Pacific Beach Corporation *and* International Longshoremen and Warehouse Union, Local No. 142, AFL–CIO, Petitioner. Case 37–RC–4022

July 29, 2005

DECISION AND DIRECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The National Labor Relations Board has considered determinative challenged ballots and objections to an election held on August 24, 2004,[1] and Administrative Law Judge James L. Rose's report[2] recommending disposition of those challenges and objections. The election was conducted pursuant to a Decision and Direction of Second Election issued on June 30. The tally of ballots shows 179 for and 174 against the Petitioner, with 12 challenged ballots.

First, we adopt the judge's recommendation to overrule the Employer's objections. The judge found, and we agree, that (1) the Petitioner's distribution, before the election, of an unaltered NLRB flyer and a union pamphlet entitled "A Guide for New Members" was not objectionable; and (2) Carmelita Fontillas and Reben Bumanglag were not statutory supervisors, and thus their alleged conduct did not warrant setting aside the election.[3] In addition, we adopt the judge's finding that the Employer's decision to grant promotions and raises to landscaping employees during the critical period interfered with the election and requires, if appropriate, that the Board hold a new election.

Second, we reverse the judge and find that (1) Gordon Campbell and Kahikina Kanekoa were not statutory supervisors, and thus the judge erred by sustaining the Petitioner's challenges to their ballots; and (2) the Employer substantially complied with the *Excelsior* rule, and the judge erred by sustaining the Petitioner's objection to the Employer's *Excelsior* list.[4]

Finally, we find it unnecessary to pass on the judge's finding that the Employer's notice-of-election posting did not comply with the Board's posting rules.[5]

Based on the above, we remand this case to the Regional Director and direct him to open and count the ballots of Gordon Campbell, Kahikina Kanekoa, Reden Bartolome, Alma Hamamoto, Diane Matayoshi, and Daniel Kadowski III.[6] If the Petitioner maintains its majority after these ballots are counted, we direct the Regional Director to certify the Petitioner as the exclusive collective-bargaining representative for the appropriate unit. In the alternative, if the revised tally shows that the Petitioner did not receive a majority of the valid votes counted, we direct the Regional Director to set aside the election and order a new election.

I. PROCEDURAL BACKGROUND

The Employer operates a hotel in Honolulu, Hawaii. The Board set aside an initial election and directed a second election, which was held on August 24. Both parties filed timely objections to conduct allegedly affecting the outcome of the election.

Following a hearing and the judge's report, the Employer submitted exceptions to the judge's decision. In response, the Petitioner initially filed an opposition brief that exceeded the Board's 50-page limit by 13 pages. On the same day, the Petitioner filed a 50-page amended opposition, to which it appended, among other things, a five-page analysis regarding the supervisory status of Gordon Campbell (appendix A). Following these submissions, the Employer filed a motion to strike appendix A and numerous statements in the Petitioner's opposing brief, cited as direct quotes, which did not appear in the record. The Petitioner opposed the motion.

A. Appendix A

The Employer argued, and we agree, that appendix A to the Petitioner's brief was nothing more than an attempt to circumvent the Board's 50-page limit. Rules and Regulations, Section 102.46. The appendix is 5 pages of argument and case law repeated verbatim from the Petitioner's initial brief, which was 13 pages over the Board's limit. We therefore grant this part of the Employer's motion and strike appendix A from the Petitioner's brief.

B. The Petitioner's Use of Quotations

The Employer argued that numerous passages in the Petitioner's brief should be stricken because they were presented as direct quotes, but they do not appear as such in the record. We do not find that the Employer was

[1] All dates are in 2004, unless otherwise indicated.

[2] On February 11, 2005, Judge Rose issued the attached Report on Objections and Challenges.

[3] As explained below, we do not rely on the judge's alternate findings for overruling these objections.

[4] Member Liebman finds it unnecessary to decide the Petitioner's *Excelsior* list objection, as discussed below.

[5] In the absence of exceptions, we adopt, pro forma, the judge's dispositions of the remaining 10 challenged ballots and Petitioner's remaining overruled objections.

[6] The judge recommended overruling the Petitioner's challenges to the ballots of Bartolome, Hamamoto, Matayoshi, and Kadowski, but the ballots remained sealed because the number was not sufficient to affect the outcome. Given our finding that Campbell and Kanekoa were not supervisors, these ballots may affect the outcome and must therefore be opened and counted.

prejudiced by this use of quotation marks. We therefore deny this part of the Employer's motion.[7]

II. DISCUSSION

A. Challenged Ballots

At the election, the Petitioner challenged 12 ballots. The judge sustained eight challenges, two of which are at issue, and overruled four. We find that the record does not support the judge's finding that Gordon Campbell and Kahikina Kanekoa are statutory supervisors.

1. Gordon Campbell

The judge found that Gordon Campbell, maintenance foreman, was a supervisor, and thus sustained the Petitioner's challenge. The judge found that Campbell had authority to assign jobs, monitor maintenance employees' work, approve vacations and time off, and ask employees to work overtime. He also had an office desk, and got a 30-percent discount—the same as managers and other supervisors.

Contrary to the judge, we find that the Petitioner has failed to meet its burden of showing that Campbell was a supervisor, and we therefore reverse the judge's finding. It was undisputed that Campbell did not have the authority to hire, fire, transfer, discipline, or discharge employees, or to effectively recommend such action. Although the judge found that Campbell had the authority to approve vacation and time-off requests, both Campbell and his supervisor, John Emerick, testified without contradiction that only Emerick had the authority to approve vacation and time-off requests.[8] Although Campbell was involved with scheduling the employees' work, Emerick testified that Campbell worked from a "boilerplate" schedule and made weekly changes according to Emerick's instructions. In addition, Campbell could ask employees to work overtime if needed, but he did not have the authority to require employees to work overtime. None of these duties indicates the exercise of independent judgment.

Regarding the judge's findings that Campbell had the authority to assign jobs to and monitor the work of the maintenance employees, the record indicates that Campbell received work requests from other departments and distributed those requests among the employees. He also checked to see if employees were performing their work properly and directed them to redo it if it was done incorrectly. The Board dealt with an individual with similar duties in *Lincoln Park Nursing & Convalescent Home,* 318 NLRB 1160, 1162–1163 (1995). In that case, a "maintenance supervisor" gave assignments to other employees, such as changing light bulbs and fixing leaks, and monitored the employees' performance of these tasks. The Board found that such direction did not require the use of independent judgment, and thus did not indicate supervisory status. Likewise, in *Tree-Free Fiber Co.*, 328 NLRB 389 (1999), the Board found that a team leader who received requests from other departments for his team's work, and decided when this work should be performed, did not have supervisory authority.

Similarly, in this case, Campbell's authority consisted merely of distributing routine tasks among the employees and monitoring the way each task was performed. We find that this does not rise to the level required to establish supervisory status. There is no evidence that qualifications and abilities are weighed in making these assignments.

