

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

1621 ROUTE 22 WEST OPERATING
COMPANY, LLC d/b/a SOMERSET
VALLEY REHABILITATION & NURSING
CENTER,

Employer,

and

1199 SEIU UNITED HEALTHCARE
WORKERS EAST, NEW JERSEY REGION,

Petitioner.

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NLRB Case No. 22-RC-13139

EMPLOYER'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE
HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS

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DATED: February 28, 2011

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I. PROCEDURAL BACKGROUND

On July 22, 2010,¹ 1199 SEIU United Healthcare Workers East, New Jersey Region (the “Union”) filed its Petition with Region 22 of the NLRB seeking a representation election among the employees of 1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation & Nursing Center (“Employer”). An election was held on September 2, at which the tally of ballots showed 38 votes cast for representation by the Union and 28 votes cast against the Union. On September 9, the Employer timely filed Objections to the Conduct of the Election. The Employer alleged that: (1) the Union and/or its agents engaged in impermissible conduct during the election campaign; (2) significant election irregularities raised serious doubts regarding the integrity and secrecy of the election; and (3) such conduct and irregularities denied employees a free choice in the election. The Employer requested that the election be set aside and a new election ordered.²

On October 12-15, 20, 25, 26, 29 and November 3, 4, and 8 a hearing was conducted on the Employer’s Objections. Although there were 11 days of hearing conducted over the course of a month, and the transcript was well over 1,300 pages, the Hearing Officer denied the parties an opportunity to file post-hearing briefs. On January 19, 2011, the Hearing Officer issued her Report recommending that all of the Employer’s Objections be overruled.

On February 28, 2011, the Employer timely filed Exceptions to the Hearing Officer’s Report and Recommendations.³ In support of these Exceptions, the Employer shows as follows:

II. HEARING OFFICER’S REPORT

The Hearing Officer reached the conclusion that the conduct relevant to the election in this matter was not objectionable by ignoring the undisputed testimony of numerous witnesses and creating her own unjustified explanation of the facts. The Hearing Officer then took those erroneous and unsupported factual findings and misapplied the appropriate legal standards.

¹ All dates are in 2010, unless otherwise stated.

² At the close of the hearing, the Hearing Officer granted the Employer’s request to withdraw Objections Nos. 8 and 14 relating to threats and intimidation of eligible voters by the Union leading up to the election.

³ By letter dated January 28, 2011, the Executive Secretary extended the date for the Employer to file its Exceptions and supporting Brief to February 28, 2011.

III. FACTS AND ARGUMENT

A. Significant Election Irregularities Raise Serious Doubts About the Integrity and Secrecy of the Election (Objections 5, 6 & 7)

1. Relevant Facts

On September 2, the day of the election, it is **undisputed** that polls for the morning session opened approximately 10 minutes late due to the fact that the Board Agent arrived late as the result of her taking sleeping pills the night before which caused her to oversleep. (Tr. 351-52, 446-47).⁴ In addition to arriving late, the Board Agent was not organized or prepared for the election. (Tr. 447). It is **undisputed** that the Board Agent failed to bring tape with her to seal the ballot box. (Tr. 450). The Board Agent also did not bring signs for the roving Observers to carry because she stated she was unaware roving Observers were to be used. (Orozco Tr. 448-49, Napolitano Tr. 321). As a result, “Time to Vote” signs for the roving Observers to carry had to be handwritten on the back of another Board document. (Tr. 449). Although the Board Agent originally wrote “Time to Vote” in pen, the pen was not visible and the writing had to be retraced with a marker. (Tr. 449). These “Time to Vote” signs were written in English only – contrary to the fact that some employees only speak or read Spanish. (Tr. 449). Further, the roving Observers were not provided with badges identifying them as NLRB Election Observers while the polls were open. (Tr. 395). Additionally, the Board Agent did not go over the Board’s Instructions to Observers (Er. 12) – instead, she handed them the document and said, “you probably read this over already.” (Tr. 450).

Pursuant to the parties’ Stipulated Election Agreement, voting was held in the conference room at the Employer’s facility. (Jt. 1). This conference room is depicted in Er. 7A - 7E. The Hearing Officer found that the “Board Agent brought to the election a three sided voting booth, which is constructed to sit on a table or on a base.” (H.O. 58). Contrary to the Hearing Officer’s report, it is **undisputed** that a voting “booth” was not used by the Board Agent. Rather, the so-called “voting booth” was, in fact, simply a cardboard shield without the remaining parts of the complete voting booth kit. The side panels of the cardboard shield measured 17 inches wide by 22

⁴ Throughout this Brief, references to the Hearing Officer’s Report will be cited as (“H.O.”); the Hearing Transcript will be cited as (“Tr.”); and the Employer’s Exhibits will be cited as (“Er. 1, Er. 2,” etc.).

inches high, and the center panel was 17.5 inches wide and 22 inches high. (H.O. 58). Contrary to the Hearing Officer's finding, it is **undisputed** that the cardboard shield used is **not** designed or constructed "to sit on a table **or** on a base," but, rather, is constructed to be used on a table only **if** it is sitting in its base, which was not used in this election. As the Hearing Officer acknowledged, "[t]here are notches at the bottom of the booth which fit into a standing base. The base was not used in this election." (H.O. 58). At the front of the side panels there are notches 3.25 inches long and 0.75 inches high. At the back of the side panels, in the corners where the side panels meet the center panel, the notches are approximately 2 inches long and 0.75 inches high. On the bottom of back panel, the notches on each side are 1.25 inches long and 0.75 inches high. (H.O. 58, Tr. 214-16). Er. 20L – 20R and 21 show the exact type of shield used in this case and the notches.

In response to the Employer's subpoena, Region 22 produced the complete voting booth kit, of which only the shield was used in this case. (Tr. 1006-27 and Er. 20L – 20R; Rejected Er. 20A – 20K, 20S – 20V). Based upon the Objections filed in this case, the Hearing Officer clearly erred in rejecting into evidence Er. 20A – 20K, 20S – 20V and proof of the complete voting booth kit and how the complete booth is designed to be used. (Tr. 1021-23; H.O. 58, fn 22). The shield used in this case is but one component of the Poll Master II voting booth. This voting booth is stored in a carrying box that resembles a large briefcase. There are detailed instructions on the side of the carrying box showing how the voting booth is properly to be used. The cardboard privacy shield sits in a plastic base. The notches and gaps at the base of the shield are a function of the shield's design – to fit into matching slots on the base that it sits in. When properly secured in the base, the cardboard shield is locked into place and cannot move. Further, the gaps at the bottom of the cardboard shield are not exposed. The base sits on aluminum legs that are stored in the bottom of the base. It takes about two to three minutes to set up the complete booth from the time it is unpacked. When the base is placed on the legs, the voting surface is higher than a ordinary tabletop (as much as one foot). Accordingly, when a voter is standing at this voting booth with the cardboard shield properly installed in the base sitting on legs, the shield covers a far

greater percentage of the voter's upper torso and body than if it were simply put on a table. (Tr. 1007-09 and Er. 20L – 20R; Rejected Er. 20A – 20K, 20S – 20V). Indeed, the detailed instructions for using the Poll Master II expressly state in Instruction No. 7 that only *after* completing the actions in the first six instructions (placing the shield in the base and attaching the legs) is “the booth ... now ready to use.” (Rejected Ex. 20B – 20C).

In referring only to the cardboard *shield* part of the booth, the Hearing Officer found that “[w]hen such a booth is used, the Board’s analysis is limited to whether a voter’s ballot marking was observed by others while voting, or before the ballot was deposited in the ballot box.” (H.O. 73). As detailed above, however, it is *undisputed* that the cardboard shield used by the Board Agent is only one part of a complete voting booth kit. While this entire voting booth apparatus (shield, base, and legs) arguably may be an approved “booth,” the cardboard shield used by itself in this election clearly was not properly used and thus was not an approved voting “booth” of any kind. Thus, it is clear from Er. 20L - 20R, that the cardboard shield used by the Board Agent has slots on the bottom that are obviously designed to fit into a base, and that when used improperly by itself without the base there are open gaps at the bottom of the cardboard shield through which the inside of the shield could be seen.

Prior to the start of the morning voting session, the Board Agent first placed the cardboard shield on the end of the table where the Observers were sitting. (Tr. 452, 454-55). After complaints by others in the room that it was too close to the Observers, the Board Agent moved the cardboard shield onto a narrow counter that runs along part of one of the side walls of the conference room directly across from the table where the Observers were seated. The cardboard shield initially was placed on this counter so that its sides were parallel to the front edge of the counter and wall, and its opening was facing directly back toward the back wall/windows of the conference room (Orozco Tr. 456; Er. 21E – 21G). When it was mentioned that with the cardboard shield facing the back wall it would be difficult for people to vote since they would have to lean around the side panel of the shield to mark their ballots, the Board agent then angled the shield slightly so that its opening faced partly toward the opposite side wall of the conference room such

that the Observers were facing the shield as indicated in Er. Exs. 8A and 8B and Er. Exs. 21A – 21D. (Napolitano Tr. 339, Orozco Tr. 455, Estrada Tr. 610-11, Moore Tr. 674-75).

Employer Observer Sheena Orozco credibly testified that the placement of the cardboard shield on the counter changed throughout the morning voting session as different voters moved the shield when they voted. (Tr. 459). Orozco's testimony was fully corroborated by numerous voters who testified about the position of the cardboard shield when they voted. (Dande Tr. 565, Estrada Tr. 609-10, Beauvoir Tr. 629, Moore Tr. 671-672). For example, some employees testified that the cardboard shield was slightly angled on the counter. (Carpio Tr. 763, Grey Tr. 791). Other employees testified that when they voted, the back of the cardboard shield was parallel or almost parallel to the counter and side wall of the conference room such that the open part of the shield was facing and **completely open to the Observers** sitting directly across from it. (Dande Tr. 565, Estrada Tr. 609-10, Beauvoir Tr. 629, Moore Tr. 671-672, Mangel Tr. 1185, 1200, 1208-09). In fact, when Jacques demonstrated at the hearing how she voted, she bumped the cardboard shield and displaced it, thereby clearly showing what numerous employee witnesses testified actually occurred during the first voting session. (Tr. 382). "Given the weight of this testimony," the Hearing Officer "credit[ed] the employees who testified that the voting booth was in a number of different positions during the morning session" and did "not credit Napolitano's testimony that the voting booth did not move from its position during the first voting session." (H.O. 68).

Regardless of which position the cardboard shield might have been in when a given employee voted during the morning voting session (completely parallel to the counter as Napolitano testified, partly angled into the room as numerous employees testified, or completely open to the room as numerous other employees testified), it is **undisputed** that the shield was only a few feet from where the Observers and Board Agent were sitting. The Hearing Officer credited Orozco's testimony that during the morning voting session, Orozco was approximately 9 feet from the cardboard shield during the morning voting session and approximately 6 feet from the shield in the afternoon session. (H.O. 72). Napolitano was not quite 8 feet away in the morning and a little over 5 feet away in the afternoon. (H.O. 72).

Despite this overwhelming, undisputed, and credited evidence, the Hearing Officer incredibly found “[t]here is no evidence that employees reasonably thought their ballots had been seen” (H.O. 73) and that “the record establishes that the voting booth provided adequate privacy for voters in this election.” (H.O. 74). Contrary to the Hearing Officers’ findings, the record is replete with **undisputed** evidence that due to the Board Agent’s improper use of the cardboard shield by itself and its placement and movement on the counter throughout the morning voting session, voters believed the Observers and others in the room could see their backs, shoulders, arms, hands, and “whole voting move” while they voted, including which side of the ballot they were marking and/or how the ballot was marked. (Dande Tr. 566, 580, Beauvoir Tr. 629, Moore Tr. 673, Mangel Tr. 1208-09). Due to the placement and movement of the cardboard shield during the morning voting session, these impressions were not only reasonable, they are objectively true.

The Union’s and Employer’s Observers could see the exposed arms and shoulders of voters. (Napolitano Tr. 341, Orozco Tr. 458). Several voters testified to even more egregious circumstances. Doreen Dande testified that the cardboard shield was angled on the counter so that it was open to the Observers in the room, that when she voted her back was to the Observers and that she believed people in the room could tell how she voted and could see inside the shield while she voted. (Tr. 563-66, 580). Dande further testified, “Everybody could pretty much see my whole voting move. ... [T]hey could see whether my hand moves to the right or moves to the left.” (Tr. 566, *see also* 580). Michele Moore testified that the cardboard shield was positioned on the counter so that it was completely open to the Observers when she voted, that the Observers were sitting directly behind her when she voted, and that (while she does not know if they actually watched) the Observers, if they were looking, could have seen which side of the ballot she was writing on. (Tr. 670-73, 1168-69, 1176). Beatrice Beauvoir testified that when she was voting she thought the Observers could “see [her] vote [her] answer.” (Tr. 630). Accordingly, she testified that she tried to “block[] [herself] from anybody seeing [her]” with her back when she voted. (Tr. 648). When pressed on cross examination regarding the lack of privacy in the voting process, Beauvoir clearly stated that **had she not used her back to block her ballot, her ballot could**

have been seen by others in the room. (Tr. 648). Although the Hearing Officer disregarded this evidence because no one actually saw how she marked her ballot (H.O. 68), *the very fact that Beauvoir felt the need to use her body as a shield clearly shows that the way the cardboard shield was set up was not private and created the real impression and concern among voters that others could see how they were voting.* Finally, Michelle Grey also testified that she tried to cover her paper with her back because “Shannon is right there” and the cardboard shield was angled on the counter so that it was open to the Union Observer sitting behind her. (Tr. 790-92). Finally, Elaine Mabilangan testified that she did not believe the voting area was private. (Tr. 737).

