

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

LACOSTA, INC.

Employer

and

Case 13-RC-21716
Stipulation

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 1

Petitioner

and

CRAFTSMEN INDEPENDENT UNION

Intervenor

HEARING OFFICER'S REPORT ON OBJECTIONS

This report contains my findings and recommendations regarding the Employer's Objections to the conduct affecting the results¹ of the election² conducted under the direction of the Regional Director of Region 13 of the National Labor Relations Board on June 27, 2008 among the employees in the stipulated unit.³ On July 2, 2008, the Employer filed a timely objection to conduct affecting the results of the Election, a copy of which was served on the Petitioner, and a copy of which is attached hereto as Board Exhibit 1(a). On July 18, 2008, the Regional Director of Region 13 issued a Report on Objections and Notice of Hearing, herein Board Exhibit 1(c), specifying that substantial and material issues were raised in the investigation of the Employer's timely filed objection, and referring it for hearing. On July 8, 2008, the Employer filed by facsimile an untimely objection to the election in this case, not evidently accompanied by evidence

¹ The tally of ballots shows that there were approximately 5 eligible voters. 4 ballots were cast for the Petitioner, 0 ballots were cast for the Intervenor, 1 ballot was cast against the participating labor organizations, 0 ballots were void, and 0 ballots were challenged.

² The election was conducted on June 27, 2008 pursuant to a petition filed on February 14, 2008, and a Stipulated Election Agreement which was approved on June 10, 2008. The payroll eligibility date was June 6, 2008.

³ All full-time and regular part-time janitorial employees and working supervisors performing cleaning services employed by the Employer and performing work at its facility currently located at 1717 Deerfield Road, Deerfield, Illinois; but excluding all other employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

of service to Petitioner,⁴ a copy of which is attached hereto as Board Exhibit 1(b). On July 24, 2008, the Regional Director of Region 13 issued an Amended Report on Objections and Notice of Hearing, herein Board Exhibit 1(e), specifying that substantial and material issues were raised in the investigation of the Employer's timely filed objections of July 2, 2008⁵ and additional objection filed July 8, 2008.

Pursuant to Section 102.69 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, after reasonable notice to all parties, a hearing⁶ was held in Chicago, Illinois on July 29, 2008 before the undersigned hearing officer. During the hearing the parties⁷ had a full opportunity to be heard, to examine and cross-examine witnesses, and to produce all relevant evidence bearing on the objections. After careful consideration of the entire record and all the evidence presented including the demeanor of the witnesses, and based upon my credibility resolutions,⁸ I recommend overruling the Employer's objections, and that the Petitioner, SEIU Local 1, be certified as the unit employees' exclusive collective bargaining representative.

The Objections

Employer's objection of July 2, 2008⁹ alleges that after the Stipulated Election Agreement was approved but before the election, at least one of Petitioner's supporters threatened employees with termination or more onerous working conditions if they did not support Petitioner and if Petitioner did not prevail in the election. During the hearing, Employer advanced the position that Manuel Padilla, the employee whom it asserts engaged in objectionable conduct, was a supervisor (Tr. 10, 12, 14); but also, acknowledging that Padilla voted in the election as part of the bargaining unit (Tr. 135), Employer asserted that whether he is a statutory supervisor is irrelevant to his alleged objectionable conduct. (Tr. 132-33). Therefore, this objection raises issues of whether Padilla's conduct was objectionable by standards for both party¹⁰ and third party conduct.

Employer's second objection, filed by facsimile on July 8, 2008¹¹ requests that the results of the election be set aside because its counsel learned on that date, for the first time, that Region 13 did not know the identity of SEIU Local 1's election observer.¹² This objection was filed eleven days after the tally of ballots¹³ was prepared on June 27,

⁴ However, the Regional Director's Amended Report on Objections dated July 24, 2008 states that the Employer's additional objection filed July 8, 2008 was served upon the Parties.

⁵ Only one objection is stated in the Employer's filing of July 2, 2008.

⁶ The Notice of Hearing directed the Hearing Officer to prepare and serve upon the parties a report containing resolution of credibility of witnesses, findings of fact and recommendations to the Board concerning the disposition of the Objections.

⁷ The Intervenor, Craftsmen Independent Union (CIU), was not present and did not participate in this hearing.

⁸ Any failure to completely detail all conflict in evidence does not mean conflicting evidence was not considered. *Bishop and Malco, Inc. d/b/a Walker's* 159 NLRB 1159 (1966).

⁹ See Board Exhibit 1(a), "Employer's Position on Election Objections."

¹⁰ Employer argues in its post-hearing memorandum of law, permitted in lieu of briefs, that Padilla is also an agent of SEIU Local 1.

¹¹ See Board Exhibit 1(b), "Subject: RC Election in Case 13-RC-21716."

¹² Employer asserts that Petitioner's objection observer was the supervisor responsible for the threats alleged in its first objection (Tr. 10.) Record testimony establishes that Manuel Padilla was Petitioner's observer to the election.

¹³ See Board Exhibit 2.

2008, and therefore was not timely filed.¹⁴ The Board holds that the rule requiring timeliness in filing objections should be strictly enforced. *Kano Trucking Service, Ltd.*, 295 NLRB 514, 515 (1989); *North Star Steel Co.*, 289 NLRB 1188 (1988); *Drum Lithographers*, 287 NLRB 22, 23 (1987) (overruled for another issue). This rule may be tolled for newly discovered and previously unavailable evidence. Newly discovered evidence that does not bear directly on timely objections “should be considered only upon presentation of clear and convincing proof that they are not only newly discovered, but also, previously unavailable.” *Burns International Security Services, Inc.*, 256 NLRB 959, 960 (1981); *Rhone-Poulenc, Inc.*, 271 NLRB 1008 (1984); *John W. Galbreath & Co.*, 288 NLRB 876, 878 (1988). Therefore, at issue is whether Employer met its burden by this standard to provide clear and convincing proof that evidence underlying its second objection was newly discovered and previously unavailable.

During the hearing, Employer failed to make any offer of proof to warrant consideration of its July 8, 2008 objection. Further, the opportunity to do so was not foreclosed. (Tr. 131, 136). With respect to its second objection, Employer’s record evidence is the first page of its memorandum dated July 18, 2008 to the Acting Regional Director of Region 13.¹⁵ (Tr. 128). Thereby, to establish timeliness, Employer relied upon a hearsay statement¹⁶ within an incomplete document, which merely asserts that the second objection was timely because the basis for filing it was newly discovered on July 8, 2008 and unavailable prior. Even so, Employer’s argument is unpersuasive. The standard requires that evidence be demonstrated to have been previously unavailable and newly discovered, not merely asserted as such. *Burns International Security Services, Inc.*, supra. Further, undisputed testimony establishes that an observer for the Employer was present at the first session of the election on June 27, 2008. (Tr. 47). Consequently Employer’s concerns about Petitioner’s observer at the election June 27, 2008, as expressed by its second objection, were discoverable as of that date. Thus, the record demonstrates that the Employer not only did not, but also could not, meet the required evidentiary standard allowing consideration of an otherwise untimely filed objection. For these reasons, I recommend that Employer’s second objection be overruled as untimely. Even if considered, Employer must fail to establish that the identity of Petitioner’s observer was objectionable conduct; for “under established Board law, an employer must raise the alleged supervisory status of a union’s election observer at the time of the preelection conference...[O]therwise, any such objections are waived, and the employer is estopped from raising the issue for the first time in its postelection objections.” *Monarch Building Supply*, 276 NLRB 116 (1985); *Liquid Transporters, Inc.*, 336 NLRB 420 (2001). Therefore, notwithstanding Employer’s inherent waiver in failing to present evidence to establish timeliness of its second objection, consideration of its merit is also barred as untimely, and, as recommended earlier, should be overruled.

¹⁴ 29 C.F.R. 102.69(a) provides: “Within 7 days after the tally of ballots has been prepared, any party may file with the Regional Director...objections to the conduct of the election or to conduct affecting the results of the election...[s]uch filing must be timely.”

¹⁵ See Employer Exhibit 2.

¹⁶ Employer Exhibit 2 suggests Employer’s counsel questioned the identity of Petitioner’s observer on July 3, 2008; however, I do not rely on this document as evidence of clear and convincing proof of the availability or discovery of information underlying Employer’s second objection.

