

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21**

**NP LAKE MEAD LLC D/B/A FIESTA
HENDERSON CASINO HOTEL**

Employer

and

Case 28-RC-245493

**LOCAL JOINT EXECUTIVE BOARD OF LAS
VEGAS A/W UNITE HERE INTERNATIONAL
UNION**

Petitioner

HEARING OFFICER'S REPORT ON OBJECTIONS

On November 22, 2019 agents of Region 28 conducted an election among certain employees of the Employer. A majority of employees casting ballots in the election voted in favor of representation by the Petitioner. However, the Employer contests the results of the election claiming that the Board agents conducting the election and the Petitioner's campaign materials compromised the integrity of the election, and therefore asks that the election be set aside and that a new election be held. Specifically, the Employer contends that the Board agents erroneously instructed voters to remove any campaign paraphernalia in order to vote. The Employer further contends that the Petitioner misled employees into taking photographs and during the critical period distributed a booklet with employees' photographs revealing that photographed employees were voting in favor of the Petitioner.

This report contains my findings of fact, credibility resolutions, conclusions of law, and recommendations regarding the Employer's objections to the conduct affecting the results of the election in the above matter. As set forth below, I recommend that the Employer's objections be overruled in their entirety and the appropriate Certification of Representative issue.

PROCEDURAL HISTORY

Based on the petition filed on July 25, 2019¹ and pursuant to a Decision and Direction of Election (DDE), an election was conducted on Friday, September 13, to determine whether a unit of employees of NP Lake Mead LLC d/b/a Fiesta Henderson Casino Hotel Fiesta Henderson Casino Hotel (Employer) wish to be represented for purposes of collective bargaining by Local

¹ All dates are 2019 unless otherwise noted.

Joint Executive Board of Las Vegas a/w UNITE HERE International Union (Petitioner). That voting unit consists of:

Included: All full-time and regular part-time banquet servers, bartenders, beverage porters, beverage servers, bus persons, cook helpers, cooks, counter attendants, food servers, guest room attendants, hosts/cashiers, housepersons, kitchen runners, kitchen workers, lead counter attendants, pantry workers, porters, room runners, service bartenders, sprinters, stove persons, team member dining room (TDR) attendants, and utility porters employed by the Employer at its facility in Henderson, Nevada.

Excluded: All other employees, front desk employees, valet parkers, gaming employees (dealers, slot attendants, cage cashiers), inspectresses, engineering and maintenance employees, office clerical employees, guards, managers, and supervisors as defined by the Act.

The tally of ballots prepared at the conclusion of the election shows that of the approximately **315** eligible voters, **167** votes were cast for and **128** votes were cast against the Petitioner, with **2** challenged ballots, a number that is not sufficient to affect the results of the election.

On September 20, 2019, the Employer filed timely objections to the conduct of the election and conduct affecting the results of the election. On February 20, 2020, the Board granted the Petitioner's Request for Review of the Regional Director's Order Granting Employer's Request for Reconsideration, Mooting Employer's Motion to Extend Time for Filing Offer of Proof, Revoking Regional Director's Decision on Objections and Certification of Representative, Setting Aside Election Results, and Directing Rerun Election. The Board retroactively granted the Employer permission to file its offer of proof in support of its objections via e-mail. The Board remanded this matter to the Regional Director of Region 28 for further appropriate action, including a hearing and, if appropriate, consideration of the Employer's other objections. Because the subject matter of one of the objections involved the conduct of Board agents in Region 28, this matter was transferred to Region 21 for adjudication.

On February 28, 2020 the Regional Director for Region 21 ordered that a hearing be conducted to give the parties an opportunity to present evidence regarding the following two objections:

Objection No. 1

During the critical period leading up to the election, the Petitioner obtained photographs of employees without explaining to them, or by misrepresenting to them, the intended use of the photographs, and then published the photographs in campaign materials along with the statement, "We are voting yes!," and distributed the materials throughout the Employer's property, in all departments and across all shifts, thereby disclosing or misrepresenting the employees' sentiments concerning union representation without their express or implied consent.

