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

BON SECOURS CHARITY HEALTH SYSTEMS,
WARWICK HEALTHCARE CAMPUS
Employer

and Case No. 2-RC-23303

1199 SEIU, UNITED HEALTHCARE WORKERS EAST
Petitioner

Amy Ventry, Esq. and *Robert Cirino, Esq., (Nixon Peabody, LLP),* Counsel for the Employer.
William Massey, Esq., (*Gladstein, Reif and Meginniss)*, Counsel for Petitioner.

RECOMMENDED DECISION ON OBJECTIONS

Statement of the Case

STEVEN FISH, Administrative Law Judge: On July 3, 2008,[1] 1119 SEIU United Healthcare Workers East, herein called the Petitioner or the Union, filed a petition seeking to represent certain employees employed by Bon Secours Charity Health Systems, herein called the Employer or Bon Secours, at the Warwick Healthcare Campus in Warwick, New York.

On September 12, the parties entered into a Stipulated Election Agreement scheduling an election for October 30.

The election was conducted in a unit of non-professional service employees at the Employer's three facilities, namely Schervier Pavilion, a nursing home (Schervier); Mount Alverno, an assisted living facility (Mount Alverno); and St. Anthony's Community Hospital, a hospital (St. Anthony's). The initial tally of ballots showed 121 votes for the Union, 118 against, and 11 challenges. Thus, challenges were determinative. On November 6, Petitioner filed 15 objections to the election.

On March 6, 2009, the parties agreed to stipulate to the eligibility of one of the challenged voters. On March 10, 2009, the Region issued an Order Approving Stipulation Regarding Challenged Ballot, Approving Request to Withdraw an Objection, and Notice of Hearing on Challenges and Objections. Among the provisions of that stipulation was that Petitioner withdrew Objection 11, leaving 14 remaining objections.

[1] All dates herein are in 2008 unless otherwise indicated.

On May 5, 2009, Administrative Law Judge Joel Biblowitz granted the Employer's Motion to bifurcate the hearing and to conduct a hearing on the challenges first, and postponing the hearing on objections until the disposition of the challenges determined whether it was necessary to resolve the objections.

Judge Biblowitz conducted a hearing on the challenges on May 14, 15, 18, 19 and 20, 2009.

On September 9, 2009, Judge Biblowitz issued a decision, sustained the challenges to the ballots of six employees, overruling the challenges to four employees, and recommending that these four ballots be opened and counted, along with the ballot of one employee, for whom the Union had withdrawn its challenge.

On December 23, 2009, the Board issued a decision adopting Judge Biblowitz's recommendations and ordered that the five challenged ballots be opened and counted, and that the revised tally of ballots be issued.

On January 6, 2010, the challenged ballots were opened and counted. The revised tally showed 121 votes for the Union, 123 against, 6 sustained challenges, and one void ballot. Thus, a majority of the valid votes were cast against representation by Petitioner.

On January 21, 2010, the Director issued a Notice of Hearing on the remaining 14 objections filed by Petitioner, which previously had been held in abeyance pending resolution of the challenges.

The hearing was held before me in New York, NY on February 8, 9, 16 and 17, 2010. On February 9, 2010, the Petitioner withdrew Objection 2.

Briefs have been filed and have been carefully considered. In its brief, the Union withdrew Objections 12 through 15, which leaves for consideration by me, Objections 1 and 3 through 10.

Based upon the entire record, including my observation of the demeanor of the witness, I issue the following:

Finding of Fact

1. The Objections

The remaining objections[2], Objection 1 and 3 through 10 are as follows:

PETITIONER'S OBJECTIONS TO CONDUCT
AFFECTING THE RESULTS OF THE ELECTION

Pursuant to Section 102.69 of the Board's Rules and Regulations, Petitioner, 1199 SEIU United Healthcare Workers East ("The Union"), objects to conduct affecting the results of the

[2] I grant the Union's request made in its brief to withdraw Objections 12 through 15. Objection 2 was withdrawn during the trial, and Objection 11 was withdrawn previously by Petitioner.

election, conducted on October 30, 2008, for the following reasons:

1. During the critical, pre-election period, the Employer through its agents and representatives, threatened employees with the loss of wages and salary increases if they voted for the Union.

3. During the critical, pre-election period, the Employer through its agents and representatives, threatened employees with the loss of their jobs if they voted for the Union.

4. During the critical, pre-election period, the Employer through its agents and representatives, threatened to change and make more onerous employees' work assignments and work schedules if they voted for the Union.

5. During the critical, pre-election period, the Employer through its agents and representatives, engaged in surveillance of employee union activity and created the impression of surveillance of employee union activity.

6. During the critical, pre-election period, the Employer through its agents and representatives, posted campaign literature that created and promoted a general atmosphere of fear, violence, and reprisal.

7. During the critical, pre-election period, the Employer through its agents and representatives, disparaged employees for engaging in protected Union activities and stated that their Union activity was incompatible with continued employment.

8. During the critical, pre-election period, the Employer through its agents and representatives, discriminatorily applied and altered its rules regarding the solicitation, distribution, and posting of literature.

9. During the critical, pre-election period, the Employer through its agents and representatives, informed employees it would be futile for them to select the Union.

10. During the critical, pre-election period, the Employer through its agents and representatives, threatened employees with the loss of their ability to speak directly to management concerning

workplace issues if they voted for the Union in the election.

2. Objection 5

A. Conduct of Mike Deyo

Subsequent to the filing of its petition in July, the Union began to engage in shift change organizational activities at the Employer's premises. These activities occurred at all of the Employer's facilities, but primarily at Schervier and Mount Alverno. They were conducted at different times of the day to coincide with three different times when shifts change. However, the majority of these activities took place at or around the 3:00 p.m. shift change, where the highest number of employees would be either arriving or leaving work.

At these activities, between five and ten unit employees would participate along with several union representatives, including Robin Ringwood, the lead organizer for Petitioner. The employees and union representatives would attempt to speak to employees leaving and entering the facilities and to hand them union literature and talk to them about unionization.

These shift change activities took place approximately once a week during July, August and early September. After the parties entered into the Stipulated Election Agreement on September 11, the Union increased the frequency of these shift change activities to approximately five days a week, sometimes including weekends. On these days, the Union would conduct between five and ten activities per day.[3]

Additionally, the Union also held weekly organizational meetings every Wednesday at the Legion Hall in Warwick, outside the Employer's premises. Ashley VonHahsel was a CNA employed by the Employer at its Schervier facility. She regularly attended these Wednesday meetings. VonHahsel participated in the Union's shift change activities at the 3:00 p.m. shift change, once or twice a week during July and August, and two or three times a week during September and October.

In early October, Mike Deyo, the Administrator at Schervier, conducted a meeting in the Mills Dining Room at Schervier. In addition to Deyo, several other management officials were present, including Sandra Gomas, nurse manager and Jody Collins, Director of Nursing.

Approximately fifteen to twenty employees were present, including VonHahsel. Deyo urged employees to vote "No" in the election and asked the employees to give him another year to make their problems better. VonHahsel responded that "We gave you enough time. Some people have been there for over ten years and it's only gotten worse in the two years that I have worked there."

Deyo then asked if anyone has any questions. VonHahsel asked why she couldn't hang her pro-union literature on the Employer's bulletin boards[4] because the Employer posted anti-union literature all around. Deyo responded that VonHahsel couldn't hang pro-union literature because it was "against policy." Deyo added that if "anyone wanted information about the Union

[3] Sometimes the Union would conduct these activities simultaneously at all three facilities. Other times, they would be conducted only at one or two facilities at a time.

[4] VonHahsel had previously been instructed by several supervisors that she could not hang pro-union literature on the Employer's bulletin boards.

they should attend your Wednesday meetings."

My findings concerning Deyo's comments at the October meeting is based on the credible and uncontradicted testimony of VonHahsel. Deyo did not testify, so her testimony was not denied and is credited.

In this regard, the Employer argues that VonHahsel should not be credited because of the lack of corroborating evidence, plus the fact that another witness called by Petitioner, Val DeWitt, testified about and was present at the Deyo meeting and did not corroborate VonHahsel's testimony concerning Deyo's comments about the union meetings. Thus, the Employer argues that it need not have called Deyo as a witness to "contradict an otherwise disproven statement." I disagree.

While DeWitt did testify concerning the meeting in question, she did not deny or contradict VonHahsel's testimony with respect to Deyo's remarks. DeWitt was not asked about the specific statements in question that I have found that Deyo made at the meeting. Further, DeWitt conceded that Deyo said *other things* more than she could recall at the meeting, but did not remember anything else that Deyo said.

Moreover, Dunkin, Respondent's supervisor, who did testify at the hearing and was present at the meeting in question, furnished no testimony on this subject and thus, did not contradict VonHahsel's testimony concerning Deyo's comments.

In these circumstances, the Employer is clearly incorrect. VonHahsel's testimony has not been "disproved," and it is appropriate for me to draw an adverse inference from its failure to call Deyo to deny or refute VonHahsel's testimony in this respect. Even apart from an adverse inference, VonHahsel's testimony was not refuted or contradicted and is therefore credited.

