

**Jurys Boston Hotel and Gregory B. Hatch, Petitioner  
and UNITE HERE, Local 26.** Case 1–RD–2081

March 28, 2011

DECISION AND DIRECTION OF  
SECOND ELECTION

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE  
AND HAYES

The National Labor Relations Board, by a three-member panel, has considered objections to a decertification election held on September 21, 2006, and the hearing officer's report recommending disposition of them.<sup>1</sup> The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 46 for and 47 against the Union, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings and recommendations only to the extent discussed below, and finds that the election must be set aside and a new election held.

We adopt the hearing officer's findings, for the reasons he explains, that the Employer did not engage in surveillance of employees' prounion activities or impose objectionable restrictions on employees' union-related conversation (Objections 2 and 3).

However, contrary to the hearing officer, we find that (as asserted in Objection 7) the Employer's maintenance of three rules in its handbook for employees<sup>2</sup>—pertaining respectively to solicitation, "loitering," and the wearing of emblems and buttons—constituted objectionable conduct and that the election must be set aside.<sup>3</sup>

I. BACKGROUND

The Employer operates a hotel, which opened in July 2004. Before that date, the Employer and the Union entered into a neutrality agreement preliminary to a card check, as a result of which the Employer recognized the Union as the representative of its nonsupervisory em-

<sup>1</sup> On December 28, 2006, the Regional Director issued a Report on Objections, order directing hearing, and notice of hearing, finding that the Union's objections raised substantial and material fact issues and directing that a hearing be held to resolve those issues. A hearing was held on January 22 and 23, 2007, and the hearing officer issued his report and recommendations—the entire report and recommendations are attached as an appendix—on February 28, 2007. The hearing officer recommended that the Union's objections be overruled and that the election result be certified. The Union filed exceptions and a supporting brief with respect to its Objections 2, 3, and 7, and the Employer filed an answering brief.

<sup>2</sup> The Petitioner also alleged as objectionable several additional handbook rules, which are briefly described below.

<sup>3</sup> In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule the Union's Objections 1, 8, and 9. (The Union previously withdrew its Objections 4, 5, and 6.)

ployees. In October 2004, the Employer signed the Union's master hotel contract.

After the master contract expired without a successor agreement, the Petitioner filed a decertification petition on June 2, 2006.<sup>4</sup> During the critical period before the election, the Employer took a cooperative position with the Union. It instructed its supervisors to take a "neutral if not positive" line concerning the Union in discussions with employees, and it issued a letter to employees noting that its relationship with the Union had been "positive." The Employer also responded with corrective action to the Union's complaints of supervisor misconduct.

At all times, including during the critical period, the Employer maintained in force a 63-page employee handbook, which it issued to all new employees after the hotel opened in 2004. Employees were asked, though not required, to sign a receipt for the handbook at the time they received it, stating that the employee "will" read the handbook. Most employees did sign the receipt. The handbook was discussed at employee orientations, including those held at the time the hotel opened. The Union attended the latter and received copies of the handbook. There was no showing that the rules were enforced against protected activity, and no employees were hired or given the handbook during the critical period.

The Union did not object to any of the rules in the handbook before the decertification petition was filed. But, on July 17—6 weeks after the petition was filed, and 9 weeks before the election—the Union filed an unfair labor practice charge alleging that seven of the rules in the handbook were unlawful. Among those rules were three on which our decision today turns:

(1) Rule 43, which prohibited solicitation and distribution "on hotel property;"

(2) Rule 30, which subjected employees to discipline (up to and including discharge) for "[b]eing in an unauthorized area and/or loitering inside or around the Hotel without permission," and for "us[ing] guest facilities for personal use including but not limited to, guest phones, ATM machines and restrooms;" and

(3) a rule in the "Grooming Standards" section of the handbook, which prohibited employees from "wear[ing] emblems, badges or buttons with messages of any kind other than the issued nametags or other official types of pins that form an approved part of your uniform."

<sup>4</sup> All subsequent dates are in 2006, unless otherwise stated.

On August 7, 9 weeks after the petition was filed and 3 weeks after the Union filed its unfair labor practice charge, the Employer issued a memo to employees, which stated that the Employer had determined that two of its handbook rules (the “Grooming Standards” policy and a solicitation policy not at issue here) were “potentially ambiguous” under the National Labor Relations Act. The memo stated that those two rules were not intended to “interfere with your NLRA rights,” and announced amendments to both. With respect to the “Grooming Standards” policy, the memo stated that “the second to last paragraph of this policy, which addresses the wearing of emblems, buttons and badges, is *deleted*” (emphasis in original).

Following the election, the Union filed objections challenging the same seven rules that were the subject of its unfair labor practice charge.<sup>5</sup> The hearing officer found that, with one exception, the challenged handbook rules violated Section 8(a)(1) of the Act.<sup>6</sup> He further found, however, that the maintenance of those rules did not warrant setting aside the election. Noting that representation elections “are not lightly set aside” and that the burden of proof on an objector “is a heavy one,” he found that the Union had not met this burden, relying chiefly on *Delta Brands, Inc.*, 344 NLRB 252 (2005), and *Safeway, Inc.*, 338 NLRB 525 (2002).

In the hearing officer’s view, the rules, though objectionable in themselves, did not require setting aside the election because they were promulgated before the Employer recognized the Union, were not enforced or cited by the Employer during the critical period, and were not shown to have deterred any employee from exercising Section 7 rights. Moreover, the hearing officer observed, there was no evidence that any employee read the rules during the critical period. He also found it significant that an incumbent union was present during the critical period to inform employees that the rules could not lawfully be enforced against protected activity.

## II. DISCUSSION

We agree with the hearing officer that at least three of the Employer’s handbook rules—rule 43 (no solicitation or distribution “on hotel property”), rule 30 (no “[b]eing in an unauthorized area and/or loitering inside or around

<sup>5</sup> In addition to the rules that we address today, the Union challenged rules (1) restricting employees’ use of guest facilities; (2) establishing an “open door policy” and grievance procedure; (3) citing “failure to participate in a hotel internal investigation” as grounds for discharge; and (4) making the failure to report to work and leaving work without authorization ground for discipline.

<sup>6</sup> Because the hearing officer lacked authority to make unfair labor practice findings in this representation proceeding, we will treat his report as finding that the Employer’s maintenance of the rules constituted objectionable conduct.

the Hotel without permission”), and the rule prohibiting the wearing of emblems, badges, and buttons—were objectionable.<sup>7</sup> Each of these rules, in force during the critical election period, reasonably tended to interfere with employee free choice. Because this is solely a representation case (and does not encompass a consolidated unfair labor practice proceeding), the election must be set aside if the maintenance of these rules “could . . . reasonably have affected the results of the election.” *Safeway*, supra, 338 NLRB at 526 fn. 3, citing *Freund Baking Co.*, 336 NLRB 847 (2001).<sup>8</sup> Contrary to the hearing officer, we conclude that the result of the election here—decided by a single vote—might well have been affected by the rules at issue, notwithstanding the factors cited by the hearing officer. The Board’s decisions in *Safeway* and *Delta Brands*, supra, where election results were upheld despite the employer’s maintenance of objectionable rules, are distinguishable on their facts.<sup>9</sup>

As our case law demonstrates, the three rules in question, individually and together, had a reasonable tendency to chill or otherwise interfere with the prounion campaign activities of employees during the election period. Rule 43 imposed an overbroad ban on solicitation or distribution anywhere “on hotel property.” See, e.g., *Pacific Beach Hotel*, 342 NLRB 372, 373–374 (2004). Rule 30 prohibited “loitering inside or around the Hotel without permission.” See, e.g., *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646, 655 (2004). The third rule prohibited the wearing of emblems, badges, and buttons.<sup>10</sup> See, e.g., *P.S.K. Supermarkets*, 349 NLRB 34,

<sup>7</sup> Accordingly, Chairman Liebman finds it unnecessary to pass on the hearing officer’s findings with respect to the remaining rules challenged by the Union.

Member Pearce agrees that the Employer’s maintenance of the no-solicitation, no-loitering, and no-buttons rules are sufficient to require a second election. He would also find that three additional rules—involving the Employer’s grievance procedure, internal investigations, and leaving work without authorization—were objectionable.

<sup>8</sup> Where a representation proceeding and an unfair labor practice case have been consolidated and an unfair labor practice found, a different standard applies: the election must be set aside unless “it is virtually impossible to conclude that the misconduct could have affected the election results.” *Clark Equipment Co.*, 278 NLRB 498, 505 (1986). See *Safeway*, supra, 338 NLRB at 526 fn. 3 (discussing two standards).

<sup>9</sup> Chairman Liebman dissented in both cases and adheres to her view that they were wrongly decided. She agrees, however, that the two decisions are distinguishable here.

<sup>10</sup> As explained, this rule was rescinded by the Employer by memo on August 7. That memo indicated that the paragraph in the handbook’s grooming section “which addresses” emblems, badges, and buttons was being “deleted,” and included a general disclaimer of intent to infringe on “your NLRA rights.” Even assuming, without deciding, that the memo provided an “unambiguous” repudiation of the rule at the time of the rescission (but compare *Intermet Stevensville*, 350 NLRB 1349, 1350 fn. 6 (2007)), the rule by then had been in force for 9 weeks following the filing of the decertification petition.

34–35 (2007). Individually and together, these three rules could reasonably be construed by employees as precluding them from communicating with each other about the Union and their wages, hours, and other terms and conditions of employment at their workplace, “the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978), quoting *Gale Products*, 142 NLRB 1246, 1249 (1963).

It is true, as the hearing officer found, that none of the rules were actually enforced against employees during the election and that there is no evidence that any employees were actually deterred from engaging in campaign activity. With respect to the Employer’s no-loitering rule, however, there was evidence tending to show a chilling effect on employees.<sup>11</sup> In any case, Board precedent does not require such evidence—indeed, the Board has set aside elections based on employers’ mere maintenance of objectionable rules. As we have explained, “the mere maintenance of an overbroad rule can affect the election results because employees could reasonably construe the provision as a directive from their employer that they refrain from engaging in permissible Section 7 activity.” *Pacific Beach Hotel*, supra, 342 NLRB at 373–374 (setting aside election, based on handbook policy prohibiting solicitation on company property), citing *Freund Baking*, supra, 336 NLRB at 847 fn. 5.

Our decisions in *Delta Brands* and *Safeway* do not compel a different result here. Neither case, each decided by a divided three-member panel, overruled prior law. Indeed, the Board subsequently emphasized that *Delta Brands* “did not hold that objecting parties in all cases must prove that an objectively overbroad rule was en-

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The memo did not also address the no-solicitation/distribution rule at issue here. Rather, as stated, it addressed a separate solicitation policy appearing elsewhere in the handbook, which the Union did not allege to be objectionable.

<sup>11</sup> Union organizer Katherine Christiani testified that on one occasion, when she and a group of housekeeping employees were seen by the Employer’s director of operations while they were waiting outside the employee entrance for a ride to a union meeting, one of the employees told her, “I don’t think we can be here. We’re supposed to leave after our shift. We can’t stand here on property. We should go.” The group then separated and left the hotel.

The hearing officer erred in declining to give any weight to this testimony on the ground that it was hearsay. That testimony was not hearsay. It was not offered to prove the truth of the matter asserted—i.e., that, under the no-loitering rule, employees could not remain on hotel property on nonworktime. Rather, it was offered to prove what that employee *understood* the rule to prohibit. Given the broad wording of the rule, that understanding was a reasonable one.

forced or that it actually deterred employees from engaging in Sec[ti]on 7 activity.” *S.T.A.R., Inc.* 347 NLRB 82, 84 fn. 7 (2006).<sup>12</sup>

In *Safeway*, which also involved a decertification election, the Board majority found that an employer’s confidentiality rule, even if overbroad, “could not reasonably have affected the [decertification] election.” 338 NLRB at 526. “Of primary significance” to the *Safeway* Board was that, before the election, the union representing the unit was “ideally placed to advise employees of their rights,” and there was no indication that any employees had asked the union for such advice or that, prior to its decertification, the union believed the rule to be unlawful. *Id.* The *Safeway* Board also observed that finding a chilling effect on employee rights, based on the confidentiality rule, “depend[ed] on a chain of inferences upon inferences,” given the nature of the rule. *Id.* at 527.<sup>13</sup>

The situation in this case was quite different. First, unlike the incumbent union in *Safeway*, the Union here did *not* fail to challenge the unlawful rules “prior to its decertification.” Rather, it filed an unfair labor practice charge based on the rules 9 weeks before the election. After a challenge to the Union’s bargaining status was raised for the first time, the impact of the rules on employees’ right to campaign acquired a new significance, and the Union then took an active position that the rules were unlawful. Second, the three rules on which this case turns have a much closer relationship to election-related activity by employees than did the single, relatively narrow confidentiality rule at issue in *Safeway*. It does not require “a chain of inferences upon inferences” to conclude that restrictions on solicitation and distribution, “loitering,” and the wearing of buttons could reasonably have affected the outcome of the election in this case. Finally, the election here was decided by a single vote in a significantly larger unit (47–46), in contrast to the electoral margin in *Safeway* (6–4).

