Longs Drug Stores California, Inc. *and* International Brotherhood of Teamsters, Local 439.[1]

Longs Drug Stores California, Inc. *and* International Brotherhood of Teamsters, Local 439. Cases 32–CA–21550 and 32–RC–5259

June 28, 2006

DECISION, ORDER, AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On April 13, 2005, Administrative Law Judge Burton Litvack issued the attached decision. The Respondent filed exceptions, a supporting brief, answering briefs, and reply briefs. The General Counsel filed a limited cross-exception, a supporting brief, and an answering brief. The Charging Party filed exceptions and an answering brief in opposition to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exception, and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision, Order, and Certification of Results of Election.

The judge found that the Respondent violated Section 8(a)(1) of the Act by maintaining overbroad confidentiality provisions in its employee handbooks and engaged in objectionable conduct by maintaining these same provisions, and by campaigning near the voting area during the election. As discussed below, we find that the Respondent's confidentiality provisions are unlawful, but, unlike the judge, we find that the Respondent did not engage in objectionable conduct.

I. THE CONFIDENTIALITY PROVISIONS

During the organizational campaign period culminating in the Union's July 7, 2004 loss in a Board election, the Respondent concurrently maintained two employee handbooks entitled "Mainland 2000" (2000 handbook) and "Employee Handbook" (2003 handbook). The Respondent's 2000 handbook, under the heading "Corrective Action/Employee Conduct," states that "Unauthorized disclosure of confidential information regarding customers, employees, or the business of the company" is conduct subject to discipline, including discharge. A provision directly following this general confidentiality provision, under the heading "Privileges of a Team Member," states, "Your pay is confidential company information and should not be discussed with fellow employees."

Neither of the aforementioned provisions appears in the 2003 handbook, which at relevant times was distributed to only five unit employees. However, the 2003 handbook, under the heading "Professional Behavior," states that the Respondent "expects compliance with the following behaviors . . . . Maintain confidentiality, including but not limited to, information regarding customers, employees and the company." The handbook further states that employees are "expected to adhere to the policies and procedures that protect customer and employee confidential information, and thereby, comply with federal and state privacy laws," and that the Respondent trusts employees not to disclose "such information to unauthorized persons, or organizations, or using it for personal gain."

Notwithstanding the limited circulation of the 2003 handbook, the provisions of the 2000 handbook remained in effect throughout the critical preelection period in 2004. The Respondent's human resources manager, Larry Gilbert, testified that he was responsible for enforcing the provisions of the handbooks and that the purpose of the provisions was to make employees aware of prohibited conduct. Gilbert further testified that individual employee wage rates constitute confidential information. Despite Gilbert's testimony and the maintenance of the confidentiality provisions in both handbooks, employees openly discussed wages without being disciplined. Also, there was a chart listing job classifications and applicable wage rates posted in the employee break room.

In determining whether an employer's maintenance of a work rule reasonably tends to chill employees in the exercise of Section 7 rights, the Board will give the work rule a reasonable reading and refrain from reading particular phrases in isolation. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Under this standard, the first inquiry is "whether the rule *explicitly* restricts activities protected by Section 7." (Emphasis in original.) Id. If so, the rule is unlawful; if not

> the violation is dependent 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)

[1] We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL–CIO effective July 25, 2005.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d. Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

the rule has been applied to restrict the exercise of Section 7 rights.

[Id. 647.]

As noted, the 2000 handbook contains a general confidentiality provision and a particular confidentiality provision prohibiting the discussion of wages. The 2003 handbook contains a general confidentiality provision. Since the complaint does not appear to challenge the particular provision as independently unlawful,[3] we do not pass on whether that provision explicitly restricts activities protected by Section 7. With respect to the general provisions, which are alleged to be unlawful, we believe that they must be read in the context of the particular provision and Gilbert's specific affirmation that the Respondent considered employee wage rates to be confidential information. So read, we conclude that the general provisions of the 2000 and 2003 handbooks, which prohibit the disclosure of confidential information, are unlawful.[4]

II. REMEDIAL ISSUES

As an initial matter, we find that the Respondent must rescind the general provisions and the particular provision. Although the latter was not attacked as independently unlawful, we believe that a complete remedy for the violations found should include the rescission of the provision which supports finding the general provisions unlawful.

Having found that the confidentiality provisions violated the Act, the judge ordered the Respondent to post copies of the remedial notice only at the Lathrop, California distribution facility where the election took place. The Charging Party and the General Counsel except, arguing that copies of the remedial notice should be posted at the Respondent's offices companywide. We find merit in this exception.

The Board has "consistently held that, where an employer's overbroad rule is maintained as a companywide policy, we will generally order the employer to post an appropriate notice at all of its facilities where the unlawful policy has been or is in effect." *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), citing, e.g., *Albertson's, Inc.*, 300 NLRB 1013 fn. 2 (1990), enf. denied on other grounds mem. *NLRB v. Albertson's, Inc.*, 17 F.3d 395 (9th Cir. 1994). Here, Gilbert testified that the handbooks were distributed at all of the Respondent's distribution centers and that he assumed they were also distributed at all of the retail stores. In the absence of contrary testimony, we will modify the judge's Order to provide for companywide posting of the remedial notice. We will also modify the judge's Order to conform with that recently issued in *Guardsmark, LLC*, supra.[5]

III. THE RESPONDENT'S CONDUCT DOES NOT WARRANT SETTING ASIDE THE ELECTION

On July 7, 2004, pursuant to a Stipulated Election Agreement, an election was held in the warehouse employees' unit sought by the Union. The tally of ballots showed that out of 285 valid votes counted, there were 107 votes for and 175 votes against the Union; with no challenged ballots. The judge recommended that the election be set aside on the basis of the Union's Objections 1 and 4. Objection 1 alleges that the Respondent, through its agents, campaigned in the voting area. Objection 4 alleges that the Respondent maintained unlawful rules, specifically the general confidentiality provisions discussed above. We find, contrary to the judge, that the objections have no merit and we, therefore, overrule the objections for the following reasons.

A. Objection 1 —Campaigning by Lead Employees

The Respondent employed approximately 15 individuals classified as lead employees at the time of the election. The lead employees assist supervisors and are responsible for crews of approximately six employees. The lead employees have no authority to hire, fire, set wage rates, discipline, or grant time off, but they are authorized to give other employees work assignments, to

[3] Prior to amendment at the hearing, the complaint alleged that the Respondent maintained and distributed an employee handbook "that contains a section entitled 'Corrective Action/Employee Conduct' which states, inter alia: . . . [L]isted below are examples of conduct that may result in disciplinary action . . . Unauthorized disclosure of confidential information regarding customers, employees, or the business of the company." The complaint did not mention the immediately following "Privileges of a Team Member" section, which, as noted above, states that employee wage rates are confidential company information and should not be discussed with fellow employees. Though the complaint was verbally amended at the hearing, the amendment also did not explicitly reference the "Privileges of a Team Member" section.

[4] Member Schaumber does not pass on whether a different result might be obtained absent the particular provision.

