

Cross Pointe Paper Corporation and PACE, Paper, Allied-Industrial, Chemical and Energy Workers International Union, AFL-CIO. Cases 13-CA-33121 and 13-RC-18874

February 17, 2000

SUPPLEMENTAL DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On April 19, 1999, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent and the Charging Party filed exceptions and supporting briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.¹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and the complaint is dismissed.

IT IS FURTHER ORDERED that the election held on November 4, 1993, in Case 13-RC-18874 is set aside and that Case 13-RC-18874 is remanded to the Regional Director for the purpose of conducting a second election.

[Direction of Second Election omitted from publication.]

Diane E. Emich, Esq., for the Regional Director.

Holly Ann Georgell and Jay Grytdahl, Esqs., for the Respondent.

Stanley Eisenstein, Esq., of Chicago, Illinois, for the Petitioner-Charging Party.

SUPPLEMENTAL DECISION ON REMAND

ROBERT A. GIANNASI, Administrative Law Judge. This is a technical 8(a)(5) and (1) refusal-to-bargain case, based on the Board's certification of the Petitioner-Charging Party Union's November 4, 1993 election victory. The final election tally was 46 votes in favor of the Union, 41 votes against, and 1 challenged ballot which was not opened because it would not have been determinative. The Respondent refused to bargain with the Union because it contests the certification based on timely filed objections to that election.¹

The initial Board decision, dated May 22, 1995, upheld the validity of the election, without a hearing on the objections, and found a refusal-to-bargain violation on summary judgment (317 NLRB 558). On review, the Seventh Circuit denied enforcement and remanded the matter for further proceedings. *Cross Pointe Paper Corp. v. NLRB*, 89 F.3d 447 (7th Cir. 1996). On November 20, 1998, the Board issued an order remanding the

¹ Because Member Hurtgen would direct a second election based on Objection 5, he does not pass on the judge's analysis of Objection 2.

² The 8(a)(5) and (1) allegations in the complaint include a flat refusal to bargain and a failure to respond to the Union's information request.

proceeding for a hearing on the objections, of which four remain for consideration here.

I conducted a hearing on the objections on February 22 and 23, 1999, in Chicago, Illinois, and received posthearing briefs from the Respondent and the Union on March 23, 1999.

Based on the posthearing briefs, the testimony before me, including my assessment of the demeanor of the witnesses, and the entire record in this case, I make the following findings and conclusions:

I. THE HECTOR FLORES INCIDENT

Respondent's Objection 3 alleges that the election results should be overturned because employees were led to doubt the secrecy of the election process. That objection deals with an alleged disruption caused by one eligible voter.

During the second voting period on November 4, 1993, between 10:45 and 11:45 p.m., Hector Flores, whose name appeared on the eligibility list provided by Respondent, was challenged by the Union. There is no evidence that the challenge was not in accordance with Board practice or that the Board agent handled the challenge and the ensuing situation in a manner contrary to Board practice. Flores apparently became concerned that the Board agent could not guarantee that his challenged ballot would not be opened at some point and be counted, thus perhaps revealing how he had voted. It is, of course, true that no one can guarantee secrecy in such circumstances because, if determinative, challenged ballots may be opened and counted. According to one witness, the Board agent told Flores that "he couldn't keep it secret because Hector's main concern was well, how many other people have you contested? And that way, he could figure out, okay, who voted which way and if it came down to the votes that were in the envelope or in the box, they would know exactly how Hector voted and he didn't appreciate that at all."

Flores apparently made a scene in the voting area, in the presence of a number of voters. He left the voting area without voting, and went outside where he told other employees his concerns about his challenged ballot. Some employees told him to go back and vote and others told him to talk to Respondent's attorneys who were apparently on the premises. But he declined to do either, even though he may have returned to the voting area a second time. There is no doubt he was screaming and complaining about what had happened and that many employees heard him. It appears, however, that he was complaining only about the secrecy of his own challenged ballot and there is no evidence that any employee voted any particular way or failed to vote because of his irrational behavior. More importantly, there were no improprieties that could be attributed to any party in the election or to the Board itself in supervising the election. Flores' conduct does not warrant setting aside the election and the objection on this matter will be overruled.