Having credited VonHahsel's testimony in this regard, the question is whether Deyo's comments establish that the Employer created the impression of surveillance of its employees' union activities as asserted by the Petitioner. The test for determining whether an employer has created the impression that its employees' union activities have been placed under surveillance, is whether the employees would reasonably assume from the employer's statements or conduct that their union activities had been placed under surveillance. *Stevens Creek Chrysler Dodge*, 353 NLRB #132 slip op, 2-3 (2009); *Donaldson Bros.*, 341 NLRB 958, 961 (2004); *Mountaineer Steel Inc.*, 326 NLRB 787 (1998). The standard is an objective one based on the rationale 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." *Flexsteel Industries*, 311 NLRB 257 (1993).

The Board does not require employees to attempt to keep their activities secret before an employer can be found to have created an unlawful impression of surveillance. *Central Valley Meat Co.*, 346 NLRB 1078, 1080 (2006); *Spartech Corp.*, 344 NLRB 576, 577 (2005); *North Hills Office Service*, 344 NLRB 1083, 1095 (2005).

The Board does not require then as employer's words on their face reveal that the employer acquired its knowledge of the employees' activities by unlawful means. *Dallas & Mavis Specialized Carrier Co.*, 346 NLRB 253, 254 fn. 6 (2006); *Sam's Club*, 342 NLRB 620 (2004); *North Hills*, supra, 344 NLRB at 1095.

When an employer tells employees that it is aware of their union activities, but fails to tell them the source of that information, the employer violates Section 8(a)(1). This is because the

employees are left to speculate as to how the employer obtained its information causing them reasonably to conclude that the information was obtained through employer monitoring. *Stevens Creek Chrysler*, supra, 353 NLRB at 3; *Conley Trucking*, 349 NLRB 308, 315 (2007); *Dallas & Mavis Carrier*, supra, 346 NLRB at 254; *United Charter Service*, 306 NLRB 150, 151 (1992). See also *Beverly California*, 326 NLRB 232, 233 (1998).

In applying these principles to the instance facts, it is clear that Deyo's comments violated the standards detailed above, violated Section 8(a)(1) of the Act, and therefore constitutes objectionable conduct. Here Deyo informed VonHahsel, as well as 15-20 other employees at the meeting, that he was aware that the Union conducted meetings on Wednesdays, as well as the fact that VonHahsel attended such meetings. Deyo did not inform the employees of the source of his information, so that the employees could reasonably conclude that the information was obtained through employer monitoring. *Stevens Creek Chrysler*, supra; *Conley Trucking*, supra.

Here the meetings were held outside the premises of the Employer, and there is no evidence that the meetings were publicized, open events. *Stevens Creek Chrysler*, supra, 353 NLRB at 3. Furthermore, by Deyo directing his comments to VonHahsel and referring to "your Wednesday union meetings," he inferred that the Employer was aware of who attended the meetings, that VonHahsel was a leader of the organizing drive and that the meetings were held regularly on Wednesdays. All of these remarks demonstrate significant knowledge by the Employer of details of the meetings and adds to the reasonableness of the employees' belief that the Employer was monitoring their union activities. *Conley Trucking*, supra, 349 NLRB at 315; *North Hills*, supra, 344 NLRB at 1096; *Spartech*, supra, 349 NLRB at 576; *United Charter Service*, 306 NLRB at 151; *Emerson Electric Co.*, 287 NLRB 1065 (1988).

Accordingly, based on the foregoing analysis and authorities, I conclude that the Employer engaged in objectionable conduct by Deyo's statements at the October meeting. Thus, this objection must be sustained, I so find.

B. The Conduct of Mary Dunkin

Petitioner also asserts that the Employer created the impression that its employees' union activities were under the surveillance by the conduct of nurse manager and admitted supervisor, Mary Dunkin.

On September 10, CNA Carina Oros was sitting alone in the Maple Hill breakroom at Schervier. Dunkin and Oros exchanged greetings, and Dunkin proceeded to post a document on the small bulletin board next to the other anti-union literature, which had been posted on that bulletin board. The next day, Oros returned to the breakroom and observed that the document was still posted. Oros removed the document from the bulletin board with the intention of showing it to her co-workers. However, Oros heard footsteps coming so she became nervous and slid the leaflet underneath some books on the table in the breakroom. Oros was off from work on September 12.

On September 13, she returned to the breakroom and saw that the document was still where she had left it on September 11. Oros folded the document and put it in her lunch bag. The document reads as follows:

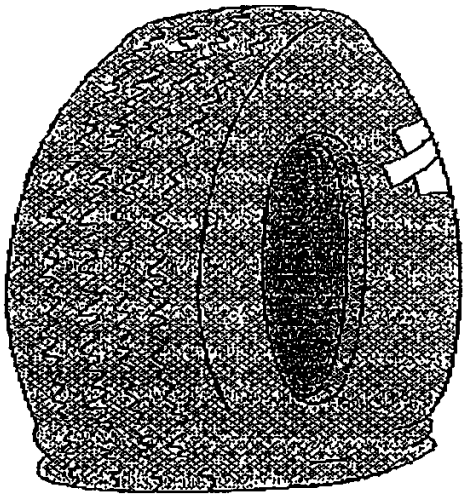
THE SEIU/1199 BULLIES EXPRESS

We, the employees of Sheviere Pavilion and MT Alverno, are sick and tired of the continuous harassment and intimidation from a few co-workers. They seem to promote the union almost on a full time basis, instead of taking care of residents like they are supposed to.

Employees like Debbie Coffey, Ashley Vonhahsel, Val Dewitt, Amanda Cooper and others are terrorizing us by threatening everyone who is not in support of the union. It is time to stand up for our rights and fight these bullies.

It is ok to support a union, but please don't push it down our throats. Last time I checked I still live in America, not in Cuba. If these bullies want to work in a union facility then go to one that already has the union.

SUPPORT THE SEIU/1199 OR GET ONE OF THESE



When she left work that day, Oros showed the document to employees VonHahsel and DeWitt as well as to Ringwood. Oros informed them that she had seen Dunkin post the document on the bulletin board in the Maple Hall breakroom. Both VonHahsel and DeWitt each informed a dozen of their fellow employees that Dunkin had posted this document on the bulletin board.

My findings above with respect to this incident is based on the credited and believable testimony of Oros, which was corroborated in part by VonHahsel, DeWitt and Ringwood, who all testified that Oros showed them the leaflet and told them that she (Oros) had seen Dunkin post

it in the breakroom at Maple Hall.

Although none of these three witnesses saw Dunkin post the document, I do find their testimony corroborative of Oros in that they confirmed that Oros informed them that she had seen Dunkin do so. I find it unlikely that Oros would fabricate such an assertion. Further, I found Oros to be an extremely credible witness. Her testimony was consistent on direct and cross examinations, and she appeared to me to be sincerely attempting to recount what she remembered rather than attempting to tailor her testimony to favor the Union.

In contrast, I was less than impressed with Dunkin's testimony. She impressed as a witness, who was in fact bending over backwards to testify to facts that she believed would be favorable to the Employer rather than to honestly testify to what she remembered. Illustrative of this tendency on her part is her insistence that the Employer was "neutral" with respect to the Union and the election, and that the documents that she was given to distribute to employees by the Employer, as well as statements made at meetings by officials of the Employer, all reflected such neutrality. Indeed, Dunkin denied that any Employer representative or documents urged employees to vote "No."

This testimony is clearly untrue and in fact is contradicted by Employer campaign documents, which are in the record, as well as the testimony of Tom Brunelle, the Employer's Executive Vice-President. Further, while Dunkin conceded that she regularly distributed the Employer's campaign literature and communicated directly the Employer's campaign messages to employees, she could not recall specifically what she said to the employees or what the campaign literature stated, other than employees need to make up their own mind and need to have all the facts.

The Employer argues that Oros should not be credited because DeWitt testified that she saw the document in question in the breakroom, but did not see it posted and that she worked during the days (September 11 and 12) that Oros testified that the document was posted on the bulletin board. However, I find little significance in DeWitt's failure to recall seeing it posted, particularly since there is no record evidence that DeWitt looked at the bulletin board on those days.

Furthermore, both the Employer and Petitioner rely on the testimony of Irene Caldwell, the Employer's Acting Director of Nursing, during the period in question to bolster their positions *vis a vis* the credibility dispute between Dunkin and Oros concerning the posting. I place little reliance on Caldwell's testimony on this issue, since it is inconclusive. To the extent that it is relevant, I find it more supportive of Oros's version. Thus, Caldwell testified that Dunkin had mentioned to her that someone's tires had been slashed during the campaign and that a document picturing a slashed tire had been posted on the bulletin board. Caldwell also testified that she observed Dunkin with the leaflet in her hand, and she (Caldwell) assumed that Dunkin had removed it from the bulletin board. The only thing that Caldwell recalled about Dunkin commenting about the document was "Look what I found."

Dunkin on the other hand testified that not only did she not post the document but that she never saw it posted, and did not recall ever discussing it with or showing it to Caldwell or even discussing tire slashing with Caldwell. Dunkin asserts that she saw the document once when it was handed to her by an employee, and Dunkin told the employee to bring it to Human Resources.

Thus, although Caldwell's testimony on this issue is not conclusive, I find that Caldwell's contradicting of Dunkin as to whether they discussed tire slashing, whether Dunkin had the

document in her hand and whether it has been posted further detracts from Dunkin's credibility.

I therefore find that Dunkin, as testified to by Oros, did post the document in question on September 10.

Having so found, the next question becomes whether the Employer is responsible for the contents of the document by virtue of that fact that Dunkin, an admitted supervisor, posted it on the bulletin board.