Objection No. 2

During at least the first voting period on September 13, 2019 (6:00 a.m. to 9:00 a.m.), the Board agents erroneously, and in an intimidating and threatening manner, instructed each employee who was wearing campaign insignia (e.g., t-shirts, buttons, etc.) that they were not allowed to wear the insignia while they were in the polling area and while they were casting their ballots.

On March 10, 2020, the Employer filed a request with General Counsel Peter Robb to allow three Board agents to testify, pursuant to subpoenas. General Counsel Robb denied the Employer's request on June 11, 2020.

On March 16, 2020, the Regional Director for Region 21 issued an Order Postponing Hearing indefinitely given the COVID-19 pandemic. On June 5, 2020, the Regional Director issued an Order Rescheduling Hearing and ordered that the hearing take place by videoconference on June 23, 2020.

On June 10, 2020, the Employer filed a Motion to Dismiss Petition or, in the Alternative, Postpone Objections Hearing Indefinitely. The Employer filed the Motion on the basis that the Employer had closed its operation and laid off all employees on May 1, 2020. The Employer noted in its Motion that there was no expectation to reopen its operation or recall any of the laid off employees. On June 16, 2020, the Petitioner filed an Opposition to the Employer's Motion to Dismiss Petition or, in the Alternative, Postpone Objections Hearing Indefinitely. On June 17, 2020, the Employer filed a Reply to the Petitioner's Opposition to the Employer's Motion to Dismiss Petition or, in the Alternative, Postpone Objections Hearing Indefinitely.

On June 17, 2020, the Regional Director issued an Order Denying the Motions to Dismiss the Petition and Postpone the Hearing Indefinitely. On June 18, 2020, the Employer filed a Request for Review of Regional Director's Order with the Board. On June 23, 2020, the Board issued an order denying the Employer's Request for Review.

As the hearing officer designated to conduct the hearing and to recommend to the Regional Director whether the Employer's objections are warranted, I heard testimony and received into evidence relevant documents on June 23, 2020.

The parties were permitted to file post hearing briefs addressing the record evidence for Objections Nos. 1 and 2. The Employer and the Petitioner timely filed briefs which were fully considered.

THE BURDEN OF PROOF AND THE BOARD'S STANDARD FOR SETTING ASIDE ELECTIONS

It is well settled that "[r]epresentation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000), quoting *NLRB*

v. Hood Furniture Co., 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Therefore, “the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one.” *Delta Brands, Inc.*, 344 NLRB 252, 253, (2005), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). To prevail, the objecting party must establish facts raising a “reasonable doubt as to the fairness and validity of the election.” *Patient Care of Pennsylvania*, 360 NLRB No. 76 (2014), citing *Polymers, Inc.*, 174 NLRB 282, 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970). Moreover, to meet its burden the objecting party must show that the conduct in question affected employees in the voting unit. *Avante at Boca Raton*, 323 NLRB 555, 560 (1997) (overruling employer’s objection where no evidence that unit employees knew of the alleged coercive incident).

To set aside an election based on Board agent misconduct or Regional Office procedural irregularities, the objecting party must show that there is evidence that “raises a reasonable doubt as to the fairness and validity of the election.” *Durham School Services, LP*, 360 NLRB No. 108, slip op. at 4 (2014), citing *Polymers, Inc.*, 174 NLRB 282, 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970); see also *Physicians & Surgeons Ambulance Service*, 356 NLRB No. 42, slip op. at 1 (2012), enfd. 477 Fed.Appx 743 (D.C. Cir. 2012).