The Parties' Positions

Concerning its position as to its first objection of July 2, 2008, the Employer stated that Manuel Padilla is the direct supervisor of the unit employees, and that he significantly influenced, threatened, and intimidated employees by providing them rides to and from work; taking them to SEIU meetings; assigning and checking their work; recommending discipline at times; and by working with the SEIU,¹⁷ including by serving as Petitioner's election observer. Employer asserts that Padilla talked frequently and openly to three unit employees whom he drives to and from work about his expectations that they vote for the Petitioner; by threatening not to bring them to work if they didn't vote for Petitioner; by threatening to fire them if they didn't support Petitioner; and by requiring them to attend Petitioner's meetings held before the workday. (Tr. 12-14). Although Employer does not waive the argument that Padilla is a statutory supervisor, it also contends his status is irrelevant, and that Padilla is a supervisor for the purposes of his ability to exert improper influence over two voters, Maria Mendoza and Myrta Varga. (Tr. 133-36). Employer characterized the unit employees as a very small, tightly knitted group working under Padilla's thumb (Tr. 134), so that even if he were not a supervisor, he engaged in conduct that destroyed laboratory conditions for a fair election. (Tr. 136).

Petitioner contends that the Employer did not meet its burden of proof to establish that Padilla is a supervisor, or that his conduct was objectionable whether as a supervisor or as a third party. (Tr. 137-39).

Therefore, the July 2, 2008 objection raises the issue of whether janitorial employee Manuel Padilla 1) is a statutory supervisor, 2) is Petitioner's apparent agent, 3) threatened employees with termination or more onerous working conditions or other reprisal, and 4) by this conduct interfered with the election. The agency of a pro-union employee is relevant only in determining the standard against which the allegedly objectionable conduct is evaluated. *Cal-West Periodicals, Inc.*, 330 NLRB 599, (2000). These differing standards are discussed below.

Burdens of Proof and Applicable Standards

Representation elections are not lightly set aside. *Safeway, Inc.* 338 NLRB 525 (2002), citing *N.L.R.B. v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (other internal citations omitted); *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000). In conducting them, the Board attempts to provide "a laboratory in which an experiment may be conducted under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees," a standard which the Board expects to drop too low in only "the rare, extreme case." *General Shoe Corp.*, 77 NLRB 124, 127 (1948). However, the expectation of laboratory conditions does not require that circumstances be those of "a petri dish that must be kept free of contamination." *N.L.R.B. v. Lovejoy Industries, Inc.*, 904 F.2d 397, 402 (7th Cir. 1990) (internal citations omitted). Thus, "[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Safeway, Inc.*, supra, and *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005), citing *N.L.R.B. v. Hood Furniture Mfg. Co.*, supra at 328. "In the absence of excessive acts, employees can be taken to have

¹⁷ Employer also argues Padilla's apparent agency in its post-hearing memorandum of law.

expressed their true convictions in the secrecy of the polling booth.” *General Shoe Corp.*, supra at 126. The Board will interfere only when the registration of free choice is shown, by all the circumstances, to have been unlikely. *The Liberal Market, Inc.*, 108 NLRB 1481, 1482 (1954).

As the objecting party, Employer bears a heavy standard of proof to demonstrate by specific evidence that the election was unfair. *N.L.R.B. v. Mattison Machine Works*, 365 U.S. 123, 124 (1961); *Avante at Boca Raton*, 323 NLRB 555, 556 (1997). This burden is met by specific evidence not only that unlawful acts occurred, but also that they interfered with the employees’ exercise of free choice to such an extent that they materially affected the results of the election. *N.L.R.B. v. White Knight Manufacturing Co.*, 474 F.2d 1064, 1067 (5th Cir. 1973), quoting *N.L.R.B. v. Golden Age Beverage Co.*, 415 F.2d 275, 281 (5th Cir. 1969). The objecting party must show that allegedly objectionable conduct was disseminated and affected employees in the voting unit; dissemination will not be presumed. *Nor-Cal Ready Mix, Inc.*, 327 NLRB 1091, 1092 (1999). Further, Employer must meet specific burdens of proof for issues it raises by its objection, i.e. supervisory status and its effect, apparent agency, and threats by parties or non parties, as applicable.

The burden of proving supervisory status rests on the party asserting it. *N.L.R.B. v. Kentucky River Community Care*, 532 U.S. 706, 710-711 (2001); *Dean & Deluca*, 338 NLRB 1046, 1047 (2003), quoting *Freeman Decorating Co.*, 330 NLRB 1143 (2000), and citing *Ohio Masonic Home*, 295 NLRB 390, 393 (1989). The party asserting supervisory status must establish it by a preponderance of the evidence. *Dean & Deluca*, supra, citing *Bethany Medical Center*, 328 NLRB 1094, 1103 (1999); *Volt Information Sciences*, 274 NLRB 308, 330 (1985). Moving party must also establish that the alleged objectionable acts of a pro-union supervisor not only occurred, “but also that they interfered with the employees’ exercise of free choice to such an extent that they materially affected the results of the election.” *Harborside Healthcare, Inc.*, 343 NLRB 906, 910 (2004) quoting *Wright Memorial Hospital v. N.L.R.B.*, 771 F.2d 400, 408 (8th Cir. 1985) enfg. 271 NLRB No. 21 (1984) (not reported in Board volumes). The test for assessing objectionable conduct first determines whether the supervisor’s pro-union conduct reasonably tended to coerce or interfere with the employees’ exercise of free choice in the election. This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the pro-union conduct; and (b) an examination of the nature, extent, and context of the conduct in question. The second step requires an analysis of whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct. *Harborside Healthcare, Inc.*, supra at 909.

The burden of proving an agency relationship is on the party asserting its existence. *Technodent Corp.*, 294 NLRB 924, 925-926 (1989); *Millard Processing Services*, 304 NLRB 770, 771 (1991); *Corner Furniture Discount Center, Inc.*, 339 NLRB 1122 (2003). A union must take affirmative steps to convey that individuals are empowered to be its agents. *BioMedical Applications of Puerto Rico*, 269 NLRB 827, 828 (1984). Apparent authority is created by a principal’s manifestation to a third party

which supplies a reasonable basis for belief that the principal authorized that party to act for it. Two conditions must be satisfied before apparent authority is deemed created: 1) there must be some manifestation by the principal to a third party, and 2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity. *Millard Processing Services*, supra (internal citations omitted); *Allegany Aggregates, Inc.*, 311 NLRB 1165, 1168 (1993).

The Board applies an objective standard to evaluate the conduct of parties. The test to determine whether a party's conduct destroyed the laboratory atmosphere necessary to the exercise of free choice in the election is whether it reasonably tended to interfere with the free and uncoerced choice of employees in the petitioned-for bargaining unit when voting. *Trump Plaza Associates*, 352 NLRB No. 72, (May 30, 2008), 2008 WL 2275432 at *11; *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000), citing *Baja's Place, Inc.*, 268 NLRB 868 (1984). To evaluate whether conduct has the tendency to interfere with employees' free choice under this standard, the Board considers the following factors: 1) number of incidents of misconduct; 2) severity of incidents and whether they are likely to cause fear among the employees in the unit; 3) number of employees in the unit subjected to the misconduct 4) proximity of misconduct to the election date; 5) degree of persistence of misconduct in the minds of unit employees; 6) the extent of dissemination of the misconduct among unit employees; 7) the effect, if any, of misconduct by opposing party to cancel out the effects of the original misconduct; 8) the closeness of the final vote; and 9) the degree to which the misconduct can be attributed to the party. *Cedars Sinai Medical Center*, 342 NLRB 596, 597 (2004); *Taylor Wharton Division Harsco Corporation*, 336 NLRB 157 (2001), citing *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986). The Board also considers the potentially determinative effect of the conduct. *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995).

Conduct not attributable to parties may also be grounds for setting an election aside, but the Board gives it less weight than party-conduct. *Orleans Mfg. Co.*, 120 NLRB 630, 633 (1958); *Steak House Meat Co., Inc.*, 206 NLRB 28, 29 (1973); *Nor-Cal Ready Mix, Inc.*, supra at 1098. The standard applied to non party-conduct is whether it was so aggravated as to create a general atmosphere of fear and reprisal rendering a free expression of choice impossible. *Price Brothers Co.*, 211 NLRB 822, 823 (1974) (internal citations omitted); *Hamilton Label Service, Inc.*, 243 NLRB 598 (1979); *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). (*Steak House Meat Co., Inc.*, supra, notes that the circumstances where conduct not attributable to the parties caused an election to be set aside were those where the conduct created a general atmosphere of confusion and fear of reprisal for failing to vote or support the union.) The test applies where there is no evidence of union involvement in the conduct at issue. *Westwood Horizons Hotel*, supra. The test remains an objective one, "whether a remark can reasonably be regarded by an employee as a threat. It is *not* the actual intent of the speaker or the actual effect on the listener." *Smithers Tire and Automotive Testing of Texas, Inc.*, 308 NLRB 72 (1992) (emphasis in original). In assessing alleged threats under the standard of third party-conduct, the Board examines: 1) the nature of the threat itself, 2) whether the threat encompassed the entire bargaining unit, 3) whether reports of the threat were disseminated widely within the unit, 4) whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat, and 5) whether the threat was

‘rejuvenated’ at or near the time of the election. *Westwood Horizons Hotel*, supra. The conduct of pro-union employees who are not agents of the union must be shown to be so disruptive as to require setting aside the election. *Id.* at fn. 14 (1984) (internal citations omitted). Also, the cumulative effect of credited testimony must be considered. *Picoma Industries, Inc.*, supra at 499.

