

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE

ENVIRONMENTAL MAINTENANCE SOLUTIONS, INC.  
Employer

AND

Case 2-RC-23211

LOCAL UNION 966, INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS  
Petitioner

ENVIRONMENTAL MAINTENANCE SOLUTIONS, INC.

AND

Case 2-CA-38340

PEDRO VALENZUELA CASTILLO, An Individual

*Olga C. Torres, Esq.*, Counsel for the General Counsel  
*Margit Reiner, Esq.*, Representative of the Regional  
Director  
*Stuart Weinberger, Esq.*, (*Goldberg & Weinberger*),  
of New York, NY, for the Employer-Respondent  
*Christopher Gant, Esq.*, (*Kennedy, Jennik  
& Murphy, P.C.*), of Cresskill, N.J., for the Petitioner

DECISION

Statement of the Case

**ELEANOR MACDONALD, Administrative Law Judge:** This case was heard in New York, N.Y., on June 10, 11, 12, 13 and 18, 2008. The Complaint alleges that Respondent, in violation of Section 8(a)(1) and (3) of the Act, discharged Jorge Donoso and Pedro Valenzuela for concerted and union activities and informed employees that Donoso and Valenzuela were discharged because they tried to bring a union into the company. Respondent denies that it has engaged in any violations of the Act.<sup>1</sup> An Order Consolidating the unfair labor practice case

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<sup>1</sup>At the hearing and in its Brief, Respondent objected, on the basis of Section 10(b) of the Act, to the granting of the General Counsel's motion to amend Paragraph 10, the conclusory paragraph of the Complaint. Paragraph 7 of the Complaint alleges that Respondent discharged employees because they engaged in concerted activities and because it believed that they engaged in union activities. Paragraph 8 alleges that Respondent informed employees that employees were discharged because they tried to bring a union to the company. Paragraph 9 alleges that Respondent discriminated against employees in violation of Section 8(a)(1) and (3) of the Act based on conduct described in Paragraph 7. As originally drawn, paragraph 10 alleged a violation of Section 8(a)(1) of the Act based on Paragraph 8. This was amended to

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with the representation case provided for the determination of challenged ballots and objections.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties on July 24, 2008, I make the following<sup>2</sup>

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## Findings of Fact

### I. Jurisdiction

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Respondent, a New York corporation with an office and place of business located at 199 Tompkins Avenue, Pleasantville, New York, is engaged in the provision of data center cleaning services to commercial customers. Annually Respondent provides services in excess of \$50,000 to its commercial customers in New York State which customers themselves are directly engaged in interstate commerce. 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 Local Union 966, International Brotherhood of Teamsters is a labor organization within the meaning of Section 2(5) of the Act.

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### II. Alleged Unfair Labor Practices

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#### A. Background

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Mark Vacirca is the president of Respondent. Chris Vitale is the vice president. Marisa Pawell is the operations manager. Xavier Zapata was the operations manager during the time relevant to the instant case.<sup>3</sup>

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The company's business consists of offering specialized cleaning services for computer locations. A typical job involves dusting and wiping down computer equipment, lifting floor tiles to clean spaces under the floor, mopping, vacuuming, buffing floors and washing windows. The employees at issue herein, called cleaning technicians, do not have fixed work schedules; they work jobs that may begin in the morning, afternoon or evening, and they work weekdays and weekends as the company requires. The technicians report for work to the facility, usually referred to as the warehouse, where they load vans with the required equipment and supplies and then drive to work locations in New York State and out of State.

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The un rebutted testimony of Pawell shows that technicians are supposed to bring their food when they report to work, that they are supposed to eat at the work location and they are not to leave the job site until the work is completed.

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The witnesses described various ways in which technicians can learn when they are

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allege that the conduct described in Paragraphs 7 and 8 violated Section 8(a)(1) of the Act. Respondent does not allege that the charges herein were filed more than 6 months after the alleged occurrence. Respondent's objection to the amendment of Paragraph 10 is without merit.

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<sup>2</sup> The record is hereby corrected so that at page 7, line 14, and thereafter in the record the numbers 881 should read "8(a)(1)"; at page 190, line 15, the question should read "and were there any obstructions"; at page 323, line 15 and thereafter, the correct spelling of the name is Xavier Zapata; page 326, line 25, should read "it would start on the 24<sup>th</sup>, ending the 29<sup>th</sup>"; page 328, line 2 and 3, the correct date is June 29<sup>th</sup>.

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<sup>3</sup> Zapata is also referred to as Jamal and Eusebio.

scheduled to work. While present at the warehouse a technician can look at the schedule for the next day and see whether his or her name is on the schedule and for what time and what jobs. Sometimes management will call the technician at home or on a cell phone and leave a message with a reporting date and time for work; these calls are usually placed by Pawell or  
5 Zapata. If an employee asks to be taken off the work schedule for a number of days he must call in and request a job when he is ready to accept more work.

## B. Concerted Activities

### 10 Jorge Donoso

Jorge Donoso began working for the company in December 2006. Donoso testified that he was paid the minimum wage for travel time from the warehouse to the work locations and that he received his regular hourly wage for actual working time. In April or May 2007 Donoso  
15 asked Zapata to explain the pay system and a meeting ensued where he discussed his pay with Zapata, Vacirca and Pawell. The discussion showed that Donoso's pay check was short \$23.60. According to Donoso the company offered him a check for \$40 which he refused. As a result of this meeting Vacirca agreed that Donoso would be paid \$9.50 per hour for both travel and work time.