An employer is responsible for conduct of individuals, where the employees would reasonably believe that the alleged agent was reflecting company policy and speaking and acting for management. *Southern Bag Corp.*, 315 NLRB 725 (1994); *API Industries*, 314 NLRB 706 fn. 1 (1994).

Here I find that the employees would reasonably believe that Dunkin, an admitted agent and at the time a supervisor of two out of three units of the Employer's nursing home, was reflecting company policy by posting the document. Thus, although there is no evidence that the Employer was involved in the preparation of the document when Dunkin posted it and was observed by employees in engaging in that conduct,[5] the Employer has adopted the messages contained in the document. *Monroe Auto Equipment*, 230 NLRB 742, 748 (1977) (employer responsible for the conduct of a supervisor, who showed employees a newspaper ad placed by "concerned employees" containing unlawful threats.) *Voca Corp.*, 329 NLRB 591, 592, 601 (1999) (employer responsible for posting of minutes of compensation board meeting, although recommendations therein were not final and were never implemented.)

Having found the Employer responsible for the statements made in the document, the next issue is whether any of these statements represent objectionable conduct. The Petitioner contends that identification of four employees as promoting the Union constitutes another example of creating the impression of surveillance of employees' union activities. I agree.

Similar to my prior discussion and analysis of Deyo's comments, the statements in the letter did not disclose the source of the Employer's information as to which employees were promoting or soliciting for the Union. *Stevens Creek Chrysler*, 353 NLRB at 3; *Beverly California*, supra, 326 NLRB at 233. Moreover, although two of the employees named as soliciting for the Union were open union adherents (VonHahsel and DeWitt), there is no record evidence that either Debbie Coffey or Amanda Cooper, the other two employees identified in the document, had been open union adherents. In that regard, the evidence discloses that VonHahsel and DeWitt had participated in shift change activities on behalf of the Union and/or spoke up at Employer meetings in favor of the Union, and/or posted or attempted to post pro-union literature. There is no record evidence that either Coffey or Cooper engaged in any of these activities or any other activities in support of the Union.

Accordingly, I conclude that by Dunkin posting the document that the Employer has again created the impression that its employees' union activities were under surveillance and constituted an additional instance of objectionable conduct.[6]

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[5] Although only Oros observed Dunkin posting the document, the fact that Dunkin posted it was disseminated by Oros and other employees to over two dozen unit employees.

[6] Petitioner also asserts that several other statements in the document also constituted objectionable conduct. However, these assertions relate to other objections and will be discussed when those objections are considered.

Objection 5 also alleges that the Employer engaged in surveillance of its employees' union activities by the conduct of Dunkin.

In this regard, the Employer's facility is a smoke-free campus, so employees need to leave the Employer's property in order to smoke. Mary Dunkin was and is a heavy smoker. She normally would take several smoke breaks throughout the day. Dunkin was regularly employed as the nurse manager of two units at Schervier during the period of the election.

Ordinarily, Dunkin would take smoke breaks between 11:00 a.m. and 11:30 a.m., between 1:30 p.m. and 2:00 p.m. and between 3:30 p.m. and 4:00 p.m. There is a shift change at 3:00 p.m. daily. Thus, Dunkin usually will remain in the facility between 3:00 p.m. until close to 3:30 p.m. in order to facilitate the shift change. More particularly, she needs to make sure that employees have arrived to replace employees whose shifts are ending.

Usually, Dunkin would take her break in front of Schervier, where she worked, but the Employer conducted weekly management meetings at Mount Alverno between 2:00 p.m. and 3:00 pm. Dunkin was required to attend these meetings. Thus, when she was attending these meetings, after the meetings ended, Dunkin would take her smoke break on a bench outside of Mount Alverno.

As I have mentioned above, the Union engaged in shift change organizational activities starting in July and intensifying in September and October to five days a week, primarily at or around the 3:00 p.m. shift change at Mount Alverno and Schervier.

Ringwood would generally arrive and commence the shift change activities between 2:30 p.m. and 2:45 p.m. and it would continue until close to 4:00 p.m. During September and October, Dunkin on between five and seven occasions would appear while the shift change activities were being conducted. Some of these incidents were at Mount Alverno and others at Schervier. At Mount Alverno, Dunkin sat on a bench 40-50 feet away from where the shift change activities occurred. At Schervier, Dunkin either sat on a bench or a chair or stood about 20-25 feet away from the activities.

On some of these occasions, Dunkin would appear either a few minutes before 3:00 p.m. and on other times she would arrive a few minutes after 3:00 p.m. She would sit on the bench or chair or stand for between 30-40 minutes, and smoke cigarettes, make calls on her cell phone and/or would have paperwork with her and she would be writing notes. According to Dunkin, she would be paying bills. Dunkin would also from time to time on these occasions look directly at the employees engaging in their organizational activities. At times, during these incidents, employees would ask Ringwood if she thought that Dunkin was taking their pictures or if she was writing their names down and might tell management which employees were out there. Ringwood would not respond to these inquiries but would try to "refocus" them on organizing.

My findings above with respect to Dunkin's conduct are based on a compilation of the credited portions of the testimony of Dunkin, Ringwood and employees VonHahsel, DeWitt and Evelyn McSherry. To the extent that credibility issues exist among the witnesses, I credit Petitioner's witnesses on this subject. Their testimony was mutually corroborative in most respects, and I have already noted my opinion of Dunkin's credibility above. The chief areas of dispute between Dunkin and the Petitioner's witnesses involve whether Dunkin looked at employees while she was present during the shift change activities and how long she was present. Dunkin testified that when she saw the activities, she turned her back and walked

away; she also insisted that she never took more than a 15-minute smoke break during these occasions. I reject Dunkin's testimony and find as detailed above that she did in fact look directly and observed the employees in their organizational activities, and that she was present at the shift change activities for 30-40 minutes and frequently remained in the area until the shift change activity ended at close to 4:00 p.m.

Although it is well established that an employer may observe open union activity at or near its property, it may not do something "out of the ordinary," which gives employees the impression that it is engaging in surveillance of their union activities. *Sprain Brook Manor Nursing Home*, 351 NLRB 1190, 1191 (2007); *Loudon Steel*, 340 NLRB 307, 311 (2003).

Here, I agree with Petitioner that Dunkin's conduct in observing shift change activities was "out of the ordinary" and constituted unlawful surveillance.

Although Dunkin did ordinarily take her smoke breaks at essentially the same locations, where she observed the union activities, she acted differently during the five to seven occasions in September and October by extending her normal 15-minute break to 30 or 40 minutes, and by observing the shift change activity until it ended on these occasion at close to 4:00 p.m. Further, she would on most of these occasions be present shortly before or shortly after 3:00 p.m., where she normally would remain inside Schervier to monitor the shift change at two floors until close to 3:30 p.m.

Thus, Dunkin acting "out of the ordinary" observed employees engaging in their organizational activity and was close enough to them to observe to see which employees passed out handbills or spoke to employees coming or leaving. *PartyLite Worldwide Inc.*, 344 NLRB 1342 (2005)[7], and observed the employees for at times 30-40 minutes and after until the shift change activity ended. *Carry Cos. of Illinois*, 311 NLRB 1058, 1073 (1993) (employer representative stood close to organizational activities and remained for entire duration of the union activities); *Eddyleon Chocolate*, 301 NLRB 887, 888 (1991) (official of employers stationed car 15 feet from union activity and spoke on phone until union representatives left); *Gainesville Mfg Co.*, 271 NLRB 1186, 1188 (1984) (representatives of employer stood close to union representatives for 15-20 minutes); *Smithfield Packing*, supra, 344 NLRB at 2 (officials of employer stationed 15-20 feet away from handbillers for 30-40 minutes); *PartyLite Worldwide*, supra, 344 NLRB at 1342-1343 (supervisors observed handbilling for 15 minutes).

Accordingly, based on the above analysis and authorities, I conclude that the Employer, by Dunkin, engaged in unlawful surveillance, which would be violative of Section 8(a)(1) of the Act and constitutes objectionable conduct.

Therefore, I recommend that Objection 5 be sustained.

C. The Conduct of Patrick Clark

Patrick Clark was the Director of Human Resources for the Employer's Warwick Healthcare Campus for approximately 8 years. As I have detailed above, the Union engaged in organizational shift change activities on a regular basis during the months of September and

[7] Notably employees, who obviously observed Dunkin writing something during these incidents, asked Ringwood whether Dunkin was writing their names down and might tell management which employees were out there. See *Smithfield Packing Co.*, 344 NLRB 1, 2 (2004).

October. On approximately six occasions during this time while the Union was conducting shift change activities at Mount Alverno, Clark rode the Employer's shuttle bus for the entire time of these activities from shortly after 3:00 p.m. to close to 4:00 p.m.

The shuttle bus in question was provided by the Employer to transport employees from the parking lots to the particular facilities where they work. The bus would drive in a loop making various stops at each facility.