Orozco testified without contradiction that from all the various positions the cardboard shield was in during the morning voting session, she could see through the gaps at the bottom of the shield, and depending on the positioning of the shield at various times during the morning session she could see the ballots of the voters and could also see which side of the voting shield the voter’s hand was on. (Tr. 458-60, 462).⁵ “As voters went in ... throughout the election I would see in the box.” (Tr. 523, H.O. 62). Orozco further testified:

- Q. In the configuration that you have it now where it is more open than you showed us in the past could you see the ballots inside the voting shield as voters voted?
- A. Yes.
- Q. Could you see voters’ hands inside the shield as they voted?
- A. Yes.
- Q. Could you see their arms move inside the shield?
- A. Yes.
- Q. Could you see their shoulders move?
- A. Yes.

⁵ The Hearing Officer did not credit this testimony because it was in response to “leading questions.” However, this testimony was admitted without any objection by the Union’s counsel as to the form of the question, and without the Hearing Officer making any mention of any issue or problem with the form of the question at the time. Thus the requirement that objections regarding the form of the question must be raised in a timely fashion *at the hearing* or they are waived is to permit counsel to rephrase the question and cure the objection. Accordingly counsel for the Union clearly waived any objection as to whether these were leading questions. Moreover, if the Hearing Officer believed the questions to have been leading and improper, she also could have raised that issue at the Hearing so as to permit counsel for the Employer to rephrase the question to cure any objection. Having not done so, it is completely inappropriate and improper for the Hearing Officer to now belatedly raise an objection based on the form of the question and use such to support her findings when she never said anything in a timely fashion at the hearing. Moreover, based on the objective evidence concerning the use and placement of the cardboard shield in positions that were open to the Observers during the morning voting session, *this is not a witness “credibility” or demeanor issue*, but rather one of objective fact, fully corroborated by credited testimony of other voters.

- Q. Was their back toward you or the wall when they voted, when it was in this configuration?
- A. Their back was towards me.
- Q. Could you see their elbows moving when they voted, when it was in this configuration?
- A. Yes.
- Q. And if I asked you this I apologize to everyone. When it [the shield] was in this configuration could you see which side of the shield the voter had their hand?
- A. Yes.

(Tr. 462).

Regardless of how the cardboard shield was oriented on the counter when each employee voted during the morning session, it cannot seriously be disputed that other employees waiting in the room to vote as well as the Observers (who were sitting at most 8-9 feet away) would be able to see most of the voters' backs, shoulders, and arms, and in some cases even their hands. It also cannot seriously be disputed that given the very close proximity and the dimensions and construct of the cardboard shield, it would have been likely that the Observers and other employees in the room waiting to vote would have seen what side of the shield the voter's arms and hands were near, and thus, what side of the ballot they were marking. ***When one already knows what side of the ballot the "yes" is on and what side the "no" is on, seeing what side of the shield the voter's hand is near while marking his or her ballot is the practical and functional equivalent of seeing and knowing how the voter marked their ballot.***

Following the morning voting session, in response to complaints from voters that they were not afforded enough privacy in the first voting session, a second table was brought into the conference room for the afternoon voting session and placed next to the table where the Observers and Board Agent were sitting, and the Board Agent put the cardboard shield on this second table. (Tr. 210, 343, 473-74 and Er. 9A – 9C, 21H – 21J). Union Observer Napolitano testified that when this second table was brought in, it was agreed that this set up was better than the set up of the morning session. (Tr. 345-46). While the placement of the cardboard shield at the end of the table with the opening facing the back wall of the room afforded voters a little more privacy, Orozco testified without contradiction that she could still see the hands and arms of voters through the gaps at the bottom of the shield during the afternoon session. (Tr. 479).

Tracey Thomas testified that she took longer to vote because she was wondering if anyone was watching her because if they were, they would see if she moved one way or the other and would know how she was voting. (Tr. 1100). Indeed, since the table that the cardboard shield was sitting on during the afternoon voting session was lower than the height of the counter it was sitting on during the morning session, more of the voters' upper bodies and arms were exposed to anyone in the room. Indeed, the Hearing Officer credited the testimony of Eric Carpio "that his arms and shoulders were visible above his mid-chest." (H.O. 68, lines 20-21). Accordingly, due to the fact that the voters in the afternoon session were facing directly toward the door of the conference room as they marked their ballots, with their upper bodies and arms exposed above the height of the cardboard shield, it is self evident that the Observers and anyone waiting to vote, all of whom were within a few feet of the voters, could easily have discerned on which side of the shield the voters were marking their ballots, and hence, how they voted.

Several witnesses also testified that there was a small TV in the conference room in both the morning and afternoon sessions sitting on a raised part at the end of the counter that reflected their image to others in the room creating a feeling that anyone in the room could see how they voted. (Illis Tr. 210, Dande Tr. 566, Beauvoir Tr. 630, 631-32, Moore Tr. 674-75, Mabilangan Tr. 725, Carpio Tr. 765, Grey Tr. 792, Thomas Tr. 816 and Er. 7C - 7E, 8A – 8B, 9A – 9C; Illis Tr. 1003). Orozco confirmed not only that the TV was there during both voting sessions, but that she could see the reflections of voters – including their arms – in the TV as they voted. (Tr. 464-66, 482). The placement of the TV is accurately indicated in Er. 8A. (Tr. 465, 793, 817). Based on the weight of the evidence, the Hearing Officer credited the testimony that the small TV was in the conference during the voting sessions. (H.O. 70).

It also is **undisputed** that the Board Agent failed to maintain appropriate conditions in the voting area while the polls were open. First, contrary to clearly published Board instructions for Observers (Er. 12), a number of witnesses testified that Napolitano had a cell phone out inside the conference room while the polls were open. Contrary to Napolitano's assertion that her cell phone was turned off and in her purse during voting and she never took it out or looked at it, several

witnesses saw her with a phone in her lap, on the table in front of her, in her hands, looking at it, and even using her fingers in such a way to give the appearance that she was manipulating the keypad as though she was texting. (Napolitano Tr. 325, Orozco Tr. 482-83, Dande Tr. 567-68, 581-82, Pratts Tr. 710, Carpio Tr. 768, Thomas Tr. 816). The Board Agent, however, said nothing to Napolitano about this blatant violation of Board rules. (Tr. 483-84). While Napolitano's Verizon phone records do not show that she sent any texts while the polls were open, it is certainly possible that Napolitano could have been using her phone to make notes of which employees voted and/or how they voted, which would have given the appearance that she was "texting." Also, it is entirely possible that Napolitano was using a phone other than her own to send messages.

In addition, an employee who was at the cardboard shield marking her ballot attempted to answer her own cell phone when it rang while she was voting. (Tr. 487). When this happened, the Board Agent was conversing with the Union's Observer and failed to stop the voter until the Employer's Observer reminded her that the Observer instructions prohibited cell phones. (Tr. 487, 489). The Board Agent agreed and told the voter she could not have her cell phone in the voting room. (Tr. 487). Still, only after looking at her phone did the employee put it away. (Tr. 488).

While the polls were open, many employees testified that the door to the conference room was open and people immediately outside the door were talking loudly. (Napolitano Tr. 349-50, Orozco Tr. 479-81, Dande Tr. 570-71, Moore Tr. 675-76, Pratts Tr. 709, Mabilangan Tr. 724-25, 729, Thomas Tr. 816). Additionally, "a bunch of people" were allowed in the voting room at the same time and were also talking. (Dande Tr. 563, 569; see also Orozco Tr. 481). In fact, it is **undisputed** that one individual was even singing, while another was waving her arms in the air and dancing. (Tr. 348, 363). This circus like atmosphere caused at least one voter to feel rushed when marking her ballot. (Tr. 727). The Board Agent did nothing to shut the conference room door or stop this conduct, but rather painted her fingernails and cleaned out the cap of her lipstick. The Board Agent's failure to perform her duties properly or even pay attention to what was going on in the polling room is clearly evidenced by the fact that she actually had to ask one of the Observers, Sheena Orozco, whether or not one of the voters had put her ballot in the ballot box

after voting. (Napolitano Tr. 348, Orozco Tr. 477-78, 484, Dande Tr. 569, Mabilangan Tr. 729-30). More shockingly, Thomas credibly testified that the Board Agent actually left ballots sitting on the table for employees to pick up themselves, rather than personally handing each employee one ballot. (Tr. 1087). It is clear the Board Agent knew the voting process was deeply flawed, as it is **undisputed** that she told the Observers that the second voting session could not happen like the first one. (Napolitano, Tr. 347; Orozco, Tr. 481-82).⁶

2. Argument

a. The Board's Rules & Regulations, Case Handling Manual, and Election Notice all Require an Actual Voting "Booth"

The Board's Rules & Regulations regarding representation elections specify that:

The actual polling is always conducted and supervised by Board agents. Appropriate representatives of each party may assist them and observe the election. As to the mechanics of the election, a ballot is given to each eligible voter by the Board's agents. **The ballots are marked in the secrecy of a voting booth.** The Board agents and authorized observers have the privilege of challenging for reasonable cause employees who apply for ballots.

Section 101.19 (a)(2) NLRB Rules & Regulations (emphasis added).

The Board's Casehandling Manual for Representation Proceedings also envisions a private space that employees can enter. Thus, Section 11322.2 provides that the "Board agent should **police** the booth to see that there are no cross-conversations between **occupants** and that there is no more than one **occupant** per booth. The Board agent should also occasionally **inspect the interior of the booth.**" (emphasis supplied). The use of the terms "occupant" and "interior" clearly indicate that the booth must be a personal space that an employee actually enters.⁷ Further, the

⁶ In her Report, the Hearing Officer stated "I do not rely on this hearsay testimony". (H.O. 52, fn 18). As set forth in the NLRB Guide for Hearing Officers, however, "it is important to remember that hearsay may be received into evidence." § IX.D.4. Hearsay, generally, is excluded due to unreliability of a proffered out of court statement and potential prejudice to the non-offering party. In this case, no such concern exists because *both* parties had Observers present during the conduct and when the statement was made. Both Observers testified about the conduct and that the Board Agent made this statement. It was error and an abuse of discretion, therefore, for the Hearing Officer not to consider this probative evidence from both parties as to the circumstances in which the first voting session took place. As the Hearing Officer noted in another portion of the Report, "Hearsay is ... 'probative ... if corroborated by something more than the slightest amount of other evidence.'" (H.O. 76, citing *Dauman Pallet, Inc.*, 314 NLRB 185 (1994))

⁷ Likewise, Form NLRB-722, Instructions to Election Observers, provides that one of an observer's duties is to "See that only one voter **occupies** a booth at any time." (Er. 12, emphasis added).

use of the terms “police” and “inspect” clearly demonstrate that the Board agent will need to take affirmative steps in order to monitor the booth, as the “interior” of the booth should not be in the Board Agent’s plain sight or open to the Observers. Similarly, Section 11338.3, which discusses challenge procedures, states

The voter is then given a ballot and instructed to **enter** the booth, mark the ballot, fold it so as to keep the mark secret and return to the voting table. The Board agent and the observers should make sure that when the challenged voter **comes out of the booth**, he/she goes to the voting table and does not drop the ballot in the box before placing it in the envelope.

(emphasis added). Obviously, one cannot “enter” or “come[] out” of a shield sitting on a table or a counter as one does with a four-sided private space created by a real voting booth with a curtain.

Finally, Section 11304.3 of the Casehandling Manual states:

[w]hat is required is a compartment or cubicle that not only **provides privacy** but that also demonstrates **the appearance of providing privacy**, while maintaining a **level of dignity** appropriate to the election process. (emphasis added).

The cardboard shield used in this election and the manner in which it was used fails to comply with any of these requirements. First, the cardboard shield itself clearly was not a compartment or cubicle. Second, the manner in which it was used, sitting on a counter with opening completely exposed to the Observers and anyone else in the room, clearly did not provide any privacy. Third, it did not even demonstrate the appearance of providing privacy, so much so that the **undisputed** record shows that voters even had to resort to trying to use their own bodies to block the view of others seeing how they were voting. Finally, one cannot seriously contend that this cardboard shield maintained **any** level of dignity appropriate to the election process. Indeed, rather than dignity, one could more aptly characterize the use of this cardboard shield as a joke hardly befitting the solemnity of a Board conducted secret ballot election.

Further, the Stipulated Election Agreement in this case directed the Employer to post copies of the Notice of Election in conspicuous places accessible to voters at least three working days prior to the election. (Jt. 1, p. 3 ¶ 3). The Board’s standard Notice of Election, Form NLRB-707, provides:

Upon arrival at the voting place, voters should proceed to the Board agent and identify themselves by stating their name. **The Board agent will hand a ballot to each eligible**

voter. Voters will **enter the voting booth and mark their ballot in secret.** DO NOT SIGN YOUR BALLOT. Fold the ballot **before leaving the voting booth,** then personally deposit it in a ballot box under the supervision of the Board agent and leave the polling area.