The application of these standards is made below according to the facts and circumstances of this case. In applying them, as discussed further below, I do not discredit the testimony of any witness.

Facts: Padilla’s Supervisory Status

The record indicates that LaCosta provides janitorial services to several corporate customers located at 1717 Deerfield Road, Deerfield, Illinois, but does not itself have a business facility there. The Deerfield Road site appears to be a complex of interconnected buildings¹⁸ throughout which La Costa employees work at distinct locations.¹⁹

LaCosta’s hierarchy includes Sandy Olvera, operations manager, who testified that her duties included payroll, new hire documents, communications with customers and quality control. Olvera testified that she did not supervise the unit employees, and that she met them for the first time on an unspecified date prior to the election when she attended a meeting at the 1717 Deerfield Road site with Jackie Parker,²⁰ LaCosta’s regional vice president; and where Parker made a presentation to the unit employees. Olvera testified that her purpose in attending was to translate for unit employees so they would know of the election on June 27, 2008. Undisputed testimony of the record establishes that James Rotfeld,²¹ with a business address on Bonner Road in Wauconda, Illinois, is LaCosta’s district compliance director and supervisor of Manuel Padilla, the employee alleged to have engaged in conduct objected to herein. Undisputed testimony of the record also indicates that LaCosta also employs individuals identified as Eduardo Olvera and Raymond, who did not testify and whose functions were not specified, but through whom Padilla communicates with Rotfeld.

As its position for the record, Employer contends that Manuel Padilla²² is one of four full time and one part time unit employees working at the Deerfield Road site. Employer specifies that the other three full time employees are Maria Mendoza, Myrta Varga, and Lucilla Gonzalez.²³ Employer focuses on the following duties to argue that Padilla is a statutory supervisor: training new people, making work assignments, inspecting work areas to be sure they are cleaned properly, telling employees how to correct areas he feels were not properly cleaned, notifying his supervisor if an employee makes consistent errors, and recommending discipline. Employer contends Padilla’s job title is supervisor.

¹⁸ The record indicates the June 27, 2008 election was held in the atrium of this complex, a common area.

¹⁹ The record indicates that Padilla works in the Grubb & Ellis building, Mendoza in the Siemens building, and Varga in the Deerfield building.

²⁰ Parker did not testify at the hearing.

²¹ Rotfeld did not testify at the hearing.

²² Manuel Padilla testified at the hearing with assistance of a Spanish-speaking translator, although the record demonstrates that Padilla is conversant with at least some English.

²³ Maria Mendoza Nonez and Myrta Varga testified at the hearing with assistance of a Spanish-speaking translator. Lucilla Gonzalez did not testify at the hearing. The record does not identify the fifth, part time employee.

Padilla testified that he worked in the Grubb & Ellis building at the 1717 Deerfield Road site, and that he had worked for LaCosta for eight years. Padilla stated that he worked the night shift, from 5:00 p.m. until 1:30 a.m. He defined his duties as training new people, inspecting the areas of each person, and making sure the building is clean. In response to leading questions, Padilla asserted that he had responsibility to make sure that LaCosta's other employees all had their work assignments. (Tr. 25-26). Padilla testified that inspecting the work areas of other employees meant to "make sure that there's no leftover garbage at [sic] the open, if they forgot to put toilet paper in the bathroom, and that's it." (Tr. 27). If something did not measure up to his standards, Padilla testified that he tells that person what he forgot to do, and reminds him not to forget the next time, to avoid a complaint from the customer. (Id.). To Employer's question about what would happen if someone consistently failed to measure up to his standards, Padilla replied that he would cover the job, but also let the supervisor know what was happening. (Id.). In response to Employer's questions about whether he could recommend discipline, Padilla testified that decision was his supervisor's. (Tr. 28).

Expansion of that issue proceeded as follows with further exploration:

Q. You just testified, I believe, that the ultimate decision on discipline would be made by your supervisor. Is that correct?

A. That's correct.

Q. But am I also correct that you make a recommendation to your supervisor with respect to that discipline?

A. I let him know what's happening, and he's the one who makes the final decision, not I.

Q. And when you let him know what's happening, do you make any recommendations as to what you think should be done about it?

(objection and ruling omitted)

A. No. (Id.)

Concerning his responsibility and the assignment of work, Padilla testified as follows:

Q. Did you tell us last week when we talked that you were in charge of the building?

A. Yes.

Q. What is your job title, sir?

A. I'm in charge of the, I'm a leader, a leader man.

Q. Okay. Do you make the work assignments for the, for the other workers on the night shift?

A. No, each one knows what he has to do in their areas.

Q. How do you get to work everyday?

A. I have my own transportation.

Q. As the leader in charge of the building, as you described, how many, how many employees work under your direction?

A. Four with me.

Q. And what are the names of those individuals?

A. Lucilla Gonzalez, Myrta Varga, Maria Mendoza, and Manuel Padilla, I. (Tr. 30-31).

This topic recurs during Employer's examination of Padilla about his service as observer to the election. Padilla testified that the things he did as "leader" or person "in charge of

the building” were to “check his area, make sure that the offices are locked.” (Tr. 54). As far as giving out work assignments, Padilla testified that he would tell “a new person” how to work in his area. Direct examination of Padilla did not cover how or what changes might come about, but Padilla testified that if an assignment were changed he would have to check with his supervisor about it, but that if someone was absent, all the employees covered that area; and further, that each person checked the area independently. (Id.). Padilla also testified that he did not have the authority to hire or fire employees, or set their wages or hours of work. (Tr. 64-65). He testified that he asks employees to work overtime, but always with his supervisor’s permission, and that he informs his supervisor if someone doesn’t come to work. Padilla also testified that his supervisor’s name was Jim, producing the business card of James Rotfeld, district compliance director, with the names of Eduardo Olvera and Raymond that he had written on the back; and that he contacted Rotfeld through Raymond, who spoke Spanish, when an employee did not report for work. (Tr. 66-68). Padilla assented as to his awareness that he is listed in LaCosta’s records as a supervisor. (Tr. 68).

Employer’s witness Maria Mendoza²⁴, having agreed that she was present under subpoena, testified that she was an employee of LaCosta who cleaned the Siemens facility at the Deerfield site full time on the 5:00 p.m. to 1:30 a.m. shift. Mendoza identified her supervisor as Manuel, assenting as to Padilla. The Employer twice questioned Mendoza as to Padilla’s duties as a supervisor; Mendoza’s initial response, as follows, reveals accumulated resentment:

I’m working for 12 years for LaCosta family, company. I had had supervisors, and none have treated me like this one. I know, I’m not here to make someone look bad, but I’m just telling from my own person how I’m treated, how I’m humiliated, like if I was a slave there because LaCosta don’t do it. The one who does it is the supervisor. (Tr. 72).

Later, however, Mendoza testified that she understood that Padilla’s job duties were “supervising; mop the bathrooms, mop the kitchen, washes the carpet.” (Tr. 94). In response to the question whether Padilla was responsible for overseeing her job duties, Mendoza testified that he was not. (Tr. 95). The following testimony addressed the assignment of work :

Q. Does he give you your job assignments?

A. To me?

Q. Yes.

A. I am, nobody's available.

Q. So he doesn't talk to you?

A. No. (Tr. 94).

Mendoza did not testify further concerning Padilla’s duties.

Employer’s witness Myrta Varga’s testified that she cleans the Deerfield building at 1717 Deerfield Road, working from 5:00 p.m. to 1:30 a.m. as did Padilla and Mendoza. She testified her supervisor was Manuel Padilla. Concerning his duties as supervisor, her entire testimony on direct examination is as follows:

A. He checks on the work, if it's done correctly or not.

²⁴ Her complete name is Maria Mendoza Nonez.

Q. Does he give you your work assignments?

A. Yes.

Q. And what does he do if he decides that the work is not done correctly?

A. He will tell us.

Q. Does he ever give warnings or recommend discipline?

A. He only told me that once.

Q. And does that mean one time he gave you a warning?

A. No, he only told me that he was going to give me more work. (Tr. 107).

On cross examination, Varga testified that Padilla cleans kitchens, shampoos carpets, and once cleaned a bathroom. (Tr. 114-115).

