The Research Foundation of the State University of New York at Buffalo *and* Research Foundation Professional Staff Association, NYSUT, AFT, AFL–CIO. Case 3–RC–11882

August 27, 2010

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER AND PEARCE

The National Labor Relations Board, by a three-member panel, has considered objections to an election held January 30, 2009, and the attached administrative law judge's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 35 votes for and 35 votes against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs[1] and, contrary to the judge's recommendation, finds that the election must be set aside based on conduct alleged in Petitioner's Objections 4 and 13.

Objections 4 and 13 allege, collectively, that the Employer interfered with employees' protected activity by "threaten[ing] to have Union agents arrested in or near the workplace, in such a manner as to interfere with employees' rights to organize and support the Union." In support of these objections, the Petitioner's organizer testified that during her visit to the office of a unit employee to solicit his support for the Union, an Employer official told her to leave the building or he would call the police. The judge found that this incident occurred, but concluded that it was not objectionable. We disagree.

Consistent with the Petitioner's exceptions, we find that the Employer's conduct, which was witnessed by a potentially determinative voter, reasonably would tend to interfere with employee free choice in the election. Accordingly, we shall set aside the election and direct the Regional Director to conduct a new election.[2]

Background

The Petitioner seeks to represent a unit of postdoctoral associates at the Buffalo, New York campus of the State University of New York (SUNY). The associates are individuals with doctoral degrees who have been hired to work on research projects funded by private or governmental grants awarded to the Graduate School at SUNY. The associates are employed by the Research Foundation of the State University of New York (Employer or Research Foundation). Research Foundation is a private, not-for-profit educational corporation that serves as a fiscal agent for SUNY. In this capacity, it administers and manages the financial research grants awarded to SUNY, hires the associates to work on the research projects, and determines their pay and benefits in accord with the budgetary confines of the award grant.

Yukstl Bukusoglu is a Research Foundation unit employee who has an office in Sherman Hall on the SUNY campus. Amy Melton is an organizer for the Petitioner. In mid-January 2009, Melton telephoned Bukusoglu and requested to meet in his office. Bukusoglu did not know that Melton was a representative of the Petitioner, but agreed to meet with her on January 15. Prior to Melton's arrival, Bukusoglu telephoned the Employer's office secretary, asked who Melton was, and reported that Melton was en route to his office. The office secretary informed Andrew Barth, a manager of the Employer, of Melton's planned visit with Bukusoglu.

Barth testified that either he or his office secretary immediately telephoned SUNY's human resources department "to check [whether] . . . we were obligated to allow the meeting" to take place. Specifically, Barth testified that he "asked if [he] was within [his] rights to ask [Melton] to leave." Told that he had that right, Barth proceeded to Bukusoglu's office and found Melton there. He told Melton that she was on private property and ordered her to leave or else he would call the police to have her removed.

DISCUSSION

The general rule under the Supreme Court's *Lechmere* decision is that nonemployee organizers, like Melton, are not entitled to engage in Section 7 organizing activity on the private property of others. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533 (1992). However, an employer has no right under *Lechmere* to exclude union representatives engaged in Section 7 activity from areas in which it lacks

[1] The judge was sitting as a hearing officer in this representation proceeding. The Petitioner has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

[2] In light of our decision to set aside the election based on the conduct encompassed by Objections 4 and 13, we do not pass on the Petitioner's exceptions to the judge's failure to sustain its weather-related objection and its Objections 1, 2, 6–9, 11, and 14.

a property interest. *Bristol Farms*, 311 NLRB 437, 438 fn. 6 (1993).[3]

Therefore, as the judge correctly noted in citing *Indio Grocery Outlet*,[4] the threshold question in cases such as this is whether the employer possessed a property interest entitling it to exclude the union representative(s) from the area where the proposed organizing activity was to occur. Whether an employer possesses the requisite property interest is a question of state property law. Id. See also *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217 fn. 21 (1994) ("The right of employers to exclude union organizers from their private property emanates from state common law."). The employer has the burden of proof of establishing its property interest. If it fails to meet that burden, its exclusion of union agents from the property violates Section 8(a)(1).[5] As explained below, under the circumstances here we find that it also constitutes objectionable conduct sufficient to warrant setting aside the election.

The judge found that the Employer met its burden to establish a property interest by relying on New York state guidelines that prohibit, subject to certain exceptions not applicable here, organizational activities on state property by individuals not employed by the State.[6] Based on these guidelines and on his finding that the Employer leases space in SUNY's Sherman Hall (a state building), the judge found that the Employer was entitled to demand that Melton leave Sherman Hall, and in doing so did not commit objectionable conduct. We disagree.

First, the record is devoid of evidence that the Employer actually holds a lease or other property interest in Sherman Hall, and the Employer asserted no such claim. Such evidence is essential to establish a property interest, under state law, that would permit the exclusion of others. See, e.g., *Farm Fresh, Inc.*, 326 NLRB 997, 1001–1002 (1998), rev'd in part *UFCW v. NLRB*, 222 F.3d 1030, 1035–1038 (D.C. Cir. 2000) (Board examined lease language under Virginia law to determine whether stores possessed sufficient property interest to exclude nonemployee union organizers from adjacent sidewalks); *Food For Less*, 318 NLRB 646, 649–650 (1995), affd. in rel. part 95 F.3d 733, 738–739 (8th Cir. 1996) (Board examined lease under Missouri law to determine whether store possessed sufficient property interest in parking lot to exclude nonemployee union representatives). Accordingly, we reject the judge's finding that the Employer met its burden of establishing that its exclusion of Melton from SUNY property was based on authority contained in a lease.

Nor do we agree with the judge that the Employer's authority to exclude Melton from Sherman Hall derived from New York State guidelines prohibiting organizing activity on state property by outside employee organizations. Even if we assume that the guidelines validly covered the organizing activity in this case,[7] they explicitly state that the "State shall take appropriate action to prevent the violation." (emphasis added). This reference to the "State" as the holder of the right to exclude others from state property plainly means SUNY in the instant case. There is no indication that a nonstate entity like the Employer can invoke the guidelines independently to expel individuals from state property.

Apparently recognizing this omission, the judge noted that, under *Lechmere*, a property owner can delegate to another its right to exclude others from its property, and found that SUNY did so by authorizing the Employer to enforce the state guidelines against Melton. *Lechmere* actually does not reference the delegation of property rights, and, more importantly, there is no evidence that such a delegation occurred between SUNY and the Employer.[8]

---

[3] The dissent's refusal to acknowledge this firmly settled principle undermines its main argument that, under *Lechmere*, Melton had no protected Sec. 7 right to engage in organizing activity in Sherman Hall because she was trespassing. *Lechmere* is not applicable here. The nonemployee organizers in that case were properly deemed trespassers because the employer that excluded them from the shopping center parking lot owned the lot, and therefore possessed an exclusory property interest against which the trespass took place. By contrast, as explained below, the Employer did not have a property interest in Sherman Hall that entitled it to exclude others. Therefore, *as to the Employer,* Melton was not engaged in unprotected trespassing.

Our colleague's reliance on *North Hills Office Services*, 345 NLRB 1262 (2005), is likewise inapposite. No property interest issue was raised in that case as to the parking lot, and the respondent did not eject the nonemployee organizer from that location. Thus, the Board's statement (at 1263) that the respondent "could [have told] the nonemployee to leave the property" is merely dicta.

[4] 323 NLRB 1138, 1141 (1997), enfd. 187 F.3d 1080 (9th Cir. 1999), cert. denied 529 U.S. 1098 (2000).

[5] *Indio Grocery Outlet*, supra at 1141.

[6] See fn. 9 of the judge's decision setting out more fully the relevant state guidelines.

[7] On their face, the guidelines appear to cover only organizing activity directed at state employees. If they did purport to prohibit organizing activity directed at employees of private-sector employers that contract with New York State, they would raise a substantial question whether they were preempted by federal labor law. See generally *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 243–245 (1959). We need not resolve these issues in light of our conclusion that the guidelines could not have justified the Employer's exclusion of the Union's representative in the circumstances of this case.