(italicized emphasis added, capitalization in original). The Notice of Election, Form NLRB-707, also contains a sample of the official ballot and shows that that the “Yes” box is on the left and the “No” box is on the right.

The cardboard shield used in this case, and the manner in which such was used, clearly fails to meet any of the above-stated requirements in the Board’s Rules and Regulations, Casehandling Manual, and Notice of Election Form. Indeed, this is objectively provable by even a cursory examination of the photos in Er. 8, 20L -20R and 21 showing how the cardboard shield was used. The election should be set aside on these grounds alone, since the employees were deprived of their right to cast their ballots in the sanctity of a voting **booth** that gave them privacy, the appearance of privacy, and dignity.

Further, insofar as the Board may have previously sanctioned or approved of the use of such cardboard shield as were used in this case, the Board should clearly and definitely discontinue this practice and return to the Board’s long-established tradition of using actual voting booths with curtains. There is simply no other way to comply with the requirements of the Boards’ Rules and Regulations, Casehandling Manual, and Notice of Election Form. Failure to do so will lead to results like the instant case where the use of a cardboard shield turned open into the room does not even offer voters the pretense of privacy much less any dignity appropriate to the election process. This is the type of voting arrangement one might expect to find used by some third-world dictator trying to justify their “democratic election,” certainly not in America in a secret ballot election that has been called the “Crown Jewel” of the National Labor Relations Board.

b. The Board’s Regulations Were Not Followed In This Case

The Board has long held that,

[i]t is of vital importance to the Board’s effectuation of the policies of the Act that the regularity of its elections be above reproach. And if the integrity of the Board’s election process is to be maintained it is manifestly essential that employees be balloted in a secret election, for the secret ballot is a requisite for a free election.

Columbine Cable Co., 351 NLRB 1087, 1087 (2007) (citation omitted). “[T]he Board has consistently set aside elections where ‘voting arrangements could have led employees to believe they were being observed as they voted.’” *Id.* (citation omitted). Moreover, Board law is clear that “election irregularities that ‘raise doubts concerning the integrity and secrecy of the election’ are grounds for setting aside an election.” *Id.* at 1088.

Where, *at a minimum*, voters’ arms were fully exposed as they voted, the Board has found that “[t]hese circumstances ‘raise doubts concerning the integrity and secrecy of the election.’” *Id.*, quoting *Royal Lumber Co.*, 118 NLRB 1015, 1017 (1957) (setting aside an election where employees voted under circumstances where, “[a] nonvoter *could* have seen how some employees voted and that the employees *could* have believed that their votes had been observed.”) (emphasis added). Applying this analysis, in *Columbine* the Board set aside the election, finding that when two employees “voted without the privacy and secrecy afforded by a voting booth or a completely private room[,]” in the same room as the Board agent and observers for the parties, with those individuals “positioned only 15 feet away[,]” where they could observe the voters’ “backs and left shoulders while they were marking their ballots,” the voting arrangements were “entirely too open and too subject to observation to insure secrecy of the ballot and freedom of choice by the employees in the selection of a bargaining representative.” *Id.* (citation omitted). Further, the Board has found that “***even though there is no affirmative proof that any person actually saw how the ballots were marked” circumstances where voters’ arms or backs are exposed raise doubts concerning the integrity and secrecy of the election.*** *Id.* (emphasis added).

In *Imperial Reed & Rattan Furniture Co.*, 118 NLRB 911, 913 (1957), the Board agent oversaw the creation of an improvised voting booth that included stacking chairs and cushions to obscure observers’ view of voters’ actions. *Id.* The evidence in that case showed

that the table at which the observers sat was located approximately 7 feet from the voting table and within their line of vision as they sat at the table. ...[T]he union observer stated that he could see some of the ballots as the employees placed them on the voting table although he could not see how they were marked.

Id. at 912-13. In those circumstances – even where the testimony was that the observer *could not see how the ballots were marked* – the Board found:

[the] voting arrangements were entirely too open and too subject to observation to insure secrecy of the ballot and freedom of choice by the employees in the selection of a bargaining representative. A secret ballot is essential to a free election. In the interest of preserving the integrity of our election processes, we shall set aside the election and direct that a new election be held.

Id. at 913. Similarly, in *Royal Lumber*, a non-voter who approached a jury-rigged lean-to erected for the election stated that he *could not* see voters making markings on ballots, but the Regional Director found that “voters could have believed that he saw their vote.” 118 NLRB at 1017. The Board there found that “the employees voted under circumstances which at least raise doubts concerning the integrity and secrecy of the election” and ordered a second election. *Id.*

As in the aforementioned cases, there was a multitude of **undisputed** testimony in this case that while individuals were voting, their backs, shoulders, arms and even hands were exposed to the room. And, in this case, the Union’s Observer was at times as near as 5 feet from the voter – much closer than the 15 feet in *Columbine* or even the 7 feet in *Imperial Reed*.

In overruling the Employer’s Objections in the present case, the Hearing Officer relied heavily on the Board’s recent holding in *Physicians & Surgeons Ambulance Service, Inc. d/b/a American Medical Response*, 356 NLRB No. 42 (2010). However, the facts in that case are clearly distinguishable from those presented here. In *Physicians & Surgeons*, no affiants asserted that anyone saw how they or any other voter marked their ballots – or “even that they thought anyone had seen their ballots.” (H.O. 72). As the Board stated in that case, “Indeed, they did not even state that they had the **impression** that their ballot choices were witnessed.” *Id.* (emphasis added). Additionally, in that case the Board stated that when a Board-sanctioned voting booth is used, the Board’s analysis is limited to “whether a voter’s ballot marking was observed by others while voting, or before the ballot was deposited in the ballot box.” *Id.*

In *Physicians & Surgeons*, the Board Agent used “the Board’s ‘table-top’ model, a structure that resembles a lectern desk used by a teacher for class room instruction [that] ... shields voter’s lower arms and hands as they mark their ballots within the hollow confines of the booth.” 356 NLRB 42. The Regional Director’s Report in that case, which the Board expressly adopted, describes the “shield” used as:

made from blue corrugated cardboard and ... approximately 16 inches high, 24 inches wide and 19 inches deep. Within the confines of the booth, the voter places the ballot on the top of the table on which the booth rests, 16 inches below the top of the booth. There is a 2 inch brace flap across the top of the booth which serves as an additional blind to shield the voter's ballot.

(Regional Director's Report, NLRB Case No. 8-RC-17008 at p. 2).

In *Physicians & Surgeons*, the Board did not overrule *Columbine*, but found it factually distinguishable and, therefore, not applicable. The facts in the present case are clearly distinguishable and are far more like those in *Columbine*. Initially, it is clear that the "table-top" shield used in *Physicians & Surgeons* is not the same shield used in this case. Rather, the table-top shield in that case was designed to sit flush on a table, is not the same height or width, and had a 2 inch brace flap across the top of the booth that served as an additional blind.⁸ By contrast, the cardboard shield used in the instant case, in addition to being of different dimensions, did not have a 2 inch brace across the top and it had notches and gaps on the bottom for insertion into a base, so that when placed on the counter or table it did not sit flush, but there were gaps and slots through which someone could see into the inside of the shield.

Also, there was no evidence in *Physicians & Surgeons* that the position of the shield moved throughout the election, that the shield was ever in a position where it was turned open to the Observers or others in the room while employees voted, that voters hands were exposed while they voted, or that Observers or others in the room could see into the shield as employees voted. Significantly, as used in *Physicians & Surgeons*, the table-top shield covered voters' hands while they voted. Indeed, the Regional Director's Report, which the Board adopted in that case, specifically found that although it was possible to see when voters' arms moved, "their hands could not be seen." (NLRB Case No. 8-RC-17008, Regional Director's Report at 3, n.3). In the present case, voters credibly testified that their hands were exposed and could be seen while voting.

⁸ The blue cardboard shield used in *Physicians and Surgeons Ambulance Service* is sold by Calloway House, Inc., a school supply company, and it is designed to be a "library study carrel," not a voting booth. See: http://www.callowayhouse.com/proddetail.asp?sku=PC705&sgrade=-1&egrade=12&search=study+carrel+&selection=search&selectcat=&multi_skus=&skip=0&begcnt=1

Another significant factual difference between that case and the present is the position of the Observers with respect to the open “side” of the shield. In *Physicians & Surgeons*, voters cast their ballots behind the shield **facing the Observers**, who were only a few feet away. (NLRB Case 8-RC-17008, Employer Objections Exs. A - Anderson Affidavit and B - Davis Affidavit). In the present case, it is **undisputed** that during the morning voting session the cardboard shield was at times completely open to the Observers and the voters backs were toward the Observers who were sitting **directly and only a few feet behind them** as they voted.

The circumstances under which employees voted in this election are clearly distinguishable and much more egregious than those in *Physicians & Surgeons*.⁹ The circumstances of this election are far more like those in *Columbine* – a shield that is turned open to the room is the functional equivalent of having no shield or booth at all, just like *Columbine*. The cardboard shield used clearly was not a Board-sanctioned voting booth, but rather **only part of a complete voting booth kit**. Had the Board Agent in this election used the complete voting booth, as it was manufactured and intended to be used, she could have minimized any encroachment on and doubts about voter privacy – the shield would not have moved throughout the election and could have been positioned on its aluminum legs so that voters stood **behind** it and **faced** the Observers (as in *Physician & Surgeons*) **rather than standing in front of it** with the Observers sitting **directly behind them**. The Board Agent did not even place the cardboard shield in its base before putting it on the counter or table – which at least would have prevented its movement. As actually used in this case – without its proper base or aluminum legs – the shield was ineffective and did not afford the privacy intended by the complete voting booth. The Hearing Officer, thus, failed to correctly distinguish *Physicians & Surgeons* and incorrectly applied that

⁹ The Hearing Officer discredited Orozco’s testimony that she could see through the slots in the voting shield. The basis for Orozco’s testimony that she could see how voters marked their ballots, however, was not limited to her seeing through those slots. Because the voting shield was open to the Observers for much of the first voting session, Orozco could see which side of the ballot the voters’ hands were on inside the shield while they were marking their ballots. (Tr. 459, 460, 462). The Hearing Officer never discredited this part of Orozco’s testimony. When one knows what side of the ballot the “yes” is on and what side the “no” is on, that is the practical, functional, and legal equivalent of seeing how the voter marked his or her ballot.

decision to the facts of this case. Like the Board in *Columbine*, the Board here should order a second election based upon the complete lack of privacy and secrecy in the balloting.

Moreover, to the extent the Board may previously have held that a “table-top” shield resembling a teacher’s lectern is somehow an “approved voting booth,” its decision in *Physicians & Surgeons* incorrectly distinguished *Columbine* and was wrongly decided. The Board’s Rules & Regulations require a “voting booth.” The Board should discontinue the use of table top shields entirely and return to its longstanding practice of using only private voting booths with curtains as required by its Rules & Regulations. Alternatively, the Board’s ruling in *Physicians & Surgeons* that once a Board Agent uses an “approved” voting booth the **only** remaining consideration is whether someone actually saw how a voter marked the ballot, does not allow for the fact that, as in this case, an “approved” device could be used improperly or improperly positioned, or there could be other circumstances that raise doubt as to whether the secrecy of the voting process was compromised. For example, if a Board Agent used an actual voting booth with a curtain, but left the curtain off and turned the booth around so the opening faced into the room, no one would seriously argue that the secret ballot election process had not been compromised even though an “approved” voting booth had been used. *Physicians & Surgeons* is inconsistent with the Board’s Rules & Regulations, was incorrectly decided, and should be reversed or modified.

3. Conclusion

The Hearing Officer erroneously found that “an election by secret ballot was held.” (H.O. 2). Further, the Hearing Officer erred in applying an erroneous standard under which an election will not be set aside “absent evidence that someone witnessed how a voter marked his or her ballot.” (H.O. 71). As shown herein, there were significant irregularities in this election that cast serious doubt about the integrity and secrecy of the balloting as required by the NLRB’s Rule & Regulations and warrant setting aside the election. For much of the morning voting session, the cardboard shield used by the Board Agent was positioned on a counter **such that it was completely open to the observers**, and to any employees waiting to vote in the room, **while employees voted**. Additionally, the Board Agent in this case failed to maintain the secrecy,

integrity, sanctity, and gravitas of the voting process based on: (1) the arrangement and condition of the voting area; (2) the Board Agent's conduct in the pre-election conference and in the polling area during the voting periods, including allowing the Union's Observer to violate the NLRB's rules for Election Observers; and (3) leaving ballots on the Observer table for voter's to pick up instead of being handed to them by the Board Agent.

