1 n.2, 7-9 & nn.5-6.

It is impossible to square *Quest* with *DHL* and *Sprain Brook* (not to mention with *Marine Welding* and *Shrewsbury Nursing Home*). Although the enhanced pre-election security in *Quest* was plainly unusual – the employer had not used a security guard in two years (338 NLRB at 856) – the Board did not consider or discuss whether there was any legitimate reason for the employer's new heightened security measures. *Id.* at 856-57.

In short, the appropriate analysis for enhanced security cases was established long before *Quest*. With the notable exception of *Quest* itself, the Board has consistently adhered to that analysis. Because *Quest* never conducted the Board's two-part analysis for enhanced security cases, and conducting that analysis almost certainly would have resulted in the conclusion that the armed-guard-and-Rottweiler scenario interfered with the election, *Quest* should be overruled.

Finally, *Quest* should be overruled for the additional reason that it ignores workplace reality. As the line of cases from *Marine Welding* to *Sprain Brook* makes clear, the Board has long reasonably recognized that an employer's unjustified decision to hire armed guards during a union election campaign is inherently coercive and intimidating. Unless the employer has some substantial justification for enhancing its security in this manner that it has communicated to its workforce, reasonable employees are likely to find the presence of an armed guard outside their workplace frightening. A 100-pound Rottweiler is likely to have a similar effect, in light of the breed's common use as guard or police dogs and its reputation for aggressiveness. In *Quest*, the Board gave no consideration to these realities, abdicating its role as the agency that is supposed to be the expert in real-world workplace conditions.

E. The ALJ Erred in Crediting the Guard Over Claudia Juarez to Conclude that the Guard Did Not Escort Employees from the Parking Lot to the Main Entrance.

The ALJ found that the security guard did not escort employees from the employee parking lot to the main entrance. This finding is based on an erroneous credibility ruling that is against the weight of the evidence, and should be reversed.

The ALJ analyzed the evidence as follows:

Claudia Juarez (Ms. Juarez), senior organizer of the Petitioner, was present at the

care facility during the polling periods on August 19 and 20. She positioned herself on the public sidewalk in front of the front/main entrance into the facility. Ms. Juarez testified that during the polling periods, she observed the security guard escorting arriving employees from their vehicles in the parking lot to the care facility. The security guard testified that he did not escort any employees or other persons to the facility. I found the security guard's testimony to be clear and candid. Having considered photographs of the care facility, a schematic of the care facility layout, and credible witness testimony, I find that Ms. Juarez had limited views of the parking perimeter from her position outside the front/main entrance. I find the security guard did not escort employees to the facility at any time during the election periods on August 19 and 20.

Report at 5:1-11. The ALJ should not have credited the guard's testimony regarding his activities on the election days over the testimony of union representative Claudia Juarez.

The Board is free to consider the evidence afresh when the clear preponderance of the relevant evidence establishes that the ALJ's credibility finding is incorrect. *Standard Dry Wall Prods.*, 91 NLRB 544, 545 (1950). Here, the clear weight of the evidence precludes deference to the ALJ's credibility finding.

First, although the ALJ characterized the guard as "clear and candid" (Report at 5:7-8), the guard was an unreliable witness on the central issue he testified about: what he was doing during the shift change voting periods. During the course of his brief testimony, the guard changed his story three times. First, he testified that he was stationed at the corner of the building outside Room 18 during the shift change voting periods. Tr. 58:12-21 & Employer Exh. 1. Later, he changed his testimony to say that he was stationed by the east exit during one of the voting periods instead of outside Room 18. Tr. 67:20-68:13. Then he changed his testimony again, claiming that he actually spent two hours of one of the three-hour voting periods inside the building. Tr. 72:15-22, 74:5-22. Whatever the guard's story was, he could not stick to it.

The guard was an unreliable witness for another reason as well. He admitted that he was

testifying at the direction of his own employer, the contractor that provided security services to West Hills, and that he consulted with West Hills' counsel before testifying. Tr. 68:18-25. In short, the guard was hardly a disinterested witness.

Second, the ALJ erred in discounting Union witness Claudia Juarez's testimony. The ALJ entirely rejected Ms. Juarez's account that the guard escorted employees from their cars to the main entrance, on the basis that from her position on the sidewalk on Strathern Street, Ms. Juarez had only "limited views" of the employee parking lot, which faces Vasser Street. Report at 5:8-10. But the ALJ ignored the necessary implications of her finding that Ms. Juarez was positioned on the sidewalk "in front of" the main entrance to the building (Report at 5:1-3; *see also* Employer Exh. 1). Every employee who parked in the employee parking lot necessarily had to walk around to the Strathern Street side of the building to enter through that main entrance, because that is the only entrance used by employees. Tr. 107:19-108:7 & Employer Exh. 1. Thus, even if Ms. Juarez had only a limited view into the employee parking lot, she still had a clear view of the main entrance. She had a clear view of the guard as he escorted workers around from the employee parking lot to the main entrance. Tr. 41:17-43:3, 53:20-25.

