

**Superior of Missouri, Inc. and Teamsters Local Union No. 682, affiliated with International Brotherhood of Teamsters, AFL-CIO.** Case 14-CA-25421

November 20, 2002

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On May 2, 2002, Administrative Law Judge Robert A. Pulcini issued the attached decision. The Respondent and General Counsel filed exceptions, supporting briefs, and answering briefs.

The National Labor Relations 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,<sup>1</sup> and conclusions<sup>2</sup> as modified below.

An overview of this case and related proceedings concerning a June 26, 1998 representation election, held after a postponement, is helpful as background to our current decision: the Respondent filed objections to the conduct of the election, which the Regional Director, without a hearing, recommended that the Board overrule. The Board did so, certifying the Union. To pursue its objections, the Respondent refused to bargain with the Union. The Board found a violation of the Act, ordered the Respondent to bargain, and petitioned the U.S. Court of Appeals for the Eighth Circuit for enforcement of the Order. The court remanded the matter to the Board for an evidentiary hearing, which was held before the judge. *NLRB v. Superior of Missouri, Inc.*, 233 F.3d 547 (2000). We now consider exceptions to his decision, based on the hearing record.

1. We agree with the judge's finding that Objection 1, which alleges that the rescheduling of the representation election disenfranchised employees and disrupted the laboratory conditions under which the election should have been conducted, is without merit. As more fully explained in the judge's decision, an election scheduled for June 19, 1998,<sup>3</sup> did not take place because Board Agent Matt Lomax, who was assigned to conduct the election, failed to arrive in time to open the polls as

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> No exceptions were filed to the judge's recommendation to overrule the Respondent's Objection 3.

<sup>3</sup> All dates are in 1998 unless otherwise indicated.

scheduled.<sup>4</sup> On that same day, Lomax conferred with the parties concerning a new date for the election, and the election was rescheduled for June 26. It is undisputed that both parties agreed to the new election date.<sup>5</sup> Lomax then delivered new election notices to the Respondent, which were subsequently posted at its facilities. The election took place on June 26 without incident, and the Union won by a vote of 41-20.

The Respondent argues that the rescheduling of the election, due to Lomax's late arrival, affected the outcome of the election when it was ultimately held on June 26. However, the rescheduling of the election by itself is not grounds for setting the June 26 election aside. See *Malta Construction Co.*, 276 NLRB 1494, 1510 (1985). The Respondent does not allege, and the evidence does not establish, that there were any irregularities in the conduct of the June 26 election that would cast doubt on the validity of the results. In the absence of such evidence, we find no basis for setting the election aside.

In seeking to upset the election, the Respondent cites cases<sup>6</sup> in which the Board set aside a representation election that was held after the Board agent arrived late or proceeded even though the agent closed the polls early or temporarily during polling hours. We find that those cases are inapposite. They involved situations in which the Board agent's conduct on the day of the election disrupted the polling hours, raising the possibility that some employees had been disenfranchised or that the vote may have been affected by the irregularities that occurred during the election. See, e.g., *Midwest Canvas Corp.*, supra. Here, in contrast, the parties agreed to reschedule the election, after the Board agent's late arrival frustrated the original effort to proceed. The Respondent now argues that the postponement of the election affected the outcome of the rescheduled election held 7 days later. The Respondent does not contend that the polling hours on June 26 were disrupted by the Board agent's conduct

<sup>4</sup> It is uncontroverted that Lomax's failure to show up on time was due to circumstances beyond his control.

<sup>5</sup> The Respondent offered no evidence to rebut Lomax's testimony that Respondent's attorney Linihan told Lomax the June 26 date for the election "would be fine."

In agreeing with the judge's overruling of Objection 1, Members Cowen and Bartlett find speculative the judge's statements that the Respondent, in agreeing to a new election date, was engaging in a "gambit" and was "bankrolling" its possible objections. Moreover, the Respondent's motive in agreeing to a new election date is irrelevant. Accordingly, Members Cowen and Bartlett find it unnecessary to rely on these statements by the judge.