II. SUPERVISORY TAIN ISSUE

Respondent's Objection 2 alleges that the election should be set aside because its own supervisors coerced, restrained, and intimidated employees by instigating and assisting the Union's organizing activities. That objection deals with Respondent's team leaders, who were excluded from the election unit, and whose supervisory status was in dispute. At the hearing, and only for the purpose of ruling on the objections in this case, the Union agreed that they could be viewed as supervisors within the meaning of the Act.

It is undisputed that, early in the union campaign, some of the team leaders spoke with employees in favor of the Union, attended one union meeting, and even solicited employees to sign union authorization cards. There is no specific evidence that any of this activity took place after the filing of the election petition on September 15, 1993. Six days later, however, on September 21, 1993, Respondent held meetings in which the team leaders were told by Chris Gleba that they were supervisors and that they should not engage in pronoun activities. In recognition of the fact that some of them had favored the Union, Gleba told them they could choose to stay as a team leader supervisor or remain a member of the bargaining unit. None of the team leaders decided to remain as members of the bargaining unit. Sandra Burns, Respondent's human relations manager, testified that Respondent campaigned against the Union and there was no doubt that Respondent was opposed to union representation for its employees.

It is well settled that the pronoun activity of statutory supervisors constitutes objectionable conduct only (1) when the employer takes no stand contrary to the supervisor's pronoun conduct, thus leading the employees to believe that the employer favors the union; or (2) when the supervisor's pronoun conduct coerces employees into supporting the union out of fear of retaliation by, or rewards from, the supervisors. *Sutter Roseville Medical Center*, 324 NLRB 218 (1997), cited with approval in *Millsboro Nursing & Rehabilitation Center*, 327 NLRB 879 (1999).

It is also well settled that conduct that takes prior to the filing of an election petition may not be the basis for overturning the election. *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961). Despite the *Ideal Electric* rule, however, the Board sometimes considers pre-petition conduct, but only when there is "significant postpetition conduct related to or continuing from pre-petition events." *Textron, Inc. v. NLRB*, 538 F.2d 957, 960 (6th Cir. 1981). As the Sixth Circuit stated, if the postpetition conduct "was insignificant or consisted of isolated incidents, it would be pointless for the Board to burden the hearing with additional evidence concerning prepetition matters." *Id.*

Applying these principles to the facts in this case, I find that there is no significant postpetition evidence of supervisory taint that would require that the election be overturned or require consideration of prepetition conduct. In any event, although some team leaders engaged in pronoun activities and discussions and may have solicited employees to sign authorization cards before the petition was filed, there is no evidence that any team leader coerced employees to support the Union. Nor has Respondent made any offer of proof that there was evidence of such coercion. Indeed, within a week after the petition was filed, Respondent told its team leaders that they had to decide whether to be included in the unit or not, but, if they chose to remain team leaders—and they all did so choose, they would be considered part of management and could no longer engage in pronoun activities. There is no evidence of any pronoun activity on the part of the team leaders after that meeting, much less of coercion against employees on behalf of the Union. Nor is there any such evidence during the period between the filing of the petition and the meeting. Finally, there could be no doubt, on this record, that the employees knew that the Respondent did not favor the Union. In these circumstances, I shall overrule the objection alleging supervisory taint.

III. THE RUMOR

Respondent's Objection 1 alleges that the election should be overturned because either the Union or third parties coerced, restrained, and intimidated employees by deliberately exacerbating "racial/ethnic feeling among employees by inflammatory appeals." There is no evidence, however, that the Union or its agents were responsible for the conduct about which Respondent complains. The objection is reduced to an allegation that a rumor that circulated in the plant on election day requires the election to be set aside.