On the days in questions, Clark received phone calls from individuals indicating that the shift change activities were causing back-ups due to congestions, and employees were having difficulty entering or exiting the facility because of the activities. Mount Alverno is the only entrance to the campus. At shift changes, employees would be leaving and coming at the same time. Thus, if a car is stopped and the occupants are talking to the employees or the Union representatives, cars behind were forced to wait and were delayed. Clark received calls from various supervisors, administrators and vice-presidents, who informed him that employees were clocking-in late and that employees informed supervisors that they could not get in the facility because they were blocked by the shift change activities. Clark also received calls directly from several employees, who informed him that they were held up at Mount Alverno because they couldn't get in or out of the facility. Further, on one of these occasions, Clark received a call from Lorraine, the shuttle bus driver, informing him that there were a lot of people in the area and that she had difficulty in turning into the area to pick-up people. On that occasion, Clark heard horns honking. Therefore, as a result of these calls, Clark decided to hop on the bus himself to check-out the situation. His main purpose was to keep the entrance way open and he conceded that he believed that when employees saw him on the bus, they "would disperse" and the employees could get in and out.

On these days, when the bus arrived at Mount Alverno, the bus would slow down, Clark waved to employees and some employees waved back. Clark continued to ride the shuttle bus around the loop until the shift change activity ceased at around 4:00 p.m. Most of the time when Clark arrived at Mount Alverno, the blocking cars had ceased and cars were coming in and out without difficulty. On one occasion, Clark himself observed cars being blocked and the employees stepped away from the cars when they saw Clark in the bus.

Clark did not get out of the bus on any of these occasions nor did he speak to the union officials or the employees to tell them that they must not block traffic from coming in and out.[8]

My findings with respect to the above events are based on a compilation of the credited portions of the testimony of VonHahsel, DeWitt, McSherry, Ringwood and Clark. The facts are largely undisputed and the testimony of all the witnesses is largely consistent, except for one area. Clark testified that on all the occasions that he rode the bus in response to the shift change activities that he made only one loop except for one time. On this one occasion, according to Clark, as he was riding the bus back to his office, he received another call informing him that the employees and the Union were again blocking traffic. Thus, he then rode the bus back to Mount Alverno.

However, I credit the mutually corroborative and credible testimony of Ringwood, VonHahsel, McSherry and DeWitt that on each of the six occasions that Clark rode the shuttle bus during the 3:00 p.m. shift change activities he rode it for the entire time of the activities

[8] According to Clark, the Union had previously been informed by the Vice-President of Operations that they had to move and could not block traffic.

making several loops. In addition to the consistent and corroborative testimony of four Petitioner's witnesses on this subject, I note that two of the witnesses, McSherry and DeWitt are still employees of the Employer. Their testimony where it is adverse to their employer is considered against their self-interest and therefore more worthy of belief. *Evergreen America*, 348 NLRB 178, 207 (2006); *Meyers Transport*, 338 NLRB 958, 968 (2003); *Georgia Rug Mill*, 131 NLRB 1304, 1305 fn. 2 (1961), enfd. as modified 308 F.2d 89 (5th Cir. 1962).

Further, Clark's testimony suffers from the same problem as Dunkin's. Clark also asserts that the Employer never communicated to employees either in writing or orally that they should vote "No." This testimony is, as I described above, contradicted by the testimony of the Employer's own witness, Brunelle, as well as by campaign literature in the record.

Petitioner contends that based on the above facts, the Employer engaged in additional acts of unlawful surveillance by Clark's conduct. I disagree.

I conclude that the Employer established reasonable justification for Clark's actions, and that it therefore did not engage in unlawful surveillance. Clark's testimony, which I credit, establishes that he rode the shuttle bus only in response to complaints from employees, administrators and supervisors that the shift change activities were causing employee problems in leaving and entering working, including causing employees to be late for the start of their shifts. In such circumstances, Clark's conduct was justified and not violative of the Act. *Saia Motor Freight Line Inc.*, 333 NLRB 784 (2001) (employer established reasonable justification for photographing employees handbilling based on concerns for accidents and traffic congestion[9]); *Wal-Mart Stores*, 340 NLRB 1216, 1217 (2003) (manager did not engage in unlawful surveillance when he watched organizers distribute handbills in response to complaints from customers); *Town & Country Supermarkets*, 340 NLRB 1410, 1414-1415 (2004) (photographing of union activity lawful since it was in response to reasonable belief that trespass had occurred and could occur again); *Berton Kirshner Inc.*, 209 NLRB 1081 (1974) (photographing in response to trespass lawful).

Accordingly based on the above precedent and analysis, I conclude that Clark's conduct did not constitute unlawful surveillance or objectionable conduct. I therefore recommend dismissal of that portion of the Objection 5 that so alleges.

3. Objections 1, 4, 9 and 10

A. Conduct of Mary Dunkin

Dunkin as nurse manager at Maple Hall regularly conducted meetings with the CNAs under her supervision. These meetings referred to as "huddles" generally encompass patient care issues and new policies. At one of these "huddles" in August or September after discussing patient care issues, Dunkin stated to a group of CNAs, including Catherine Fink, that if the Union comes in the employees' flexibility in shifts would be taken away. Dunkin asked if there were any questions and no employee responded. According to Fink, at the time of Dunkin's comment three CNAs in the unit were working 10-hour shifts.

During the second week of October, Dunkin and Dewitt had a disagreement about whether DeWitt could take at break at a particular time. After Dunkin instructed DeWitt that she

[9] Notably, *Saia Motor*, supra was decided under the more stringent standard of requiring an employer to establish reasonable justification for photographing employees.

could not go on break, DeWitt asked to speak to Irene Caldwell, the Acting Director of Nursing, at the time.

A few minutes later, Caldwell met with DeWitt and Dunkin in the Maple Hall breakroom. DeWitt began by complaining to Caldwell about Dunkin denying her permission to take a break. Caldwell interrupted DeWitt and said "I'm so sick of this union shit." DeWitt responded "What does this have to do with the union? I didn't get a break. I'm tired." Caldwell replied "I'm sick of you disrespecting Mary." DeWitt denied that she had disrespected Dunkin and added that she merely wanted to discuss the break issue. Dunkin then interjected "You know if the union comes in here, they're going to take away your 10-hour shifts and it could drive your salary down to minimum wage." DeWitt concluded the discussion by stating again "What does this have to do with the union? You just wasted a half an hour. I could have been back on the floor. I can't talk about this." DeWitt then left the breakroom.

I note that DeWitt as well as two other employees (Trisch Guy and Michele Burn) worked 10-hour shifts. The record also reveals that the Employer had a longstanding practice of permitting employees to work 10 or 12-hour shifts if they so chose.

On October 28, Dunkin came into the Maple Hall breakroom to get a cup of coffee. Oros was present in the room. Dunkin approached Oros and said "If the Union wins, you're going to lose your self-scheduling and have shift changes." Self-scheduling refers to the Employer's practice of permitting employees to fill out a proposed schedule, which is reviewed by management and generally approved as long as it has sufficient staff coverage.

My findings above with respect to the three conversations with Dunkin is based on the mutually corroborative and credible testimony of Fink, DeWitt and Oros. All three of these witnesses provided consistent testimony on both direct and cross examinations concerning these incidents. Further, DeWitt and Fink are both still employees of the Employer. Thus, as I have observed, their testimony adverse to the Employer's interest is apt to be particularly reliable especially where it contradicts the testimony of their supervisor. *Evergreen*, supra; *Flexsteel Industries Inc.*, 316 NLRB 745 (1995), enfd 83 F.3d 419 (5th Cir. 1996); *Farris Fashion*, 312 NLRB 547, 554 fn. 3 (1993), enfd 32 F.3d 373 (8th Cir. 1994).

In contrast, I have already discussed Dunkin's credibility above in connection with other conduct, and I rely on the above assessment of her testimony and the reasons detailed therein to further support my conclusion that the employees' testimony as to these incidents should be credited over Dunkin's unconvincing denials.

I have considered the fact that Caldwell testified and supported Dunkin's denials concerning the conversation with DeWitt. I did not find Caldwell to be a particularly convincing witness. Her memory was admittedly poor, and she conceded that she did not remember much that was said about the Union or the election by anyone during the election campaign. Indeed, even her "denial" of hearing Dunkin's comments to DeWitt was somewhat equivocal. When she was asked whether she heard Dunkin say to DeWitt "If the Union comes in they'll take away your 10-hour shifts and your pay will be lowered to minimum wage." Caldwell replied "No. I don't recall it. No." Thus, Caldwell did not forthrightly deny hearing the remark but hedged by stating "I don't recall it."

Moreover, Caldwell on direct examination admitted that she said "I'm sick of this union shit," but denied that she said it to DeWitt. According to Caldwell, she made the statement right after the election was over and as she was getting out of the elevator. She also did not believe that anyone heard this comment. However, on further examination on this subject, Caldwell

changed her testimony and asserted that she did not mention the word “union” in the comment that she made getting out of the elevator, but she said merely “I’m tired of this shit” while conceding that she was referring to the conflict in the facility between the employees over the election campaigns. Caldwell also admitted that DeWitt was one of the employees, who had been involved in conflicts with other employees concerning the Union.

Thus, I find Caldwell’s testimony somewhat supportive of DeWitt’s testimony in that Caldwell admitted stating that "she was tired of this union shit” as testified to by DeWitt, and that she (Caldwell) was aware that DeWitt was one of the employees, who had conflicts with others about the Union. This fact supports DeWitt’s testimony that Caldwell would have made the comment to her, as she so testified and as I too have so found.

For the above reasons, I therefore credit Oros, DeWitt and Fink and find that Dunkin made the comments to them as detailed above.