In the absence of primary indicia of supervisory status, the judge relied on several secondary indicia to reach his conclusion that Campbell was a supervisor.[9] The Board has held, however, that secondary indicia should not be considered in the absence of at least one characteristic of supervisory status enumerated in Section 2(11). See, e.g., *Palagonia Bakery Co.,* 339 NLRB 515, 535 (2003); *Hausner Hard-Chrome of KY., Inc.*, 326 NLRB 426, 427 (1998). Therefore, for the reasons stated above, we reverse the judge's finding that Campbell was a supervisor and overrule the Petitioner's challenge to his ballot.

2. Kahikina Kanekoa

The judge found that Kahikina Kanekoa of the curator department was a supervisor, and thus sustained the Petitioner's challenge to her vote. The judge found that Kanekoa recommended hiring based on conducting applicant diving tests, and that she was the "go to" person when her supervisor was absent. We find that the Petitioner did not establish that Kanekoa was a supervisor, and we reverse the judge's finding.

Kanekoa was primarily involved in the maintenance and operation of a large fish tank. Because she was the most experienced diver in the department, she administered a diving test to prospective employees in the department. Kanekoa usually (but not always) sat in on a prospective employee's interview, and she gave her su-

[7] In denying this aspect of the Employer's motion, we do not interpret or rely on the quoted passages at issue as direct quotations from the record. Having reviewed the transcript, however, we note that the substance of the quotes is supported by the record. Member Schaumber is of the view that the Union appears to have used quotation marks to show emphasis rather than to indicate a verbatim quote from the record.

[8] Campbell testified, and documents confirmed, that Campbell initialed employees' vacation request forms, but Campbell stated that he did so only with Emerick's approval.

[9] For example, he found that Campbell worked at a desk, had the title of "supervisor," got a 30-percent discount like other managers and supervisors, and received higher pay than other maintenance workers.

pervisor, Hiram Higashida, her evaluation of the applicant's diving abilities based on the test dive.

Higashida testified that he was a certified diver, he observed each applicant's test dive, and he made his own evaluation of the applicants. An applicant's test dive was judged on three established sets of criteria. Higashida relied on Kanekoa for the technical aspects of the dive, but he made the final decision to hire an applicant.

In similar situations, the Board has found that administering tests to an applicant does not constitute an effective recommendation to hire. For example, in *Hogan Mfg.*, 305 NLRB 806 (1991), the Board found that an employee who administered welding tests was not a supervisor. The test had preestablished standards designed to determine the applicant's technical competence, and the employee's report on the results was not found to be an independent recommendation to hire. Id. at 807. Similarly, in *Farm Fan, Inc.,* 174 NLRB 723 (1969), the Board found that an employee who conducted welding tests for prospective employees was not a statutory supervisor. The employee's supervisor made an independent evaluation of the test and made the final decision to hire the applicant. Id. at 725. See also *Volair Contractors, Inc.,* 341 NLRB 673, 684 fn. 7 (2004) (ALJ found that administering welding test does not establish supervisory status).

The judge also relied on testimony that Kanekoa was the "go to" person when Higashida was absent, which was up to 70 percent of the time. This figure, however, is misleading. In addition to his duties at Pacific Beach, Higashida was the landscape manager at the Pagoda Hotel, the Employer's sister property, located 2 miles away. During the summer of 2004, although Higashida spent significant time at the Pagoda, he could be reached easily if needed. Higashida testified that he had the final authority on any special projects in the curator department at Pacific Beach. Thus, although Kanekoa was a contact person when Higashida was absent, she had no authority to make decisions on significant issues, and the Petitioner did not establish that she exercised independent judgment.

B. Employer's Exceptions

The Employer objected to the Petitioner's conduct before the election, asserting that the following alleged actions affected employees' free choice: (1) the Petitioner distributed an NLRB flyer and a union pamphlet entitled "A Guide for New Members"; (2) the Petitioner's pamphlet "A Guide for New Members" promised employees material economic benefits; (3) Carmelita Fontillas, an alleged prounion supervisor, interrogated and threatened employees; and (4) the Petitioner appointed an alleged supervisor, Reben Bumanglag, as an election observer. The judge recommended overruling these objections, to which the Employer took exception. We adopt the judge's findings, as described below.

During the critical preelection period, the Petitioner distributed to employees an unaltered NLRB flyer which generally set out election procedures and employees' rights, and a pamphlet entitled "A Guide for New Members" which outlined services and benefits offered to union members. The Board has never held that distributing an unaltered Board document is grounds for setting aside an election. But cf. *Sofitel San Francisco Bay,* 343 NLRB No. 82, slip op. at 2 (2004) (Petitioner's distribution of altered ballots required setting aside election); *SDC Investment, Inc.,* 274 NLRB 556, 557 (1985) (same). Further, the Board has consistently held that informing employees of existing benefits, rather than promising increased or additional benefits, is not objectionable. See, e.g., *Ameraglass Co.*, 323 NLRB 701, 701 (1997); *Ideal Macaroni Co.*, 301 NLRB 507, 507 (1991). As to the conduct of the alleged supervisors, we agree that the Employer has not met its burden by showing that either Fontillas or Bumanglag was a statutory supervisor.[10] Thus, we adopt the judge's recommendation to overrule these objections.

C. Petitioner's Exceptions

If the Petitioner loses its majority vote after the challenged—but overruled—ballots are counted, we find sufficient merit to one of the Petitioner's exceptions to require setting aside the election and directing a new one.[11]

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[10] In adopting the judge's decision to overrule objections regarding Fontillas, we do not pass on whether Fortillas' alleged conduct was objectionable. But we note, in light of the judge's reliance on *Sutter Rosseville Medical Center*, 324 NLRB 218 (1997), that the Board has recently clarified its position regarding supervisors' threats and promises of benefits during an election campaign. In *Harborside Healthcare, Inc.,* 343 NLRB No. 100, slip op. at 2 (2004), the Board stated that the proper inquiry is whether a supervisor's conduct "interfered with the employees' freedom of choice so as to materially affect the election outcome," and that explicit promises of benefits or threats of reprisal are not required to find conduct objectionable. Id. As to Bumanglag, we do not rely on the judge's additional reasoning that because the Employer put Bumanglag on the voter eligibility list, it cannot argue that he should not have been eligible because he was a supervisor. This is inconsistent with Board law. See, e.g., *Dauman Pallet, Inc.*, 314 NLRB 185, 194 fn. 13 (1994) (stating that "either party may challenge the eligibility of any person whose name has been placed by the employer on the *Excelsior* list"); *Kirkhill Rubber Co.*, 306 NLRB 559, 560 fn. 4 (1992) ("The placement of an employee's name on the *Excelsior* list is not determinative of that employee's status."). Finally, we do not rely on the judge's statement that, even if Bumanglag was a supervisor, he was sufficiently low level that his presence as an election observer would not reasonably affect the vote.