In *Delta Brands*, the Board majority held that a handbook rule prohibiting solicitation did not warrant setting

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<sup>12</sup> In *S.T.A.R.*, the Board found that a union’s misstatement concerning the waiver of initiation fees was objectionable because it “could have affected the election result.” 347 NLRB at 84 fn. 7. “We make this finding,” the Board observed, “without requiring any evidence of enforcement or that employees were actually deterred from engaging in Sec. 7 activity.” *Id.*

<sup>13</sup> The *Safeway* confidentiality rule stated that various types of information were required to be kept confidential, including “personnel records” and “payroll data.” 338 NLRB at 527. The *Safeway* Board declined to find “that the employees would infer that the reference to personnel and payroll records, in the context of the rest of the rule, referred to their own wages, hours, and working conditions, and that employees would further infer that the ban on disclosure to ‘unauthorized’ persons or organizations encompassed their coworkers and the Union.” *Id.*

aside a 10–8 election result. Absent a showing that the rule had been enforced or that any employee had been “affected by the rule’s existence,” it could not be found that “the mere existence of the rule could have affected the results of the election.” 344 NLRB at 253. In upholding the election, the Board observed that the employer did not specifically cite the rule to employees during the critical period, that the “relatively brief” rule was contained in a 36-page manual, and that other types of solicitation had been permitted in the past. *Id.* The *Delta Brands* decision did not address cases such as *Pacific Beach Hotel*, *supra*, setting aside elections based on the mere maintenance of an objectionable rule. Nor did the two-member majority purport to overrule precedent, observing instead that the “decision is not a departure from established Board law.” *Id.* at 253. The *Delta Brands* majority cited *Safeway*, but the two-member *Safeway* majority itself had disclaimed both the intent and the authority to overrule precedent. 338 NLRB at 526 fn. 3.<sup>14</sup>

As the Board’s later decision in *S.T.A.R.*, *supra*, suggests, *Delta Brands* is best understood as limited to its precise facts.<sup>15</sup> In any case, the decision is factually distinguishable here, where three objectionable rules (not one) are involved, where there is evidence that one of the rules actually chilled employees,<sup>16</sup> and where a single vote decided the election.<sup>17</sup>

Finally, the Employer and our dissenting colleague assert that the Employer’s cooperative policy toward the Union during the critical period precluded the objectionable rules from having a coercive impact. However, this assertion assumes that all employees were not only fully aware of the cooperative policy, but understood it to make the Employer’s written rules of conduct nonenforceable with respect to election-related activity. The record does not support this assumption. Even the Employer’s letter to employees stating that its relation-

ship with the Union had been “positive” in no way suggested that its handbook rules were being suspended or changed with regard to union activity.

[Direction of Second Election omitted from publication.]

MEMBER HAYES, dissenting.

I would affirm the hearing officer’s recommendation to overrule the incumbent Union’s objections to the results of a decertification election which it narrowly lost by a 46–47 vote over 4 years ago. To reach the opposite result and direct a second election, my colleagues strain to avoid controlling precedent and a record clearly indicating that none of the Employer’s rules they find objectionable could reasonably have affected the election.<sup>1</sup>

The bargaining unit employees of Jurys Boston Hotel had experienced collective-bargaining representation by the Union for over 2 years at the time of the election. When the hotel opened in 2004, the Employer and the Union entered into their bargaining relationship without rancor, pursuant to a card check and neutrality agreement. Shortly before the hotel opened, the Employer compiled a 63-page handbook. Nestled at various spots within the handbook were the three work rules in dispute, separately dealing with solicitation and distribution, loitering, and the wearing of emblems and buttons. During posthire orientation sessions, all employees received copies of the handbook, and its contents were discussed. The Union likewise received copies of the handbook and attended the orientation sessions. The three rules were not promulgated in response to union activity, and there is no evidence that any of them were applied to protected union or other concerted activity at any time from 2004 through the critical preelection period. The handbook itself advises employees of their rights under the Act.

After the decertification petition was filed in June 2006, the Employer maintained a cooperative and neutral, if not even favorable, attitude towards the Union. There is no evidence that any employees were hired or given copies of the handbook during the ensuing preelection period. Union officials continued to have unfettered access to employees in the hotel cafeteria area. Its organizers distributed literature in the hotel, as did employee supporters of decertification in the hotel. As previously stated, there is no evidence whatsoever of enforcement of the three work rules during the election period, much less enforcement against those participating in protected activity. Human Resources Director John Burnham credibly testified observing some employees wearing buttons, albeit unrelated to the election, in ap-

<sup>14</sup> The *Delta Brands* majority stated that “*Safeway* stands for the proposition that the mere maintenance of an arguably overbroad rule will not be the basis for overturning an election where an incumbent union was in a position to advise employees of their rights.” 344 NLRB at 253. That statement—no more than dictum in *Delta Brands*, which did not itself involve a decertification election—reads *Safeway* far too broadly, for reasons already explained. *Safeway* involved only a single confidentiality rule, in circumstances where the union could reasonably be said to have acquiesced in the rule.

<sup>15</sup> In *Longs Drug Stores California*, 347 NLRB 500, 502–503 fn. 11 (2006), the Board cited *Delta Brands* favorably, but the case—unlike this one—involved a “one-sided” vote and a confidentiality rule. *Id.* at 503 fn. 12.

<sup>16</sup> The *Delta Brands* majority itself observed that if the union there had “adduced evidence that . . . employees told each other that they should refrain from solicitation because of the [objectionable] rule,” such evidence would have been significant. 344 NLRB at 253 fn. 6.

<sup>17</sup> The margin in *Delta Brands* was 10–8.

<sup>1</sup> I would affirm the hearing officer’s findings that three additional rules cited by Member Pearce were not objectionable.

parent contravention of the rule banning such displays. He also observed employees regularly congregating outside the employee entrance to the hotel, in apparent contravention of the rule prohibiting loitering.

On July 17, the Union filed an unfair labor practice charge alleging that the maintenance of the three handbook rules (and some others) which it had known about for 2 years violated Section 8(a)(1) of the Act.<sup>2</sup> Less than a month later and 3 weeks prior to the election, the Respondent issued a memo to employees announcing the deletion of the prohibition on the wearing of emblems, buttons, and badges, and clarifying a distribution work rule in accord with Board law.<sup>3</sup> The memo stated that the changes were made to resolve ambiguities under the Act and assured that nothing in the handbook was intended to interfere with employee rights under the Act. Nevertheless, after the election, the Union filed objections in this separate representation proceeding to the Employer's maintenance of the rules during the preelection period.

The hearing officer correctly found that even if all three rules were unlawfully overbroad,<sup>4</sup> the Union failed to meet its burden of showing that their maintenance during the election period had a reasonable tendency to affect the outcome of the election. He also correctly concluded that the analysis of the Union's objections is controlled by *Delta Brands, Inc.*, 344 NLRB 252 (2005), and *Safeway, Inc.*, 338 NLRB 525 (2002), notwithstanding my colleagues' unavailing attempts to distinguish and diminish that precedent. In sum, the totality of circumstances related to the maintenance of these rules shows that (1) they were not promulgated in response to union activity; (2) they were not enforced against anyone engaged in union activity; (3) the Employer assured employees before and during the election period that nothing in the handbook was meant to interfere with their rights under the Act; (4) the incumbent Union was on the scene and available to advise employees with respect to these rights; (5) there is evidence that employees may have violated the rules without consequence; and (6) the evidence weighs heavily in favor of finding that the rules' potential chilling effects on Section 7 rights did

not have that affect on any employee.<sup>5</sup> I readily acknowledge that the closeness of the election is a factor to be considered in assessing the merits of the objections, but this factor alone cannot be controlling.

Based on the foregoing, I would affirm the hearing officer's recommendation to overrule the Union's objections and to certify the election results. I dissent from my colleagues' failure to do so.

APPENDIX

HEARING OFFICER'S REPORT AND RECOMMENDATION ON OBJECTIONS

Pursuant to a petition for election filed on June 2, 2006,<sup>1</sup> and a Stipulated Election Agreement executed by the above parties and thereafter approved by the Regional Director, an election was conducted on September 21, 2006, among certain employees<sup>2</sup> of the Employer. The tally of ballots cast at the election is as follows:

Approximate number of eligible voters.....	96
Void ballots.....	0
Votes cast in favor of Union.....	46
Votes cast against Union.....	47
Valid votes counted.....	93
Challenged ballots.....	0

Challenges are *not* sufficient in number to affect the results of the election.

A majority of the valid votes counted plus challenged ballots has not been cast for the Union.

On September 28, 2006,<sup>3</sup> the Union filed objections to conduct affecting the results of the election. Copies of the objections were served on the Employer and the Petitioner and are attached hereto.

Pursuant to Section 102.69 of the Board's Rules and Regulations, an investigation of the objections was conducted. Thereafter, on December 28, the Regional Director issued a Report on Objections and Notice of Hearing that found that the objec-

<sup>5</sup> My colleagues criticize the hearing officer for failing to give weight to the uncorroborated testimony of union organizer Katherine Cristiani that on one occasion an unidentified employee expressed concern about being in the hotel area because they were supposed to leave after their shift. Even if treated as credible nonhearsay for the fact of what was said to Cristiani, I find this brief, vague testimony would not outweigh other record evidence that the Employer's antiloitering rule did not have the alleged chilling effect.

<sup>1</sup> All dates are in 2006, unless otherwise specified.

<sup>2</sup> The appropriate collective-bargaining unit as set forth in the initial Stipulated Election Agreement is as follows: All full-time and regular part-time room attendants, housepersons, porters, linen room employees, cleaners, bellpersons, doorpersons, telephone operators, captains, waitpersons, buspersons, bartenders, long end employees, food preparation employees, dishwashers, and potwashers employed by the Employer at its 350 Stuart Street, Boston, Massachusetts facility but excluding all other employees, executive chefs sous chefs, restaurant managers, bar managers, executive steward, hostpersons, lead line cooks, manager, guards and supervisors as defined by the Act.

<sup>3</sup> All dates are in 2006, unless otherwise specified.

<sup>2</sup> At the time of the hearing in this representation case proceeding, those charges remained pending in the Region.

<sup>3</sup> There is no allegation that the maintenance of this distribution work rule, as opposed to the no-solicitation/no-distribution work rule 43, was objectionable.

<sup>4</sup> For purposes of this analysis, I need not address whether the rules were unlawful. Further, I need not address whether the assessment of the objectionable nature of the rules' mere maintenance should be different if the issue was raised in a consolidated unfair labor practice and representation proceeding.

tions raised substantial and material factual issues that would best be resolved on the basis of record evidence at a hearing.

On January 22 and 23, 2007, a hearing was held on the objections in Boston, Massachusetts, at which time the Employer and the Union<sup>4</sup> appeared before me and participated.

All parties were afforded a full opportunity to be heard, to present evidence, to examine and cross-examine witnesses, and to file briefs. On review of the entire record, including my observations of the witnesses appearing before me, I make the following findings of fact, conclusions of law, and recommendations to the Board.

#### A. Summary of Findings

In Objection 1, the Union alleged that the Employer, on separate occasions, engaged in the interrogation of employees Vibert Austin and Rui Yi Yu concerning their union activities. For the reasons stated below, I conclude that Supervisor Carola Flores did not interrogate Austin and, further, I credit Director of Human Resources John Burnham that he did not interrogate Yu. I therefore recommend that this objection be overruled.