A rumor circulated within the plant on election day that, in a conversation with Plant Engineer Fred Susterich, Director of Operations Chris Gleba said something to the effect that he hoped that the "f-ing Mexicans" voted against the Union.²

A number of employees, team leaders and management officials testified about the rumor. Not surprisingly, much of their testimony was ambiguous, contradictory and difficult to reconcile. There was testimony, some of it hearsay, about how other employees who did not testify viewed the rumor. Moreover, much of the testimony as to whether employees heard the rumor before or after they voted was hearsay. I attempt below to make some sense of what is understandably a confused record.³

Chris Gleba, who apparently worked the entire day, testified that he heard about the rumor only after the polls had closed. According to Gleba, employee Vince Roland told him that he supposedly had made the derogatory comment in a conversation with Susterich earlier in the day. At the hearing, Gleba denied he made such a comment to Susterich, and Susterich, who also testified, corroborated Gleba.

Juan Rodriguez, a second-shift team leader, testified that he overheard three or four employees talking about the rumor at 5 or 6 p.m. on election day. The only employee he could identify was Octavio Soto, but he could not remember what was said by any of these employees. He testified that some of the employees were angry about the rumor, but also that there was a lot of tension surrounding the election, even apart from the rumor. He further testified that he did not approach Gleba about the rumor, but that "way prior" to the election he had overheard Gleba make an ethnic slur against "people from Poland."

Employee Vincent Roland worked second shift on election day. He testified that he heard the rumor "in the evening after he had voted" from Albert Tittorino. Steve and Martin Martinez were also present. Roland later told Carlos Selgato and Ben Molaro about the rumor. With the possible exception of Molaro, none of these individuals testified.⁴ According to Roland, when he told Selgato of the rumor, Selgato was angry. Other employees were angry or surprised. Actually, Roland

² Different witnesses testified about different versions of the rumor: (1) The election depends on how the f-ing Mexicans vote; (2) the Mexicans could vote any way they f-ing wanted to; (3) The f-ing Mexicans are going to lose the election; (4) the f-ing Mexicans better vote no if they know what is best for them; and (5) the election depends on how the f-ing Mexicans vote.

³ In evaluating the testimony it is useful to note that Respondent operated three shifts at the time of the election: The second shift began at 3 p.m. and ended at 11:30 p.m.; the third began at 11 p.m. and lasted until 7:30 a.m.; the first apparently began at 7 a.m. and ended at 3 or 3:30 p.m. There were two voting periods. The first ran from 2:30 p.m. to 3:30 p.m. and the second from 10:45 p.m. to 11:45 p.m.

⁴ It is unclear whether the Ben Molaro referred to by Roland is the Roman Molaro who testified before Roland in this proceeding. I discuss Roman Molaro's testimony later in this decision.

testified that Selgato told him that he had already heard the rumor earlier that day from someone else and Selgato did not say he had overheard Gleba make the remark. Roland also denied ever talking to Gleba on election day about the rumor or anything else, thus contradicting Gleba on this point.

Terry Henry, Respondent's operations coordinator and a member of management, testified that he was asked by employee Vince Roland whether Gleba had said that "those f-ing Mexicans are going to lose the election for us." Several employees were present, including Sal Monroy and Mike Richards, neither of whom testified. Henry told Roland that he had known Gleba for some time and "there's no way that he said that." Henry thought that the conversation took place at about 3:30 p.m., a half-hour after the start of the second shift. Henry also credibly testified that he contacted Gleba that day and Gleba denied making the statement attributed to him. Although Henry was not sure when during the day he talked to Gleba, it is reasonable to infer that it was not too long after Henry heard the rumor.

Employee Tom Williams testified that, while he was working the second shift, he heard the rumor in a group of about 10 or 12 employees, none of whom he could identify. He said that some were very upset and angry and said they were going to vote for the Union, although his testimony does not indicate that they were going to vote for the Union because of the rumor. Williams did not testify whether he himself heard the rumor before or after he voted.