[8] The judge cited language, purportedly from *Lechmere*, that an exclusory property interest may be delegated to an employer based on proof that "an owner had by express delegation authorized the employer to stand in its shoes as against trespassers." The court made no such statement in *Lechmere*. The quoted passage was from a judge's decision in *Farm Fresh*, supra, 326 NLRB at 1011, and the Board ex-

As set out above, SUNY neither instructed the Employer to enforce the state guidelines to eject Melton nor authorized Employer official Barth to act on SUNY's behalf. Rather, Barth took the initiative to contact SUNY's human resources office to ask if he was "obligated to allow the meeting," and whether he was "within [his] rights to ask Melton to leave." There was no discussion of the existence of the guidelines or Barth's authority to invoke them on behalf of SUNY. We find, therefore, that the record fails to establish that SUNY delegated its exclusory property interest to the Employer. Further, even assuming that SUNY delegated to the Employer the authority to enforce the state guidelines against Melton, the Employer failed to identify any authority suggesting that the delegation was valid under New York State law. As discussed above, it is state law that defines the nature and extent of an employer's property interest, and the Employer here made no argument that it had a sufficient property interest, delegated or otherwise, under state law that entitled it to expel Melton from Sherman Hall.

In circumstances where such legal authority has not been established, the Board has held that an employer violates Section 8(a)(1) by excluding union agents from the property. *Indio Grocery*, supra at 1141; *United Food & Commercial Workers v. NLRB*, 222 F.3d 1030, 1035 (D.C. Cir. 2000). The lesson of those decisions is that the denial of access interferes with employees' Section 7 rights and, where no private property interest has been shown, there is no conflict between Section 7 rights and private property rights and, therefore, no need for accommodation of the employer's property rights under *Lechmere*. See *Indio*, supra at 1141.

Considering these principles in light of the Board's test in representation cases, we find that Melton's ejection from Sherman Hall constitutes objectionable conduct. That test, an objective one, evaluates whether a party's conduct has the "tendency to interfere with the employees' freedom of choice" and "could well have affected the outcome of the election." *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004); *Cambridge Tool & Mfg Co*., 316 NLRB 716 (1995). The evidence shows that this test is plainly met here.[9]

As stated above, Melton scheduled a meeting with Bukusoglu during the organizational campaign to explain "the role of the [Union] and what they could do on behalf of postdoctoral associates." When Melton arrived at Bukusoglu's office, she gave him her card, and asked "if he wanted to meet there" or "perhaps go someplace for coffee." Bukusoglu gestured for Melton to sit down. After Melton had explained the organizing campaign for about 5 minutes, Employer official Barth entered the office.

As described by Bukusoglu, a "very big argument" ensued, during which Barth told Melton that she was "not allowed to be here and this is not a public place, [and] if you don't leave, I'm going to call the police to arrest you." Bukusoglu testified that he "was so disturbed because on the one side there was an official person in my department [and o]n the other side, there was a lady [whom] I invited to give me something, idea." Bukusoglu stated that Barth's "behavior was so offensive" and because Barth was "threatening . . . to call the police to arrest [Melton]," he "really felt ashamed and guilt[y]."

By inviting Melton into his office and listening to her describe the advantages of union representation, Bukusoglu was exercising an essential Section 7 right to "learn the advantages of self-organization from others." *Lechmere* supra, 502 U.S. at 532, quoting *NLRB v. Babcock & Wilcox*, 351 NLRB 105, 113 (1956). We conclude that the Employer's interdiction of this Section 7 activity reasonably would tend to interfere with Bukusoglu's free and uncoerced choice in the election.[10]

---

pressly did not rely on the passage in affirming the judge's decision. See 326 NLRB at 997 fn. 4.

[9] Our dissenting colleague contends that we have applied the "wrong legal standard" by considering the 8(a)(1) decisions discussed above. He acknowledges that under *Dal-Tex Optical Co*., 137 NLRB 1782, 1786–1787 (1962), conduct violative of Sec. 8(a)(1) is, a fortiori, conduct which interferes with an election. He states, however, that this standard applies only when the challenged conduct is alleged as *both* an election objection and an unfair labor practice in a consolidated proceeding.

Dal-Tex itself involved only an election objection, and the *Dal-Tex* Board flatly rejected the view that conduct should be assessed differently "depending on the nature of the proceeding in which the issue is raised before the Board." 137 NLRB at 1786. Nevertheless the Board has stated twice recently that *Dal-Tex* is inapplicable to cases that involve only objections. See *NYES Corp.*, 343 NLRB 791 (2004); *Metaldyne Corp*., 339 NLRB 352 (2003). We need not resolve that tension here, however, because we need not apply the *Dal-Tex* standard in determining whether the conduct here warrants setting aside the election. We have merely considered similar employer conduct in Sec. 8(a)(1) cases in examining whether the conduct here interfered with the election—a common practice in representation cases. See, e.g., *Freund Baking Co.*, 336 NLRB 847 fn. 5 (2001) (citing a Sec. 8(a)(1) case in discussing whether an employer rule was objectionable); *Majestic Star Casino*, 335 NLRB 407, 407–408 (2001) (citing Sec. 8(a)(1) cases in discussing whether solicitation of grievances was objectionable).

[10] Our dissenting colleague contends that because Melton could have met with Bukusoglu elsewhere, her removal from Sherman Hall cannot be deemed objectionable. We disagree. Where, as here, the Employer lacked the requisite property interest to exclude Melton from Sherman Hall, Bukusoglu was entitled to meet her there, in his office, subject only to her removal by SUNY and as long as the meeting did not occur during his work time. See generally *Our Way, Inc.,* 268 NLRB 394 (1983). There is no evidence that Bukusoglu's meeting with Melton occurred during his work time.

We further find that Barth's threat of arrest when ejecting Melton amplified its coerciveness. Indeed, based on Bukusoglu's description of the encounter, we think that he or any employee would reasonably be coerced by it. See e.g. *Hopkins Nursing Care Center*, 309 NLRB 958, 959 (1992) (coerciveness of employer's objectionable threat to assign employees less desirable shifts was accentuated by supervisor chasing employees down hallway and yelling at them). Finally, the shift of a single vote could have changed the outcome of the election.

In sum, although Sherman Hall was property that the Employer may have lawfully occupied, the record fails to establish that the Employer had a property interest in Sherman Hall sufficient to lawfully eject Melton. By barring Melton, in the presence of a potentially determinative voter, from organizing activity at Sherman Hall, the Employer committed objectionable conduct that requires setting aside the election and directing a new one.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Research Foundation Professional Staff Association, NYSUT, AFT, AFL–CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co*., 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the

Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C. August 27, 2010

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting.

I agree with the judge that the Petitioner failed to establish that the Employer engaged in objectionable conduct when one of its officials informed a trespassing union organizer, who was on the premises in violation of state regulations, that the organizer could not meet with an employee on the property during work hours. It simply cannot be said that this isolated directive had such a tendency to interfere with employee free choice that it could have affected the election results. Rather, as the judge found, both the employee and organizer had ample alternative opportunities to discuss the pros and cons of unionization prior to the election, and the incident was disseminated to no other employee. Contrary to my colleagues, therefore, I would adopt the judge's overruling of the Union's Objections 4 and 13, and certify the results of the election.

As a preliminary matter, my colleagues apply the wrong legal standard and analysis to the extent that they rely on cases in which an unfair labor practice charge has been filed alleging that an employer violated Section 8(a)(1) by excluding a union agent from property in which the employer has no interest. If such a violation is alleged and found in a consolidated representation and unfair labor practice proceeding, then under the Board's decision in *Dal-Tex Optical Co.*,[1] the unfair labor prac-

[1] 137 NLRB 1782, 1786 (1962). In *Dal-Tex*, the Board held that conduct in violation of Sec. 8(a)(1) that occurs during the critical period is "a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in and election." The Board subsequently backed away from a per se approach and even under *Dal-Tex*, now examines

tice is considered, a fortiori, objectionable conduct. In this case, however, no unfair labor practice has been alleged or found, so the precedent my colleagues rely upon, primarily *Bristol Farms*[2] and *Indio Grocery Outlet*,[3] have no bearing on this case; nor does *Dal-Tex Optical Co*.