In Objection 2, the Union alleged that the Employer engaged in surveillance of union representatives in the hotel as they engaged in discussions with employees in work areas on hotel premises pursuant to their contractual right of access to the premises. I do not find that the Union established that the Employer, as a practice, interfered with the Union's contractual right of access to employees at the hotel, nor do I find that the Union was precluded by the Employer from access to the employees. In this objection, the Union also alleges that the Employer engaged in surveillance of a meeting in the employee cafeteria between employee David Doremus and organizer Emma Ross. For the reasons described below, I conclude that no surveillance of this meeting occurred. Finally, the Union alleges that Carola Flores made a remark to Vibert Austin which created the impression of surveillance. I conclude that the comment was too vague and out of context to warrant that finding. Therefore, I recommend that this objection be overruled.

In Objection 3, the Union alleges that Assistant Food and Beverage Manager Shelly Demmon orally forbade employees from discussing the Union during worktime. For the reasons stated below, I conclude that the evidence concerning Demmon's discussion with employees did not support that allegation. I recommend that this objection be overruled.

In Objection 7, the Union contends that the Employer maintained seven rules in its employee handbook which were over-

broad and/or chilled employees in the exercise of their Section 7 rights. I concluded that, while several of the rules at issue were, on their face, overbroad or chilled employees in the exercise of their rights, under the standards established by the Board in *Delta Brands, Inc.*, 344 NLRB 252 (2005), the mere maintenance of these rules was not sufficient, in itself, to warrant the setting aside of the election. Therefore, I recommend that Objection 7 be overruled.

In Objection 8, the Union alleged that the employer circulated a memo in English only concerning the employee handbook which caused non-English-speaking employees to believe their rights were being restricted. I found that the Union presented no specific evidence in support of this objection which had not been otherwise considered in Objection 7 and recommend that it be overruled.

In Objection 9, the Union alleged that proponents of the Petitioner distributed a sample ballot which compromised the neutrality of the Board and warranted setting aside the election. I conclude that the Union presented no evidence establishing either that the sample ballot was distributed by the Petitioner or his agents or that the sample ballot was seen by any employees prior to the election. Therefore, even assuming that the sample ballot was objectionable, I recommend that this objection be overruled.

The Union withdrew Objections 4, 5, and 6 and I recommend that the withdrawal be approved.

Having recommended that each of the remaining objections be overruled, I recommend that a Certification of Representative be issued.

#### Background

The following background testimony was elicited from the Employer witnesses and documents in evidence. The testimony is un rebutted and I find it is relevant in considering the facts alleged in support of the Union's objections.

The Employer operates a hotel located in Boston which opened on July 2, 2004. Prior to opening the hotel, the Employer entered into a neutrality agreement with the Union, the terms of which required the Employer to be neutral, or even positive, about union representation among its employees. In consideration of this agreement, union representatives were present when the Employer interviewed applicants for employment during April 2004. Thereafter, the Employer conducted four orientation sessions for its newly hired employees during mid-June 2004. During these sessions, the Employer distributed its employee handbook to the employees. A review of the terms of the employee handbook was a part of the employee orientation program. Union representatives were present for the latter part of each employee orientation session and made a presentation of their own to the employees. The employee handbook was made available to the union representatives at these sessions.

Pursuant to a card check performed by a neutral arbitrator, the Employer granted recognition to the Union as the exclusive representative of the employees in the bargaining unit on July 28, 2004. In October 2004, the parties agreed to be bound by the agreement between the Union and the Greater Boston Hotel

<sup>4</sup> The Petitioner, Gregory Hatch, was not present at the start of the hearing on January 22. After waiting some 30 minutes for Hatch, at my request a representative of the Regional Office contacted him. The representative reported to me that Hatch said he was sick and would not be able to appear and, further, that he was not requesting a postponement of the hearing. I concluded that Hatch was waiving his right to appear and participate and conducted the hearing without him. As the hearing did not conclude that day, I called Hatch that evening and left a message on his voice mail informing him that the hearing was continuing at 9 a.m. on January 23 and inviting his attendance. When he had not appeared or called by 9:20 a.m. on January 23, I concluded he had again waived his right to participate and conducted the hearing in his absence.

and Motor Inn Association, which agreement expired in 2006. No successor agreement has been negotiated.

Following the filing of the decertification petition, on August 2 Union President Janice Loux and Union Vice President Brian Lang met, at the Union's request, with the Employer's regional vice president, Peter Hilary, and General Manager Stephen Johnston. According to Johnston, the purpose of the meeting was "about ways in which we could help the union positively in terms of unionization." The Union made a list of requests of the Employer. Among the matters agreed upon by the parties was an agreement that the Employer would instruct its managers to remain neutral, if not positive, regarding the union campaign. Further, the Employer agreed to issue a letter of support for the Union during the campaign.

In two meetings prior to the election, General Manager Stephen Johnston instructed his managers to be neutral, if not positive, towards the Union during the campaign. Johnston further told his managers not to answer any questions raised by employees regarding the Union, but to refer the employees either to himself or to Director of Human Resources John Burnham.

On August 31, Johnston issued a letter in support of the Union to all employees. In the letter, Johnston stated that it was the employees' right to union representation if the employees so chose. He said that the Employer took a "positive approach to the issue of union representation." Johnston stated that the Employer's relationship with the Union had been "mutually beneficial" and that they had a "positive and productive relationship" with the Union. After describing certain rights and benefits received by employees under the union contract, the letter concluded:

If you chose to reject the Union, the Union contract would have no further effect on Jury's. Jury's would not be obligated under the law to maintain the same terms and conditions provided by the Union contract.

During the election campaign, Union Vice President Lang called Johnston on three occasions in September complaining about supervisors who allegedly made statements that were not in support of the Union. On each occasion, Johnston spoke to the supervisor, reminding the supervisor to remain neutral and to refer questions regarding the Union to him or Burnham.

About September 14, Johnston was approached by an employee in midafternoon. The employee requested Johnston's permission to place antiunion posters on the hallway wall leading to the cafeteria. Johnston reviewed the material and, finding nothing inflammatory or improper in it, gave his permission to post. An hour and a half later, Johnston was called by Union President Loux demanding that Johnston remove the antiunion posters or face "serious consequences." Johnston agreed to remove the antiunion posters and immediately did so.

#### Objection 1

Since June 2, 2006, the Employer, through its supervisors and agents, has coercively interrogated employees about their union sympathies.

In support of this objection, the Union provided two employees who testified regarding two instances of alleged interrogation. Vibert Austin, a p.m. shift houseman, testified that, on

September 13, he went into the office of Carola Flores, the housekeeping director, to take the radio. His supervisor, identified only as Lici, was also present. Austin testified on direct that Flores, in the presence of Lici, asked him what time he had come in to work the day before. Austin responded that he couldn't remember. Flores then said Austin had come in late and started yelling at him. As she began yelling, Flores asked Lici to leave. Flores began yelling and, "during the yelling" said, "[T]hat's why you want a union to support you, Vibert." Austin responded, "[N]o, no, no Carola, that's not it." By Flores' tone, Austin took Flores' comment about the Union as a threat. Austin testified that Flores continued yelling but he "didn't pay much attention to her."

Austin further testified, in response to a leading question, that, shortly before he left the office, Flores said, "I know everything." Austin understood Flores to be saying that she knew everything that is going on in the hotel. Austin did not provide any context for this comment.<sup>5</sup>

On cross-examination, Austin admitted that, in a prehearing affidavit provided to the Board, he had said Flores said she needed to talk to him and asked Lici to leave. Flores accused Austin of being late and he responded that he had a domestic problem. Flores responded, "A lot of you here just want to do your own thing." To which, Austin replied, "No, it's not like that." Flores then said, "[D]o you want the Union to represent you?" Austin testified that, when Flores asked him if he wanted the Union to represent him, he thought she wanted to give him a warning.

Austin testified that he reported this conversation with Flores to one of his coworkers, identified only as a housekeeper named Mary. Mary was not called to testify.

Carola Flores testified that she questioned Austin about his lateness, which Austin attributed to train problems. Flores denied that she made the comment about the Union attributed to her by Austin in his testimony.

As to the second allegation, Rui Yi Yu is employed by the Employer as a housekeeper. On September 19, Yu, whose native language is Chinese and testified with the aid of an interpreter, went to the office of John Burnham, director of human resources. Yu testified that she asked Burnham for a statement regarding her 401(k) plan. She and Burnham spoke in English. Yu requested the statement to give to her landlord related to her rent subsidy. Burnham replied that he could not produce a statement at that time, but offered to type a letter in lieu of the statement. Yu testified that, as Burnham was typing the letter, Burnham smiled and said, "[H]ow do you feel about the union?" Yu replied that she couldn't tell him anything about it. Yu testified that Burnham asked this question out of nowhere and there was no surrounding small talk or discussion. Yu admitted she was a strong union supporter.

Burnham denied asking Yu about her union sympathies when she requested the letter. In describing himself as "long winded," Burnham further denied that he would have had a one sentence conversation with any employee in that situation. Burnham said that Yu's English skills were "pretty good." He

<sup>5</sup> The merits of this comment, alleged as objectionable by the Union, will be discussed under Objection 2.

said he has had a number of one-on-one conversations with Yu in English during her time with the Employer. Burnham admitted to receiving an email from Supervisor Carola Flores on September 6 in which Flores reported that another employee had identified Yu as a leader in the union campaign. Burnham testified he didn't pay any attention to this report.

#### Analysis and Recommendation

Austin's testimony was unimpressive and is at odds in several respects with that of his affidavit. From my observation of Austin, I believe that this conversation with Flores was more accurately described in Austin's affidavit than in his testimony. Austin's affidavit was far more specific in describing the conversation. Austin's testimony was vague in several respects, admitting in one instance that he was not paying attention to what Flores said. In his testimony, Austin describes "yelling" by Flores without stating what was yelled. In his affidavit, Austin admitted to Flores he was late; in his testimony he said he couldn't remember. Most critically, Austin's affidavit and testimony diverge on the words used by Flores regarding the Union. In Austin's testimony, Flores said, "[T]hat's why you want a union to support you, Vibert"; in Austin's affidavit, Flores said, "[D]o you want the Union to represent you?" I believe the latter statement was most likely made by Flores.

Austin admitted on cross that, as stated in his affidavit, Flores asked him if he wanted the Union to represent him as she was discussing his tardiness. Thus, I conclude Flores was inquiring of Austin as to whether he wanted to invoke his *Weingarten* rights to union representation regarding her investigation of his potential discipline, rather than interrogating him about his union sympathies. Accordingly, I find no merit to this allegation and recommend that it be overruled.

As to the statement attributed by Yu to Burnham, I credit Burnham's denial that the statement was made. In these circumstances, where the Employer had taken a neutral, if not a positive, approach towards unionization, I find it inherently improbable that Burnham, one of two management officials designated to answer employee questions about the Union, would have made such an inquiry. Burnham was charged with implementing the Employer's neutral to positive approach towards the Union which the record evidence indicates the Employer was quite diligent in maintaining. For Burnham to be inquiring of employees sentiments towards the Union is inconsistent with that approach. Furthermore, the alleged inquiry into her union sentiments appears more unlikely considering Burnham already knew Yu was a union leader. I further find Yu's version of the statement, that Burnham solely inquired about her union sympathies, unlikely. My observations of Burnham comport with his testimony that he is loquacious and he would not engage in such a limited conversation.

#### Objection 2

The Employer, through its supervisors and agents, has engaged in surveillance of union activity, including by following union representatives closely during their conversations with employees.

This objection concerns the alleged interference with, and surveillance of, union representatives while they were attempt-

ing to meet and talk to employees on the Employer's property during working time based on three allegations.

#### *A. The Employer Followed Union Representatives in the Hotel*

Article 17 of the parties' collective-bargaining agreement reads as follows:

Authorized business representatives of the Union shall have the privilege of visiting the premises during working hours, at reasonable times, to investigate grievances or for any other Union business which may be necessary to be transacted during working hours. The Union representative shall not talk with dining room employees while meals are being served; shall not interfere with employees in the performance of their duties; and shall not engage in group or prolonged discussions in public areas. The Union representative shall not visit the guest room floors of the Hotel, but the Union Steward(s) in Housekeeping shall be made available to the representative upon reasonable request during his/her working time. No more than three authorized Union representatives, plus interpreter(s) as necessary, shall be on the premises of a hotel at any one time.

A Union representative shall notify the management of his/her presence on the premises.