Employee Darryl McMullen was a third-shift employee who worked a full shift after the election was over. He arrived at the plant sometime before the beginning of the 10:45–11:45 p.m. voting session, and, because he was an observer for Respondent during that session, met with David Guerrero, another employer observer, and Sandy Burns, Respondent's human resources manager. He testified that there was no discussion at this meeting of the Gleba rumor.

McMullen also testified that, after the voting was completed, he heard about the rumor from employees Vince Roland and Martin Martinez and others whom he did not identify. He testified that these employees were very upset and that Martinez, who did not testify, said that, if he and Roland had known about the rumor before they voted, they would have voted for the Union. That implied that Martinez had already voted when he heard the rumor. But McMullen's testimony is internally inconsistent. At another point, he testified that Martinez knew about the rumor before he voted, but he corrected that, after being shown his affidavit. Later, on recross, McMullen testified that Martinez told him that the rumor changed the way he voted. Unlike Martinez, Roland testified in this case. He testified that he heard about the rumor after he voted. McMullen's testimony about Martinez' voting was hearsay and unreliable for that reason. But his inconsistent testimony about Martinez also leads me to conclude that all his testimony about hearing the rumor after the polls closed is unreliable and I reject it.

David Guerrero, one of the Respondent's election observers, testified that he came to work at 2:30 p.m. on election day, and worked the entire second shift. He did not hear anything about the rumor. Human Resources Manager Sandy Burns testified that she first heard the rumor after the voting was completed, which would have been 11:45 p.m., from Vince Roland.

Employee Roman Molaro testified that, shortly after he reported for work at 10:45 p.m., he heard the rumor being discussed by a group of 15 to 20 employees in front of a group of

vending machines. About half of those employees were Hispanic. He testified that Octavio Soto, who did not testify, or someone else said that employees should vote "yes" because of Gleba's alleged remark. That testimony conflicted with a signed statement prepared in November 1993 by Respondent's then-attorney and apparently submitted to the Seventh Circuit in connection with its review of this case. According to Molaro, Vince Roland and another employee who did not testify approached him before he voted and urged him to vote for the Union. Again according to Molaro, Roland told him he was going to make sure all the employees knew about the rumor. Roland did testify but did not corroborate Molaro on this point. He testified that he mentioned the rumor to Ben Molaro but it is unclear on this record whether he meant Roman Molaro. In any event, his reference to Molaro was brief and not consistent with Molaro's account. In these circumstances, and because parts of Molaro's testimony conflicted with an earlier statement of his, I cannot find reliable or credit any of Molaro's testimony as set forth above.

I do, however, credit Molaro in one respect. In answer to my question near the end of his testimony, he testified quite candidly, I thought, that he did not believe the remarks in the rumor that were attributed to Gleba.

Employees Jimmy Nieves and Dan Brandon testified that, shortly before 11 p.m. on election day, they heard the rumor from Martin Martinez and Carlos Selgato, neither of whom testified. According to Brandon, who had already voted, Martinez and Selgato were upset and claimed actually to have overheard Gleba making the remarks attributed to him. Martinez also said he was going to make sure everybody knew what Gleba had said. Nieves, who had not yet voted, said something like, "that's all right because I'm Puerto Rican anyway" and he laughed.⁵

Employee David Howard, a third-shift employee, testified that he was in a group of four or five employees when he first heard the rumor on election day. According to Howard, some of the employees were upset. He identified only Rodney Pronos and Martin Martinez, neither of whom testified. He also testified that he had not voted at this point.