THE EMPLOYER’S OBJECTIONS AND MY RECOMMENDATIONS

The order directing hearing in this matter instructs me to resolve the credibility of witnesses testifying at the hearing and to make findings of fact. Unless otherwise specified, my summary of the record evidence is a composite of the testimony of all witnesses, including in particular testimony by witnesses that is consistent with one another, with documentary evidence, or with undisputed evidence, as well as testimony that is uncontested. Omitted testimony or evidence is either irrelevant or cumulative. Credibility resolutions are based on my observations of the testimony and demeanor of witnesses and are more fully discussed within the context of the objection related to the witnesses’ testimony.

Record Evidence

Objection No. 1

During the critical period leading up to the election, the Petitioner obtained photographs of employees without explaining to them, or by misrepresenting to them, the intended use of the photographs, and then published the photographs in campaign materials along with the statement, “We are voting yes!,” and distributed the materials throughout the Employer’s property, in all departments and across all shifts, thereby disclosing or misrepresenting the employees’ sentiments concerning union representation without their express or implied consent.

In support of Employer Objection No. 1, the Employer presented former employees Nadine Cloud, Janice McNamara, Vilma Patino and Marla Torres. The Petitioner presented External Organizing Director Delores Brown and Lead Organizer Mario Medina.

The witnesses' testimony consistently showed that a few days prior to the election the Petitioner distributed a booklet titled "We Are Fiesta Henderson! It's Our Time ¡Somos Fiesta Henderson!" The booklet was entered and received into evidence as Joint Exhibit 1. The booklet consists of the election details, a sample ballot, voting instructions and photographs of 189 employees with the statement "We are voting yes!" and "¡Vamos a votar si!" Witnesses admitted that at some point prior to the distribution of the booklet they signed the Petitioner's "Media Release Form." The media release contains the following language, "I agree to having my picture taken and published in a "We Are Voting Yes" booklet that will be given to workers during the National Labor Board Relations [sic] union election at my property." The witnesses testified that they understood the booklet to be campaign propaganda.

According to former employee Cloud, she first saw the booklet after the election had been scheduled at her bar at the casino where she worked as a bartender. At that time, Cloud noticed that her photograph was included in the booklet. Cloud claimed that she had never authorized the Union to use her photograph and that she was unhappy and shocked when she saw her picture. However, Cloud also admitted that she signed the Union's media release form. The executed media release forms for all employees included in the booklet were received into evidence as Petitioner Exhibit 1. Cloud notably testified regarding the media release form that she "...didn't read it thoroughly, which I should have, I guess." (TRA Pg 4 line 15-16). Cloud also admitted that she voluntarily drove to the Union hall in late 2018 where she signed the media release form and had her picture taken by Lead Organizer Mario Medina. Cloud testified that Medina assured her that her picture would not be used in a booklet but also testified that Medina never disavowed the language in the media release form. Moreover, Cloud stated that while her picture was included in the booklet, she knew that she was free to vote in whatever manner she chose.

Former employee McNamara testified that she never actually saw the booklet prior to the election but heard from other employees that her photograph was in the booklet. McNamara said that she learned that the booklet was being passed out about 1 week before the election. Similar to Cloud, McNamara testified that she voluntarily drove to the Union hall in December 2018 and signed the media release form. Notably, McNamara admitted that she did not read the media release form and signed it under the assumption that it was for the Union's records. McNamara also acknowledged that no one from the Union ever disavowed the language on the media release form. McNamara actually testified that "it's my fault, I should have read it. I mean it's nobody's fault but mine." (TRA Pg 73 l 23-24). As to her photograph, McNamara did not have her picture taken because she was in a rush. However, McNamara took an additional step and sent her picture to the Union at a later time. Like Cloud, McNamara testified that despite the inclusion of her photograph in the booklet, she understood that she was free to vote in any manner.

Former employee Patino worked for the Employer from July 2000 to March 2020. Like the other witnesses Patino, stated that she voluntarily went to the Union office, signed the media release form, and had her picture taken by Lead Organizer Medina. A few days prior to the election Patino, saw the booklet in the team member dining room. Patino's photograph was also included in the booklet. Patino said she felt very upset and very deceived because Medina said her picture would be kept confidential. However, Patino confirmed that Medina never

disavowed the media release form she signed or asked her to disregard the language. Patino, like the other witnesses, said she knew she was not required to vote for the Union despite her picture being included in the booklet.

