

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ASHLAND NURSING & REHABILITATION CENTER¹
Employer

and

Case 5-RC-16580

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 400
Petitioner

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ADMINISTRATIVE LAW JUDGE'S REPORT AND RECOMMENDATIONS ON OBJECTIONS

Procedural Background

The Petitioner, Local 400 of the United Food and Commercial Workers International Union, filed a petition to represent employees at the Employer, Ashland Nursing and Rehabilitation Center, on September 21, 2010. Pursuant to a Stipulated Election Agreement, the Board conducted a secret-ballot election at the Ashland Nursing and Rehabilitation Center on November 3, 2010 in a bargaining unit described as, "All regular full-time and part-time CNAs (certified nursing assistants), restorative aides, activity aides and maintenance employees: Excluding all RNs, dietary employees, office clerical employees, confidential employees, and guards and supervisors as defined in the Act."

Thirty-one votes were cast for the Petitioner; 28 were cast against it. There was one challenged ballot. On November 10, the Employer filed timely objections to conduct affecting the result of the election. The Employer's first objection is that the Union's campaign was based in whole or in substantial part on unlawful appeals to racial prejudice. The bargaining unit is approximately 73% African-American. As an example of alleged appeals to racial prejudice, the Employer in its objections accuses the Union of circulating an endorsement from a local NAACP chapter without revealing that the chapter's board included an individual who was on the

¹ The correct identity of the employer and thus the proper caption for this case is somewhat confusing. At hearing, the employer's counsel represented that Ashland Nursing & Rehabilitation Center is the appropriate employer, rather than Consulate Health Care. For purposes of this case only, I accept that representation. However, this record shows that Consulate Health Care provides Ashland Nursing & Rehabilitation Center and other nursing homes with management services, including management of its human resources and labor relations matters. The executive directors of the nursing homes receiving such management services appear to move freely between one such home and another.

Union's payroll. However, in the hearing before this judge, the Employer focused almost exclusively on statements made by King Salim Khalfani, the Executive Director of the Virginia State Conference NAACP months prior to the critical period and what it contends were the persistent and lingering effects of those statements.

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The second objection is that the Union spread false rumors among employees on Election Day that the Board agent (and/or the Employer) was seeking to deny employees their right to a secret ballot election by falsely characterizing an innocent error on the part of the Board agent. At hearing and in its brief, the Employer appears to have abandoned this objection.

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The Regional Director mandated that a hearing be held on the issues raised by Objections 1 and 2.² However, the Regional Director specifically stated that he would consider only that alleged interference that occurred during the critical period, September 21 through November 3, 2010. I conducted a hearing in Richmond, Virginia in this matter on December 15, and 16, 2010.³

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I provided the parties 13 days to file briefs, which I have read and considered.⁴

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The issues and material facts bearing on the Employer's objections

The Employer's principal objection to conduct affecting the election involves the conduct of King Salim Khalfani, the Executive Director of the Virginia State Conference NAACP, occurring months before the representation petition was filed and what it terms the lingering effects of Khalfani's activities up through the election. As to the latter, the Employer introduced testimony intending to show that unidentified employees were repeating the allegations made by Khalfani throughout the critical period. Finally, the Employer alleges that a fair election was also impossible because in the context of these allegations, the Union solicited an endorsement from the Hanover County branch of the NAACP which the Union mailed to all unit employees within a week of the election.

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With regard to Mr. Khalfani, the Employer argues that the Union should be held responsible for the statements that he made because of the close relationship between the Virginia State Conference NAACP and Local 400 and the involvement of Kenneth Pickard in both organizations and in the Union's organizing drive. It is not clear as to whether the Employer contends that Khalfani is or was an agent of the Union within the meaning of the Act.

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One of the first hurdles for the Employer is the Board's long-held rule that generally only activity within the critical period may provide a basis for overturning election results, *Ideal Electric & Manufacturing Co.*, 134 NLRB 1275 (1961). A second hurdle is that the Union or individuals who are clearly its agents engaged in none of the alleged objectionable conduct, except for distributing the letter from the Hanover County NAACP.