20 Donoso said that he discussed with his co-workers the fact that he believed the company had an unjust method of paying its employees and he told them about the agreement with Vacirca and showed them his paycheck. At some point Pawell called him to the office and asked why he had shown his paycheck to other employees. At some unspecified time Donoso  
25 called Local 32BJ and left his name and number with a secretary. No one from Local 32BJ returned his call so Donoso and co-workers Pedro Valenzuela and Odalis Franco decided to write a petition requesting the company to adopt better terms and working conditions. The petition was drafted in Spanish and Franco translated it into English. Donoso, Valenzuela and Franco signed the petition. During their meal breaks and other breaks the three employees  
30 showed the petition to their fellow employees and solicited their signatures. Donoso placed this activity as occurring two months before his last day of work which he said was between June 20 and 23, 2007. Thus, the preparation and circulation of the petition would have taken occurred in April 2007.

35 Odalis Franco has been employed by Respondent since 2001. Franco testified that he typed the petition from a handwritten sheet given to him by Donoso. Franco brought the petition to work so that others could sign it. After he had collected some signatures he gave the petition to Valenzuela. Franco placed these events in the month of June 2007. Franco testified that  
40 after he stopped seeing Donoso and Valenzuela at work he telephoned Donoso to ask why he was not working and to give him the petition.

Donoso testified that his last day of work was sometime between June 20 and 23, 2007. Donoso stated that when he came back to the warehouse after completing his job that day his name was not on the work order for the next day. After this, Donoso called Zapata and asked  
45 whether he had any work the following day. Zapata replied that there was no work. The next day, Donoso testified, he called Zapata again and asked whether he had any work and again Zapata replied that there was no work for Donoso. Donoso testified that he did not telephone Zapata on the weekend. Donoso stated that he called the company again and asked Pawell whether there was any work for him. By this time, according to Donoso, he had not worked for  
50 four days and he had never gone four days without work in the past. Pawell told Donoso that there was no work for him. Donoso stated that he never received any phone calls or messages from the company asking him to return to work. He said that he did not quit or abandon his job.

Two weeks after his last day at work Pawell called him and asked that he return his uniforms to the company.

5 Zapata testified that Donoso had been scheduled to work on Friday June 22 but that the job was cancelled. Zapata called all the employees who had been scheduled to go out on that job and told them not to come in that day.<sup>4</sup> Donoso was not scheduled to work on Saturday or Sunday, June 23 and 24, because the company was slow that weekend. Zapata identified records which show that on June 23 there were 29 technicians scheduled to work and on June 10 technicians at work and on Sunday June 10 there were 38 technicians at work. On Saturday June 16 there were 44 technicians at work and on Sunday June 17 there were 39 technicians at work. On Saturday June 30 there were 36 technicians scheduled to work and on Sunday July 1 there were 30 technicians on the schedule.

15 Zapata stated that if an employee is not scheduled to work on a Friday but if he is on the schedule for Saturday, Sunday or Monday he would be called by the company and informed when he should report to work. Zapata testified that on Monday June 25 Pawell informed him that Donoso had called her and said he was going to claim unemployment because he was not given a job on a slow weekend. Zapata testified that he works Saturdays and sometimes he works on Sundays. Pawell does not work on weekends.

25 Pawell testified that on Monday June 25 Donoso telephoned her and asked why he was not on the schedule. Pawell said that she wanted to speak to him. Donoso said he would go to the unemployment office. Pawell said that she tried to talk to Donoso but he hung up. Pawell testified that she did not want Donoso to collect unemployment. She had not fired him and he was still working for the company. However, Pawell acknowledged that during this conversation she did not inform Donoso what his future work schedule was. Pawell stated that after the phone call from Donoso she was upset. Donoso was a good worker; he could have grown in the company, he spoke English, he drove, he was mature and he knew how to use the buffers. 30 Donoso had many complaints about his job; he wanted night differential pay and he did not like the work schedule at the company. Pawell said that she wanted to utilize him as much as possible but it was a problem for him. After speaking to Donoso, Pawell sent the following e mail to Chris Vitale and Mark Vacirca:

35 Spoke with Jorge Donoso. He called and I had answered the phone he asked why he wasn't on the schedule to work this weekend and I explained to him that I needed to speak with him. He said I will go for employment, I gather he meant I will go and apply for unemployment. I have explained to Xavier now that he said that we will wait until he goes and when they unemployment agency contacts me and asks me if I have work for him I will let them know that he has a job here, that way he cannot collect. This will most likely take a couple of weeks by then he will probably be to embarrassed to come back and if he does I will then find ways and reasons to get rid of him without having him collect unemployment. (No grammatical or spelling corrections have been made to the original.)

45 On July 5 Pawell asked her assistant Joe Delgado to telephone Donoso to find out if he would be working if he were placed on the schedule. Delgado sent Pawell an e mail stating that he had telephoned Donoso and left a message on his answering machine "saying to please

50 <sup>4</sup> The company produced the document for that job showing that Donoso had been on the schedule but that the work was never done.

come and speak with Maritza (sic) otherwise to return the uniform.” Pawell denied that she fired Donoso because he engaged in union activities.

5 Shortly after this day, Vitale asked Pawell to recommend a worker for a friend’s company and Pawell recommended Donoso for the other job.

10 Donoso spoke to Valenzuela, Franco and other employees at the end of June. On July 3, 2007 Donoso accompanied Valenzuela to the Regional Office to file an unfair labor practice charge against the company.

15 Donoso began working for another company on July 27, 2007. He denied that Respondent helped him get that job. Donoso said his new employer called and offered him a job. When asked how his new employer had obtained his name Donoso said that he did not know.

20 Zapata testified that he did not know about the petition prepared by Donoso, Valenzuela and Franco. Pawell testified that she first heard about an employee petition during the investigation of the instant case.