[11] Because we find grounds to set aside the election if appropriate, we do not pass on the issue of the Employer's compliance with the notice-of-election posting rule.

1. Raises for landscaping employees

As stated above, on June 30 the Board issued a decision setting aside the first election and directing a second election on August 24. On July 8, Landscaping Department Manager Hiram Higashida approved promotions and raises, retroactive to July 1, for six of seven employees in the department. The judge sustained the Petitioner's objection to these promotions and raises, and we agree that the Employer's conduct warrants setting aside the election.

The Board has held that providing economic benefits to employees during the critical period is presumptively coercive, but the employer can rebut the presumption by providing an explanation, other than the election, for the conduct. See, e.g., *Lampi LLC,* 322 NLRB 502, 502 (1996). Higashida stated that in his absence from Pacific Beach from 2000 to 2002, the landscaping department was reorganized, and when he returned in 2002, he considered reestablishing the former structure. But he presented no credible evidence to explain why he waited 2 years to implement the restructuring or why the changes occurred on the eve of the election. Thus, the judge did not credit Higashida's claim that the promotions were part of normal business operations. Moreover, the judge did not credit Higashida's testimony that he did not know about the upcoming election when he approved the promotions.

We agree with the judge that the Employer has not met its burden by showing that the raises were unrelated to the impending election, and we thus adopt the judge's finding that the Employer's conduct was objectionable.

2. Inaccuracies in the *Excelsior* list

On July 30, the Employer submitted to the Board its *Excelsior* list with 498 names and addresses. On August 9, the Petitioner informed the Employer that 26 addresses were incorrect, and the next day amended the number to 43 (8.6 percent). The Employer sent the Petitioner a corrected list on August 18. The final list contained 24 inaccuracies (4.8 percent). The judge concluded that the Employer acted in good faith in attempting to submit a complete and accurate list.

The judge, relying on *Woodman's Food Market,* 332 NLRB 503 (2000), found that the Employer's *Excelsior* list did not substantially comply with the rule because the number of inaccuracies (24) exceeded the margin of the vote (5). The Board has recently rejected this argument. In *Washington Fruit & Produce Co*., 343 NLRB No. 125, slip op. at 9–10 (2004), the Board stated that *omissions* from the *Excelsior* list—the issue in *Woodman's Food Market*—are treated differently than inaccuracies, and whereas the vote margin may be relevant in cases of omissions, the Board has allowed greater latitude in cases of inaccuracies. See also *Women in Crisis Counseling*, 312 NLRB 589, 589 (1993) (holding that 30-percent inaccuracy rate and employer's good-faith compliance were sufficient to meet *Excelsior* rule requirements). Under the appropriate analysis, the 4.8 percent inaccuracy rate in this case and the Employer's good-faith attempt to correct the inaccuracies require a finding that the Employer substantially complied with the *Excelsior* list rule. We therefore reverse the judge and overrule the Petitioner's objection.[12]

DIRECTION

It is directed that the Regional Director for Region 37 shall, within 14 days from the date of this Decision and Direction, open and count the ballots of Gordon Campbell, Kahikina Kanekoa, Reden Bartolome, Alma Hamamoto, Diane Matayoshi, and Daniel Kadowski III. The Regional Director shall then serve on the parties a revised tally of ballots, including the count of the ballots named above. If the revised tally shows that the Petitioner received a majority of the valid votes cast, the Regional Director is directed to certify the Petitioner as the exclusive bargaining representative for the appropriate unit. If the revised tally shows that the Petitioner did not receive a majority of the valid votes cast, the Regional Director is directed to set aside the election and order a new election.

Wesley M. Fujimoto, Esq. and *Ryan E. Sanada, Esq.,* of Honolulu, Hawaii, for the Employer.

Danny Vasconcellos, Esq., of Honolulu, Hawaii, for the Petitioner.

ADMINISTRATIVE LAW JUDGE'S REPORT ON OBJECTIONS AND CHALLENGES

JAMES L. ROSE, Administrative Law Judge. Pursuant to Section 102.69 of the National Labor Relations Board's Rules and Regulations, the Regional Director for Region 37 entered an amended report on objections and challenged ballots, and ordered a hearing before an administrative judge. The matter was heard by me from November 16–22, 2004,[1] at Honolulu, Hawaii.[2]

The first election among employees of the Employer, Pacific Beach Corporation,[3] in the unit found appropriate for collective bargaining was held on July 31, 2002. The revised tally of ballots served on all the parties at the conclusion of the balloting showed the following:

[12] Because she agrees that the Employer interfered with the election by granting promotions and raises to landscaping employees during the critical period, and that the election should be set aside if the revised tally of ballots does not show that the Petitioner received a majority of the valid votes cast, Member Liebman finds it unnecessary to resolve the Petitioner's election objection alleging that the Employer's *Excelsior* list was substantially inaccurate.

[1] All dates are in 2004, unless otherwise indicated.

[2] Included in the record is a posthearing affidavit of the security department custodian of records and copies of the security log book for July 28–31, 2002.

[3] The name of the Employer is amended in accordance with the Employer's motion to amend all formal papers to reflect its correct name.

Approximate number of eligible voters……565
Number of void ballots……..……1
Number of votes cast for Petitioner……..….212
Number of votes case against participating labor organization…….…..…….220
Number of valid votes counted…….……..……...432
Number of undetermined challenged ballots……..……....1
Number of valid votes counted plus challenged ballots…..433
Number of sustained challenges (voters ineligible)……..….16

Timely objections were filed and a hearing was held before Administrative Law Judge Gerald A. Wacknov on these objections and challenged ballots. Judge Wacknov concluded that some challenges be sustained while others should be overruled and that certain of the Employer's actions amounted to conduct affecting the results of the election. Accordingly, he recommended that if a revised tally of ballots showed that the Union did not receive a majority of valid votes cast, then the election should be set aside and a rerun held. If, however, the Union received a majority, then it should be certified as the employees' bargaining representative.

Following exceptions to the Board, Judge Wacknov's decision was affirmed and a rerun election held on August 24, 2004. The tally of ballots served on all parties at the conclusion of the second election showed:

Approximate number of eligible voters……..481
Number of void ballots…..…….…..…1
Number of votes cast for Petitioner……...….179
Number of votes case against participating labor organization……174
Number of valid votes counted……..……..353
Number of challenged ballots……12
Number of valid votes counted plus challenged ballots……....365

Again, both parties filed timely objections to conduct affecting the results of the election, which will be considered seriatim following consideration of the challenges.

A. The Challenged Ballots

1. The six "general cleaners"

The Union's election observers challenged the ballots of Cheong Sun Kim, Chong Ja Kim, Eon Sook Kim, Kyong Soak Lee, Shin Cha Lee, and Chu Ja Oh, on grounds they were not employees. The Employer's payroll records reflect that these six individuals were hired as "general cleaners" in 2002 and each work a few days and a hand full of hours that year. These records also show that the six worked for the Employer not at all in 2003 or 2004 before the election. Renato Flojo, the Employer's executive housekeeper and project manager, testified the six were not on the housekeeping schedule in 2004 before the election because "they were not our employee [sic.] in housekeeping at that time." Since September or October, they have in fact worked in housekeeping.