The applicable law is well settled. As the Second Circuit observed many years ago, "[s]ince it is not uncommon for elections to be characterized by unfounded rumors, the Board is justified in requiring at the very least that there be a 'substantial likelihood' that the outcome was affected by the rumor." *NLRB v. Staub Cleaners, Inc.*, 418 F.2d 1086, 1088 (2d Cir. 1969), cert. denied 397 U.S. 1038 (1970). Elections are not lightly set aside on the basis of alleged conduct that is not attributable to unions or employers because there is little they can do to prevent it, and it is less likely to affect the outcome. Thus, even third party threats and rumors of deportation do not invalidate an election. See *Deffenbaugh Industries, Inc. v NLRB*, 122 F.3d 582, 586 (8th Cir. 1997). For such conduct to vitiate an election, it must be shown that it created "an atmosphere of fear and reprisal such as to render a free expression of choice impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984).

The rumor here did not involve a threat. Indeed, it could only have been a threat that voting for the Union would have

⁵ I cannot find that Selgato and Martinez overheard Gleba's remark because Brandon's testimony is hearsay on that point and it conflicts with other testimony in this case.

incurred Respondent's displeasure: Hispanics had better vote against the Union. Respondent, however, suggests that the rumor engendered an appeal to ethnic pride, and, since a management official allegedly made an ethnically offensive statement, Hispanics, would have reacted by voting for the Union rather than against it. In this respect, Respondent seems to invoke the rule that the Board sets aside elections where a party "deliberately seek[s] to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals to racial prejudice." *Sewell Mfg. Co.*, 138 NLRB 66, 71-72 (1962). Even then, however, elections are not set aside if the racial or ethnic appeal is not sufficiently close to the core theme of the election campaign. See *State Bank of India v. NLRB*, 808 F.2d 526, 542 (7th Cir. 1986), cert. denied 483 U.S. 1005 (1987). The Respondent also alleges that the rumor spread a falsehood because Gleba did not say what he was accused of saying. The Board however, has stated that it will not police even misrepresentations by parties, except in limited situations not applicable here. The reason is that the Board believes that employees are capable of recognizing campaign propaganda for what it is and discounting it. *Midland National Life Insurance Co.*, 263 NLRB 127 (1982).

Applying these principles to the facts on this record, I find that the rumor, which was not attributable to the Union, did not create an atmosphere of fear and reprisal such as to render a free expression of choice impossible. As I have indicated above, some of the testimony on the issue is not reliable. Other portions are suffused with hearsay and confusing or contradictory. It is impossible to trace the rumor to its source, although it is clear that it was repeated during election day. There is also testimony that employees were urging their fellow employees to vote for the Union because of the content of the rumor. And some employees were angry and upset at the content of the rumor. Yet there were other tensions over the election, even apart from the rumor, and there is no evidence that ethnic solidarity or prejudice was even an issue in the campaign. Moreover, it is not clear to me that the rumor was either widespread enough or believable enough to have made a fair or free election impossible. Molaro credibly testified that he did not believe Gleba said what he is rumored to have said. That was also the point made by Terry Henry, an official of management, to Vince Roland and several other employees. Indeed, Henry credibly testified that he heard the rumor early in the second shift and he contacted Gleba during the day. Significantly, Gleba told Henry he did not make the statement attributed to him. David Guerrero, one of the Respondent's election observers worked the entire second shift and did not even hear the rumor. And Jimmy Nieves dismissed the rumor because he said it did not affect him.

In sum, although Gleba's alleged remarks were insensitive, they were not inflammatory. The rumor was not phrased or used as a threat by the Union. Indeed, the Union was not involved in initiating or circulating the rumor, which was the type of third-party conduct that cannot be prevented in any election. Moreover, the rumor was not shown to be related to a core issue in the campaign, and it is unclear on this record whether substantial numbers of employees believed the content of the rumor or were so affected by it to alter their vote. Finally, I believe the employees were able to determine for themselves whether Gleba was capable of making the remarks attributed to him in the rumor. In these circumstances, I find and conclude that Respondent has not met its burden of proving that there was a substantial likelihood that circulation of the rumor cre-

ated an atmosphere of fear and reprisal such as to render a free expression of choice impossible.⁶

IV. OBSERVER LIST KEEPING

Respondent's Objection 5 alleges that impermissible conduct of the union election observers "destroyed the prerequisite laboratory conditions and affected the election and the results of the election." That objection deals with alleged list keeping by a Union observer.

