

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

IN THE MATTER OF:

FLAMINGO LAS VEGAS OPERATING
COMPANY, LLC,

Employer,

and

INTERNATIONAL UNION, SECURITY,
POLICE AND FIRE PROFESSIONALS OF
AMERICA (SPFPA),

Petitioner.

Case Nos. 28-CA-077145
28-CA-079092
28-CA-078866

ANSWERING BRIEF TO CHARGING PARTY/PETITIONER'S
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S
RECOMMENDED DECISION

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I. INTRODUCTION

The Petitioner has filed Exceptions to the Administrative Law Judge's decision overruling its objections to the election conducted on March 29, 2012, contending, "Contrary to the findings of the Administrative Law Judge, the record established at the hearing substantiates and validates SPFPA's Objections."

Respondent disputes Petitioner's claim regarding the state of the record established at this hearing. As will be seen below, the Petitioner did place into evidence in this record a number of events on which a portion of its Objections are based. The Respondent will address those Objections, the relevant law and show that those objections are not a proper basis to overturn the true desires of employees as expressed in the Representation Election conducted on March 29, 2012. However, for the majority of Objections (6, 7, 10, 11, 12, 13, 15, 16, 17, 18, 19, 21 and 22) the only "evidence" Petitioner submits is a reference to a prior Administrative Law Judge's (Gregory Z. Meyerson) recommended decision (Case Nos. 28-CA-069588 and 28-CA-073617) which was and is pending before the Board on exceptions. (*See* Petitioner's Exceptions and Supporting Brief at pages 12-14 which reference as the only support for the Objections the terminology "GZM findings:" with a reference to a specific part of the recommended decision on appeal.)

A party submitting objections has the burden to provide evidence in support of its objection. *Consumers Energy Company*, 337 NLRB 752 (2002); *Sahuaro Petroleum & Asphalt Co.*, 306 NLRB 586, 587 (1992). Reference to a case on appeal is not admissible evidence: a judge's findings in a case pending on exceptions before the Board are not binding authority. *St. Vincent Medical Center*, 338 NLRB 888 (2003) ("We decline to take judicial notice of *St.*

Francis Medical Center because it is pending on review before the Board and the judge's findings therein are not binding authority.”)

Objections for which there is record evidence are not violations of the Act and the remainder of the Objections are unsupported by admissible evidence.¹

II. ARGUMENT

1. **Objection 1: Permitting Employees To Vote During Working Time Is Not A Valid Election Objection.**

If it were a violation of the Act to permit employees to vote during working time in a Board-conducted representation election, more than 90+% of the elections held since the Act has been in existence would have been invalidated. Permitting employees to vote in a Board conducted election during work time is the norm and not an unusual occurrence. The NLRB Casehandling Manual at Section 11302.3 makes it abundantly clear that permitting employees to vote during working time in a Board-conducted election is an accepted practice: “The voting period(s) should be adequate to permit all voters, at their option, to cast votes either on employer time or on their own time, without making a special trip to vote.”

The Election Notice prepared in due course by the Region reflected the same principle as the ALJ noted at ALJD 11: footnote 13: “EMPLOYEES ARE FREE TO VOTE AT ANY TIME THE POLLS ARE OPEN.” If it were a valid objection to an election that employees be permitted to vote during working time, the Region’s Notice of Election stating that employees can vote anytime the polls were open was also in error.

¹ Respondent contends that the present Board is required to have a quorum of three members in order to act validly pursuant to Section 3(b) of the Act. *New Process Steel L.P. v. NLRB*, 1305 S.Ct. 2635 (2010). Because the recess appointments of two current Board members have been found to be constitutionally invalid, the Board, as presently constituted, does not have the authority to rule on these matters. *Noel Canning v. NLRB*, DC 12-1115 (D.C. Cir. 2013).

There is no record evidence whatsoever and the Petitioner cites none to support a claim that the employer gave employees an extra break in order to vote in the election. In the absence of any evidence of a ground rules agreement that was violated (as was the case in *Holding Acquisition Co. LP d/b/a Rivers Casino*, 356 NLRB No. 142 (2011), p.3 or evidence that the employer provided employees with any extra break or that the employer unfairly signaled its authority to grant and thus take away benefits as was the case in *Rivers Casino, supra*, it was not objectionable conduct for employees to vote while they were working.

