

Avante At Boca Raton, Inc. and Avante Terrace At Boca Raton, Inc. and 1115 Nursing Home, Hospital, & Service Employees Union-Florida, affiliated with 1115 District Council, Petitioner.
Case 12-RC-8034

April 25, 1997

DECISION AND CERTIFICATION OF REPRESENTATIVE

CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The National Labor Relations Board has considered objections to an election held January 17, 1997,¹ and the hearing officer's report (attached) recommending disposition of them.² The election was conducted pursuant to a Decision and Direction of Election issued by the Regional Director on December 20, 1996, and the tally of ballots shows 38 for and 31 against the Petitioner, with 1 challenged ballot, a number insufficient to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings and recommendations, and finds that a certification of representative should be issued.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of valid ballots have been cast for the 1115 Nursing Home, Hospital, & Service Employees Union-Florida, Affiliated with 1115 District Council, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time certified nursing assistants (CNAs), restorative aides, activities assistants, dietary aides, cooks, dietary porters, maintenance assistants, receptionist and central supply clerk employed by the Employer at its facilities located at 1130 N.W. 15th Street, Boca Raton, Florida 33486; excluding all other employees, including registered nurses (RNs), licensed practical nurses (LPNs), managers, confidential employees, office clerical employees, guards and supervisors as defined in the Act.

¹ All dates are 1997 unless noted otherwise.

² In the absence of exceptions, we pro forma adopt the hearing officer's overruling of the Employer's Objections 4 and 5.

APPENDIX

HEARING OFFICER'S REPORT ON OBJECTIONS WITH FINDINGS AND RECOMMENDATIONS

Following the filing of the petition here on November 13, 1996, and pursuant to a Decision and Direction of Election issued by the Regional Director for Region 12, National Labor Relations Board, on December 20, 1996, an election

by secret ballot was conducted on January 17, 1997, under the direction and supervision of the Regional Director among employees of Avante at Boca Raton, Incorporated and Avante Terrace at Boca Raton, Incorporated (the Employer or Employers), in the unit set forth in the aforesaid Decision and Direction of Election¹ to determine whether or not the employees desire to be represented for collective-bargaining purposes by 1115 Nursing Home, Hospital & Service Employees Union-Florida, affiliated with 1115 District Council (the Petitioner).

At the conclusion of the election, the parties were furnished with a tally of ballots which showed the following results:

Approximate number of eligible voters	97
Void Ballots	0
Votes cast for Petitioner	38
Votes cast against participating labor organization	31
Valid votes counted	69
Challenged ballots	4
Valid votes counted plus challenged ballots	73

The challenged ballots were not sufficient in number to affect the results of the election.

On January 23, 1997, the Employer timely filed election objections to conduct affecting the results of the election (Objections) and attached as Exhibit "A," and a copy thereof was duly served on the Petitioner pursuant to Section 102.69(a) of the Board's Rules and Regulations. On January 31, 1997, the Regional Director ordered that a hearing be held before a hearing officer for the Board on the issues raised by the Objections. The Regional Director further ordered that the hearing officer prepare and cause to be served on the parties a report containing resolutions of credibility of witnesses, findings of fact, conclusions of law, and recommendations to the Board as to the disposition of the Objections.

Pursuant to the Order Directing Hearing on Objections and Notice of Hearing duly served on the parties on January 31, 1997, a hearing was conducted by me on February 7, 1997, in Miami, Florida. The parties were afforded full opportunity to be heard, to call, and to examine and cross-examine witnesses called by the opposing party and to introduce other evidence relevant to the issues. On review of the entire record, including my observations of the witnesses appearing before me, I make the following findings of fact, conclusions of law, and recommendations to the Board.²

¹ The appropriate unit is all full-time and regular part-time certified nursing assistants (CNAs), restorative aides, activities assistants, dietary aides, cooks, dietary porters, maintenance assistants, receptionist, and central supply clerk employed by the Employer at its facilities located at 1130 N.W. 15th Street, Boca Raton, Florida 33486; excluding all other employees, including registered nurses (RNs), licensed practical nurses (LPNs), managers, confidential employees, office and clerical employees, guards and supervisors as defined in the Act.