Employer's witness Sandy Olvera did not testify concerning Padilla's duties.

Analysis: Padilla's Supervisory Status

Determining if Padilla was a statutory supervisory during the critical period is one of the threshold questions concerning the appropriate standard to apply to evidence of his alleged objectionable conduct. For the following reasons, I find that none of the Employer's evidence is sufficient to meet its burden to establish that Padilla is a statutory supervisor.

The burden of establishing supervisory status rests on the party asserting that status. *N.L.R.B. v. Kentucky River Community Care*, 532 U.S. 706, 711–712 (2001). Only if the Employer establishes that Padilla is a supervisor is it necessary to evaluate whether his conduct requires that the election be set aside on the basis of conduct by the more rigorous party-standards. Thus, the first issue in resolving this objection is determining whether the Employer has carried its burden of establishing that Padilla possesses authority to act in the interest of his employer in the matters, and in the manner, specified in Section 2(11) of the Act.

Section 2 (11) of the Act defines the term supervisor as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

As the Court noted, this tripartite test requires that statutory supervisors 1) have the authority to engage in any one of the twelve listed supervisory functions; 2) exercise their authority using "independent judgment" that is not merely routine or clerical, and 3) act on authority is held "in the interest of the employer." *N.L.R.B. v. Kentucky River Community Care*, citing *N.L.R.B. v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-574, (1994). In addition, a person need only exercise one of the functions listed in Section 2(11) to be deemed a supervisor. *Kentucky River Community Care, supra*; *Schnurmacher Nursing Home v. N.L.R.B.*, F.3d 260, 264 (2nd Cir. 2000); *Butler-Johnson Corp. v. N.L.R.B.*, 608 F.2d 1303, 1306 fn. 4 (9th Cir. 1979) ("[t]he enumerated functions in Section 2(11) are to be read in the disjunctive, and the existence of any of

them, regardless of the frequency of their performance, is sufficient to confer supervisory status”) (citations omitted). Further, the Court held that judgment is not independent if it is dictated or controlled by detailed instructions, including the verbal instructions of a higher authority. *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006), WL2842124 at *10.

The Employer asserts that Padilla’s supervisory authority was shown by his duties to make work assignments, approve overtime, train new people, inspect work areas, issue corrections, notify his supervisor of employees’ errors, and recommend discipline. Employer also contends Padilla’s job title is supervisor.

The Employer presented no evidence to contradict Padilla’s testimony that he did not independently assign tasks or approve overtime, but instead sought verbal approval from his supervisor, and only acted on the direction of his supervisor. The record does not indicate how often Padilla did so. Padilla testified that he would tell a new person how to work in his area, but called his supervisor if there was a change in assignments; and that all employees covered the area of an absent employee. (Tr. 54). There is no testimony as to whether they did so independently or by assignment. Varga testified that Padilla once told her that he would give her more work. (Tr. 107). However, Varga’s assertion is unpersuasive because the record does not indicate any facts or the basis for her conclusion, which remained unexplored. Thus it does not establish that Padilla had the authority of a statutory supervisor to assign work. Without further evidence, the record suggests only that making work assignments is not part of Padilla’s regular duties, and whatever might occasionally occur is routine. Padilla and Mendoza agree that Padilla did not make work assignments; Padilla testified that he did not make work assignments for others on his shift, each of whom knew what to do and where. (Tr. 31). The record does not demonstrate that any of the cleaning duties of Padilla or the other unit employees were anything other than daily, routine work in the same area, not requiring instruction or assignment. No evidence was presented to dispute Padilla’s testimony that he always checks with his supervisor before conveying any instructions that are required, such as overtime necessitated by absences. (Tr. 66). Overall, the record suggests that employees independently cover their work without direction. To sustain its argument that Padilla assigns and responsibly directs the work of others, the Employer seems to rely principally on the logical consequence of Padilla’s duties as an acknowledged leadman. Moreover, an employee does not become a supervisor merely because he gives some instructions or minor orders to other employees. *N.L.R.B. v. Wilson-Crissman Cadillac*, 659 F.2d 728 (6th Cir. 1981); *N.L.R.B. v. Doctors’ Hospital of Modesto*, 489 F. 2d 772 (9th Cir. 1973). The fact that the record does not distinguish Padilla’s skills from those of the other employees also does not suggest that he was distinct in having supervisory authority.

As to other supervisory acts, a paucity of evidence concerns Padilla’s duty to train new employees. Padilla testified that he did so. (Tr. 25). However, his simple assertion remained unexplored. The record demonstrates no duty that reflects statutory authority in this capacity. The topic was only broached again by Padilla, who volunteered that he would tell a new person how to work in his area. (Tr. 54).

The record also demonstrates that Padilla’s admitted duty of inspection does not comprise supervisory authority. Padilla’s testimony makes clear that what he meant by

inspection was taking a quick look for obvious tasks that remained undone, and that whatever he found wanting resulted only in a gentle reminder. (Tr. 27).

Likewise, the evidence does not establish that Padilla effectively recommended or carried out any disciplinary or adverse action. Padilla denied that he made recommendations of discipline to his supervisor. (Tr. 29). Padilla testified that if a coworker forgot a task, he told that person directly what had been omitted, and not to forget again to avoid a complaint by the customer. (Tr. 27). In response to a hypothetical question as to what he would do if someone consistently failed to measure up to his standards, Padilla testified that he would cover the job but let the supervisor know what was happening. Although Varga's answer to the Employer's question whether Padilla ever gives warnings or recommends discipline is not initially clear, it was also not explored. (Tr. 107). Thus, evidence that Padilla did either is not established by her testimony. In order to convey supervisory authority, the purported supervisor's action must effectively lead to personnel action, without the independent investigation or review of other management personnel. See *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002); *Passavant Health Center*, 284 NLRB 887, 890-891 (1987).

Finally, although there was some testimony as well as disagreement about Padilla's title,²⁵ actual supervisory status is determined by an individual's duties, and not his title. *Dole Fresh Vegetables, Inc.*, 339 NLRB 785 (2003). Overall, the testimony adduced by Employer is comprised of conclusive statements without supporting evidence, which do not establish supervisory authority. *Beverly Enterprises-Minnesota, Inc. d/b/a Golden Crest Healthcare Center*, 348 NLRB No. 39, slip op. at 5 (2006); *Volair Contractors, Inc.*, 341 NLRB 673 (2004). Accordingly, the statements of Mendoza and Varga, who offered their conclusions that Padilla was their supervisor, fail to assist the Employer in meeting its burden of establishing his supervisory status.

Accordingly, I disagree with Employer's assertions that Padilla was a statutory supervisor by virtue of authority to make work assignments, issue corrections, train, inspect work, approve overtime, or discipline or effectively recommend it; or by any other duty. Nothing in the record suggests that Padilla exercised anything other than routine judgment in this regard, which does not establish supervisory status. *Chrome Deposit Corp.*, 323 NLRB 961, 963 (1997). Employer presented only conclusory testimony lacking meaningful specificity and without supportive evidence, which does not meet the burden required. *Avante at Wilson, Inc.*, 348 NLRB No. 71, slip op. at *2 (2006); also citing *Golden Crest Healthcare Center*, supra; *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995); and *Sears Roebuck & Co.*, 304 NLRB 193, 193 (1991). As discussed above, such testimony, wholly lacking in details or circumstances, does not suffice to show Padilla is a supervisor.

In sum, I find that Padilla is best described as a leadman, who may have possessed greater skill and experience than his fellow employees, but who did not possess the requisite authority to be deemed a supervisor under the Act. *Northcrest Nursing Home*, 313 NLRB 491, 509 (1993) (see fn. 13 and cases cited there).

²⁵ Padilla acknowledged that Employer termed him a supervisor, while maintaining he was a leadman.

Padilla's Agency or Apparent Agency

Padilla's alleged objectionable conduct must also be evaluated by standards for party conduct if he is Petitioner's agent or apparent agent, as Employer also argues. (Tr. 12). A union may create an agency relationship either by directly designating someone to be its agent, i.e. granting actual authority; or by taking steps that lead third persons reasonably to believe that the putative agent was authorized to take certain actions, i.e. allowing apparent authority to exist. The question whether an employee is an agent of the union is very fact-specific. *Overnite Transportation Co. v. N.L.R.B.*, 104 F.3d 109, 113 (7th Cir. 1997).

Padilla testified that he was not employed by SEIU Local 1. (Tr. 64). Although Employer frequently raised Padilla's service as Petitioner's observer to the election, service as an election observer does not convey agency of a union. *Anchor Inns, Inc.*, 262 NLRB 1137, 1138 (1982).