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² The Employer also made a third objection that the election was tainted by improper pro-union supervisor conduct. The Regional Director did not order a hearing on this objection and no evidence in this regard was introduced into the record before me.

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³ Tr. 11 at line 24 should read, "critical period," rather than "criminal hearing."

⁴ I am receiving, *sua sponte*, into the record as Judge's exhibit 1, a December 23, 2010 letter from Union counsel and four attached emails dated May 25, May 25, May 26 and May 27, 2010.

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While there are cases in which the Board has sustained objections based on conduct occurring prior to the critical period and in which it has held a party responsible for third-party conduct, these cases are exceptions to the general rule. I conclude that the facts of this case do not warrant departing from the *Ideal Electric* rule or the Board's general rule finding that pro-union employees are not agents of the Union.

The events leading up to King Salim Khalfani's allegations

Six employees were required to empty their purses for inspection in February 2010⁵

Ashland Nursing and Rehabilitation Center is a 190 bed skilled nursing facility located just north of Richmond, Virginia. The nursing staff at this facility works around the clock in three shifts.

In February 2010, Carmen Sanderson, an African-American certified nursing assistant (CNA), alleged that \$200-\$250 had been stolen from her purse. Nancy Taylor, a Caucasian LPN/shift supervisor, and Levita Page, an African-American charge nurse, paged six CNAs, five of whom were African-American and one who is Caucasian, and required them to empty their purses for inspection of the contents. One employee was also required to remove her shoes and one or two others were required to remove outer garments, such as jackets or sweatshirts.

The response by Taylor and Page is apparently contrary to the Employer's policies and the two were suspended and later terminated, apparently as a result of the February incident. Charles Nelson, who at the time was Ashland's Executive Director, met with the 6 employees (2 LPNs and 4 CNAs) who had been searched and apologized to them.

Some or all of the six employees contacted King Salim Khalfani, the Executive Director of the Virginia State Conference NAACP. Khalfani wrote to the Employer's Executive Director, Charles Nelson, on April 22, 2010, stating that the six employees, whom he called "the Ashland Six," were ordered to remove their shoes, jackets and to dump everything out (assumedly from their purses) at a nurses' station in front of residents, visitors and other staff. He also alleged that only African American employees were targeted; that a white LPN was not searched. Khalfani's letter also stated that on snowy days these employees were told they could not leave the facility and were told to get some blankets and to sleep on the floor.

Attorney Sharon Goodwyn from the Hunton and Williams law firm called Khalfani on behalf of the Employer on three occasions asking to speak with him about his April 22, 2010 letter. Khalfani did not return her telephone calls.

Khalfani accuses the Employer of racial discrimination and treating its employees like slaves

In early May, Khalfani held a press conference. At this press conference some or all of the six employees, referred to as "the Ashland Six," alleged that they were targeted because of their skin color, publicly and illegally strip-searched, ridiculed and later harassed. Some or all also claimed that on snow days they were told that they could not leave the facility, were told to get some blankets and sleep on the floor, and had to eat out of snack machines because meals

⁵ There is not any first-hand evidence in this record as to what transpired in February 2010. Rather, I take at face value the testimony of Debra Mason, the vice-president of Consulate Management Company, who investigated the incident in late March 2010.

were not provided. Khalfani stated at the press conference that, "human beings should not be treated like chattel enslaved captives. What we have here is a cesspool of inhumanity that needs to be told and fixed."

5 On May 10, Khalfani sent an email to three of the employer's employees stating, "my folks from the Labor Union Local 400 asked if you could meet sometime on Sunday? Antoinette can you get a consensus from the other ladies?"⁶

10 *The Richmond Voice* of May 12-18, 2010, Employer exhibit 4, reported the aforementioned allegations of the nurses at the press conference and Khalfani's statements. At least six copies of this edition of the paper were circulating at the employer's facility.

15 Khalfani repeated his assertion that Ashland's employees (or at least the African-American employees) had been treated like chattel and slaves on several television and radio shows broadcast in the Richmond area, apparently in the May-June timeframe.