² It was noted in the record that the Employer's motion for continuance was properly denied as the Employer was the party who filed the objections and, thus, should proceed in a timely manner. The parties agreed to said hearing date and all subpoena requests

Continued

In deciding whether employees could fully and fairly exercise their choice in an election, the Board evaluates the following factors: (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among the bargaining unit employees; (3) the number of bargaining unit employees subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of misconduct in the minds of bargaining unit employees; (6) the extent of dissemination of the misconduct among bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party in canceling out the effect of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. *Avis Rent-A-Car Systems*, 280 NLRB 580, 581 (1986).

The question presented is whether the facts as found require that the election be set aside. The standard is "whether the character of the conduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free expression of choice of representatives impossible." *Hamilton Label Service*, 243 NLRB 598 (1979); *Zeigler Refuse Collectors*, 245 NLRB 449 (1979). "A party objecting to the validity of an election on the grounds of improper pre-election [or election] conduct must shoulder a heavy burden of proof to demonstrate by specific evidence that the election was unfair." *NLRB v. Mattison Machine Works*, 365 U.S. 123, 124 (1961). With this in mind, I have considered the conduct described below to determine whether, taken individually and taken as a whole, it meets the criteria for setting aside the election of January 17, 1997.³

The Employer filed five paragraphs raising certain specific objections, and one objection included in catchall language. In this report I will discuss the objections raised in all six of the aforementioned paragraphs in the order alleged.⁴

were promptly approved and issued by the Region, thereby negating any suggestion of prejudice to either party. Further, the Employer's contention that the hearing should be postponed due to the filing of an unfair labor practice charge, Case 12-CA-18534, was also properly denied. There are no coextensive duplicative allegations involved in the unfair labor practice charge which overlap or could arguably be viewed as duplicative with any of the Employer's objections.

³ Transcript references are noted by page and line numbers.

⁴ The facts found here are based on the record as a whole, my observation of the witnesses, oral arguments, and briefs. The credibility resolutions are derived from a review of the entire testimonial record and exhibits with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). All testimony has been reviewed and weighed in light of the entire record. No testimony has been pretermitted. In some instances, an interpreter was needed during the course of witnesses' testimony. Necessary allowances for unimportant testimonial variations, attributable to language difficulties, have been made, particularly with regard to Evanette Cyriague. Based on the demeanor, conduct, and candor of all the witnesses presented, in addition to the fact that none of the witness testimony was contradicted or inconsistent with any other witness testimony, I have credited all the witnesses' testimonies in full. I note that Louis Manzo testified that he did not go to the pre-election conference (Tr. 115:22), yet testified to witnessing the ballot box preparation, and inspecting the election area prior to the election. (Tr. 115:25, 116:1-21.) Therefore, I viewed his initial response of nonattendance to be caused by an unfamiliarity with the terminology of the Board in re-

Objection 1

The first objection alleged that on January 17, 1997, the day of the election, one or more of the union observers improperly maintained a record of which employees voted during the election.

The Employer presented Marguene Louissaint and Marie Ledain, union observers during the election. (Tr. 46:20, 60:19)⁵ Louissaint and Ledain separately testified that, in addition to the *Excelsior* list which was placed in the middle of the table, each did have a list of those voters who were to be challenged by them, on behalf of the Union. (Emp. Exhs. 7 & 8.) (Tr. 47:6, 61:14, 65:4.) They indicated that this list was placed on their respective laps during the election unless and until a challenged voter came to vote. (Tr. 49:23, 50:5, 65:7.) At that time, Louissaint testified that the challenge list was raised up, still in her lap and marked. From a review of the marked *Excelsior* list, Employer's Exhibit 8, the markings took the form of the letter "c," circles, handwritten names of two individuals and a scratch out.⁶ Louissaint indicated that she circled the names of two challenged voters on Employer's Exhibit 7 as they came to vote after they had told her that they were to be challenged. (Tr. 48:2, 49:9.) Ledain testified that she marked "c," next to three challenged voters' names on Employer's Exhibit 8 as they came to vote. (Tr. 64:24.) Ledain also indicated that one of the names that she had written on Employer's Exhibit 8 was placed there because she inadvertently did not initially see it on the challenged list; however when she discovered it on the typed list, she crossed out her writing while the voter was there. (Tr. 62:5-9, 63:15-16.) The second name which Ledain wrote on the challenge list while the voter was present was Jocelyn Joseph, who was challenged for not

ferring to the event as a "pre-election conference," and not as an inconsistency in his testimony.