[5] "The Respondent may comply with our Order by rescinding the unlawful provisions and republishing its employee handbook without them. We recognize, however, that republishing the handbook could entail significant costs. Accordingly, the Respondent may supply the employees either with handbook inserts stating that the unlawful rules have been rescinded, or with new and lawfully worded rules on adhesive backing which will cover the old and unlawfully broad rules, until it republishes the handbook without the unlawful provisions. Thereafter, any copies of the handbook that are printed with the unlawful rules must include the new inserts before being distributed to employees." *Guardsmark*, supra, 812 fn. 8. Consistent with *Guardsmark*, our Order will additionally provide the Respondent with the option of immediately rescinding the unlawful provisions or modifying the existing provisions to make clear that the discussion of wages and other terms and conditions of employment is not prohibited.

reassign employees from one job to another, and to direct employees in their work.[6]

The Respondent's labor relations consultant, John Henderson, testified that during the election a Board agent requested the Respondent to control the employees near the voting line because the employees were loud and "milling around." The Respondent selected four of its lead employees to maintain control pursuant to the Board agent's request. According to Henderson, the Respondent asked the lead employees to "go back to the polling place and to try and control the crowd and make sure that people were orderly in line and[,] if they were done voting[,] to leave the area and go back to work."

Employee Manuel Lopez credibly testified that while he was waiting in line to vote, he heard one of the lead employees tell other employees to "get in line, hurry up, go to work, don't be talking, comments like that." According to Lopez, three lead employees,

> were all together and just, how do I say it, not directly at anybody, but you know telling each other [the Union] ain't going to win, the [U]nion is going to lose. . . . They make [sic] comments to each other about vote no and stuff but never directly to no one, no individual, but made sure people heard.

The judge found that the lead employees were the Respondent's nonsupervisory agents and that their statements at the voting line, which he found disparaged the Union and suggested that employees vote "no," were objectionable under *Milchem, Inc.*, 170 NLRB 362 (1968). The Respondent excepts, arguing that the lead employees were not its agents and that, even if they were agents, the lead employees did not engage in *Milchem* electioneering because they did not hold any conversations with employees waiting in line to vote.

In *Milchem*, supra at 362, the Board found that it is objectionable for parties to engage in "sustained conversation[s]" with voters while the voters are in the polling place waiting to vote. Here, while the employees waiting in line to vote may have overheard the statements made by lead employees, those statements were not conversations with employees. In fact, according to Lopez (the only witness among 285 voters who testified about hearing these statements),[7] the lead employees were speaking to each other, not to the employees waiting to vote. See *Midway Hospital Medical Center,* 330 NLRB 1420 fn. 1 (2000) (union observer's loud declamations against the employer were not objectionable because they were not directed at the employees).[8] Accordingly, we find, contrary to the judge, that whether or not the lead employees were agents, the Respondent did not engage in objectionable campaigning near the polling site.[9]

B. Objection 4—Maintenance of the Confidentiality Provisions

In *Dal-Tex Optical Co.*, 137 NLRB 1782, at 1786–1787 (1962), the Board held that conduct in violation of Section 8(a)(1) of the Act that occurs during the critical period prior to an election is "a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in an election." There is an exception to *Dal-Tex*, however, where the conduct is so minimal or isolated that "it is virtually impossible to conclude that the misconduct could have affected the election results." *Clark Equipment Co.*, 278 NLRB 498, 505 (1986). Applying *Dal-Tex*, the judge found that the Respondent's violation of Section 8(a)(1) by maintaining overbroad confidentiality provisions was a fortiori objectionable conduct that interfered with the election results. The Respondent excepts, arguing that, even if the provisions violated Section 8(a)(1), the conduct fits within the "virtually impossible" exception to *Dal-Tex*. We agree.

The confidentiality provisions were not adopted in response to the Union's organizing campaign. While copies of the 2000 handbook were distributed widely, the 2003 handbook was only distributed to five unit employees. There is no evidence that the Respondent called employees' attention to the confidentiality provisions in either handbook when it was distributed or during the critical preelection period. There is also no evidence that these provisions were ever enforced.[10] To the contrary,

[6] Although our colleague relies on the fact that the employees "generally considered the leads to be their supervisors," there are no exceptions to the judge's finding that the lead employees were not supervisors.

[7] Lead employee Tapia, whose testimony is referenced by our colleague, testified only about the number of employees waiting in line to vote, not about overhearing the other leads' statements.

[8] Unlike our dissenting colleague, we do not find that the evidence warrants the inference that the lead employees were attempting to communicate with employees by their comments inter se. Thus, the cases cited by the dissent involving nonverbal attempts at direct communication with employees are inapposite.

[9] Chairman Battista therefore finds it unnecessary to pass on the issue of whether the lead employees were the Respondent's special agents for the limited purpose of maintaining order in the relevant area. Contrary to his dissenting colleague, Member Schaumber finds that the Union did not meet its burden of proving that the lead employees were the Respondent's agents for the purpose of making the alleged statements at the voting line. The Respondent simply directed the lead employees to maintain order at the voting line, not to convey management's position concerning the Union or to encourage employees to vote "no." It is an elementary rule of law that the party asserting agency status must prove that the act at issue was within the agent's authority. See *Ferro Concrete Construction Co. v. U.S.*, 112 F.2d 488 (1st Cir. 1940), cert. denied 311 U.S. 697 (1940). The Union did not meet its burden in this case.

[10] Notwithstanding cases cited by the dissent where maintenance of unlawfully overbroad rules were found objectionable, the Board held in

as stated above, there is affirmative evidence that employees openly discussed wages and other terms and conditions of employment during the critical period, and a chart listing job classifications and wage rates was posted in the employee break room.[11] Further, the Union lost the election by a wide margin of 68 votes.[12] Thus, it is virtually impossible to conclude that the employee handbook confidentiality provisions could have had an effect on the results of the election.[13]

Accordingly, we overrule both objections and certify the results of the election.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Longs Drug Stores California, Inc., Lathrop, California, its officers, agents, successors, and assigns, shall

1. Case and desist from

(a) Maintaining in effect confidentiality provisions in its "Mainland 2000" employee handbook and in its 2003 employee handbook, which may be understood as prohibiting employees from discussing their wages and other terms and conditions of employment with other employees and third parties, including union representatives.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the language consisting of (1) "Unauthorized disclosure of confidential information regarding customers, employees, or the business of the company" on page 13, under the heading "Corrective Action/Employee Conduct," in the "Mainland 2000" handbook, (2) "Your pay is confidential company information and should not be discussed with fellow employees," on page 14, under the heading "Privileges of a Team Member," in the "Mainland 2000" handbook, and (3) "Maintain confidentiality, including but not limited to, information regarding customers, employees and the company" on page 8, under the heading "Professional Behavior," in the 2003 handbook; or, alternatively, modify the language of the provisions to make clear that a discussion of wages and other terms and conditions of employment is not prohibited.

(b) Furnish all current employees with inserts for the "Mainland 2000" handbook and the 2003 handbook that (1) advise that the unlawful provisions above have been rescinded, or (2) provide the language of lawful provisions; or publish and distribute to all current employees a revised "Mainland 2000" handbook and a 2003 handbook that (1) do not contain the unlawful provisions, or (2) provide the language of lawful provisions.

(c) Within 14 days after service by Region 32, post at its facilities nationwide copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including

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Delta Brands, Inc., 344 NLRB 252, 253 (2005), that even accepting the premise that mere maintenance of an overly broad rule violates the Act, "it is not 'axiomatic' that such conduct warranted setting aside the election."

[11] Our colleague would have us believe that employees ignored the rule in regard to conversations among themselves, but would obey it in regard to conversations with union officials. There is no record basis for such an inference.