Based on these findings, there can be little doubt that the Employer engaged in objectionable conduct by Dunkin’s statements to its employees. By such conduct, the Employer has unlawfully threatened its employees with loss of flexibility in scheduling: *St. Joseph Ambulance*, 346 NLRB 1311, 1314 (2006); *Exelon Generation Co.*, 347 NLRB 815, 820 (2006); changes of shifts: *Transportation Repair and Service*, 328 NLRB 107, 110, 112 (1999) and reduction of wages: *Schaumburg Hyundai Inc.*, 318 NLRB 449, 450 (1995). See also *Pennant Foods*, 352 NLRB 451, 452, 462 (2008) (if union comes in, employees would lose control to union and lose benefits); *Mercy Hospital*, 334 NLRB 100, 103 (2001) (employees would lose benefits such as time-off if union comes in); *Fieldcrest Cannon*, 318 NLRB 470, 495 (1995) (stricter enforcement of rules if union comes in).

Thus, based on Dunkin’s conduct alone, I recommend that Objections 1 and 4 be sustained.

B. Conduct of Thomas Brunelle

On October 27 and 28, Thomas Brunelle conducted a series of approximately 10 meetings of employees at various times to set forth the Employer’s view concerning the union election. At one of these meetings held in the Green Briar Room at Mount Alverno, there were 10 employees present plus Deyo.

Brunelle gave the employees reasons why he felt that employees should vote “no” in the election. Among the reasons he discussed was that if the Union came in, the employees’ “open door policy” would be taken away. Accordingly, Brunelle explained that employees would lose their freedom to speak with HR or managers because if the Union came in, the employees would have to find a third party to represent them, and the Union would have to represent them in dealing with management.

Brunelle also mentioned that if the Union came in, the employees would lose special privileges like flexibility. Brunelle explained that a lot of CNAs are mothers, who are permitted to leave work early or come in later for doctor’s appointments for themselves or their children. Thus, if the Union came in, the employees would lose that flexibility of scheduling.

On October 28, Brunelle conducted another meeting in the Green Briar Hall at Mount Alverno. Present were 8-10 employees plus Deyo. After urging employees to vote against the

Union, Brunelle informed the employees that it would take years to get a contract if the Union is voted in, that everything would be frozen and there would be no annual pay raise[10], and the employees won't be able to do flexible schedules anymore.

Evelyn McSherry asked a question and had a discussion with Brunelle about benefits at another facility that employees had worked in. The discussion became somewhat heated, and Deyo intervened and said "That's enough." McSherry then said that she had to go back to work, shook Brunelle's hand and left the meeting.

My findings concerning the events at these two meetings is based on the credible testimony of VonHahsel and McSherry.

Both witnesses furnished detailed and somewhat mutually corroborative testimony[11], which was consistent on direct and cross examinations. The testimony is also in part similar to statements made by Dunkin to employees that I have found above concerning the loss of flexibility if the Union came in. Further, McSherry is currently an employee of the Employer, and as I have observed above, her testimony where it is adverse to the Employer's interest is entitled to greater weight. *Evergreen*, supra; *Flexsteel Industries*, supra.

In contrast, Brunelle's testimony as to his statements at meetings was vague and uncertain, and he could not recall what he said at any particular meeting. His testimony consisted primarily of generalized statements of what he "would have" said at meetings about particular subjects, not what he actually said.

Brunelle did deny making the specific statements attributed to him by VonHahsel and McSherry, although as noted he was somewhat vague concerning what he did say and at what meeting. Thus, with respect to the issue of an open door policy, Brunelle denied telling employees that the Employer's open door policy would be taken away if the Union came in and emphatically denied telling employees that they would no longer be allowed to meet with Human Resources if the Union came in.[12]

According to Brunelle, he did mention at meetings that if a union was voted in to represent the employees that that would restrict the things that he could meet with employees to talk about, that there were certain things that could only be brought to management through the Union.

Brunelle also denied that he told employees that wages or other benefits would be "frozen." However, Brunelle does recall saying that if employees chose to be represented by a union their wages as well as everything else would stay the way that it was until negotiations were completed.

Brunelle also denied that he told employees at the meeting attended by McSherry that it would take years to get a contract. According to Brunelle, he did tell employees at that meeting, as well as at other meetings, that the length of time for negotiations is not prescribed. He added

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[10] The Employer had a policy of awarding pay raises to employees annually on the anniversary of their date of hire.

[11] Both employees testified that if the Union came in, that employees would lose their privilege of flexibility in scheduling.

[12] Brunelle testified that "I would remember if I made a statement to the effect because I knew it to be untrue."

that negotiations continue until a contract is reached, and it could take a short period of time and it could take a long period of time depending on how well the communications go.

Brunelle denied telling employees that they would no longer have flexible schedules. Brunelle testified that he did tell employees that flexibility in scheduling would be reduced unless it was negotiated into a contract. He asserts that he further explained that once a union contract is in place things like scheduling and shifts are set in a contract, so there would be less flexibility in that environment than in a non-union environment.

As noted above, I credit the testimony of the employees as detailed above[13], for the reasons that I have set forth.

Further, as more fully explained below, I find that in most of the areas in dispute *vis a vis* McSherry and VonHahsel versus Brunelle, my conclusions with respect to the existence of objectionable conduct would be unchanged based on either version of Brunelle's comments.

Starting with Brunelle's statement concerning the open door policy, I have credited VonHahsel that Brunelle told employees that the Employer's "open door policy" would be taken away if employees voted for the Union. However, such comments are neither unlawful nor objectionable. *Ben Venue Laboratories*, 317 NLRB 900 (1995); *SMI Steel*, 286 NLRB 274 (1987); *FGI Fibers*, 280 NLRB 473 (1986); *Koons Ford of Annapolis*, 282 NLRB 506 (1986); *Tri-Cast, Inc.*, 274 NLRB 377 (1985).

Petitioner cites *Guardian Automotive Trim Inc.*, 337 NLRB 412, 415 (2002) in support of its assertion that comments, such as these made by Brunelle, are unlawful. However, in that case, respondent filed no exceptions and the Board therefore affirmed the judge's findings *pro forma* and affirmed the decision based on general counsel's exceptions to conform the judge's conclusions to his findings and add the union's complete name to the notice. Notably, the judge cited no case in support of his conclusion that the statement that an open door policy would end constitutes an unlawful threat.

I therefore find *Guardian Automotive* not to be a persuasive authority and find as I have stated above that such comments by Brunelle are neither unlawful nor objectionable. *Ben Venue*, supra; *Tri-Cast*, supra; *Koons Ford*, supra.[14]

I therefore recommend that Objection 10 be dismissed.

I have found above that Brunelle did tell employees at a meeting that if the Union is voted in, it would take years to get a contract, everything would be frozen and there would be no annual pay raise. Brunelle's remarks that there would be no annual pay raise and everything would be frozen is clearly an unlawful threat to withhold wage increases, particularly where as here the Employer had a practice of granting annual wage increases to its employees. *First Student Inc.*, 341 NLRB 136, 141 (2004); *Superior Emerald Park Landfill*, 340 NLRB 449, 460-

[13] However, I do not credit the testimony that Brunelle said that if the union comes in employees would no longer be able to speak to Human Resources. I credit Brunelle's emphatic denial in this respect as I do not believe that he would have made such a comment since he knew that it was not true.

[14] See also *United Rentals*, 349 NLRB 190, 191 (2007), a post-*Guardian Automotive* case reaffirming the principles of *Tri-Cast*, supra that accurate descriptions that the selection of a union changes the relationship between employees and their employer are not unlawful.

462 (2003); *Federated Logistics & Operations*, 340 NLRB 253, 254 (2003); *Jensen Enterprises*, 339 NLRB 877 (2003); *Illiana Transit Warehouse Corp.*, 323 NLRB 111, 113-114 (1997). I therefore find Brunelle's comments constituted objectionable conduct.

Notably, even crediting Brunelle's version of his remarks would not change my conclusions in this regard. Thus, although Brunelle denies telling employees that their wages would be "frozen" if the Union came in, he does admit to informing employees that if they chose to be represented by a union their wages would stay the way it was until negotiations are completed. Thus, although Brunelle denies using "frozen" to describe the status of its employees' annual increases, he concedes that he told employees that their wages would stay the way it is until negotiations are completed. I find no significant difference between the word "frozen" and the phrase "stay the way it is" and conclude based on the precedent cited above that even crediting Brunelle, the Employer engaged in objectionable conduct by threatening to withhold wage increases.

Based on the credited testimony of VonHahsel and McSherry, Brunelle told employees at the meeting that these employees attended, that if the Union came in, the employees would lose special privileges like flexibility (VonHahsel) or that they won't be able to do flexible scheduling anymore (McSherry).

These comments are virtually identical to the statements made by Dunkin to employees in individual conversations that I have found above to be objectionable. *St. Joseph Ambulance*, supra, 346 NLRB at 1314; *Exelon Generation*, supra, 347 NLRB at 830. I find that Brunelle's statements are similarly objectionable.

Moreover, I also conclude that were I to credit Brunelle's version of what he said to employees at meetings concerning flexibility, such comments were objectionable. According to Brunelle, he told employees that flexibility in scheduling would be reduced, unless it was negotiated into a contract. He asserts that he added that once a union contract is in place, things like scheduling and shifts are set so there would be less flexibility in a non-union environment.

Thus, Brunelle was in effect making a prediction of the possible consequences of union representation on the employees' current practice of flexible scheduling. Such predictions must be based on objective facts to convey to employees an employer's belief as to demonstratively probable consequences beyond his control. *Exelon Generation*, supra, 347 NLRB at 830; *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969); *Systems West LLC*, 342 NLRB 851, 852-853 (2004); *Schaumburg Hyundai*, supra, 318 NLRB at 450.