My colleagues grudgingly concede that the Board has expressly held that the *Dal-Tex* unfair labor practice analysis is inapplicable in cases involving only election objections, yet they sidestep that analytical and precedential hurdle and invoke unfair labor practice cases—such as *Bristol Farms* and *Indio Grocery Outlet*—all the same. They assert that such decisions stand for the proposition that "the denial of access interferes with Section 7 rights and, where no private property interest has been shown, there is no conflict between Section 7 rights and private property rights and, therefore, no need for accommodation of the Employer's property rights under *Lechmere*." As discussed below, my colleagues err in their analysis of *Lechmere* and its principles, but the more fundamental problem is that *Lechmere* is irrelevant to the instant proceeding. There is no assertion here that the Employer violated the Act by excluding a nonemployee union organizer; thus, whether the Employer established a sufficient property interest to justify the eviction is irrelevant.

The sole issue in this case, a representation proceeding in which no unfair labor practice allegation or finding exists, is, as the Board set forth in *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995), whether the alleged objectionable conduct, taken as a whole, warrants a new election because it has "the tendency to interfere with the employees' freedom of choice" and "could well have affected the outcome of the election." *Metaldyne Corp.*, 339 NLRB 352 (2003).[4] My colleagues, focused as they are on property interests not at issue, fail to explain how the directive to Melton to leave Sherman Hall could possibly have affected the election outcome. The record establishes that Bukusoglu did not even know what Melton wanted to speak to him about when he agreed to meet her. Then, when Barth arrived, he did not forbid Bukusoglu to meet with Melton, he simply told Melton she could not engage in organizing on the property at that time. Hence, the instruction to leave, consistent as it was with state law, could hardly have had a coercive impact on a reasonable person under the circumstances.[5] Moreover, as noted above, the judge found there were ample alternative opportunities and locations for the two to have met prior to the election. In light of these circumstances, the directive, even if improper, could not realistically have impacted on the election outcome, and my colleagues err in finding otherwise.

Second, even if the *Lechmere, Inc.*[6]/*Indio Grocery Outlet* property interest line of cases were implicated in this objections case, the outcome would remain the same, as Melton's conduct was unprotected by the Act. In *Lechmere*, the Supreme Court made clear that nonemployee union organizers "cannot claim even a limited right of access to a nonconsenting employer's property until 'after the requisite need of access to the employer's property has been shown.'" 502 U.S. at 534 (quoting *Central Hardware Co. v. NLRB,* 407 U.S. 539, 545 (1972)). No right of access exists unless the union meets its "'burden of showing that no other reasonable means of communicating its organizational message exists,'" and that burden "'is a heavy one,'" that will be met only where "'unique obstacles prevented nontrespassory methods of communication with the employees.'" Id. at 535 (quoting *Sears, Roebuck & Co., v. Carpenters*, 436 U.S. 180, 205–206 (1978)). Simply put, Section 7 "does not protect nonemployee union organizers except in the rare case where the 'inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels.'" Id. at 537 (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105,112 (1956). In the instant case, there clearly were alternative means of communicating, as the judge specifically found. Hence, Melton's trespassory conduct was not protected and, therefore, contrary to my colleagues, Bukusoglu did not possess a Section 7 right to "learn the advantages of self-organization" on state property to which Melton had no legal right of access at the time. It necessarily follows that Barth's directive did not

---

the unfair labor practice conduct to determine whether it was extensive enough to interfere with the election. See *Caron Int'l*, 246 NLRB 1120 (1979).

[2] 311 NLRB 437 (1993) (sole issue was whether the respondent violated Sec. 8(a)(1) by excluding union agents under threat of arrest from a sidewalk in front of a grocery store; no representation case implicated).

[3] 323 NLRB 1138 (1997) (sole issue was whether the respondent violated Sec. 8(a)(1) by seeking to have union representatives arrested and removed from property; no representation case implicated).

[4] See generally Outline of Law and Procedure in Representation Cases (2008), Sec. 24–311.

[5] My colleagues attempt to bootstrap their argument with selective excerpts of Bukusoglu's testimony, which they interpret as reflecting Bukusoglu's subjective negative reaction to the encounter. An equally reasonable interpretation is that Bukusoglu felt responsible for having created a problem by agreeing to meet with someone who was not supposed to be there in the first place. Regardless, the Board does not rely upon subjective perceptions, and no reasonable employee would be coerced in the exercise of his or her free choice in a secret-ballot election by observation of such an incident.

[6] *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533 (1992).

interfere with protected activity to such a degree that the election should be set aside.

Finally, even if I were to agree that the Board in an objections case should proceed to assess an employer's property interest before determining whether the trespassory organizational activity of a nonemployee is protected by Section 7,[7] I would find a sufficient property interest here. Research Foundation was not a stranger to SUNY, but a rightful occupant, performing contract services for SUNY. Further, it was a Research Foundation employee, not a SUNY employee, with whom Melton sought to meet. Knowing that she was trespassing, Barth instructed Melton to leave Sherman Hall, after receiving permission from a SUNY official to eject her.

North Hills Office Services, 345 NLRB 1262 (2005), supports Research Foundation's ejection of Melton. There, as here, the respondent performed contract services on the property of another company (Pall Corporation) and was advised by a Pall official "to be 'very careful' with nonemployees on the property because the building was considered a terrorist attack target." In accord with this advisory, and pursuant to its own work rule that prohibited "unauthorized personnel on the job at any time," the respondent told its own employee that she could not talk to nonemployee union organizers in Pall's parking lot, but was free to do so off the property, a few feet away. The Board found no violation, reasoning that because the respondent could have lawfully removed the nonemployees from the parking lot as trespassers, "there [was] no meaningfully difference" in telling its employee not to talk to the trespassing nonemployees. "In both instances, the purpose and effect of the instruction [was] to obtain compliance with a property restriction, one that does not impermissibly restrict Section 7 activity." 345 NLRB at 1263.

Here, Barth instructed nonemployee organizer Melton to leave property on which she was trespassing, rather than, as in *North Hills*, instructing his employee Bukusoglu not to speak to her on the property. As in *North Hills*, because the "purpose and effect of [Barth's] instruction [was] to obtain compliance with a property restriction" imposed by property owner SUNY, his instruction was lawful.

This result follows even under the "property interest" rationale applied by my colleagues. Assuming, arguendo, that they are correct that only SUNY possessed the requisite property interest entitling it to expel Melton from Sherman Hall, I agree with the judge that SUNY delegated its expulsion right to Research Foundation during the phone call between Barth and SUNY's HR official. My colleagues do not dispute that SUNY had the authority to make this delegation; rather, they conclude that the delegation was not properly executed because the SUNY official failed to expressly reference the state guidelines governing the proper location for organizing activities when authorizing Barth to exclude Melton. This cramped interpretation is unwarranted and falls well short, as a legal basis, for reversing the judge's finding that SUNY properly assigned to Research Foundation the right to exclude Melton from Sherman Hall.

In sum, because Melton was trespassing by entering Sherman Hall, and because there were multiple alternative means of communication available, her removal from the building did not interfere with any Section 7 right. Accordingly, I would affirm the judge's overruling of the Union's objections pertaining to Melton, and adopt his conclusion that the Union did not receive a majority of the votes in the election.

Dated, Washington, D.C. August 27, 2010

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

Subhash Viswanathan, Esq. and *Raymond J.Pascucci, Esq.,* for the Employer.

Michael Deely, Labor Relations Specialist, and *Anna Geronimo, Organizer,* for the Petitioner.