⁵ The Employer also presented Evanette Cyriague, another union observer, who testified that she had not seen a challenge list; and therefore, could not have utilized it during the election. (Tr. 34:15-16)

⁶ It was noted from a review of the sealed marked *Excelsior* list, which was Emp. Exh. 4, that the three names with "c"'s from Emp. Exh. 8 were the only names to have a "c" next to their names on the *Excelsior* list and that the marking of a "c" was used by the union observer, Louissaint, as a substitution for a check mark. As the record reflects, the Employer's subpoena for purposes of obtaining the marked *Excelsior* list was appropriately quashed due to its failure to follow the Board's Rules and Regulations 102.118; and further, I conclude that the Employer was not prejudiced by its failure to obtain a copy of this sealed exhibit as it had limited probative value as set forth above. The Employer contends that, due to the fact that the marked *Excelsior* list remained sealed, it could not identify and call as witnesses those who did not vote in order to establish that the lack of voting was caused by confusion and/or lack of understanding of certain notice language. I do not give credence to this argument, particularly in light of the fact that the Employer did not request a copy of the marked *Excelsior* list until well into the hearing giving it limited time to trace and prepare to call any additional witnesses not already present, and secondly, there were other methods and means for the Employer to utilize in order to find bargaining unit employees to testify without review of the marked *Excelsior* list. Further, as four witnesses testified to their lack of understanding of certain phrases or words on the notice to employees, yet still voted in the election, the Employer's claim that voter confusion and/or lack of understanding of certain phrases or words on the notice caused voters not to vote is an inaccurate reflection of the events.

being on the Excelsior list. (Tr. 64:8-17.) Neither union observer testified that the other writing on the challenged list, specifically "does not work here" or "does not exist/facility address" or "dietary supervisor" was theirs (Tr. 47:14), and presumably those phrases were placed on the challenge list by others prior to the commencement of the election. None of the union observers indicated that they showed the challenge lists to any voter, nor did they indicate that the challenge lists were on the table and that the names were in the plain view of the voters. In fact, Louissaint specifically testified that she did not show any voters this list (Tr. 54:8) and this testimony was undisputed.

Pretrina Smith and Roi Green, the only two Employer's observers utilized on election day (Tr. 77:18, 118:1) confirmed that the challenge lists remained in the laps of the union observers until the time came to challenge a voter at which time it was raised to the approximate height of the table but at an incline, and, while still facing the observer, was marked. (Tr. 88:24-25, 89:1-13, 90:18, 91:23-25, 92:1-12, 97:21.)⁷ In fact, Smith indicated that the challenge lists were only raised from the union observers' laps approximately four times during the entire election proceedings, inclusive of both sessions. (Tr. 97:18.)

Discussion

It is noted that the Board's Casehandling Manual for Representation Proceedings Rule 11338.2 allows for the maintenance of such lists to be kept by observers for potential challenge purposes. Additionally, the Employer presented no actual voters, other than the observers, to testify to seeing a challenge list, to noticing union observers mark a challenge list or to feeling fearful and coerced by the actual markings made by the union observers which interfered with their freedom of choice. Rather, the Employer presented Patseta Taylor who broadly indicated that she was concerned about whether anyone would know how she voted, and who testified that she shared this concern with Michelle Bailey, who corroborated same. (Tr. 125:7-10.) Taylor never testified to having seen union observers make markings on a list, nor did she state that it was for that reason that she had a concern about others learning of her election choice. Rather, Bailey testified that Taylor's concern as she recalled stemmed from wondering if she could be observed by the observers while making her choice in the voting booth. (Tr. 123:10-14.)