In support of this aspect of the objection, the Union asserts that the Employer, by its supervisors, systematically and deliberately followed union representatives in the hotel and interfered with the Union's contractual right of access and discussion with employees in their work areas.<sup>6</sup>

Union organizer Katherine Christiani testified that she was at the hotel virtually every day in the 6–8 weeks preceding the election. Christiani testified, while she didn't go into the kitchen on a regular basis, a manager would intervene in her presence with an employee in a work area "every single time I was there." She testified that when she approached an employee in the kitchen or in-room dining area adjacent to the kitchen, she would be interfered with by a supervisor or manager by telling her she couldn't be present or by talking to the employee and assigning them additional duties.

Christiani testified that on several occasions, Executive Sous Chef Eileen O'Donohue stood in front of the door to the kitchen and physically blocked her entrance. She said there were a couple of times when Assistant Human Resources Director Erin Conboy told her that she was not able to be in the kitchen and would have to go to the cafeteria. Christiani further testified that Outlets Manager Nulla Creane, on an unspecified number of occasions, stood next to her as she attempted to converse with an employee in a work area or sent the employee to perform a task. On occasion, the managers told Christiani she was interfering with the flow of work, a claim Christiani denies.

Christiani testified that on two occasions she was approached in work areas while talking to employees by General Manager Johnston. Johnston objected to her conversing with the em-

<sup>6</sup> There is no contention that union representatives were denied access to employees in the nonwork areas of the hotel, such as the employee cafeteria, with the exception of one instance of alleged surveillance described below.

ployee in the work area. Christiani told him she had the right under the contract to be there. Johnston asked her to continue the conversation in the cafeteria and stood there until she left. Christiani never filed a grievance under the contract about any of these incidents.

Organizer Emma Ross testified that she was “generally followed” whenever she left the cafeteria. According to Ross, whenever she exited the cafeteria, within “20–30 seconds,” a manager would be there with her. Managers would do one of three things: stand very close to her and listen to the conversation; give additional work duties to the employee; or ask Ross to return to the cafeteria. Ross would inform the managers that she had a contractual right to be there, but would then return to the cafeteria. Ross said that, in May when she first was assigned by the Union to the Employer, she was followed by management 50 percent of the time; by August, she was followed 100 percent of the time. According to Ross, this conduct impacted employees, who felt they were under surveillance and asked that the organizer speak to them outside of the hotel, which she did.<sup>7</sup>

The Employer’s witnesses presented a somewhat different view. John Burnham testified that the kitchen and in-room dining areas are small and cramped. They are located adjacent to the cafeteria and human resources offices where he and Erin Conboy are located. There are several supervisors and managers who work in this area and they also are frequently in the area during the day as part of their duties.

Burnham denied ever instructing supervisors that they should follow union representatives to monitor their conversations with employees. According to Burnham, union representatives were supposed to check in with him upon arrival, but often did not. Union representatives were permitted in the cafeteria and the employee entryway corridor. They are permitted in the kitchen, in-room dining area, and laundry areas so long as they were not interrupting the flow of work or causing unsafe working conditions. Burnham testified that union representatives were allowed in work areas, but, if they were hanging out there for a while, supervisors could ask them to move to the cafeteria or someplace else to talk. Burnham could not recall relaying these instructions to the supervisors. According to Burnham, the Employer’s practice regarding access for union representatives was no different during the union campaign than it had been before it.

There were only about three instances Burnham was aware of where there were issues with access for union representatives. Erin Conboy, assistant human resources director, and Nulla Creane, assistant food and beverage manager, reported to him that, on two occasions they had asked a union representative to leave the in-room dining area to let the employee he was speaking to finish what they were doing. Burnham did not specify the third instance.

General Manager Johnston testified that there were about three occasions when he objected to union representatives talking to employees, two of which he could recall. In one instance, Johnston spoke to Emma Ross when he saw her in the restaurant speaking with an employee who was bussing a table.

<sup>7</sup> No employees testified in support of this contention.

Johnston said that he did not want her having such discussions in public areas of the hotel and preferred she confine them to the cafeteria and the “back of the house” areas. Ross said OK and went back towards the kitchen. In the other instance, Johnston encountered Christiani having an “animated discussion” with cook David Doremus in the doorway to the kitchen. Johnston said he told them it was a busy night and asked them to have their conversation at another time. Johnston testified that he gave no instructions to Erin Conboy or Nulla Creane regarding how they should monitor union representatives.<sup>8</sup>

Assistant Food and Beverage Manager Shelly Demmon testified, on cross-examination by the Employer counsel, that union representatives were in the hotel daily during the campaign talking to employees in the cafeteria and also in work areas. Demmon testified that these discussions were not interfered with. On redirect examination, Demmon testified that she was instructed at an unspecified time by Assistant General Manager Dan Donoghue<sup>9</sup> that union representatives were only allowed in the cafeteria. Demmon testified that when she saw union representatives were in work areas, she asked if they could conduct their conversation in the cafeteria. Demmon did not state when or on how many occasions she did so.<sup>10</sup>

The Union argues that managerial intervention against union representatives in the course of their contractual right of access is a violation of Section 8(a)(1) of the Act under *Frontier Hotel & Casino*, 309 NLRB 761, 766–767 (1992), and *Heck’s, Inc.*, 293 NLRB 1111, 1117–1118 (1989). The Union further contends that a denial of its contractual right of access constitutes objectionable conduct, relying upon *ATC/Vancom of California, L.P.*, 338 NLRB 1166, 1170 (2003). The Union contends that any credibility issue regarding the facts on this allegation is resolved by Demmon’s testimony that she was instructed by Assistant Manager Donoghue that union representatives were only allowed in the cafeteria.

The Employer contends that there is no evidence to support an allegation that union representatives were followed. Rather, the representatives’ contacts with management are explained by the congested work area and the numerous supervisors who routinely travel in that area in the course of their duties. The Employer further argues that the Union identified only a few occurrences where representatives were asked to leave a work area to conduct a conversation. Thus, the Employer contends the Union has not proven its objection.

#### Analysis and Recommendation

I do not believe that the Union has established that the Employer, as a practice, followed union representatives and interfered with their conversations with employees in work areas. Rather, I believe that there were occasions where the Employer did so, based on its belief, correctly or not, that the conversations were interfering with the workflow. In view of the ex-

<sup>8</sup> Neither Conboy nor Creane were called to testify.

<sup>9</sup> At the time of the hearing, Donoghue was no longer employed by the Employer.

<sup>10</sup> Housekeeping Supervisor Carola Flores also testified that union representatives were not allowed in work areas. Under the contract the Union had no access rights to guest room floors of the hotel, which was Flores’ work area.

traordinary measures, described above, taken by the Employer to remain neutral towards the Union in the election campaign, I find it inconsistent and improbable that the Employer would, as a practice, interfere with access to employees by union representatives, as alleged. In fact, the record establishes that they did not do so.

The record is clear that union representatives had unfettered access to employees in the cafeteria. The union made consistent use of that access prior to the election. Had the Employer, in fact, embarked on such a course of interference, I have no doubt that the Union would have brought this issue to the Employer's attention, just as Union Vice President Brian Lang three times complained to the Employer about the conduct of supervisors and Union President Janice Loux called the Employer demanding that antiunion posters be removed from the hotel. Yet the Union, in these circumstances, made no such claim and filed no grievance. This convinces me that the testimony of Ross and Christiani was considerably overstated as to the frequency of occurrences when management "interfered" with their discussions with employees. Even when management did so intervene, the union representatives were not barred from the premises, merely redirected to another location or time to continue their discussions. The record does not establish that the Union was prevented from conversing with employees but, rather, that they were not always able to converse with employees in work areas of the hotel. Nevertheless, other options remained available for discussions and were utilized without interruption.

In this regard, I found the testimony of Christiani and Ross to be overstated as to the frequency of occurrences where management interfered with their conversations. For management to have "always" interrupted or done so "every time" over a period of weeks amounts to a practice by the Employer that I do not believe is supported by the evidence. Their testimony was general and conclusionary, providing few specific instances to establish that the Employer engaged in the conduct at issue. I do not credit it as to the extent of these occurrences.

I credit the testimony of Johnston and Burnham that they spoke to union representatives whenever they felt their conversations were interfering with the workflow. It is not surprising that the Union and the Employer disagreed over this point, but such disagreements do not establish objectionable conduct by the Employer. In the absence of specific instances, Demmon's testimony regarding her instructions from Assistant General Manager Donoghue does not warrant a different result. Demmon was not asked, and did not provide, any evidence about the frequency or circumstances of any instances where she redirected a union representative from a work area. Nor is there any indication that Erin Conboy or Nulla Creane received similar instructions or acted upon them.

The key factor, I find, is that the Union was not precluded from contacting and having conversations with employees. Rather, union representatives were not always able to converse with employees in work areas without restriction, a right even the contract did not grant them.

I find the cases cited by the Union to be distinguishable. In *Frontier Hotel*, supra, the employer adopted a practice of barring union representatives from their contractual access rights

to its premises for perceived transgressions, a procedure known as "6ing." Once barred, the representative could not return to the hotel premises. The Board found that, by systematically barring union representatives from its premises, the employees were unlawfully denied their right to communicate with the Union. Similarly, in *Heck's Inc.*, supra, the Board found that an employer violated the Act by "close, pronounced and unjustified scrutiny" of union representatives attempting to speak to employees in the facility. In *ATC/Vancom*, supra, the employer, under a claim of neutrality during a decertification campaign, prohibited the union from its contractual right to use a union bulletin board in the facility, thereby denying the union its right to communicate with the employees.

In this case, unlike *Frontier Hotel* and *ATC/Vancom*, I have found that the Union was not prevented from communicating with the employees. It had access to the facility and unimpeded use of the cafeteria for communications purposes. Its access to work areas, limited by the contract itself, was not unrestricted. The Employer, as was its right, redirected union representatives if they felt the workflow was being interfered with by their conversations. The Union was still able to communicate with the employees, but not always at the time and place of its choice. Unlike *ATC/Vancom*, I have found no evidence that the Employer engaged in close surveillance of union activity. The testimony of Ross and Christiani regarding the extent of alleged interference was general, conclusionary, and without many specific examples. I do not credit it.

Accordingly, I recommend that this objection be overruled.

#### *B. The Employer Conducted Surveillance of a Meeting by Emma Ross with David Doremus*

Organizer Emma Ross testified that she scheduled a meeting for September 8 at 2 p.m. in the cafeteria with David Doremus,<sup>11</sup> a cook. Ross arrived about 1:45 p.m. and, while waiting for Doremus, encountered John Burnham. Ross and Burnham had a brief conversation about schedules before Doremus entered. According to Ross, Burnham said something to the effect of "you guys are meeting today" and left.<sup>12</sup> Ross testified that, as Burnham left, the entire supervisory staff entered the cafeteria. There are four tables in the cafeteria, which is quite small. Ross and Doremus sat at the table closest to the door. Executive Sous Chef Eileen O'Donahue and sous chef Shelly Demmon sat at the table behind them. Lead line cooks Mary Zalanskas and Timothy Hurton sat at the table across from them.<sup>13</sup> According to Ross, each of the four supervisors sat facing the table occupied by Ross and Doremus. Because of the small size of the cafeteria, any conversation could be heard by the others in the room.

The four supervisors remained in the cafeteria for 20 minutes. Ross testified that the four supervisors sat and stared at her and Doremus for the entire 20-minute period, neither eating, drinking, nor smoking. Ross further said that the supervisors said, "not a word" during this 20-minute period. Ross did not see them taking notes.

<sup>11</sup> Doremus was not called to testify.

<sup>12</sup> Burnham did not recall making this comment.

<sup>13</sup> The parties stipulated that O'Donahue, Demmon, Zalanskas, and Hurton are all statutory supervisors as defined in Sec. 2(11) of the Act.

During this period, Doremus asked Ross questions about the Union. After the supervisors left, Ross and Doremus spoke for another 10 minutes. Ross' conversation with Doremus became "more open" at this time. Doremus had a lot more interest in what she had to say. Doremus expressed interest in becoming a shop steward. After 10 minutes, Doremus left to go to work and, according to Ross, "seemed excited." However, Ross said that Doremus refused to meet with her thereafter, claiming to be too busy. Ross believes Doremus was intimidated by the alleged surveillance during their cafeteria meeting, causing him to refuse to meet further with her.