ADMINISTRATIVE LAW JUDGE'S REPORT AND RECOMMENDATIONS ON OBJECTIONS

BRUCE D. ROSENSTEIN, Administrative Law Judge. Pursuant to petitions filed on December 5 and 18, 2008,[1] and a Stipulated Election Agreement entered into by the parties and approved on December 23, 2008, an election by secret ballot was conducted under the direction and supervision of the Acting Regional Director, Region 3 of the National Labor Relations Board (the Board or NLRB) on January 30, 2009,[2] in the following unit of employees.

> INCLUDED: All full-time and part-time postdoctoral associates and all senior postdoctoral associates.
> EXCLUDED: All postdoctoral fellows, clinical investigators, research scientists, managers, confidential employees, guards, and supervisors as defined in the Act, and all other employees not included.

The tally of ballots, which was made available to the parties at the conclusion of the election showed the following results:

[7] See *Salmon Run Shopping Center LLC v. NLRB*, 534 F.3d 108, 114 (2d Cir. 2008) ("Simply put, the Board may not fashion a remedy without first considering whether section 7 rights are at issue and whether a *Babcock* exception applies.").

[1] The December 5, 2008 petition was withdrawn and filed again on December 18, 2008.

[2] All dates are in 2009 unless otherwise indicated.

Approximate number of eligible voters	142
Void ballots	0
Votes cast for Petitioner	35
Votes cast against participating labor organization	35
Valid votes counted	70
Challenged Ballots	0
Valid votes counted plus challenged ballots	70

A majority of the valid votes counted have not been cast for the Petitioner.

On February 6, the Petitioner filed timely objections to conduct affecting the results of the election. On March 9, the Regional Director issued an Order Directing a Hearing on the Objections designating an Administrative Law Judge to conduct the hearing.[3]

I conducted a hearing on the below noted objections in Buffalo, New York, on March 25 and 26.[4] On the entire record, I make the following recommendations.

BACKGROUND

The Employer is a private, nonprofit 501(c)(3) educational corporation that was established in 1951. It has offices at 30 State University of New York (SUNY) locations including Buffalo, New York, with its central office located in Albany, New York. The Employer carries out its responsibilities pursuant to a 1977 agreement with SUNY. The Facilities and Administration revenue portion of a sponsored project supports the administrative cost of the Employer and the infrastructure on campus that supports sponsored research. Each campus, including Buffalo, determines how the dollars are best utilized at their specific location and each Principal Investigator (PI) determines how the dollars awarded to them in a sponsored project are best utilized to support their research.[5]

The parties agreed to hold two-scheduled voting sessions on January 30, a 3-hour period from 11 a.m. to 2 p.m. and a 3-hour session from 3 to 6 p.m. They established two polling sites for the election, one in the Natural Science Center on the University of Buffalo's (UB) North Campus and one in Harriman Hall on UB's South Campus.

In election proceedings, it is the Board's function 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. It is the Board's duty to establish those conditions and to determine whether they have been fulfilled. *General Shoe Corp.,* 77 NLRB 124, 127 (1948). It is also the responsibility of the Board to ensure that its elections are properly conducted; the Board's role in the conduct of elections must not be open to question. *New York Telephone Co.,* 109 NLRB 788, 790 (1954).

OBJECTION RELATED TO INCLEMENT WEATHER

The Petitioner alleges that during both polling periods, the weather in the Buffalo area made it extremely difficult to travel and there was record snowfall in the Buffalo metropolitan area 2 days prior to the election. The Petitioner further argues that the snow already on the ground along with new snow that fell on the day of the election, combined with strong persistent winds, made roads throughout the area very difficult to navigate. Accordingly, the Petitioner contends that due to these extreme conditions less than half of the eligible employees were able to vote in the election. Many of the eligible voters worked off campus and until 5 p.m., and on a normal day without the presence of inclement weather the trip to either polling place would take about 15 minutes. On January 30, the trip to either of the polling sites, according to the Petitioner, took in excess of 1 hour with difficult road conditions confronting prospective voters.

FACTS

On January 30, the National Weather Service reported that 1.20 inches of snow fell in the Buffalo area. The wind was measured at 17 miles per hour with average visibility of approximately 3 miles. There were no weather or travel advisories in the Buffalo area on that day. The Weather Service reported that on January 28, 2 days prior to the election, that the snowfall measured 7.10 inches and on January 29, the day before the election, there was 0.30 inches of snow. On the 3 days before the election, the Weather service did not measure any significant snow accumulations (Jt. Exh. 4–8 and 13–19). The weather on January 30 did not cause UB to close and classes were in session as usual. The public school districts in the immediate area of the UB's North and South Campus did not close nor did any of the neighboring school districts. The record evidence shows that no eligible voters called in on January 30 to report an absence from work due to inclement weather conditions.

The Petitioner presented two witnesses to testify about the weather conditions on the day of the election. Yukstl Bukusoglu, a recently hired postdoctoral associate from Turkey and a medical doctor, lives on the UB campus and normally walks to work. On the day of the election, after working his normal day, he walked from his office in Sherman Hall to the polling area located in Harrison Hall on the South Campus. Bukusoglu reported no exceptional difficulty in traversing the sidewalks and voted at approximately 5:45 p.m. He testified that other then the Board Agent and the two observers he was the only employee present in the polling area at that time.

David Parisi, a senior programmer analyst for the Employer who served as the union observer at the North Campus for both voting sessions, testified that his normal driving commute to work takes approximately 25 minutes. On the day of the election, because of the weather conditions and slow traffic, it took him approximately 45–55 minutes to arrive at the location for the preelection conference. He acknowledged, despite the

[3] The Employer filed a special appeal with the Board challenging the Acting Regional Director's decision to direct a hearing on the Petitioner's objections. By Order dated March 31, the Board denied the Employer's special appeal.

[4] Posthearing briefs filed by the Petitioner and the Respondent were duly considered.

[5] A PI is a University of Buffalo faculty or staff member who bears responsibility for the intellectual leadership of a project. The PI accepts overall responsibility for directing the research, financial oversight, and compliance with relevant university policies and sponsor terms and conditions. The PI serves as the supervisor and mentor to the postdoctoral associates during their tenure in support of a specific research project.

weather conditions, that all of the Petitioner and Employer observers were able to attend the preelection conference along with the two Board Agents and representatives of the Petitioner and the Employer. Parisi noted that after the election ended at 6 p.m., it took the Board Agent who conducted the election at the South Campus polling location approximately 1 hour to arrive at the North Campus polling location where the ballot count was held.

The Employer, in addition to introducing documentary evidence into the record concerning the weather conditions experienced prior to and on the day of the election, called a number of witnesses to testify about this issue. Jason Benedict is a postdoctoral associate and voted in the election. Benedict testified that his driving commute to work on the day of the election was fairly ordinary with the roads in pretty good condition. He lives approximately 6 or 7 miles from the UB campus. His normal commuting time is 15–20 minutes and on the day of the election it took him approximately the same amount of time to arrive at work. He walked to the polling area without difficulty and voted around 11:30 a.m. Sean O'Brien served as the Employer's observer on the South Campus for both polling sessions. He testified that none of the voters who cast a ballot at his polling location said anything about having difficulties arriving at work because of the weather. Michael Lukasik was the observer for the Employer at the North Campus and testified that no voters expressed any problems with getting to the polls because of the weather conditions.[6]

DISCUSSION

The Board has issued two significant cases that set forth the legal principles for setting aside an election due to inclement weather conditions. In *Baker Victory Services, Inc.,* 331 NLRB 1068 (2000), the Board held that an election should be set aside where severe weather conditions on the day of the election denied eligible voters an adequate opportunity to vote and a determinative number of employees were unable to cast a ballot. In that case, the employer operated early childhood programs in Buffalo at two school-based facilities and other locations. The election was scheduled to be held on Thursday, January 14, 1999. During the 4 days prior to the election, the Buffalo metropolitan area received 19.7 inches of snow, and data from the weather service indicated that the City of Buffalo received a total of 55.8 inches of snow during the first 2 weeks of January. The Mayor of Buffalo and President Clinton declared a state of emergency in Buffalo for the period from January 11 to 19, 1999, which entitled the City of Buffalo to Federal Disaster assistance. The evidence disclosed that the employer's schools were closed because of the weather which caused many of the employees in the petitioned for bargaining units not to report to work and led many of them to believe that the election would be cancelled. Based on the totality of evidence in that case, the Board concluded that the weather conditions reasonably denied a determinative number of eligible voters to cast their ballots.