20 In June 2010, a publication of radio station WCLM, *Heart and Soul of the City*, carried a column in which statements attributed to Khalfani asserted that six African-American employees of Ashland had been strip-searched, that the Ashland Six were not allowed to leave the nursing home on winter snow days and were told to grab blankets and sleep on the floor. The column ended by stating that, "human beings should not be treated like chattel enslaved captives."

25 Kenneth Pinkard, who is a vice-president of Local 400 and is also on the executive board of the Virginia State Conference of the NAACP met with Khalfani and some or all of the so-called "Ashland Six." One of them, Antoinette Patron, appears to have been the principal distributor of union authorization cards. She also appears to have assisted the Union in gathering other information for its organizing campaign. In June the six employees retained an attorney and, so far as this record shows, Khalfani had no further involvement with respect to their grievances or to Local 400's efforts to organize the employer.

30 *Conduct During the Critical Period: September 21 to November 3, 2010.*

35 Ken Pickard a vice-president of Local 400, is also one of 32 members of the Virginia NAACP's State Conference's executive board and chairperson of its Labor and Industry committee. On October 27, 2010, at his request, Elizabeth Waddy, the President of the Hanover County Chapter of the NAACP, who is also on the executive board of the State Conference, wrote a 2-line letter to Ashland unit employees encouraging them to vote in favor of the Petitioner. This letter did not give any reason for the endorsement. The Union sent the October 27 letter to every person on the *Excelsior* list.

40 The Employer alleges this is objectionable because the NAACP did not reveal the fact that Ken Pickard is an official of Local 400. It also alleges that by sending this letter, the Union was reminding the employees of the racial hostilities at the core of the Union's organizing campaign.

45 Board law establishes that the October 27, 2010 letter does not come anywhere near providing a basis for sustaining the employer's objections. A racial remark involving the employer-employee relationship must be so inflammatory as to make a fair election impossible

50 ⁶ The Antoinette addressed in the email is Antoinette Patron, one of the six employees who had to empty her purse in February.

in order to find it objectionable, *Coca-Cola Bottling Co*, 273 NLRB 444, 445 (1984). A two-line letter telling employees to vote in favor of the Union does not come close to meeting this standard, see *Shepherd Tissue, Inc.*, 326 NLRB 369, 374 (1998).⁷

5 There is no evidence to support the Employer's assertion that the Union's organizing campaign was largely predicted on inflaming racial hostility. In fact, there is little evidence in this record regarding what the Union said or published during the campaign. The Employer's argument is that everything said by Mr. Khalfani is attributable to the Union and that it poisoned the atmosphere so much that a fair election was impossible. I reject this argument.

10 First of all, Khalfani's statements were made months in advance of the critical period. The Employer had ample opportunity to acquaint employees with the truth, or at least its version of what had transpired with regard to the so-called Ashland Six and the treatment of employees during the 2009-10 snow storms. The Employer not only had the opportunity to set the record straight, it availed itself of this opportunity by holding 6 meetings for each shift (18 total) during the critical period. Thus, employees had ample opportunity to decide what they believed and to vote on the basis on the information they received.

15 The only other alleged objectionable conduct possibly occurring within the critical period on this record is that unnamed persons were spreading rumors to the effect that employees should vote in favor of the petitioner to prevent employees from being strip searched, being compelled to stay at the facility in bad weather and work in slave-like conditions.⁸ Such statements by unidentified individuals are not a valid basis for sustaining the Employer's objection, *Brightview Care Center*, 292 NLRB 352 (1989).

20 The testimony supporting the employer's assertions in the regard was given by three individuals, Phyllis Wilson, a CNA (bargaining unit member) who works on the 7:00 a.m. to 3:00 p.m. shift, and who was the Employer's election observer, Gregory Ashley, the Executive Director of Ashland Nursing and Rehabilitation Center, and Donna Howard, the Employer's Director of Dietary Services.⁹

25 Wilson testified as follows at Tr. 109-110:

30 Q. In the period leading up to the election, tell us whether you've heard other CNAs discussing the article in Exhibit 4 from time to time.

35 A. Yes, sir.

 Q. Tell the Judge some of the things that you've heard people discussing about the article?

40 ⁷ For purposes of this decision I find that Elizabeth Waddy was an agent of Local 400 in writing the letter at Mr. Pinkard's request.