Further, the names of the voters that Louissaint marked were already aware that they were to be challenged according to Louissaint's credited and undisputed testimony. Assuming arguendo that the list was seen by these four challenged voters, the list itself had the word "CHALLENGE" in big, bold, and clearly distinguishable lettering across the top of it as shown in Employer's Exhibits 7 & 8. Therefore, this circumvented any misperception that a voter may have had regarding the reason that their name was being marked on this list.

⁷ As the Employer had a number of witnesses to corroborate the placement and markings of the challenge list, it was unnecessary to call the Board agent to testify as his testimony would have simply been cumulative, and therefore, the revocation of his subpoena was appropriate. Furthermore, after hearing the testimony, the Employer did not raise the issue that the Board agent's testimony was still necessary.

"List keeping is a basis for a new election *only* when it can be shown or inferred from the circumstances that the employees *knew* that their names were being recorded." *Southland Containers*, 312 NLRB 1087 (1993). Based on all the above, the evidence does not establish that the union, through its agents or representatives or third parties, created an atmosphere of fear and coercion rendering the election results invalid where challenge lists were kept primarily in the observers' laps during the election and where only the two Employer observers, and no other voters, testified that they were aware of this fact.⁸ Accordingly, for all the reasons stated above, I recommend that Objection 1 be overruled in its entirety.

Objection 2

The second objection alleged that the voting arrangements in the polling area, including the placement of the ballot box, created the impression that the observers and others could determine how employees voted in the election.

Some of the Employer's witnesses, both union observers, Louissaint and Ledain, and employer observers, Green and Smith, credibly testified that the ballot box was placed in front of the Employer's observers, particularly Roy Green, during the election (Tr. 57:22-25, 58:3, 65:20-22) and was less than 3 feet away from an observer and from the translator at times. (Tr. 59:1, 68:15-18, 80:21, 81:18, 86:16-18, 118:25.)

Discussion

There was no testimony presented that any observer or the translator or Board agent,⁹ for that matter, handled any of the ballots once they were provided to the voter. Nor was any evidence provided regarding any tampering with the ballot box.¹⁰

It is noted that the Board's Casehandling Manual for Representation Proceedings Rule 11322.4 states that the observers should remain at least 3 feet away from the ballot box. The provisions of the Board's Casehandling Manual are not binding procedural rules, rather they are merely intended to provide operational guidance in the handling of representation cases. *Queen Kapiolani Hotel*, 316 NLRB 655 (1995). The aforementioned rule does not *require or mandate* that

⁸ Assuming the unlikely event that this list keeping affected the election choice of the two Employer's observers, changes in their votes would not have affected the results of the election.

⁹ As the Employer had a number of witnesses to corroborate the placement of the table, ballot box, voting booth, observers, Board agent, and translator, it was unnecessary to call the Board agent to testify as his testimony would have simply been cumulative, and therefore, the revocation of his subpoena was appropriate. The layout of the individuals, table and box were further illustrated by Emp. Exhs. 10 & 14. Furthermore, after hearing the testimony, the Employer did not raise the issue that the Board agent's testimony was still necessary.

¹⁰ It is noted that the Employer requested recusal of myself from the proceedings due to the fact that I am familiar with the Board agent who conducted the election and am employed at the same Region. As I felt confident that I would conduct the hearing with complete impartiality, and in fact did so, there was no need to recuse myself. Further, the Employer presented no evidence of Board agent misconduct, therefore, any fear of potential bias on my part was unwarranted.

the observers remain 3 feet away from the ballot box. Further, in order to set aside an election on the basis of a Board agent's conduct, the Board must be presented with facts raising reasonable doubt as to the fairness and validity of the election and the Board Agent's failure to follow the Board's Casehandling Procedures will not warrant setting aside an election absent showing that the deviations from these guidelines raised reasonable doubt as to the fairness and validity of the election. *Rheem Mfg. Co.*, 309 NLRB 459 (1992).

Clearly, in the instant case, based on the fact that there were four observers, a Board agent and a translator by a voting table whose width was approximately 30 inches according to the Employer (Tr. 108:5), it is unreasonable to assume that the ballot box would be kept 3 feet away from each one of those individuals during the entire election process, particularly the observers who were seated behind the table.