Former employee Torres worked for the Employer as a cook at the time of the election. Torres worked for the Employer from 2007 to 2020. Similar to the other witnesses, Torres said she saw the booklet a few days prior to the election. Torres' photograph was included in the booklet. Torres also voluntarily drove to the Union office, signed the media release form, and had her picture taken by Lead Organizer Medina. While Torres did not specifically recall signing the media release form, she did recall signing a document while at the Union's office. Torres confirmed her signature on the media release form. Torres said she felt defrauded when she saw the booklet. Torres stated that she did not know the booklet would be published. However, Torres confirmed that neither Medina nor anyone from the Union ever disavowed the media release form or asked her to disregard the language. Torres, like the other witnesses, said she knew she was not required to vote for the Union despite her photo being included in the booklet.

The Petitioner presented External Organizing Director Brown and her subordinate Lead Organizer Medina. Brown and Medina both work out of the Union office visited by former employees Cloud, McNamara, Patino, and Torres. Brown and Medina were partially responsible for the creation of the booklet, compiling pictures and obtaining signed media release forms. Brown testified that she trained Medina on obtaining employees' signatures on the media release form, taking employees photographs, and explaining the purpose of booklet to employees. Brown's testimony was clear that employees' pictures were included in the booklet only if they signed the media release form. As previously noted, the Petitioner entered into evidence all the media release forms obtained for each employee included in the booklet. Brown testified that the booklet was never intended to be confidential and was always meant to be released. The Petitioner did not take pictures of employees that expressed confidentiality concerns. According to Brown, the Petitioner distributed the booklets to employees and not any Employer supervisors or managers prior to the election.

Lead Organizer Medina testified that he was responsible for soliciting employees to sign the media release forms, taking their photographs, and answering questions related to media release form. Medina recounted in specific detail each of his meetings with Cloud, McNamara, Patino, and Torres. The meetings between Medina and each of the employees were generally the same. Medina detailed that these employees went to the Petitioner's office, he showed them similar booklets from other casino campaigns, asked employees to read and sign the media release forms, took their pictures, and told employees that a booklet with their picture would be distributed at the Employer's facility a few days prior to the election. As previously detailed, Medina recalled that McNamara sent her picture at a later time because she wanted to look her best. Medina took photos of Cloud, Patino, and Torres. None of these employees objected to signing the media release form or providing their photograph. Medina denied telling employees that their photos would not be released or only used inside the Petitioner's office. Medina stated the only purpose of taking employees' pictures was to include it in the booklet, and that he would have not taken their picture if they did not sign the media release form. Medina recalled that

there were a few employees that did not sign media release form and that he did not take their photos. None of these employees testified at the hearing.

Board Law

In determining whether to set aside an election, the Board applies an objective test. The test is whether the conduct of a party has “the tendency to interfere with employees’ freedom of choice.” *Cambridge Tool Pearson Education, Inc.*, 316 NLRB 716 (1995). Thus, under the Board’s test the issue is not whether a party’s conduct in fact coerced employees, but whether the party’s misconduct reasonably tended to interfere with the employees’ free and uncoerced choice in the election. *Baja’s Place*, 268 NLRB 868 (1984). See also, *Pearson Education, Inc.*, 336 NLRB 979, 983 (2001), citing *Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970).