In *V.I.P. Limousine, Inc.,* 274 NLRB 641 (1985), the employer operated a limousine service in the New York metropolitan area. A deauthorization petition election was held on February 11, 1983. On the day of the election, a snow storm commenced that resulted in approximately 20 inches of snow in the area making navigation of the roads very difficult and dangerous. Because of the blizzard conditions on the day of the election, the Board set aside the election.

Based on the totality of circumstances discussed above, I find that the weather conditions in Buffalo on the day of the election did not approach the type of conditions found in the above cited cases for which the Board set aside the elections. Only 1.20 inches of snow fell in Buffalo on January 30, and the area did not experience large snowfall accumulation in the days preceding the election. In comparison to the extreme circumstances discussed in the above cited cases, there was no state of emergency declared on January 30, no travel restrictions were imposed, and no public schools in the immediate area including the UB North and South campus were closed due to adverse weather conditions.

I have carefully considered the testimony of all witnesses that were called by both parties to discuss this issue. Even the Petitioner's witnesses acknowledged that they were able to report to the polling areas without great difficulty and Parisi admitted that he arrived at the preelection conference on time despite his commute to work taking approximately 20 to 30 minutes longer. It is telling, however, that the Petitioner did not call as witnesses any of the 72 eligible employees that did not vote in the election to assert that the reason for their absence was directly related to the weather conditions experienced on the day of the election. There could be many reasons for less than a 50 percent turnout on the day of the election, however, the Petitioner failed to carry its burden that the low turnout was directly related to the adverse weather conditions experienced on the day of the election.

For all of the above reasons, I recommend that this objection be overruled.

OBJECTION 1

The Employer created the impression of surveillance, or actually engaged in surveillance of employees.

The Petitioner alleges that on January 15, the Employer's Lab Director Andrew Barth asked Amy Melton, a nonemployee union organizer, who was meeting with postdoctoral associate Bukusoglu in his office, what they were doing. According to the Petitioner, Barth told Melton and Bukusoglu that he had been instructed by Human Resources to stop any union activity and report it. In addition, the Petitioner is claiming that Donna Scuto, the assistant vice president of Policy and Control for UB sent out emails advising employees to be aware of union organ-

[6] Due to cumulative testimony presented by the Employer regarding difficulty in arriving at work on the day of the election, I permitted counsel to make an offer of proof on behalf of O'Brien and Lukasik. Both employees would have testified that there was nothing remarkable about the weather conditions on the day of the election and neither employee had any problem in arriving at work and attending the preelection conference. Testimony, in the form of an offer of proof was also provided by Employer witnesses Donna Scuto and Lynn Manning. Consistent with the other Employer witnesses, these individuals would have testified that they were not prevented from attending the preelection conference due to inclement weather conditions.

izers and to report any instance of organizers talking to employees.

FACTS

Melton testified that as part of her duties and responsibilities as an organizer for the Petitioner, she attempted to contact eligible postdoctoral associates in advance of the January 30 election, to explain the benefits of forming a union and to answer any questions that the eligible voters might have. For this purpose, she contacted Bukusoglu by telephone to inquire whether he would meet with her. Bukusoglu agreed and the meeting was scheduled for January 15. Melton arrived at Sherman Hall, the building where Bukusoglu has his office, and walked unaccompanied without having to pass through security to his office location. They engaged in conversation for approximately 5 minutes before Barth knocked on the office door and entered. According to Melton, Barth asked her who she was and who do you work for? Melton responded and asked Barth the same questions. Barth then informed Melton that you have no right to be here and would have to leave the building. Melton replied that she was invited by Bukusoglu to meet with him about the Union. Barth replied that if you do not leave I will have to call the authorities. He then stated that this is private property and I have called Human Resources and will do so again if you do not leave. According to Melton, Barth also stated that Bukusoglu was a new postdoctoral associate and did not know better when he scheduled the meeting. Melton decided it was best to leave the premises and no further confrontation occurred. Melton noted that she did not contact Bukusoglu again before the scheduled election.

Bukusoglu testified and confirmed that he was contacted by Melton and agreed to meet with her on January 15 in his office. Bukusoglu stated that his English was poor and he was uncertain who Melton represented. Since he thought Melton might be someone who was investigating his status as a new employee, he contacted the Department's administrative secretary to inquire if she knew Melton or could find out who she represented. According to Bukusoglu, the secretary suggested that he lock his door and pretend that he was not in his office if Melton arrived for the scheduled appointment. Bukusoglu decided to go forward with the appointment and confirmed that Barth came into his office on January 15, shortly after Melton arrived, and informed her that she was not allowed to be in the building as it was private property. Barth told Melton that if she did not leave, he would call the Police. Melton replied that she had a right to be in the building because Bukusoglu had invited her. Barth and Melton argued back and forth for a short period with Barth raising his voice above Melton's. Finally, Melton decided to leave his office and the meeting ended at that point.[7]

Barth testified that on January 15 his secretary informed him that a union organizer was coming to the Lab to meet with Bukusoglu but that he really did not want to meet with the organizer. Barth instructed his secretary to contact Human Resources to discern if the meeting could take place on SUNY property. Human Resources reported that the meeting should not occur as all offices in the Lab were private property. On January 15, Barth was apprised by someone on his staff that Melton had arrived at Sherman Hall and was in the building unaccompanied. Since Barth knew that Melton intended to have a meeting with Bukusoglu in his office he proceeded to that location, a distance of less than 5 minutes, and entered the office. He admits that he informed Melton that she must leave the premises and if she did not, he would be forced to call the authorities. He acknowledged that he raised his voice and was adamant about Melton leaving the building.

On January 12, Scuto sent an email to all postdoctoral associates informing them that this would be the first in a series of communications that they would receive concerning the Union's organizing efforts (Pet. Exh. 2).[8]

During the course of the hearing, the Petitioner withdrew the portion of the objection that alleges that Scuto sent out emails advising employees to be aware of union organizers and to report any instance of organizers talking to employees.

DISCUSSION

The Petitioner's primary allegation in this objection is that the Employer, by Barth's actions and conduct, created the impression of surveillance or engaged in surveillance of employee's union activities.

Based on the evidence discussed above, I am not convinced that Barth engaged in objectionable conduct as alleged by the Petitioner. In this regard, Barth only became aware of the scheduled meeting between Bukusoglu and Melton due to Bukusoglu's inquiry to the administrative secretary to determine who Melton represented and worked for. Thus, Barth was not engaging in surveillance when he was informed that Melton had arrived at the Sherman building. Since Barth knew that Melton was planning on meeting with Bukusoglu he immediately left his work area and arrived at the meeting place in less than 5 minutes.

For all of the above reasons, I find that the Employer did not create the impression of surveillance or engage in surveillance as alleged by the Petitioner. However, the underpinnings of this objection must be examined further as the evidence establishes that Barth threatened to call the authorities to have Melton removed from the Sherman building while she was engaged in organizing activities. As a result of Barth's actions, Melton was placed in the untenable position of either being escorted

[7] Ana Geronimo, one of the lead organizers for the Petitioner, testified that around 4:30 p.m. on January 15, she telephoned Barth to confront him about ordering Melton to end her meeting with Bukusoglu and leave the building. Barth admitted that he instructed Melton to leave the building and would do it again because the building was private property. Geronimo informed Barth that he could be violating Federal Labor Law. Barth hung up on Geronimo.

[8] The email states in pertinent part some of the reasons that the Employer believes that having a unionized workforce in a sponsored program environment would not be beneficial for employees or researchers. It also informed the associates that the Office of Postdoctoral Scholars has worked with the Administration at UB and the Postdoctoral Association to develop a policy which sets the groundrules for postdoc scholars and faculty mentors regarding postdoctoral appointments.

from the building by the authorities or leaving the premises without completing her meeting with Bukusoglu.