Third, the Employer's witnesses could not establish that the guard did not escort employees from their cars to the entrance. Administrator Seifert was only outside the building during the shift change voting periods for a moment to deliver a note to the labor consultants who were outside the main entrance. Tr. 113:13-14. Thus, although he said he did not instruct the guard to escort employees (Tr. 101:8-11), he did not, and could not, testify to any observations of what the guard was doing. Although labor consultant Rivera testified that he did not see the security guard escorting workers to the main entrance (Tr. 128:9-11), he was an

extraordinarily poor witness. Rivera is strongly interested in the outcome of the election, because was engaged by the Employer to help defeat the Union campaign. Tr. 115:1-116:4, 120:5-121:2. However, he was reluctant even to admit that his purpose at West Hills was to ensure the Union's defeat. Tr. 135:10-19. Given that Administrator Seifert had already conceded that was Mr. Rivera's job (Tr. 115:1-116:4, 120:5-121:2), Mr. Rivera's evasion on this most basic point was sufficiently curious to cast doubt on his testimony as a whole. Moreover, as discussed *supra* at 8, Mr. Rivera gave only evasive responses to explain his presence in the main entrance and lobby areas during the voting periods, further underscoring the unreliability of his testimony. In short, Mr. Rivera has a substantial business and financial interest in the Union's defeat in this case, and even notwithstanding his apparent motivation to shade his testimony, he was an evasive witness. His testimony cannot be credited.

In sum, the reliable evidence establishes that the security guard *did* escort workers from the parking lot to the main entrance during the shift change voting periods. This conduct was also out of the ordinary, and has no legitimate business justification. Objection 3 should be sustained on this ground as well, and the election should be set aside.

IV. The ALJ Erred in Not Examining the Cumulative Effect of the Employer's Objectionable Conduct.

As discussed *supra* at 2-3, a party's instances of objectionable election conduct should not be examined in isolation, but should be considered cumulatively to determine whether, "taken as a whole," those instances require the election to be set aside. *See Cambridge Tool*, 316 NLRB at 716; *Metaldyne*, 339 NLRB at 352; *NYES Corp.*, 343 NLRB at 791 n.2; *Avis Rent-a-car*, 280 NLRB at 581. Here, the ALJ failed to conduct such an analysis. *See generally* Report

at 4-5.

Even if any one of the Union's objections, standing alone, might not have warranted setting aside the election, taken as a whole they surely do. Each employee arriving at work on the two days of the election had to run the gauntlet of the managers, the labor consultants, and the guard before voting. Dozens of employees were also engaged in conversation by the managers and labor consultants. There was no good reason for the guard's presence in the parking lot. There was no good reason for the labor consultants to linger in the main lobby where they knew employees would have to pass by on their way to vote. Employees knew who the labor consultants were and why they were there: to persuade them to "vote no." It cannot have been lost on the employees that the presence of this intimidating election-day gauntlet was meant to send a powerful, final "vote no" message. Had the ALJ applied the correct legal standards, she should have held that each objection, standing alone, warranted setting aside the election. Taken together, that conclusion is inescapable.

CONCLUSION

For the foregoing reasons, Petitioner's Exceptions to the ALJ's Report and Recommendations should be granted. The results of the August 19-20 election should be set aside, and the Board should order a second election.

Dated: December 30, 2010

Respectfully submitted,



Eileen B. Goldsmith
ALTSHULER BERZON LLP

Attorneys for Petitioner SEIU

PROOF OF SERVICE

Re: Service Employees International Union, and
Canoga Healthcare, Inc. dba West Hills Health & Rehabilitation Center

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, San Francisco, California 94108.

On **December 30, 2010**, I served the following document(s):

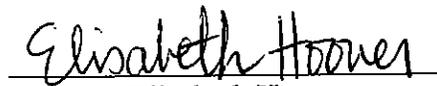
**PETITIONER'S BRIEF IN SUPPORT OF EXCEPTIONS TO ALJ'S
REPORT AND RECOMMENDATIONS**

on the parties, through their attorneys of record, via:

E-mail or electronic transmission. I caused the documents to be sent to the persons at their e-mail addresses. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

John Douglas
Foley & Lardner LLP
555 South Flower Street
Suite 3500
Los Angeles, CA 90071-4500
JDouglas@foley.com

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this December 30, 2010, at San Francisco, California.


Elisabeth Hoover