## 20 **Pedro Valenzuela**

25 Pedro Valenzuela worked for Respondent from 2000 until 2007. He described himself as a “technician and supervisor.”<sup>5</sup> Valenzuela testified that he and others created a petition because they had no benefits on the job, no personal days, no sick days, no fixed schedule and they had to work every weekend and could not spend time with their families. Franco typed the petition and Valenzuela signed it. Valenzuela asked others to sign the petition and after collecting about seven or eight signatures he gave it to Donoso. Valenzuela placed this activity in mid-May 2007.

30 Valenzuela received a written warning on June 8, 2007 for an incident that occurred on June 1. Valenzuela was the supervisor for a cleaning job in a doctor’s office. Instead of eating in the office, Valenzuela took his crew to a Spanish restaurant and then he stopped in a Sam’s Club. Valenzuela testified that when Pawell found out about this she asked him why he had left the premises. Valenzuela told her that there was no lunchroom in the facility and it was not  
35 hygienic to eat lunch on the floor of a doctor’s office. He said he stopped to use the restroom in Sam’s Club. Valenzuela’s pay was cut by 50 cents per hour for the next three months as a result of this incident.

40 Valenzuela testified that his last day of work was Wednesday, June 27, 2007. He had asked to be off the schedule on June 28 and 29. According to Valenzuela, on Friday June 29 he called Freddy and asked for his schedule for Saturday and Sunday.<sup>6</sup> Freddy said there was no work for him. Valenzuela asked about Monday but Freddy said he was not on the schedule for Monday. Then Freddy said that Zapata and Pawell wished to speak to Valenzuela and that  
45 he should telephone on Monday. On Monday July 2, Valenzuela stated, he called the office and spoke to Freddy who informed him that he had no work on Tuesday. Valenzuela asked to speak to Zapata or Pawell but Freddy said they were in a meeting.

Valenzuela testified that on Monday July 2 Franco telephoned him and reported that

50 <sup>5</sup> The supervisory issue relating to Valenzuela will be described below.

<sup>6</sup> Valenzuela identified Freddy as the operations manager.

Marisa was "saying in the office" that Valenzuela had been terminated for "doing things against the company." On Tuesday July 3 Valenzuela went to the Regional Office to file a charge against Respondent. He was accompanied by Franco and Donoso. The charge was sent by regular mail to Respondent on July 5.

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Franco testified that he stopped seeing Valenzuela at work and that "a few days had passed" when the two spoke by cell phone and Valenzuela said he did not know why the company was not calling him back to work. Franco further testified that in the "beginning of July of 2007" and the day before he accompanied Valenzuela to the Regional Office to file the charge, he spoke to Pawell in the parking lot following his return from completing a job. Employees Manuel Galarza, Christina and Rosa Galarza were present. According to Franco, Pawell said that a few years ago a group had brought the Department of Labor to the job and things got worse. Franco quoted Pawell as saying that was the reason Valenzuela and Donoso were no longer working at the job, because they were bringing the union and the union is bad and the union just wants to get money from workers. Franco said that Pawell explained that Valenzuela did that because he was angry at receiving a warning. Franco testified that a few minutes later he called Valenzuela and reported this conversation, saying he knew why Valenzuela had been fired. Franco stated that after Valenzuela stopped working for the company he and Valenzuela were active in trying to organize the company for Local 966.

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Valenzuela testified that on July 4 Pawell telephoned him and asked him to return his uniforms. Valenzuela stated that when he asked why he was terminated Pawell said "return the uniforms" and then she hung up. Valenzuela denied that he had quit his job.

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Zapata testified that Valenzuela had requested days off on Thursday June 28, Friday June 29 and Saturday June 30. Respondent's payroll documents support this testimony and I credit it. Zapata recalled that Valenzuela telephoned him on Friday to ask about the schedule for days when he was available. Zapata told Valenzuela to report to the warehouse on Monday July 2 at 9:30 am. Zapata told Valenzuela he had a lot to do in the warehouse; Valenzuela would help him with that work and they would speak to Marisa about his work schedule. Zapata testified that Valenzuela did not come to work on July 2.

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Valenzuela did not get a written warning for failing to report to work on July 2. Pawell testified that it is customary for the company to issue warnings to employees who are "no call/no show." Pawell stated that she could not give Valenzuela a warning because he never called her and he never came in after July 2. Pawell wanted to speak to Valenzuela because he had requested multiple days off and she wanted to ask about his availability to work as a supervisor. Valenzuela was not put back on the schedule after July 2 because the company policy after employees request time off is to put them on the schedule when they call and ask to work.

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Pawell testified that she asked Delgado to telephone Valenzuela to check on his status and see if he intended to come to work. Valenzuela did not answer the calls or any messages left for him.

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Both Pawell and Zapata testified that Freddy Cisneros was responsible for telephoning employees until April 2007 when he was fired. Respondent's records show that Cisneros was terminated on April 9, 2007.

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Zapata testified, and Respondent's payroll records show, that Franco was not at work on Monday July 2, 2007. Pawell denied speaking to Franco about Donoso and Valenzuela on July 2 and she stated that she "never" discussed Donoso and Valenzuela with Franco. Pawell testified that the company was closed on July 4 and she did not speak to Valenzuela that day.

Pawell denied that she fired Valenzuela for engaging in union activities.

### C. Supervisors

5 Every job has a supervisor who is in charge of the work. Valenzuela was often assigned  
to be the supervisor of a particular cleaning job. On these occasions he was not paid more than  
his regular technician wage rate and he also performed the same work as the technicians.  
Sometimes the supervisor is also assigned to drive the van to the job locations. All the  
witnesses agreed that the supervisor tells the technicians what room to work in and what tasks  
10 to perform.

Zapata testified that a supervisor is responsible for the job and he tells the technicians in  
what order the work is to proceed. The supervisor inspects the premises after the job is finished  
and asks the client whether there is anything more he would like done. Valenzuela stated that if  
15 a technician did not perform a job to his liking then he would do it over himself or he would ask  
the technician to do it over.

