UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

In The Matter Of:	)	
ASHLAND NURSING & REHABILITATION CENTER,	)	
Respondent,	)	**Case No. 5-RC-16580**
and	)	
	)	
UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 400,	)	
Petitioner.	)	
	)	

PETITIONER'S BRIEF IN OPPOSITION TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S REPORT AND RECOMMENDATIONS ON RESPONDENT'S OBJECTIONS

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I. INTRODUCTION

The Respondent brings to the Board ten different exceptions to Administrative Law Judge Arthur Amchan's well-reasoned decision to reject Ashland Nursing & Rehabilitation Center's ("Employer" or "Ashland") Objections to a presumptively valid Board-conducted RC election and to certify United Food and Commercial Workers, Local 400 ("Union" or "Local 400") as the exclusive representative of the workers at the Employer's facility. These exceptions must fail in their entirety and the Union urges the Board to deny the Employer's request for oral argument to avoid further delaying the Employer's bargaining obligation. At the heart of the Employer's exceptions is the unsubstantiated assertion that Union and one of its allies, the Virginia NAACP, made statements during the campaign—prior to and during the critical period—that had no purpose except to inflame the racial feelings of the voters in the election. As the Union shows below, this is completely untrue. The statements on which the Employer focuses were nothing more than complaints—sometimes boldly stated—about unfair working

conditions at the Employer's facility. Board law decisively demonstrates that these sorts of complaints are commonplace in a union organizing campaign and are certainly not grounds for overturning a presumptively valid Board-conducted election.

Moreover, the Employer has asserted with little more than conclusory allegations that both the Virginia NAACP and certain Ashland employees were "agents" of the Union for the purpose of statements the Employer alleges amounted to objectionable conduct. The Board should reject the Employer's assertions with regard to the relationships between the Union, the Virginia NAACP and the Ashland Employees, since the Employer has provided almost no evidence to substantiate those claims. Furthermore, with regard to the Virginia NAACP, the ALJ correctly pointed out that the Employer failed during the objections hearing and in its post-hearing brief to elaborate any legal theory of agency under which it would tie the Virginia NAACP to the Union.

When viewed in light of the record, it is clear that all of the Employer's objections are totally without merit. In fact, the Employer had a day and a half to put on largely unrebutted testimony and evidence at the objections hearing in this case and it put on no evidence that comes anywhere close to demonstrating that a free and fair election was impossible. In that regard, it is also clear from the record that the Employer is simply using the Board's processes to delay its bargaining obligation. As the Union demonstrates below, the Employer has also infringed on the Union's First Amendment right to associate by burdening the Union's ally, the Virginia NAACP, with overbroad and irrelevant subpoenas, which were calculated to impose a large cost on the NAACP because of its support for the Ashland employees' desire to organize, and to therefore chill the NAACP from continuing with that perfectly legal and appropriate relationship.

Because the Employer has failed to carry its heavy burden, the Board should reject the Employer's exceptions and certify the Union without further delay, including the further delay that would be caused by holding oral argument.

II. STATEMENT OF FACTS

The Employer's objections exclusively stem from employee complaints about mistreatment beginning during the snowstorm that struck the Eastern Seaboard in February 2010. The Ashland employees—the overwhelming majority of whom are African American—complained that they were forced to spend the night on the floor of the Employer's facility and forced to feed themselves by purchasing food from vending machines. (Tr. 124, 127, 166)(EX. 4)(EX. 2).[1] After the storm, another situation arose in which an employee alleged that money had been stolen from her purse. (EX. 4). After the employee made that allegation, supervisors of the Employer required employees working on the shift to remove—or strip—certain articles of clothing and submit to a search of their persons and their belongings to determine whether they had taken the money. (Tr. 171)(EX. 4). No money was ever recovered and the Employer terminated the supervisors involved, admitting that they had engaged in a breach of employee privacy. (Tr. 171). Ms. Debra Mason, a human resources representative for the Employer, testified that employees "were visibly shaken by what happened. They were upset by what had happened." (Tr. 169). Ms. Mason testified that she personally apologized for the searches and called them a violation of Employer policy, effectively admitting that the searches were unfair and upsetting to the Ashland employees. (Tr. 172-173).