[12] The one-sided election vote and evidence of open wage discussions during the critical period distinguish this case from *IRIS, Inc.*, 336 NLRB 1013 (2001), where the Board found that the maintenance of an overbroad confidentiality rule in its employee handbook in violation of Sec. 8(a)(1) did not fall within the "virtually impossible" exception to *Dal-Tex* and therefore warranted setting aside the election which resulted in a 43-43 vote. *Freund Baking Co.*, 336 NLRB 847 (2001), is also distinguishable. Even though the vote there was not close, the handbook confidentiality provisions at issue were far more specific in prohibiting discussion of employee wages, hours, and other terms and conditions of employment. Further, employees were required to read the handbook when distributed to them and to signify in writing that they had done so. Finally, unlike the present case, there was no affirmative evidence of employees actively engaging in conduct prohibited by the confidentiality provisions. Chairman Battista and Member Schaumber did not participate in either *IRIS* or *Freund Baking.* They express no view whether those cases were correctly decided, but they agree that they are factually distinguishable.

[13] Our colleague argues that even if the two instances of alleged objectionable conduct (the leadmen's conversations and the maintenance of the confidentiality rule) do not present independent grounds for setting aside the election, together they interfered with employees' free choice such that the election result cannot stand. However, we have determined that the leadmen's conversations were not objectionable. Thus, we reject the dissent's argument that the cumulative effect of the challenged conduct warrants setting aside the election. Two instances of independently unobjectionable conduct do not rise to the level of objectionable conduct, even when viewed together.

Chairman Battista and Member Schaumber express no view on the appropriateness of the "virtually impossible" standard because they find that, in any event, the standard has been met in this case. See the Chairman's and Member Schaumber's position in *Washington Fruit & Produce Co.*, 343 NLRB 1215, 1223 (2004). For the same reason, they do not pass on the judge's finding that the totality of circumstances test of objectionable conduct in *Delta Brands, Inc.*, supra, a case which did not involve unfair labor practice allegations, should not apply here.

[14] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 24, 2004.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for International Brotherhood of Teamsters, Local 439, and that it is not the exclusive representative of these bargaining unit employees.

MEMBER LIEBMAN, dissenting in part.

Contrary to the majority's view, the election here should be set aside, based on two instances of objectionable conduct by the Employer:

> (1) electioneering by lead employees who, as Employer agents assigned to keep order in the voting line, made repeated statements, over the course of 20 minutes, disparaging the Union; and
>
> (2) maintenance of overbroad confidentiality rules in its employee handbooks, which we all agree violated Section 8(a)(1) of the Act,[1] because they prohibited talking about wages with co-workers and with outsiders.

Given Board precedent, the majority errs in finding the electioneering unobjectionable and in concluding that it is "virtually impossible" that the confidentiality rules could have affected the election results. Taken together, at least, the electioneering and the confidentiality rules are sufficient grounds to overturn the election.

[1] I join my colleagues in finding that the general confidentiality provisions in the Respondent's 2000 and 2003 handbooks violated Sec. 8(a)(1) and that the remedy should be modified. In finding the provisions unlawful, the majority relies on *Lutheran Heritage Village-Livonia*, 343 NLRB646, 649–652 (2004). Member Walsh and I dissented in part in that case finding that certain of the employer's rules were unlawful. In the present case, I find that under either the majority or dissenting view in *Lutheran Heritage*, supra, the Respondent's general confidentiality provisions are unlawful.

1. Electioneering by lead employees

Relying on *Milchem, Inc.*, 170 NLRB 362 (1968), the majority finds that "whether or not the lead employees were agents, the Respondent did not engage in objectionable campaigning near the polling site." In fact, however, the agency status of the lead employees is clear, and their conduct was objectionable under Board precedent, whether or not it fits neatly into the *Milchem* box.

a. Facts

In response to the Board agent's request to control the voters, the Employer sent four lead employees (leads) to keep order in the voting line and to instruct employees to return to work after voting. The employees generally considered the leads to be their supervisors. Three leads made comments about voting "no" and predicting the Union's defeat as they stood near the voting line for about 20 minutes. Although the leads directed these statements to each other and not to employees in line, the leads made the comments continually in voices audible throughout the line of voters.

b. Agency

The agency rules applicable here are well established. See *Tyson Fresh Meats, Inc.*, 343 NLRB 1335, 1337–1338 (2004) (holding that union stewards had actual authority to represent the union in the workplace and apparent authority to speak to employees waiting to vote).[2]

By expressly asking the leads to keep order in the voting line and to direct employees to return to work after voting, the Employer vested the leads with actual authority to do so. In turn, the leads had apparent authority to speak for the Employer as they carried out those duties. Here, the employees would reasonably believe that the leads were speaking and acting for the Employer as its agents, because the employees generally considered the leads to be their supervisors. The leads made comments

[2] Agency can be established by actual authority or apparent authority. Actual authority exists when a principal manifests to his agent the power to act on the principal's behalf. Such a manifestation may be express or implied. See, e.g., *Tyson Fresh Meats, Inc.*, supra, 343 NLRB 1339, quoting *Communications Workers Local 9431 (Pacific Bell)*, 304 NLRB 446 fn. 4 (1991).

Apparent authority results from a manifestation by a principal to a third party that another is his agent. "Under this concept, an individual will be held responsible for actions of his agent when he knows or 'should know' that his conduct in relation to the agent is likely to cause third parties to believe that the agent has authority to act for him." Id.

Finally, a "principal is responsible for its agents' conduct if such action is done in furtherance of the principal's interest and is within the general scope of authority attributed to the agent . . . [I]t is enough if the principal empowered the agent to represent the principal within the general area in which the agent has acted." Id., quoting *Bio-Medical Applications of Puerto Rico, Inc.*, 269 NLRB 827, 828 (1984).

opposing the Union in the election, in furtherance of the Employer's interest. The comments were also within the general area of the leads' actual authority because they were made while keeping order in the voting line. The Employer is therefore responsible for the conduct of the leads.

c. Objectionable nature of the conduct

Because the lead employees did not engage in conversation with employees waiting in line to vote, the majority finds the Board's decision in *Milchem*, supra, inapplicable and concludes that the leads' conduct was not objectionable. But the majority interprets the rule of *Milchem* too narrowly.

There—in order to prevent the "potential for distraction, last minute electioneering or pressure, and unfair advantage from prolonged conversations between representatives of any party to the election and voters waiting to cast ballots"—the Board held that "sustained conversation[s] with prospective voters waiting to cast their ballots, regardless of the content of the remarks exchanged" were objectionable. 170 NLRB at 362.

The Board has applied *Milchem* in situations analogous to this case, where no actual conversations occurred, but where employer agents nevertheless effectively communicated an antiunion message to waiting voters. See *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 567 (1995), enfd. in relevant part 97 F.3d 65 (4th Cir. 1996) (supervisor "effectively communicated" with employees in voting line by showing them poster listing union's history of strikes).[3]

Here, the leads' conduct implicates the rationale for the *Milchem* rule (distraction, pressure, unfair advantage) and amounts to effective communication with employees. Obviously, the leads intended employees to hear their antiunion remarks, as employees did.[4] Indeed, there is testimony (from employee Bernie Tapia) that there may have been 50 employees in line to vote at the time, more than the margin of the Union's defeat in the election. Another employee (Manuel Lopez) testified that there were 20–30 employees in line. Even accepting the lower figure, the leads' conduct, at least considered in conjunction with the possible effect of the Employer's confidentiality rules (discussed next) was sufficient grounds to set aside the election.

2. The Employer's unlawful confidentiality rules

As the majority acknowledges, conduct found to violate Section 8(a)(1) is "a fortiori" conduct that warrants setting aside an election, unless the Board finds it "virtually impossible" to conclude that the conduct could have affected the results of the election.[5] Until the recent decision in *Delta Brands*, it was settled that an employer's mere maintenance of an unlawful rule is objectionable conduct sufficient to set aside an election, whether or not the rule was also found to have violated Section 8(a)(1).[6] The majority now goes farther, refusing to set aside an election even where an 8(a)(1) violation *is* found.