In determining whether a party’s conduct has the tendency to interfere with employee free choice, the Board considers a number of factors: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among employees in the voting unit; (3) the number of employees in the voting unit who were subjected to the misconduct; (4) the proximity of the misconduct to the date of the election; (5) the degree to which the misconduct persists in the minds of employees in the voting unit; (6) the extent of dissemination of the misconduct to employees who were not subjected to the misconduct but who are in the voting unit; (7) the effect (if any) of any misconduct by the non-objecting party to cancel out the effects of the misconduct alleged in the objection; (8) the closeness of the vote; and (9) the degree to which the misconduct can be attributed to the party against whom objections are filed. *Taylor Wharton Division*, 336 NLRB 157, 158 (2001), citing *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

Analysis

In a series of cases, the Board has rejected assertions that union flyers bearing employees signatures, statements, or photographs conveying impression they supported the union constituted objectionable conduct. *Gormac Custom Mfg.*, 324 NLRB 423 (1997) (union flyer with signatures of employees supporting union not objectionable where employees signed document authorizing union to reproduce signatures); *Champaign Residential Services*, 325 NLRB 687 (1998) (union flyer with photocopied signatures of employees supporting the union not objectionable); *Somerset Valley Rehabilitation & Nursing Center*, 357 NLRB 736 (2011) (flyer purporting to quote employees as saying they were going to vote for the union, when in fact they had not done so, not objectionable); *Enterprise Leasing Co.–Southeast, LLC*, 357 NLRB 1799 (2011), ultimately enforced at 722 F.3d 609, 617–618 (2013) (use of employee photograph on flyer without his permission not objectionable); *Durham School Services, LP*, 360 NLRB 851 (2014), enfd. 821 F.3d 52 (D.C. Cir. 2016) (flyer picturing employees with caption “WE’RE VOTING YES” for petitioner).

The Petitioner argued in its post-hearing brief that the Board’s longstanding rule for reviewing campaign literature is whether “a party has used forged documents which render the voters unable to recognize propaganda for what it is.” *Midland National Life Ins. Co.*, 263 NLRB 127, 133 (1982). Unless the objecting party can prove that the objectionable campaign

literature was forged in a way that prevented voters from recognizing propaganda for propaganda, then the election results must stand. *Midland National Life Ins. Co.*, 263 NLRB at 133.

The *Midland* rule “applies where unions circulate campaign literature and identifies individual employees as union supporters, as well as attributing pronoun statements to them or representing that they intent to vote for the union.” *Durham School Servs.*, 360 NLRB 851, 851 (2014) (citing *Somerset Valley Rehabilitation & Nursing Center*, 357 NLRB 736 (2011); *BFI Waste Services*, 343 NLRB 254 (2004); *Champaign Residential Services*, 325 NLRB 687 (1998)).

The Employer similarly cited *Durham School Services, LP*, 360 NLRB 851, 853 (2014); *Somerset Valley Rehabilitation & Nursing Center*, 357 NLRB 736, 736 (2011); *BFI Waste Services*, 343 NLRB 254 (2004) for the holding that a union may publicize employees’ pictures on campaign propaganda, and attribute “we are voting yes” statements to them, even without their authorization, so long as the union’s conduct involves no forgery or pervasive misrepresentation. The Employer argues in its post-hearing briefs that the Petitioner lied to at least four employees about the use of their pictures in the booklet and about whether their pictures would be kept confidential. The Employer noted that the Petitioner misattributed the employees intended vote thus engaging in objectionable conduct.