Employees were understandably disturbed and angered by these actions. They complained that the actions were violations of their basic rights, and indicated a pattern of racial

[1] Joint Exhibits are designated as ("JX. __"). Union Exhibits are designated as ("UX. __"). Company Exhibits are designated as ("EX. __"). Transcript references are designated as ("Tr.__").

discrimination in their workplace. (EX. 4). In the ensuing months, some Ashland employees took steps to remedy this unfair treatment. First, the employees lodged a complaint with their local chapter of the National Association for the Advancement of Colored People (the "NAACP"). (Tr. 64). The local chapter of the NAACP then reached out to the Virginia NAACP, which assisted the employees in filing EEOC charges against the employer with regard to the employees' allegations of workplace discrimination. (Tr. 57, 77-78, 99). To support the Ashland employees, the Virginia NAACP also organized media outreach, which included press releases, print media, radio, and television interviews regarding the unfair treatment. (Tr. 46-50)(EX. 4)(EX. 6)(EX. 17)(EX. 18) (EX. 19). The Employer produced no evidence that the Union was involved in any of this media outreach, that the Union assisted in filing the EEOC complaints, or that the Union urged the Virginia NAACP to become involved.

The NAACP, as it has done throughout its distinguished history, sought to zealously defend the rights of the African American Ashland employees. In particular, the Executive Director of the Virginia State Conference of the NAACP, Mr. King Salim Khalfani, was an outspoken, public critic of the Employer's mistreatment of these employees. He sent a letter to the Employer detailing the employees' allegations. (EX. 2). It was Mr. Khalfani's words in the *Richmond Voice* newspaper on which the Employer primarily focused during the objections hearing and on which it now focuses its exceptions. These comments were published on May 12, 2010, a time well outside the critical period. (EX. 4). The Employer's witnesses testified that the *Richmond Voice* newspaper circulated amongst employees, and that employees discussed the article. (Tr. 109). Yet, the Employer did not put on any evidence as to who circulated the article during the critical period or what effect the article had on the Ashland employees decision

to vote for or against the Union, and there was no evidence it was circulated by Union agents. (ALJ Rpt. at 6-7).

Mr. Khalfani testified that the Union's contributions to the Virginia NAACP made up a small fraction of the organization's operating budget. (Tr. 101-102)(EX. 15). He testified that the Union does not pay him for his activities. (Tr. 84). He also testified that the Union did not at any time direct him to make any particular statement or to take any particular position with regard to Ashland employees. (Tr. 100-101). To the contrary, he testified that the Virginia NAACP's relationship with the Union stems from the NAACP's belief in the right of workers to organize and bargain collectively. (Tr. 73-74).

Meanwhile, the record and the ALJ's decision reflect that at some point (again, months prior to the critical period), Union executive board member Ken Pinkard learned of the complaints of unfair treatment by employees at Ashland. Mr. Pinkard is also a member of the board of the Virginia NAACP. (Tr. 62-63). Around May 2010, Mr. Pinkard approached the employees at the suggestion of Mr. Khalfani about initiating a union organizing drive at Ashland. (Tr. 64-65). The NAACP encouraged the Ashland employees to attend a Union meeting. (Tr. 42). Mr. Khalfani, however, testified that he does not participate in union organizing. (Tr. 74, 76). Mr. Khalfani further testified that the NAACP's involvement with the employees at Ashland ended around June 30, 2010, when the employees retained counsel to assist them with their legal claims regarding workplace discrimination at Ashland. (Tr. 77-78). This, too, was months prior to September 2010, the month in which the Union filed its Petition.

As the ALJ pointed out, the Employer admits to holding eighteen captive audience meetings during the critical period, where it campaigned against the Union and at which it would have had ample time to respond to its employees' many complaints about workplace fairness.

(Tr. 152) (ALJ Rpt. at 5). Employer witnesses asserted that employees frequently raised complaints of workplace discrimination during the critical period; but, witnesses mentioned only one complaining employee, Marcia Walker, by name. (Tr. 111-112, 128). Ms. Donna Howard, a dietary supervisor,[2] stated that alleged "rumors" were circulating about unfair treatment and that the *Richmond Voice* article circulated at the workplace during the critical period, but she did not name a single employee, Union representative, NAACP representative or any other representative who might have been responsible for those alleged "rumors" or circulating the article. (Tr. 197-203). During the critical period, three professional Union staff members were involved with organizing the employees—Jim Hepner, Loyd Baker, and Eric Schlein. (Tr. 232). Mr. Hepner oversaw the Union's organizing efforts and managed the other two Union professional staff who worked to organize employees at Ashland. (Tr. 222). Among other things, these staff members held organizing committee meetings, where employees were invited to learn about different beneficial aspects of unionization. (Tr. 226). There is no evidence that the Union sent out any materials whatsoever regarding discrimination. In fact, there is no evidence on the record that Mr. Hepner had any contact with the NAACP at all or that he had even seen the *Richmond Voice* article prior to the instant objections proceeding. (Tr. 127).