The majority observes that while the Employer's handbooks were widely distributed, there is no evidence that the Employer called employees' attention to the confidentiality provisions or that the provisions were enforced. Indeed, says the majority, employees engaged in conduct that would seem to violate the rules. In any case, the Union lost the election "by a wide margin of 68 votes." Whatever weight these facts may have, they do not satisfy the "virtually impossible" standard that controls here, given the determination that the confidentiality provisions were not merely objectionable, but unlawful.

The facts in this case are similar to *Freund Baking Co.*, 336 NLRB 847 (2001). There, the Board set aside an election, based on an overbroad confidentiality rule published in a handbook. There was no evidence that the rule was enforced or that the rule caused employees not to discuss wages or other terms or conditions of employment. Id. at 847 fn. 5. The tally was 3 for and 30 against the petitioner. Noting that the margin of victory was substantial, the Board found that because the overbroad rule in the handbook was distributed to the entire

[3] This case is also analogous to *Pearson Education, Inc.*, 336 NLRB 979, 979–980 (2001), enfd. 373 F.3d 127 (D.C. Cir. 2004). There, applying the factors identified in *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118 (1982), the Board found that the employer had engaged in objectionable electioneering by hanging a campaign poster in a location employees had to pass in order to vote, which was the equivalent of a no-electioneering area, despite the lack of a formal designation. Here, the leads were agents of the Employer. They made their audible comments near the semi-open polling place (created by stacking boxes to form an enclosure with two entrances), continually for 20 minutes as different voters filed past.

[4] *Midway Hospital Medical Center, Inc.*, 330 NLRB 1420 (2000), cited by the majority, is distinguishable. There, the Board found that a union observer's loud complaints after being directed to leave the polling area—which were made to a union representative, management officials, and a Board agent in the polling area—were not objectionable, because the observer could not "reasonably be viewed as attempting to communicate with" employees. Id. at 1420 fn. 1. Here, the circumstances, including the content of the remarks made, strongly support the inference that the leads were attempting to communicate with employees.

[5] *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962); *Clark Equipment Co.*, 278 NLRB 498, 505 (1986).

[6] Compare *Delta Brands, Inc.,* 344 NLRB 252(2005) (refusing to set aside election, based on failure of proof that maintenance of rule affected election result) with *Pacific Beach Hotel*, 342 NLRB 372, 375 (2004) (setting aside election for maintenance of overbroad rule); *Iris U.S.A., Inc*., 336 NLRB 1013, 1013 fn. 3 (2001) (same); *St. Joseph's Hospita*l, 262 NLRB 1385 (1982) (same); and *Mervyn's*, 240 NLRB 54, 61 fn. 16 (1979) (same). I dissented in *Delta Brands*.

unit and employees could have reasonably construed the provision as prohibiting them from discussing terms and conditions of employment with coworkers or union representatives, it may have directly accounted for the union's margin of defeat. Id. Here, there is an even stronger case than in *Freund Baking* to set aside the election, because the Union's margin of defeat was proportionately smaller,[7] and the confidentiality rules at issue also violated Section 8(a)(1), triggering a more stringent standard.

Even if mere maintenance of the rule is insufficient to set aside the election, the record here does not virtually negate the possibility that employees were affected by the rule—the controlling standard. While the wages for job classifications (not individual employees) were posted in the break room and employees spoke among themselves about wages, there is no evidence that employees felt free to discuss their wages with those outside the company such as union representatives. Nor is there evidence that the Employer ever disavowed the rules or clarified that the rules did not prohibit employees from discussing their terms and conditions of work with union representatives. See *Pacific Beach Hotel*, supra, 342 NLRB at 347. To the contrary, a manager testified that individual employees' wages were confidential information.

The judge was correct in finding that the Employer's confidentiality rules may have inhibited employees from exercising their right to discuss their terms and conditions of employment with others, including union representatives. Out of the 285 unit employees who voted, it is possible—not "virtually impossible"—that at least 35 employees (a number sufficient to change the election outcome) would have voted for the Union, if not for the overbroad rules deterring them from speaking freely with union representatives.

3. Conclusion

Whether or not the two instances of objectionable conduct here present independent grounds for setting aside the election, certainly together they interfered with employees' free choice to a degree that the election result cannot stand. Accordingly, I dissent.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT publish or maintain in effect confidentiality provisions in our personnel handbooks which may be understood by our employees to prohibit them from discussing their wages and other terms and conditions of employment with their fellow employees or third parties, including union representatives.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed to them by Section 7 of the Act.

WE WILL rescind the language consisting of (1) "Unauthorized disclosure of confidential information regarding customers, employees, or the business of the company" on page 13, under the heading "Corrective Action/Employee Conduct," in the "Mainland 2000" handbook, (2) "Your pay is confidential company information and should not be discussed with fellow employees," on page 14, under the heading "Privileges of a Team Member," in the "Mainland 2000" handbook, and (3) "Maintain confidentiality, including but not limited to, information regarding customers, employees and the company" on page 8, under the heading "Professional Behavior," in the 2003 handbook; or, alternatively, WE WILL modify the language of the provisions to make clear that a discussion of wages and other terms and conditions of employment is not prohibited.

WE WILL furnish all of you with inserts for the "Mainland 2000" handbook and the 2003 handbook that (1) advise you that the unlawful provisions above have been rescinded, or (2) provide the language of the lawful provisions; or WE WILL publish and distribute to all of you a revised "Mainland 2000" handbook and 2003 handbook that (1) do not contain the unlawful provisions, or (2) provide the language of the lawful provisions.

LONGS DRUG STORES CALIFORNIA, INC.

Virginia L. Jordan, Esq., for the General Counsel.
David Faustman, Esq. (Grotta, Glassman & Hoffman, P.C.), of San Francisco, California, appearing on behalf of the Respondent.

[7] The majority distinguishes *Iris U.S.A.*, supra, in part because the election results were closer than the results here, but this distinction is insignificant in light of *Freund Baking*, supra.

David A. Rosenfeld, Esq. and *Caren P. Sencer, Esq. (Weinberg, Roger & Rosenfeld),* of Oakland, California, appearing on behalf of the Union.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. On May 24, 2004,[1] International Brotherhood of Teamsters, Local 439, AFL–CIO (the Union), filed a petition for a representation election in Case 32–CA–5259. Pursuant to a Stipulated Election Agreement, agreed upon by the Union and Longs Drug Stores California, Inc. (the Respondent), and approved by the Regional Director for Region 32 of the National Labor Relations Board (the Board), on June 10, 2004, an election by secret ballot was conducted on July 7,[2] and on July 14, the Union filed timely objections to the conduct of the election. Thereafter, on August 2, 2004, the Regional Director issued a report and recommendations on objections, finding and concluding that certain of the Union's objections to the election raised material issues of fact and law, which should be resolved at a hearing. A week later, on August 9, 2004, the Union filed the unfair labor practice charge in Case 32–CA–21550. After an investigation, on October 22, 2004, the Regional Director for Region 32 issued a complaint, alleging that Longs Drug Stores California, Inc., had engaged in, and continues to engage in, unfair labor practices within the meaning of Section 8(a)(1) of the National Labor Relations Act (the Act). Subsequently, on October 26, 2004, inasmuch as one of the Union's objections and the allegation of the complaint constituted "a single, overall controversy," the Regional Director issued an order consolidating the above-captioned matters for hearing. Respondent timely filed an answer to the complaint, essentially denying the commission of the alleged unfair labor practices. As scheduled, the merits of the complaint allegations and the Union's objections[3] came to trial before the above-named administrative law judge on January 10, 2005, in Oakland, California. At the trial,[4] all parties were afforded the opportunity to examine and to cross-examine witnesses, to offer into the record all relevant documentary evidence, to argue their respective legal positions, and to file posthearing briefs. All parties filed the latter documents, which have been carefully scrutinized and considered. Accordingly, based upon the entire record herein, including the post-hearing briefs and my resolution of the credibility of the witnesses, I make the following

[1] Unless otherwise noted, all events herein occurred during 2004.