Ross did not object to the presence of the four supervisors or ask them to leave. Ross made no complaint thereafter to the Employer about the incident and no grievance was filed.

Shelly Demmon recalled having lunch in the cafeteria one day during shift change before the election with Eileen O'Donahue. Demmon and O'Donohue were crossing shifts, Demmon having worked the morning shift and O'Donohue the afternoon. Demmon eats lunch in the cafeteria daily. On this day, Chef Matthew King was on vacation and Demmon and O'Donohue met at the shift change to discuss issues and make sure things were going smoothly in King's absence. Demmon testified that Doremus and a union representative were at another table. Because of the small size of the cafeteria, Demmon could hear their conversation. Demmon did not recall Zalanskas or Hurton being present.

The record is clear that all employees, including supervisors, use the cafeteria for breaks and lunch. Kitchen supervisors are frequently in the cafeteria to check on the food and make sure it is operating properly. Burnham, whose office and that of Erin Conboy are adjacent to the cafeteria, testified that he is in there several times a day for the same reasons.

#### Analysis and Recommendation

As to the alleged surveillance of Ross' cafeteria meeting with Doremus, I credit Demmon's version of this incident. Demmon struck me as an honest and forthright witness. Her testimony that she and O'Donohue had lunch at shift change to compare notes about their shifts is far more plausible than Ross' version of four supervisors sitting for 20 minutes staring at them without speaking. I note also that Ross' testimony was not corroborated by Doremus. No reason was proffered as to why the Employer would select this meeting to surveil out of the numerous such cafeteria meetings admittedly held by the Union during the campaign. Particularly in view of the Employer's neutrality during the campaign, and the actions it took in that regard, I find it inherently implausible that this surveillance as described by Ross occurred. While Demmon and O'Donahue were admittedly in the cafeteria, their presence there did not constitute an act of surveillance. See *Metal Industries*, 251 NLRB 1523 (1980) (management officials may lawfully observe public union activity occurring on company premises so long as they do not do something out of the ordinary).

In *Oakwood Hospital*, 305 NLRB 680, 688-689 (1991), relied upon by the Union, the Board found that an employer engaged in unlawful surveillance of a union representatives activities in its employee cafeteria by admittedly assigning man-

agement representatives to observe him and sit next to him, conduct that was "out of the ordinary." In this case, the Employer's representatives did not act out of the ordinary for they routinely used the cafeteria. There is no evidence that they entered the cafeteria for the purpose of observing the exchange at issue. Further, because the cafeteria is so small, unlike *Oakwood Hospital*, supervisors had no choice but to sit within earshot of anyone else who is present. I recommend that this allegation of the objection be overruled.

The Union further alleges that Burnham's comment that Ross and Doremus had a meeting created the unlawful impression of surveillance. I do not agree. Union representatives were required to report to management upon arrival on the premises. The Union was openly engaged in discussions with employees in various spots in the hotel, particularly the cafeteria, throughout the campaign. It was common knowledge that the purpose for the organizers' presence was to talk to employees. I find Burnham's comment that Doremus and Ross had a meeting, rather than an act of surveillance, to be an innocuous acknowledgement of the fact that Ross had other business to attend to at that time and he should excuse himself and allow them to meet.

The case relied upon by the Union is distinguishable. In *Musick Express East*, 340 NLRB 1063, 1076 (2003), the fact that a union meeting was scheduled was not common knowledge. Here, the organizers' meetings with employees were well known and obvious, conducted in the Employer's presence. For these reasons, I find that Burnham's comment does not create an impression of surveillance.

#### C. Carola Flores "I know everything" Comment

In the meeting described above in Objection 1 between Carola Flores and Vibert Austin, Austin further testified, in response to a leading question, that, shortly before Austin left Flores' office, Flores said, "I know everything." Austin took Flores to be saying that she knew everything that is going on in the hotel. Austin did not provide any context for this comment. He had earlier testified that, towards the end of the meeting, Flores had been yelling and he had paid little attention.

The Union contends that this comment constitutes the impression of surveillance. I do not agree. The comment is vague and without context, as Austin admitted he was not paying attention to Flores' comments during this part of the conversation. There is no basis on the record to link that comment to the Union or to union activities by Austin or other employees.

Accordingly, I recommend that this aspect of the objection, and the objection in its entirety, be overruled.<sup>14</sup>

#### Objection 3

The Employer, through its supervisors and agents, has forbidden talk about the union during worktime.

<sup>14</sup> Testimony was also given during the hearing of an incident involving Deputy General Manager Dan Donoghue standing at the employee entrance of the hotel which could arguably be viewed as surveillance. In its brief, the Union disavowed any such contention on that issue. (U. Br. at p. 28.) Accordingly, I have not considered that evidence as an allegation of surveillance.

About 2–3 weeks before the election, a heated discussion occurred between two employees, Philip Martinelli and Kenneth, whose last name was not identified. According to Shelly Demmon, assistant food and beverage manager, on the next shift, “the rumor was that Phil, Philip Martinelli was allegedly called a scab and that got everybody very heated.” Demmon met with General Manager Stephen Johnston and John Burnham about the situation. She was instructed to talk to the staff to keep the situation from escalating. They told Demmon to make sure that everyone respected each other’s opinions but that they needed to focus on the business at hand.

Demmon called the staff together in the kitchen. About five employees were present. Demmon spoke for about 3 minutes. She told the employees that there had been an incident the previous night and everyone knew it by then through gossip. Demmon said that everyone was heated about it. She said that everyone was entitled to their passion, whether they were for or against the Union. Demmon then told the employees that they “just need to get back to business and not let the incident get any bigger than it is.”

Demmon testified that she did not tell the employees that they could not talk about the Union, but that she did tell them they should not fight about the Union in the kitchen.

Demmon said that she heard employees discussing the Union in the kitchen thereafter, but heard no further arguments about the Union.

Burnham testified Martinelli came to him and complained about how he had been treated by Kenneth and what he had been called. Burnham described it as a “very aggressive” situation. Burnham spoke to both employees and asked them to behave and not call each other names. No discipline was imposed regarding the incident.

The Employer’s position is that the Union failed to establish that the Employer forbade union talk during worktime.

The Union argues that Demmon’s conduct was objectionable because she admonished employees not to talk about the Union without assuring them of what they *could* say about the Union. The Union contends that the employees would reasonably believe that they had to avoid any discussion about the Union to avoid being disciplined, citing *Scripps Memorial Hospital*, 347 NLRB 52 (2006). Citing the fact that Demmon, while thereafter hearing talk about the Union, heard no further arguments about the Union, the Union contends that a ban on contentious speech is just as unlawful as a ban on any speech, citing *Claremont Resort & Spa*, 344 NLRB 832, 836 (2005) (ban on “negative conversations about associates or managers” unlawful). The Union further argues that the Employer disciplined employee for the use of the word “scab,” which is unlawful under *Nor-Cal Beverage Co.*, 330 NLRB 610, 611 (2000).

Demmon’s testimony regarding her speech, which is un rebutted, establishes that she did not restrict speech about the Union but, rather, sought to quell rumors among the staff about a dispute between two employees and to control a simmering controversy which was disrupting the operation of the kitchen. Her comments were general in nature and did not specifically limit any conduct other than fighting. Demmon’s talk sought to calm the emotional level of the employees and get them to focus on their work. Demmon made no mention of the word

“scab” or whether it could be used by employees. Nor did she restrict speech regarding the Union. Rather, Demmon assured employees they were entitled to their “passion” on the subject. She informed employees they should not “fight” in the kitchen. Demmon stated that employees continued to talk about the Union thereafter.

The real issue here is that rumors among employees were causing controversy in the kitchen, raising the emotional level and disrupting the work force. The Employer properly sought to address these rumors and calm the situation. That Demmon’s conduct was unobjectionable is supported by the fact, established by her un rebutted testimony, that employees continued to talk about the Union thereafter. Accordingly, I do not find that the Employer improperly restricted employee speech about the Union.

I find *Scripps Memorial Hospital*, supra, relied upon by the Union, to be distinguishable. There, a supervisor told two employees discussing a union meeting that such talk “does not belong here,” thereby unlawfully banning talk about the union in the workplace. Here, Demmon’s comments did not specifically refer to speech about the Union but were directed at having employees focus on their work. Further, I find *Claremont Resort & Spa*, supra, inapposite. In that case, the employer instituted a rule prohibiting “negative conversations about associates and/or managers.” The Board found that the rule unlawfully restrained employees from discussing complaints about their managers, thereby discouraging them from engaging in protected activities. No such admonition was made in this case.

The Union misconstrues the issue by suggesting that it concerns the discipline of employees for the use of the word “scab.” John Burnham creditably testified that neither employee was disciplined regarding the incident. Therefore, whether or not the Employer would discipline employees for the use of the word scab, I find to be irrelevant.

The Union further alleges the conduct directed at Union Representatives Christiani and Ross regarding the alleged interference with their conversations with employees, discussed in Objection 2 above, also falls within the scope of this objection. The Union simply argues that the conduct is violative of Section 8(a)(1) under *Frontier Hotel*, supra. I find, consistent with my recommendation on Objection 2, that this aspect of the objection should be overruled.

Accordingly, I recommend that Objection 3 be overruled.

#### Objection 7

The Employer has maintained in effect an employee handbook, for which all employees are required to sign a receipt, which included rules which unlawfully restrict employees’ activities under Section 7 of the Act.

The Employer maintains an employee handbook, called the handbook, containing rules of conduct for employees. The Employer promulgated the handbook in 2004 and it has remained in effect since that time, except as modified on August 7 as discussed below. The handbook is a 63-page document, printed in English only, which is given to employees at the time of their hire. According to John Burnham, employees are asked to sign a receipt for the handbook, stating that they will read the

handbook. Burnham testified that employees are not required to sign the receipt, though most do so.

The handbook is discussed during employee orientations. The handbook was discussed with employees during four employee orientation meetings held in June 2004, prior to the hotel's opening. The Union attended part of each of these orientation sessions and the handbook was made available to it. Thereafter, as noted above, the Union attained majority status and was recognized by a card check. Union representatives were also given copies of the handbook in the spring of 2005 and in May 2006.

There is no evidence that any employees were hired, received the handbook or had it discussed with them by management in the period between the filing of the petition and the date of the election.

Prior to the filing of the decertification petition, the Union never raised any objection to any of the provisions of the handbook. On July 17, however, the Union filed an unfair labor practice charge alleging that certain rules in the handbook were unlawful. The allegations in the charge parallel the allegations in Objection 7.<sup>15</sup>

On August 7, the Employer issued a memorandum to employees regarding the employee handbook. The memo was attached to employee paychecks and posted on bulletin boards in the cafeteria and at the employee entrance. The memo announced two changes to the employee handbook: (1) the deletion of the second last paragraph of the grooming standards policy on page 35 regarding the wearing of emblems, badges, or buttons; and (2) the modification of the second last sentence of the solicitation policy on page 41 to read "Likewise, distribution or circulation of printed materials by employees is not permitted during working time or during non-working time in work areas."

General Manager Johnston testified that the handbook reflects the rules for employees. John Burnham testified that the rules in the handbook are "guidelines" and may not be strictly enforced. Burnham testified that management could enforce the handbook, so long as it did not conflict with the collective-bargaining agreement or any other law. There is no evidence on the record that any employee has been disciplined for violating any of the rules at issue in this objection.

There is no evidence on the record that any of the challenged rules have been applied to protected activity or that the Employer adopted the rules in response to protected activity.

The handbook has four references to the National Labor Relations Act.

The objection contends that the Employer's maintenance of the following seven rules by the Employer during the critical period warrants setting aside the election. In discussing each rule, I shall also discuss whether I view the rule would, on its face, tend to chill employees in the exercise of Section 7 rights. Thereafter, I shall discuss whether any of the rules warrant

<sup>15</sup> The parties stipulated that a charge was filed on July 17 in Case 1-CA-43381 regarding the rules at issue. No evidence was offered or presented concerning the disposition of this charge. I take administrative notice of the fact that the charge remains pending in the Regional Office.

conducting a new election. While I find that several of these rules are overly broad or chill employees in the exercise of Section 7 rights, for the reasons discussed below, I do not find that they warrant the conduct of a new election.