Additionally, the Employer did not present any voters to testify about witnessing any of the observers, the translator or the Board agent handling or tampering with their ballot once marked, nor to testify about the fact that their election choice was witnessed or that they had the impression that it was witnessed by one of those individuals as they approached the ballot box.¹¹ Therefore, there is no evidence that the placement of the ballot box, or the marking of the challenge list for that matter, raised reasonable doubt as to the fairness and the validity of the election.

Moreover, it was noted that Louis Manzo, administrator at Avante (Tr. 99:18), testified that he was present in the room prior to the commencement of the election, reviewed the election notices to employees, witnessed the seating arrangements of the observers and the placement of the ballot box and made no objections or attempts to change the configuration. (Tr. 115:25, 116:2-4, 116:10-21.)

Based on all the above, I recommend that Objection 2 be overruled in its entirety.

Objection 3

The third objection alleged that the election notices and ballots were not translated in a manner sufficient to have provided employees who do not read English with information necessary for them to cast an informed vote.

Specifically, the Employer indicated that the words "affiliated with," which were contained within the phrase "1115 Nursing Home, Hospital & Service Employees Union-Florida affiliated with 1115 District Council" placed on notices and

ballots, were not translated, and therefore, intimated that this lack of translation created confusion in the minds of the voters and prevented free election choice.¹²

The Employer presented Evanette Cyriague, Marguene Louissaint, Marie Ledain, all union observers (Tr. 31:20, 46:20, 60:19), who testified that they did not know what the words "coercion" or "affiliated with" meant despite being able to speak and read some English. (Tr. 35:7-9, 45:11-13, 55:1-5, 70:24, 71:3.)¹³ The union observers further testified that they had each passed a written certification examination in English. (Tr. 36:5, 53:25, 73:6.) In fact, Cyriague read a whole portion of a "Notice to Employees" in English. (Tr. 44:20-25, 45:1-2.) Elinia Pierre, an Employer witness and bargaining unit employee, also testified that she did not understand what the words "affiliated with" or "AFL-CIO" meant. (Tr. 137:6, 137:21)

Ledain also testified that a translator was called to translate for the voters many times during the election. (Tr. 67:21.) Smith, the Employer's observer, similarly testified that the translator was identified for the voters as such and that the voters were informed that he/she was there to help them and did so. (Tr. 95:8, 95:20-21.)

Discussion

Assuming that the words "affiliated with" and "coercion" were not understood, there was no evidence presented by the Employer to suggest that the voters did not know that they were either voting or not voting for collective-bargaining representation by the Petitioner. In fact, Employer's witness, Pierre, specifically stated that, despite not knowing what "affiliated with" meant, she understood the notice language including that phrase "affiliated with" to mean "one fifteen union." (Tr. 137:23.)

A review of the marked *Excelsior* list revealed that the three union observers and Pierre all voted despite the fact

¹²The Employer has raised for the first time in its brief an issue regarding the lack of translation to Creole of P. Exh. 2, a notice to employees. This issue was not raised at the hearing and there is no evidence to support the conclusion that the notice marked at the hearing as P. Exh. 2 was the actual one utilized for election purposes. As the issue was not initially raised as an objection, it seems reasonable to conclude, and I so conclude, that the copy of the notice to employees marked at the hearing and attached to the transcript by the court reporter at the end of the hearing was not the same as the original used at the hearing and election. Rather, it seems an accurate and correct copy of the notice, translated into Creole, which was utilized for purposes of the election, is the attachment to Petitioner's motion for substitution dated February 20, 1997, which establishes that the full notice, except for the phrases already discussed, were translated into Creole for purposes of the election. It was noted that, during the hearing, the Petitioner referred to the notice it was using when examining a witness as being a Creole version (Tr. 38:15) and that the Employer verified that the exhibit utilized by the Petitioner at the hearing was in fact a notice that had been translated into Creole. (Tr. 38:23-24.) It is clear, and I so conclude, that the copy attached at the end of the hearing by the court reporter was an inadvertent, ministerial error. Based upon all of the above and a review of the entire record, I grant the Petitioner's Motion for Substitution and I overrule this objection in its entirety.