[2] The tally of ballots showed that, of 285 valid votes counted, 107 votes were cast in favor of representation by the Union, and 175 votes were cast against the participating labor organization.

[3] On December 27, 2004, the Regional Director issued a document, entitled "Clarification Regarding Objections Noticed for Hearing," in which he set forth the issues for each of the Union's objections set for trial.

[4] During the trial, counsel for the General Counsel was granted permission to amend par. 5 of the complaint, which essentially conformed the allegations to the evidence, and counsel for the Union withdrew three of the Union's objections to the election.

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent, a State of Maryland corporation, with offices and places of business throughout the State of California and the western United States, including its warehouse and distribution facilities in Lathrop, California, has been engaged in retail pharmacy and general retail sales. During the 12-month period preceding the issuance of the complaint, in the normal course and conduct of its business operations, Respondent derived gross revenues in excess of $500,000 and purchased and received in California goods and products, valued in excess of $50,000, directly from suppliers located outside the State of California. Respondent admits that it is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2 (2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits that the Union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. UNFAIR LABOR PRACTICE ISSUES

The General Counsel contends that Respondent engaged in acts and conduct, violative of Section 8(a)(1) of the Act, by, at all times material herein, maintaining facially overbroad confidentiality provisions, which impinge upon its employees' Section 7 rights, in its employee handbooks, which were distributed to its employees. Respondent denied that said confidentiality provisions were facially unlawful.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

The record establishes that Respondent is a publicly-traded corporation, which owns and operates 450 retail drug stores in six western States, including California, and that it maintains three warehouse and distribution centers, including the distribution facility, at issue herein, located in Lathrop, California, from which goods and products are shipped to approximately 300 of its retail outlets. The Lathrop distribution facility consists of two buildings, an open 470,000 square foot building and a smaller building, located 2 miles away, in which seasonal items are stored. At all times material herein, approximately 350 employees worked in the larger building, and 10 to 12 employees worked in the smaller building. The record further establishes, and Respondent admits, that at all times material herein, it has maintained and distributed to its employees copies of its employee handbooks,[5] which set forth terms and conditions of employment applicable to employees at its retail stores

[5] There are, apparently, two employee handbooks, GC Exhs. 3 and 4, with the latter published with the intent to replace all other handbooks published prior to November 2003. However, the parties stipulated that, during the critical period prior to the election, May 24 through July 7, 2004, both handbooks remained in effect for, and were distributed to, bargaining unit employees at the Lathrop distribution facility, with GC Exh. 4 having been distributed to no more than five employees.

and at its distribution centers[6] and which are given to each new employee during his or her employment orientation period.[7] The General Counsel alleges that the confidentiality provisions, found in Respondent's employee handbooks, are violative of Section 8(a)(1) of the Act. Thus, as set forth on pages 12 and 13 of General Counsel's Exhibit 3, Respondent's "Mainland 2000" handbook, under the heading "Corrective Action/Employee Conduct," the following acts . . . may result in disciplinary action, up to and including termination. . . . Unauthorized disclosure of confidential information regarding customers, employees, or the business of the company," and, as set forth on page 8 of General Counsel's Exhibit 4, Respondent's November 2003 "Employee Handbook, under the heading, "Professional Behavior," Respondent ". . . expect[s] compliance with the following behaviors. . . . Maintain confidentiality, including but not limited to, information regarding customers, employees, and the company." With regard to the confidentiality rule, set forth in the November 2003 revised employee handbook, on page 11 of said handbook, employees are admonished that they are "expected to adhere to the policies and practices that protect . . . employee confidential information," thereby complying with "federal and state privacy laws," and that the company trusts them not to disclose "such information to unauthorized persons, or organizations, or using it for personal gain."

While denying being aware that a confidentiality provision existed in Respondent's employee handbooks (Honestly . . . . I wasn't aware that it was even in there), Larry Gilbert testified that, in his capacity as Respondent's human resources manager, he was responsible for enforcing the work rules contained in the handbooks and that the purpose of the work rules was to make employees aware of prohibited conduct. He further testified that he was aware employees sometimes violated said provisions; that he would investigate on such occasions and take corrective action, up to and including discharge, if necessary; and that he knew employees were adhering to a rule when no violations of said provision were reported.[8] Specifically regarding the confidentiality provisions, while the record establishes that employees openly discussed wages during the critical period prior to the election, a chart, listing job classifications, and applicable wage rates is posted in the employees' area in both buildings, and Respondent shares labor cost information with competitors for surveys and while Gilbert was not aware of any violations of said provisions, he testified that individual employees' wage rates constitute confidential information, which he would never divulge, and that he maintained, in the personnel office, much material, including social security numbers, home addresses, workers compensation claims, time off records, and employee work-related complaints, which Respondent considers confidential.

The Board's touchstone for determining the legality of work rules, such as Respondent's confidentiality provisions, is found in *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998)—"In determining whether the maintenance of rules . . . violates Section 8(a)(1), the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement." Recently, in *Lutheran Heritage Village—Lavonia*, 343 NLRB 646 (2004), the Board elaborated, stating that it must give alleged unlawful work rules "reasonable" readings and that, an inquiry into the legality of a work rule ". . .begins with the issue of whether the rule explicitly restricts activities protected by Section 7 of the Act." If not, concluding that a provision violates Section 8(a)(1) of the Act ". . . is dependent 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; and (3) the rule has been applied to restrict the exercise of Section 7 rights." With regard to Respondent's confidentiality rule, I note, at the outset, that, in most circumstances, the concept of employees' communications with their fellow employees and with third parties, such as union representatives, regarding their terms and conditions of employment is a right clearly privileged by Section 7 of the Act. *KinderCare Learning Centers*, 299 NLRB 1171, 1171–1172 (1990).[9] Herein, noting that Respondent's confidentiality provision prohibits disclosure of confidential information, pertaining to employees, counsel for the General Counsel argues that said rules ". . . can by reasonably understood by employees as restricting their right to discuss with each other and with outsiders their terms and conditions of employment and, therefore, are unlawful on that basis." In several recent decisions, including *Iris U.S.A., Inc.*, 336 NLRB 1013 (2001); *University Medical Center*, 335 NLRB 1318 (2001); and *Flamingo Hotel-Laughlin*, 330 NLRB 287 (1999), the Board had occasion to consider the language of confidentiality provisions, which were similar to those of Respondent. Thus, in *Iris U.S.A., Inc*., the respondent's confidentiality provision instructed employees that "all of the information, whether about IRIS . . . or employees is strictly confidential;" in *University Medical Center,* the respondent's rule prohibited "release or disclosure of confidential information concerning patients or employees;" and, in *Flamingo Hotel-Laughlin*, the respondent's rule prohibited employees from revealing confi-

[6] According to Larry Gilbert, Respondent's human resources manager at its Lathrop distribution, while most of the terms and conditions of employment, set forth in the handbooks, applied to employees at the retail stores and at the distribution centers, some applied only to employees at the retail stores and some applied only to the employees at the distribution centers.