Nor does the fact that employees were relieved from their post for a short time to vote mean that they were given a break or were relieved from duty as would be the case in a normally scheduled break. There is simply no evidence that the employer granted employees breaks in order to vote.

The Petitioner complains that it was precluded from having any input into the question whether employees should be permitted to vote during working hours. It is difficult to conceive any union objecting to employees voting during working hours. To restrict employees' ability to vote during working hours would manifestly be making it more difficult for employees to vote and would be contrary to the Board's stated principles that "all eligible employees be given an opportunity to vote." *Yerges Van Liners*, 162 NLRB 1259, 1260 (1967). Nor does the union offer a better alternative to voting during working time as a basis for this Objection.

The logical conclusion to the Petitioner's argument is that the outcome of the election was unfairly impacted because employees were permitted to vote during working hours. This claim flies in the face of logic and well-articulated NLRB principles designed to facilitate employees' ability to vote rather than hindering employees' expression of their preferences.

This Objection is baseless, because, as the ALJ found, “there is no showing that any employee who wanted to vote was unable to do so.” ALJD 12:3-4.

2. Objections 2-4: The Wearing of Everyday Uniforms And The Use Of A Table Cloth Conveyed No Message To Voting Employees

Voters came to the polls wearing their uniforms because many of them were on duty. A number of the company election observers were on duty (TR 391) It was neither unusual nor unexpected that observers and voters would wear their uniforms when they came to vote. Nor did the uniforms in any way communicate anything other than the fact that employees were at work. *See* RX6 which shows the uniform shirt in question which does nothing more than identify security officers as security officers along with the bright yellow shirt color designed to make them more visible to patrons of the casino. (Stipulation regarding the uniform shirt received at TR 551)

Nor did the tablecloth convey any message other than that the premises were owned by Caesars Entertainment which was a revelation to no one. A similar tablecloth to that used during the election is shown at RX 7. There was no campaign-related message. The tablecloth was no different from tablecloths used in every other meeting room in the Respondent’s properties and was not distinctive in any way.

Petitioner hypothesizes all sorts of nefarious scenarios but the truth of the matter was that employees perceived that it was a work day, as were each of the 364 other days in the year. The ALJ concluded that the wearing of uniforms by company observers was permissible under the Board’s election rules at Section 11310.4 of the NLRB Casehandling Manual, Part Two. ALJD 12:35-42. He further correctly concluded that it was “highly unlikely” that the table cloth would impact voters’ free choice in the election. ALJD 12:47-7.

The Board does not lightly set aside representation elections. *Quest International*, 338 NLRB 856 (2003); *Safeway, Inc.*, 338 NLRB 525 (2002); *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (citing *NLRB v. Monroe Auto Equipment Co.*, 470 F.2d 1329, 1333 (5th Cir. 1972), cert. denied 412 U.S. 928 (1973)). And the objecting party must show that objectionable conduct affected employees in the voting unit. *Avanta At Boca Raton, Inc.*, 323 NLRB 555, 560 (1997).

Petitioner's citation of authority that the Board goes to great lengths to assure the integrity of the election process adds nothing to its argument here where the issues complained of were so minute and picayune. The test as articulated in *Peoples Drug Stores*, 202 NLRB 1145 (1973) requires an "assessment of whether the facts indicate that a reasonable possibility of irregularity inhered in the conduct of the election." The presence of a table cloth of an entity which did not directly employ any of the officers voting in the election and observers wearing their regular uniforms as Board guidance says they are permitted to do are not facts that establish the kind of irregularity necessary to establish even the likelihood of impacting employees' votes. Nor could they logically lead voters to believe that the Respondent was in control of the voting process. The ALJ's analysis and conclusions are supported by the record evidence and should be affirmed.