The Employer presented no evidence to establish that Petitioner took any actions to recognize Padilla as its agent or that Padilla performed as an agent. Employer questioned Padilla about his contacts with Petitioner's representatives. (Tr. 32-34; 37-44). Padilla testified that he first encountered a representative of SEIU a few years prior when a representative came to the site by mistake; and that he attended about five SEIU meetings in 2007 and 2008, the last of which was the Friday preceding the hearing at a McDonald's restaurant.²⁶ (Tr. 40). Padilla also testified that he heard about SEIU's meetings through personal and telephone conversations with Rebalino Martinez,²⁷ who told him about two SEIU meetings that he attended before the election. Padilla testified that he provided transportation to the three employees who worked with him²⁸ to those two meetings. The record does not indicate that by bringing employees to meetings, Padilla acted on Petitioner's behalf or behest. It also does not suggest that Padilla acted as a conduit for SEIU to the employees. (Tr. 36). Mendoza testified that at a meeting held at McDonald's about two days before the election²⁹, two agents³⁰ were present for Petitioner. (Tr. 89). Thus, from the limited evidence of the record, Padilla does not appear to have filled a representative's role. No evidence concerning any conduct at meetings was adduced. Employer did not question Mendoza and Varga about any representations made to them by or about Padilla in relation to SEIU.

On the basis of the record overall, I reject Employer's assertion that Padilla was an agent or apparent agent of SEIU. First, the record does not demonstrate that Padilla conducted himself with real or apparent authority of SEIU. *Bio-Medical Applications of Puerto Rico, Inc.*, supra. Even ardent support does not convey union-agency upon an employee-advocate who was not the union's principal contact with voters, particularly where a union was represented by agents that personally directed or were present in its campaign. *Tennessee Plastics, Inc.*, 215 NLRB 315, 319 (1974) enfd. 525 F.2d 670 (6th Cir. 1975); *Evergreen Healthcare, Inc. v. N.L.R.B.*, 104 F.3d 867 (6th Cir. 1997). Where

²⁶ The hearing was on July 29, 2008, and so that Friday meeting was on July 25, 2008.

²⁷ Martinez was present at the hearing as an SEIU representative, and did not testify.

²⁸ Myrta Varga, Maria Mendoza, and Lucilla Gonzalez

²⁹ The exact date is not specified on the record. Other evidence suggests this meeting was the day before the election. See Tr., 61-62.

³⁰ Mendoza identified these agents as Rebalino Martinez and Steven Stewart, who were present for Petitioner at the hearing. (Tr. 89).

a union had its own admitted agent involved in the campaign and an enthusiastic employee activist was not the only conduit to employees, activities such as soliciting and obtaining signatures on authorization cards, organizing and informing employees of union meetings, and serving as election observer, were insufficient to convey general agency of the union under the principles of actual or apparent authority. *United Builders Supply Co.* 287 NLRB 1364, 1365 (1988). Similarly, more extensive activities than the record demonstrates for Padilla, such as membership in an in-house organizing committee, solicitation of support for the union, distribution of union literature, being an in-plant informer to the union, and serving as the union's election observer, were still insufficient to convey agency. *Advance Products Corp.*, 304 NLRB 436 (1991). Even an employee's holding union meetings did not convey agency status. *L & A Juice Co.*, 323 NLRB 965 (1997). Even beyond consideration that the nature of Padilla's demonstrated conduct did not further Petitioner's interests, the record shows no evidence that the Union empowered him to represent it in its organizing activities. Employer presented no proof that Petitioner held Padilla out as its agent, and there is no basis to conclude Padilla was one. The legal authorities Employer cites in its post-hearing memorandum of law,³¹ suggesting that apparent agency can be conveyed by circumstantial evidence of union activities and association with union representatives, are distinguishable from the circumstances herein. In *White Oak Coal v. United Mine Workers*, 318 F.2d 591, 599-600 (6th Cir. 1963), an employer's suit against a union for destruction of property, the judge instructed the jury to decide from direct or circumstantial evidence whether an individual was an agent of the union or authorized by union representatives to engage in activities for the union. Next, *N.L.R.B. v. International Longshoremen's and Warehousemen's Union*, 420 F.2d 957, 959 (9th Cir. 1969), concerns the apparent agency of an international union's employee for a local union, and does not address criteria that confer apparent agency on an employee. And in *Schauffler v. Highway Truck Drivers & Helpers*, 230 F.2d 7, 10-11 (3rd Cir. 1956), agency that was based on circumstantial evidence was also clearly dependent on "regular conduct" and "reasonable ground" of association.

The standards by which Padilla's conduct might be attributable to SEIU are found in *Millard Processing Services*, supra. To convey apparent agency, two conditions must be met. "There must be some manifestation by the principal to a third party, and the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity." (Id). As discussed above, the record is devoid of evidence to show that Petitioner took steps to manifest to employees that Padilla was its agent, or that it advised them that Padilla was authorized to act on its behalf. The record merely demonstrates that Padilla engaged in conduct typical of a union supporter during an election campaign, and by such activity did not act with apparent agency. Where the employer failed to meet its burden of showing that an employee pro-union activist had apparent authority to threaten employees on the union's behalf, the alleged objectionable remarks were not attributable to the union, and properly assessed under the Board's standards for third-party conduct. *Corner Furniture Discount Center, Inc.*, supra at 1123.

³¹ "With respect to whether an employee engaging in threatening conduct is acting as an agent of the union, even when that individual is not a paid employee of the union and even though there was no evidence that he was ever formally appointed a union agent, it has been held that circumstantial evidence of an agency relationship can be established by showing that that individual was a union 'contact' engaged in organizational activities on behalf of the union, and conducted those activities with union representatives." (p.3).

Therefore, without any basis in the record to find that Padilla was either a statutory supervisor, as discussed earlier, or Petitioner's agent or apparent agent, I will evaluate his alleged objectionable conduct by the third-party standard.

Padilla's Conduct

On the record, Employer argued that Padilla used the opportunity of providing daily transportation to and from work for Maria Mendoza, Myrta Varga, and Lucilla Gonzalez to threaten them with loss of transportation and employment if they did not vote for Petitioner, and also to compel their attendance at SEIU meetings held before the workday began. Employer also asserted that Padilla pressured his coworkers to conform to expectations that they support SEIU, about which he allegedly talked frequently and openly until the election day, when he served as SEIU's observer. (Tr. 12-13). Employer maintained that Padilla's conduct caused fear in Maria Mendoza, and that he intimidated employees who worked under his direction and believed he would carry out his alleged threats. (Tr. 134-136). Employer asserted that Padilla's alleged threats and intimidation are notable because of his presence in the voting area during the election. (Tr. 45).

Padilla testified on direct examination that he provided transportation to and from work for Lucilla Gonzalez, Myrta Varga, and Maria Mendoza. He assented that he drove to their houses to pick them up at a designated time before work started, and brought them home at the end of the work day (Tr. 31); and that they depended on him as a means of transportation. (Tr. 35). In response to Employer's question whether he attempted, during rides to work in the afternoon or rides home in the early morning hours, to get any of those employees to go to SEIU meetings, Padilla testified that he had done so only in the afternoon. (Tr. 34). More about this was not adduced for the record. Padilla also testified that he attended two SEIU meetings³² before the election, and also brought to them all three of the employees³³ he regularly drove to work. (Tr. 44). Padilla also assented that sometimes SEIU meetings were held just before work. He stated that, if the others attended, he picked them up early so they could attend those meetings. (Tr. 34-35). This is an important condition, as it suggests Padilla did not compel attendance; however, his statement was not explored. Padilla also testified that he never discussed the SEIU with fellow employees during working hours or on the way home from work. (Tr. 36). Padilla stated that he said "absolutely nothing" to other employees about what he thought about SEIU, and assented that anything he heard said to them was by an SEIU representative. (Tr. 37). More specific information was not adduced.

Concerning attendance at SEIU meetings, Padilla denied that Maria Mendoza ever declined to attend a meeting. (Tr. 44-45). He testified that he did not drive Mendoza to work for one week because he was on vacation, and not because she didn't attend a union meeting. (Tr. 45). Padilla also denied ever telling Mendoza that he would not drive her to work, or that she would be fired, if she didn't support SEIU. (Tr. 45). He made the same two denials for Varga. (Tr. 46). He was not asked concerning Gonzalez.

Concerning conversations on the day of the election, Padilla denied talking to any of the other employees when they were in the atrium voting; when they came into the

³² The record does not identify the dates of these meetings, but indicates that one was a day or two before the election.