The Employer defends its conduct based on the guidelines for organizational activities and Campaigns set forth in the Governor of New York State's Manual on Employer Relations that applies to State facilities and State employees. A section of that document titled Employee Relations Manual was made part of the record in the subject case (Emp. Exh. 6). The Manual states in pertinent part that the State of New York's position is one of neutrality during organizational campaigns, preelection periods and the election process.[9]

The case therefore presents the issue of whether the Employer established a sufficient property interest to exclude Melton from Bukusoglu's work location (owned by SUNY) and in which the Employer leases space for its laboratory and administrative offices. The Employer, by virtue of the Employee Relations Manual from the New York State Governor's office, argues that it acted under delegated authority and under the protection of the Supreme Court's decision in *Lechmere Inc. v. NLRB,* 502 U.S. 527 (1992), in which the Court held that an employer can meet its burden of establishing a property interest entitling it to exclude individuals from property by showing, inter alia, that "an owner had by express delegation authorized the employer to stand in its shoes as against trespassers."

In *Indio Grocery Outlet,* 323 NLRB 1138 (1997), the Board reaffirmed that "in cases in which the exercise of Section 7 rights by nonemployee union representatives is assertedly in conflict with a respondent's private property rights, there is a threshold burden on the respondent to establish that it had, at the time it expelled the union representatives, an interest which *entitled* it to exclude individuals from the property." To determine the property interest, the Board looks at the law that created and defined the Employer's property interest, which is state, rather than Federal law.

Based on the forgoing, and particularly noting that the Employer herein leases space in a SUNY building that prohibits the use of its space for employee organizations for campaign purposes, I find that the actions of Barth in demanding that Melton leave the Sherman building is not violative of the Act. Likewise, I conclude that the Petitioner did not fall within any of the exceptions listed in the manual since there were numerous public areas available on the campus that Melton could have met Bukusoglu, no offer to reimburse the State was made, and no request was made by Melton in advance to meet with Bukusoglu in his Sherman building office.

In summary, I find that the Employer did not create the impression or engage in surveillance nor did it engage in objectionable conduct when it directed Melton to leave Bukusoglu's office and exit the building. Therefore, I recommend that Objection 1 be overruled.

OBJECTION 2[10]

The Employer threatened to and/or did reduce wages, hours, or other terms and conditions of employment, in order to influence the outcome of the election.

The Petitioner alleges that at two captive audience meetings held on January 21 and 27, Scuto advised eligible voters in attendance that a union victory would result in loss of work or the termination or reduction of other grants.

FACTS

By memorandum dated January 17, Co-Presidents of the Postdoctoral Association, Jurgen Bulitta and Silvia Brown invited faculty and staff to attend several town hall meetings at both the UB North and South Campuses to discuss the pros and cons of unionization (Emp. Exh. 1). The memorandum noted that the Postdoctoral Association would like to be impartial and provide the postdoctoral associates a balanced summary of pros and cons to enable them to make an informed decision concerning the upcoming union election.[11]

The first meeting occurred on January 21 and was attended by Geronimo, Melton, Scuto, faculty, and staff members along with seven or eight postdoctoral associates. The second meeting was held on January 27, and was attended by the same individuals along with faculty and staff and approximately the same number of postdoctoral associates.

Geronimo gave a presentation to the attendees concerning the benefits of having the Union serve as the collective-bargaining representative of the postdoctoral associates. This presentation was followed by a power-point presentation by Scuto that summarized the pros and cons of a labor organization in the research environment (Pet. Exh. 9). It specifically noted that while unionization may be appropriate in some environments, the Employer does not believe it would be appropriate in a sponsored programs research environment such as is present here. Following the formal presentations of Geronimo

[9] Portions of the Manual relevant to the subject case include the following. Organizational activities by employee organizations must be conducted so as not to interfere with the safe and efficient conduct of State operations and the discharge of work responsibilities by State employees. The State shall take appropriate action to prevent the violation of these guidelines by any person acting on behalf of an employee organization. The State will not make meeting space in buildings or areas which it owns or leases available to an employee organization for campaign purposes except under the following conditions (a) suitable space is not reasonably available elsewhere in the area, (b) the employee organization reimburses the State for any costs which the State incurs as a result of making such space available, and (c) the organizations requests the use of such space in advance, pursuant to the rules of the department or agency concerned. Organizational activities by persons not employed by the State are permissible for the purpose of soliciting membership, distributing literature, obtaining signatures on authorization cards, and other organizational activities in parking lots, entrances to buildings, and other areas to which members of the public are admitted, provided that such activities do not inhibit the movement of people or vehicles, impair the safe and efficient conduct of operations, or interfere with work duties or work performance.

[10] The underpinnings of this Objection are also alleged in Objections 4, 7, and 13. In Objection 13, the Petitioner during the course of the hearing withdrew the portion of that Objection that alleged "Threatened to have employees arrested."

[11] The Postdoctoral Association is a voluntary organization open to membership for all postdoctoral associates at UB including those employed by the Employer. The Association was formed in June 2007, and operates under policy documents that were finalized at that time. Bulitta became co-president of the Association in June 2008.

and Scuto, the meeting was opened up for a general question and answer session.

Geronimo testified that during Scuto's power-point presentation she informed the attendees that the Employer's funding is not entirely controlled by them but rather by external sources. Therefore, any kind of union that came in would really not be able to have any impact at all and it would be useless to join a union. Additionally, Geronimo asserts that Scuto stated that if a Union is selected to represent the postdoctoral associates there would be no ability to bargain a raise and therefore it would be a futile effort, it could diminish the Employer's work load, it would reduce jobs for lab staff and postdoctoral associates, and it could prove more difficult to obtain grants for research projects. Geronimo further testified that Scuto stated that if the Union won the election the relationship between the PI and the postdoctoral associates would likely be damaged especially if a grievance was filed against the PI who controls the grants and would be the author of any letter of recommendation.

The Employer called three witnesses who attended either one or both of the town hall meetings in which the power-point presentation was presented.

Scuto testified that she closely followed the power-point presentation outline and did not deviate from its content. She vigorously denied that she threatened to reduce wages, hours, or working conditions of the postdoctoral associates if they selected the Union as their collective-bargaining representative. Indeed, Scuto noted that on December 19, 2008, she sent a memorandum to the faculty on what they could do or say during a union organizing campaign and was very aware that threats to take away or withhold benefits from employees would be violative of the law (Emp. Exh. 7).

Bulitta, who helped organize the town hall meetings and attended both sessions, denied that Scuto threatened the postdoctoral associates with the loss of any benefits or that she implied that if the Union won the election, there could be less money to obtain grants or hire faculty. Additionally, Bulitta denied that Scuto stated that forming a union is useless. He also confirmed that Scuto faithfully followed the power-point presentation during the course of her remarks.

Benedict testified that he attended the January 27 town hall meeting and heard both Geronimo and Scuto's presentations. He has no recollection of Scuto stating or implying that there would be a reduction in postdoctoral opportunities if the Union wins the election or that Scuto made any other threatening remarks about relationships being damaged if the employees voted to unionize.

DISCUSSION

I am not convinced that Scuto threatened employees with loss of wages, hours, or working conditions during the course of the town hall meetings held on January 21 and 27, for the following reasons.

First, Scuto impressed me as a sincere and grounded witness whose testimony had a ring of truth to it. I have closely reviewed the power-point presentation materials and while the Employer gives its firm position against unionization, it does so without threatening employees with loss of benefits if the Union wins the election. The slides used in the presentation follow the written materials introduced into the record and I am convinced that Scuto faithfully followed the script without adding comments to undermine the Union's status or threaten employees with loss of benefits.

Second, I find that Scuto was well versed in what could be said to employees during the course of an organizing campaign and shared such information with faculty and staff immediately after the petition was filed in the subject case. Therefore, it is unlikely that Scuto would deviate from these instructions during the course of the town hall meetings with eligible voters present.