The company contracts with the client for the specific work to be performed and the type  
of work is entered on a form that is given to the supervisor. The form may state which rooms  
and equipment are to be cleaned and it may state that certain equipment should not be cleaned.  
20 The form may state which equipment is to be brought to the job. In addition, the form may have  
specific directions such as the requirement to replace tiles in exactly the same position, or  
directions not to plug anything into the floor, or to use a minimum amount of water. The form  
may specify that certain rooms are to be waxed and that rugs are to be shampooed later. In  
25 addition, the supervisor may vary a specified order of work if a client is using a part of the  
premises thereby denying access to an area at a certain time. Further, when the work crew  
arrives at the job, the client may ask the supervisor to do additional work and the client may ask  
that certain work be done first. If neither the work form nor the client provides instructions as to  
the order in which tasks should be performed, then the supervisor decides in what order to do  
30 the work.

The supervisor decides who does what job at the work site. Valenzuela testified that he  
would not give heavy work to women. He would not assign a new employee to a job that  
requires extra care.

35 The supervisor does not hire, fire or promote technicians. He does not discipline  
employees. He does not approve overtime. If a job is taking longer than provided on the  
schedule the supervisor must call the office for instructions.

40 Supervisors do not recommend discipline for technicians. However, they are given  
evaluation forms to fill out for new employees and review forms for long term employees. On  
one occasion, according to Pawell, an employee was discharged because his evaluations were  
unsatisfactory and the supervisors said he was not doing enough.

### 45 D. Discussion and Conclusions

In deciding this case I must apply *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d  
889 (1<sup>st</sup> Cir. 1981), cert. denied 455 U.S. 989 (1982). The Board has recently explained the  
process for finding unlawful motivation in the discharge of employees as follows

50 *Wright Line* is premised on the legal principle that an employer's unlawful motivation  
must be established as a precondition to finding an 8(a)(3) violation. In *Wright Line*, the

Board set forth the causation test it would henceforth employ in all cases alleging violations of Section 8(a)(3). The Board stated that it would, first, require the General Counsel to make an initial “showing sufficient to support the inference that protected conduct was a ‘motivating factor’ in the employer’s decision. If the General Counsel makes that showing, the burden would then shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.” 251 NLRB at 1089. The ultimate burden remains, however, with the General Counsel.

To establish his initial burden under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a motivational link, or nexus, between the employee’s protected activity and the adverse employment action. *Tracker Marine, L.L.C.*, 337 NLRB 644, 646, (2002).

The General Counsel has met the first element set forth by the Board. The uncontradicted evidence shows that Franco, Donoso and Valenzuela prepared a petition demanding improved working conditions and that they solicited signatures on the petition during meal breaks and other breaks. Further, Donoso called Local 32BJ at an unspecified time but that union did not return his call.

The General Counsel has not satisfied the next element set forth by the Board. There is no evidence that Respondent was aware of the preparation and circulation of the petition by Franco, Donoso and Valenzuela.<sup>7</sup> First, the testimony shows that the petition was circulated during meal breaks and other breaks at work and no testimony indicates that solicitation of signatures ever took place at the warehouse or in the parking lot. Second, I find that the testimony about the supposed remarks by Pawell to the effect that Donoso and Valenzuela were fired because they were bringing the Union to the company is not worthy of belief. Franco testified that after he did not see Valenzuela at work for a few days he called the latter to ask about this and Valenzuela replied that he did not know why he was not being called to work. Since Valenzuela’s last day of work was June 27, and since Valenzuela had asked not to be assigned any jobs on June 28, 29 and 30, Franco’s call must have been after June 30. If he had called Valenzuela on the 30<sup>th</sup>, the answer would have been that Valenzuela had requested the last few days off. Franco testified that after his conversation with Valenzuela he heard Pawell make the remarks in the parking lot and then he called Valenzuela to say he now knew why Valenzuela had been fired. Valenzuela testified that the day before the July 3 charge was filed Franco telephoned him about Pawell’s alleged remarks. Franco also testified that Pawell’s remarks took place the day before they filed the July 3 charge. I find that the testimony does not admit of any other interpretation: both Franco and Valenzuela firmly place on July 2 the Pawell remarks that Donoso and Valenzuela were fired because they were bringing the union to the company. As shown above, Franco did not work on July 2. Pawell denies speaking to the employees about Donoso and Valenzuela on July 2 or at any other time.

I find that the testimony about Pawell’s purported remarks on July 2 was crafted by Franco and Valenzuela to sustain their claim that Donoso and Valenzuela were discharged because Respondent believed that they were engaged in union activities. I find that this

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<sup>7</sup> General Counsel does not contend that Respondent was aware of Donoso’s call to Local 32BJ.

testimony is not credible. I credit Pawell and I find that Pawell did not inform employees that Donoso and Valenzuela were fired because they tried to bring a union to the company. Thus there is no basis to find that Valenzuela and Donoso were discharged because Respondent believed that they were bringing in a union.

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I credit Zapata's testimony that Valenzuela telephoned him on Friday June 29 and asked for his work schedule. This would have been in accord with established company policy that employees must call for work after they have requested time off. I credit Zapata that he asked Valenzuela to come to the warehouse at 9:30 on Monday July 2 to help him in the warehouse. I credit him that he told Valenzuela that on Monday they would speak to Pawell about his work schedule. The record shows that Valenzuela did not report to work on July 2. I note that Valenzuela testified that he asked Freddy Cisneros for work on Friday June 29 and Monday July 2. This testimony is patently false; Cisneros had been fired in April. Thus, it is clear that Valenzuela's testimony about the material facts relating to his employment is not credible. I have grave doubts about all of Valenzuela's testimony herein and I shall not credit it where it is contradicted by more reliable evidence.