Counsel for the Employer argues that notwithstanding the de minimus nature of their employment in 2002 and none in 2003 or 2004 before the election, and in spite of Flojo's testimony, they were nonetheless employees. Therefore the Union's challenge must fail. Further, for the Union now to challenge their ballots on grounds of de minimus hours would be tantamount to a postelection challenge, which the Board's Rules forbid.

The Employer argues that the six were still in its system as employees. Thu, even though they did not work at all for some 2 years prior to the election, the challenge that they were not employees is erroneous. Such is a hypertechnical argument which I reject. The Union actually did not challenge these ballots. Employee observers did and they would not reasonably be expected to know the difference between someone who listed as an employee but does not work and one who is not an employee. In fact Foljo agreed they were not employees at the time.

The Board has long held that whether one is a regular part-time employee and eligible to vote is dependent on whether that employee does bargaining unit work "with sufficient regularity to demonstrate a community of interest with remaining employees in the bargaining unit." *Hampton Inn,* 309 NLRB 942, 947 (1992). It is clear that these individuals lacked any real community of interest with employees in the bargaining unit, whether they are considered nonemployees or irregular casuals. Accordingly, I will recommend the challenges to their ballots be sustained.

2. The alleged supervisors

Section 2(11) of the Act states:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall promote, discharge, assign, reward, or discipline other employees, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Union contends that the duties of Gordon Campbell, Reden Bartolome, Kahikina Kanekoa, Alma Hamamoto, Diane Matayoshi, and Daniel Kadowaki III, meet this definition and therefore the challenges to their ballots should be sustained.

In addition to the statutory criteria, any one of which is sufficient to find an individual a supervisor, the Board also considers such secondary criteria as rate of pay vis-à-vis employees, the number of supervisors per employee, perks, title, and so on. As is typical in these types of cases, whether a given individual is a senior rank-and-file employee in the nature of a leadperson, or is low-level management, is not clear. There are factors which tend to suggest either conclusion.

On balance, and as will be detailed below, I conclude that Campbell, and Kanekoa are supervisors and the challenges to their ballots should be sustained. I conclude that the challenges to the ballots of Bartolome, Hamamoto, Matayoshi, and Kadowaki should be overruled. However, I also conclude that their ballots should remain sealed since their votes would not be determinative. That is, even if all four voted against representation, the Union still would have received a majority of valid votes cast.

a. Gordon Campbell

Campbell is the maintenance foreman. He has a desk, as do his boss the chief engineer and the special assistant. Campbell testified that he spends 2 to 4 hours a day at his desk, checking e-mails from other departments requesting work, record keeping, charting the progress of jobs. He approves vacation requests and takes calls from employees who might call in sick. He then checks the work of maintenance employees to see if the jobs are done correctly, and if not, he will tell them to do it over. On one occasion he remembered, Campbell recommended an employee be promoted.

In July 2004 Campbell received a $1-wage increase to $19.74 per hour. In 2002 his earnings were $48,187.63. There are three supervisors named on the weekly schedule. Three days a week, all three work. Two days there are two. And 2 days only one supervisor is scheduled. Campbell's solo day on those schedules in evidence is Sunday. As a "supervisor or member of management" Campbell receives a 30-percent discount on purchases, whereas rank-and-file employees receive 20 percent.

John Emerick is the director of engineering and Campbell's immediate boss. He testified that work is assigned by work orders and that Campbell makes out about 60 percent of these and he does the other 40 percent. The other two individuals listed as supervisors do none. Emerick also testified that in situations where someone is needed to stay over past his scheduled shift, Campbell had the authority to tell (or ask) the employee to do so. Emerick also testified that on July 16 he gave Campbell a $1-an-hour wage increase and changed his position from maintenance foreman to foreman.

On balance I conclude that Campbell has been given the authority to responsibly direct other employees by assigning them jobs, checking their work, approving vacations and time off, and asking them to work overtime. From this authority, and considering the secondary criteria such as the title of supervisor, office desk, and the 30-percent discount availability, I conclude that Campbell is a supervisor within the meaning of Section 2(11) of the Act and the challenge to his ballot should be sustained.

b. Reden Bartolome

Bartolome has been a supervisor in the landscaping department since at least May 2002. From the totality of the record it appears that Bartolome may have sufficient authority and exercise sufficient independent judgment to be considered a supervisor within the meaning of Section 2(11).

However, at the first election his ballot was challenged by the Union, then at the conclusion of the hearing before Judge Wacknov, the Union withdrew its challenge to Bartolome's ballot. Counsel for the Employer filed a prehearing motion for partial summary judgment on grounds that the Union is estopped from now contending that Bartolome is a supervisor. Counsel for the Union opposed this motion on grounds that Bartolome's duties have changed sufficiently since the first election to render its withdrawal of the first challenge of no determinative effect.

Since I had been advised that there would be additional material facts to be considered, I overruled the Employer's motion. Now, having considered the record and briefs, I find no evidence that Bartolome's duties have changed since 2002 in any significant manner.

The only evidence of much change appears in the testimony of Hiram Higashida, "the corporate environmental and conversation specialist." In that capacity, he is in charge of the landscaping employees and the curators, a position he has held "a little over two years." From 1991 to 2000 he was the landscape manager. He resigned to work for another hotel, and then returned in 2002 to his present job. When he returned in 2002, the landscape supervisor was Bartolome. At about that time, Higashida spent about 50 percent of his time at the Pacific Beach Hotel and about 50 percent at the Pagoda Hotel, a sister property whose employees are not in the bargaining unit petitioned for here. In the period immediately prior to the second election, these figures changed somewhat–30 percent at Pacific Beach and 70 percent at Pagoda.

Higashida testified that when he was absent from Pacific Beach, Bartolome "would be the go to person" for other employees in landscaping. This I conclude is an acknowledgment that in Higashida's absence, which is considerable, Bartolome is in charge of the Pacific Beach landscaping employees. The question is whether there is any substantive difference between being in charge 50 percent of the time or 70 percent. I conclude not. I conclude that Bartolome's duties and authority in 2004 was substantially the same as in 2002.