<sup>6</sup> *Midwest Canvas Corp.*, 326 NLRB 58 (1998); *Wolverine Dispatch Inc.*, 321 NLRB 796 (1996); *Jim Kraut Chevrolet*, 240 NLRB 460 (1979); *Grant's Home Furnishings, Inc.*, 229 NLRB 1305 (1977); *Nyack Hospital*, 238 NLRB 257 (1978); *B&B Better Baked Foods, Inc.*, 208 NLRB 493 (1974); and *Kerona Plastics Extrusion Co.*, 196 NLRB 1120 (1972).

on that day, or that there were any irregularities in the conduct of that election that affected the results. In these circumstances, we find the cases cited by the Respondent are inapplicable here.<sup>7</sup>

2. We also affirm the judge's reliance on *Alladin Plastics, Inc.*, 182 NLRB 64 (1970), in finding that an alleged rumor that the June 19 election did not take place because the Respondent "paid off the Labor Board" did not affect the laboratory conditions surrounding the June 26 election. Under circumstances similar to those here, the Board in *Alladin* found no grounds for setting aside an election where the Union had nothing to do with starting or spreading a rumor that the employer had "bought off" the Board. *Id.* at 64. Here, as in *Alladin*, it is clear that the Union had nothing to do with the alleged rumor; indeed, the evidence shows that the union agent attempted to put an end to it before it could spread.<sup>8</sup>

Prior to remanding this case to the Board, the Eighth Circuit found *Alladin* to be materially distinguishable, based on the prehearing evidence presented by the Respondent. See *NLRB v. Superior of Missouri, Inc.*, *supra*. Specifically, the court determined that "without a hearing, we cannot know whether Union organizers or supporters helped fuel the rumor to Superior's disadvantage." *Id.* That question has now been answered, negatively. We find that the evidence presented at the hearing after remand, discussed above and more fully described in the judge's decision, demonstrates that the credible facts of this case do not differ from those in *Alladin* in any material way. We therefore affirm the judge and find *Alladin* to be controlling.

Because we find no merit in the Respondent's objections to the election conducted on June 26, 1998, we reaffirm the Certification of Representative issued on November 30, 1998, and our original Decision and Order issued on March 31, 1999.<sup>9</sup> See *K Mart Corp.*, 322 NLRB 1014 (1997), *enfd.* 125 F.3d 572 (7th Cir. 1997);

<sup>7</sup> We similarly find the judge's reliance on *Glass Depot, Inc.*, 318 NLRB 766 (1995), and *Pea Ridge Iron Ore Co.*, 335 NLRB 161 (2001), to be inappropriate, as neither of those cases involved the validity of a rescheduled election.

<sup>8</sup> Although they recognize that the current Board does not require it, Members Cowen and Bartlett are of the view that, when, as here, an election must be rescheduled for administrative reasons and not due to the fault of any party, it would be preferable for the notice of the rescheduled election to state that the election had been rescheduled solely for the Board's administrative reasons. Such language would dispel any erroneous impression among employees that the election was required to be rescheduled because of misconduct by any party.

<sup>9</sup> 327 NLRB 1208 (1999), *enf. denied* 233 F.3d 547 (8th Cir. 2000). As stated in our previous Decision and Order, we shall construe the initial period of certification as beginning on the date that the Respondent begins to bargain in good faith with the Union.

*Monark Boat Co.*, 276 NLRB 1143 (1985), *enfd.* 800 F.2d 191 (8th Cir. 1986).<sup>10</sup>

## ORDER

The National Labor Relations Board overrules all of the Employer's objections to the election conducted on June 26, 1998, in Case 14-RC-11946, and affirms its Decision and Order issued on March 31, 1999, reported at 327 NLRB 1208 (1999), with the Respondent, Superior of Missouri, Inc., St. Louis, Missouri, its officers, agents, successors, and assigns, ordered to take the action set forth therein.

*Lucinda L. Flynn, Esq.*, for the General Counsel.  
*Geoffrey M. Gilbert Jr., Esq.*, and *Stephen B. Maule, Esq.*  
(*McMahon, Berger, Hanna, Linihan, Cody & McCarthy*),  
of St. Louis, Missouri, for the Respondent.

*Brian A. Spector, Esq.* (*Spector & Wolfe, L.L.C.*), of Kirkwood,  
Missouri, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

ROBERT A. PULCINI, Administrative Law Judge. This case was tried in St. Louis, Missouri, on December 12, 2001. On May 7, 1998, Teamsters Local Union No. 682, affiliated with International Brotherhood of Teamsters, AFL-CIO (Union), filed a petition seeking an election in an appropriate bargaining unit of employees employed by Superior of Missouri, Inc. (Respondent). This petition resulted in a Stipulated Election Agreement approved by the Regional Director on May 19, 1998. The election, scheduled for June 19, 1998, did not happen due to alleged Board agent misconduct. On June 26, 1998, the Board held the rescheduled election. It resulted in the Union prevailing. The Company then filed timely objections to the conduct of the election.