Elections are rightly referred to as the Board's "crown jewel." See, e.g., *Ensign Sonoma, LLC d/b/a Sonoma Health Care Center*, 342 NLRB 933, 937 (2004) ("The Board's election process is rightly called the 'crown jewel' of the Board's endeavors. The election is the place where the ultimate Section 7 choice is made, and the Board goes to extraordinary lengths to see to it that the election is conducted in a fair and impartial manner."); *S.F.D.H. Associates, L.P. d/b/a Sir Francis Drake Hotel*, 330 NLRB 638, 638 (2000) ("NLRB elections are among the crown jewels of this nation's practice of industrial democracy. The presence of dedicated and experienced Board-agents at these elections is an essential element of that electoral process. If these Board agents cannot effectively control that process, the entire system is in jeopardy."). By allowing cardboard shields that are designed to be library study carrels rather than voting booths, and sanctioning the open viewing of ballots being marked, the Board is tarnishing its crown jewel and casting doubt on the secrecy of elections. We would not accept or tolerate this type of "amateur hour" approach to secret balloting in our political elections, and the Board should not condone such in its representation elections. Accordingly, the election should be set aside.

B. The Union Unlawfully Used Employee Images and Fabricated Employee Statements in Its Campaign Literature (Objections 1 & 2)

1. Relevant Facts

The Union prepared a campaign flyer (Er. 1) that it mailed to employees on during the critical period August 27 – less than one week before the September 2 election. (Tr. 54, 1112; H.O. 4). This flyer is a folded poster that contains photographs of and quotations from individual employees expressing, in various words, support for the Union. The cover shows two photographs of groups of employees and states, "At Somerset We're Voting Yes for 1199SEIU!" This statement is attributed to all the employees appearing in these photographs. When half open, the flyer has a

large box in the middle stating, "Our Opportunity to Vote Yes is Here!" When fully opened, the front and back sides of the flyer contain the individual names and/or photographs of 39 employees with quotes attributed to each. When fully opened, the inside or back side of the flyer contains 31 individual employee names and photographs. In large letters in the middle of these photographs, the flyer states "We're Voting Yes for 1199SEIU!," thus attributing this statement to all 31 employees whose photographs appear on that side of the flyer. The flyer also contains quotations attributed to 10 other employees without any photographs.

The Hearing Officer incorrectly found that the "record evidence does not support th[e] objection" that the employee statements appearing on pro-Union literature were obtained or used without employees' permission or were false statements not made by employees. (H.O. 11). Indeed, the undisputed evidence shows that the Union fabricated employee quotes appearing in this flyer and used both pictures and statements without authorization from employees. The Union unlawfully included the images of employees in this campaign flyer that was distributed and/or shown to employees during the critical period shortly before the election. Several voters testified that they received or saw the flyer (postmarked August 27, 2010) immediately preceding the election.¹⁰ (Er. 1, Tr. 54, 490, 770). Upon seeing this publication, voters testified that they thought all the employees pictured and/or quoted in the flyer were supporting the Union. (Tr. 490). Although the Union's organizer Walsh testified that the Union obtained releases for all photos, names, and quotes used in the flyer and made sure employees understood the release, this testimony is simply not true and is not supported by the record evidence. (Tr. 37, 39).

¹⁰ Although the flyer was not mailed until late August, a review of the Release Forms that comprise Er. 2 reveals that many of the releases were signed in early July – almost two months earlier. To the extent that some employees may have supported the Union when they signed the Release Forms, that support did not necessarily exist nearly two months later. As set forth herein, several employees who signed releases testified they never authorized the Union at any time to publish that they were voting "yes".

a. Roque did not Authorize Use of His Name, Photo, or Comments

Miquel Roque's name and photograph appear on the back side of the flyer. The quotation "I'm voting yes for 1199" is attributed to him under his photograph. (Er. 1). It is **undisputed** that Roque **never** signed a release or gave the Union permission to use his name, photograph, or statements in the Union's flyer. (Tr. 802-803, 808; H.O. 9). Roque testified that he did not expect to see his name in the flyer and, in fact, was surprised to see it. (Tr. 803, 808). He also testified that he never made the statement attributed to him, "I'm voting yes for 1199," and never authorized the Union to publish and attribute such statement to him. (Tr. 803, 808; Er. 1). Roque's testimony was fully corroborated by the fact that the Union failed to produce any signed Release Form from him, although they produced Release Forms from many other employees. (Er. 2). While the Hearing Officer actually acknowledged that Roque did not sign a Release Form or give the Union permission to use his picture or words (H.O. 9), incredibly she found that the evidence "does not support" the objection that the Union used employee pictures or statements without permission.¹¹ The Union's Vice-President Ricky Elliot, as well as Union Organizer Walsh, testified that the quotes appearing on the Union's flyer came from the employees' answers to two questions on the Release Forms obtained from employees. (Tr. 61, 266-68; H.O. 5). As shown above, this is objectively false, as it is **undisputed** that Roque never completed or signed any Release Form. Thus, the Hearing Officer's finding that Roque "was accurately quoted" (H.O. 13) cannot be supported.

b. The Union has No Release Forms From Hunter or Gonzalez

The Union claims that all the quotes in the flyer came from the Release Forms. (Tr. 61, 266-68). The Hearing Officer found, however, that the Union did not produce any Release Forms from two other employees – Claudine Hunter and Hector Gonzalez – whose names appear on the flyer with quotes attributed to them (on the front side of Er. 1 next to the Union's return address).

¹¹ On cross-examination, Roque testified that he told co-workers he was voting for the Union. (H.O. 9). There is no evidence that he made this statement before the flyer was published and no evidence that his statement was ever reported to the Union. Further, the Union claimed only that it obtained the quotes on the flyer from the Release Forms, not from hearsay statements made to co-workers. Nevertheless, it is **undisputed** that Roque never authorized the Union to publish or attribute **any** statement to him.

(H.O. 9, fn 4). These statements, therefore, if actually made by these employees, were used without authorization. Based on this finding, the Hearing Officer's subsequent finding that "in all but *one* case, employees signed releases allowing the [Union] broad use of the information on the releases" (H.O. 16, emphasis added) is clearly contrary to the record evidence in this case. Rather, there were at least **three** instances where **no** releases were obtained.

c. Dande, Rice, and Mora did not Authorize "I'm Voting Yes", Nor Did Any of the Other Employees Pictured or Named on the Union's Flyer

The quotation "We're voting yes for 1199" is collectively attributed to the 31 employees whose photographs appear on the back side of the flyer. (Er. 1). Individually, the quotation "I'm voting yes" or "I'm voting yes for 1199" (in English or Spanish) is attributed to 23 of the 39 employees whose individual photographs and/or names appear on the flyer. (Er. 1). Voters Dande, Rice, and Mora, who appeared in the flyer along with the quote, "I'm voting yes," testified, however, that they **never** told anyone with the Union that they were voting yes, nor did they ever give the Union permission to publish the statement that they were voting yes. (Dande, Tr. 597, Rice Tr. 844, Mora, Tr. 1168). The Hearing Officer specifically credited these witness's testimony on this issue (H.O. 7-8); yet, incredibly, found that these employees made these statements and authorized the Union to use them. While other employees' quotes were not addressed specifically by the Hearing Officer, the fact remains that **none** of the Release Forms signed by employees authorize publication of the statement, "I'm voting 'yes'."

d. The Union Used Fabricated Quotes in its Campaign Flyer

There are also numerous significant issues regarding the authenticity of the Release Forms themselves that call into serious question whether many of them were filled out by the employees in question. Many of the original Release Forms are filled out in different pens on different portions, and in many cases the handwriting in the comments portion at the bottom of the Release Forms clearly does not match that of the employee signatures. For example, different pens were used on different portions of the Release Forms on pages 18, 19, 20, 33, 49, 51, 56, 57 and 61 of Er. 2. The Hearing Officer's Report does not even mention or address these discrepancies.

The fact that there are numerous discrepancies in handwriting on many of the Release Forms is also clear from the testimony of Union Observer Jacques, who “witnessed” 17 of the Release Forms. Indeed, Jacques’ testimony confirms the worst fears regarding these handwriting discrepancies – that in many cases the Union’s agents and supporters filled out and simply made up the “testimonial” portions of these forms *without ever speaking with the employees* who had pre-signed them.¹² (H.O. 9-10, 12). Thus, Jacques testified that on several Release Forms, she did not actually witness the employee who allegedly completed the form – even though she signed the “witnessed by” line. Jacques further testified that on some of the Release Forms she witnessed she never even spoke with the employee about what to write on the form, but simply made it up herself. For example, Jacques testified that she handwrote the comments at the bottom of Release Form for Maria Berrios (Er. 2, p.11) without ever being told by Berrios what to write. (H.O. 10, Tr. 403-04). For example:

- Q. Okay. Now where did you come up with the information to fill out the bottom of this form?
A. I wrote it in.
Q. Did Ms. Berrios (sic) tell you what to write?
A. No, she did not.

(Tr. 404, lines 17-21). Further, Jacques testified that she handwrote the comments at the bottom of Annie Stubbs’s Release Form (Er. 2, p. 57) without ever even discussing it with Stubbs (H.O. 10, Tr. 417-18):¹³

- Q. And where did you get the information from to put down here?
A. I just wrote it.
Q. You didn’t talk to Ms. Dobbs (sic) about it?
A. No.

¹² This is especially troublesome in light of the fact that the Release Form only authorizes use of comments “made by me *on this date*.” (Er. 2 emphasis added). Clearly, such authorization did not allow the Union to make up quotes, statements or comments, or to use comments from any dates other than the date the Release Forms were signed.

¹³ The Hearing Officer found that the quote attributed to Annie Stubbs on the Union’s flyer came from the portion of the Release Form Stubbs filled out herself. (H.O. 10). Stubbs, however, did not testify. The only proof that Stubbs wrote any information on the form came from Jacques’s testimony that Jacques answered one, but not both, of the questions on Stubbs’s Release. (Tr. 417). Jacques’s credibility on this issue is severely impeached, as she admittedly fabricated a number of statements on Release Forms, including at least a portion of Stubbs’s Release Form. (see, e.g., Tr. 417-18). The Hearing Officer erred in relying upon Jacques’s testimony to make this significant factual finding for which there is no other support in the record.

Q. She didn't tell you what to put down here?
A. No.

(Tr. 418, lines 2-8). Jacques also testified that she handwrote the comments on the bottom of the Release Forms for Maria Granda (Er. 2, p. 23), Elsa Rivera (Er. 2, p. 47), Kwame Sarpong (Er. 2, p. 51) and Adele Scotto di Carlo (Er. 2, p. 52). She claimed she had conversations with those individuals prior to doing so, but days other than when the Release Forms were signed and they were not present when she "witnessed" and wrote "their" words on the form. (Tr. 407-17).

Voter Fanny Mora testified that she did not fill out any of the statements that appear on the bottom half of her Release Form. (Tr. 1168). The Hearing Officer credited Mora's testimony that she did not make the statements attributed to her on the flyer. (H.O. 10-11). The Hearing Officer further acknowledged that Mora "was not accurately quoted in her support of the Union" on the flyer (H.O. 13), but nevertheless finds it not to be objectionable because "the evidence establishes that she [Mora] signed a release." (H.O. 13). This is completely illogical reasoning. While Mora may have signed a Release Form, she never signed a Release Form that authorized the Union to publish statements that she did not make or to make up statements for her. Also, a Release Form was completed in English for Isabel Estrada, who neither writes nor reads English. (Er. 2, p. 21, Tr. 607). And of course, it is **undisputed** there are no Release Forms at all for Roque, Hunter, or Gonzalez that could possibly be the "source" for the quotes attributed to them. (H.O. 12).¹⁴

The Hearing Officer (1) acknowledged that Jacques wrote down answers to the questions and made statements on some employees' Release Forms **without ever talking to those employees first** (H.O. 9-10); (2) acknowledged that employee Berrios never wrote or stated that she was voting for or supported the Union, did not make the statement attributed to her on the Union's flyer, and that the statement attributed to her on the Union's flyer appears in the record

¹⁴ The Hearing Officer attempts to excuse the Union's failure to obtain a Release Form from Roque by stating that he told other co-workers he was going to vote for Petitioner. (H.O. 12). A verbal statement to co-workers, however, is clearly distinguishable from a signed Release Form authorizing publication of an individual's statement – a fact the Hearing Officer failed to address. Further, it is **undisputed** that the Union claimed it obtained all quotes from Release Forms, not from any alleged verbal statements by of the quoted employee. (Tr. 61, 268). The Hearing Officer has no explanation or excuse for the Union's failure to obtain Release Forms for Hunter or Gonzalez.

only on the portion of the Release Form admittedly fabricated by Jacques (H.O. 10); and (3) credited Mora's testimony that Mora did not write down the answers to the questions on the Release Form from which the "quotes" attributed to her allegedly came. (H.O. 10). Indeed, the **only** evidence in the record relating to the answers to the questions on Mora's Release Form is that they are not in her handwriting and she did not tell anyone to write those words. (Tr. 1168-70). Notwithstanding this undisputed and credited testimony, the Hearing Officer incredibly found that the "record evidence does not support" the objection that the Union's campaign literature contains false statements not made by the employees. Further, since the Release Form expressly states that the Union may publish only "comments made by me **on this date**," (Er. 2, emphasis added, H.O. 5), the publication of any statement allegedly made by any employee on any day other than the day that he or she signed the Release Form clearly is not authorized by the express terms of the Release Form itself.¹⁵ Nor do the Release Forms authorize the publication of "remembered" statements that allegedly resided in Jacques's mind – the very same mind that admittedly fabricated several employee statements.

e. There are Significant Discrepancies Between the Employees' Statements on the Release Forms and the Quotes Attributed to the Employees on the Union's Flyer

Contrary to the Union's testimony that it obtained the quotes for its Flyer (Er. 1) from the Release Forms (Er. 2), there are numerous significant discrepancies between the statements on the Release Forms and the quotes attributed to employees in the flyer. The Hearing Officer erroneously found that "with a few exceptions, the quotations in the flyer are substantially similar to the answers the employees provided on their releases" (H.O. 6), "[m]ost of the quotations on the

¹⁵ The Employer attempted to establish the dates that the photographs and video were taken, but the Hearing Officer refused to enforce the Employer's subpoena for this information and testimony from Union officials Eliza Bates and Isabelita Sombillo. (Tr. 955-63). Bates was responsible for producing the flyer that is Er. 1. (Tr. 260-61, 956). The Employer wanted to examine Bates on whether the Union considered the creation or attribution of inaccurate quotes to employees or made any pre-publication effort to verify the quotes. (Tr. 960). Elliott testified that it was the organizers' responsibility to get releases from the employees. (Tr. 269-70; H.O. 6). Sombillo was the lead organizer responsible for the Union's campaign in this matter. (Tr. 259). The Hearing Officer acknowledged that Sombillo "also took photographs and videos of employees as well." (H.O. 6). Since the Release Forms relied upon by the Union only authorize the use of "pictures made of me and comments made by me **on this date**," it was clear error for the Hearing Officer to quash the Employer's subpoena for this information and for the testimony of Bates and Sombillo.

flyers are identical or substantially similar to the information provided by employees on the release” (H.O. 12), “these discrepancies between the flyer and the releases are minor” (H.O. 13), and there is “no evidence that the misrepresentations were pervasive.” (H.O. 13).