On or about October 27, 2010, the Union—through Ken Pinkard—solicited and received the endorsement of the Hanover County NAACP. (Tr. 21-27). (EX. 1). The Union mailed this community-group endorsement to all Ashland employees listed on the *Excelsior* list produced by the Employer. (Tr. 74). The endorsement read, in its entirety, as follows: "The Hanover County Branch of the NAACP supports the UFCW Local 400 in representing the Caregivers at Consulate Health Care, Ashland, Virginia. VOTE YES!!" (EX. 1). It was signed by President

[2] It is worth noting that the employees Ms. Howard superviseed, dietary employees, were not included in the unit voting in the election.

Elizabeth Waddy of the Hanover County Branch NAACP. (EX. 1). This was the only communication between the Union and any branch of the NAACP during the critical period and, as the ALJ found, the endorsement "letter does not come anywhere near providing a basis for sustaining the employer's objections." (Tr. 18) (ALJ Rpt. at 4).

The final vote tally was 31 to 28 in favor of the Union with a single challenged ballot. The Employer filed objections and Administrative Law Judge Arthur Amchan issued his Report and Recommendations on those objections on January 3, 2011. Among other things, the ALJ held that the Employer produced "no evidence to support [its] assertion that the Union's organizing campaign was largely predicated on inflaming racial hostility." (ALJ Rpt. at 5).

III. ANALYSIS

In the present case, the Employer excepts to the ALJ's decision on ten different grounds, which the Union addresses in detail below. In its exceptions, the Employer attempts to build a bridge too far, tying together a string of flimsy assertions that failed to persuade the ALJ and should similarly be dismissed by this Board. First, the Employer wrongly asserts that statements made by a spokesman for the Virginia NAACP four months before the Union filed a petition made a fair election impossible. Not only were these statements made far outside the critical period but they were also statements regarding unfair working conditions, which were clearly not intended "to inflame the racial feelings of voters in the election." The Employer also provided vague assertions about how those allegedly objectionable statements by the Virginia NAACP were repeated by employees during the critical period, providing no evidence that the Union had anything to do with these statements. Those statements also were not calculated "to inflame the racial feelings of voters in the election" and—as the ALJ held—the Employer provided no evidence that the Union encouraged, authorized, or otherwise should be held responsible for

those statements. The Employer further wrongly asserts that the Virginia NAACP was an agent of the Union when it made these completely acceptable statements. Yet, the evidence—or lack thereof—on the record demonstrates to the contrary that the Virginia NAACP acts independently of the Union and controls its own messages and affairs.

a. The Board Should Dismiss the Employer's Exceptions because they are Employee Complaints about Unfair Working Conditions, which are a Legitimate Part of All Union Elections and, Indeed, a Reason Why Employees Organize

The Employer has not pointed to single statement—by the Union, the Virginia NAACP, employees, or any other party—that qualifies as a statement with "no purpose except to inflame the racial feelings of voters in the election." *Sewell Mfg.*, 138 NLRB 66, 71 (1962). Rather, every one of the statements to which the Employer has referred are complaints about unfair working conditions, which the Board has consistently held to be a normal part of a union organizing campaign. Despite the fact that some of those statements were boldly stated and pertained to allegations of workplace discrimination, they are not grounds for overturning a presumptively valid Board-conducted election.

It is axiomatic that a Board-conducted election is presumptively valid and will not be set aside unless the objecting party proves that "an atmosphere of fear and coercion rendered free choice impossible." *NLRB v. Herbert Halperin Distrib. Corp.*, 826 F.2d 287, 290 (4th Cir. 1987); NLRB, *Hearing Officer's Guide*, at 142. The Employer here must prove "by specific evidence 'not only that improprieties occurred, but also that . . . they materially affected the election results." *Id.* (*citing Beard-Poulan Div. v. NLRB*, 649 F.2d 589, 592 (8th Cir. 1981)). The Fourth Circuit Court of Appeals has called the Employer's task "a heavy burden." *Id.*

The Board scrutinizes alleged appeals to racial prejudice under the following standard:

> What we have said indicates our belief that appeals to racial prejudice on matters unrelated to the election issues or to the union's activities are not mere "prattle" or puffing. They have no place in Board electoral campaigns. They inject an element which is destructive of the very purpose of an election. They create conditions which make impossible a sober, informed exercise of the franchise. The Board does not intend to tolerate as "electoral propaganda" appeals or arguments *which can have no purpose except to inflame the racial feelings of voters in the election*.