The record evidence in this case is not sufficient to warrant that the election be set aside. It is important to begin by stating that only 4 of 189 employees photographed in the booklet claim to have been deceived by the Union. Here, the number of incidents does not support the Employer’s objection that the election should be overturned. In addition, the publication and dissemination of the booklet does not support severe conduct that would warrant the election be set aside. It is important to note that the Union obtained express consent from everyone included in the booklet to take their photograph and publish it in the booklet. While the Employer’s four witnesses claim that Medina told them that their picture would not be released, their testimony is simply not credible. Instead, I credit Lead Organizer Medina who credibly testified that he asked employees to read the media release forms before signing. The language in the media release form offers no room for doubt as it is clearly stated “I agree to having my picture taken and published in a “We Are Voting Yes” booklet that will be given to workers during the National Labor Board Relations [sic] union election at my property.” The Petitioner appropriately followed through with the authorization given to them by employees and published the book. The four witnesses confirmed that Medina never disavowed the media release form or asked them to disregard the language, disputing that Medina somehow deceived them. While the four employees claim they were deceived by Medina, their signature on the form clearly contradicts their testimony as the authorization speaks for itself. If the witnesses failed to read the media release form, that was their own fault, which employees Cloud and McNamara acknowledged. While the employees contend that they did not know what they signed, such a contention does not invalidate the objective language of the media releases each employee acknowledged and signed. Moreover, the Employer failed to present any evidence to support that the inclusion of these four employees in the booklet or the alleged deception by Medina had some sort of impact on the voting unit. While it is clear that the booklet was disseminated, there is little to no evidence to support that the alleged deception was ever

disseminated. Rather, it appears that 185 employees were perfectly content with their photos appearing in the booklet and likely understood their authorization. As the Employer's argument that Medina lied to employees about the use of their photographs and misattributed the intent of their vote in the election, I find that the Employer witnesses failed to establish such facts. As previously noted, I credit Medina and the very explicit media release forms executed by the Employer's witnesses. Both Medina's testimony and media release forms clearly show the intended use of the photograph. While employees claim they were misled by Medina, I find that difficult to believe given the explicit language on the media release forms that employees willingly signed. In addition, there is no evidence that employee signatures were somehow forged. Rather, the record evidence shows that employees voluntarily authorized the release of their picture with the statement "We Are Voting Yes" to be used as campaign propaganda. Overall, the evidence fails to warrant that the election be set aside, as the Employer's evidence does not show that the alleged conduct interfered with employees' free choice that would warrant a new election.

Recommendation

Because the Employer failed to meet its burden under Board law to establish sufficient evidence to warrant setting the election aside, I recommend that the Employer's Objection No. 1 be overruled in its entirety.

Objection No. 2

During at least the first voting period on September 13, 2019 (6:00 a.m. to 9:00 a.m.), the Board agents erroneously, and in an intimidating and threatening manner, instructed each employee who was wearing campaign insignia (e.g., t-shirts, buttons, etc.) that they were not allowed to wear the insignia while they were in the polling area and while they were casting their ballots.

In support of Employer Objection No. 2, the Employer presented former employee Julie Jarboe and Employer Attorney Reyburn W. Lominack III. The Petitioner presented former employees Rory Bybee and Jorge Alberto Sanchez Esposa.

Former employee Jarboe served as an Employer observer at the election during the first session from 6:00 a.m. to 9:00 a.m. This was the only session where the Board agents allegedly engaged in objectionable conduct. According to Jarboe, after the conclusion of the preelection conference, once the Employer and the Petitioner representatives left the polling area, the Board agents instructed the observers to remove any campaign attire. The Board agents also stated that if any voters entered the polling area wearing campaign attire, they were to take it off or they were not allowed to vote. Jarboe testified that these instructions were not given to the observers while the Employer and Petitioner representatives were in the room. Jarboe's testimony also revealed that once employees arrived to vote, one Board agent began instructing employees to remove their campaign paraphernalia regardless of whether the paraphernalia was pro-Union or pro-Employer. This Board agent did this in the presence of other voters. Jarboe estimated that about 47 of 60 voters were wearing some type of campaign paraphernalia throughout the 3-hour

polling session. Jarboe stated that some employees followed instructions and removed their paraphernalia while others did not. However, all employees were allowed to vote regardless of whether they complied with the instructions, according to Jarboe, and no voters left without voting. Jarboe generally described one incident between the Board agent and a voter, where the voter refused to remove his pro-Union paraphernalia. Jarboe described the incident as a verbal altercation where voter refused to remove his t-shirt after receiving the instruction from the Board agent. Jarboe stated that the voter proceeded to vote despite his refusal to comply with the Board agent's instruction.