Neither counsel cited authority on the issue of whether in an election context a party's agreement to eligibility of a given employee estopps that party from questioning that employee's eligibility in a subsequent election in the same bargaining unit. Nor has independent research disclosed any authority precisely on point. However, in an unfair labor practice context the Board has repeatedly held that a party is barred from relitigating issues that were, or could have been, litigated in an underlying representation case. *Venture Packaging,* 294 NLRB 544 (1989). The same bar of relitigation and basic principles of estoppel would certainly seem to apply to a second representation proceeding. Thus, absent evidence that Bartolome's duties changed in some significant way after the 2002 election, counsel's stipulation to his status should be considered binding and Bartolome should be considered eligible based on the parties' earlier stipulation. Accordingly, I will recommend that the challenge to his ballot be overruled.

c. Kahikinaokala Kanekoa

The curator department at Pacific Beach takes care of the fish and water quality in the Oceanarium, a "380,000 gallon fish tank," about 2 stories high. (Judge Wacknov found it to be 280,000 gallons and 3 stories high.) The job of curator employees is to clean the tank and feed the animals. Necessarily these employees must be certified SCUBA divers. Kanekoa was hired as a diver level 1 in 1994 and has subsequently been promoted.

At the time of the first election, Jane Fee was the curator department supervisor. Fee left her employment in 2003 and has not been replaced as such; however, from the testimony of Kanekoa and Higashida, Kanekoa's duties and authority are essentially the same as those Judge Wacknov found for Fee.

Thus Kanekoa tests prospective employees on their ability to dive and be comfortable in the tank and recommends whether they be hired. Such recommendation is effective and not routine as it requires her particular judgment. Higashida testified that he relies on her recommendations in making the final hiring decision for divers. In addition, in the absence of Higashida, which is about 70 percent of the time, according to his testimony, employees are told they should "go to" Kanekoa. She does not receive the 30-percent discount; however, I do not consider this determinative since she effectively recommends hiring, and for at least 70 percent of the time is the senior responsible employee present at the hotel in the curator department. I conclude that she is a supervisor within the meaning of Section 2(11) and that the challenge to her ballot be sustained.

d. Alma Hamamoto

Prior to the first election, Hamamoto had been promoted from Guest Service Agent to "Working Supervisor" and as such her ballot was challenged by the Union. Judge Wacknov found that her duties and authority did not rise to the level set forth in Section 2(11). In May 2004, she in effect took a demotion (and a reduction in pay) for personal reasons and became a senior accounting clerk. In this position she does not hire or fire employees, participate in their performance reviews or their promotions. There are no employees below her that she supervises.

A review of her testimony establishes that her duties and authority from and after May 2004 were less indicative of supervisory status than before. Indeed she lost the 30 percent discount and reverted to 20 percent. If, as Judge Wacknov found, she was not a supervisor before the first election, she could scarcely be found one at the time of the second. If anything, her authority had diminished beginning in May 2004. Accordingly, I conclude that the challenge to her ballot should be overruled.

e. Diane Matayoshi

Since September 2003, Matayoshi has worked in the position of income audit, in which job she goes "through the chits to make sure that they are rung correctly for each outlet." She double checks the work of the cashiers in the restaurants. She has no authority to hire, fire, or in any way direct the work of other employees. There is really nothing in this record which would suggest she is a supervisor. Since September 2003 she has been an accounting clerk. Accordingly, I recommend that the challenge to her ballot be overruled.

f. Daniel Kadowaki III

Kadowaki is, and has been, a senior guest services agent, in which capacity he works the front desk, along at least 10 other employees. Some years ago he trained new employees, but he testified he has not done any training for years. According to his testimony, he has no authority to hire, fire, discipline, or direct other employees. There is no evidence that his duties have changed since Judge Wacknov found that he was not a supervisor or management employee as alleged by the Union.

As with Bartolome, counsel for the Employer filed a prehearing motion for partial summary judgment relating to Kadowaki since he had been found eligible by Judge Wacknov. Counsel for the Union stated that there had been material changes in the job duties of both employees and therefore the previous decision should not estopp the Union for asserting that they were supervisors.

A review of the record, particularly the testimony of Kadowaki, convinces me that there was no significant change in his job duties or authority between the first and second elections. Nor is there evidence that he in fact had any of the indicia of supervisory status set for in Section 2(11). I conclude that he was an eligible voter and that the challenge to his ballot should be overruled.

B. The Employer's Objections

1. Union campaign material

Objection 1 reads:

> During the critical period prior to and including the day of August 24, 2004 representation election in the above-entitled matter, the International Longshoreman and Warehouse Union ("Union") distributed campaign material to the Pacific Beach Hotel employees implying governmental support of the Union. Such conduct interfered with, coerced, and restrained employees in the exercise of their Section 7 rights, and thereby interfered with the employees' ability to exercise a free and reasoned choice in the election and undermine the laboratory conditions surrounding the election.

In evidence is a NLRB flyer. It is 8-½" by 11" and is apparently made to be folded in thirds. There is printing on both sides which generally sets forth employee rights under the Act and election procedures. There is also a listing of the Board's field offices. This flyer and a pamphlet from the Union entitled "A Guide for New Members" were distributed by union representatives. The Employer contends that by distributing the NLRB flyer, the Union suggested to employees that the Board favored the Union in the election.

In support of this position, the Employer cites several altered ballot cases, the most recent of which is *3-Day Blinds, Inc.,* 299 NLRB 110 (1990). In those cases the Board held that by reproducing an official ballot and placing an "X" in the "No" box, the employer communicated to employees that the Board favored the employer. This, of course, is not such a case.

Here, the Union reproduced a flyer generally available to the public which states in layman terms the rights of employees. It certainly cannot be objectionable to inform employees, through Board produced material, of their rights–even when accompanied by a union pamphlet. The Board flyer was not altered in any way. There is nothing on either of these documents which would suggest that the Board favored the Union. Accordingly, I will recommend that objection 1 be overruled.

2. Interrogation and threats by supervisors

Objection 2 (and 3, which is in identical language) reads:

> During the critical period prior to and including August 24, 2004 representation election in the above-entitled matter, individual who were supervisors at Pacific Beach Hotel under the meaning of the Act unlawfully interrogated Pacific Beach Hotel employees and encouraged them to vote in support of the Union. Such conduct interfered with, coerced, and restrained employees in the exercise of their Section 7 rights, and thereby interfered with the employees' ability to exercise

> a free and reasoned choice in the election and undermine the laboratory conditions surrounding the election.

This objection is based on the alleged supervisory status of Carmelita Fontillas and the fact she discussed the election with two housekeeping employees, urging them to vote for the Union. The Employer cites *Millsboro Nursing & Rehabilitation Center,* 327 NLRB 879 (1999), affirming the Board's two-part test concerning whether prounion conduct by supervisors would taint an election. To find prounion activity by supervisors objectionable requires (1) that the employer's position concerning the election was not known to employees and (2) there were threats or promises of benefits. *Sutter Rossville Medical Center*, 324 NLRB 218 (1997).

Here, while Fontillas has some indicia of supervisory status, she was clearly considered by the Employer to be a bargaining unit employee. Her name was included on the eligibility list.[4] Second, even if she was a supervisor, her statements would not be grounds for setting aside the election. The Employer's anti-union stance was well known. There were no threats or promises of benefits made by Fontillas. Accordingly, I will recommend that Objections 2 and 3 be overruled.