[7] According to Gilbert, the employee handbooks were included in each new employee's "new hire orientation packet." He added that the orientation process is a "laborious" one, consuming 3 or 4 hours, with explanation of the handbook provisions being one aspect of it. "Employees are given the handbook and what we retain is one sheet of paper that says I have received the employee handbook. We don't go through [it] with them." However, ". . . they were . . . encouraged . . . to read it in their time at home . . . ."

[8] Bernie Tapia, a lead person for Respondent in its inventory control department, testified that employees were expected to abide by the warehouse rules and faced discipline for violating them.

[9] This statutory right is not an unfettered one. Thus, for example, employees' communications with others may not be so disloyal as to constitute "a disparagement or vilification of the employer's product or reputation." *Sahara Dotsun*, 278 NLRB 1044, 1046 (1986).

dential information about "fellow employees." As explained by former Chairman Hurtgen concurring in *IRIS U.S.A., Inc.,* supra at 1014, and by the Board in *University Medical Center*, supra, at 1322, the language of such a rule ". . . is unlawfully broad because it could reasonably be construed by employees to prohibit them from discussing information concerning terms and conditions of employment. . . which they might reasonably perceive as being within the scope of the broadly-stated category of 'confidential information' about employees" with other employees or with union representatives. From the foregoing, what is manifestly certain is that the Board's concern is with the utter ambiguity of such confidentiality provisions and the stifling effect of their incertitude upon employees' Section 7 activities and that, in order to overcome a presumption of invalidity, an employer must make it clear to employees that the thrust of an inexplicitly-worded confidentiality rule is not to prohibit discussion of their terms and conditions of employment. See *Vanguard Tours,* 300 NLRB 250, 264 (1990).

I agree with counsel for the General Counsel that Respondent's provisions patently demonstrate the vice of overbroad confidentiality rules. Thus, while Respondent's confidentiality provisions do not expressly prohibit employees from discussing their terms and conditions of employment, neither provision defines the ambiguous term "confidential information," leaving said language susceptible of interpretation that such includes information pertaining to the employees' terms and conditions of employment. Moreover, as noted by former Chairman Hurtgen, the nondisclosure prohibition seemingly extends to anyone, including fellow employees and third parties, including union representatives. Finally, the language on page 11 of General Counsel's Exhibit 4, which suggests that employees, who disclose confidential information, do so in violation of federal and state privacy laws, enforces the seriousness, which Respondent attaches to the nondisclosure of undefined confidential information, and might well inhibit employees in the exercise of their Section 7 right to discuss their terms and conditions of employment with each other and union representatives. While, in defense, counsel for Respondent points out that employees openly discussed wages and working conditions during the preelection period without being disciplined and that job classifications and accompanying wage rates are posted in the facility, such lack of enforcement may only demonstrate Respondent's fear of interfering with the laboratory conditions prior to the representation election, and there is no evidence that any employees disclosed information about their working conditions to the Union's representatives. In the latter regard, as Larry Gilbert[10] pointed out, inasmuch as no violations of the confidentiality provisions were ever reported to him, one may presume that each was effective in curbing disclosure of employees' terms and conditions of employment to outside entities. Based upon the foregoing, I agree with the General Counsel and counsel for the Union[11] and find that Respondent's confidentiality rules are violative of Section 8(a)(1) of the Act. *IRIS U.S.A., Inc*., supra; *University Medical Center*, supra.

The Union's Objections to the Election

Two of the Union's objections to conduct, by Respondent, which allegedly affected the results of the July 7, 2004 representation election, remain at issue. Initially, I consider the objection, which alleges "the Employer maintained unlawful rules," and note that the Regional Director, in his December 27 "clarification" document, stated that the rules, which he set for hearing, are those alleged as violating Section 8(a)(1) of the Act in the instant complaint—Respondent's confidentiality rules. I have found above that, in fact, Respondent published and maintained confidentiality provisions in its employee handbooks, which were distributed to employees during the critical period preceding the representation election; that said rules were facially overbroad, susceptible of being interpreted as prohibiting employees from disclosing and discussing their terms and conditions of employment; and that, therefore, as did the respondent in *IRIS U.S.A., Inc*., supra, Respondent engaged in serious unfair labor practices in violation of Section 8(a)(1) of the Act. In this regard, the usual test for the validity of an objection is whether the asserted conduct ". . . had a reasonable tendency to effect the outcome of the election" (*Delta Brands, Inc*., 344 NLRB 252 (2005)), and "it is well settled that conduct in violation of Section 8(a)(1) of the Act that occurs during the critical period prior to an election is 'a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in an election.'" *IRIS U.S. A., Inc.,* supra; *Dal-Tex Optical Co.,* 137 NLRB 1782, 1786 (1962).[12] Nevertheless, counsel for Respondent points to the Board's decision in *Delta Brands, Inc*. and asserts that decision is "dispositive" of the issues presented by this objection. I disagree. Thus, in *Delta Brands, Inc*., a case involving objections to an election with no accompanying alleged unfair labor practices, the issue, before the Board, was whether an employer's mere maintenance of an alleged overbroad no-solicitation rule during the critical period before a representation election was sufficient to overturn the results of the election. The Board held that, assuming the rule was facially overbroad, absent a showing that any employee was affected by its existence, the rule was enforced during the critical

[10] I believe Gilbert may well have dissembled in asserting he was unaware of the existence of the confidentiality provisions of the employee handbooks. In this regard, he was responsible for enforcing the work rules and for imposing discipline for violations. Moreover, he conducted orientation sessions for new employees and was cognizant of what types of employee information was considered confidential by Respondent.

[11] Counsel for the Union argue that Respondent's confidentiality provisions are also unlawful because they may prevent employees from disclosing information pertaining to the financial condition of the company to union agents. In this regard, counsel argues that such information, including plans for layoffs and plant or store closures, would aid the Union in its organizing efforts. Counsel further argues that, insofar as the rules may be construed as precluding disclosure of information pertaining to vendor and supply lists, shipping plans, and sale plans, which information would be necessary for possible peaceful boycotts, Respondent's confidentiality provisions are overbroad. Given my finding herein, I need not rule on counsels' theories and suggest that they may be best put before the Board for its consideration.

[12] The Board has traditionally recognized a limited exception to this rule—where the conduct ". . . is so minimal or so isolated that 'it is virtually impossible to conclude that the misconduct could have affected the election results.'" *IRIS U.S.A., Inc*., supra at 1013; *Clark Equipment Co*., 278 NLRB 498, 505 (1986).

period, or there was any mention of it during the critical period, ". . . the mere maintenance of [such a] rule will not be the basis for overturning an election where [the petitioning labor organization] was in a position to advise employees of their rights." Id. at 253. Contrary to counsel, the lack of an accompanying unfair labor practice allegation in *Delta Brands, Inc.* is a critical distinction inasmuch as ". . . conduct which may interfere with the 'laboratory conditions' for an election is considerably more restrictive than the test [for] conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1)." *Dal-Tex Optical Co.*, supra. Moreover, Respondent's confidentiality rule applied to the entire bargaining unit and, as such was published in the employee handbooks, which were distributed to employees during orientation and which employees were expected to read, was widely disseminated to all employees. Finally, as in *IRIS U.S.A., Inc*., the ambiguity of Respondent's rule, accompanied by the language in the 2003 employee handbook, which warns that employees, who fail to adhere to the confidential information prohibition, act in contravention of federal and state law, may well have inhibited employees from exercising their Section 7 right to discuss their terms and conditions of employment with others, including union representatives. Accordingly, based upon the foregoing, while it is true there is no record evidence of enforcement of the rule during the critical period and while I understand the import of *Delta Brands, Inc*., I adhere to traditional Board law and find that the Union's objection, which involves the identical conduct as Respondent's serious unfair labor practice, is meritorious. *IRIS U.S.A., Inc*., supra.[13]