The Regional Director conducted an inquiry into the objections and issued a report recommending overruling them and certifying the Union as the collective-bargaining representative of Respondent's employees. The Board affirmed the Regional Director's recommendations and issued a Certification of Representative. Respondent refused to bargain in further contest of the issues raised by its election objections. A complaint issued followed by General Counsel filing a Motion for Summary Judgment on February 26, 1999. The Board granted the Motion for Summary Judgment on March 31, 1999.

<sup>10</sup> We have revised the judge's recommended Order accordingly. Member Cowen would adopt the judge's Order overruling the Respondent's objections and would issue a Certification of Representative. Unlike his colleagues, however, he would not reaffirm the Board's original Decision and Order finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by refusing to bargain with the Union at a time when, as subsequently found by the Eighth Circuit, the Board had erroneously certified the Union as the bargaining representative of the Respondent's employees without affording the Respondent an evidentiary hearing on its election objections. See *NLRB v. Superior of Missouri, Inc.*, 233 F.3d 547 (8th Cir. 2000), *denying enf.* 327 NLRB 1208 (1999).

The Board petitioned the Eighth Circuit Court of Appeals (the court) for enforcement of the issued Decision and Order. On November 7, 2000, the court remanded the matter to the Board for an evidentiary hearing on the three objections in the underlying representation case. The Board then remanded the case to the Regional Director to conduct the hearing held before me on December 12, 2001.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

The Respondent, a corporation, is engaged in trash hauling and recycling at its facility in St. Louis, Missouri, where it annually ships to points directly outside of the State of Missouri goods valued in excess of \$50,000. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### II. ISSUES

Objection 1. Whether the Board agent assigned to the election engaged in misconduct that interfered with the laboratory conditions for running an election.

Objection 2. Whether the rescheduling of the election to the following week of June 26, 1998, disenfranchised voters in some fashion in the context of the Board agent alleged misconduct.

Objection 3. Whether a union representative promised dues waivers to those employees who voted in favor of the Union.

##### III. FACTS

Respondent is a trash hauling business that does some recycling from North and South St. Louis, Missouri locations. In early 1998, the Union began an organizational campaign among the drivers and helpers of the Respondent. Respondent replied with a countercampaign consisting of meetings with employees. It held these at the North location, making its case against unionization. This countercampaign, in no way, stepped beyond the bounds of appropriate and lawful conduct. On May 19, 1998, the parties entered a Stipulated Election Agreement, approved by the Regional Director for Region 14 that same day. The agreement provided for the election on June 19, 1998, from 6 to 8 a.m., at the employer's North facility in a bargaining unit of some 69 employees. By agreement, the Board agent conducting the election was to meet the parties at the situs of the election for a preelection conference at about 5:45 a.m. that morning.

The Union's preelection campaign also involved meeting with groups of interested employees. Tim Ryan, union representative, held these meetings.<sup>1</sup> Some meetings took place at a lounge in a shopping center called the Runaway Lounge, a short drive from the North facility. Here, Ryan passed out au-

<sup>1</sup> The number, dates, and time of these meetings are unclear in this record.

thorization cards, retrieved them, and engaged in campaign rhetoric. About 20 employees seemed to be the usual number of attendees. During one of these preelection meetings, Ryan told employees that no one employed when the Union is voted in would have to pay the customary \$300 initiation fee.<sup>2</sup> Ryan spoke to some of the attendees at this meeting a second time the next day, and reiterated the Union's promise to waive initiation fees for all.<sup>3</sup>

On the day of the election, Field Examiner Matt Lomax, the NLRB agent assigned to run the election, did not arrive on time.<sup>4</sup> This caused General Manager Kenneth L. McAfee to release the employees to their runs. The nature of the trash hauling business involves schedules, according to the Respondent. Thus, with the workday disrupted by the failure of the election to begin on time, it decided to send the employees out on their runs. Moreover, the parties agreed the employees milled around in the confusion caused by the failed election start, creating a negative dynamic, resolvable by releasing them to work.<sup>5</sup>

Lomax called the parties some 50 minutes into the scheduled election time. He spoke to McAfee. He explained what happened to him. He then asked McAfee to bring the employees back in. McAfee refused.<sup>6</sup> McAfee told his attorney what had happened. He, in turn, told Union Agent Ryan. Ryan testified this conversation took place some 8 feet away from a group of about 20 employees still on site. The failure of the Board agent to show immediately generated speculation and comment among the waiting employees. What the parties refer to as the "rumor" began to circulate that "Superior paid off the Labor