3. Conferring economic benefits

Objection 4 reads:

> During the critical period prior to and including the day of August 24, 2004 representation election in the above-entitled matter, the Union conferred various material economic benefits to the Pacific Beach Hotel employees. Such conduct interfered with, coerced, and restrained employees in the exercise of the Section 7 rights, and thereby interfered with the employees' ability to exercise a free and reasoned choice in the election and undermine the laboratory conditions surrounding the election.

This objection is based on the distribution of the Union's "A Guide for New Members" pamphlet which describes certain benefits members enjoy. The Employer contends that such confers a tangible economic benefit akin to offering free medical screening a few days before an election as in *Mailing Service,* 293 NLRB 565 (1989). While the Board has set aside elections where the petitioning union gives prospective employees a tangible benefit prior to the election, to distribute literature which sets forth benefits members enjoy is not the same.

Indeed, as the Board further said in *Mailing Service*, "We agree with the Regional Director that the Union was entitled to publicize an existing incident of union membership or representation. It could have provided employees with descriptive information about its health screening program." That is all the Union did here. The Union did not confer a tangible monetary benefit. It merely told employees about some benefits of being a union member. Accordingly, I will recommend that Objection 4 be overruled.

4. Supervisor as election observer

Objection 5 reads:

> The Union appointed an individual who was a supervisor at Pacific Beach Hotel under the meaning of the Act to serve as an election observer for the representation election held on August 24, 2004 in the above-entitled matter. The appointed individual served as an election observer on behalf of the Union during the August 24, 2004 representation election. Such conduct interfered with, coerced, and restrained employees in the exercise of their Section 7 rights, and thereby interfered with the employees' ability to exercise a free and reasoned choice in the election and undermine the laboratory conditions surrounding the election.

This objection is based on the allegation that Reben Bumanglag "may be a supervisor in the maintenance department" (Emp. Br. at 103) and he was a union observer. The Employer contends that Bumanglag "may be a supervisor" because his job duties are similar to Gordon Campbell, who was challenged as supervisor and I find was.

Although the minimal evidence concerning Bumanglag's work does suggest that it is similar to Campbell's, the evidence is really too sketchy to find that he had any of the authority under Section 2(11). In fact he testified that Campbell directs his work and has asked him to work overtime. Further, the Employer put Bumanglag on the voter eligibility list, which I find precludes it from now arguing that he should not have been eligible. Finally, if he is a supervisor, Bumanglag is sufficiently low level that his presence as an observer would not reasonably affect the vote in favor of the Union. Accordingly, I will recommend that Objection 5 be overruled.

5. Catch-all objection

Objection 6, 7, and 8 are general allegations that by the Union's overall conduct, employees were denied the ability to exercise a free and reasoned choice. The Employer offered no additional evidence concerning these objections, and did not brief why they should be sustained. Accordingly, I will recommend that Objections 6, 7, and 8 be overruled.

C. The Petitioner's Objections

Inasmuch as I have concluded that 8 of the 12 challenges be sustained even if the remaining four are all "no" votes, the Union would have received a majority of valid votes cast. Therefore, the Union's objections are moot; however, in the event there are exceptions to this decision and the Board reverses on one or more of the challenges, and if then the tally of ballots were to show the Union did not receive a majority, I would recommend the election be set aside and a rerun ordered based on the following findings concerning the Union's objections.

1. Posting the election notice

The Petitioner's first objection states:

> Commencing on July 23, 2004, and thereafter, including the day of the election (8/24/04), the Employer, by and through its employees, representatives, and agents failed to post Notice of Second Election on its premises in accordance with Section 103.20 of the Board's Rules requiring that the Em-

[4] Fontillas was apparently discharged after the eligibility list was submitted by the Employer but before the election.

> ployer post copies of the election notice at least three full working days prior to the day of the election; thus, limiting the opportunity of the eligible voters to exercise their statutory rights and privileges. The foregoing misconduct affected voter turnout and election results.

Though the Union presented some testimony from employees that they did not see a notice of the second election, the most credible evidence shows, and I find, that in fact an official notice was posted on the main bulletin board across from the security office where all employees swipe in and out. This notice was posted on August 19–5 days before the election.

There are other bulletin boards and timeclocks throughout the facility. No notice was posted at any of these places, as they had been prior to the first election.

The issue is whether positing one notice where there is a large bargaining unit and many departments scattered throughout a large facility is substantial compliance with Section 103.20 of the Board's Rules, and if not, whether the lack of compliance requires setting aside the election.

The Petitioner cites *Kilgore Corp*., 203 NLRB 118 (1973), where the Board set aside an election because the Employer only posted one notice even though employees worked in "widely scattered locations." Similarly, in *Thermalloy Corp.,* 233 NLRB 428 (1977), the Board set aside an election, notwithstanding all eligible employees voted, where one notice was posted in one building whereas some employees worked in another, not within walking distance. And most recently, *Kilgore* was followed. *Systems West LLC*, 342 NLRB 851 (2004), wherein the judge distinguished *Penske Dedicated Logistics,* 320 NLRB 373 (1995), in which the Board found that posting requirement of Section 103.20 was met for a small (61) unit even though one of rooms where the notice was posted was locked on the weekend.

The sum of these cases is that the posting requirement of Section 103.20 (amended into the Rules in 1987) is one which the Board will seriously consider, notwithstanding there are no precise criteria as to where and how many notices must be posted. The policy of the rule is to give all employees a reasonable chance to read the notice, and not only know when the election will be held but of their rights under the Act.

While it is true that all employees must swipe in near the bulletin board where the notice was posted, I conclude that one notice on one of many employee bulletin boards in a large facility such as this hotel is not sufficient compliance. There is, of course, no way of knowing whether all employees were adequately informed of the election and their rights. However, I note that in 2002, when several notices were posted, the turnout of eligible voters was 79 percent, whereas in 2004 it was 75 percent. Although 4 percent may not seem much, in a unit of 481 employees, such amounts to about 19 votes not cast. In an election as close as these two have been, 19 votes is significant.

I conclude that by posting only one notice of the election, the Employer was not in substantial compliance with Section 103.20 and its failure, pursuant to subparagraph (d) is grounds for setting aside the election.

2. Objections 2, 5, and 11

Counsel for the Petitioner concedes that there is no record evidence concerning Objections 2, 5, and 11. Thus, the Petitioner withdrew these objections.

3. Threats of job loss through the use of subcontracts/independent contractors

Petitioner objection 3 reads:

> Commencing on or about July 23, 2004, and thereafter, the Employer, by and through its employees, representative and agents, unlawfully threatened employees that they would lose their jobs through the partial subcontracting of housekeeping work at the Hotel and the threat of expanding subcontractor/independent contractors in other departments; thus, interfering with the right of free choice of eligible voters and destroying the laboratory conditions necessary for the conduct of a fair election.