Here, Brunelle provided no objective facts to support his prediction that flexibility in scheduling would or could be reduced in the event of union representation. He provided no support for his assertion or speculation that since a union contract details scheduling or shifts, flexibility is less likely. Indeed, while union contracts may or may not detail shifts and schedules, it is not likely that a union contract would preclude an employer from permitting employees to leave early or come in later on particular days for doctor's appointments or other such reasons.

Further, the statement by Brunelle that flexibility in scheduling would be reduced unless it was negotiated into a contract conveys to employees that the loss of their present benefit of flexibility in scheduling would be triggered by unionization and the loss would continue throughout negotiations unless and until it is restored. *Hertz Corp.*, 316 NLRB 672 fn. 2 (1995); *Federated Logistics*, supra, 340 NLRB at 255-256; *Mercy Hospital*, supra, 334 NLRB at 103-104.

Accordingly, based on the foregoing, I conclude that Objections 1 and 4 should be sustained.

I have also found above that Brunelle told employees at one meeting that it would take years to get a contract if the Union was voted in, everything would be frozen, there would be no annual pay raise and employees won't be able to do flexible scheduling any more. These comments would reasonably be understood by employees that selecting union representation would be futile. *Federated Logistics*, supra, 340 NLRB at 255-256; *Allegheny Ludlum Co.*, 320 NLRB 484, 487-488, 494 (1995); *General Fabrications Corp.*, 328 NLRB 1114, 1130 (1999); *Capitol EMI Music*, 311 NLRB 997, 1007-1009 (1993), enfd 23 F.3d 399 (4th Cir. 1994); Sivalls Inc., 307 NLRB 986, 1001 (1992).

Such conduct is unlawful and constitutes objectionable conduct. I therefore conclude that Objection 9 should be sustained.

4. Objections 3, 6 and 7

These objections relate to the posting of the document described above by Dunkin, wherein I found above that the Employer was responsible for the contents of the document and had created the impression of surveillance of employees' union activities as encompassed by Objection 5.

Petitioner also argues that other parts of this document also established that the Employer threatened employees with loss of jobs, disparaged employees for engaging in union activities, stated that union activity is incompatible with continued employment and posted literature that created and promoted a general atmosphere of fear, violence and reprisal.

Petitioner contends that the comments in the document that if union supporters want to work in a union facility then they should go to one that already has the union, is an implied threat of discharge. I agree.

Statements similar to the above quoted comment imply that support for the Union is incompatible with continued employment. "Suggestions that employees who are dissatisfied with working conditions should leave rather than engage in union activity in the hope of rectifying matters coercively imply that employees who engage in such activity risk being discharged." *Jupiter Medical Center Pavilion*, 346 NLRB 650, 651 (2006).

I therefore find that the Employer has engaged in further objectionable conduct by impliedly threatening discharge. *Jupiter Medical*, supra (employer informed employee that he "seemed unhappy here" and adding "maybe this isn't the place for you…there are a lot of jobs out there"); *Hialeah Hospital*, 343 NLRB 391, 394 (2004) (employer suggesting that if the employees were "not happy" they should quit); *Paper Mart Co.*, 319 NLRB 9 (1995) (employer telling employee that he should seek employment elsewhere if he was not happy working for employer); *Stoody Co.*, 312 NLRB 1175, 1181 (1993) (telling employee that those who were "so nitpicking" about conditions of employment should seek other employment); *House Calls Inc.*, 304 NLRB 311, 313 (1991) (informing employees, who were engaging in concerted activities by complaining about working conditions, that "they could quit if they did not like it"); *Fontaine Body & Hoist*, 302 NLRB 863, 866 (1991) (employer tells employee if he was unhappy with the company and wanted the union so much, he should seek other employment).

Accordingly, I concluded that Objection 3 and Objection 7 in part should be sustained.

Objection 7 also alleges that the Employer "disparaged employees for engaging in protected union activities." Petitioner argues in this regard that the leaflet falsely accuses union supporters of continually promoting the union and harassing and terrorizing co-workers not in support of the union instead of taking care of the residents. Petitioner argues that this conduct is objectionable. *Aldworth Co.*, 338 NLRB 137, 141-142 (2002) (employer unlawfully disparaged and falsely accused unnamed union proponents of misconduct and thus held them up to derision in the voting unit.) Petitioner also argues that the leaflet "unlawfully portrays union supporters as bullies and pushers who belong in Cuba, not in America." *Refuse Compactor Service*, 311 NLRB 12, 13 (1993) (employer unlawfully opined that supporting the union is like "being in Russia"). I disagree.

It is well settled that the Act countenances a significant degree of vituperative speech in the heat of labor relations. Words of disparagement alone concerning a union, its officials or its supporters is insufficient for a violation of Section 8(a)(1) of the Act. *Trailmobile Trailer LLC*, 343 NLRB 95 (2004). Rather, flip or intemperate statements that are mere expressions of opinion are protected by the provisions of Section 8(c) of the Act. *Trailmobile Trailer*, supra; *Sears Roebuck & Co.*, 305 NLRB 193 (1991).

Here, I find that the statements made in the leaflet about union supporters while disparaging, did not suggest that the employees' union activity was futile, did not convey any implicit threats and did not constitute harassment that would reasonably tend to interfere with employees' Section 7 rights. *Trailmobile Trailer*, supra (referring to union supporters as "monkeys," people in the union or union representatives as "stupid," "worthless," "no good" and as a "fat ass"); *Evergreen*, supra, 348 NLRB at 201 (telling employees that the union was related to gangsters); *Sears Roebuck*, supra (telling employees that the union might send someone out to break their legs in order to collect dues); *Salvation Army Residence*, 293 NLRB 944 (1989) (telling the employees that the union belonged to the mafia); *Camvac International*, 288 NLRB 816, 820 (1988) (informing employees about union officials' reported connections to organized crime and criminal investigations of union pension funds); *Newsday Inc.*, 274 NLRB 86, 95 (1985) (telling employees that the union president was corrupt); *The Nestle Co.*, 248 NLRB 732, 737 (1980) (referring to union as "a bunch of crooks"); *Fayette Cotton Mill*, 245 NLRB 428 (1979) (stating that the union had "chickened out"); *North Kingstown Nursing Care Center*, 244 NLRB 54, 65 (1979) (stating that unions were "communistic").

The cases cited by Petitioner in support of its position are inapposite. *Aldworth*, supra, 338 NLRB at 141-142 found that the employer had unlawfully disparaged employees by falsely accusing union proponents of specific and serious misconduct, which held these employees "up to derision before the entire unit." However, the primary basis for this finding was the Board's prior conclusions that the purported misconduct for which the employees were disciplined and which were referred to by the employer in its comments to employees ("lateness," "stealing time" and "sleeping on the job") were found to be pretextual since the ultimate suspension and discharge of these employees was violative of Section 8(a)(3) of the Act. Here, there is and can be no such finding, and in fact, Petitioner adduced no evidence that the accusations made against the union supporters in the leaflet (that they were "bullies," that they had "terrorized" employees by "threatening" everyone who is not in support of the union, and that they "promoted the union on a full-time basis instead of taking care of residents like they are suppose to") were not true or accurate. See *Newsday*, supra, 274 NLRB at 95 (ALJ affirmed by Board finds that accusation that union president was "corrupt" in absence of evidence to the contrary to be "truthful"). I need not and do not find that the accusations made about the union supporters were truthful. However, I do rely in part on the absence of any evidence that the accusations were false in determining that the comments in the leaflet were neither unlawful nor

objectionable, and that *Aldworth*, supra is clearly distinguishable on that basis.

Refuse Compactor Service, supra also cited by Petitioner is even less persuasive. There, the Board considered an exception by General Counsel that the judge had failed to find that a statement by the employer that supporting the union is "like being in Russia" violated Section 8(a)(1) of the Act. The Board concluded there was no need to find a separate 8(a)(1) violation based on this statement since the judge had appropriately treated this and similar statements by the employer on that day as collectively threatening the futility of union organization. Thus, contrary to Petitioner, the Board did not find that a statement that supporting the union is "like being in Russia" violated the Act. Here, there are no other statements made in the leaflet that can be construed as threatening the futility of union representation.

Therefore, the cases cited by Petitioner do not support its assertion that the accusations made in the leaflet unlawfully "disparaged" the union supporters or amounted to objectionable conduct. Rather, based on the precedent that I have cited above[15], I conclude that this portion of Objection 7 be dismissed.

Petitioner contends in Objection 6 that the Employer "posted campaign literature that created and promoted a general atmosphere of fear, violence and reprisal." *Robert Orr-Sysco Food Services*, 338 NLRB 614 (2002). Petitioner argues that the Employer was "encouraging loyal employees to stand-up and fight the terrorizing union bullies" and "promoting the specter of vandalism" by posting the leaflet. Once again, I cannot agree.

Contrary to Petitioner, the statements made in the leaflet do not come close to meeting the stringent standard of "creating an atmosphere of fear and violence" applied in *Robert Orr-Sysco*, supra. There, the evidence revealed several direct threats of violence as well as threats to cause employees to be deported.

Here, there is no such evidence. Petitioner's assertion that the leaflet encourages "employees to stand-up and fight the terrorizing union bullies" and creates an atmosphere of fear, violence and reprisal, I find to be misplaced.