<sup>2</sup> There are two conflicting versions of this event. Employees Wilbert R. Harking and Joe Green testified Ryan told the employees that the Union would waive its initiation fee for all employees. Another employee Sean Sontage arrived late for the meeting and testified that he heard Ryan say that those employees who voted for the Union would have their initiation fee waived. I credit Harking and Green's version of events, given the context of the meeting, and the admitted late arrival of Sontage into the crowded and noisy atmosphere implicit in lounges. Of these witnesses, Harking and Green had the better recollection and impressed me in their respective testimony with their forthright and ingenious demeanor. Sontage's account, on the other hand, had none of these attributes. He seemed unsure in his demeanor and hesitant. His recitation of events had a processed and rehearsed quality in which I can place no confidence in its accuracy.

<sup>3</sup> After the meeting, employees Sean Sontage and Kevin Calcagno approached Ryan and told him that employees who had not attended might have questions. In apparent response to this, Ryan went to the South facility the next day and met with three employees including Sontage. Ryan spoke to them, telling them as he did the night before, the Union would waive initiation fees for everyone if successful. Kevin Calcagno never testified.

<sup>4</sup> Lomax testified that a storm had "knocked out" the power in his home resulting in a failure of his alarm to timely wake him. He did not contact the parties until approximately 6:50 a.m., nearly 1 hour into the scheduled time for the election's start.

<sup>5</sup> There is no disagreement that the unexplained failed election start created general confusion and made the usual tense atmosphere of a preelection setting even more so.

<sup>6</sup> It is unclear where Lomax called from when he made his first contact with the Employer and spoke to McAfee. Presumably, he was enroute to the election site.

Board.”<sup>7</sup> Others confirmed the reality of the rumor.<sup>8</sup> Ryan testified that he knew of the rumor and in response told the employees that the Labor Board could not be “bought off” and that the Board agent had not come because his alarm had failed him. He assured the employees that the election would be run. Employees Harking and Green’s testimony support Ryan’s recollection. There is little reason in this record to doubt that Ryan assured the assembled employees that the election would happen and that the Board agent did not show because of circumstances beyond his control. I credit Ryan’s account as confirmed by Harking and Green.

Board Agent Lomax called some 10 minutes after his first call again to entreat McAfee to recall the employees to hold the election. When McAfee refused a second time, Lomax went to his office. From there, he spoke to Michael Linahan, Respondent’s counsel and signer of the original election agreement. This conversation took place sometime that morning. In it, Lomax apologized for the morning’s events and suggested that a new date be set for the election for the following week. Linahan told Lomax he would speak to his client and get back to him. McAfee with Stephen Maule, Respondent’s onsite counsel spoke to Ryan about this new election date. This conversation took place at the election site.

I draw a clear inference Linihan conferred with Maule resulting in the parties’ oral agreement, inasmuch as Linihan called Lomax and told him the date was fine. Lomax told Linihan that new election notices would be prepared and delivered by him, and would serve as confirmation of the parties’ agreement to the new date. Thus, he told Linihan, no new written election agreement was necessary. Union Attorney Brian Spector told Ryan that afternoon of the new date. Lomax presumably was in touch with Spector as well. The new election agreement was hand delivered by Agent Lomax to the Company that afternoon. Respondent never raised any objection to the new date or the new notice to anyone in the week that followed.

Three days later, the Respondent handed out a letter to the employees that in pertinent part said,

As you all know, the National Labor Relations Board election that was scheduled for last Friday did not take place. This certainly was not due to any fault of the company and we apologize for any inconvenience this may have caused you. *The election has been reset for this Friday, June 26, 1998.* It will be conducted at the same time and place for which the original election was scheduled.

Even though the election did not take, place timely as it was originally scheduled, this issue remains important to all of us. [Y]ou should not let this fact keep you from coming in this Friday and voting. This still remains *the* most important decision that you will ever make as a Superior employee, and you owe it to yourself and to your fellow employees to vote in this election. The election will, as you know, be decided by a majority of those people who actually show up and vote, so it is important that

every person cast a ballot. The final decision should truly reflect the opinion of *all* Superior employees.

This letter closed by saying,

Again, we apologize for the disruption and inconvenience which many of you suffered last Friday because the National Labor Relations Board did not show up for the election. There was no excuse for the election being delayed and all of us certainly wanted to get this issue behind us. Unfortunately, this delay and inconvenience were simply beyond our control. I do hope however, that you will take the time and effort to vote this Friday on this issue that is so vitally important to you, your job, and your future.