According to Employer Attorney Lominack, after the conclusion of the 6:00 a.m. to 9:00 a.m. polling session, Petitioner Representative Kevin Kline confronted the Board agents about the instructions concerning the campaign insignia. According to Lominack, Kline stated that the Board agent's conduct was highly improper and objectionable. Kline directed the Board agents to seek guidance from the Regional Director after the Board agents asserted that they were giving instructions permitted by the NLRB Casehandling Manual. According to Lominack, one of the Board agents confirmed that it was a consistent instruction given to everybody. Lominack stated that at some later time, the Board agents confirmed that they would not give the instruction at the following two sessions regarding the campaign insignia.

Former employee Bybee worked as a casino porter for the Employer beginning on August 20, 2019 until about October 2019. Bybee stated that he voted at about 7:00 a.m. Bybee testified that he wore a red Local 226 union t-shirt to the polling location, entered the polling area, voted, and exited the room. Bybee stated once he was outside of the room, a male in a black suit told him he was not allowed to wear the shirt because it could influence the outcome of the election. By this time Bybee had already voted. Bybee stated that he did not recognize the male and that the male's instruction did not influence his vote. No one else was present other than Bybee and the male when Bybee received the instruction.

Former employee Sanchez Esposa worked for the Employer as a bar porter in September 2019. Sanchez Esposa testified that when he arrived at the polling location at about 7:30 a.m., the Board agent asked him to remove his Union button or he could not vote. Sanchez Esposa stated that he removed the button in order to vote. Sanchez Esposa stated there were about 4-5 other voters in the polling area at the time the Board agent gave him the instruction. Sanchez Esposa voted and left the polling area.

Board Law

When determining whether to set aside an election on the basis of Board agent conduct, "the Board goes to great lengths to ensure that the manner in which an election was conducted raises no reasonable doubt as to the fairness and validity of the election." *Jakel, Inc.*, 293 NLRB 615, 616 (1989) (citing *Polymers, Inc.*, 174 NLRB 282 (1969), *enfd.* 414 F.2d 999 (2d Cir. 1969), *cert. denied* 396 U.S. 1010 (1970)). There is not a "per se rule that ... elections must be set aside following any procedural irregularity." *St. Vincent Hospital, LLC*, 344 NLRB 586, 587 (2005) (quoting *Rochester Joint Board v. NLRB*, 896 F.2d 24, 27 (2d Cir. 1990)). Thus, the Board "requires more than mere speculative harm to overturn an election." *J. C. Brock Corp.*, 318 NLRB 403, 404 (1995) (citation omitted). The Board will set aside an election, however, if

the irregularity is sufficient to raise “a reasonable doubt as to the fairness and validity of the election.” *Polymers*, 174 NLRB at 282.

The Employer argued in its post-hearing brief that the Board goes to great lengths to ensure that its election procedures raise no reasonable doubt as to the fairness and validity of the election.” *Madera Enterprises*, 309 NLRB 774, 774 (1992) (citing *Jakel, Inc.*, 293 NLRB 615 (1989), and *Athbro Precision Engineering Corp.*, 166 NLRB 902 (1967)). “To that end, the General Counsel’s Casehandling Manual (CHM) serves as procedural and operational guidance for the Agency’s staff in the handling of representation cases.” *Id.* (internal quotations omitted). The Employer argues in part that the Board agents failed to comply with the CHM and that the election should be overturned.