³³ By context, these three were Gonzalez, Varga, and Mendoza.

building; or on the way to work that day. (Tr. 49). Padilla also denied hearing a representative of SEIU speak to employees on election day. (Id.). Other than affirming that Padilla didn't talk to any of the employees when they came in to vote (Tr. 55), these topics were not further explored on direct examination.

Asked if he volunteered to be an election observer for SEIU, Padilla agreed (Tr. 51). His ensuing testimony concerns how he became SEIU's observer, and what he told unit employees about this. Padilla testified that he first learned that he was going to be an observer, and also that he told the other employees, on the day before the election. (Tr. 56, 61). He also testified that concerning his service as observer, he told other LaCosta employees only that he "was going to be there at the table as an observer." (Tr. 61). Padilla's testimony indicates that, on election day, he told the Region's personnel conducting the election that he wanted to be an observer and was accepted for service. (Tr. 51-55). Padilla agreed that he was told by a SEIU representative that he would observe the election before he told that to the other employees. (Id.). He identified Regalino³⁴ as that SEIU representative. Padilla confirmed that "Regalino" was present when he told the LaCosta employees he would serve as observer; and that the conversation took place at a McDonald's [restaurant] the day before the election. (Tr. 61-62). No testimony was adduced concerning Padilla's conduct as observer.

On cross examination, Padilla testified that he volunteered to take his coworkers to work, and that it was not a duty of his job to do so. (Tr. 64). The record does not indicate how long Padilla provided transportation to and from work for Gonzalez, Varga, or Mendoza; how the practice originated; or whether remuneration was involved.

Employer asserts that Padilla testified inconsistently and was not a credible witness. (Tr. 57, 133-134). I do not agree. I observed him closely during his entire testimony, and did not find his testimony inconsistent or untruthful. I judged him to be careful, rather than evasive, in answering often complex questions of undefined scope. Padilla's testimony was often not sufficiently developed on the record to demonstrate inconsistency. Thus if some of his answers were general, nothing in the record proves that they were unlikely. Employer argues that Padilla's testimony about his history of contacts with SEIU and how he came to be observer are inconsistent, and make him an unreliable witness. That was not my impression. Employer manufactured a credibility issue that is unsupported by testimony in the record, then asserted it as fact. That argument is mere distraction. Padilla's testimony was not inconsistent. What he said about being an observer on the election day, and the day before, are not mutually exclusive. Nor were his responses about his contacts with Petitioner contradictory. Having worked until 1:30 a.m. the day before testifying, Padilla expressed his fatigue and hunger. I did not conclude this was unreasonable or evasive. Despite physical duress, I observed that Padilla's demeanor approximated the tension of concentration rather than that of anxiety. Put to the test of beleaguering questions, nothing in Padilla's demeanor suggested dishonest or even disingenuous responses. This was true of Padilla's entire testimony.

Employer's witness Maria Mendoza testified that Padilla did not talk to her about the SEIU during the two years that she worked with him. (Tr. 72). She stated that one

³⁴ Elsewhere identified by Petitioner as Rebalino Martinez. See Tr. 42.

day Padilla told her that the union at LaCosta³⁵ was not good. (Tr. 73). Asked what Padilla told her about changing unions, Mendoza replied, that there would be better benefits with the new union. (Tr. 74). However, Mendoza also added that Padilla “didn’t tell us personally” about that, “because he never told us they were doing that...only when there were meetings he will tell us we were going to a meeting.” (Tr. 74). Further facts about this conversation were not adduced. The context of Mendoza’s testimony indicates that the focus of Padilla’s comment was attendance at the meeting rather than support for Petitioner per se.

Mendoza testified that a “long time” ago, Padilla and other coworkers spoke about going to a meeting. (Tr. 75). She testified that Padilla told her that “we” had to go to the meeting “in order to have a good union.” (Id.). Mendoza testified that she preferred not to go to SEIU meetings. She said that when she told Padilla that, he replied, you have to look for a ride. (Tr. 76). Mendoza further testified that she understood this to mean that if she did not go to the meeting, she would have to look for a ride to work “because they would leave early to go to the meeting. Because [if] I didn’t want to go to the meeting I have to look for another person to take me to work.” (Id.) However, the record does not address whether Mendoza had other options, such as accepting a ride early but not going to the meeting. She insisted that Padilla told her many times that he would not drive her to work if she did not attend an SEIU meeting (Tr. 76-77). Mendoza testified that: “On Thursday³⁶ [Padilla] told me, are you going to go to the meeting, and I said I don’t know. He say, you have to go. You have go to vote for the Union because you are working here.” [sic] (Tr. 77). No testimony was developed about these statements. As to timing, the record indicates that both SEIU and LaCosta each had one meeting for unit employees in the week before the election. (Tr. 91). When asked whether Padilla threatened her in any way if she did not support the new Union, Mendoza assented by Padilla’s “not taking me to work sometimes. There are times when I have to pay someone else for a ride because he won’t take me.” (Tr. 80). Mendoza was not questioned about Padilla’s contention that she paid someone else for a ride during the week he was on vacation. (Tr. 45). And in response to the question whether there was anything else that Padilla said he might do to her if she didn’t support SEIU, Mendoza answered, simply, “no.” (Tr. 81). This suggests a difference of opinion rather than a threat. Personal disputes unrelated to the election, when viewed in the context of behavioral norms of the workplace, cannot be objectively taken as coercive. *Buedel Food Products Co.*, 300 NLRB 638, fn. 3, (1990).

Mendoza clearly did not support any union. She testified that she told Sandy Olvera that she did not want the Union coming in or someone pushing her to have a union. (Tr. 103). Yet her statement of explanation, “when they say let’s go to a meeting, we go to the meeting,” does not suggest a threat. (Tr. 103). Mendoza also testified that “the other day” Padilla told her that “we have to choose the Union,” and on election day she told Padilla that she didn’t want to choose any union and he got mad, but walked away without saying anything. (Tr. 95-96). Mendoza also testified that nobody ever told her that she might be fired for her position about SEIU, or for not attending SEIU meetings. (Tr. 98). Mendoza did not recall whether Padilla spoke to her at the SEIU

³⁵ Referring to Craftsman Independent Union, CIU

³⁶ There is no contextual clue as to the actual date of the remark.

meeting the day before the election. (Tr. 91). There was no testimony concerning the effect of Padilla's service as an observer.

Although Mendoza perceived that she was threatened, nothing in the record indicates that Padilla compelled her to attend SEIU meetings or vote for SEIU, or that he threatened her job. Although I do not discredit Mendoza's testimony, I cannot rely on it to credit her perception that Padilla threatened her with loss of transportation. Her testimony did not clearly show whether she understood Padilla to say that he would punish her for not going to SEIU meetings or not voting for SEIU, or whether he merely told her that she had to arrange other transportation if she did not want to ride in to work early when he attended a meeting. The subjective reactions of employees to alleged threats are irrelevant to the objective evaluation of conduct. *Smithers Tire and Automotive Testing of Texas, Inc.*, supra (internal citation omitted); *Picoma Industries, Inc.*, 296 NLRB 498 (1989). The record suggests that Mendoza may have been confused about these arrangements, particularly as her testimony showed little detail. The record also does not reveal how often and when these arrangements were discussed. Mendoza testified that Padilla did not talk to her "from the beginning," asserting that he did not like her because she was an old lady and he liked young people. (Tr. 94-95). She also perceived isolation from her coworkers. (Tr. 96). And Mendoza specifically linked a lack of communication with Padilla to the threat she perceived. Asked whether Padilla threatened her in any way if she did not support the new Union, Mendoza assented to this perception:

As a threat, like I said, he wouldn't give me a ride and sometimes during the whole week he wouldn't speak to me. He doesn't speak to me at all like if I don't exist. They are lucky if I don't work there, and he treats me like an old lady. I'm not Maria there. I'm the old lady there. (Tr. 80).

Mendoza's testimony reflects her insecurity that Padilla didn't talk to her because of her age. As such, she did not appear to perceive being coerced as much as being marginalized. Mendoza's presumed impression of fear is related to this perception. (Tr. 82). For example, when asked again if Padilla told her that he wouldn't give her rides to work if she didn't support the new Union, Mendoza stated:

A. I don't want you to ask me too many questions because now I don't want to talk.

Q. And is that because you're afraid of Mr. Padilla?

(objection and ruling omitted)

Q. ...Ms. Mendoza, are you afraid to testify?

(instruction to witness omitted)

A. It's hard for me because I don't want to make look bad my supervisors, my lawyers, my company because my company has give many years of work [sic]. (Tr. 78-79).