3. Objection 5: The Respondent's Observation of Bizzarro's Public Actions Did Not Violate The Act Or Form The Basis For A Valid Objection

The primary basis for this objection is that the employer watched Francis Bizzarro and nothing more. Petitioner states its contention on this issue as follows: "Pursuant to this objection, however, the Employer need only engage in surveillance to violate the Act. Put another way, it is immaterial whether other employees were aware of the Employer's actions." Petitioner Exceptions and Brief, p. 11. Petitioner did not cite any Board precedent in support of this

contention. There was no citation to authority because there is no authority for the assertion. The Board's teaching is rather that "An employer does not create an unlawful impression of surveillance where it merely reports information that employees have voluntarily provided." *Bridgestone Firestone South Carolina*, 350 NLRB 526, 527 (2007) (citations omitted).

As further explained in *Grouse Mountain Lodge*, 333 NLRB 1322, 1323 (2001), enforced 56 F. App'x 811 (9th Cir. 1983), "The rationale behind finding an impression of surveillance as a violation of Section 8(a)(1) is that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways."

The test to be applied to determine whether an employer has unlawfully created the impression of surveillance of employees' union activities is whether, under all the relevant circumstances, reasonable employees would assume from the statement in question or activities in question that their union or other protected activities had been placed under surveillance. *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1276 (2005); *Flexsteel Industries*, 311 NLRB 257 (1993)

Petitioner's claim is not supported by Board law which requires some unlawful observation by the employer, be that even observation out of the ordinary: ". . . an employer violates Section 8(a)(1) when it surveils employees engaged in Section 7 activity by observing them in a way that is "out of the ordinary" **and thereby coercive**. *Alladin Gaming, LLC*, 345 NLRB 585, 586 (2005) citing, *Sands Hotel & Casino, San Juan*, 306 NLRB 172 (1992), enfd. Sub nom. mem. *S.J.R.R., Inc. v. NLRB*, 993 F.2d 913 (D.C. Cir. 1993). (Emphasis added.)

The touchstone for surveillance as a violation of the Act is coercion. The Act prohibits employer actions which chill employees' exercise of their Section 7 rights. Stated another way,

the Board prohibits surveillance that is or has the tendency to be *coercive*. Surveillance which is unknown cannot have any tendency to coerce any employee's exercise of Section 7 rights. Therefore the surveillance must be known by someone whose rights are thereby infringed by the surveillance. And normal workplace observations do not qualify as illegal surveillance: "A supervisor's routine observation of employees engaged in open Section 7 activity on company property does not constitute unlawful surveillance. *Eddyleon Chocolate Co.*, 301 NLRB 887, 888 (1991)" *Alladin Gaming, supra*, 585-6.

One aspect of this Objection is based on the employer's request that two employees who verbally complained of Bizzarro's activities put their complaints in writing. Harold Kea and Kolei Kea complained to management about Bizzarro and on February 19 each provided a written statement to management. (GCX 38g and 38h). It is nothing more than good practice for an employer to obtain written statements confirming verbal reports it receives on a host of subjects. This is particularly applicable to a department which is responsible for the security of the employer's property. The obtaining of written statements is nothing more than a sign of a careful investigation and Petitioner's attempt to turn the request for statements into something more is unavailing as the ALJ concluded. (ALJD 13:14-17)

It is also significant that management took no action on these February 19 employee complaints before the March 29 election and it took no action until it had received *additional complaints* regarding Bizzarro's behavior *after the election*. (TR 870) Had the employer been as virulently anti-union as Petitioner attempts to portray, management would not have waited to act on these complaints of harassment until April 14, 2012 by which time its actions could not possibly have impacted the election results. Judge Wacknov's conclusion (ALJD 12-13:54-17) that the request to submit written statements supporting their verbal reports would not reasonably

have caused the two complaining employees to believe that the Employer was keeping Bizzarro's activities under surveillance is logical and is supported by the evidence including his view of the demeanor and testimony of Harold Kea. Furthermore there is no record evidence to suggest the opposite.