Third, I find that the other witnesses proffered by the Employer that attended either both or one of the town hall meetings did not support the assertions of the Petitioner that Scuto threatened employees with loss of benefits.

Fourth, the evidence establishes that Melton attended both town hall meetings as one of the two union representatives and participated in the question and answer sessions. Despite Melton being called as a witness for the Petitioner during the course of the hearing, no questions were presented to her about what Scuto said at the town hall meetings. Therefore, I must conclude that not asking Melton about what Scuto stated during the course of her power-point presentation would not have supported Geronimo's testimony that Scuto threatened employees with loss of wages, hours, or working conditions. Lastly, I note that the Petitioner did not call any of the postdoctoral associates that attended either of the two town hall meetings that could have supported Geronimo's testimony regarding this objection.

Accordingly, I recommend that Objection 2 be overruled in its entirety.

OBJECTION 3

The Employer promised to and/or did put into effect favorable changes in wages, hours, or other terms and conditions of employment, in order to influence the outcome of the election.

The Petitioner alleges that during the critical period, Scuto announced a favorable change in the vesting period for the postdoctoral associates at the two town hall meetings.

DISCUSSION

During the course of the hearing, the Petitioner withdrew Objection 3. Accordingly, I have not made a finding concerning this objection.

OBJECTION 4

The Employer interfered with employees engaged in protected activity.

DISCUSSION

The Petitioner is relying on the facts previously discussed in Objection 1 to support this objection. Based on my finding concerning Objection 1, I recommend that Objection 4 be overruled.

OBJECTION 5

The Employer permitted employees who oppose the Union to campaign against the Union on working time or enjoy other privileges, while denying union supporters the same privileges.

DISCUSSION

During the course of the hearing, the Petitioner withdrew Objection 5. Accordingly, I have not made a finding concerning this objection.

OBJECTION 6

The Employer suggested that employees form a committee to deal with problems or grievances.

The Petitioner asserts that the Employer and UB allowed the Postdoctoral Association to act as a bargaining agent for the employees. It further contends that the Employer, UB, and the Postdoctoral Association acted in collusion by sending out a series of joint emails commencing on January 12 that describe the partnership between these three groups. Lastly, the Petitioner alleges that the "Postdoctoral Scholar Policy" is effectively a grievance procedure to which postdoctoral associates have access.

FACTS

As previously discussed, the Postdoctoral Association is a voluntary organization open to membership for all postdoctoral associates at UB including those employed by the Employer.

On January 12, Scuto sent the first in a series of email's to all Employer postdoctoral associates concerning the Petitioner's efforts to form a Union at the Employer (Pet. Exh. 2). In addition to explaining the Employer's position on unionization, it stated in pertinent part that "The Office of Postdoctoral Scholars has worked with the Administration at UB and the Postdoctoral Association to develop a policy which sets the ground rules for postdoc scholars and faculty members regarding Postdoctoral appointments. This includes, but is not limited to appointments and hiring practices, dispute resolution, and compensation minimums."

On December 3, 2008, prior to the filing of the representation petition in the subject case, the Office of Postdoctoral Scholars created an informational document designed to inform both postdoctoral scholars and their faculty mentors of policies unique to individuals with the title of Postdoctoral Associate or Postdoctoral Fellows (Pet. Exh.11).[12] The Postdoctoral Association was sent a printout of the document in August 2008, and submitted a number of comments and suggested changes. That was the only input they had in the development of the document. Likewise, Scuto received an advanced copy of the document but limited her comments to suggested editing changes and had no input in its development or distribution.

The second, third, and final email was sent to the postdoctoral associates on January 16, 23,[13] and 29[14] respectively (Pet. Exh. 3–5). They were authored by Paul Kelly, a member of the UB Human Relations Department that has human resource responsibility and oversight for the Employer.

On January 30, the Postdoctoral Association sent an email to all postdoctoral associates urging them to vote and make their voices heard (Pet. Exh. 6). The Association also provided an overview of the pros and cons of unionization for the postdoctoral associates (Pet. Exh. 10). The document apprises postdoctoral associates of what a union can do and possibly improve at the Employer, sets forth what is available for postdoctoral associates including existing policies, and compares salary and hiring for postdoctoral associates. While the outline presents the facts in a neutral fashion and urges all eligible employees to vote and be heard, it does state that in the opinion of the Association, the relationship between a postdoc and his/her mentor may be permanently destroyed if a postdoc takes steps against his/her PI.[15] The outline also discusses the Associations thoughts about union's in general and the benefits a postdoctoral associate can receive from a mentor.

DISCUSSION

I find that the Petitioner has not sustained the allegations in this objection for the following reasons.

First, the evidence does not establish that the Postdoctoral Association is a bargaining agent for the employees. Rather, the organization which is open to membership for all postdoctoral associates at UB including those employed at the Employer, does not possess the indicia of a labor organization under Section 2(5) of the Act. It is merely a professional organization that attempts to further the interests of postdoctoral

[12] The policy statement includes appointments of a Postdoctoral Scholar, Designated Titles, Recruitment and Hiring, Compensation, Leaves, Dispute Resolution, and a Responsibility Section. The Dispute Resolution Procedures are more fully set forth in Appendix D. The process is an internal grievance procedure that prohibits members of the bar from participating, does not use a neutral third-party arbitrator and the final decision rests with the Dean of the Graduate School with no other appeals permitted.

[13] This email states in pertinent part that: "The RF (Employer) is pro-employee rather than anti-union. We recognize and respect the rights of Postdocs to learn about the union, but we also believe that Postdocs should have access to all information including reasons why unionization may not be a good decision. Our main goal is to provide reliable and honest information to Postdocs as they consider the very important issue of unionization. During the campaign the Employer is committed to following all laws and regulations regarding union elections. The Employer believes that you already receive the potential benefit of unionization without having to pay dues. Lastly, it points out that Employer graduate students at three other SUNY locations at Albany, Buffalo, and Syracuse ESF voted "no" to unionization. In all three elections, informed Employer graduate students voted "no" so they could continue to work directly with the Employer on all issues."

[14] This email states in pertinent part that: "We place a high value on the direct working relationship between managers and Employer staff and we would like to continue that relationship. We believe that inserting a union between management and staff would have a negative impact on job satisfaction for all of us. A section on Employer funding points out that all funds awarded to the Employer for grants and contracts are made available to campus PIs for performance of the research, teaching/training or community service project for which funding was sought. Funds awarded cover project related direct costs such as salaries, benefits, travel, equipment and supplies. The Employer does not keep any direct cost funds. All direct costs are allocated and expended on sponsored projects in accordance with the approved budget and at the discretion of the PI."

[15] Bulitta credibly testified that he inserted this bullet based on his past experience as a postdoctoral associate. He believed that challenging a supervisor/mentor could negatively impact the receipt of a favorable letter of recommendation. He confirmed in his testimony that no one from the Employer including Scuto ever suggested that he include this bullet in the outline.

associates during their tenure at UB. The Postdoctoral Association has no authority to negotiate over wages, hours, or working conditions and has never held itself out for this purpose. Membership is voluntary and no dues or membership fees are collected.

The Petitioner notes that the Scuto January 12 email states that the Postdoctoral Scholars has worked with the Administration at UB and the Postdoctoral Association to develop a policy which sets forth the groundrules for postdoc scholars and faculty mentors regarding postdoctoral appointments. They argue that the policy effectively contains a grievance procedure that the postdoctoral associates have access to. The policy was established on December 3, 2008, a time period prior to the filing of the representation petitions in the subject case, and sets forth general guidelines for the compensation, hiring, and personnel practices of postdoctoral associates. While the policy does contain an informal grievance procedure that can be utilized by postdoctoral associates, the policy does not preclude the Petitioner from attempting to negotiate a binding third-party procedure if it is selected as the collective-bargaining representative of the postdoctoral associates.