¹³It was noted that all the witnesses were able to understand and speak English to some extent despite using an interpreter at times, perhaps more for comfort, and in fact did answer questions posed to them on cross-examination and sometimes on direct examination in English without using the interpreter provided by the Board.

¹¹As stated earlier, the only voter who testified about feeling "concerned" that "some unidentified person" may learn of her election choice was Patseta Taylor, whose broad concern led her to ask Bailey if anyone had to know who she voted for. (Tr. 125:7-10.) Taylor also summarily adopted Bailey's account of their conversation on election day. That account being that Taylor unreasonably thought that she could be seen marking her ballot by the seated observers while in the voting booth. (Tr. 123:10-14.) There was no testimony presented which indicated that any observer in the voting room came near enough to the voting booth to witness what election choice any voter had made, as they all remained seated behind the table throughout the election proceeding. In fact, Pretrina Smith, Employer's observer, indicated that the translator was the only one near the booth at any time and he/she was about 2 to 6 feet away from it at any given time. (Tr. 83:1-12, 83:19.) It was noted that Taylor did, in fact, vote despite this "concern" according to the marked *Excelsior* list.

that they did not understand certain words in the notice. Therefore, I conclude that neither party was prejudiced by the lack of translation of those words and that there is no evidence to suggest that voters did not cast ballots because of the lack of translation of "affiliated with" or "coercion" or "AFL-CIO." Certainly, English speaking individuals who learned English as a first language may not understand that those words mean either; however, that does not discount their voting choice or cause the election to be set aside.

Lastly, Manzo admitted that the Employer provided informational materials to voters during the critical period which were written solely in English (Tr. 115:1-13), thereby leading to the inference that he assumed that the voters could make an informed election decision after reviewing materials written only in the English language.

Additionally, for those who were uncomfortable with the English language and had questions or concerns about the process, there was a translator at the election proceedings to help them and this was made known to voters.¹⁴ Clearly, there was no evidence presented to indicate that voters could not make a free election choice or were confused about their choice because certain words, such as "affiliated with" were not translated.¹⁵

¹⁴It is not required that every voter be introduced to the translator for each one to utilize his or her skills for the purpose of answering any questions that they may have and, in fact, there was testimony by Ledain that many voters did exactly that. (Tr. 67:21.)

¹⁵It must be noted that the Employer attempted to utilize Marie Louis, the Board's interpreter, after subpoenaing her at the hearing, as an expert witness to translate "affiliated with" into Creole. The interpreter refused to translate same as she was surprised by the sudden issuance of a subpoena and did not deem it appropriate to be called as an expert witness without proper notice. I was in error to allow her to take the stand and to indicate that she could be questioned as an adverse witness and I so stated on the record. Clearly, as a limited agent for the Board, the interpreter's subpoena was improperly served and it was appropriately quashed. It is highly questionable, improper, and ingenuous for a party to attempt to take advantage of the presence of the Board's interpreter by calling her as an expert witness, and it is especially improper without adequate notification and payment of appropriate fees. The Employer was informed that it could present other expert witnesses to testify regarding this issue; however, it declined to do so. Further, it already knew of the translation of the words "affiliated with" by the interpreter based on her interpretation of same while assisting other witnesses with the translation of questions while they were on the witness stand. Rather than present its own expert witness regarding the matter as suggested, the Employer created an issue by indicating that it believed Louis' agitation at being called to testify exhibited some evidence of bias. However, to the contrary, I felt and still do feel that Louis' refusal to answer the Employer's questions showed utmost objectivity as she did not want to give an appearance to the witnesses in the courtroom that she was testifying on behalf of one party over another. The Employer requested that the whole proceeding be dismissed due to his perception that the interpreter was biased against it. However, there is no evidence to suggest same. Louis has been used many times by the Board and has always acted, as she did in this case, in the most professional and nonpartisan manner. Lastly, it was noted that Louis utilized her interpreting skills to aid the Employer's witnesses prior to her being called to testify by the Employer towards the end of the hearing; therefore, the Employer has no evidence that she misinterpreted any information to witnesses based on its misconceived perceptions of her, which were formed and verbalized after her witness translations. It is noted that one witness, Pierre, who indicated that she wanted an interpreter to aid her,

Based on all the above, I recommend that Objection 3 be overruled in its entirety.