 On the afternoon of November 2, the employer posted a notice, Union Exhibit 1, by the employee time clock, in each of the nursing units and in the employee breakroom identifying Kenneth Pickard as a vice president of Local 400 and labor chairperson of the Hanover branch of the NAACP. Employees who may have voted but who may not have worked on November 2, and/or November 3, may not have had the opportunity to see this notice.

45 ⁸ The Union repeated some of these allegations, such as the strip-searching, in internet postings after the election, Employer exhibit 13 and 14. What transpired after the election has no bearing on whether the employer's objections should be sustained or overruled, *Mountaineer Bolt*, 300 NLRB 667 (1990).

50 ⁹ Howard does not supervise bargaining unit employees.

A. They were saying that it's a shame that people are actually saying that we're being treated like slaves. A lot of them was very negative about the situation, but then there were some that was positive about it, and they was like, well, we need to make a difference because we shouldn't be treated like slaves.

5 Q. Will you tell the Judge whether you ever heard complaints from employees -- during the --

COURT REPORTER: Could you repeat that? I'm sorry.

MR. NAUGHTON: Sure.

10 Q. BY MR. NAUGHTON: Tell the Judge if you heard any comments from CNAs during the time leading up to the election about employees supposedly being strip-searched by management.

A. Yes, sir.

Q. Tell the Judge what you heard.

15 A. I heard that somebody had lost \$200, and that some nurses all got together and stated that they had to be strip-searched to so where the \$200 went, and they strip-searched all the black CNAs, but there was one lady that they didn't strip search who was white.

20 Q. When employees talked about the Richmond Voice article, Exhibit 4, and talked about things like slavery conditions and strip searching, what did some of them say they needed to do because of the existence of those conditions?

A. Well, they said they were going to call the NAACP because it was -- it was the sisters that were being mistreated, and they said they were going to get the Union in so it would be fair for everybody.

25 It is important to note that Wilson did not testify to the identity of any of the persons from whom she heard these statements and thus they cannot be attributed to the Union. Moreover, it is unclear what Wilson meant in terms of "the time leading up to the election." Thus her testimony above could relate to comments she heard well before the beginning of the critical period on September 21. Indeed, her testimony that she heard employees talk about calling the NAACP suggests that Wilson was testifying in part about comments she heard before the *Richmond Voice* article was published. Anyone who read the *Richmond Voice* article would have been aware that the "Ashland Six" had already called the NAACP.

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35 At Tr. 112-13, Wilson answered similar questions pertaining to "the weeks leading up to the election." Even assuming, that she meant that she heard these comments during the critical period she did not identify any of the persons from whom she heard such rumors.¹⁰

40 Donna Howard's testimony about the rumors she heard is similarly unspecific as to the identity of the speakers and, with one exception, the time period in which they were made, Tr. 197-199, 201-02.¹¹ Howard testified that:

45 ¹⁰ Wilson also testified that she visited the Facebook site of Marcia Walker, one of the employees who passed out authorization cards for the Union. On Facebook, Walker apparently alleged that the Employer was "firing all the sisters." Even assuming that there was no truth to this statement, or that African-American employees had been discharged, but not discriminatorily, the Employer has made no showing that Walker was an agent of the Union, *Cornell Forge Co.*, 339 NLRB 733 (2003).

50 ¹¹ The employer's counsel phrased his questions to Donna Howard both in terms of "the period between the time the Union filed for an election and the election itself," and "the period

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I did hear them talking about the slave-like conditions during the period of the election. Within that two-week [time] frame of the election, they still were. Because the thing was, was that I believe different CNA's were trying to convince each other one way or the other, and the one thing that kept coming up was the slave-like conditions and the Ashland 6.

Tr. 202.

Ashley testified that after he became executive director on October 4, he conducted 18 meetings with employees (6 per shift) in order to encourage them not to vote for union representation. At transcript page 124, Ashley testified that he heard the following complaints from employees:

A. Well, they explained to me that prior to me coming there, that employees were subject to strip searches and other outrageous treatment during weather periods.