Apparently this objection relates to the Employer's sometimes use of housekeeping employees from a company called "Team Clean." The record evidence is that there are not enough regular housekeeping employees when the hotel is at high occupancy. In such cases, regular employees are asked to work overtime, and if there are still not enough employees to cover the work required, then the independent contractor is called. This occurred before the second election. However, the Employer had used Team Clean employees at least since 2003 when Penato Flojo, the Employer's executive housekeeper and project manager, came on duty.

Though the Employer does use an independent contractor for overflow work in housekeeping, it appears this has been the case for some years. There is no testimonial evidence that employees were threatened with loss of jobs as a result of the Employer using subcontracts or independent contractors. Accordingly, I conclude that the Petitioner did prove the facts asserted in Objection 3 and it should be overruled.

4. Fraudulent misrepresentations

Petitioner Objection 4 reads:

Commencing on or about July 23, 2004, and thereafter, the Employer, by and through its employees, representatives and agents, unlawfully engaged in fraudulent misrepresentations through the submission of Employer sponsored leaflets and /or mail outs regarding the amount of union dues, medical benefits, wage increases and other benefits. The Employer also issued leaflets and/or mail outs dated July 28, 2004, and August 4, 2002, misrepresenting job closures at sister-property, while at the same time identified the NLRB elections as being "hostile takeover," by ILWU; which materially interfered with the Union's right to communicate with said eligible voters prior to the election. The Employer's misrepresentations served to falsely identify the Union as a corporate raider in competition with other business entities. Job security and retention of hours, wages and other terms and conditions of employment were the major issues of concern to voters in the proposed bargaining unit and thus, the Employer's rebutted misrepresentations immediately before the election destroyed the laboratory conditions necessary for the conduct of a fair election.

This objection is based on a number of flyers disseminated by the Employer, as well as a bogus paycheck to each em-

ployee which stated the dues deducted that pay period (the one immediately preceding the election) and the year to date.

In evaluating preelection material, the standard is set by the Board in *Midland National Life Ins. Co.,* 263 NLRB 127, 133 (1982): "Thus we will set an election aside not because of the substance of the representation but because of the deceptive manner in which it was made." This standard has been discussed and expanded in some cases, but generally followed. For instance, in *Michellace, Inc. v. NLRB,* 90 F.3d 1150 (1996), the court agreed that an election should not be set aside based on the substance of the misrepresentations alone, but only on the deceptive manner of the representations which would cause employees not to be able to distinguish truth from falsehood.

The issue, then, is wither the six flyers in evidence contain such pervasive misrepresentations that employees would be unable to separate truth from untruth. I conclude not. One flyer likens representation by the Union as a hostile takeover. Another notes that employees of the Pagoda Hotel received a wage increase and more vacation time. Another states that the Kona Beach Hotel avoided closure by reducing costs 15 percent and laying off employees. Another states union representatives push themselves on employees who do no want to talk with them and lie about medical benefits if employees were to vote for the Union. Finally, a flyer is devoted to the supposed lies union representatives tell about medical benefits.

The bogus paychecks are closer to a forgery or a deceptive manner of representation requiring the election to be set aside. The checks were generated by the payroll department and looked exactly like the regular paycheck, with various deductions. Included was an amount for union dues, even though there is no indication that this was accurate. Linda Morgan, the Employer's director of human resources, did not know where the figures for union dues came from, or if they were accurate. Although a different figure on each of the bogus paychecks in evidence, generally the asserted dues is a little more than two and one half times the per hour rate shown on the pay stub. Thus for an employee earning $10 per hour, the Employer was telling employees that their monthly dues would be in excess of $50. This may accurately reflect the Union's dues structure, but probably not.

Nevertheless, I conclude that issuing this bogus pay checks would not be grounds for setting the election aside. Even if the asserted dues are excessive, and the checks appear real, certainly the employees would know that at some point with union representation they would be required to pay dues.

Accordingly, I will recommend that Union's Objection 4 be overruled.

5. Discipline of a known union supporter

This objection is based on allegedly unlawful discharge of Carmelita Fontillas. A charge was filed by the Union alleging her discharge with being a violation of Section 8(a)(3). Following an investigation, the General Counsel declined to issue a complaint and the charge was withdrawn. Though asserting that he did not intend to litigate the legality of the discharge, Counsel for the Union maintained that the effects of the discharge on unit employees could be a basis for setting aside the election.

At the hearing I sustained the Employer's objection to testimony concerning Fontillas' discharge. If, as must be presumed, the discharge was lawful then it could not be a basis for setting aside the election, otherwise before an election an employer would not be able to lawfully discharge employees for cause.

As noted by counsel for the Union, absent testimony concerning the Fontillas discharge, there is no evidence of record supporting Objection 6. Accordingly, I will recommend it be overruled.

6. Offering and providing monetary gifts/payouts

Objection 7 reads:

> Commencing on or about July 23, 2004 and thereafter, including up to the 24-hour time period just prior to the election, the Employer, by and through its representative, employees and agents, unlawfully engaged in pre-election conduct by offering and providing monetary gifts/payouts based upon Union and anti-Union sentiment, in order to interfere with the exercise of Section 7 rights of employees under the Act.

In evidence are "STATUS/RATE CHANGE FORM" for 18 kitchen employees (one form is unreadable and there are two for G. Bustamante, 6/15/04 and 7/16/04) and 6 in landscaping. The Union contends that by giving these employees promotions and wage increases, the Employer engaged in objectionable conduct. The Employer maintains that each was given in the normal course of business, and specifically in connection with reorganization of the kitchen and landscaping departments.

Counsel for the Union seems to argue that these were general pay increases and notes that Morgan testified that it had been 8 years since general pay increases had been given employees. The evidence does not support this contention. The record and testimonial evidence tends to prove that in the kitchen and landscaping departments there were some organizational changes and employees were promoted. Such does not in and of itself prove that the Employer engaged in objectionable conduct. Counsel for the Union cites *American Sunroof Corp.,* 248 NLRB 748 (1980), for the proposition that such increases are presumptively objectionable, placing the burden on the employer to prove that the timing of the raises was governed by factors other than the election.

John Lopianetzky has been the director of food and beverage since August 19, 2003. He testified at length concerning the rate increases a few weeks before the election for 13 of the 82 employees in the culinary department. Similar increases were given three employees after the election. For many employees, particularly in the culinary department, there are two and sometimes three pay rates. Typically, an employee will have an "A" rate and position for his or her primary job and a "B" rate. The "B" rate is higher and is paid the employee when assigned to "B" position. Most of the changes involved making the employee's "B" rate permanent, or assigning a "B" rate.

Lopinanetzky testified that on his return to the Hotel in 2003, he began making some changes and that most of pay grade changes in 2004 were as a result of restructuring. Some were the result of employees leaving or retiring. There is nothing in his testimony or the documentary evidence which would tend to

dispute that the pay grade changes were other than done in the normal course of business. I credit Lopianetzky and conclude that the pay grade changes in the culinary department did not amount to objectionable conduct.