During the second of two voting periods, on November 4, 1993, between 10:45 and 11:45 p.m., one of the Union's election observers, Ricardo Briones, was seen writing something on a sheet of paper in front of him. Sitting with Briones at a table facing the voters as they approached to vote were Respondent's observers, Darryl McMullen and David Guerrero, a second union observer, Mark Tinarina, and the Board agent conducting the election. Guerrero and Tinarina were responsible for checking the voters against the official eligibility list. Between 20 and 30 employees probably voted during this period, according to the uncontradicted testimony of Guerrero.

McMullen and Guerrero and employees Jimmy Nieves and Dan Andrade testified that they saw union observer Briones writing something, which they could not identify exactly, during the time when voters were actually voting or coming in to vote. I find, from a composite of their testimony, that Briones was writing something on a sheet of paper in open view of the voters. Their testimony was essentially confirmed by Briones, who testified that he was writing on a small sheet of paper on the table in front of him. He also testified that he was simply writing check marks as employees came in to vote. Employee Tom Williams credibly testified, however, that Briones told him later that day, after the polls had closed, that he, Briones, was "keeping a sheet of who he thought was voting yes and no."⁷

⁶ In its brief, Respondent asks that I reconsider my refusal to permit it to allow the testimony of an alleged expert witness on the impact of the rumor on a predominantly Hispanic work force and the "lay opinion" testimony of its human resources manager on the impact of the rumor on Respondent's work force. At the hearing, Respondent's counsel were unable to cite authorities to show that the Board allowed such evidence in circumstances such as those presented here. Nor have they done so in their brief. Some of the reasons I gave at the hearing for refusing to permit that evidence, however, were inartfully and perhaps too broadly stated. I therefore reconsider my ruling here. I adhere to my exclusion of the evidence, but only for the following reasons. In my view, the opinion testimony of neither witness would have been probative, reliable or helpful in deciding an issue that is ultimately for the Board to decide, applying its expertise in this area of the law. Accordingly, the admission of such opinion testimony, whether called expert or not, would have "waste[d] time" and unduly prolonged the hearing, without any significant benefit to the decision-maker. Had I admitted Respondent's evidence, I could not have excluded any qualified counter-opinion witnesses offered by the Union. The resulting prospect of dueling "oath helpers" or "legal opinion helpers" would, in my judgment, have hindered rather than forwarded a prompt and reasoned resolution of the issue presented here. See Advisory Committee note to Rule 704 of the Federal Rules of Evidence. See also *Associated Constructors*, 315 NLRB 1255 fn. 3 (1995).

⁷ Williams seemed to be an honest, straightforward witness. Although Briones initially denied telling anyone he was noting how people voted or even talking with Williams, he later testified he could not "recall" such a conversation with Williams. I credit Williams' clearer, more detailed testimony on this point.

In *Days Inn Management Co.*, 299 NLRB 735, 737 (1992), the Board stated:

It is well settled that the only list of voters that may be maintained in Board-conducted elections is the official voter eligibility list used to check off the names of voters as they receive their ballots. The keeping of any other list of individuals who have voted is prohibited and is grounds in itself for setting aside the election when it can be shown or inferred from the circumstances that the employees knew that their names were being recorded. And this is so even when there has been no showing of actual interference with the voters' free choice.

And, in its decision remanding the instant case, the Seventh Circuit quoted from *Masonic Homes of California*, 258 NLRB 41, 48 (1981), as follows:

The Board and courts long have held that voting in Board cases must be free of any impropriety, and that employees must be permitted to cast their ballots in secret, in complete freedom, and without fear of reprisal or discipline. Activity that reasonably can be construed as improper is proscribed whether or not the activity is, in fact, improper. Impropriety has taken many forms in the cases, and one such is the keeping of lists of voters. Such lists are improper if employee voters know, or reasonably can infer, that their names are being recorded.