1. Rule on distribution of literature and solicitation  
on hotel property

The handbook provides in rule 43, pages 45-46:

Vending, solicitations, collections or distribution of literature are subject to the following limitations; Distribution of literature by employees on hotel property is prohibited. Selling, \*solicitation, collection or distribution on hotel property is prohibited. This applies to both the employee who is performing the act and the employee who is the object of the selling, solicitation, collection or distribution.

*\*Solicitation and/or distribution by non-employees on the company's property is strictly prohibited and should be reported immediately to the General Manager. [Italics in original.]*

This rule remained in effect throughout the critical period following the filing of the petition.<sup>16</sup>

The Board has held that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). In analyzing a rule, the Board starts by determining whether the rule explicitly restricts activities protected by Section 7. If so, the rule will be found to be unlawful. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). If the rule does not explicitly restrict Section 7 activity, the violation depends upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict Section 7 rights.

This rule is overly broad as it explicitly prohibits employee solicitations and distributions during nonworktime and in nonwork areas. *Lutheran Heritage Village*, supra at 646 fn. 5; *Our Way, Inc.*, 268 NLRB 394 (1983). I find that this rule

<sup>16</sup> A second rule appears on p. 41 of the handbook, entitled "Solicitation" stating the following rule:

Solicitation is not permitted on hotel property during the working hours of the employee soliciting or being solicited. Likewise, distribution or circulation of printed material by employees is not permitted during working time or during non-working time on hotel property.

"Working time" refers to that portion of any workday during which an employee is supposed to be performing any actual job duties; it does not include other duty periods of time.

Solicitation and distribution by non-employees on the Hotel's property is strictly prohibited.

The solicitation rule appearing on p. 41 was amended by the Employer in its August 7 memo. The second sentence of the first paragraph if the solicitation policy was modified to read: "Likewise, distribution or circulation of printed materials by employees is not permitted during working time or during non-working time in work areas." The Union does not allege the maintenance of either version of this rule as objectionable under Objection 7.

unlawfully restricts the Section 7 activities of employees and supports a finding of a violation of Section 8(a)(1) of the Act.

There is evidence on the record that employees did distribute literature during the campaign in violation of this rule. Emma Ross, for instance, testified that the decertification supporters issued materials found in the cafeteria. Similarly, the Union distributed materials in the hotel. There is no evidence on the record that prounion employees, independent of union organizers, distributed materials.<sup>17</sup> As there is no evidence as to why this is the case, I do not draw the conclusion, urged by the Union, that this was due to employee concern about the Employer's no-solicitation rule. Based on the hearsay testimony of organizers Christiani and Ross, the Union further argues that employees were afraid to talk about the Union in the workplace, inferring this was due to the no-solicitation rule.<sup>18</sup> I give this hearsay testimony no weight in support of that assertion.

## 2. Rule regarding being in an unauthorized area and/or loitering

The following rule appears as rule 30 on page 44 of the handbook as an infraction that may be grounds for discipline up to and including termination of employment:

Being in an unauthorized area and/or loitering inside or around the Hotel without permission. Use of guest facilities for personal use including but not limited to, guest phones, ATM machines and restrooms.

The Employer argues that this rule has a sound business justification, that of being able to avoid situations where off-duty employees interrupt "on the clock" employees in the performance of their duties, thereby protecting the hotel's image.

While this rule does not explicitly interfere with Section 7 activity, the Board has held that a rule prohibiting "loitering" on the employer's premises could reasonably be interpreted by employees as prohibiting them from lingering on the employer's premises after the end of a shift in order to engage in Section 7 activities, such as the discussion of workplace concerns. *Lutheran Heritage Village*, supra at 649 fn. 16. *Palms Hotel & Casino*, 344 NLRB 1363, 1363 fn. 3 (2005). The Employer's rule closely parallels that found unlawful in *Lutheran Heritage Village*. Accordingly, for the reasons expressed therein, I conclude the Employer's loitering rule supports the finding of a violation of Section 8(a)(1) and chills employees in the exercise of their Section 7 rights.

The Union contends that employees were discouraged from protected activities by this rule. In support of this contention, employee Rui Yi Yu testified that, in August, she was among a group of employees standing outside the employee entrance waiting for a ride to a union meeting. Deputy General Manager Dan Donahue came and stood outside. Yu was afraid of being seen by Donahue and hid herself. Yu testified that she hid because she was afraid of Donahue seeing the Union picking her up to attend a meeting. I find that Yu's testimony does not

<sup>17</sup> While Carola Flores sent an email to Burnham which referenced Rui Yi Yu signing a petition, the reference is vague and does not describe the surrounding circumstances.

<sup>18</sup> Shelly Demmon testified to the contrary, stating that employees in her department talked about the Union throughout the campaign.

support a finding, as urged by the Union, that she was concerned about, or even aware of the application of the Employer's work rule regarding loitering. Rather, Yu was afraid about the Employer discovering her being engaged in union activity. Organizer Christiani testified that an unidentified employee told her at that time that they should not be there because they were supposed to leave after their shift. In the absence of corroborative employee testimony, I give no weight to Christiani's hearsay testimony on this point.

## 3. Rules regarding use of guest facilities and public areas

The following rule appears on page 36 of the Handbook entitled "Use of Guest Facilities":

Patronizing the Hotel's guest areas, including but not limited to: guest rooms, food & beverage outlets, and public restrooms and or hotel lobby is strictly prohibited.

In the event that you wish to be in a guest area for non-work related reasons you must have prior authorization from General Manager, Deputy General Manager or Director of Human Resources.

Appearing on page 38, entitled "Lobby/Public Areas" is the following rule:

Employees may not use the lobby, public restrooms and other public guest areas inside the Hotel unless on specific work assignments. Further, we ask that you meet your friends and family outside the Hotel. The lobby is where we serve our guests and should be used for this purpose only. . . . Nothing in this policy shall be construed in a manner to interfere with employee's rights under the National Labor Relations Act.

The Union argues these rules prohibit soliciting and communicating in areas of the hotel.

These rules do not explicitly restrict Section 7 activity. The issue, then, is whether a reasonable employee would so read them as restricting Section 7 activity. *Lutheran Heritage Village*, supra at 647. The issue in the Board's analysis is not whether a reasonable employee *could* read the rules to apply to Section 7 activity, but whether an employee *would* interpret the rule in that way. These rules simply restrict employee use of certain areas of the hotel to work-related purposes. I do not find it likely that employees would read these rules as limiting their Section 7 rights. The Employer's first rule prohibits patronizing the hotel as a customer; the second clearly restricts the use of public and guest areas. Both rules have an apparent business justification and, under a fair reading, would not impinge on Section 7 rights. Moreover, there is evidence on the record that these rules were neither followed by employees, nor enforced by the Employer.

The case relied upon by the Union, *Double Eagle Hotel & Casino*, 341 NLRB 112, 113 (2004), concerns an employer rule restricting discussions of work-related issues in guest areas. That case is distinguishable in that the rules in this case do not specifically limit discussions, nor do I feel they would be reasonably read as doing so. Accordingly, I would not find that these rules unlawfully restrict employees Section 7 rights.

#### 4. Rule regarding wearing emblems, badges and buttons

Appearing on page 36, under the section “Grooming Standards” which begins on page 35, is the following rule:

You are not permitted to wear emblems, badges or buttons with messages of any kind other than the issued nametags or other official types of pins that form an approved part of your uniform.

The Employer has not provided any basis for its maintenance of this rule. As noted above, this rule was revised by the Employer’s August 7 memo. That memo states that the Employer had reviewed the employee handbook and determined that some of its provisions were ambiguous under the National Labor Relations Act. The memo further states that nothing in the handbook was intended to interfere with employee rights under the NLRA. In referencing the Grooming Standards policy on page 35, the memo reads “The second last paragraph of this policy, which addresses the wearing of emblems, badges and buttons, is **deleted**.” (Emphasis in original.)

In the absence of special circumstances, Section 7 entitles employees to wear union insignia, including union buttons, in the workplace. *P.S.K. Supermarkets*, 349 NLRB 34 (2007). The burden is on the employer to show the existence of special circumstances that would justify a restriction on that right. *W San Diego*, 348 NLRB 372, 373 (2006).

As the employer offered no special circumstances to justify its restriction on employees’ rights to wear buttons and other insignia, I conclude that the employer maintained an overly broad prohibition against wearing buttons, emblems, and badges. *P.S.K. Supermarkets, Inc.*, supra at 373. The rule was maintained for a majority of the critical period before the Employer issued its August 7 memo. This memo, whether or not it was effective prospectively, did not cure the unlawful maintenance of the rule during the remainder of the critical period. Accordingly, I find that the Employer maintained an overly broad rule during at least a portion of the critical period.

#### 5. Rule regarding Employer grievance procedure

In the section entitled “Open Door Policy” at pages 11–13, the Employer describes its grievance procedure:

No organization is free from day to day problems. In fact, you yourself may have a problem, a question or a suggestion about your job or the company. Regardless of the type of problem, question or suggestion, your supervisor and all others in management are ready to listen and assist you.

If you have a problem, question or suggestion, please follow these steps:

(The section then describes a four step process).

You understand and agree that any cause of action subject to arbitration shall be brought under the laws of the State of Massachusetts which law shall govern all matters in dispute. You further understand that you may elect not to be bound by this arbitration provision by signing the attached document prior to or at the time of your execution of employment with Jurys Hotel Boston. To the extent that you do not do so, however, you understand that all disputes between you and

Jurys Boston Hotel shall be settled through the arbitration process as described above.

The rule predated the recognition of the Union as collective-bargaining representative. The parties’ collective bargaining agreement contains a grievance procedure, including an arbitration procedure. The “Open Door Policy” was not revised in light of the parties’ contractual grievance procedure.

The Employer argues that its policy was not mandatory upon employees and no penalty is imposed for not using it.

The Union argues to the contrary, that even phrases such as “please follow these steps” have been held by the Board to be a directive, citing *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992). The Union further argues that a policy requiring problems to be addressed through the managerial chain of command precludes concerted action or union grievances, rendering it illegal. Both parties rely upon *Guardsmark, LLC*, 344 NLRB 809 (2005), in support of their positions.

In *Guardsmark*, the Board found a violation where the Employer had promulgated a rule requiring employees dissatisfied with any aspect of their employment to discuss the issue through the chain of command and forbade any discussion with representatives of the employer’s client. Such a limitation limited employees in the exercise of their Section 7 rights as employees could read it to preclude them from seeking assistance from the employer’s clients for all aspects of their employment.

As noted by the Union, the mere phrasing of the proposal by the Employer as a request makes it no less of a directive. *Radisson Hotel Minneapolis*, supra. As in *Guardsmark*, a reasonable reading of the rule by an employee would indicate that the employer requires the use of its grievance procedure by employees with questions or complaints. In the absence of a disclaimer that indicated the policy did not apply to represented employees, employees could believe that the policy required them to raise complaints through the employer’s grievance procedure, thereby discouraging the filing of grievances by employees under the contractual grievance procedure and, further, discouraging union activity. Thus, I find that the employer’s maintenance of its own grievance procedure, which appears mandatory in nature, without clarification that employees were eligible to use the contractual grievance procedure, would inhibit employees in the exercise of the Section 7 rights.

#### 6. Rule regarding cooperation in internal investigations

In the handbook is a section concerning an employee code of conduct. Section 1 lists 22 rules, or offenses, which may lead to immediate discharge. Rule 17 on page 43 reads:

##### 17. Failure to participate in a hotel internal investigation

The Union contends that this issue is governed by *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 348–349 (2000). The Union argues that the rule at issue here would require employees to cooperate in the investigation of unfair labor practices and have a chilling effect upon the exercise of employee rights.<sup>19</sup>

<sup>19</sup> The Union contends on brief that, related to this issue, four employees submitted affidavits but did not testify at the hearing. While

The Employer contends that, unlike *Beverly Health*, the rule at issue is specifically and narrowly aimed at internal investigations of the hotel, not broadly read as in *Grandview*. The Employer further argues that the rule is not unlawful because of the disclaimer in this section of the handbook stating that employees will not be disciplined in a manner to interfere with their rights under the NLRA.