I find that the statements referred to are ambiguous and cannot be reasonably be construed as urging any employees to engage in any violent activity. The comment urging employees to "to stand up for our rights and fight these bullies" does not in my view imply fighting by the use of violence but rather a metaphorical "fighting" by standing up for their rights. While it is true that the leaflet accused the union supporters of "terrorizing" non-union supporters, that comment does not promote violence but is merely an opinion by the anti-union employees (adopted by the Employer) that characterized union supporters' behavior. I have already concluded above that such "disparaging" comments about the union and/or its supporters are neither unlawful nor objectionable.

Petitioner's further contention that the document "promotes the specter of vandalism" presumably by its picture of slashed tires is also without merit. I do not view the slashed tire as a promotion of vandalism. There is no suggestion that anti-union employees engage in tire slashing or any other violent activity or engage in any vandalism. Rather, the leaflet appears to be accusing union supporters of engaging in the tire slashing by its comment "SUPPORT THE

[15] *Trailmobile Trailer*, supra; *Evergreen*, supra; *Salvation Army*, supra; *Camvac International*, supra; *Newsday*, supra; *Nestle Co.*, supra; *Fayette Cotton*, supra; *North Kingstown*, supra.

UNION OR GET ONE OF THESE." I have already concluded based on the precedent cited above that these kinds of accusations against the Union or its supporters are neither unlawful nor objectionable particularly where, as here, no evidence was adduced that the accusations were baseless or not true.

Accordingly, based on the foregoing, I recommend that Objection 6 be dismissed.

5. Objection 8

In August, VonHahsel began to post union literature on the bulletin board located in the Forest Hall breakroom at Schervier. On about five occasions in that month, Sandra Gomas, nurse manager for Forest Hall, instructed VonHahsel to remove the literature and not post such literature on the bulletin board. Gomas added that if VonHahsel did not remove the literature, she (Gomas) would take it down herself. VonHahsel asked she why could not post union literature. Gomas replied that it was against company "policy." VonHahsel answered that she was not aware of any such policy and demanded that Gomas show her the policy. Gomas never showed VonHahsel any policy that prohibits the posting of union or other literature on the bulletin, nor did Gomas explain to VonHahsel what the policy specifically stated concerning the posting of items on the bulletin board. On some of these occasions, Gomas actually removed the union literature in front of VonHahsel from the bulletin board and took the literature with her.

As I have detailed above, in early October, VonHahsel complained at an anti-union meeting conducted by Deyo about why she couldn't hang pro-union literature around the facility when "you" post your anti-union literature. Deyo responded that she couldn't post union literature because it was against "policy." As related above, Deyo added that if anyone wanted information about the Union, they should attend VonHahsel's Wednesday union meetings. Deyo did not explain at the meeting what the Employer's "policy" was concerning the posting of union or other literature on the Employer's bulletin boards.

Similarly, in mid-October, DeWitt was in the Briar Hall breakroom at Schervier. Dunkin began to post anti-union literature on the bulletin board. DeWitt asked Dunkin if the employees could hang up some pro-union fliers on the bulletin board. Dunkin replied "No, it's illegal." DeWitt responded by asking "Why is it illegal?" and adding Dewitt's opinion "It's not illegal." Dunkin replied "Yes, it is," and Dewitt left the room.

Previously, DeWitt had herself put up pro-union fliers on several occasions on bulletin boards in the breakrooms at Maple Hill and at Briar Hall. However, the day after she posted the union literature, DeWitt noticed that the fliers had been removed.

The day after DeWitt's conversation with Dunkin, as detailed above, DeWitt observed a notice handing on the Briar Hall breakroom bulletin board along with other Employer campaign literature. This notice in Dunkin's handwriting stated "There are only postings on material approved and initialed by H.R."

The above findings concerning the above incidents are based on the credited and similar testimony of DeWitt and VonHahsel. Notably, Gomas did not testify, so VonHahsel's testimony with regard to her conversation with Gomas is undenied and uncontradicted. While Dunkin did deny that she told DeWitt that it was "illegal" to post union literature, I have not credited her denials concerning other alleged comments and events as testified to by employees for the reasons that I have detailed above. I find similarly here, including the fact that DeWitt is still an employee of the Employer. *Evergreen*, supra; *Flexsteel Industries*, supra.

Employees VonHahsel, DeWitt and Allen testified that they were never made aware of any policy of the Employer concerning what items can be posted on bulletin boards at the Employer's facilities.[16]

VonHahsel testified that throughout her employment at Schervier, she observed on three bulletin boards in the breakrooms at that facility various items posted, such as advertisements for Weight Watchers, leaflets by employees selling jewelry, jewelry parties, food tasting parties and Avon functions. She saw these items for months at a time. DeWitt testified that she observed items on the bulletin boards in Briar Hall at Schervier, such as people selling jewelry or other items, cards from residents' families, Avon materials and candlelight party invitations. Shannon Allen testified that she recalled seeing a notice for the Haiti Relief Fund on bulletin boards at Schervier. Allen did not recall ever seeing on bulletin boards personal notices, such as weddings or people selling things.

Several witnesses for the Employer testified concerning the Employer's alleged policy concerning bulletin boards. It is undisputed that the Employer has never announced to employees any kind of policy or rule concerning bulletin boards in writing. Notably, the Employer has issued a manual detailing various rules and regulations that employees must follow, but there is no mention of any policy or requirement with respect to posting material on the Employer's bulletin boards.

Clark, who as noted was the Employer's Director of Human Resources for the Warwick Campus, testified that the Employer had in place a longstanding unwritten two-tier policy. According to Clark, each facility had one or two bulletin boards designated as Human Resources or Administration bulletin boards. As to these boards, Clark asserts that employees were required to obtain permission from HR in order to post any items. However, Clark contends that as to other bulletin boards generally located in breakrooms, nurse managers were given discretion as to what items could be posted in the breakrooms for which these supervisors were responsible.

Brunelle and Dunkin, on the other hand, did not mention any two-tiered policy. They testified that all postings at all bulletin boards needed permission from HR. According to Brunelle, he found out about this policy when he was transferred to the Warwick Campus in September 2007, and he was told by one of three Human Resources officials, Clark, Larry Delacourt or a woman, whose name Brunelle did not recall. Brunelle also testified that during the union campaign one of these same three HR officials informed him that union supporters had asked HR for permission to post union material on the Employer's bulletin boards and that HR had denied those requests.

Mary Dunkin testified that in her experiences the "policy" had always been that all postings at bulletin boards must be approved by HR. She also testified that she has consistently applied and enforced this policy in the units under her supervision. Dunkin recalled that an employee asked for permission to post a notice selling a television and an employee was hosting an Avon party. According to Dunkin, when these employees asked her for permission to post these items on bulletin boards, she instructed them to get permission from HR. She asserts further that both employees did so, permission was granted, the items were initialed by HR and the postings were permitted. Dunkin also testified that during the campaign, she was instructed by someone from HR, probably Larry, that if there were materials on the bulletin boards which

[16] VonHahsel was employed by the Employer for slightly over 2 years, Allen for 9 years and DeWitt for 13 years.

did not have initials from HR that she should take it down. Dunkin further testified that she followed these instructions and removed material from bulletin boards, including union literature and gave the items to HR.

Clark also testified that he was unaware of whether or not anyone asked HR for approval to post union literature. According to Clark, as related above, particular managers used their discretion to decide whether materials could be posted on HR bulletin boards. He asserted that under this policy individual managers have allowed postings for garage sales and birthday parties. Clark also testified to an occasion when an employee asked HR for permission to post a notice on the HR Administration's bulletin board for an event for an outside not for profit agency for which the employee was a volunteer. Clark approved that request, initialed it and the notice was posted. He recalls approving the posting of a sympathy card on the HR board. Further, Clark contends that if he saw a posting on an HR board that was not initialed he would pull it down. Clark also testified that generally he would grant permission for employees to post items on the HR boards but he did recall one incident where he denied such permission. Clark could not recall the specifics of the item but he believed that an employee was selling something and he (Clark) felt that the Employer was not in business to help employees profit.

Clark also testified that early on in the campaign, prior to the filing of the petition, supervisors of the Employer were routinely removing union literature from all bulletin boards. However, after consulting with counsel, Clark testified that the Employer instructed its supervisors that with respect to non-HR bulletin boards if the supervisor had permitted employees to post non-work related items, such as garage sales, birthday parties and selling their kids tricycle, then they must also allow union related literature to be posted on these bulletin boards.

An employer is under no obligation to permit employees to use its bulletin boards to post pro-union materials or literature even where the employer itself uses the same bulletin boards to post its own anti-union messages. *Register Guard*, 351 NLRB 1110, 1114, 1118 (2007). However, if the restrictions on employees' use of bulletin boards are promulgated with anti-union motivation or discriminatorily enforced, then an employer has violated Section 8(a)(1) of the Act. *Loparex LLC*, 353 NLRB #126 slip op at 9 (2009); *Starbucks Corp.*, 354 NLRB #99 slip op at 21 (2009).

In applying these principles here, I am in agreement with Petitioner that the evidence establishes that the Employer both unlawfully promulgated and discriminatorily enforced its prohibition against employees' use of its bulletin boards to post pro-union literature.