Objection 4

The fourth objection alleged that agents, employees, and representatives of the Petitioner provided meals, gifts, and other financial inducements to eligible employees in an attempt to affect the outcome of the election.

The only testimony that the Employer provided regarding this matter involved Evanette Cyriague, whose testimony was candid and was credited in full.¹⁶ The Employer admitted into evidence Employer's Exhibit 5, which was a check issued by the Petitioner to Cyriague dated December 6, 1996, in the amount of \$108.73. Cyriague admitted that she did receive a check in that amount from the Petitioner for her observer duties. (Tr. 28:16-18.) She testified that she did not go to work on election day because of the election and she was compensated for her lost wages by the Union. (Tr. 31:12-16.) She further testified that she was not aware at the time of the election, whether she would be compensated for her services as a union observer. (Tr. 35:5, 35:10.) Marie Jean Phillippe, union agent, confirmed this. (Tr. 150:17, 152:22-23.) She credibly testified that the check in issue, Employer's Exhibit 5, was provided to Cyriague to compensate her for a loss of a day's pay caused by not being able to work in November 1996 since she was brought by the Petitioner to testify at a Board proceeding regarding a preelection issue during that month. (Tr. 151:22-24, 152:17.) Phillippe testified that the check in issue was not compensation for Cyriague's observer duties on January 17, 1997. (Tr. 153:4.)

Discussion

Based on the above, there was no evidence presented that Cyriague, or any other voter for that matter, was provided with financial inducements to vote for the Petitioner. The check was issued on December 6, 1996, weeks prior to the election and remote in time from it. Cyriague credibly testified that she was not aware that she was to be compensated for her observer duties before or on the day of the election and this testimony was undisputed. Therefore, it is reasonable to conclude, and I so conclude, that the check admitted into evidence was, as Phillippe indicated, one to compensate Cyriague for her participation in a preelection hearing which occurred in November 1996 at which time Cyriague lost wages from two facilities that she was working for. Her presence at a preelection Board hearing in November 1996 was confirmed by Cyriague herself. (Tr. 42:18.) Assuming arguendo that the check that Cyriague was provided with by the Petitioner dated December 6, 1996, did affect her election

did testify after Louis had taken the stand; however, as the record reflects, the witness responded in English to questions posed to her in English without utilizing the assistance of the interpreter.

¹⁶It was noted that Cyriague was nervous presumably since she was the first witness to take the stand. She also had a more difficult time than the other witnesses with the English language. However, I believed her statements on direct and cross-examination to be candid and truthful based on her demeanor. It is my belief that her nervousness and unfamiliarity with the setting led to her mistaken belief that the check marked as Emp. Exh. 5 was the same check which she received for her observer duties after the election had concluded.

choice, a change of her vote would not have affected the outcome of the election on January 17, 1997. There was no evidence to establish that the information that Cyriague had received a check from the Petitioner was disseminated to any bargaining unit employees. Further, there was no evidence presented to suggest that any other voter was provided with alleged financial inducements by the Petitioner, nor was there any evidence presented that any meals or gifts were provided to voters to affect their election choice.

Accordingly, I recommend that Objection 4 be overruled in its entirety.

Objection 5

The fifth objection alleged that agents, employees, and representatives of the Petitioner threatened employees and made other attempts to coerce employee sentiment in a manner which adversely affected the Employer and destroyed the laboratory conditions necessary for a fair and free election.

The only witness presented by the Employer regarding this objection was Director of Maintenance Owen Henriques. (Tr. 140:8.) Henriques, a nonbargaining unit employee, testified that during the critical preelection period he discovered coins on the floor of the facility in abnormal positions. (Tr. 140:18-25, 141:1-2.) Henriques, who is not Haitian, testified that he understood this symbol to be a Haitian intimidating factor. (Tr. 144:6, 144:24-25.) However, Henriques stated that he did not see who had placed these coins in the area, nor did anyone take responsibility for their placement. (Tr. 147:5-8, 147:15-20.) He indicated that, while picking up the coins he found, he was told by an unidentified aide to leave them in place or get in trouble. (Tr. 145:5-7.)