Turning to the Union's next objection, concerning alleged campaigning activities by certain lead personnel, acting as supervisors or agents of Respondent, directed at employees as they waited to vote in the election, the record establishes that Respondent employed approximately 300 workers at its Lathrop distribution facility at the time of the election, including 10 to 12 supervisors and 15 individuals classified as lead employees; that the lead employees, who assist the supervisors and are responsible for crews of approximately 6 employees, are hourly employees; and that the lead employees, who have no authority to hire, fire, set wage rates, discipline, or grant time off, are authorized to give other employees work assignments, to reassign employees from one job to another, and to direct them in their work; and that the lead employees exercise some degree of discretion in assigning work to employees. With regard to the authority of lead persons to assign and direct the work of employees on their crews, Bernie Tapia testified that, while, on a daily basis, employees, who are on his work crew, know their job functions and what work they should be performing, when he selects an employee for a change of job assignment, he takes into account the employee's work skills and experience and the nature of the work. Tapia further testified that he is authorized to handle "minor" disciplinary problems, which he defined as those not requiring written disciplinary action, and employees know he is the person, whom they should approach, with any work problems. Finally, in these regards, Manuel Lopez, who, at the time of the election, worked as an inventory control employee for Respondent, testified that Bernie Tapia was the lead person in his department; that Tapia held a meeting with the inventory control employees at the start of each work shift in order to give them their work assignments; and that "most of the employees" considered the leads to be their supervisors.

With regard to the merits of the allegation, John Henderson, who is employed by Cruz and Associates, a labor relations consulting company, and who worked for Respondent as a labor relations consultant during the preelection campaign, testified that, during the election voting hours on July 7,[14] he, Larry Gilbert, other management representatives for Respondent, and other employees of Cruz and Associates, were stationed in a conference room of the main distribution facility building, waiting for the voting to conclude,[15] and that, sometime after 9 that morning, Mike Moore, the facility manager, received a "walkie-talkie" call[16] from a supervisor in the building. The sound was audible throughout the room, and "the call was that the Board agent had sent an employee looking for a supervisor to ask that there be some control exerted over the employees outside the polling area."[17] Upon the conclusion of the call, "we had a discussion . . . in the conference room and decided that we could ask some of the lead workers to go . . . and control the crowd that was waiting to vote because they

[13] Counsel for the Union argue that, in addition to Respondent's confidentiality provisions, its "unlawful rules" objection also encompassed Respondent's rules, prohibiting solicitations, and that the latter work rules are likewise overbroad and, therefore, unlawful. Contrary to counsel, while the Union may well have included Respondent's solicitation rules in its "unlawful rules" objection, the Regional Director did not include them within the objections set for hearing in the instant matters; nor did the Regional Director allege Respondent's solicitation rules as unlawful in the instant complaint. In these circumstances, especially noting that the Regional Director specifically clarified the "particular matters," pertaining to the objections, which were to be set for trial before the above-named administrative law judge, I have no authorization to consider the merits of the Union's assertion that Respondent's solicitation prohibition also constitutes objectionable conduct. Moreover, assuming that I do posses such authority, I would not find merit to counsel's contention. Thus, while the solicitation rules, in both GC Exhs. 3 and 4, state, "If you observe solicitation on company property at any time, report it to your manager immediately" and while each may arguably be unlawful, there is no record evidence either that employees were aware of the rules, which are contained in multipage documents, or that employees were ever disciplined for soliciting for the Union. In these circumstances, an objection, based solely on the presumed facial illegality of the solicitation provision, would not be meritorious. *Delta Brands, Inc*., supra.

[14] The election hours were 9 until 11 a.m. and 8 until 10 p.m. in the main distribution facility and 11:45 a.m. until 12:45 p.m. in the smaller building

[15] According to Henderson, "We had been told by the attorney handling the case not to be anywhere near the election."

[16] All facility managers were equipped with NEXTEL cellular telephones.

[17] Moving 12 feet high stacks of boxes to create an enclosed 20 square foot voting area with two entrances, Henderson testified, created the polling area. He added that the polling enclosure was not a private area. Thus, ". . . it was open to the back of the warehouse," and ". . . you could easily hear inside what was going on outside and visa versa."

were not supervisors. . . ."[18] Henderson added that four lead personnel, Bernie Tapia, Randy Delatta, Marvin Andrews, and Mario Bustamante, were selected to comply with the Board agent's request, and Moore telephoned the supervisor, to whom he had previously spoken, and told him ". . . to ask the four lead workers . . . to go back to the polling place and to try and control the crowd and make sure that people were orderly in line and, if they were done voting, to leave the area and go back to work." Henderson further testified that, upon conclusion of the morning voting period in the main facility, he spoke to lead persons Tapia and Andrews, and "they told me that they went back to the polling area. There were a large number of employees milling around. It was quite loud. They [told those who had yet to vote] to get in line. If they had voted, please go back to work and to keep the noise down . . . ." According to Henderson, the two lead workers also told him they were with the employees, who were waiting to vote, for no more than 15 to 20 minutes between 9:15 and 9:45 a.m. As to what occurred that morning when the lead personnel[19] enforced management's instructions, Manuel Lopez testified that he was in the voting line, which stretched from an entrance to the voting area back into the work area of the distribution facility, for "roughly 20 minutes," that Tapia, Bustamante, and Delatta were standing near the line the entire time he was in the area, and that Delatta ". . . was telling [the employees] get in line, hurry up, go to work, don't be talking, comments like that." Also, according to Lopez, the three lead persons ". . . were all together and . . . not directly at anybody . . . telling each other they ain't going to win, the union is going to lose. . . . They made comments to each other about vote no . . . but never directly to [any] individual but made sure people heard."[20] Asked by me if he was describing a single incident, Lopez replied that the three leads made these comments "continually with different people as they were coming through." Bernie Tapia contradicted Lopez, stating that, upon being instructed by the production supervisor to walk over to the line of workers, who were waiting to vote, and make sure those, who voted, returned to work, he went to the voting area, and "I just made sure that everyone standing in line kept walking forward till they got to the point of voting. When they got out, I just watched as they walked away." Tapia stated he remained in the voting area "probably about an hour" until the completion of the voting period at 11 a.m. but denied directly telling any employee to vote no. Further, while admitting there were times the four or five lead personnel talked among themselves while in the voting area, he was certain that their talk was about work and not the election.

Having carefully considered the credibility of each, I credit Manuel Lopez' version of what occurred over that of Bernie Tapia. Thus, Lopez impressed me as testifying in a veracious manner and appeared to be significantly more candid than Tapia. Further, the latter failed to specifically deny the essence of Lopez' testimony—that, while positioning themselves near the line of employees, who were waiting to vote, lead personnel, including him, in voices audible to the employees, made disparaging comments about the Union and suggested employees should vote "no." Finally, Tapia and John Henderson contradicted each other as to the amount of time the former spent near the line of employees, who were waiting to vote in the election, with Tapia saying he remained there until the close of the morning voting period at 11 a.m. and Henderson saying Tapia told him they left the voting area by 9:45 a.m. In these circumstances, I find that, on the morning of the election, acting pursuant to instructions from managers, lead personnel, including Bernie Tapia, Randy Delatta, and Mario Bustamante, stood near the line of employees, who were waiting to vote, and, while maintaining discipline, in voices audible to the employees, continually disparaged the Union and urged employees to vote "no."