Other Board cases have recognized that the focus of the inquiry must be on what voters observed and could reasonably believe. See in addition to *Masonic Homes of California, Inc.* and *Days Inn* cited above, *Southland Containers, Inc.*, 312 NLRB 1087 (1993); and *Cerock Wire & Cable Group*, 273 NLRB 1041 (1984), and cases cited therein.

Applying these principles to the facts developed at the hearing, I find that employee-voters reasonably could infer that their names were being recorded by Union Observer Briones. Besides Briones, two other voters and two other observer-voters testified. Although they could not see exactly what Briones was writing, they saw that he was writing something. As Briones was writing in open view, I infer that other voters in the second voting period would also have witnessed Briones writing something. Because Briones was seated near the voter eligibility list, voters could reasonably conclude that he had access to it, and that he was keeping a list of names. In these circumstances, and because the appropriate focus of inquiry in these cases is on what the employees saw and reasonably could believe, it is unnecessary for me to determine exactly what Briones was writing. Nonetheless, I note that Briones later told another employee he had been "keeping a sheet of who he thought was voting yes and no." Accordingly, I find that Briones' conduct violated the Board's Rule against list keeping as described above in *Days Inn* and *Masonic Homes of California*, and I sustain the objection.

In urging a contrary finding, the Union cites *Southland Containers, Inc.*, 312 NLRB 1087 (1993), and other cases that seem to set forth a de minimis rule in list keeping cases. In view of

the openness of Briones' conduct, however, and the fact that between 20 and 30 voters may have observed the same thing the 4 witnesses did, I cannot view the conduct or its impact as de minimis. *Southland Containers* is also distinguishable because the list keeper was not an agent of any party and was not an election observer.

The Union also relies on *Cerock Wire & Cable Group*, supra, and *Textile Service Industries*, 284 NLRB 1108 (1987). But those cases, in which the Board found the tally-keeping by observers unobjectionable, are distinguishable. In both, it appears that the observers successfully concealed from voters not only what they were writing, but also the fact that they were writing. In each case, unlike here, only a fellow observer saw the alleged misconduct. There is no evidence that employee voters saw it; and aside from the fellow observers, who were presumably sitting near the allegedly offending observer and could see exactly what was being written, no employee-voters testified. Here, on the other hand, in addition to the fellow observers, two employee-voters testified that Briones was openly writing something, although they could not tell what it was. Voters thus could not preclude the possibility that the observer was recording names, as was the case in *Cerock Wire* and *Textile Services*. Finally, in *Cerock Wire*, the union won the election by a margin of almost 2 to 1, and, in *Textile Service*, the petitioning union beat the intervening union by a comfortable margin. Here, in a situation where between 20 to 30 voters may have seen Briones' conduct, a change of 3 votes would have affected the results of the election. In these circumstances, I cannot conclude that *Cerock Wire* and *Textile Service* warrant overruling the objection in this case.⁸

SUMMARY AND RECOMMENDED ORDER

Because I have sustained Respondent's Objection 5 to the election of November 4, 1993, the election must be set aside. Thus, the certification cannot stand and the complaint in Case 13-CA-33121 is dismissed. The representation case, Case 13-RC-18874, is remanded to the Regional Director for the purpose of conducting a new election whenever and under whatever circumstances she deems appropriate.⁹

⁸ In *Cerock Wire*, the Board suggested that it was relevant that the observer was only making hash marks. But, as noted above, here, voters could not tell what the observer was actually writing, thus leaving open the inference that he was keeping a list. In any event, I view that language in *Cerock Wire* as dictum. If I am wrong, however, I urge the Board to promulgate a bright line rule against observers writing anything during an election period unless it is directly related to their responsibilities, if any, in checking voters against an eligibility list. Board agents conducting elections should also be directed to give explicit instructions on this matter to prevent any appearance of impropriety in future elections.

⁹ In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.