First, these findings clearly ignore the admitted fabrications discussed above. Second, the record evidence does not support these findings with respect to other statements and quotes that appear in the Union’s flyer. Finally, contrary to the Hearing Officer’s findings, the **undisputed** record evidence shows that many of the discrepancies are not “minor,” the statements are not “substantially similar”, and the misrepresentations are pervasive.

It is **undisputed** that **none** of the quotes on the flyer exactly match the statements on the Release Forms. Indeed, the Hearing Officer acknowledged that they are “not exact.” (H.O. 6). While the Hearing Officer attempted to excuse the Union’s falsification of the Release Forms contents by characterizing the quotes as “substantially similar,” “virtually verbatim,” or “almost exactly” like the phrases on the Release Form (H.O. 6), the fact remains that by attributing these statements to employees with the use of quotation marks, the Union was telling everyone who read the flyer that this is what the employees had actually said, when in fact they had not. No amount of post-hoc rationalization can absolve the falsity of what the Union did here. Indeed, since some of the statements on the flyer do not include any quotation marks, the Union’s selective use of quotation marks on other statements in its flyer are clearly designed to have the reader believe that those quoted statements were actually made by the employees verbatim.

Moreover, in several cases there are glaring discrepancies between the statements on the Release Forms and the quotes attributed to employees in the Flyer that cannot be explained away as merely “clean up” or “minor discrepancies.” Compare, for example:

Employee	Flyer (Er. 1)	Release Forms (Er. 2)
Alvarenga	“With the union we’ll have a way to solve problems in our workplace”	“You will not be out of a job for sometime (sic) stupid if you have the union” (p. 4) “With the union you have someone to protect you and your job if any problem arrived” (p. 4)

Employee	Flyer (Er. 1)	Release Forms (Er. 2)
Destin	"We'll be able to stand up for our rights when we form our union"	"Having a union will improve the rights (sic) under family and medical" (p. 20) "They make sure their (sic) is more staffing" (p. 20)
Hacker-Jones	"I'm voting yes for 1199 because I know that we're stronger together"	"many ways you can think of" (p. 24) "you can rest assured (sic) that the union is there for you" (p. 24)
Mora	"I'm voting yes to improve resident care and have less stress on the job"	"help increase my pay[,] Health Plan[,] Our rights" (p. 40) "to not be so stressed (sic) at my job. working in a safe place with out (sic) too (sic) much problem." (p. 40)

More significantly, while the Union contends that the Release Forms were the source of the quotes that it attributed to employees in the flyer, it is **undisputed** that nowhere in any of the signed Release Forms are there any statements by any employees that "I'm voting yes," or that "I'm voting yes for 1199." (H.O. 6, 7, 12). Further, nowhere in any of the Release Forms did any of the employees give the Union authorization or permission to quote them or state in the Union's flyer that "I'm voting yes," or that "I'm voting yes for 1199." (Er. 2). Indeed, when shown her executed Release Form, voter Dande testified:

- Q. Can you show me where on the document that you're looking at [Release Form] it says "I'm voting yes"?
- A. I do not see it.

(Tr. 599, lines 20-22).

Yet despite this glaring omission from the Release Forms, the quotes "I'm voting yes" or "I'm voting yes for 1199" appear in no fewer than 23 of the 39 quotes that the Union attributed in its flyer to individually identified employees. (Er. 1, Er. 2).

The Hearing Officer attempted to downplay this significant omission by finding, generally, that these employees obviously supported the Union when they signed the Release Forms. Specifically, the Hearing Officer found that "the inclusion of 'I'm voting Yes' in quotations from employees who have expressed support for the [Union] by signing a release and answering specific questions about why they would like to be represented by a union does not constitute a

substantial misrepresentation.” (H.O. 13). The Hearing Officer cites no specific record evidence for this bold conclusion, but merely compounds error upon error to reach an objectively unsupportable conclusion. The Release Form itself demonstrates this. The Release contains ***no wording or other language wherein an employee pledges or states support for the Union*** (see H.O. 13).¹⁶ Employees can and do change their minds. More significantly, ***no*** employees ever committed to voting for the Union anywhere in the Release Forms. Moreover, contrary to the Hearing Officer’s finding, the employees ***did not*** answer questions on the Release Form specifically asking about why they would like to be represented by a union. Rather, as acknowledged by the Hearing Officer, the two questions on the Release Form, verbatim, are:

Speak from the heart – How does having a union improve your life and/or the life of your family?

How does having a union help you provide better care? Be very specific:

(Er. 2; H.O. 5).

Neither question asks why or even whether the employee would like to be represented by this Union. Both questions can be answered by people do not want to be represented by this Union.

Additionally, the Union obtained employees’ images through deceit or misrepresentation and/or without permission, and fabricated quotes attributed on the flyer to other employees. Fanny Mora, who speaks Spanish and testified through a translator, testified that she did not understand that the document she signed was a release and no one explained it to her. (Tr. 1168). Additionally, Mora testified that she did not know her picture would be put in a flyer, did not write the statements on the bottom half of her Release Form, and never gave the Union permission to attribute to her the quote, “I’m voting yes.” (Tr. 1168). Indeed, Mora testified that while she signed the Release Form, she did not recall that anyone ever translated it for her or explained it to her in Spanish (Tr. 1168). Significantly, the Hearing Officer credited Mora’s testimony that she did not make the statements attributed to her on the flyer. (H.O. 10-11). Accordingly, ***even if*** the

¹⁶ The Hearing Officer also found specifically that voters Berrios and Hacker-Jones “provided releases expressing their support.” (H.O. 13). For the reasons set forth above, the Releases provided by these two employees ***did not*** “express their support” for the Union.

statement attributed to Mora on the flyer was identical to the content of her Release Form (which it is not) such a finding would be insignificant since it still is ***not Mora's statement***.

A comparison of Release Forms in Er. 2 further shows obvious significant discrepancies between the handwriting and signatures of the employees and witnesses. For example, the handwriting, and even spelling, of Bessie Rice's name and signatures vary on pages 6, 9, 25, and 45; Pearl Hooper's signature varies on pages 17, 25, 45, and 63; Maria Lopez's signature is not the same on pages 7, 33, and 34; and Graze Lopez's signature is different on pages 31 and 43. Additionally, it appears that in some instances different pens were used on the same Release Form for those parts allegedly completed by the employee, suggesting that parts of the form were completed at different times and/or by different people. See, e.g., Er. 2 pages 19 (DeMars) and 61 (Tyler). The Union put forth no evidence to show that it made any effort whatsoever to check or verify the accuracy of any of the Release Forms that Union supporters like Jacques collected and "witnessed" on its behalf. In fact, when examining DeMars's Release Form, the Hearing Officer acknowledged: "The pen that's used at the bottom [of the Release Form] does look somewhat different. It's a heavier line. ... It looks like a different pen ... the printing does look somewhat heavier at the bottom [of the Release Form] than it does at the top." (Tr. at 1283). The Hearing Officer, however, failed to address these recognized inconsistencies in her Report.

Despite the foregoing uncontested record evidence, which shows numerous misquotations and fabricated releases, in addition to the 59% of individually attributed quotations that include "I'm voting yes," the Hearing Officer inexplicably draws the conclusion that there was no evidence that such blatant misrepresentations are "pervasive." (H.O. 15). Such a finding is both illogical and totally unsupported by the record evidence.

2. Argument

In *Allegheny Ludlum Corp.*, 333 NLRB 734, 745 (2001), the Board held that "the images of the employees" may only lawfully be included in a campaign video when employees have not consented to have their images included under the following circumstances:

1. The employees were not affirmatively misled about the use of their images at the time of the filming;

2. The video contains a prominent disclaimer stating that the video is not intended to reflect the views of the employees appearing in it; and
3. Nothing in the video contradicts the disclaimer.

Thus, employees may lawfully be filmed or photographed and their images used “without previously soliciting their consent to be filmed, only if the videotape, viewed as a whole, does not convey the message that the employees depicted therein either support or oppose union representation and the employer complies with the remaining requirements set forth above.” *Id.*

Although the facts in *Allegheny Ludlum* involved employer conduct, there is no valid legal basis for this standard not to apply equally to union conduct. In *Allegheny Ludlum*, the Board was concerned with conduct that infringed upon employee Section 7 rights, rights that protect employees from conduct by employers *and* unions. 29 U.S.C. § 157. Moreover, in *Allegheny Ludlum*, the Board established standards for the use of “images of the employees.” The fact that *Allegheny Ludlum* involved video does not mean that its standard does not apply to other forms of campaign propaganda that use “images of the employees,” such as flyers. In the present case, the Union failed to meet these requirements when it used employee images and alleged statements in its flyer without the *Allegheny Ludlum* disclaimer.

First, the Union affirmatively misled employees about the use of their images at the time their photos were taken. The Union obtained employee photos through deceit or misrepresentation and/or without permission. The **undisputed** record evidence shows that employees were not informed of the purpose for which their photos were being taken or were deceived as to the true purpose of the photographs. Roque did not authorize the Union to use his picture and was surprised to see his name and photo in the Union’s flyer. (Tr. 802-03, 808).

Second, the Union’s flyer does not contain any disclaimer stating that it is not intended to reflect the views of the employees appearing therein, as required by *Allegheny Ludlum*. The Union’s flyer affirmatively conveys the message that the employees depicted in it support and will vote for the Union. Indeed, employees testified that this is exactly the message they understood when they saw the flyer. In fact, the Union attributed false statements to the employees depicted

in the flyer either by completely fabricating the quotes, or by rephrasing the quotes so much so that they are unrecognizable.¹⁷ While the Board might allow such without a disclaimer if **all** of the employees listed on the flyer had signed releases, in this case it is **undisputed** that Roque never signed a release, there are no releases for Hunter and Gonzalez whose names appear in the flyer, and there are serious questions about the validity of many of the releases signed by other employees due to the many handwriting discrepancies and admitted fabrications. Thus, at a minimum the *Allegheny Ludlum* disclaimer was required for the flyer.

The Union's flyer also constitutes a clear misrepresentation of employee sentiment that affected a free and fair election and was an impermissible use of employee names, photographs, and purported employee statements. This misrepresentation and deception tainted the laboratory conditions necessary for a free and fair election. In *Van Dorn Plastic Machinery, Inc. v. NLRB*, 736 F.2d 343, 348 (6th Cir. 1984), the court carved out an exception to the standards in *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), used to evaluate whether campaign literature interfered with employees' free choice in a representation election. The court held:

There may be cases where no forgery can be proved but where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected. We agree with the Board that it should not set aside an election on the basis of the substance of representations alone, but only on the **deceptive manner in which representations are made**. (emphasis added).

This standard has been applied using the following factors, none of which is dispositive:

(1) the timing of the misrepresentation; (2) whether the employer had an opportunity to respond; (3) the nature and extent of the misrepresentation; (4) whether the source of the misrepresentation was identified; and (5) whether there is evidence that employees were affected by the misrepresentation. [citation omitted].

Id. The closeness of the election is an important consideration in evaluating the fifth factor. *Id.*

Following *Midland National*, the Board has stated, "anonymous or falsely attributed campaign propaganda has been treated as the necessary but not sufficient threshold for a case by case examination to determine whether a voter can 'recognize propaganda for what it is.'"

¹⁷ The Hearing Officer's finding that "many employees were accurately quoted on the flyer" (H.O. 12) is clearly erroneous, as the **undisputed** record reveals that few, if any, of the quotes on the flyer are accurate.