The second element of this objection relies on the mere allegation of surveillance, based on two internal management memos unaccompanied by any evidence of or claim that other employees were in any way aware of surveillance of Bizzarro. The Charging Party relies in part on Eric Golebiewski's email dated October 15, 2011. (GCX 22(b))

This email is evidence that Golebiewski made a report on the details of the meeting, but it is evidence of nothing more. It is beyond dispute that it is not a violation of the Act for an employer to observe employees engaged in open Section 7 activity on company property. And Bizzarro was engaged in direct conversation with Golebiewski during the October 14-15 meeting. Golebiewski estimated that Bizzarro monopolized 60 to 70% of the meeting. (TR 254). Bizzarro confirmed that he spoke "the majority of the time" during this meeting. (TR 392) It cannot be a violation of the Act for a manager to memorialize what went on in his presence and what he lawfully observed. This is particularly so where, as Bizzarro conceded, there was a "heated discussion about, about things that the, between the management and the officers and the Union." (TR 376) This exchange between Bizzarro and Golebiewski was found to have occurred by ALJ Wacknov at ALJD 3:30-38.

The same is true for another fact the union relies on in this objection GCX 22(b) which is a memo reporting a comment Bizzarro made in the presence of a supervisor – "everyone thinks that the union is over and done with. I've got news for them; I will be putting up more literature next week." There was also a communication from a supervisor reporting that Bizzarro had not

attended a security officer picnic. (GCX 22(h)). This report was pursuant to information Golebiewski had received that Bizzarro intended some undisclosed actions in order to disrupt a security officer picnic. (TR 243-4)

None of the actions recorded in the internal management memoranda were secret or intended to be private. There is no suggestion, as the ALJ noted (ALJD13:2-3) of any clandestine surveillance. The events reported took place in the presence of management, no employee was aware of the internal management communications referenced in the objection and the decision to communicate these facts internally among management was neither improper, nor could those communications possibly have impacted the results of the election. The Act does not mandate that managers hide their heads in the sand and pretend they did not see or did not hear what union supporters said and did in front of them. Management's private communications about such events are lawful, particularly where there is no evidence suggesting in any way that these communications were shared with or known of by any eligible voter in the election. Since these communications were unknown to any employee, the ALJ correctly concluded (ALJD12-13:57-4) they cannot form the basis for any allegation of unlawful surveillance.

There is no record evidence of unlawful surveillance of union supporters and Petitioner's claim that surveillance of public acts and words by itself is objectionable conduct finds no support in Board law.

4. Objection 9: The Employer's Flyer Did Not Violate The Act

In a rhetorical flourish Petitioner claims that a management communication "mocked, demeaned and otherwise brought negative attention to" Bizzarro. The fact of the matter is that management would have had to have been brain dead not to know that Bizzarro was a union advocate after the four hour meeting on October 14-15 in which Bizzarro spoke, in his own

words, “a majority of the time.” (TR 392) He also made numerous statements to various managers in support of the union. (See, GCX 22(d) October 22 discussion with supervisor Keith Berberich where Bizzarro expressed extremely critical comments about Golebiewski and told Berberich about the union’s organizing plans.) See also Bizzarro’s request to supervisor Janice Miller that she let him copy a union posting so he could repost a union flyer that had been removed from the security officer briefing room bulletin board. (TR 373) There were emails sent to all security officers as well as managers in which Bizzarro actively encouraged employees to support the union. (GCX 22(e)) Petitioner would have the Board step over Bizzarro’s open and active support of the union in order to find a violation of the Act.

If management had used Bizzarro’s name in the following paragraph which tracks the challenged paragraph in GCX 20(a), such use would not have been a violation of the Act in light of his open and active support of the union:

We believe that BIZZARRO and a few individuals have very specific and personal complaints that they have taken to someone at this union and that’s where this all started, based on what we’ve been told in meetings. We realize it’s a pretty strange situation, but it looks like a small group is trying to convince all of you that you need to sign up (without asking questions) for a union that has absolutely no track record for achieving “better” or “more” for its dues-paying members.

Section 8(c) of the Act does not require management to pretend that it does not know what is clearly in front of its face. The fact that management commented on what was obvious to everyone is not a violation of the Act and would not reasonably chill other employees’ Section 7 rights. Employees had the right to form a union and management had the right to resist by lawful means. The use of the word “Bizzare” at least a month before the filing of the petition is not a valid basis for an election objection, Petitioner’s verbal flourishes notwithstanding.