In its post-hearing brief, the Petitioner acknowledged that the Board agent’s direction is inconsistent with the Casehandling Manual. However, the Petitioner argued that it is not a reason to overturn the results of the election. The Petitioner states that the Board has repeatedly held that “the provisions of the Casehandling Manual are not binding procedural rules; the CHM is issued by the General Counsel, not the Board, and is intended to provide guidance to regional personnel in the handling of representation cases.” *See Patient Care of Pennsylvania, Inc.*, 360 NLRB 637, 638 (2014) (citing *Solvent Services*, 313 NLRB 645, 646 (1994); *Superior Industries*, 289 NLRB 834, 837 fn. 13 (1988)). Consistent with *Polymers*, alleged noncompliance with the CHM does not warrant setting aside an election absent a showing there was a reasonable doubt as to the fairness and validity of the election. *See id.*; *see also Correctional Health Care Solutions*, 303 NLRB 835, 835 fn. 1 (1991); *Kirsch Drapery Hardware*, 299 NLRB 363, 364 (1990); *Robert Orr-Sysco Food Services*, 338 NLRB 614, 623 (2002).

Analysis

In this case, the record evidence is insufficient to warrant that the election be set aside. While it is clear that the Board agent erroneously told voters that they could not wear campaign paraphernalia in the polling area, this conduct does not raise a reasonable doubt as to the fairness and the validity of the election. First, Jarboe’s testimony was clear that the Board agent’s instructions were given to all voters regardless of whether their campaign paraphernalia was pro-employer or pro-union. Here, it was established that the instruction was issued in an equal manner and not in favor of any particular party, thus, there was no evidence that the Board agents demonstrated any type of bias. In addition, Jarboe’s testimony revealed that all employees that wanted to vote, did, regardless of whether they removed their campaign paraphernalia. The testimony of Bybee and Sanchez Esposa detailed that they both voted despite wearing pro-union insignia while in the polling area. There is no evidence that any voter was somehow disenfranchised as a result of the Board agent’s instruction. Again, there was no evidence to support that the Board agents precluded anyone from voting because they were displaying campaign paraphernalia. Moreover, there was no evidence to support that the direction had any sort of impact on the election. While it is clear that the Board agents gave the instructions in the presence of other voters, there is no evidence to support that these instructions somehow impacted any voters or that the instructions were even disseminated. Here, the Employer failed to present a single witness to show any sign of impact on the election. Rather,

the witnesses merely established that the Board agents gave voters wrong instructions during the first polling session. As to the Employer's argument, I find that while the Board agent's instructions failed to adhere to the CHM, it is insufficient to set the election aside. In this regard, despite the wrong instruction the Employer failed to show that there was any reasonable doubt as to the fairness and validity of the election. As previously noted, there is no evidence to support that the instruction had any impact on the election. Rather, as cited by the Petitioner, mere noncompliance with the CHM does not warrant setting aside an election absent showing there was a reasonable doubt as to the fairness and validity of the election. The evidence merely demonstrates speculative harm and is insufficient to set the election aside.

Recommendation

Because the Employer failed to meet its burden under *Polymers* to establish a reasonable doubt as to the fairness and validity of the election, I recommend that the Employer's Objection No. 2 be overruled in its entirety.

CONCLUSION

I recommend that the Employer's objections be overruled in their entirety. The Employer has failed to meet the Board's standard and therefore has not provided evidence that raises a reasonable doubt as to the fairness and validity of the election. Therefore, I recommend that an appropriate Certification of Representative issue.

APPEAL PROCEDURE

Pursuant to Section 102.69(c)(1)(iii) of the Board's Rules and Regulations, any party may file exceptions to this Report, with a supporting brief if desired, with the Regional Director of Region 21 by October 1, 2020. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Exceptions must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the exceptions should be addressed to the Regional Director, National Labor Relations Board, Region 21, US Court House, Spring Street, 312 North Spring Street, Los Angeles, CA 90012 and must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden.

Pursuant to Sections 102.111 – 102.114 of the Board's Rules, exceptions and any supporting brief must be received by the Regional Director by close of business at 5:00 p.m. Pacific Time on the due date. If E-Filed, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Pacific Time on the due date.

Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions

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may file an answering brief with the Regional Director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Dated: September 17, 2020

A handwritten signature in black ink, appearing to read "Alvaro Medina", written in a cursive style.

ALVARO MEDINA
Board Agent