Albertson's, Inc., 344 NLRB 1357, 1359 (2005) (citations omitted). In determining whether employees were able to recognize a forged document, the Board takes into account the employer's attempt to reveal the forgery. *Id.* Where the attempts are insufficient to mitigate the effects the forged document had on employee free choice, the Board has sustained the employer's objection, set aside the election, and directed a second election. *Id.* Although the Board has not specifically defined what is included under the ambit of a "forged document," the Board has upheld the analysis that on its face, one cannot recognize a forged document "for what it is" since, by definition, it has been altered to appear to be something it is not. *Mt. Carmel Medical Center*, 306 NLRB 1060 (1992) (citations omitted).

On the issue of the creation of a document in which quotes are attributed to employees, the Board has stated, "we do not condone the creation and attribution of quotes to employees, at least where the union makes no pre-publication effort to verify that the quotes fairly represent the views of the quoted employees." *BFI Waste Services*, 343 NLRB 254, 254 n.2 (2004). In *BFI*, the concurrence stated:

We have seen a number of cases presenting variations of the tactic used by the Petitioner in this case - the solicitation on a petition of employee signatures that are then transferred to a widely circulated flyer, mailing, or poster. In some cases, the poster says no more than the wording on the petition itself. In others, photographs of the employees are added. In still other cases, like this one, the poster offers quotations from the signers, in some instances, "quotations" that have been furnished after the fact by the union.

Although we have not found such conduct objectionable [in this case], I am concerned about its potential adverse impact on the laboratory conditions for an election. An employee who has merely signed a petition may feel compelled to support the union after seeing his signature or photograph reproduced on a poster. A slickly produced mass-mailing that includes **ghost-written employee quotations** may deceptively induce other employees to support the union.

I believe that we should, in an appropriate case, consider whether the photocopying or reproduction of employee signatures is subject to some sort of "fair use" rule, e.g., that we will not permit a party to take an employee's signature affixed to one medium and use it in another medium where the message is different, without the express permission of the employee.

Id. (emphasis added).

In *BFI*, the Board found that at most only two employees were "arguably misrepresented." 343 NLRB 254 at fn. 2. While the *BFI* Board did not find its facts met the situation described in the

concurrence, the instant facts clearly do and this is the “appropriate case” for the Board to consider and adopt a fair use rule. There are a substantial number of misrepresentations, including fabricated, altered, modified, inaccurate, and misleading statements. The Union attributes the quote “I’m voting yes” collectively to 31 employees and the quote “I’m voting yes” to 23 of the 39 (59%) individual employees identified on the flyer. Union officials testified that the quotes on the flyer came from the Release Forms. Yet it is **undisputed** that nowhere on the Release Form does it state “I’m voting yes” nor did any employee commit to vote for the Union on the Release Form. Moreover, as set forth above, in at least five cases there are significant discrepancies between the quotes attributed to specific employees on the flyer and the employees’ actual comments on the Release Forms. Finally, there are **undisputed** admissions in this case that Union agents “ghost wrote” and completely fabricated employee comments that were eventually published by the Union in its flyer without anyone ever talking to the employees and without the Union making any pre-publication effort to verify that the quotes fairly represented the views of the quoted employee.¹⁸

The obvious deception in this case, which appears to have been lost on the Hearing Officer, is not in the obtaining of the signatures on the Release Forms (H.O. 15 – “no evidence ... that employees had in any way been deceived into signing releases”; see *also* H.O. 16 - same), but rather in the Union’s use of inaccurate, misleading, and in some cases completely fabricated comments on the flyer to deceive voters who saw or read the flyer. The publication by the Union of employees’ names, photos, and purported quotations in this case clearly meets the definition of “artful deception” (if not an outright forged document), and it was created in such a manner that employees could not distinguish the deception for the forgery that it is. Moreover, it was published in such close proximity to the election that neither the Employer nor the employees pictured in the flyer had an opportunity to mitigate the effect of the deceptive document.

¹⁸ The Hearing Officer refused to enforce the Employer’s subpoena for the testimony of Eliza Bates, the Union official responsible for the production of the flyer, and thus erroneously denied the Employer the opportunity to develop proof on any pre-publication efforts by the Union to verify that the quotes used in the flyer were accurate, properly attributable to the employees to which they were attributed, or fairly represented the views of the “quoted” employees. See fn. 15, *infra*.

The Hearing Officer cites *Sprain Brook Manor Nursing Home, LLC*, 348 NLRB 851 (2006), for the proposition that use of photos in campaign material of employees who signed consent forms is not objectionable absent evidence that “authorized use ... reasonably tended to interfere with employee free choice in the election.” (H.O. 13). As shown above, however, the present case involves the use of statements and photos that were **never** authorized, the use of statements that are significantly different from the “authorized” statements, and in some cases the use of **completely fabricated statements** that were **never** shown to or discussed with the employee. The fact that an employee may have signed a release or consent form in this case does not mean that such employee thereby authorized the Union to change his or her statements or to make up statements for them. Accordingly, the Hearing Officer’s reliance on this case is clearly misplaced.

The Hearing Officer’s reliance on *Gormac Custom Manufacturing, Inc.*, 335 NLRB 1192 (2001), and *Champaign Residential Services, Inc.*, 325 NLRB 687 (1998), also is misplaced. Both of those cases are factually distinguishable and wholly inapposite to the facts in the present case. In *Gormac*, the Union published a flyer prior to the election containing copies of 31 employee signatures under the words “We’re the Majority! We’re Voting Yes!” *Gormac* is clearly distinguishable from the present case, since in *Gormac* the employees whose signatures appeared on the “We’re Voting Yes!” flyer previously signed a document that stated: “I hereby authorize the [Union] to represent me for the purposes of collective bargaining with my employer. This further authorizes the Union to ... sign my name to union leaflets.” *Id.* at 1193.¹⁹ Unlike *Gormac*, in the *instant case* there is **nothing** in the Release Form whereby employees authorized the Union to represent them or otherwise pledge support for the Union or state that they will vote for the Union. Further, unlike the broad general release at issue in *Gormac*, the Release Form in the present case is specifically limited to photographs of and comments made by the employee “on this date” – the date signed. *Gormac* also is distinguishable in that in *Gormac* the employer’s objections were based on alleged Union misrepresentations to obtain the employee signatures on the release (*i.e.*,

¹⁹ The Hearing Officer’s discussion of *Gormac* in her report omits the first part of this statement, wherein the employees in *Gormac* pledged their support for the union.

“this will remain confidential”). The objections presented in *Gormac* did not involve misrepresentations or fabrications of the statements themselves. Unlike *Gormac*, the quotes attributed to specifically identified employees on the Union’s flyer in the present case were not on the Release Form at all, were altered or significantly different from the comments on the Release Form, or were outright fabricated by the Union without ever consulting with the “quoted” employee. In *Champaign Residential Services*, the union published a flyer with photocopied signatures of unit employees under a heading stating, in part, “We are winning! Join Us!” With one exception, the signatures on the flyer matched those on the union’s “Vote Yes!” petitions. 325 NLRB at 687. Unlike *Champaign*, however, the Release Form in the present case does not state “I’m voting yes,” does not state that the employee will vote for the Union, nor does it pledge any support for the Union. Rather, the flyer at issue in the present case involves altered, significantly different, and fabricated “quotes” attributed to specifically identified employees.

Finally, in dismissing the Employer’s Objections, the Hearing Officer gave no consideration whatsoever to the effect that the Union’s publication of inaccurate, misleading, deceptive and in some cases fabricated statements attributed to employees by name and photograph had in “locking in” those employees. This is precisely what interferes with these employees’ free choice – up to the moment they cast their ballot – to change their mind on the issue of union representation. As the Board recognized in *Allegheny Ludlum*, Section 7 guarantees employees “the ‘right to express an opinion or remain silent’” and, except in cases when an employee has “volunteered to be included,” those rights are violated by disseminating to employees material with their images that “indicates, explicitly or implicitly, that a specific employee or employees either support or oppose unionization.” *Id.* at 744. When an employee’s actual position is at variance with the published statement,

an employee’s Section 7 rights are further infringed because the employee may be pressured into acting in conformance with the way he has been publicly identified rather than his true beliefs. Employees depicted as [supporting a position], for example, may be inhibited from subsequently expressing support [for the opposite position] as they may be required to explain the discrepancy between their position as shown . . . and their subsequent statements, and thus, suffer the embarrassment of having to explain why they changed their minds.

Id.

C. The Union Engaged in Impermissible Electioneering (Objections 3, 4, 12 & 13)

1. The Union Improperly Electioneered through Telephone Calls, Voicemails, and Text Messages and/or other Electronic Communications (Objections 4 & 12)

a. Relevant Facts

The Hearing Officer found:

There is no evidence that any employee received a call or a text message from the [Union] in the final minutes before they voted. (H.O. 38).

[T]here is no evidence that the [Union] engaged in any objectionable electioneering by calling or sending text messages to employees on the day of the election. (H.O. 40).

There is no evidence that the [Union] contacted any employees who were waiting to vote, violated *Peerless Plywood* by contacted (sic) a mass assembly of employees within 24 hours of the election, or made statements about who had voted or the outcome of the election. (H.O. 40).

As detailed below, the clear record evidence dictates contrary factual findings. Union representatives engaged in impermissible electioneering through telephone calls, voicemails and text messages and/or other electronic communications by telling employees that they knew which employees had voted or had not voted. On election day, including while the polls were open, Union representatives made repeated telephone calls to employees and sent text messages to employees telling them that they knew whether or not the employees had voted, telling them they needed or wanted them to vote yes, and personally asked them whether they had voted. The telephone messages and text messages were disseminated widely among employees while the polls were still open.

i. Walsh's Text Messages to Voters on Election Day

On election day, Union organizer Brian Walsh sent a text message to voters that said: "this is brian from 1199 reminding you to go vote YES!!! election ends at 4!!! we are winning keep it up!!!". (Er. 3; Tr. 84, 817-18; H.O. 31). A copy of one of these texts by Walsh introduced into evidence shows that voter Tracey Thomas received this text message at 2:50 p.m. on election day. (Er. 3). It is **undisputed** that Thomas received this text message from Walsh while the polls were open during the afternoon voting session. (Tr. 817-18). Although Thomas testified that she did not

read the message until after she voted, the record is **undisputed** that Walsh sent and Thomas received this text message right before or while she was voting. (Tr. 817-18 and Er. 3).

Voter Crystal Pratts received this same text message from Walsh while she was clocked in for work at the facility on election day before the polls closed, and showed it to voter Elaine Mabilangan, who also was clocked in for work and standing next to Pratts at the time. (Pratts, Tr. 712; Mabilangan, Tr. 724). Moreover, Walsh's phone records confirm that he not only texted both Thomas and Pratts at 2:45 p.m. on election day, but that he sent this same text message to a total of 9 voters at that same time. (Er. 18, 19). Walsh admitted that he sent the **same text message** shown in Er. 3 to multiple voters (Tr. 85-88, 1132). Initially, Walsh testified that he sent this text to somewhere between 1 and 10 voters (Tr. 86), later he stated "it was approximately five" voters (Tr. at 88), and, finally, after being shown his cell phone records, Walsh agreed that it was sent to 9 voters. (Tr. at 1132). Walsh further admitted that at the time he sent these text messages **he did not know where the employees were, whether they were at work or away from work** (Tr. at 121-22; H.O. 31), **or whether they had voted.** (Tr. 97, H.O. 31).

Although Walsh testified that he only texted 5 voters during the afternoon voting session (Tr. 87-88), that he did not text *any* voters during the morning voting session (Tr. 89), and that no employees returned his texts (Tr. 121), his phone records from Verizon Wireless clearly show that his testimony was false. (Er. 18, 19). Thus, Walsh's phone records show that he sent at least 25 texts to 25 different voters between 5:55 a.m. and 4 p.m. on election day, and that a voter returned his text at 11:30 a.m. – 10 minutes after he sent one. (Er. 18, 19). Further, witnesses testified correctly that Walsh texted them while the polls were open. In fact, the Verizon records show that while the polls were open during the morning voting session, Walsh sent one voter a text at 6:44 a.m. and at 6:45 a.m. he texted 4 voters. (Er. 18, 19). Similarly, while the polls were open during the afternoon voting session, at 2:45 p.m. Walsh sent text messages to 9 voters. (Er. 18, 19). Contrary to his initial testimony, when Walsh was called by the Union after his Verizon phone records were in evidence, he then changed his story completely and testified that he had texted "a lot" of people on the day of the election. (Tr. 1108; See also Elliott Tr. 274).

Further, in direct contradiction to Walsh's testimony that he only texted employees whom he knew to be off work the day of the election (Tr. 85, 122), Pratts testified without contradiction that she received a text from Walsh while she was at work – as witnessed by Mabilangan. (Tr. 711, 724). Indeed, Walsh eventually admitted that he had no idea where the employees might have been at the time he sent them his text messages, nor did he know whether or not the employees he texted had already voted. (Tr. 97, 121-22). The Hearing Officer's finding that "Walsh sent these reminders to vote [via text messages] to voters who had already voted, suggesting that the [Union] did not know who had voted" (H.O. 47) not only is not supported by, but is directly contradicted by, the record evidence. Moreover, such a finding is completely illogical, as Walsh would not send "reminders to vote" to employees "who had already voted."