Employer attempted to demonstrate that Padilla coerced Mendoza, and that she was frightened of him, through evidence of her conversation, not with Padilla, but with Sandy Olvera, LaCosta's operations manager. Mendoza asserted that she initiated her conversation with Olvera in the women's restroom. (Tr. 104). Mendoza testified that she told Olvera "that [she] didn't want the Union coming in. [She] didn't want a Union or someone pushing [her] to have a Union." (Tr. 103). Mendoza added that

she approached Olvera, and told her so, “because we³⁷ wanted to speak to her personally to see if they would hear us because we tell them and they never listen to us either.” (Tr. 104). About Padilla, Mendoza testified that she told Olvera, “he...gets mad and very ugly.” (Id.). Mendoza testified that she did not recall anything else she told Olvera in the restroom, but assented that she wept during that conversation. She stated that it was “because he has made me upset, because he treats me very bad. That’s why that day I was crying, not for other things.” (Id.).

The apprehension of employees and their unarticulated professions of fear are not sufficient to invalidate an election. *N.L.R.B. v. Lovejoy Industries, Inc.*, supra. Employer suggests Mendoza was not a credible witness, (Tr. 134), asserting she “lived in fear of” Padilla. (Tr. 133). Mendoza revealed resentment and perceived humiliation, but these are not the same as fear. Even in empathy with Mendoza’s perceptions, for the purpose of evaluating the record, I do not find that she was fearful because Padilla threatened her because she did not support SEIU. I also do not conclude Mendoza’s expressed desire not to cause trouble undermines her credibility. My close observation of her behavior convinces me that her emotional insecurity and desire to protect her superiors did not preclude her truthfulness. Nevertheless, her testimony does not sufficiently demonstrate that Padilla threatened her for not wanting to support Petitioner or attend its meetings. Rather, it reflects personal considerations unrelated to the expression of Sec. 7 rights.

Employer’s witness Myrta Varga testified that she first heard about the SEIU about a year ago when Lucilla Gonzalez, her coworker, told her about a then upcoming meeting. (Tr. 109). Varga testified that she attended SEIU meetings, which were all “a long time ago” before the election. (Id.). Varga stated that Padilla did not say anything about attending those meetings, but “he only said that we had a meeting.” (Id.). Varga further testified that Padilla “told us that if you wanted to go we could go and he was going to stop by earlier,” [sic]. (Tr. 110). Varga affirmed that Padilla did not ever say that he wouldn’t drive her to work if she didn’t attend SEIU meetings or support the SEIU. (Id.) To clarify this point, Varga testified that Padilla “only said that once because once he came to pick me up and I took a while to come out and he said, you take this time next time and you will see how you get to work.” (Tr. 111). The record does not indicate whether Padilla’s comment about Varga’s not being ready when he came to pick her up was related to attendance of an SEIU meeting. Later, on cross examination, Varga affirmed that Padilla volunteered to drive. (Tr. 115).

Varga denied that Padilla ever threatened her in any way or told her that her job would be made any more difficult if she did not support Petitioner. (Tr. 111). Asked if she spoke with Padilla about SEIU during working hours, she stated she had not. (Tr. 112). Varga testified that she saw Padilla in the voting area during the election, and that he did not tell her the day before that he was going to be serving as an observer. (Tr. 112). Varga affirmed that Padilla did not say anything to her about the election on the election-day; and that she did not feel at anytime that she was being pressured by Padilla to support the SEIU. (Tr. 113).

Employer asked Varga whether she spoke with Olvera “within a couple of days before the election,” or if she made “any effort to contact her about the upcoming election,” but Varga denied both queries. (Tr. 113.) Varga also denied recalling a

³⁷ Mendoza does not testify that anyone else was present during her conversation with Olvera in the restroom.

telephone conversation on a Sunday night,³⁸ or discussing with Maria Mendoza concerns about treatment from Padilla relating to support for SEIU.³⁹ (Id.). Using a rhetorical question, Employer reminded Varga that he questioned her “last Thursday” in Olvera’s presence. (Id.). Subsequently, Varga denied that she talked to anybody between that date and the hearing about what she testified to at the hearing. (Tr. 113-114). From the latter, I conclude only that Varga’s sworn testimony differed from conversations outside the hearing, which do not affect the credibility of her testimony.

The testimony of Employer’s witness Sandy Olvera attempts both to suggest that Padilla threatened Mendoza and Varga, and to discredit them. As indicated earlier, Olvera went to the Deerfield Road site once,⁴⁰ to translate for Employer’s meeting with unit employees. Olvera testified that on the day of that meeting, Maria Mendoza caught her eye and motioned for Olvera to join her in the women’s restroom. Olvera testified that Mendoza then initiated a conversation in which she apologized to Olvera “for all that was going on with the new Union being called into the building. She wanted us to know that she had nothing to do with it, that she was actually being pressured and threatened to vote for this new Union.” (Tr. 118). Olvera testified that Mendoza identified Padilla as the source of this pressure and threat. (Id.). Olvera elaborated that Mendoza told her that Padilla pressured or threatened her by “giv[ing] her rides, so if she didn’t vote she would no longer get a ride to work or she would get fired or he will make her job very hard where she will quit on her own.” (Id.). Asked about any private conversation she had with Varga, Olvera testified that Varga was in the restroom with Mendoza when she entered, and “[Varga] was probably, she was there when she⁴¹ mentioned the fact that they were being threatened to vote for the Union, but they walked away because they were scared to be seen talking to me.”⁴² (Tr. 118). Olvera testified that “during the translation⁴³ [Varga] briefly said something and didn’t want to speak anymore and asked if she could give me a call at a later time.” (Tr. 119). Olvera testified that Varga telephoned her on the Sunday after the election and told her “that during the election, you know, she took her vote. She didn’t tell me what she voted for. She just told me that she did her vote based on what she felt like threats and if she didn’t vote for whoever she was told she would lose her job. She just didn’t want to lose her job.” (Tr. 119-120). Olvera testified that Varga did not mention Padilla in that Sunday conversation, but did mention him “during the translation she mentioned briefly, that was it, that she was being threatened to vote for this new Union, if not she would lose her job. But she didn’t want to keep talking because she didn’t want to be seen, Myrta didn’t want to be seen talking to us.” (intervening question omitted.) (Tr. 120). On cross examination, Olvera testified that she did not personally hear Padilla threaten either Mendoza or Varga.

Employer elicited Olvera’s testimony that Varga’s testimony at the hearing was inconsistent with “what she was saying to us last Thursday,” and evidence of Varga’s prior inconsistency. (Tr. 120-121). I do not disbelieve Olvera’s recollection of her

³⁸ The record reflects some confusion as to whether this suggested Sunday night-conversation was before or after the election.

³⁹ Mendoza was queried about a conversation with Olvera, but not Varga.

⁴⁰ Elsewhere the record indicates LaCosta’s meeting was on an unspecified date in the week before the election.

⁴¹ Presumably Mendoza, but not clarified.

⁴² Varga was not questioned on this topic.

⁴³ There are no details in the record about this occasion.

conversation with Mendoza, excepting her conclusion that Mendoza and Varga were afraid to be seen talking to her; I am empirically skeptical of the presumed fear of conversation in the women's restroom. However, I find Olvera's testimony worthless to establish the matters at issue here. In particular, I do not give any weight to Olvera's testimony to establish that Padilla threatened Mendoza or Varga, or that they were complicit in their complaints to her. Olvera testified with no certainty concerning Varga's presence in the restroom or her comments during the enigmatic 'translation'. Rather, I credit Mendoza's and Varga's sworn testimony. Notwithstanding that Employer alludes to their having privately expressed something other than what they testified to, nothing in the record or in my observation of their behavior at the hearing convinces me that their sworn testimony was not credible. Certainly there is no evidence that Mendoza or Varga contradicted themselves. Further, the record demonstrates that Employer did not question the witnesses comparably. Consequently, their testimony was distinct, yet not inconsistent or contradictory.