Q. What were some of the allegations about outrageous treatment during bad weather that you heard?

A. They were forced to lay on the floor, that they weren't offered any beds, and they were told they couldn't leave the building, couldn't go home, things of that nature. Now, there was some disagreement. Not everybody agreed with that. But there was a contingency of employees that would state those kinds of things.

Q. What, if anything, did you hear about eating arrangements during storm periods?

A. There were some employees that indicated that the facility didn't provide them any meals during the storm periods.

Q. What did they say they were forced to do in those circumstances?

A. Eat out of the vending machines.¹²

Ashley, like Wilson, did not identify the employees making these comments. Thus, they cannot be attributed to the Union. These allegations never appeared in union campaign literature. Moreover, through Ashley, the Employer had ample opportunity to make an effective reply to the statements regarding strip-searching and other alleged forms of alleged racial discrimination. These were not allegations that were made suddenly on election eve, nor is it clear as to how recurrent or persistent were comments about strip-searching and slave-like treatment. This is another factor in my finding that the employer's objections should be overruled, *Catherine's Inc.*, 316 NLRB 186 (1995); *Coca-Cola Bottling Co.*, 273 NLRB 444 at 448 (1984).¹³

Moreover, it is not clear that the allegations regarding mistreatment during the

(or weeks) leading up to the election." It is not clear to me that Howard was testifying about comments she heard after the Union filed its representation petition or whether she even knows when the petition was filed.

¹² Thus the statement in the Employer's brief at page 6 that, "during the campaign, no employee ever complained that she/he had been strip searched, forced to sleep on the floor or eat out of vending machines..." is inaccurate with regard to having to sleep on the floor or eat out of vending machines.

¹³ In order to convince its employees that Khalfani's May allegations were untrue, the Employer could have pointed out to employees that Khalfani's April 22, 2010 letter to Nelson did not allege that employees were strip-searched.

winter storms were exclusively or even predominantly made as examples of racial prejudice. Charles Nelson did not testify that the complaints he heard on this subject at the meetings he conducted were limited to African-American employees, Tr. 124, 127.¹⁴

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Election Day, November 3, 2010

The Employer appears to have abandoned its contention regarding objectionable conduct during the election in its post-trial brief. However, assuming it has not done so, I find that there is no merit to it. On November 3, 2010, voting was conducted in the training room at Respondent's facility from 6:30-8:30 a.m. and from 2:00 to 4:00 p.m. During the morning voting, the Board Agent challenged the ballot of Kevin Coleman, an African-American maintenance employee. At a debriefing shortly after 8:30 a.m., the Board Agent admitted she had made a mistake in challenging Coleman's ballot, which appeared at the end of the *Excelsior* list. She suggested that his ballot be inserted into the ballot box.

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James Hepner, the Union's director of organizing, initially did not agree. Efforts were made to contact Coleman and have him recast his ballot. After this effort failed, Hepner agreed to the Board Agent's proposal and Coleman's ballot was opened and placed in the ballot box. There is no evidence in this record to support the employer's initial objection, i.e., that the Union created and spread false rumors among employees that the Employer, with the assistance of the Board Agent, was trying to prevent African-American employees from having their vote

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¹⁴ It is also not clear from this record that all the allegations regarding what transpired on snow days were false. Wilson was not present during the second and third shifts and Ashley did not work at Ashland yet. From Donna Howard's testimony, one can only conclude that she was unaware that any of the allegations of mistreatment during snowstorms were true; not that they were completely false.

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The testimony of Charles Nelson, who was Ashland's Executive Director during the storms in question, is that available beds in the facility were made available to staff. He did not testify that there was an available bed for every staff member who stayed at the facility. His testimony that staff could bring in sleeping bags or use any available mattress leaves open the possibility that some staff members did end up sleeping on the floor, Tr. 212. It is also possible that some employees did in fact encounter working conditions that they subjectively considered, "slave-like."

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In any event, the Board held in *Midland Life Insurance Co.*, 263 NLRB 127 (1982) that it would not set aside election results on the basis of misleading campaign statements and would not probe into the truth or falsity of such statements.