5. Objections 6, 7, 10, 11, 12, 13, 15, 16, 17, 18, 19, 21, and 22 Are Not Properly Before The Board In This Appeal

As opposed to the prior Objections, on which evidence was submitted during this hearing, the Petitioner makes not one reference to this record in support of these objections, preferring in each case to cite to the decision of ALJ Gregory Z. Myerson in a prior case between the parties which is currently before the Board on exceptions. (28-CA-069588 and 28-CA-073617).

Petitioner states that each of these Objections were presented at the hearing in this matter. It is accurate to state that these Objections were presented in the sense that the union's Objections were filed in the case and were in the record and that counsel for the Petitioner was present and participated fully in the hearing before ALJ Wacknov. However, the Petitioner is required to do more than just show up. It must introduce admissible evidence in support of its Objections for the ALJ's ruling. "The burden is on the objecting party to provide evidence that the election should be set aside." *Outline of Law and Procedure in Representation Cases*, Section 24-130 Duty to Provide Evidence of Objections. *See also, Consumers Energy Company*, 337 NLRB 752 (2002); *Sahuaro Petroleum*, 306 NLRB 586, 587 (1992) ("The burden is on the objecting party, in this case, the Union, to come forward with evidence in support of its objection); *Campbell Products Dept.*, 260 NLRB 1247, 1249 (1982) ("It is well settled that the burden is on the party who seeks to overturn the election to establish that objectionable conduct existed which requires such a result." *Citing, N.L.R.B. v. Morrison Machine Works*, 365 U.S. 123, 124 (1961))

The Union cites to no record evidence introduced in this hearing in support of these Objections, preferring rather to rely on the matter presently pending before the Board on Exceptions. Counsel for Petitioner, explaining his position to the ALJ during the hearing, stated:

But I had no intention of re-litigating Judge Meyerson's decisions with respect to the ULP's that were before him, and in fact, he decided against the Board with a couple ULP's that would have supported the objections and I am not going to re-litigate that . . . I mean we are living and dying with his – his determination on those ULP's. . . . We don't believe it is in anyone's interest to re-litigate the numerous Unfair Labor Practices that were before Judge Meyerson, and . . . we choose not to do that, and we choose to rely upon what Judge Meyerson – and I understand that it may affect the timing of some of this, in terms of the ultimate decisions. . . .

(TR 257-9)

ALJ Meyerson did not and could not rule on the Petitioner's Objections which were not before him in the earlier hearing because the Union did not file its request to proceed until the final day of ALJ Meyerson's hearing which was March 16, 2012. (ALJD 2:16-17)The Union's Objections are before ALJ Wacknov and no evidence has been entered into this record in support of the Objections. Since the burden of persuasion is on the party making the objections, these objections which rely entirely on a previous ALJ's recommended decision which is pending before the Board on exceptions cannot serve as admissible evidence in support of the Petitioner's objections and for that reason should be dismissed in keeping with well-established Board precedent. In *St. Vincent Medical Center*, 338 NLRB 888 (2003) the Board ruled on this same issue. In that case the Union requested that the Board take judicial notice of an ALJ's decision in a previous case. The Board refused to take judicial notice holding, "We decline to take judicial notice of [the related case] because it is pending on review before the Board and the judge's findings therein are not binding authority." *Id.* Similarly, ALJ Meyerson's findings are not binding authority on ALJ Wacknov who can hardly be expected to validate election objections in the absence of any evidence concerning those objections.

ALJ Wacknov indicated his understanding of the principles articulated in *St. Vincent Medical Center* when discussing the impact of ALJ Meyerson's decision on Judge Wacknov's ruling in this case as follows:

Mr. McLachlan: Just to make sure that I understand what the Judge has said, my understanding was that the Judge was not going to rely on Judge Meyerson's recommended decision, because it is not a final decision, and because the matter can be appealed to the Board, and an Administrative Law Judge's findings in a separate unrelated -- in a separate issue or matter, aren't going to be given any weight in your analysis of the facts that are presented in this trial.