Counsel for the Union argue that Respondent's lead persons are supervisors within the meaning of Section 2(11) of the Act and, if not, were acting as its agents, within the meaning of Section 2(13) of the Act, when maintaining order on the voting line during the time of the election. Contrary to counsel for the Union and in agreement with counsel for Respondent, I do not believe the lead personnel are supervisors. Thus, while it is true that said individuals are authorized to assign work and, utilizing a degree of discretion, to change the work assignments of other employees and that "an individual is a supervisor under Section 2(11) of the Act if that person exercises any of the supervisory authority set forth therein with independent judgment," on a daily basis, Respondent's employees normally know their work assignments and the jobs they are to perform. Moreover, the fact that lead personnel select the employees, whose work assignments will be changed, appears to be demonstrative of nothing more than ". . . the knowledge expected of experienced persons regarding which employees can best perform particular tasks." *Hexacomb Corp*., 313 NLRB 983, 984 (1994); *Quadrex Environmental Co.*, 308 NLRB 101 at 101 (1992). However, I agree with counsel for the Union that the lead workers acted as Respondent's agents while they acted to maintain order on the line of employees waiting to vote in the representation election. In this regard, "the burden of proving an agency relationship is on the party asserting its existence." *Tyson Fresh Meats, Inc*., 343 NLRB 1335, 1337 (2004). An alleged agent may have actual authority or apparent authority. The former ". . . refers to the power of an agent to act on his principal's behalf when that power is created by the principal's manifestation to him. Said manifestation of authority may be either express or implied." Id; *Communications Workers Local 9431 (Pacific Bell)*, 304 NLRB 446 at fn. 4 (1991). On the other hand, apparent authority exists when there has been some 'manifestation' by the employer to employees that creates a reasonable basis for the employees to believe that the employer has authorized the alleged agent to perform the acts in question." *Teddi of California,* 338 NLRB 1032, 1037 (2003). Further, with respect to the principal's liability for the actions of its agent, such responsibility is established ". . . if such action is done in furtherance of the principal's interest and is within the general scope of au-

[18] The lead employees were eligible voters, whose names were on the *Excelsior* list.

[19] According to lead person, Bernie Tapia, each of the four or five lead workers, who was in the voting area, wore a T-shirt, with "Vote No" across the front. John Henderson testified that Respondent placed the T-shirts in the employee break room on the day of the election.

[20] Lopez stated that the lead persons' words were audible "all through the line."

thority attributed to the agent . . . it is enough if the principal empowered the agent to represent the principal within the general area in which the agent has acted." *Tyson Fresh Meats*, supra; *Bio-Medical Applications of Puerto Rico, Inc.,* 269 NLRB 827, 828 (1984).

Herein, the record evidence is that Respondent's lead personnel assign work, reassign work to employees, and resolve minor disciplinary problems and that Respondent specifically authorized four lead persons to maintain order and decorum on the line of employees, who were waiting to vote in the representation election. These factors convince me that Respondent gave its lead personnel actual authority to represent its interests in the voting area on the morning of the election and that, while there is no affirmative evidence that Respondent specifically authorized said individuals to utter the comments which are attributed to them, speaking about the Union fell within the range of their authority. This is so, for "it is enough if the principal actually empowered the agent to represent him in the general area within which the agent acted." *Tyson Fresh Meats*, supra at 4, quoting *Teamsters Local 886* (*Lee Way Motor Freight*), 229 NLRB 832 at fn. 5 (1977). Moreover, under the concept of apparent authority, I think that Respondent created a perception that its lead personnel represented its interests when they conversed in the presence of the employees, who were waiting in line to vote. Thus, Respondent's lead personnel held daily meetings with employees in order to give to them their work assignments, resolved minor grievances, changed employees' work assignments, and were considered by employees to be supervisors. Moreover, the lead personnel were in the voting area maintaining order among the employees, who were in line to vote. In these circumstances, I believe that Respondent ". . . either intended employees to believe that the [lead persons] were acting for [Respondent] when they spoke to employees in the voting line or that [Respondent] should have realized that the employees waiting in line to vote would have perceived the [lead persons] as [Respondent's] agents." *Tyson Fresh Meats*, supra. Accordingly, I find that Respondent was responsible for the actions of its lead personnel, who were in the voting area during the morning election period at its distribution facility.[21]

Having determined that Respondent was responsible for the acts and conduct of its lead personnel, who were in the voting area, the question remains whether they engaged in objectionable conduct. In *Michem, Inc*., 170 NLRB 362 (1968), the Board promulgated a strict rule, concluding that sustained conversations between supervisors or agents of one of the parties to a representation election and employees, who are waiting to cast ballots, constituted objectionable conduct. The Board held ". . . that the potential for distraction, last minute electioneering or pressure, and unfair advantage from prolonged conversations between representatives of any party to the election and voters waiting to cast ballots is of sufficient concern to warrant a strict rule against such conduct, without inquiry into the nature of the conversations." Herein, Respondent's lead personnel, while standing together close to the voting line for as long as an hour, made disparaging comments about the Union and suggested that employees cast "no" votes. While, concededly, none of the leads directly engaged any employee in such conversation, as they spoke in loud enough voices to make certain their comments were audible to all in the voting line, their obstructive intent was patently obvious. Therefore, in my view, the vice, which the *Milchem* rule was intended to prevent, was blatantly flaunted by Respondent's lead personnel and the Union's objection clearly must be found meritorious. *Tyson Fresh Meats,* supra.

In the foregoing circumstances, having found each of the Union's existing objections to have merit, I conclude that Respondent's acts and conduct were sufficiently serious to have destroyed the laboratory conditions, which are required for the unfettered selection of a bargaining representative. Accordingly, I remand Case 32–RC–5259 to the Regional Director for Region 32 for the purpose of conducting a new election at such time as he deems circumstances permit the free choice of a bargaining representative.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By, at all times material, publishing and maintaining in effect confidentiality provisions in its personnel handbooks, which, by their terms, may be understood as prohibiting employees from discussing their wages and other terms and conditions of employment with fellow employees and third parties, such as union representatives, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

4. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

I have found that Respondent engaged in serious unfair labor practices within the meaning of Section 8(a)(1) of the Act. Therefore, I shall recommend that Respondent be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act, including the posting of a notice, delineating for its employees its acts of misconduct.

[Recommended Order omitted from publication.]

[21] Counsel for Respondent contends that it acted at the behest of the Board agent when it sent its lead personnel to the voting area in order to maintain decorum on the voting line. In my view, while the Board agent was ultimately responsible for maintaining order on the voting line, when it acted in compliance with the Board agent's wishes and appointed its lead personnel to monitor the employees, who waited to vote, Respondent alone bore responsibility for their acts and conduct.

Also, contrary to counsel for Respondent, I believe that the lead persons herein were no less agents of Respondent than were the shop stewards, in *Tyson Fresh Meats*, supra, agents of the union. Thus, while there are obvious fact differences, Respondent admitted it gave a range of actual authority to the lead personnel to maintain order on the voting line. Moreover, by utilizing the lead workers, who assign work, change work assignments, and resolve minor employee problems, to maintain order on the voting line, Respondent clearly created the perception that the leads represented its interests in doing so.