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The United States Court of Appeals for the Sixth Circuit has applied a somewhat different test than the Board in deciding this kind of controversy. The factors it considers are 1) the timing of the misrepresentation—in this case months before the critical period; 2) whether the employer was aware of the misrepresentation and had an opportunity to respond; 3) the extent of the misrepresentation; 4) whether the source of the misrepresentation was identified; and 5) whether there is evidence that employees "actually were affected" by the misrepresentation. The court also considers the closeness of the election, see the discussion of Sixth Circuit law in *Gormac Custom Mfg.*, 335 NLRB 1192 (2001).

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If I were to apply this test I would still overrule the employer's objections. While the election was close and misrepresentations about strip-searching may have been considerable, the employer had months to respond to them, including during its multiple meetings with employees during the critical period. There is absolutely no evidence that employees who voted for union representation would not have done so but for the allegations regarding strip-searching and slave-like treatment.

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remain secret.

The cases relied upon by the Employer are easily distinguishable

5 I find that the cases relied upon by the Employer are either distinguishable from the instant case or wholly irrelevant, or both. I conclude there is no precedent which supports the Employer's position in this case. With regard to the some of the cases cited by the Employer, I note the following:

10 In *Zartic, Inc.*, 315 NLRB 495 (1994), the Board sustained the objections of the Employer to an election in which the Union had prevailed. The case is easily distinguishable from the instant case in that the Union distributed leaflets within the critical period, only a week or ten days before the election, in which it falsely connected the Employer with the Ku Klux Klan in an already highly-charged atmosphere of ethnic tension. It is clear from the portion of the Board's decision at page 497-98 that the Union's repeated use of an inflammatory audiotape (in which a management official had recounted unflattering comments about Hispanics) was not in of itself
15 enough to overturn the election results. The Board relied on the leaflets which were "inflammatory, gratuitous, and irrelevant to any bona fide campaign issue."

20 *Columbia Tanning Corporation*, 238 NLRB 899 (1978) concerned a letter sent to 26 Greek employees the day before the election, in Greek, which suggested directly or indirectly that the NLRB endorsed the Union. This case has no relevance to the endorsement of the Petitioner in this case by the Hanover County branch of the NAACP.

25 In *Pepsi-Cola Bottling Co.*, 291 NLRB 578 (1988), the Board did in fact overturn the election results on the basis on the activities of pro-union employees. However, the Board did not do so on the grounds that these employees were agents of the Union. Indeed, the Board found that the employees were *not* acting as agents of the Union. Rather, the Board found that these employees' activities, electioneering while the election was in progress in a no-electioneering area, destroyed the laboratory conditions of the election. *Pepsi-Cola* has no
30 relevance to the instant matter.

35 *M & M Supermarkets v. NLRB*, 818 F.2d 1567 (11th Cir. 1987) involved anti-Semitic remarks made by an identifiable, outspoken advocate of the union well within the critical period. These remarks were far more inflammatory than those made by Khalfani. They were an attack on Jews generally, worthy of Joseph Goebbels, and were not limited to alleged conduct by the employer related to the workplace.

40 The Board has declined to hold a union responsible for isolated remarks made by unidentified employees, apparently in the course of casual conversations among employees, particularly when these remarks have been made before and after the beginning of the union organizing campaign, and were possibly made by supporters and opponents of the union, *Brightview Care Center*, 292 NLRB 352 (1989).

Conclusion

45 I recommend that the Employer's Objections to the Petitioner's Alleged Conduct affecting the outcome of the election be overruled and the results of the election be certified.

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RECOMMENDED CERTIFICATION OF RESULTS OF ELECTION

5 It is certified that a majority of the valid ballots have been cast for United Food and
Commercial Worker International Union, Local 400, and that it is the exclusive representative of
the bargaining unit employees. 15

Dated at Washington, D.C. this 3rd day of January 2011.

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Arthur J. Amchan
Administrative Law Judge

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15 If no exceptions are filed within 14 days of this order (no later than January 17, 2011) as
provided by Sec. 102.69 of the Board's Rules and Regulations, the findings, conclusions, and
recommended Order shall, as provided in Sec. 102.69 of the Rules, be adopted by the Board
50 and all objections to them shall be deemed waived for all purposes.