In *Beverly Health*, supra, the Board found unlawful under Section 8(a)(1) an employer rule requiring employees to cooperate, under pain of discipline, in the investigation by the employer of any violation of laws or government regulations. The Board held that the plain language of the rule applied to the investigation of unfair labor practice charges. This, then, violated the longstanding principle that employees cannot be required by an employer to participate in unfair labor practice investigations. *Johnnie's Poultry Co.*, 146 NLRB 770, 774-776 (1964), enf. denied 344 F.2d 617, 619 (8th Cir. 1965). I do not agree that the language of the rule at issue is to be narrowly read. The plain language of the rule requires cooperation in hotel investigations, without limitation. While, unlike *Beverly Health*, this rule does not specify investigations into violations of law or regulation, a reasonable employee would read that language of the rule that way. Accordingly, I conclude that this rule would have a chilling effect on employees in the exercise of protected rights and, thus, it supports a finding of a violation of Section 8(a)(1).

#### 7. Rule regarding leaving a work area without authorization

The Union objects to two rules in this area. In section I of the handbook regarding the employee code of conduct regarding offenses which may lead to immediate discharge, on page 43, is the following rule 18:

Failure to report to your scheduled shift for more than three consecutive days without prior authorization or "walking off the job" during a scheduled shift.

In section II of the employee code of conduct are rules 23-46, which are described as offenses that may be grounds for discipline, up to and including termination. Rule 29 on page 44 states:

Leaving your work area without authorization, including but not limited to, meal breaks, smoke breaks and at the end of your scheduled shift.

The Union argues that these rules infringe on protected activity as it broadly prohibits any protected work stoppage, relying upon *Labor Ready*, 331 NLRB 1656 fn. 2 (2000). The Employer argues that these are common sense rules to ensure that all duty stations are covered and that they do not infringe or even mention Section 7 activity.

In *Labor Ready, Inc.*, supra, two employees were terminated for refusing to work in support of another employee, in violation of an employer rule stating that employees who walked off the job would be terminated. The Board found the rule to be overly broad and in violation of Section 8(a)(1). The Board stated that the employer could have tailored an appropriately

narrow rule to satisfy its business concerns. *Labor Ready*, supra at fn. 2.

More recently, the Board adopted an ALJ who stated that "leaving work early is not protected activity even when the object of leaving work is to engage in protected activity." *Quantum Electric, Inc.*, 341 NLRB 1270, 1279 (2004) (citations omitted.). The Board adopted the ALJ's finding that the employees who left work without permission to attend a union meeting were lawfully terminated for violating the employer's attendance policy.

I conclude from *Quantum Electric*, and the cases cited therein, that an employer has the right to maintain a rule requiring its employees' attendance at work. I am persuaded by these cases that the mere maintenance of a rule prohibiting leaving the job is not unlawful. The rules at issue are designed to maintain order in the workplace. They do not explicitly restrict Section 7 activity, nor do I feel a reasonable employee would so read the rules. *Labor Ready* is distinguishable on its facts because the Board, in that case, found the rule overly broad in the context of its enforcement. Here, there is no evidence that the rule has ever been enforced to restrict Section 7 activity. For these reasons, I conclude that the Employer's rules are not an overly broad restriction upon Section 7 activity by employees.

#### The Employer's Disclaimers

In four different locations of the employee handbook,<sup>20</sup> the Employer advises employees that they have rights under the National Labor Relations Act which supercede any possible interpretation of the rules in the handbook. In addition, in his August 7 memo, John Burnham states:

Rest assured that none of these provisions, nor anything else in the current Employee Handbook, was intended to interfere with your NLRA rights. You are, and always have been, completely free to exercise those legal rights.

The Employer argues that these disclaimers assure that no employee could reasonably read any of the rules in the employee handbook as restricting their rights under the National Labor Relations Act. The Union argues to the contrary, citing *Ingram Book Co.*, 315 NLRB 515, 516 (1994), and *McDonnell Douglas Corp.*, 240 NLRB 794, 802 (1979).

I agree with the Union that the Employer's disclaimers did not cure the overly broad and improper rules. Employees cannot be expected to understand the nuances of the National Labor Relations Act so that they would know that a rule, as written, was improper and, thus, need not be followed. *Ingram Book Co.*, supra; *McDonnell Douglas Corporation*, supra. Accordingly, I would not find that the Employer's disclaimers, individually or collectively, cured any of the rules found above to be overly broad or otherwise restrictive of employees' Section 7 rights.

<sup>20</sup> See pp. 19, 29, 38, and 46 of the employee handbook. The reference on p. 39 is in conjunction with the rule restricting employee use of the lobby and public areas (see item 3 above). The reference on p. 46 is at the end of the employer rules of conduct, which involve items 6 and 7 above.

Employer counsel also made this claim at the hearing, there is no record evidence to support it and I give it no weight.

#### The Effectiveness of the Employer's August 7 Memo

The Union contends that the Employer's August 7 memo, described above, did not effectively repudiate the Employer's rules regarding the wearing of buttons and prohibiting solicitation and distribution. I agree.

The August 7 memo was written in such a way that its meaning could only be clear to employees by comparing the language of the memo with that of the handbook. Regarding the button rule, for instance, the memo did not affirmatively state that employees could wear buttons. Rather, it simply said that the old rule, which was not described, was deleted. Similarly, the no-solicitation rule did not republish the entire rule, but simply quoted the new revised portion of the rule, leaving employees to refer to the handbook to understand the entire rule. There is no evidence that any employees did so. Moreover, the August 7 memo failed to rescind the Employer's other no-solicitation rule (rule 45), which I have found improperly restricts employee rights. An employer cannot cure one improper rule while leaving another improper rule in place. *TeleTech Holdings, Inc.*, 333 NLRB 402, 403 (2001). Accordingly, I do not find that the various disclaimers issued by the Employer cured the improper nature of any of the rules at issue.

#### Analysis and Recommendation

As described above, I have found that the Employer maintained, through the critical period, certain rules which were overly broad and, on their face, chilled employees in the exercise of their Section 7 rights. These are the rules discussed above in items 1, 2, 4, 5, and 6. I make the following recommendations regarding the Employer's maintenance of these rules during the critical period following the filing of the petition.

It is well settled that "[r]epresentation elections are not lightly set aside" and that, further, the burden of proof on parties seeking to have a Board-supervised election set aside is "a heavy one." *Safeway, Inc.*, 338 NLRB 525 (2002). The objecting party must show, inter alia, that the conduct in question affected employees in the voting unit. *Avante At Boca Raton, Inc.*, 323 NLRB 555, 560 (1997). The objecting party must also show the conduct had a reasonable tendency to affect the outcome of the election. *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005).

I conclude that the Union has not met its burden in that regard. The Board has recently altered its position regarding whether the mere maintenance of overly broad rules constitutes objectionable conduct. The Board has held that it is not "axiomatic" that the mere maintenance of unlawful or overly broad handbook rules during the critical period is per se grounds for setting aside of an election. *Delta Brands, Inc.*, 344 NLRB at 253. See also *Longs Drug Stores California*, 347 NLRB 439, 442 fn. 10 (2006). Rather, as with all elections, the Board looks at all of the facts and circumstances to determine whether the atmosphere was "so tainted as to warrant the setting aside of the election." *Delta Brands*, supra at 253. Among the factors considered by the Board is whether the rules were adopted in response to union activity, whether the rules were issued to or called to employees' attention during the campaign, whether there is any evidence of enforcement of the rules, and whether

there is any evidence that any employees were deterred from Section 7 activity by the rules. *Id.*

In this case, each of these rules was contained in a 63-page handbook, promulgated prior to recognition of the Union. None of these rules was promulgated in response to union activity. There is also no evidence that any of the rules at issue were enforced by the Employer at any time, including during the critical period. Further, there is no evidence that the employee handbook was issued to any employees during the critical period, or that any of these rules were discussed with any employees during that time. I have found that there is no evidence on the record that employees were deterred from engaging in Section 7 activity by any of these rules. In fact, there is evidence that some of these rules have been violated by employees without discipline by the Employer.<sup>21</sup>

In *Safeway, Inc.*, 338 NLRB 525 (2002), an objection was filed alleging that the employer's mere maintenance of an overly broad confidentiality rule during the critical period warranted setting aside the election. In finding that the mere maintenance of the rule was not objectionable, the Board held that, of "primary significance" was the fact that at all times the employees had been represented by the union which had negotiated at least one collective-bargaining agreement on their behalf. *Safeway, Inc.*, supra at 526. The Board found that, to the extent that any employees were confused about their statutory rights under the rule, the union was ideally placed to advise them of their rights. The Board found that there was no evidence that the union was ever called upon to do so or that it had raised any objection to the rule prior to decertification.

Here, the Union had been recognized as the employees' collective-bargaining representative since shortly after the issuance of the employee handbook in 2004. Having been involved in the Employer's hiring process, the Union was aware of the handbook since before it obtained recognition. Thereafter, the Union successfully negotiated a collective-bargaining agreement. Thus, the Union was "ideally placed to advise the employees of their rights." *Id.* There is no evidence that the Union was ever called upon to do so. Nor, prior to the filing of the decertification petition, did the Union ever take the position that any of the rules at issue infringed upon employees Section 7 rights.<sup>22</sup> Accordingly, this factor militates against a finding that the maintenance of these rules constituted objectionable conduct. *Safeway, Inc.*, supra.

The Union raises several arguments in support of its contention that the Employer's maintenance of these rules was objectionable. First, the Union argues that this case is controlled by the Board's decisions in *IRIS U.S.A., Inc.*, 336 NLRB 1013 (2001), and *Freund Baking Co.*, 336 NLRB 847 (2001). I find both cases to be factually distinguishable. Unlike this case, in neither *IRIS* nor *Freund* was there a union present, as there is

<sup>21</sup> I note the testimony of John Burnham that employees regularly congregate outside the employee entrance to the hotel; Burnham's testimony that he had seen some employees wearing buttons and the evidence discussed above that employees distributed literature during the campaign.

<sup>22</sup> As noted previously, the Union did file an unfair labor practice charge alleging certain of the Employer's rules to be unlawful on July 17, some 6 weeks after the filing of the decertification petition.

here. The Board, in *Safeway*, distinguished *Freund* for that very reason. *Safeway, Inc.*, 338 NLRB at 526 fn. 3. Having stated in *Safeway* that the presence of a union which could inform employees of their rights is a factor of “primary significance” in assessing whether the maintenance of a rule was objectionable, I conclude that both *IRIS U.S.A.* and *Freund Baking* are distinguishable on that basis alone.

The Union further argues that the election in this matter was close, noting that the Board distinguished its holding in *Longs Drug Stores* from *IRIS U.S.A.* on that basis. There is no doubt that the election here was as close as could be, a difference of a single vote. The Board has held that the closeness of the vote can be a factor in determining objectionable conduct. *Quest International*, 338 NLRB 856, 857 fn. 1 (2003). However, the closeness of the election is only a factor and is not controlling. I note that in both *Safeway* and *Delta Brands*, the Board overruled objections regarding the maintenance of improper rules despite there being only a two vote margin in each of those cases. Accordingly, I cannot recommend sustaining this objection on that basis alone.

The Union argues that some of the rules are explicit restraints on Section 7 activity under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). The Union argues that the Board distinguished *Freund Baking* from *Longs Drug Stores* on the basis that the confidentiality provisions at issue in *Freund* were far more specific than those at issue in *Longs Drug Stores*, 347 NLRB 500, 503 fn. 12 (2006). On this basis, the Union argues that, because certain of the Employer’s rules were explicit restraints, that should render them objectionable. Further, the Union argues that the Board in *Freund Baking* distinguished *Longs Drug Stores* because, in *Freund*, the employees were required to read the handbook when it was distributed to them and signify in writing that they had done so. The Union claims similar facts exist in this case.

I find these distinctions to be unpersuasive. I note first, that the Board in *Longs Drug Stores* distinguished *Freund* on several bases, not simply these two. The Board in *Freund* found that the confidentiality provisions at issue were specific in their prohibition of discussions of wages, hours, and other terms and conditions of employment. No similar rules exist in this case. Further, unlike in *Freund*, in this case employees were asked, not required, to sign a receipt stating that they *will* read the handbook, not that they *had* read the handbook. In any event, as noted above, I conclude that *Freund* is distinguishable from this case because of the absence of a union in *Freund* which could have explained to employees their rights.

The Union also contends that the evidence supports a finding that employees refrained from protected activity because of the rules. It contends that no employees wore buttons, that they were afraid to be seen loitering, and were reluctant to be seen engaged in union activity. I have previously found that the record does not support these contentions.