The Respondent did not post anything at the facility besides the notice. The Board and the Union did nothing to address the issues of the failed election. On June 26, 1998, the Board held the election without incident. Of the 69 eligible employees, 63 voted. There were 41 votes in favor of the Union and 20 against it. There were two challenged ballots.

#### IV. DISCUSSION AND ANALYSIS

##### A. *The Failed First Election—Board Agent Misconduct and the Alleged Unilateral Reschedule of the Second Election—Objection 1*

The Respondent argues the Board agent’s failure to appear at the scheduled time disenfranchised voters. It cites a number of cases in support of this premise. See *B&B Better Baked Foods, Inc.*, 208 NLRB 493 (1974); *Nyack Hospital*, 238 NLRB 257 (1978); *Kerona Plastics Extrusion Co.*, 196 NLRB 1120 (1972); and *Wolverine Dispatch*, 321 NLRB 796 (1996). In these cases, the Board agent arrived late, or closed the polls early or temporarily and unexpectedly halted polling during the election time. In these cases, there was a question as to the decisiveness of the vote for one reason or another. There also was only one single election in question. This case involves none of these circumstances. No election happened on June 19, 1998. Yet, Respondent alleges that the events of June 19, 1998, carried over into the rescheduled election of the next week, as if they are a single event. An analytic framework to address the issue here was set out by the Board in *Glass Depot, Inc.*, 318 NLRB 766 (1995). There, the Board held “in deciding whether an act of nature or other unexpected event constitutes “extraordinary circumstances” justifying a new election we shall examine both the event itself and whether it resulted in a situation where less than a representative complement of employees voted in the election.”<sup>9</sup>

The logic of *Glass Depot* precisely applies to this case. The failed election on June 19, 1998, served as the predicate for the conduct of the second election and the resulting objections. Why the Board agent failed to arrive on June 19 1998, to run the election then is especially relevant if his failure to appear was inadvertent and/or beyond his control. I find Lomax’s

<sup>7</sup> No one could identify the source of the rumor or the extent of its mongering afterwards.

<sup>8</sup> Former employee Melissa Seay, employee Harking, and Union Agent Ryan confirmed the rumor’s circulation.

<sup>9</sup> In *Glass Depot*, a snowstorm prevented 4 out of a possible 19 employees from voting. The Board found that a representative complement of the voters was able to vote. It upheld the election results.

description of the circumstances surrounding his failure to timely appear credible and more than qualifying as an “unexpected event” and an “extraordinary circumstance” as contemplated by *Glass Depot*. Thus, how the parties dealt with this becomes the next focus of my review.

The Respondent argues that the Regional Director erred in unilaterally directing a second election thereby destroying the laboratory conditions of that. I do not agree. First, the facts of this matter do not support any conclusion that a unilateral act happened. Respondent orally agreed to the June 26 date under clear advice of counsel. There is not a scintilla of evidence to demonstrate any hesitation in this regard. Indeed, the Respondent’s letter to employees, above, emphasizes the importance of the election and decries the delay of June 19. Second, it had options available to it on June 19, 1998, if it was concerned about possible disenfranchisement of voters. For example, it could have requested a new prehearing conference to execute another written election agreement with a new date, place, and time. It also could have brought to the Region’s attention any or all of the concerns it raised later in its objections.<sup>10</sup> It did none of these things. Rather, I infer Respondent made a considered decision to agree to the new date, while holding its tongue on other concerns it had. Essentially, Respondent bided its time to see what the results were, bankrolling its possible objections. In choosing this gambit, Respondent ran a risk that the election results might be so dispositive as to devalue the currency of its objections. This is precisely what happened. I conclude that the laboratory conditions necessary for a valid election were more than met in the election of June 26, 1998. I find this in large measure because of the Respondent’s considered participation and the opportunity it had to address its concerns if it wanted to.

Moreover, Respondent produced no objective facts to prove voter disenfranchisement caused by an improperly run election and none to justify setting aside its results. In the end, the results of this election define its’ validity. On June 26, 1998, 63 of 69 eligible voters exercised their franchise, reflecting over a 90 percent turnout, which by any measurement standard qualifies as a “representative complement.” Voters cast 41 ballots in favor of the Union and 20 for the Employer. There were two challenged ballots. Why the six nonvoting employees chose this as their option is unknown. However, given the circumstances of this case, I find it unlikely that lack of notice about the election was a reason. Most importantly, the most salient point is these six votes do not materially affect the outcome of the election. They are not dispositive. This fact above all others controls this question. See *Pea Ridge Iron Ore Co.*, 335 NLRB 161 (2001), and cases cited therein.