Judge Wacknov: Right, and in fact, I can tell you I am not going to read the decision and I didn't know anything about it until we got here yesterday, and I am not going to read it. I am not going to let it influence me in my thinking here on this case, unless the Board has ruled prior to the time I issue my decision.

(TR260)

The Petitioner's effort to piggy-back on ALJ Meyerson's challenged decision and to support its Objections by reference to evidence not presented or considered in the present hearing ignores Board precedent requiring that the party asserting objections present evidence in support of its objections. The Petitioner cannot rely on evidence from another hearing and another time to support Objections about which it submitted no evidence in support.

This straight-forward principle receives further confirmation in Rule 102.46 (b)(1) which provides that "Each exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception." Petitioner's broad-brush treatment and total reliance on another ALJ's pending decision would have the Board ignore the complete absence of any record evidence in support of the majority of its Objections. The Petitioner's approach to these Objections ignores Rule 102.46(b)(1)(iii) which requires citation to the portions of the record relied on in support of the Objections. Petitioner

refers to **no** page of the record because this record contains no evidence in support of Petitioner's Objections. The Petitioner's failure and inability to refer to record evidence in this hearing dooms its Objections because it does not begin to comply with the Board's rules for the filing of exceptions nor is it consistent with Board precedent which refuses to accord evidentiary weight to a recommended decision which is on appeal.

Petitioner cites a number of specific instances occurring in January, 2012 which were ruled on by ALJ Meyerson and states in Petitioner's Exceptions at page 15: "Again, although evidence of these violations was presented to him, Judge Wacknov did not provide any analysis of these violations that occurred during the critical period, let alone acknowledge their existence." No evidence was presented during this hearing of these alleged violations of the Act. Certainly ALJ Meyerson's decision was mentioned but a reference to an ALJ decision which is pending on exceptions is not the presentation of evidence in a separate Objections hearing before another ALJ. This statement is at a minimum misleading.

Counsel's choice of litigation strategy does not overcome the requirement that the party seeking to overturn an election has the burden to prove that there has been misconduct sufficient to set aside the election. For the Board to overrule an ALJ's denial of objections about which no admissible evidence had been presented during the objections hearing would be contrary to existing Board precedents (e.g., *Campbell Products Dept.*, 260 NLRB 1247 (1982) as well as its public and internal guidance (e.g., *Outline of Law and Procedure in Representation Cases, Section 24-130 Duty to Provide Evidence of Objections*).

6. Petitioner's Attempt to Avoid Application Of The *Ideal Electric* Rule Is Unavailing

The period between the filing of the petition and the date of election is known as the "critical period" and it is the objecting party's burden to show that the objectionable conduct

occurred during the critical period. *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961); *Accubuilt, Inc.*, 340 NLRB 1337 (2003); *Gibraltar Steel Corp.*, 323 NLRB 601 (1997); *Outline of Law and Procedure in Representation Cases*, Section 24-110.

There is a limited partial exception to the *Ideal Electric* standard articulated by the Board in *Stevenson Equipment Company*, 174 NLRB 865, 866 fn. 1 (1969) (“[although] the rule in *Ideal Electric and Manufacturing Company*, 134 NLRB 1275, forbids specific reliance upon prepetition conduct as grounds for objecting to an election, such conduct may properly be considered insofar as it lends meaning and dimension to related postpetition conduct.”)

In previous cases the Board has considered a prepetition promise of increased benefits and wages and threat of plant closure which were reaffirmed during the critical period. *Parke Coal Company*, 219 NLRB 546 (1976). The Board also properly considered and acted on an employer’s insinuation of itself into the election process through the filing of a bogus election petition. *Ron Tirapelli Ford, Inc. v. N.L.R.B.*, 987 F.2d 433, 443 (7th Cir. 1993).

However, Petitioner’s effort to bridge the chasm between prepetition and postpetition conduct under a *Stevenson Equipment Company* analysis fails here because prepetition conduct does not lend meaning and dimension to related record postpetition conduct because Petitioner fails to cite to *record* evidence of postpetition misconduct in support of its objections. There are numerous references to postpetition conduct as ruled upon by ALJ Meyerson, but there is no postpetition conduct which was found to be in violation of the Act by ALJ Wacknov whose decision is at issue in these exceptions.