The same result, however, is not the case with the landscaping department. There are seven employees in the landscaping department, including Bartolome. As of May 2002, Bartolome had the "B" position of supervisor I and, apparently, the highest rate available for landscaping employees. On July 1, the other six employees (which included one transfer) received rate changes and pay increases.

As noted above, Hiram Higashida is in charge of the landscaping and curator departments at both the Pacific Beach Hotel and the Pagoda Hotel. He testified that when he returned to the Hotel in 2002 he started evaluating the duties of his landscaping employees and determined that the assistant gardeners should be made gardeners. Then, according to his testimony, two years later, in early 2004, he decided to make the changes. However, he did not get around to doing so until July.

I do not credit Higastida. His testimony was, at best, conclusionary. He gave no persuasive reason for "restructuring" the department or why he would give everyone in the department (other than the supervisor) a pay raise a few weeks before the rerun election or why it took him so long to effectuate the changes. He testified that not only did the wage increases not have anything to do with forthcoming election, he did not even know about the election–a statement I find wholly incredible. I do not believe the Employer met its burden of proving these pay increases were benign and given in the normal course of business. Accordingly, I conclude that Union's Objection 7 should be sustained.

7. Incomplete "*Excelsior* list"

Union Objection 8 reads:

> Commencing on or about July 23, 2004 and thereafter, the Employer, by and through its employees, representatives and agents, provided the Union wholly inaccurate, misleading, and incomplete information on the "Excelsior list" and engaged in other practices to prevent ILWU supporters and campaigners access to employees' home and/or residence (see Objection IV). The Employer's failure to provide an adequate and complete listing of names and addresses of all eligible voters resulted in an usurpation of the Board's power to determine voter eligibility and materially interfered with the Union's right to communicate with said eligible voters prior to the election, and prevented a designation by a majority of a representative segment of eligible voters from indicating their choice of Union representation or note in the election. By these acts, The Employer unlawfully interfered with the Section 7 rights of the employees.

On July 30 the Board's subregional office received the names and addresses of 498 employees purporting to comply with *Excelsior* list requirement. On August 9, an attorney for the Union wrote the Employer contending that 26 addresses were incorrect and on August 10 amended this to state that 43 addresses were incorrect. There was an exchange of correspondence, with counsel for the Employer stating that the Employer was making its best efforts to correct any inaccuracies. On August 18, counsel for the Employer sent counsel for a union list of updated addresses.

Notwithstanding the Employer's efforts to insure that the addresses of employees submitted to the Union were accurate, the Employer was unable to correct them all. Thus, counsel for the Employer, on brief, stated: "However, based on the Employer's investigation of the matter, 23 of the allegedly incorrect addresses were, in fact correct. Further four of the employees alleged by the Union to have incorrect addresses no longer worked at Pacific Beach Hotel. Therefore, there were just 24 incorrect addresses on the Excelsior List. This constitutes an inaccuracy rate of under 5%."

In evidence are union campaign mailers returned for insufficient addresses for 10 employees. Also, William Udani, a field organizer for the Union, testified that he went to homes to talk to employees and on occasion was told the employee did not live at that address. This testimony is fairly vague, but together with the returned mailers and counsel for the Employer's statement tends to support the conclusion that there were inaccuracies in the *Excelsior* list—a matter which was in fact stipulated to by counsel.

The Employer maintains that it was in substantial compliance with the *Excelsior* list rule and that inaccuracies of less than 5 percent is not sufficient under Board law to require setting aside an election. While the Board has in the past considered the percentage of address inaccuracies to be determinative, the Board now also considers whether the number of inaccuracies is within or more than the election margin. *Woodman's Food Market,* 332 NLRB 503 (2000). Thus notwithstanding the employer's good faith in attempting to submit a complete and accurate list of names and addresses, if the number of inaccurate addresses exceeds the margin of the vote, then such is sufficient to set aside the election.

Here the Union's margin of victory was 5 votes. However, if all 12 challenges were to be overruled and all those votes were against representation, then the Union would lose by 7 votes. Thus the 23 inaccuracies admitted by the Employer, or even the 10 who did not receive mailers would be more than the election margin. Accordingly, I conclude that Objection 8 should be sustained.

8. Overly broad no-solicitation rule

Objection 9 states:

> Commencing on or about July 23, 2004 and thereafter, the Employer, in order to discourage membership in a labor organization, promulgated, implemented, and *never rescinded* an overly broad and unlawful no solicitation rule.

In the previous case, Judge Wacknov found that the Employer's policy concerning where and when employees and non employees could engage in solicitation (contained in its employee handbook) was overly broad, invalid, and a basis to set aside the election, a finding which was affirmed by the Board.

On April 15, 2003, shortly after Judge Wacknov issued his decision, the Employer undertook to amend this policy in order to conform to the Board's standards by issuing a memo to all employees. The Union does not contend that the revised policy

is invalid, only that it has not adequately been distributed to all employees. Morgan testified that the memo is, and has been, inserted into the employee manual given new employees, and current employees were told to take the old policy out of their manuals and insert the new one. She also testified that the memo was placed on various bulletin boards and each department had meetings with employees to discuss the new policy. Several employee witnesses also so testified.

Counsel for the Union maintains that since Morgan was not able to "guarantee" that all employees were given a copy of the memo, the Employer has not presented substantial evidence that the unlawful policy has been fully rescinded.

I disagree. The credible evidence is that in fact the Employer published the revised policy and undertook to advise all employees of it. There is no evidence that the old unlawful policy has been enforced in any way. On balance, I conclude that the Union's objection concerning the no-solicitation policy should be overruled.

9. Catch-all objection

Objection 10 reads:

> By such other acts and deeds, the Employer, by and through it agents, employees, and representative, interfered with and coerced employees in exercise of their rights under Section 7 of the Act, and said acts and deeds precluded a fair election.

The Union offered no evidence on this objection and I recommend it be overruled.

D. Conclusions and Recommendations

I recommend that all the challenged ballots remain sealed, that the Employer's objections to conduct affecting the results of the election be overruled and that the Union be certified as the duly elected representative of all employees in the bargaining unit found appropriate by the Regional Director for Region 37.[5]

In the event that following exceptions to this decision, the Board should make rulings on the challenged ballots such that a revised tally of ballots would show a majority not to have voted in favor of the Union, then I recommend that Petitioner Objections 1, 6, and 7 be sustained and a third election be conducted.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Employer's objections to conduct affecting the results of the mail ballot election in the above matter are overruled. The Regional Director for Region 37 shall certify the Petitioner as the collective-bargaining representative of employees in the appropriate unit.

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[5] See amended report on objections and challenged ballots, order directing hearing and notice of hearing dated October 22, 2004.

[6] Any party may, under the provisions of Secs. 102.67 and 102.69 of the Board's Rules and Regulations, file exceptions to this report with the Board in Washington, D.C., within fourteen (14) days from the issuance of this report. Immediately upon filing of such exceptions, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director. Exceptions must be received by the Board in Washington, D.C. by February 24, 2005.