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It follows that I do not find that Valenzuela was fired by the company. Rather the facts show that on June 8 he was given a written warning and his pay was cut by 50 cents per hour for three months. Valenzuela was given three days off at the end of June at his request. After calling to ask for his schedule Valenzuela was told to report for work in the warehouse on July 2. He was also told that Pawell would discuss his schedule on July 2. Valenzuela did not report to work on July 2 and he did not telephone the company that day. The next day he filed a charge. Thus, Valenzuela did not suffer an adverse employment action. The General Counsel has not met the burden under *Wright Line* as to Valenzuela. Valenzuela did not report to work and he abandoned his job.

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Based on the discussion above, I find that there is no evidence that Respondent was aware of Donoso's participation in the drawing up and circulation of the petition. Because I have found above that Pawell did not make the remarks about Donoso and Valenzuela attributed to her on July 2, I further find there is no evidence Pawell believed that Donoso was bringing a union to the company.

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I credit Zapata that Donoso's scheduled job on Friday June 22 had been cancelled by the client and that Donoso was not scheduled on the weekend because work was slow. Pawell testified, and I credit her, that when Donoso called on Monday June 25 she did not give him a schedule; she only said she wanted to speak to him. Donoso said he was going to file for unemployment and then he ended the phone call. It is clear that Donoso was not scheduled to work that day. Pawell testified that she knew Donoso was dissatisfied with his schedule and his pay and she wanted to speak to him. The e mail she sent to Vitale and Vacirca after Donoso spoke to her about claiming unemployment is consistent with her claim that she did not fire him and, indeed, that she wanted to speak to him before giving him any further work. The e mail also makes clear that she would be just as happy to get rid of Donoso. However, I credit Pawell that she asked her assistant to call Donoso on July 5 to see if he would come back to work. Given General Counsel's failure to show that Respondent had knowledge of Donoso's concerted activities or to show that Respondent believed Donoso was bringing in a union, the General Counsel has not met the burden of showing that the failure to give Donoso any work on June 25 or thereafter was due to any protected activity by Donoso. Donoso did not return to work and he therefore abandoned his job with the company.

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### III. Case 2-RC-23211

#### A. Background

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The election was scheduled to take place on August 24 from 5 pm to 7 pm and on August 25 from 5 am to 9 am. The appropriate unit is

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All full-time and regular part-time cleaning technicians employed by the Employer at and out of its facility at 199 Thompkins Avenue, Pleasantville, NY, but excluding all other employees including office clerical employees, guards, professional employees and supervisors, as defined in the Act.

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There were approximately 58 eligible voters and 49 ballots were cast. Six voters cast challenged ballots and 43 votes were counted. The Petitioner received 28 votes and 15 votes were cast against a labor organization.

#### B. Objections

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The Employer filed Objections to the election. A hearing was directed on the following objections:

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1. The observer for Local Union 966, IBT, talked to employees in the polling area, including, but not limited to, as they waited to vote.

3. The Union, including through its observer and other employees, electioneered in the polling vicinity.

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4. Employees were allowed to loiter in the polling area.

6. The agent conducting the election for the NLRB arrived at the election on or about a half an hour after the election was scheduled on August 25, 2007

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7. The agent conducting the election for the NLRB left the balloting area on several occasions during the election.

8. The agent conducting the election for the NLRB abandoned the ballot box when he left the election area.

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#### Evidence Concerning the Objections

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Gerard Covello, the secretary-treasurer of Petitioner testified that he was present on both days of the election.<sup>8</sup> Covello was at the warehouse from about 4 pm on the first day of the election. Before the start of the election the Board Agent discussed the conduct of the election with Covello, Union observer Pedro Valenzuela, company controller Licia Albanese, Employer consultant Lou D'Angelis, and Employer observer Carol Bufo.<sup>9</sup> The group discussed

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<sup>8</sup> I credit Covello's testimony. He had excellent recall of the events, he answered questions on cross-examination in a cooperative manner, and he did not shade his testimony even where he gave answers that were more favorable to the Employer than the Union.

<sup>9</sup> Bufo has worked for the employer for nine years. She appears to know all of the

Continued

the best locations for the ballot box and the ballot marking area.

5 The election was held in the company's warehouse in an area close to the loading dock. The group wished to find a private location where voters could mark their ballots. All the participants agreed that the best location for voters to mark their ballots was the supply room. This location was the best available but it was not ideal because other people would have to enter the room to obtain supplies and equipment to load on the vans before leaving for a job or to put away supplies and equipment that had been used on a job. The group agreed that the situation had to be monitored and that the observers and the Board Agent would tell people not to enter the supply room while a voter was actually inside and marking his ballot. A counter located about 12 to 15 feet from the loading dock was chosen as the best place on which to put the ballot box. The group considered whether to put the ballot box farther inside the warehouse, and therefore farther from the loading dock, but the lighting was not sufficient and the inside location would have been far from the supply room where the ballots were to be marked. Bufo testified that she had suggested placing the ballot box farther inside the warehouse but the Board Agent pointed out that from such a location he and the observers would not be able to see the supply room where the voters would be marking their ballots.

20 Technician Carlos Hernandez testified that he returned from a job the first day of the election. He tried to put his equipment back in the supply room but a gentleman told him that he could not enter the room because the election was about to take place. That day Harry Ward was Hernandez' supervisor. Ward was upset that they were not permitted to place their equipment back in the supply room. Hernandez was second in line to vote. The Board Agent called him to vote and gave him a pen and a ballot. He was supposed to go into the supply room to vote but "someone" said not to go inside the room because there were cameras in there. Whoever said this to Hernandez explained that the company had put a camera in the supply room so if he voted in there the company would be able to see how he voted. Instead of marking his ballot in the supply room Hernandez marked it on a table just outside the supply room. Hernandez knows of four employees who voted on this table. Hernandez did not see how anyone voted. No one said anything to him while he was marking his ballot. Hernandez thought that those waiting to vote after him were two or three steps from him while he was voting. The marking of the ballots on a table outside the supply room was not the basis of any objection herein.