Petitioner did address several areas about which testimony was given in this hearing, including the ALJ’s finding of coercive statements by Security Director Golebiewski during a four hour meeting, “during which Golebiewski and the Union’s chief proponent, Officer Francis

Bizzarro, spoke back and forth “the majority of the time” as Bizzarro presented his concerns and advocated the need for union representation.” (ALJD 3) The ALJ also ruled that Golebiewski made similar comments to security officer, Christian Alberson also suggesting a pay freeze could occur if the union were to be elected, that he might be unable to protect employees from suspensions or discharges. Petitioner also referenced a company flyer using the term “Bizarre.” If Petitioner is to avoid the application of the *Ideal Electric* rule, he must tie the prepetition action to violations of the Act during the critical period and show the earlier actions “lend meaning and dimension to related postpetition conduct.” This the Petitioner does not and cannot do, relying rather on the conclusory allegation that “[t]hese actions had long acting consequences, chilling employees from actively and publicly supporting the union.” (Petitioner’s Exceptions Brief, p. 16) There is no record evidence to support this assertion. Nor is there any showing in the record that the violations of the Act had any bearing on the outcome of the election.

The absence of impact of unfair labor practices is further confirmed by the Union’s own actions in its election tactics in this case. As noted by the ALJ, the petition in this case was filed by the Union on November 23, 2011. The election was scheduled to be conducted on January 19, 2012 but was postponed on January 17, 2012 pending the investigation and resolution of a blocking charge filed by the Union. On March 16 the Union filed a request to proceed and the election was held on March 29, 2012. (ALJD 2:10-25) If there were any lingering effects of unlawful employer conduct, there was no requirement that the Union proceed to election. The blocking charge put the election on hold indefinitely until the effects of any unfair labor practices could be properly remedied. The Union had every right to let the Board’s processes proceed as they were designed to do in situations involving blocking charges. However, the Union chose to

proceed to election, even though there was no requirement that it do so. If the environment were as poisoned as Petitioner now claims, there was every reason for it not to have proceeded to election. It is too late now to claim that the election was influenced by any employer unfair labor practices when the Union obviously concluded on March 16, 2012 that unfair labor practices were not a factor in the election.

III. CONCLUSION

A party making objections has the burden of providing evidence in support of its objections. Where the Union did provide evidence (Objections 1-5 and 9), the evidence was insufficient to show that any challenged employer action created a situation rendering a free and fair election impossible or that any Objection occurred during the critical period. As to the Objections for which the Petitioner submitted no evidence (Objections 6, 7, 10, 11, 12, 13, 15, 16, 17, 18, 19, 21 and 22), the Petitioner has not begun to carry its burden of production of evidence supporting those Objections and they were properly dismissed by the ALJ for the reasons that there was no evidence of conduct supporting either the fact or the timing of the Objection.

ALJ Wacknov's decision is properly based on the facts presented during the hearing and his rulings, findings and conclusions regarding the dismissal of Petitioner's Objections should be affirmed.

Respectfully submitted,
FISHER & PHILLIPS LLP

Dated: January 29, 2013

By: 
John D. McLachlan
FISHER & PHILLIPS LLP
Attorneys for FLAMINGO LAS VEGAS
OPERATING COMPANY, LLC,

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of San Mateo County. I am over the age of 18 and not a party to the within action. My business address is One Embarcadero Center, Suite 2050, San Francisco, CA 94111-3712.

On this date the foregoing **ANSWERING BRIEF TO CHARGING PARTY/PETITIONER'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION** was electronically filed via the E-Filing system on the NLRB's website and a copy was emailed to the following:

Via E-Gov; E-Filing:

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National Labor Relations Board
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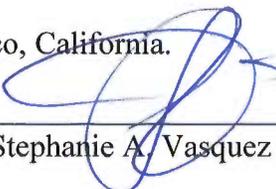
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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on January 29, 2013, at San Francisco, California.


Stephanie A. Vasquez