Summary of Credited Evidence

Upon my review of the record and consideration of the testimony, the evidence shows that Padilla provided transportation to work for three unit employees, of whom only two, Mendoza and Varga, testified. Beyond his admission that he attempted to get employees to go to SEIU meetings in the afternoon, before work began, there is no evidence that he discussed the SEIU frequently and openly, as Employer asserts. There is also no evidence to show what Padilla did say while driving Mendoza and Varga to work. Padilla denied that he discussed the SEIU during working hours, which Varga confirmed. Mendoza, however, recalled the single comment, Padilla's telling her "we have to choose the Union," but the record reveals nothing of the context, time, or location of the remark, or its dissemination. Mendoza also recalled that Padilla walked away without comment when she told him on election day that she didn't want to choose any union. Varga denied that Padilla ever threatened her in any way or told her that her job would be made more difficult if she did not support SEIU. Mendoza did not testify concerning threats of more onerous conditions related to her position about SEIU. Mendoza did testify that nobody ever told her that she might be fired for not supporting SEIU or for not attending SEIU meetings. Padilla denied that he spoke to any of the other employees when they were in the voting area. Mendoza did not testify about Padilla's conduct as an observer. Varga affirmed that Padilla did not say anything to her about the election on the voting day; and that Padilla did not pressure her at any time to support SEIU. Varga testified that Padilla said nothing to her about attending SEIU meetings, and never told her that he wouldn't drive her to work if she didn't attend SEIU meetings or support SEIU. Mendoza, however, testified to four threats. First, she maintained that Padilla told her, we have to go to the meeting in order to have a good union. Second, Mendoza also affirmed that when she told Padilla that she didn't want to go to SEIU meetings, he replied, you have to look for a ride. Third, Mendoza testified that Padilla stated on an unspecified Thursday that she had to vote for the Union "because you are working here." Fourth, Mendoza testified that "the other day" Padilla told her "we have to choose the Union."

The Standards Applied and Recommendations

As discussed earlier, I did not find that the evidence was sufficient to show that Padilla was a supervisor, or the agent or apparent agent of SEIU. The standard, discussed earlier, to evaluate non party-conduct is whether it was so aggravated as to create a general atmosphere of fear and reprisal rendering a free expression of choice impossible. As I do not find Padilla to be a party to the election, his conduct is weighted less than party conduct would be. Remarks are evaluated objectively, and must be reasonably regarded as threats. Actions must have been so aggravated as to create a general atmosphere of fear and reprisal rendering a free expression of choice impossible. The conduct of pro-union employees who are not agents of the union must be shown to be so disruptive as to require setting aside the election. Threats are examined for: 1) the nature of the threat itself, 2) whether the threat encompassed the entire bargaining unit, 3) whether reports of the threat were disseminated widely within the unit, 4) whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat, and 5) whether the threat was 'rejuvenated' at or near the time of the election. Also, the cumulative effect of credited testimony must be considered. However, the Employer's burden of proof requires demonstration by specific evidence.

There is no evidence to show that the first threat Mendoza perceived, that "we" had to go to the meeting in order to have a good union, is anything other than mere encouragement. Mendoza testified that Padilla made this remark "one day" and a "long time" ago, without details about context, location, or dissemination, other than that it was made after she heard that the other unit employees were going to go to a meeting and Padilla also invited her. The evidence was not sufficient to show that this comment was serious or coercive.

The context of Mendoza's testimony regarding her second asserted threat, that if she didn't want to go to meetings she had to look for a ride, indicates that Mendoza understood that attending the meeting required leaving earlier for work, and hence, her need for another ride. The evidence is not sufficient to establish, however, that Mendoza was ever denied a ride for any reason other than Padilla's vacation. I do not find that Mendoza's perceived threat of loss of transportation was supported by objective evidence linking it to attendance at Petitioner's meetings or support for Petitioner. Further, the evidence is insufficient to show the timing and dissemination of the remark.

Mendoza's third perceived threat, that she had to vote for SEIU, occurred in the context of Padilla's asking her on a Thursday before a SEIU meeting if she was going to attend. Mendoza replied she didn't know, and that Padilla said, you have to go vote for the Union because you are working here. So, at most, the credible evidence of the record suggests that Padilla made one threat of unspecified reprisal to Mendoza that she had to vote for the Union. However, the record is silent as to the exact nature of the threat; the timing of Padilla's comment; whether it was directed to anyone other than Mendoza; or whether it was disseminated. As the preponderance of the evidence did not suggest that Padilla had the authority of a statutory supervisor, the record remains unexplored as to his capability of meaningfully enforcing a threat. As discussed earlier, I did not find that Mendoza's subjective perception that Padilla would deprive her of transportation was related to her degree of support for SEIU. Further, the record does not establish that

Padilla took any action against Mendoza despite her declared lack of support for Petitioner. Even on the election day, when Mendoza told Padilla she did not support any union, the record shows that Padilla made no response. Thus, I cannot conclude that the evidence shows that Mendoza acted in fear of Padilla, or thought him capable of carrying out any threat. As to the last of the evaluative criteria, rejuvenation near the election, the record provides no objective basis to establish the timing of any of Padilla's remarks which Mendoza perceived as threats. In applying evaluative criteria to the Mendoza's fourth perceived threat, that "the other day" Padilla said "we have to choose the Union," I also find the comment not a threat. Syntactically, it lacks an ultimatum. There is no evidence to show to whom the remark was directed other than Mendoza, if it was disseminated, or even when it was made. By context, it appears to have been made after the election, and is consequently irrelevant on that basis alone.

I find that only the single comment of Padilla to Mendoza that she had to vote for SEIU can reasonably be regarded as a threat. However, it was not a serious one, and does not, by itself, warrant setting aside the election. According to standards set forth fully earlier, whether a threat is serious and likely to intimidate prospective voters depends on its character and circumstances and not on the number of employees threatened. However, conduct upon which an election is set aside must be found to have affected the outcome of the election; not only must the conduct be coercive, but it must be so related to the election as to have had a probable effect upon the voters. *The Great Atlantic and Pacific Tea Co., Inc.*, 177 NLRB 942, 942-943 (1969). The single, vague comment at issue could not have been determinative of the results of the election. Further, there is no evidence in the record to show that the circumstances of the remark intimidated any of the eligible voters. Nothing in the record shows that the comment was disseminated to employees, much less that it aggravated them or their working conditions, or created a general atmosphere of fear and reprisal rendering a free expression of choice impossible. Thus, the Employer has not met its burden to demonstrate by specific evidence that the election was unfair. Rather, the preponderance of the evidence does not show that the conduct of Padilla, arguably a pro-union employee, was shown to be so disruptive as to require setting aside the election.

Although I did not find Padilla to be a supervisor, or Petitioner's agent or apparent agent, the record still does not show his conduct to be objectionable even if the standard for party conduct were applied. Even if Padilla were a supervisor, I would nonetheless recommend overruling the Employer's first objection because the evidence falls well short of establishing that Padilla's pro-union conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election. Even assuming that most of the evidence weighed in favor of finding Padilla a supervisor, he would still best be described as a low level supervisor, with very limited authority, which argues against the potential coerciveness of his conduct. Further, the record does not show that if Padilla had supervisory authority, he held it over all four other unit employees. Such a low supervisory authority does little to support the impact of Padilla's conduct. By comparison, the supervisor's conduct in *Harborside Healthcare, Inc.*, supra, included prediction of job loss, advising employees that they had to attend union meetings, and soliciting employees to sign union authorization cards. There is no evidence that Padilla solicited authorization cards, which might have been objectionable *Id.* at 911. The nature, extent, and context of Padilla's conduct were limited, on the basis

of this record, to at most four comments reported by Mendoza, which are unaccompanied by evidence that establish them as credible threats. There was no testimony as to anything Padilla said at any of the meetings Mendoza mentioned. Other than by occasional isolated and general comments, and Padilla's unexplored admission that he talked to employees about going to SEIU meetings on the way to work in the afternoons, the record also does not show how Padilla conveyed his support for SEIU. Moreover, nothing in *Harborside* suggests that merely going to pro-union meetings is coercive. The next step under the *Harborside* analysis is an examination of the extent that the pro-union conduct materially affected the outcome of the election. Here, the margin of victory was 4 to 1 in favor of the Union. Even discounting the unlikely influence of Padilla on both Mendoza and Varga to vote for the SEIU, their votes are still not determinative.

Accordingly, even if Padilla were a supervisor, I would still find that Padilla's limited pro-union conduct did not reasonably tend to coerce or interfere with the employees' exercise of free choice in the election. Thus, under any standard applied, Employer has not met its heavy burden of proof to demonstrate that under all the circumstances, employees did not register free choice in the election.

CONCLUSION AND RECOMMENDATIONS

Based upon my findings and conclusions, I recommend that the Employer's first objection of July 2, 2008, and second objection of July 8, 2008, be entirely overruled, and that a Certification of Representative issue.⁴⁴

Dated at Chicago, Illinois this 17th day of September, 2008.

/s/ Cathy Brodsky

Cathy Brodsky, Hearing Officer
National Labor Relations Board
Region 13
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⁴⁴ Under the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, exceptions to this report may be filed with the Board in Washington, D.C. within fourteen (14) days from the date of issuance of this report. Immediately upon filing such exceptions, the party filing same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director of Region 13. If no exceptions are filed, the Board may adopt the recommendations of the Hearing officer.