35 Bufo testified that she and the Board Agent stopped people who attempted to go into the supply room to get equipment and supplies while someone was actually in the supply room to mark a ballot. About five times someone got through without her knowledge. Bufo did not name any of the employees involved in these incidents. The only testimony concerning a complaint by an employee relating to the voting involves Henry Ward. According to Bufo, Ward objected that he was not able to cast a secret ballot. Ward voted on Saturday and at first he said he was not going to vote out of annoyance at the confusion in the place. Bufo also said that Ward "was having a fit" because everyone was speaking Spanish. Bufo told Ward that he could not leave until "we finish this." Ward complained to the Board Agent and the latter assured Ward that he would make sure no one came in while he was voting. In the event, Ward voted in the supply room and no one else entered while he was there. Ward did not testify herein.

50 Bufo testified that there was never an occasion when two voters were marking their ballots in the supply room at the same time.

employees and to be familiar with their jobs.

5 Bufo recalled that the ballot box was on a counter in plain view of the Board Agent and the observers, all three of whom stayed close to the ballot box while the voting was going on. The witnesses agreed that on the occasions during the election when the Board Agent used the lavatory, the ballot box was taped up, signed and taken into the lavatory, and then returned intact when the voting resumed.

10 Covello testified that the loading dock area where employees gathered both before and after going out on their jobs was not part of the polling area. Covello said that people gathered less than 10 feet from the polling area inside the warehouse. Bufo stated that some people stood around in the voting area after they had voted because they were waiting to leave on a job.<sup>10</sup>

15 The Board agent instructed the observers to limit their conversations with voters to “hello” and “goodbye.” However, according to Bufo, Valenzuela did not seem to limit his conversations. By the day of the election, Valenzuela had not been at work for some time and he and the voters greeted each other. Some of these greetings were in Spanish and while Bufo could not understand them, she said it seemed like more than just “hello.” Bufo said that Valenzuela spoke to 20 or 25 voters during the two days of the election. Some of these  
20 conversations “could have” lasted up to two minutes. Bufo complained about these conversations to the Board Agent. When Valenzuela spoke in Spanish Bufo complained to the Board Agent that Valenzuela should not be speaking to voters in Spanish. The Board Agent instructed Valenzuela to speak English and Valenzuela agreed to do so. Bufo said she spoke to all the voters who appeared on both days. She greeted them and introduced them to the Board  
25 Agent. Bufo also testified that most of the employees did not understand English so she told the Board Agent that he should give them instructions for the election in Spanish. Bufo identified two employees to whom Valenzuela spoke for a few minutes “on the sidelines” by name: these were Donoso and Juan Jimenez. When Valenzuela spoke to them they were not near the ballot box; they were close to the door of the warehouse at the loading dock.

30 Hernandez recalled that he voted after work the first day of the election. When he arrived at the polling area, he asked Valenzuela “How are you doing? How is everything going? Do you have another job? How’s your family doing.” Valenzuela replied that he was “very well. How are you? How’s it going? I can’t really talk that much. You guys know what you guys  
35 have to do already.” Hernandez said this is more or less what he heard Valenzuela say to about four other employees; it was the usual conversation when people have not seen each other for some time. Hernandez saw Valenzuela leave the polling area at one point to greet Jose Carpio with a hug at the loading dock, but the Board agent called him back. Hernandez did not hear Valenzuela tell employees to vote for the Union.

40 Valenzuela testified that the Board agent told him not to have conversations with the voters. According to Valenzuela when employees came to vote and expressed pleasure at seeing him he told them that he could not talk too much. Valenzuela said he never told any voter to cast a ballot for the Union

45 There is no evidence that any person wore Union insignia at the election and there is no evidence that there was any campaign literature in evidence.

50 On August 25, Covello arrived at the warehouse at 4:15 am. He left his car in a parking

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<sup>10</sup> This would have occurred on the second day of the election.

lot belonging to another establishment. Covello, D'Angelis, Valenzuela and Bufo all anxiously waited for the Board Agent who had promised to arrive at 4:45 am. The Board Agent arrived at 5:22 am. Covello explained that he looked at his watch, and, "The reason I say 5:22 is I worked for UPS, and anybody who worked for UPS they watch all the time because they're very time oriented. And you just automatically glance when somebody comes."

Covello testified that no employees came to vote before 5:22. Bufo testified that nothing happened before the election was set up. She said there were no employees present when the Board Agent arrived. Thus, there is no indication in the record that any employees appeared for the purpose of voting before the election was set up. That morning, employees would have been scheduled to depart for their jobs at 6 am or later.

On both days, once the Board Agent had set up the election, Covello and D'Angelis left the area. Covello stood at his car in the parking lot of another enterprise from which he could see the warehouse and the loading dock; he could not see the ballot box when it was located in the agreed upon place on the table inside the warehouse nor could he observe people as they voted. He could only see people if they were on the loading dock. On occasion, he could see the observers as they came to the loading dock to stretch their legs during a lull in the voting.