Additionally, I find that the content of the emails sent to the postdoctoral associates during January 2009, in no way threatened loss of benefits or denigrated the status of the Petitioner in any way. Rather, the emails authored by Scuto and Kelly set forth facts and in certain instances gives the opinion of the Employer regarding unionization, all of which is protected by Section 8 (c) of the Act.

Under these circumstances, and particularly noting that the Postdoctoral Scholars Policy was created outside the critical period with limited assistance from the Employer and the Postdoctoral Association, I recommend that Objection 6 be overruled.

OBJECTION 7

The Employer threatened the closure of the Research Foundation, relocation, going out of business, transfer, or loss of work (other harmful economic consequences) if the Union won the election.

DISCUSSION

The Petitioner is relying on the facts previously discussed in Objection 2 to support this objection. Based on my finding concerning Objection 2, I recommend that Objection 7 be overruled.

OBJECTION 8

The Employer created an impression of futility, by suggesting that it would not bargain in good faith if the Union won the election.

DISCUSSION

The Petitioner is relying on the facts previously discussed in Objections 2 and 6 to support this objection. Based on my finding concerning Objections 2 and 6, I recommend that Objection 8 be overruled.

OBJECTION 9

The Employer threatened to end its "open door policy," or stated that individual employees would not be able to talk to management, if the Union won the election.

DISCUSSION

The Petitioner is relying on the facts previously discussed in Objection 2 to support this objection. Based on my finding concerning Objection 2, I recommend that Objection 9 be overruled.

OBJECTION 10

The Employer told employees to report to management about employees soliciting authorization cards, "bothering" them about the Union, or engaging in protected activity.

DISCUSSION

During the course of the hearing, the Petitioner withdrew Objection 10. Accordingly, I have not made a finding concerning this objection.

OBJECTION 11

The Employer prevented employees from voting on Election Day.

The Petitioner asserts that employees were prevented from voting because the election notices did not sufficiently identify the polling locations. In this regard, it asserts that there are actually six conference rooms in the National Science Center, and what was supposed to be a conference room in the Harriman building was actually a classroom. It further argues that employees were not notified of the actual polling sites until the Employer put up its own homemade notices the day before the election.[16]

FACTS

Deely testified that he informed the Board that their Notice of Election posted by the Employer did not contain the correct room numbers for the scheduled January 30 election (Pet. Exh. 1). To correct this oversight, as the Board indicated the Notices could not be corrected in time before the scheduled election, the Petitioner mailed the corrected room numbers for the election to all postdoctoral associates in its January 25 newsletter (Pet. Exh. 12).

On January 23, the Employer in its third email to all postdoctoral associates set forth the corrected room numbers for the January 30 election (Pet. Exh. 4).

On the morning of the election, January 30, the Employer placed a stick-on-notice on every postdoctoral associate's paycheck that confirmed the election would take place on that day and contained the specific room numbers where the voting would take place (Emp. Exh. 5).

[16] The Petitioner, in its posthearing brief, raises for the first time the issue that the Board's election notices were not posted in a timely manner prior to the election. Since this issue was not included as part of the Petitioner's objections filed after the election on February 6, the Board's Case Handling Manual (Sections 11392.2(a)(2) and 11392.5) and the Rules and Regulations (Section 102.69(a) precludes there consideration. Thus, I have not considered this allegation as part of the Petitioner's Objections.

DISCUSSION

Based on the forgoing, and particularly noting that all postdoctoral associates were informed of the correct room numbers in sufficient time prior to the January 30 election (at least 7 and not less then 5 days), I find that this objection has not been substantiated. Moreover, I note that all 70 employees who cast ballots in the election at either the North or South Campus locations had no problem in finding the correct room locations.

Accordingly, I recommend that Objection 11 be overruled.

OBJECTION 12

The Employer maintained a separate list of employees, or took notes, as employees voted in the election.

DISCUSSION

During the course of the hearing, the Petitioner withdrew Objection 12. Accordingly, I have not made a finding concerning this objection.

OBJECTION 13

The Employer threatened to have employees and/or union agents arrested in or near the workplace, in such a manner as to interfere with employees' rights to organize and support the Union.

DISCUSSION

The Petitioner withdrew the portion of objection 13 that states "Threatened to have employees" arrested in or near the workplace.

The Petitioner is relying on the facts previously discussed in Objection 1 to support the remaining portion of the objection. Based on my finding concerning Objection 1, I recommend that Objection 13 be overruled.

OBJECTION 14

The Employer promoted or acquiesced in the illegal or coercive activity of a third party directed against unionization.

The Petitioner asserts that the Employer allowed and endorsed administrators from UB to lead its campaign and the actions of Scuto created the impression that UB was the Employer. It further alleges that the Employer allowed and endorsed the Postdoctoral Association to participate in the Employer's antiunion campaign.

FACTS

Scuto testified that the first contact she ever had with Bulitta was the receipt of two emails inviting her to participate in town hall meeting sessions to discuss the pros and cons of unionization in front of faculty, staff, and postdoctoral associates' eligible to vote in the election. It was not until January 21, the date of the first town hall meeting, that Scuto first met Bulitta in person. Prior to the receipt of the emails on or about January 13 and 17, and the first town hall meeting on January 21, Scuto had never discussed the union campaign with Bulitta or any other official of the Postdoctoral Association (Pet. Exh. 7 and Emp. Exh. 1).

Bulitta testified that the Postdoctoral Association took all precautions not to take a position about the election and merely organized the town hall meetings to serve as an information forum for all postdoctoral associates to receive the presentations of both Employer and union representatives. Bulitta also confirmed that he had never met Scuto before the January 21 town hall meeting and neither he nor any official of the Postdoctoral Association had any meetings or discussions about the union campaign with Scuto or any other Employer representative prior to January 21. Likewise, Bulitta testified that no representatives of UB or the Employer were involved in researching, organizing, or putting together the information that the Postdoctoral Association distributed to postdoctoral associates in advance of the town hall meetings (Pet. Exh. 10). Likewise, neither Bulitta nor the Postdoctoral Association was involved in the development or dissemination of the Postdoctoral Scholars policy statement that was created on December 3, 2008, a period prior to the filing of the representation petitions in the subject case. Rather, Dr. Marilyn Morris, the associate dean of the Graduate School, Office of Postdoctoral Scholars, coordinated the creation and distribution of the policy statement with limited editing and input from the Postdoctoral Association and the Employer.

DISCUSSION

Based on the forgoing, I find that the Employer did not coordinate, endorse, or allow administrators from UB or the Postdoctoral Association to lead the campaign against the Union. In fact, the emails distributed to the postdoctoral associates in January 2009 prior to the scheduled election, all clearly state that the Research Foundation (RF) was the Employer rather than UB. Both Scuto and Bulitta credibly testified that they had no contact by telephone or personal meetings to discuss the union campaign prior to their email exchange on or about January 13 or 17, and their first face to face meeting on January 21.

Under these circumstances, and particularly noting that the Petitioner's allegations in this objection are based primarily on speculation without concrete evidence being presented, I find that the underpinnings of this objection have not been sustained. Accordingly, I recommend that Objection 14 be overruled.

OBJECTION 15

The Employer engaged in disruptive and disorderly conduct and such conditions were permitted at the polling area.

DISCUSSION

During the course of the hearing, the Petitioner withdrew Objection 15. Accordingly, I have not made a finding concerning this objection.

CONCLUSIONS AND RECOMMENDATIONS TO THE BOARD

Based on my findings and conclusions above, I recommend that the Board overrule all of the Petitioner's objections that were not withdrawn during the course of the hearing. Further, I recommend that the results of the election be sustained establishing that the Petitioner did not receive a majority of the ballots cast.[17]

Dated, Washington, D.C. April 24, 2009

[17] Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, within 14 days from the date of issuance of this Recommended Decision, either party may file with the Board in Washington D.C. an original and eight copies of exceptions thereto. Exceptions must be received by the Board in Washington by May 8, 2009. Immediately upon the filing of such exceptions, the party filing same shall serve a copy upon the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may adopt this Recommended Decision.