I credit the mutually corroborative testimony of VonHahsel, DeWitt and Allen[17] that they had never been informed or aware of a policy of the Employer with respect to posting material on bulletin boards or that permission from HR was required before such posting was permitted.

While witnesses for the Employer furnished testimony concerning the existence of such a policy, such testimony was not consistent. Thus, Clark testified that the Employer had in existence and enforced a two-tier policy of requiring permission for posting materials only on certain HR or administrative bulletin boards, but as to other bulletin boards located in breakrooms and which were the boards involved here, the manager of each unit had discretion to allow such postings or not. In contrast, Brunelle and Dunkin testified that the Employer's policy was to require permission from HR to post any notices on any bulletin boards. This

[17] I note that Allen was a witness called by the Employer.

inconsistency in testimony renders the Employer's attempt to establish the existence of a policy with regard to permission to post, suspect and unpersuasive. Further, it is undisputed that the alleged "policy" concerning permission was not in writing and was not included in the Employer's manual distributed to employees. *Jordan March Stores*, 317 NLRB 460, 462 (1995) (alleged rule requiring approval for posting notices on bulletin boards, not mentioned in manual and employees unaware of such rule); *Nashville Plastic Products*, 313 NLRB 462 (1993) (alleged rule not in handbook and employees unaware of its existence).

Further, when Gomas instructed VonHahsel to remove from the bulletin board union literature that VonHahsel had posted or in some cases removed the literature herself, VonHahsel asked why she could not post these items. Gomas replied that it was against company "policy." VonHahsel replied that she was not aware of any such policy and demanded that Gomas show her the policy. Gomas did not show her any policy and more significantly, never explained to her what the policy was or that VonHahsel needed to obtain permission from HR in order to post items on the bulletin board.

When VonHahsel subsequently complained about being unable to post union literature at a meeting conducted by Deyo, she was told that such posting was against "policy," again without explaining what the policy was or that she needed to ask permission from HR before posting items on the bulletin boards.

Similarly, when DeWitt asked Dunkin if she could hang up pro-union fliers on the bulletin board, Dunkin replied "No, it's illegal." Dunkin did not explain why it was "illegal,"[18] and more importantly, did not inform DeWitt of any company policy requiring permission from HR.

I therefore conclude that based on the above evidence that the Employer has unlawfully promulgated a policy of denying employees permission to post union literature. *Loparex*, supra; *Gallup Inc.*, 334 NLRB 366 (1993*); Nashville Plastic*, supra; *Jordan Marsh*, supra.

Moreover, even if it were found that the Employer had such a policy in place, the evidence discloses that it failed to enforce such a policy until the Union appeared on the scene. *Starbucks*, supra, slip op at 22; *Gallup*, supra, 334 NLRB at 373-374; *Jordan Marsh*, supra, 317 NLRB at 462.

While this finding in itself constitutes objectionable conduct by the Employer, I also conclude that even apart from that finding that the Employer discriminatorily enforced its policy pertaining to posting on its bulletin boards. *Loparex*, supra; *Starbucks*, supra; *Register Guard*, supra.

I note that *Register Guard*, supra modified extant Board law concerning what constitutes discriminatory enforcement of policies and rules, such as the use of bulletin boards.[19]

The Board adopted the analysis of the 7th Circuit in *Fleming Co.*, 349 F.3d 968 (7th Cir.),

[18] I agree with Petitioner's assertion that Dunkin's comment to DeWitt that it was "illegal" to post union fliers in the bulletin board is independently violative of Section 8(a)(1) of the Act and should therefore constitute objectionable conduct. *Wal-Mart Stores Inc.*, 340 NLRB 220, 234-235 (2003) (statement to employee that it was "unlawful" for employees to participate in union activities violative of Section 8(a)(1) of the Act.

[19] While *Register Guard*, supra involved the issue of the use on employer's email system, it is clear that the analysis applied to bulletin boards as well.

denying enf. of 336 NLRB 192 (2001) and *Guardian Industries*, 49 F.3d 317 (7th Cir.), denying enf. of 313 NLRB 1275 (1995) and finds discriminatory enforcement only if the disparate treatment consists of activities and communications of a similar character because of their union status. While the Board did not define precisely what communications or activities are of "a similar character" to union activities or communications, it did provide some examples of where discrimination would be construed as unlawful and along Section 7 lines.

> For example, an employer clearly would violate the Act if it permitted employees to use e-mail to solicit for one union but not another, or if it permitted solicitation by antiunion employees but not by prounion employees.[17] In either case, the employer has drawn a line between permitted ad prohibited activities on Section 7 grounds. However, nothing in the Act prohibits an employer from drawing lines on a non-Section 7 basis. That is, an employer may draw a line between charitable solicitations and noncharitable solicitations, between solicitations of a personal nature (e.g., a car for sale) and solicitations for the commercial sale of a product (e.g., Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and non-business-related use. In each of these examples, the fact that union solicitation would fall on prohibited side of the line does not establish that the rule discriminates along Section 7 lines.[18] For example, a rule that permitted charitable solicitations but not noncharitable solicitations would permit solicitations for the Red Cross and the Salvations Army, but it would prohibit solicitations for Avon and the union.[19]
>
> [17] On the other hand, an employer may use its own equipment to send antiunion messages, and still deny employees the opportunity to use that equipment for prounion messages. As noted above, employees are not entitled to use certain method of communication just because the employer is using it. See *Nutone*, supra at 363-364.
>
> [18] Of course, if the evidence showed that the employer's motive for the line drawing was antiunion, then the action would be unlawful. There is no such evidence here.
>
> Member Kirsanow notes that in determining whether a facially Section 7-neutral line has been drawn with an antiunion motive, the employer's reasonable interest in drawing that particular line would be, for Member Kirsanow, a relevant consideration. That is, if the line drawn has the effect of prohibiting all Section 7 communications and is not based on any reasonable employer interest, Member Kirsanow would find an antiunion motive to be a permissible inference.
>
> [19] Indeed, the Board has already recognized that allowing limited charitable solicitations does not necessarily require an employer to allow union solicitations. See *Hammary Mfg. Corp.*, 265 NLRB 57 (1982) (an employer will not violate Sec. 8(a)(1) by "permitting a small number of isolated 'beneficent acts'" – such as solicitation for a United Way campaign – as "narrow exceptions" to a no-solicitation rule, while prohibiting union solicitation).
>
> 351 NLRB at 1118

Later in the decision, the Board in assessing the alleged disparate treatment distinguished between personal announcements and personal offers to sell products, which it deemed dissimilar to union activities from solicitations to support groups or organizations, which it deemed similar to union activities. 351 NLRB at 1119; *Starbucks*, supra, 354 NLRB #99 at 22.

In applying this analysis, it is clear that the employer's conduct here consisted of disparate treatment along Section 7 lines and was unlawful. Thus, the Board in *Register Guard* stated that an "employer clearly would violate the Act if it…permitted solicitation by antiunion employees but not by prounion employees. 351 NLRB at 1118. Here, not only did the Employer permit non-union literature prepared by anti-union employees to be posted on the same bulletin boards where it denied permission of pro-union literature to be posted, but in fact the Employer actually posted the anti-union literature prepared by anti-union employees on such bulletin boards. This evidence is sufficient in itself to establish discriminatory disparate treatment along Section 7 lines. *Register Guard*, supra.

Moreover, some of the same types of items that the Employer permitted to be posted would be considered to be similar to union notices and would be disparate treatment along Section 7 lines. The evidence discloses that the Employer permitted postings on its bulletin boards for Avon[20] and for Weight Watchers. Both of these items would fall within the Board's definition in *Register Guard* of groups or organizations deemed to be similar to labor organizations. Indeed, the Board in *Register Guard* specifically coupled Avon and union solicitation as similar in explaining what types of discrimination is unlawful. 351 NLRB at 1118.

Additionally, Clark conceded that he personally had, on behalf of the Employer, granted permission for an employee to post a notice for an event for an outside non-profit agency where the employee was a volunteer. This would appear to be a posting for a group or an organization and also similar to a union communication. I find this to be further evidence of discriminatory enforcement. *Register Guard*, supra.

Accordingly, based on the foregoing analysis and authorities, I conclude that the Employer discriminatorily promulgated and enforced a policy of denying employees the right to post union literature on its bulletin boards. Such conduct constitutes objectionable conduct. I therefore recommend that Objection 8 be sustained.

Conclusions

I have found above that Objections 6 and 10 and portions of Objections 5 and 7 should be dismissed. I have also concluded that Objections 1, 3, 4, 8 and 9 and portions of Objections 5 and 7 should be sustained. The objectionable conduct that I have found included a number of instances of surveillance, creating the impression of surveillance, threats of discharge, threats to reduce wages, threats to change flexibility in scheduling and shifts, and threats of futility and unlawfully promulgating and enforcing a policy of prohibiting employees from posting union literature on the Employer's bulletin boards.

This conduct which affected a large number of unit employees in a close election is more than sufficient to require that the election be set aside. I so find.

[20] Notably, Dunkin testified that the Employer granted permission to employees to post a notice for an Avon party.

ORDER

I therefore recommend[21] that the election held on October 30, 2008 be set aside, and the case be remanded to the Regional Director to schedule a new election.

Dated, Washington, D.C. April 26, 2010

Steven Fish
Administrative Law Judge

[21] Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, Exceptions to this Report may be filed with the Board in Washington, DC within 14 days from the date of issuance of this Report and recommendations. Exceptions must be received by the Board in Washington by May 10, 2010.