Bufo testified that on three occasions during a lull in the voting, twice on the first day of the election and once on the second day, the Board Agent left the polling area to smoke outside the warehouse. The smoking episodes lasted from three to five minutes. During some of this time the Board Agent was using his cell phone. When the Board Agent went out for a smoke he moved the ballot box from its location on the counter to a place on the same counter closer to the loading dock. He explained to Bufo that he was moving the box so that he would have a direct view of it while he was outside smoking. Bufo testified that after it was moved the ballot box was six to eight feet from the edge of the loading dock. On these occasions the Board Agent sat on a stone wall outside the warehouse about eight to twelve feet from the edge of the loading dock. The observers remained in the area. Bufo stated that while the Board Agent was outside smoking there was no obstruction blocking his view of the ballot box.

On one of these occasions during a lull when the Board Agent was outside smoking Bufo informed him that she was going to use the lavatory. The Board Agent said he would be right in. When Bufo emerged from the lavatory the Board Agent was still outside sitting on the wall. A short time later employee Martha Fillhart was approaching the warehouse from the parking lot in order to cast her vote. Bufo called to the Board Agent. Fillhart turned around to get her eyeglasses which she had forgotten. By the time Fillhart returned the Board Agent was back at the ballot box and Fillhart did cast her ballot.

#### **Discussion**

Objection 1. The evidence shows that both Bufo and Valenzuela greeted the employees as they arrived to vote. Valenzuela had not been at work for some weeks and so employees asked after him and his family and Valenzuela replied in kind. I credit Valenzuela that he told employees he could not speak at length and that he never told voters to cast a ballot for the Union. Although Bufo said that some of Valenzuela's conversations "could have" lasted up to two minutes, she specified only two conversations that lasted a "few minutes." These were conversations that took place "on the sidelines" between Valenzuela and Donoso and Juan Jimenez. I find, in accordance with Bufo's testimony, that these conversations took place at the door of the loading dock and away from the actual polling area. Similarly Valenzuela's greeting of Carpio with a hug occurred at the loading dock and was swiftly ended by the Board Agent. Bufo's testimony makes clear that many of the voters had to be instructed in Spanish. Bufo also

acknowledged that when she complained to the Board agent that Valenzuela was speaking to voters in Spanish the Board agent instructed him to speak English and he complied. I find that Valenzuela's conduct, as described by Bufo, was not objectionable. The only conversations lasting up to two minutes took place away from the polling area and not in the area where voters were lined up to get their ballots or waiting to vote. An innocuous social pleasantries between an observer and a voter that is not prolonged and is not touching on the election does not constitute objectionable conduct warranting a new election. *Sawyer Lumber Co.*, 326 NLRB 1331, 1333 (1998). Conversations away from the polling area are not subject to the strict rule against sustained conversations with prospective voters enunciated in *Milchem, Inc.*, 170 NLRB 362 (1968).

Hernandez described the conversations between Valenzuela and the voters in much the same way, confirming that the talk was a typical social exchange when people have not seen each other in a while.<sup>11</sup> Hernandez also said that he heard Valenzuela tell four voters that he could not talk that much and, "You guys know what you have to do already." I do not find that this was objectionable. The voters would have been instructed by the Board Agent as to how and where to mark their ballots and where to return them. Although vague and ambiguous, Valenzuela's comment would just as likely have been taken to refer to that circumstance as to any other. Further, Valenzuela made no reference to the Union or to the outcome of the election in his statements. Thus, his remarks did not convey any particular meaning. *U-Haul Co. of Nevada*, 341 NLRB 195 (2004).

Objection 3. As discussed above, I do not find that the Union's observer electioneered in the polling area and there is no evidence that there was any electioneering by any other person.

Objection 4. The polling area was 12 to 15 feet from the loading dock where employees returned to work in the evening and arrived for work in the morning. Further, the nature of the supply room required that it be in sporadic use during the voting. Both of these areas were thus subject to the "loitering" cited in the Employer's Objection. However, this possibility was caused by the choice of polling place. Thus, it was inevitable that some employees would linger near the supply room and the polling area during voting hours. The testimony establishes that some employees gathered less than 10 feet from the polling area inside the warehouse. The evidence shows that both the Employer and the Union agreed on the polling location and agreed on the supply room as the place where ballots would be marked. The evidence shows that the Board Agent and Bufo controlled access to the supply room while a voter was inside marking a ballot. Bufo testified that she and the Board Agent stopped people from going to the supply room while a voter was actually inside marking a ballot. She also testified that about five employees entered the supply room without her knowledge. Bufo did not explain how, if the employees entered without her knowledge, she was able to ascertain that they were in the supply room. Further, Bufo did not name any of these employees. I do not credit this testimony. No evidence was presented to show that the secrecy of the ballot was compromised or that any voters were turned away. No evidence was presented that any person actually observed how an employee marked his ballot in the supply room. Indeed, the only complaint made during the actual voting was by Harry Ward who was upset on the first day of the voting that he could not have access to the supply room to return some used equipment. Also, according to Bufo, Ward was "having a fit" during the election because everyone was speaking

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<sup>11</sup> I credit Hernandez. I observed that he conscientiously listened to every question and reflected before answering. His demeanor was impressive and inspired confidence in his truthfulness.

Spanish. Ward told Bufo that he was annoyed that there was confusion. On the second day of the election Ward threatened to leave without voting but Bufo insisted that he stay and Ward eventually went into the supply room and voted without disturbance. Ward did not testify herein so it is not clear what is meant by the reference to confusion. Perhaps Ward was confused because he did not understand the instructions being given to some of the employees in Spanish.

I note that the Employer had full knowledge of the conditions prevailing in the loading dock area, the warehouse and the supply room when it agreed to conduct the election in the location selected. The Employer knew that employees would come to the loading dock both before and after work. The Employer knew that employees would require access to the supply room. The Employer knew the exact distance between the loading dock and the polling area. It can hardly be heard to complain that the conditions may not have been ideal. Further, after the first day of the election the Employer was fully aware of the actual voting conditions but it did not suggest any change or make any complaint to the Board Agent before the second day of the election. The failure to voice any immediate complaint after the first day of the election is an indication that the Employer did not see the need for a change in the conduct of the election.