The Hearing Officer also erroneously credited Walsh's explanation that his statement "we are winning" in the text messages sent on election day to voters was based on the Union's "own polling data prior to the election and not on any information about the actual election." (H.O. 47). Incredibly, this finding ignores Walsh's own admission that the statement "we are winning" in his text messages to voters meant winning the "actual balloting" of voters on election day:

Q. And by "we are winning" you meant winning the actual balloting, is that correct?
A. Yes.

(Tr. at 98, lines 11-13).

Finally, the Hearing Officer found that "[t]here is no evidence that employees believed their votes were being surveilled as a result of this message." (H.O. 47). The record evidence clearly demonstrates, however, that a reasonable person under the circumstances – Union agents asking employees how they voted, telling employees it knew whether or not certain employees had voted, telling employees it knew the Union was winning, and typing on a cell phone in the voting room while employees cast their ballots – could and would believe that his or her vote was being tracked by the Union on election day. This is the standard that should be applied.

ii. Walsh's Phone Calls to Voters on Election Day

Walsh testified falsely that he did not call any voters during the morning voting session, and that in the afternoon session he only called the same 5 voters whom he claimed he had also sent

text messages. (Tr. 90). Walsh's Verizon phone records, however, show that Walsh placed at least 32 calls to 17 different voters between 5:45 a.m. and 4 p.m. on the day of the election. (Er. 19). Further, of these 32 calls Walsh placed at least 6 calls to 4 different voters during the morning voting session, and in the afternoon voting session he placed 10 calls to 8 different voters. (Er. 18, 19). Walsh also testified falsely that no one returned any of his calls. His Verizon phone records, however, show he called a voter (Vyecheslav ("Steven") Usherenko) at 11:59 a.m., who returned his call at 12:12 p.m.; he called another voter (Maria Lopez) at 10:50 a.m., who returned his call 10 seconds later; he called yet another voter (Annie Stubbs) at 11:08 a.m., who returned his call 9 seconds later; and he called another voter (Gertrudis Rodriguez) at 6:22 a.m., who called him back at 6:23 a.m. (Tr. 121, Er. 18, 19). Thus, Walsh's credibility and veracity as a witness was completely undermined by his cell phone records.

iii. **Venette's Telephone Calls and Texts to Voters on Election Day**

Union Organizer Jean Venette also made phone calls and sent text messages to voters on the day of the election. (Er. 18, 19). Venette admitted that he called at least seven voters on the day of the election between voting sessions and left voice messages for them regarding voting. (Tr. 745-46, 749). Venette testified he did not know whether these employees had not voted when he called. (Tr. 748-49, 754; H.O. 33). It is **undisputed** that Venette called voter Keisha Rice between voting sessions and left a voicemail for her stating **that he knew she had not voted** in the first session and reminding her to vote in the second session because "we're looking good but we need your vote." (Tr. 751-52, 832 and Er. 15, 16). Venette claimed that he did not know whether Rice had voted, but that Rice previously had told him she would vote in the morning. (Tr. 753). Rice credibly testified she never had a conversation with Venette or any Union representative regarding when she would vote. (Tr. 833). The Hearing Officer's finding that Venette's claim is credible is completely illogical, as Venette's explanation is nonsensical. (H.O. 40). If Venette had spoken previously with Rice and believed she would be voting in the morning as he claimed, why then did he call her after the first voting session to remind her to vote – in fact,

stating that he *knew* she missed the morning vote? As far as he knew, she would have already voted. Unless, of course, the Union was keeping track of which employees had or had not voted.

Also, voter Tracey Thomas testified without contradiction that she received a call from “Jean” with the Union ***as she was driving to the facility to vote.*** (Tr. 815, 1084-87). Jean told her “it looks like we are winning” but that it was still important for her to vote. (Tr. 815). Union organizer Jean Venette admitted that he called at least six other voters between polling sessions on election day from his office phone. (Tr. 749). These calls, therefore, are not on his cell records.

Finally, the Hearing Officer erroneously found that there is no evidence that either Walsh or Venette knew whether an employee had voted when they called or texted voters on election day. (H.O. 40). This finding ignores Walsh’s and Venette’s own admissions, as well as other credited testimony in the record. (H.O. 33, 36, 38, 40). Venette admitted that in his election day telephone message to voter Keisha Rice he stated, “I’m calling to remind you to vote this afternoon, ***because you missed the one earlier this morning.***” (H.O. 33; Venette, Tr. 751; Tr. Exs. 15-16) (emphasis added). Venette also testified ***that he assumed the persons he called had not voted.*** (Tr. 748). Walsh ***admitted that he did know if the recipients of his text messages had already voted*** when he sent the messages. (Tr. 97). Thus, either of these Union agent’s calls or text messages could have been taken or read in the final minutes before any employee voted, as demonstrated by Thomas’s testimony that Venette called her while she was driving to the facility to vote and that she received, but did not read, Walsh’s text message right before or while she was voting. Also, the Hearing Officer credited the testimony of Michelle Grey and Eric Carpio that on election day, before the polls closed, the Union’s agent personally asked them if they had voted and even asked Carpio *how* he voted. (H.O. 28; Tr. 770). Therefore, it is illogical and contrary to the record evidence to find that the Union did not know whether employees had voted.

In fact, Venette was not a credible witness at all, as he testified falsely that he made **all** of his calls to voters using the office phone at the Union’s Iselin, New Jersey, office. However, Venette’s Verizon cell phone records clearly show that he made at least 16 calls to voters from his

cell phone. (Tr. 756-57; Er. 18, 19). Notably, at the hearing Venette did not even know the phone number of his office phone – where he had worked for more than three months. (Tr. 757-58, 60).

iv. Evidence of Other Union Phone Calls to Voters

Beauvoir received a call from a Union representative the evening before the election who asked her how she was going to vote. (Tr. 632). Additionally, Mora received a call from a Union representative on her cell phone **on the day of the election while the polls were open, asking her whether she had voted.** (H.O. 40).

b. Argument

It is well-settled that the Board has a “duty to safeguard the election processes from conduct that inhibits the employees’ exercise of free choice.” *Brinks, Inc.*, 331 NLRB 46, 46 (2000). As part of this duty, the Board prohibits electioneering “at or near the polls.” *Id.*, quoting *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118, 1118-1119 (1982), *enforced*, 703 F.2d 876 (5th Cir. 1983).

When faced with evidence of impermissible electioneering, the Board determines whether the conduct, under the circumstances, “is sufficient to warrant an inference that it interfered with the free choice of the voters.” This determination involves a number of factors. The Board considers not only whether the conduct occurred within or near the polling place, but also the extent and nature of the alleged electioneering, and whether it is conducted by a party to the election or by employees. The Board has also relied on whether the electioneering is conducted within a designated “no electioneering” area or contrary to the instructions of the Board agent. [Citations omitted].

Id., quoting *Boston Insulated Wire & Cable Co.*, 259 NLRB at 1118-1119.

The numerous phone calls, voicemails, and text messages from the Union’s organizers on the day of the election and while the polls were open interfered with the free choice of voters under the *Brinks/Boston Insulated Wire* test. First, it is **undisputed** that the texts and phone calls occurred while employees were in the workplace and sometimes near the polling place. Second, Union organizers made the phone calls and sent the text messages, not employees. Third, regarding the “extent” of the phone calls, voicemails and text messages, at least 25 voters were sent text messages, other employees read or heard about the text messages, at least 17 voters received phone calls and/or voicemail messages from Walsh, and at least 16 more voters received phone calls and/or voicemail messages from Venette. Finally, as to the “nature” of the conduct, it

is **undisputed** that Union organizers: (1) told employees they knew the Union was winning; (2) told employees they knew whether employees had voted; (3) told employees to vote yes; and (4) asked employees whether and how they had voted. This conduct by the Union's organizers seriously interfered with the election process and is a valid basis to have the election set aside.

The barrage of phone calls and text messages to employees while they were at work on the day of the election also violated the 24-hour rule in *Peerless Plywood*, 107 NLRB 427, 429 (1953), which prohibits "election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election." This rule applies as equally to unions as employers. In addition to election speeches to "massed assemblies of employees," the Board has found that prolonged sound truck broadcasts of speeches and partisan songs are objectionable under *Peerless*, where the broadcasts were heard in the plant by employees at work. *Virginia Concrete*, 338 NLRB 1182, 1187 (2003); *United States Gypsum Co.*, 115 NLRB 734, 734-735 (1956) (emphasizing that although the employees subjected to the broadcast were not in a "massed assembly," they "were not isolated, but were working with or near each other").

In *Virginia Concrete*, the Board reviewed an ALJ's decision likening a text message sent to employees' mobile data units (MDUs) to the sound truck cases. *Id.* Although the Board rejected the judge's finding that the employer's messages in that case violated *Peerless Plywood*, those facts are distinguishable from the facts presented here. The *Virginia Concrete* Board found the text messages sent by the employer were not like the sound truck cases, in part, because, the Employer sent its message to individual employees in their trucks. The message was not delivered to "massed assemblies of employees," as in *Peerless*, or even to employees "working with or near each other," as in *United States Gypsum*. In the instant case, however, the Verizon phone records clearly show that the Union sent a barrage of text messages to numerous employees all at the same time, not knowing **where** those employees were. The facts are that many of those employees were at work, working with or near each other. For example, Pratts received her text message at work and immediately showed it to a co-worker, Mabilangan, standing next to her.

The Union's texts and calls while the polls were open also violated the Board's rule in *Milchem, Inc.*, 170 NLRB 362 (1968) (prohibiting conversations between parties to the election and employees preparing to vote), since the Union admitted it did not know where employees were when they called or texted them, and thus, employees could have been in line waiting to vote or even inside the polling location. Indeed, the record establishes that one voter's phone rang while she was standing at the shield marking her ballot, and another voter testified that Venette called her as she was on her way to the facility to vote. Since the Union chose to engage in this blatant electioneering with employees who were at work while the polls were open, and had no way to be certain that some of the employees they were calling and texting might have been waiting to vote or in the polling room itself when they received the Union's calls/texts, the burden should shift to the Union to affirmatively prove that none of its calls/texts violated *Milchem*.

If the Board allows or condones this conduct by the Union, then both employers and unions will be free to send barrages of texts and phone messages to employees who are at work while the polls are open encouraging them to vote a certain way and claiming "we are winning." As in the instant case, this activity is clearly destructive of the laboratory conditions necessary for a free and fair election. The Board should adopt a bright line test and prohibit either party from sending mass text messages to voters during the 24 hour period or while the polls are open. The Board also should adopt a bright line test that prohibits either party from making any kind of statement claiming that they are "winning" or otherwise forecasting victory at any time during the 24 hour period or while the polls are open.

2. Roving Union Observer Jillian Jacques Engaged in Impermissible Electioneering (Objections 3 & 13)

a. Relevant Facts

The Union's Roving Observer Jacques engaged in impermissible electioneering under the *Brinks/Boston Insulated Wire* test by telling employees it was "time to vote yes" outside the voting room. Jacques admitted that she was told by the Board Agent that while acting as an Observer, she was not to have any conversations with voters other than to greet them. (Tr. 378). Her testimony that she did not tell employees to "vote yes" while serving in this role or have

conversations with voters is not credible and is contradicted by record evidence. Initially, Jacques denied having any conversations with any voters while she was serving as an Observer and carrying her sign. (Tr. 394). She later admitted, however, that an employee approached her and asked if she still had time to vote and Jacques responded yes and told the employee the voting time had been extended. (Tr. 397). When confronted with this conflicting testimony, Jacques argued that she earlier denied having conversations with voters because this was not a “conversation.” (Tr. 399). Additionally, Jacques asked employees whether they had voted and even how they voted. (Carpio Tr. 769, Grey Tr. 793).

Inez Konjoh, Rick Speas, and employee Doreen Dande testified that they heard Jacques say, “It’s time to vote yes.” (Konjoh Tr. 858, 887, Speas Tr. 692, Dande Tr. 572-73). In fact, employee Dande stated that she heard Jacques say “time to vote yes” more than one time the morning of the election. (Tr. 573). Even after being admonished by Konjoh that telling employees to vote yes while acting in her role as an Observer was impermissible, Jacques continued to do so. Thus, Konjoh credibly testified that she heard Jacques tell employees to vote yes a second time when her back was to Konjoh and when Jacques turned around and saw Konjoh, she quietly added “or no.” (Tr. 861). Further, Jacques talked so loud that Orozco could hear her from **inside the voting room**. (Tr. 484). The Hearing Officer erroneously credited the testimony of Jacques and Mangel on this issue. (H.O. 25) Contrary to the Hearing Officer’s finding, however, there was no credible evidence to corroborate Jacques’s story. As set forth above in detail, Jacques entire testimony and credibility was seriously impeached in general by the fact that she admitted she completely fabricated statements in connection with the Release Forms. Her self-serving testimony on **this** issue certainly should not be credited. Moreover, the person Jacques claimed could support of her version of the events, Mangel, testified that she did not know the exact words Jacques used. (Tr. 1197). Further, Mangel stated that she was running late for work and that she never stopped walking when she had the brief exchange with Jacques. Critically, however, Mangel admitted that she “wasn’t paying much attention” and **didn’t know whether Jacques had**

told her to “vote yes” or not. (Tr. 1198-1199).²⁰ At another point in her testimony, Mangel admitted “I really can’t remember everything exact, I was running late just to get a vote.” (Tr. 1204). Indeed, the Hearing Officer noted on the record during Mangel’s testimony that Mangel “doesn’t have an accurate memory” and “her recollection is not a hundred percent.” (Tr. 1205).