#### B. The Rumor Surrounding the Failed Election—Objection 2

The Respondent alleges that the spontaneous rumor of Agent Lomax’s failure to arrive disrupted the laboratory conditions for the election and affecting its outcome.<sup>11</sup> It cites *Midwest*

<sup>10</sup> The evidence submitted makes it clear that the Employer was aware of all the facts it raised as objections well before the election.

<sup>11</sup> Employee Debbie Crossen testified to the rumor as circulating among at least two other employees confirming what Ryan and Harking testified to.

*Canvas Corp.*, 326 NLRB 58 (1986), in support of this. *Midwest* holds that elections may be set aside where (1) “the votes of those possibly excluded could have been determinative; (2) the record also showed accompanying circumstances that suggested that the vote may have been affected by the Board agents late opening or early closing of the polls; or (3) it was impossible to determine whether such irregularity affected the outcome of the election,” citing *Wolverine Dispatch, Inc.*, 321 NLRB 796 (1996), and *Celotex Corp.*, 266 NLRB 802, 803 (1983).

*Midwest*, however, differs significantly from the present case that has a hiatus of 1 week between the “rumor” and the election. Here, as well, there is no evidence to show that the “rumor” survived beyond June 19, 1998. Further, each party here acted to dispel the impact of the “rumor.” Union Agent Ryan immediately addressed the very group that probably spawned the “rumor” to correct its erroneous premise. A few days later, Respondent handed out its letter of explanation about the failed election.<sup>12</sup>

These two events, in concert, measured by election turnout, establish that the impact of the “rumor” was negligible at best. The June 26, 1998 election is without incident, with decisive results. In *Alladdin Plastics, Inc.*, 182 NLRB 64 (1970), a virtually identical case, the Board refused to set aside an election, wherein, as here, a failed election attempt resulted in the same sort of rumor of a buyout of the Board. That rumor as here, was unconnected to any actions of the Union involved. The Board said that the existence of a rumor does not afford adequate ground for setting aside an election especially where the Employer involved had opportunity to respond to the rumor. I find this case falls squarely within the ambit of this logic. The June 19, 1998 “rumor” is too ephemeral an event to justify setting aside this election. It could only have substance if its existence could objectively establish it materially affected the votes cast.

#### C. The Alleged Unlawful Statements of Union Agent Ryan—Objection 3

Respondent bases the allegation of unlawful comments by Ryan on the single event at the Runaway Lounge, as described above. Sontage was not entirely reliable as a witness to the alleged remarks, as I have said. However, even if this were not the case, the facts still do not support Respondent’s contention. Ryan had separate discussions with Sontage and other employees shortly after the lounge meeting.<sup>13</sup> If there was a misconception, he corrected it. It is a permissible act for a Union to waive its initiation fees for all employees in the bargaining unit. See *Savair*, 414 U.S. 270 (1973). Respondent cites *Demming Division Crane Co.*, 225 NLRB 657 (1976), in support of its contention that the remarks Sontage attributed to Ryan compromised the free election choice of the employees. *Demming*’s facts have little to do with those of this case. In *Dem-*

<sup>12</sup> Curiously, this letter failed to address these concerns. In fact, it gave no details about the reasons beyond placing responsibility on the Board. The Employer did exculpate itself by denying any involvement in the events of that morning.

<sup>13</sup> Sontage did not dispute that Ryan explained the issue of initiation fee waiver.

ming, the union mail distributed a document waiving fees for those who had signed authorization cards. Here, there only exists the single alleged remark reported by Sontage, an unreliable informant, with no evidence that his misunderstanding went beyond him for the single day it existed. I find these facts too tenuous to conclude that there was any impact on voters.<sup>14</sup> See also *Molded Acoustical Products v. NLRB*, 815 F.2d 934, 937 (3d Cir. 1987), cert. denied 484 U.S. 925 (1987).

---

<sup>14</sup> There is also serious illogic to Sontage's account. There is no way Ryan could know with certainty who voted for the Union or not. Thus, there is no possible way the Union could have acted on his alleged remark even if it wanted to. It is unlikely for anyone to make such a hollow promise in the heat of an election campaign. This gives further support to the finding that Sontage misunderstood what Ryan said.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>15</sup>

ORDER

Objections 1, 2, and 3 are overruled in their entirety. A Certification of Representative should issue as appropriate.

---

<sup>15</sup> If 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.