Discussion

The law is clear that "the subjective reactions of employees to alleged threats are irrelevant to the question of whether there was in fact objectionable conduct, rather the test is based on an objective standard." *Picoma Industries*, 296 NLRB 498 (1989), citing *Emerson Electric Co.*, 247 NLRB 1365, 1370 (1980). Therefore, my focus is on the reasonableness of the employee's fears as reflected by objective facts. See *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995); *Electra Food Machinery*, 279 NLRB 279, 280 (1986). I cannot conclude that the feelings of Henriques, a nonbargaining unit employee, regarding his understanding that the coins symbolized a threat or intimidation to bargaining unit employees was reasonable. Further, the Employer presented *no bargaining unit employees* to testify regarding their knowledge of the placement of these coins or their understanding as to the coins' purpose, if any. Therefore, I cannot conclude that the placement of these coins was a threat or an implied threat or an intimidating factor.

Additionally, the evidence presented does not establish that any agent, employee, or representative of the Union placed these coins on the floor, nor is there any evidence that it could be attributed to a third party whose actions were condoned or authorized by the Union. See *Catherine's, Inc.*, 316 NLRB 186 (1995).

Assuming *arguendo* that the placement of the coins was an implied threat or intimidation, the standard to apply in determining whether third-party conduct warrants setting aside an election requires that the Employer establish that the conduct

was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible. In determining the seriousness of a third-party threat, the Board evaluates not only the nature of the threat, but also whether the threat encompassed the entire bargaining unit; whether reports of the threat were disseminated widely within the unit; whether the person making the threat was capable of carrying out the threat; whether it is likely that the employees acted in fear of that person's capability of carrying out the threat; and whether the threat occurred or was rejuvenated at or near the time of the election. *Q. B. Rebuilders*, 312 NLRB 1141 (1993). The evidence does not even establish how or when the coins came to be on the floor, who placed them there or wide dissemination of this vague information. Clearly, it cannot be concluded that this conduct, even if considered a threat or intimidation, which I cannot so conclude, was so aggravated as to create a general atmosphere of fear and coercion warranting the election to be set aside.

Based on all of the above, I recommend that Objection 5 be overruled in its entirety.

Objection 6

Objection 6 contained the catchall language "other conduct upon which evidence is submitted by the Employer or which is discovered during the course of the Region's investigation of these objections which served to undermine the laboratory conditions surrounding the election."

The Employer contends that the concealment of its observer, Roi Green, created a perceived observer imbalance in Petitioner's favor so as to create favoritism and control by the Petitioner of the voting process.

In support of this objection, the Employer presented Green who testified that he could not see over the ballot box, but could see around the box. (Tr. 119:4-6.) It was admitted that the Employer had another observer present, Smith, who viewed the entire election proceedings. (Tr. 77:18.)

Discussion

There was no evidence presented that Green's allegedly hindered view created a numerical disadvantage for the Employer or that this development prejudiced the Employer or had any impact on the election by creating a perception of bias in favor of the Petitioner. The Employer presented no voters to testify to such perceptions. Additionally, as stated earlier, Manzo witnessed the seating arrangement of the observers and the placement of the ballot box prior to the commencement of the election and raised no concerns or objections.

There is no record evidence to support any further alleged objectionable conduct. Accordingly, based upon the above, I recommend that this objection be overruled in its entirety.

CONCLUSIONS AND RECOMMENDATIONS TO THE BOARD

Having recommended, as I do, that all of the Employer's Objections be overruled, I further recommend that Certification of Representative issue for the unit found appropriate in the Decision and Direction of Election, dated December 20, 1996.

In accordance with the Regional Director's Order Directing Hearing on Objections and Notice of Hearing, dated Jan-

uary 31, 1997, within 14 days from the issuance of this Report, either party may file with the Board in Washington, D.C., an original and seven copies of exceptions thereto. Immediately upon filing of such exceptions the party filing

same shall serve a copy thereof on the other parties and on me. If no exceptions are filed, the Board may adopt my recommendations.