The Employer's Brief argues that the election should be set aside because four employees marked their ballots on a table immediately outside the supply room after they were told that they would be subject to observation by the Employer's camera inside the supply room. The Employer's Election Objections do not state this ground and I shall not consider it.

Objection 6. I credit Covello and I find that on August 25 the Board Agent arrived at the polling place at 5:22 am. The election had been scheduled to begin at 5 am. Employees were scheduled to depart for their jobs at 6 am or later. I credit Covello and Bufo that no employees arrived at the polling place before 5:22 in order to cast their votes. I credit Bufo that no employees were present when the Board Agent arrived and set up the voting. There is no evidence that any voter was disenfranchised by the late arrival of the Board Agent. The Board has stated that it will not set aside an election "based solely on the fact that the Board agent conducting the election arrived at the polling place later than scheduled, thereby causing the election to be delayed." *Jobbers Meat Packing*, 252 NLRB 41 (1980). It must be shown that the late opening of the polls affected the outcome of the election. Here, no employees arrived at the warehouse to vote before the polling place actually opened and the election was not affected by the 22 minute delay.

Objections 7 and 8. The testimony shows that on three occasions during a lull in the voting while the polls were open the Board Agent left the polling area to smoke outside the warehouse. When this occurred the Board Agent moved the ballot box along the counter to a location closer to the loading dock. The Board Agent explained to Bufo that he was moving the box so that he would have a direct view of it while he was outside. Bufo testified that when he went outside to smoke the Board Agent maintained an unobstructed view of the ballot box and that the observers remained in the area near the box. The Board Agent was seated 8 to 12 feet from the loading dock. On one such occasion Bufo used the lavatory while the Board Agent remained seated outside. There is no evidence that the Board Agent ceased his vigilance during this time. The testimony establishes that one employee approached the polling area to vote while the Board Agent was outside the warehouse. By the time the employee was at the polling area the Board Agent had returned to the area and the employee voted without incident.

It is clear from the evidence that the ballot box was never left unattended by the Board Agent and that he never abandoned it. In fact, the Employer's witness testified that the Board Agent had an unobstructed view of the ballot box at all times while he was outside the

warehouse sitting 8 to 12 feet from the loading dock. Unlike *Austill Waxed Paper*, 169 NLRB 1109 (1968), cited by the Employer, the ballot box in the instant case was never left wholly unattended by all the election officials. There is no evidence that the integrity of the election was compromised.

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Based on the foregoing discussion I conclude that the Objections to the Election should be overruled.

### C. Challenges

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#### George Peopplein

The Petitioner Union challenged the ballot of George Peopplein. Bufo testified that Peopplein is a “technician supervisor.” He does not go out on jobs with the cleaning crews. He does specialized cleaning for the company at the warehouse and he performs electrical jobs and maintenance jobs at the warehouse. Peopplein performs work outside the facility of an unspecified nature but he does not clean computer rooms. Bufo testified that Peopplein wears the same shirt as the cleaning technicians. Valenzuela testified that the technicians wear a uniform consisting of a blue T shirt, blue pants, black shoes, a blue belt and a black hat. He stated that Peopplein does not wear that uniform; he wears construction clothes and a tool belt. Peopplein performs handyman jobs such as repairing lighting and walls. From the description of Peopplein’s job duties given by Bufo and Valenzuela it appears that Peopplein is not a cleaning technician and is not a member of the bargaining unit. Peopplein does not clean computer facilities, he does not go out on jobs with the cleaning crews, he performs different work from the cleaning technicians and he seems to have no interaction with the unit employees. Further, Peopplein does not use the same tools and equipment as the cleaning technicians and he does not wear the complete standard uniform worn by unit employees. The challenge to his ballot should be sustained.

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#### Pedro Valenzuela and Jorge Donoso

The challenges to the ballots of Pedro Valenzuela and Jorge Donoso because their names did not appear on the list of eligible voters should be sustained. I have found above that they stopped working for the employer and I have not found that they were discharged in violation of the Act. I need not decide whether Valenzuela was a supervisor as claimed by the employer.

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#### Juan Jimenez, Jorge Torres and Rafael Rosario

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The Employer did not present any evidence in support of its challenge to the ballot of Juan Jimenez.

The Petitioner withdrew its challenges to the ballots of Jorge Torres and Rafael Rosario.

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#### Conclusions and Recommendation

Based on the foregoing discussion there are three challenged ballots that should be opened and counted if the number of challenges would affect the outcome of the election. However, the tally of ballots in the election showed that there were 43 valid votes counted and that 28 votes were cast for the Petitioner and 15 were cast against a labor organization. Thus, the number of challenged ballots would not change the result of the election.

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I therefore recommend that a Certification of Results of Election should be issued by the Board.

**Conclusions of Law**

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1. The General Counsel has not shown that the Respondent engaged in the violations of the Act alleged in the Complaint in Case 2-CA-38340.

10 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>12</sup>

**ORDER**

15 The complaint in Case 2-CA-38340 is dismissed.

**IT IS FURTHER ORDERED** that Case 2-RC-23211 is transferred to and continued before the Board in Washington, D.C.<sup>13</sup>

20 Dated, Washington, D.C., August 28, 2008.

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Eleanor MacDonald  
Administrative Law Judge

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<sup>12</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.

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<sup>13</sup> Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, Exceptions to this Recommended Decision may be filed with the Board in Washington, D.C., within 14 days from the date of issuance of this Decision. Exceptions must be received by the Board in Washington by September 11, 2008. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof upon the other parties and shall file a copy with the Regional director. If no exceptions are filed thereto, the Board may adopt this Recommended Decision.

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