The Hearing Officer incorrectly found that Ikurekong, the Employer’s roving Observer, who did not testify, was a potentially corroborating witness for Konjoh’s testimony. This finding was based on the Hearing Officer’s inaccurate statement that Konjoh “conceded Ikurekong was present when Jacques made both statements.” (H.O. 26, fn. 9). The record evidence, however, shows – and the Hearing Officer acknowledged – that Ikurekong was on **the other side of the hall** and **not with** Konjoh and Jacques during the first incident. (H.O. 20, Tr. 887). Moreover, Konjoh did not testify that Ikurekong was standing next to Jacques when Konjoh heard Jacques the second time. (Tr. 903). Further, neither Jacques nor Mangel, who had the conversation with Jacques, testified that Ikurekong was standing next to or with Jacques during either instance.

Finally, the Hearing Officer’s findings that Jacques’s interactions with voters were allowable “greetings” (H.O. 26) and pertained only to whether the polls were open and whether employees had the “opportunity” to vote (H.O. 30) is contradicted by the credited testimony of Grey and Carpio that Jacques asked them, while serving as a roving Observer, whether they had voted and asked Carpio how he voted. (H.O. 28, 30). These conversations clearly exceed mere greetings.

b. Argument

Jacques’s electioneering interfered with the free choice of voters under the *Brinks/Boston Insulated Wire* test. First, Jacques’s electioneering occurred near the polling place, such that it could be heard inside the polling place. Second, Jacques engaged in the electioneering while acting as a Union Observer; therefore, she was an agent of the Union at the time of her

²⁰ The Hearing Officer’s finding that even if Jacques said “vote yes” to Mangel, “this conduct in relation to one voter could not have affected the outcome of the election” (H.O. 30) improperly applies reasoning to the facts in a vacuum. This comment cannot be viewed in isolation – when combined with the mass texts to voters that “we are winning” and the fact that others, such as Dande, overheard the comment, the act certainly could have affected more than one vote which would be significant in a close election in a small voting unit.

misconduct. *Brinks*, 331 NLRB at 46. Third, Jacques acted contrary to the instructions of the Board agent not to talk to employees about the election. Fourth, with respect to the “extent” of the conduct, Jacques directly told at least one voter she had “ten minutes to vote yes;” others overheard her say this; and still others were asked if they were going to vote. See *id.* (noting that the union observer “directly told four employees how to vote: others were told what he had said: and still others were given the ‘thumbs up’ signal). Finally, with respect to the “nature” of the conduct, the electioneering occurred during the voting, was in close proximity to the polling area, could be heard in the polling area, and is a serious interference with the election process. See *id.* at 46-47 (finding “party electioneering during the voting, and indeed in the election room, is a serious interference with the election process”). Therefore, Jacques’s conduct was objectionable and the election should be set aside. *Id.* at 47.

D. The Union Improperly Kept a List of Employees Who Voted, Gave the Impression of Surveillance, and Told Employees the Union Was Winning the Election Before Polls Closed on Election Day (Objection 11)

1. Relevant Facts

The Hearing Officer erroneously found that the Employer did not establish that the Union engaged in surveillance or created the impression of surveillance on the election day. (H.O. 47), and that there is no evidence that employees believed or even suspected that the Union was keeping a list of who voted. (H.O. 45).²¹ The record evidence and voter testimony credited by the Hearing Officer, however, clearly shows that these findings are in error.

²¹ The Hearing Officer erred in excluding testimony from Orozco about Walsh’s text message. Orozco testified that Pratts told her about the text message she received from Walsh. When the Employer’s counsel attempted further inquiry, the Hearing Officer sustained the Union’s hearsay objection and precluded further inquiry. The proffered testimony was not being offered for the truth of the matter asserted, but for the impression it was creating in the workplace about the circumstance surrounding the election. (Tr. 491-92). If permitted to testify on this matter further, Orozco would have testified that when Pratts told her that Walsh’s text message stated “we are winning,” she had the impression that the only way the Union would know that is if it was keeping track of how employees were voting. Therefore, it was improper to preclude this testimony on the basis of hearsay. To the extent any hearsay was involved in this testimony, it already had been corroborated in previously admitted testimony. Walsh already had identified and verified the content of his text message. (Tr. 97 and Er. 3). Orozco’s testimony, therefore should have been admitted. “Hearsay is ... ‘probative ... if corroborated by something more than the slightest amount of other evidence.’” (H.O. 76 citing *Dauman Pallet, Inc.*, 314 NLRB 185 (1994)).

The Hearing Officer credited Grey's testimony that before the polls closed on the election day, the Union's agent asked her if she had voted. (H.O. 28; Tr. 793-94). The Hearing Officer also credited Mora's testimony that a Union representative called her at 2:45 p.m. on election day (before the polls closed) and asked if she had voted. (H.O. 36; Tr. 97). Moreover, the Hearing Officer's finding is impossible to square with the credited testimony of Carpio that before the polls closed, the Union's agent asked him not only *if* he had voted but *how he voted*. (H.O. 33; Tr. 770). It also is *undisputed* that at the end of the first voting session, Napolitano the Union's in-room Observer, ran her finger down the voter eligibility list (Er. 11) and commented on the number of employees left to vote. (Tr. 485-86). How would Napolitano know how many employees were left to vote if she were not keeping track? In response, the Board Agent advised Napolitano that she could not engage in that activity. (Tr. 486). That Napolitano obviously was keeping track of who had voted is corroborated by Walsh's testimony that at the end of the second voting session, Napolitano told him all but 5 people had voted. (Tr. 1110).

As detailed above, on election day, including while the polls were open, it is *undisputed* that Union representatives made repeated telephone calls to employees and sent text messages to employees telling them that they knew the Union was winning the election, and that they knew specifically that at least one voter (Rice) had not voted yet. It is *undisputed* that Union organizer Venette called voter Rice after the first voting session and left her a voice message stating in part, "I'm calling to remind you to vote this afternoon because you missed the one [voting session] earlier this morning." (H.O. 33; Rice, Tr. 832; Venette, Tr. 751; and Tr. Exs. 15-16).²² Further, it is *undisputed* that Walsh sent a text message to at least 9 voters telling them the Union was winning while polls were still open on election day. (Tr. 97). While Walsh tried to claim that when he said to voters in his texts "we are winning," he was simply basing his comment on the support the Union

²² The Hearing Officer attempted to minimize this conduct by finding that Venette credibly testified that at the time he called he "believed Rice would have already voted based on their prior conversation." (H.O. 40). This, too is inconsistent and illogical. Why would Venette have called Rice and left a message stating that he knew she did not vote in the first session if he thought she had already voted? Nevertheless, what Venette thought about this issue is not important. It is *undisputed* that Venette called Rice on election day and *told her* that he knew she had not voted. Voter impressions are based on other people's observable conduct, not their unknown and secret thoughts.

believed it had during the campaign, **he eventually admitted that the “we are winning” statement in his texts was based on the Union winning the actual balloting on election day.** (Tr. 98). Further, Walsh admitted he talked to Napolitano after the first polling session, the two discussed that some employees had and had not voted, and that Napolitano verbally recalled for Walsh the names of some of the people that had voted. (Tr. 106, 108-09).

Employee witnesses also testified that Walsh texted them on the day of the election before the voting was over with a message telling them the Union had won the election. (Tr. 633, 676-77). Beauvoir testified that she received such a message in the morning and it made her question how the Union would know the results of the election before the second voting session had concluded. (Tr. 633-634). Moore also received a text from Walsh on the day of the election telling her the Union won; however, Moore did not view the text until she got home after work and turned on her phone. (Tr. 677). The testimony of these two employees is corroborated by Walsh’s Verizon phone records, which show that texts were sent to both Beauvoir and Moore **at 11:20 a.m.** (Er. 18, 19). Further, **no other messages** to either employee appear on Walsh’s subpoenaed records for September 2, 2010.²³ Therefore, Walsh’s testimony that he did not text these two voters with his “we won” message until **after** the election was over is not credible and not supported by the objective evidence in the record.

Finally, the Hearing Officer credited the testimony of witnesses that Napolitano had a cell phone out and while employees voted, despite the Board Agent’s instruction that cell phones could not be used in the polling room. (H.O. 44). The Hearing Officer, however, erroneously found that “none of these employees could state what Napolitano was doing with her phone.” (H.O. 45). This finding directly contradicts the Hearing Officer’s acknowledgement that voter Thomas testified that Napolitano was holding her phone and “manipulating it” (H.O. 43, Tr. 816), and that voter Dande testified that she saw Napolitano “flipping” her phone and that it looked like Napolitano was texting. (H.O. 43). Further, in her testimony Dande demonstrated by moving her hand and thumb what she

²³ Significantly, neither individual testified that she received **any other text messages** from Walsh on the day of the election.

saw Napolitano doing with her phone – actions she described as “texting.” (Tr. 568). Dande further testified that Napolitano was “playing with it in her hand as though she was texting.” (Tr. 568). This cited testimony also directly contradicts the Hearing Officer’s finding that “there is no evidence that employees believed or even suspected that the [Union] was keeping such a list.” (H.O. 45). While the Hearing Officer dismisses this conduct because Napolitano’s cell phone records show that Napolitano did not send any text messages while employees were voting (H.O. 43), this does not rule out the possibility that Napolitano was keeping track of who voted on her cell phone’s note pad or other programs. Napolitano’s “texting” gestures could just as easily have been typing.

2. Argument

The Board has consistently stated:

It is well settled that the only list of voters that may be maintained in Board-conducted elections is the official voter eligibility list used to check off the names of voters as they receive their ballots. The keeping of any other list of individuals who have voted is prohibited and is grounds in itself for setting aside the election when it can be shown or inferred from the circumstances that the employees knew that their names were being recorded. And this is so even when there has been no showing of actual interference with the voters’ free choice.

Cross Pointe Paper Corp., 330 NLRB 658, 662 (2000) (citation omitted). “Board cases have recognized that the focus of the inquiry must be on what voters observed and could reasonably believe.” *Id.* “Activity that reasonably can be construed as improper is proscribed whether or not the activity is, in fact, improper.” *Id.* (citation omitted).

Indeck Energy Services of Turner Falls, Inc., 316 NLRB 300 (1995), relied upon the Hearing Officer (H.O. 46), actually supports the Employer’s position and dictates that the election be overturned. In *Indeck*, the Board reaffirmed that it will set aside an election on the basis that a voting list other than the official eligibility list was kept if it can be shown **or inferred from the circumstances** that employees were aware that their names were recorded. *Id.* at 301. In this case, voters credibly testified that Union agents personally asked how they voted while the polls were open, engaged in “texting” (or typing) motions on a cell phone in the polling room during voting, called voters while the polls were open and said they knew they had not voted, and sent texts messages before the polls closed stating “we are winning.” It can be readily inferred from

these **undisputed** circumstances that voters reasonably could have the impression that the Union was keeping a list of not only **who** had voted, but also **how** they had voted. Thus, the Hearing Officer's finding that there is "no evidence that employees believed or even suspected the [Union] was keeping such a list" disregards the undisputed record evidence.

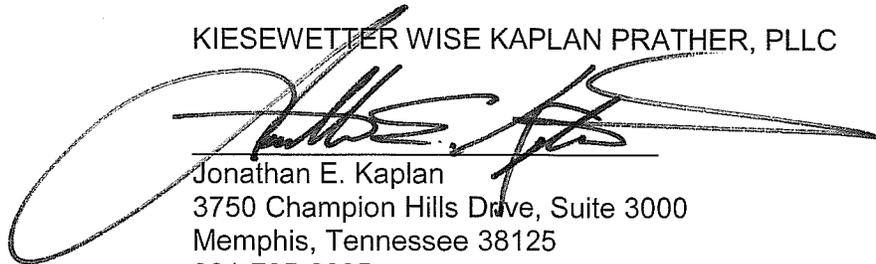
Such conduct is never permissible while the polls are open and voting is still going on. In addition to giving the impression of surveillance of who voted and how they voted, it also tends to create a bandwagon effect where employees might mistakenly believe that the election results already have been decided or that it would be futile to vote. It is for this very reason that during national political elections, the news networks no longer "call" election results or release any exit polling data until all the polls have closed. The Board should adopt a bright line rule that neither party may make statements or send text message to voters on election day regarding the results of the election or predicted the results of the election until after the polls have closed.

IV. CONCLUSION

For all of the foregoing reasons, the Employer's Objections should be sustained, the results of the election conducted on September 2, 2010 should be set aside, and a second election should be held in an environment that allows employees to exercise their free choice in deciding whether or not to be represented by the Union.

Respectfully submitted,

KIESEWETTER WISE KAPLAN PRATHER, PLLC

A large, stylized handwritten signature in black ink, appearing to read 'Jonathan E. Kaplan', is written over a horizontal line. The signature is highly cursive and extends significantly to the left and right of the line.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 28th day of February 2011, the foregoing pleading was filed via electronic filing with:

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