There is no evidence that any employees sought to wear buttons and were deterred from doing so by the rule. Moreover, there is testimony by John Burnham that some employees wore buttons, albeit unrelated to union activity. The only evidence regarding a fear of loitering is a hearsay statement from an unidentified witness on which I placed no weight. There is no

evidence linking any reluctance to engage in union activity to any of these rules, rather than being based on some other factors.

Finally, the Union argues that the Employer called employees’ attention to these unlawful rules by the issuance of its August 7 memo. In so doing, the Employer called attention to the entire handbook. This is particularly so because, as noted above, the rule changes listed in the memo were not clear without referring to the handbook. The Union also argues that the August 7 memo, purporting to change two rules, implicitly reaffirmed all others, including some which I have found interfere with protected employee rights.

While this argument has some appeal, there is no evidence on the record that any employees did, in fact, refer to the employee handbook to understand the two clarifications the Employer sought to make in its August 7 memo. More importantly, there is no evidence that any employees took the initiative to review other portions of the handbook and, thus, had their attention drawn to any of the remaining improper rules. I cannot conclude without more that, by simply issuing a memo attempting to clarify two rules to make them proper, the Employer thereby established in employees’ minds the existence of other improper rules or otherwise coerced them.

Accordingly, for the reasons stated above, I recommend that Objection 7 be overruled.

#### Objection 8

On or about August 7, 2006, the Employer circulated a memorandum, in English only, which made revisions to the employee handbook and caused non-English-speaking employees to believe that their rights were being restricted.

The Employer’s August 7 memorandum, described above, was issued in English only and a substantial number of the Employer’s employees have other languages as their primary language, particularly Spanish and Chinese. There is no evidence on the record, however, that the Employer’s issuance of its memorandum only in English caused any sort of confusion or concern among non-English-speaking employees. The Union presented no facts and made no specific arguments on brief regarding this objection, but rather included Objection 8 in its arguments regarding Objection 7. Accordingly, having considered all of the Union’s arguments in support of Objection 7, I find no evidence to support this objection and recommend that it be overruled.

#### Objection 9

During the final weeks of the critical period, and particularly on the day of the election, proponents of the decertification petition compromised the neutrality of the NLRB by circulating a sample “Vote No” ballot using the official NLRB ballot form without the disclaimers and source identification required by *Sofitel San Francisco Bay*, 343 NLRB 769 (2004).

The election was held on September 21. At issue in this objection is a sample ballot purportedly distributed between September 18 and 21.<sup>23</sup> The document, printed on yellow paper, is

<sup>23</sup> A copy of the sample ballot is attached as an appendix [omitted from publication]. The notations “UX12” in two corners of the docu-

a facsimile of the sample ballot used on the Board's official Notice of Election. The sample ballot was an altered photocopy with a handwritten "X" placed in the "NO" box. The sample ballot contained explanatory language at the top that stated, in English: "This sample ballot shows you how to vote NO for the Union. To vote NO for the Union, put an "X" in the NO box, and do not make any other marks." Other parts of the ballot, including the question on the ballot and various instructions, were also translated into Spanish and Chinese.

Katharine Christiani, an organizer for the Union, testified that she first saw five–six copies of the sample ballot, on yellow paper, on the tables in the cafeteria on September 18. As previously described, the cafeteria is small, containing only four tables. Christiani also saw sample ballots in the cafeteria on September 19–21. Christiani testified she was in the cafeteria daily on these days from about 7:30–8:30 a.m., from 11:30 a.m.–2 p.m. and again at 4 p.m. to an unspecified time. On September 21, Christiani was in the cafeteria all day beginning about 7:30 a.m., save for about an hour. Christiani observed between one and five sample ballots in the cafeteria on each of these occasions. She did not identify any employees as being present when she saw the sample ballots in the cafeteria. Christiani testified she never found out who produced and distributed the sample ballot. Christiani did testify that unnamed employees asked her about the sample ballot.

Union organizer Emma Ross, however, testified that, while she was in the cafeteria daily between September 18 and 21, she did not remember seeing the sample ballots there at any time.

There is no evidence on the record that the sample ballot was seen by any employees prior to the election. Although called by the Union as witnesses, employees Vibert Austin and Rui Yi Yu were not asked whether they had seen the sample ballot.

Director of Human Resources John Burnham testified that he is regularly in the cafeteria during the day in the course of his duties. His office is next door to the cafeteria. Burnham testified he never saw a sample ballot in the cafeteria prior to the election. Burnham further testified that he had been in the cafeteria on September 21 at times beginning at 5:30 a.m. and had not seen any sample ballots there. Similarly, General Manager Stephen Johnston testified that he was in the cafeteria as often as 10 times a day in the period leading up to the election. Johnston never saw the sample ballot in the cafeteria.

The only other evidence regarding the distribution of the sample ballot is the hearsay testimony of John Burnham that employee Jonah Nigh showed him a sample ballot 2 days after the election.<sup>24</sup> Burnham testified that the ballot shown him by Nigh was similar to the one in the appendix to this report [omitted from publication], but oriented in portrait format, rather than landscape. Burnham also could not remember the color of the sample ballot showed him by Nigh or whether there was additional writing on it compared to the document in evidence. According to Burnham, Nigh told him that he had placed the sample ballots in the cafeteria on the morning of the election at

about 6 a.m.<sup>25</sup> Nigh told Burnham that the sample ballots had been destroyed by employee Kenneth English and Nigh had not replaced them. Burnham testified that Nigh was the observer for the Petitioner during the first session of the election on September 21.

#### Analysis and Recommendation

The test for analyzing altered sample ballot cases was set by the Board in *SDC Investment, Inc.*, 274 NLRB 556 (1985). First, if the source of the altered sample ballot is clearly identifiable on its face, then the Board will find the distribution of the document to be objectionable because employees would know the document emanated from a party, not from the Board. *Id.* at 557. If however, the source of the altered sample ballot is not clearly identifiable on its face, it becomes necessary, under the second prong of the test, to examine the nature and contents of the material in order to determine whether the document has the tendency to mislead employees into believing that the Board favors one party's cause. In making this determination, the physical appearance of the document may support the conclusion that it is not misleading where the document would appear to a reasonable employee to be an obvious photocopy of an official document marked up by a party as part of its campaign propaganda. *Worth's Stores Corp.*, 281 NLRB 1191, 1193 (1986). In examining the nature and contents of the document at issue, the Board will also look to the extrinsic evidence of the document's preparation, as well as the circumstances surrounding its distribution. *3-Day Blinds*, 299 NLRB 110, 111 (1990); *Oak Hill Funeral Home & Memorial Park*, 345 NLRB 532 (2005). Evidence of the proper posting of the Board's official notice of election with its language that disavows the Board's role in any defacement of the notice and specifies the Board's neutrality in the election process will not, without more, be dispositive in cases involving a separate distribution of marked sample ballots. *Sofitel San Francisco Bay*, 343 NLRB 769, 770–771 (2004).

The *SDC Investment* standard must be applied to this case for, under the first prong of the test, nothing on the face of the sample ballot identifies the source responsible for preparing the document.

Under the second prong of the *SDC Investment* test, the sample ballot at issue, while slightly off center, is sufficiently consistent with the Board's sample ballot that I believe a reasonable employee would not know, based on the physical appearance of the document, that its source emanated from a party and not the Board. See *3-Day Blinds*, *supra*.

Despite that finding, for several reasons, however, I find that this objection must be overruled. First, the Union produced no evidence whatsoever regarding the circumstances of the sample ballot's distribution which would establish that it was distributed by the Petitioner, as alleged. John Burnham's testimony regarding what he was told by Nigh, objected to by the Union, is inadmissible hearsay. Thus, there being no other evidence on the point, I cannot conclude on the record evidence establishes that the ballot was distributed by the Petitioner, as alleged.

ment were placed on the document during the hearing and are not part of the exhibit.

<sup>24</sup> Nigh was not called as a witness by any party.

<sup>25</sup> The first shift of the election was conducted from 7–9 a.m.

Further and most importantly, the Union produced no evidence that the sample ballot was seen by any employee prior to the election. *No employees testified* as to having seen the sample ballot, including the two called as witnesses by the Union.<sup>26</sup> From that, I take an adverse inference and conclude that neither saw the sample ballot. *Queen of the Valley Hospital*, 316 NLRB 721 (1995). Regarding Christiani's testimony that employees asked her about the sample ballot, I find such testimony to be self-serving hearsay. Such vague and uncorroborated hearsay cannot be used to establish facts not otherwise in evidence.

There is conflicting testimony as to whether the ballots were even distributed prior to the election. Christiani's testimony that she saw the sample ballots in the cafeteria daily from September 18–21, the day of the election, was uncorroborated by her fellow organizer Emma Ross. General Manager Johnston and Director of Human Resources Burnham each testified that, though frequently in the cafeteria during that period, they did not see the sample ballot there. The weight of the evidence, considering the denials of seeing the sample ballots by Burnham and Johnston and the lack of corroboration of Christiani by Ross, convinces me that the testimony of Christiani on this point cannot be credited.

The Union contends that this objection should be sustained under *Sofitel San Francisco Bay*, 343 NLRB 769. In *Sofitel*, however, it was undisputed that the document in issue had been mailed by a party. *Id.* at 772. Similarly, in *Sofitel*, there was evidence that employees had received the disputed document. *Id.* at n. 12. Neither of these facts is present here.

The Union further contends that Nigh, as the Petitioner's observer, was an agent of the Petitioner in the distribution the ballots. First, I do not find that there is record evidence that Nigh distributed the sample ballots. Moreover, while there is testimony that Nigh served as the Petitioner's observer at the election, the Board has held that a party's observer is only an agent of the party for the purposes of electioneering conduct at the time they act as observers. *Brinks, Inc.*, 331 NLRB 46, 46–47 (2000); *Dubovsky & Sons*, 324 NLRB 1068 (1997). Even assuming Nigh was responsible for the sample ballot's distribution, Christiani's testimony indicates that the ballots were distributed preelection, a time when Nigh was not acting as an agent of the Petitioner. Accordingly, I cannot find that, even

<sup>26</sup> The Union also called as witnesses employer supervisors, Demmon, Deras, and Flores. None was asked whether they had seen the sample ballot.

assuming Nigh is responsible for the ballot's distribution, that he was an agent of the Petitioner at that time.

The Union also contends that, under the standard for third-party conduct, the election should be set aside, citing *Hollingsworth Management Service*, 342 NLRB 556, 558 (2004). In *Hollingsworth*, the Board set a standard for third-party conduct in electioneering cases to be "whether the conduct at issue so substantially impaired the employees' exercise of free choice as to require that the election be set aside." *Id.* at 558. Further, "in considering whether the election should be set aside for third-party electioneering, the Board considers the closeness of the election." *Id.* at 558 fn. 6. *Hollingsworth* involved threats and physical violence to employees waiting in line to vote.

Even under the Board's third-party standard, set forth in *Hollingsworth*, the Union has failed to prove its case. There is no evidence that Nigh or any third party prepared and distributed any sample ballots. There is no record evidence that employees viewed the sample ballot and, therefore, could have been affected by it. The burden of proof on parties seeking to overturn an election is a heavy one. *Nor-Cal Ready Mix, Inc.*, 327 NLRB 1091, 1092 (1999). The objecting party must show that the conduct in question affected employees in the voting unit. See *Avante At Boca Raton, Inc.*, 323 NLRB 555, 560 (1997). As the Union has not demonstrated either the presence of an improper sample ballot prior to the election or that any employees saw the sample ballot in question prior to the election, I find that the Union has not met this burden on this objection. Accordingly, I recommend that Objection 9 be overruled.

#### Conclusion

For the reasons stated above, I have recommended that the Union's Objections 1, 2, 3, 7, 8, and 9 be overruled.

The Union having requested withdrawal of Objections 4, 5, and 6, I recommend that that withdrawal be approved.

Having recommended that each of the Union's remaining objections be overruled, I further recommend that a Certification of Results issue.<sup>27</sup>

<sup>27</sup> Any party may, within 14 days from the date of issuance of this Report, file exceptions to this Report with the Board in Washington, D.C. in accordance with Sec. 102.69 of the Board's Rules and Regulations. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director. If no exceptions are filed, the Board will adopt the hearing officer's recommendation.