Sewell Mfg., 138 NLRB 66, 71 (1962) (emphasis added). In *Sewell*, the Board found that the Employer made an inflammatory appeal to racial prejudice when it distributed propaganda featuring white trade unionists fraternizing with African Americans. *Id.* at 72. Unlike the statements allegedly made here, the Board found that the "photographs and the news articles were not germane *to any legitimate issue* involved in the election . . ." *Id.* (emphasis added).

To the contrary, in *Baltimore Luggage Co.*, the Fourth Circuit Court of Appeals upheld the Board's certification of a result in a case in which the employer alleged that statements made by the NAACP in its endorsement of a union were inflammatory appeals to racial prejudice. *NLRB v. Baltimore Luggage Co.*, 387 F.2d 744, 745 (4th Cir. 1967). The NAACP's statements included descriptions of outrageous acts of violence committed against African Americans in the deep South, far away from where the union election was taking place. *Id.* at 747. Yet, the court refused to hold that these statements were grounds for overturning the election, finding instead that—like the statements in the present case— the NAACP's statements and flyers "addressed themselves to the economic and self-interest of the workers, over ninety percent of whom were [African American]. . ." *Id.*

Since *Baltimore Luggage*, the Board has only overturned elections in circumstances where there were actual appeals to racial prejudice that were extreme in nature.[3] One court

[3] *See, e.g., YKK (U.S.A.), Inc.*, 269 NLRB 82 (1984) (overturning an election where there were "several acts of violence and threats of violence occurred during the critical period" and "the [u]nion also disseminated racially

summarized the Board's jurisprudence as follows: "it appears that the major concern [of the Board and courts with regard to racial issues in union elections] is that workers of one race not be persuaded to vote for or against a Union on the basis of invidious prejudices they might have against individuals of another race." *NLRB v. Sumter Plywood Corp.*, 535 F.2d 917, 924-925 (5th Cir. 1976). The Board and courts have been clear that statements regarding unfair treatment at the workplace are well within the rights of employees, even if those statements are boldly made and/or pertain to racially discriminatory conditions.

For example, the Board refused to overturn an election where a Union representative stated, "[T]he Company had kept blacks down for a long time and now they had a change [sic] to take care of it." *The Coca-Cola/Dr. Pepper Bottling Co. of Memphis*, 273 NLRB 444, 444 (1984). The Union also made other statements with regard to unfair racial treatment, such as referencing "everyone back on [the owner's] plantation," "Martin Luther King," and other race-related comments during the critical period. *Id.* The Board was clear that these comments "simply put these [workplace-related] matters in a historical setting well understood by all, blacks in particular." *Id.* And, the comments "represent[ed] the view that black employee [sic] [had] not been fairly treated because of their race." *Id.*

The Fourth Circuit Court of Appeals came to a similar decision in a case where a union urged a primarily Latino workforce to vote for the union, alleging that the employer had fired

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oriented and inflammatory remarks [regarding the Japanese-owned company] in several of its handbills which made reference to 'Japs' and a 'sneak attack.' In addition, anti-Japanese graffiti appeared on the bathroom walls. Finally, two employees, a union vice president and a steward, wore shirts and work rags printed with the phrases 'Remember Pearl Harbor,' 'Japs Go Home,' 'Japs speak with forked tongue' and 'slant eyes.'"); *Zartic, Inc.*, 315 NLRB 495 (1994) (overturning election in which union falsely accused the employer of giving money to the KKK and near-riot took place at employer's facility as a result of racially charged atmosphere stoked by the union); *NLRB v. Silverman's Men's Wear, Inc.*, 656 F.2d 53 (3d Cir. 1981) (overturning election where union representative called management "stingy jews"); *KI (USA) Corp. v. NLRB*, 35 F.3d 256 (6th Cir. 1994) (overturning election where Union distributed comments of Japanese businessman with no relationship to company calling U.S. workers "lazy," "uneducated," and "half-witted").

Amish workers because "they could pay Latinos less and treat them worse." *NLRB v. Case Farms of North Carolina, Inc.*, 128 F.3d 841, 843 (4th Cir. 1997). The flyer also stated, "They care more about the **chickens** than any of their workers. How are we going to prevent Case Farms from treating us like the Amish?" *Id.* (bold in original). The Board certified the union and the court upheld the Board's decision, holding that the union's statements were not "inflammatory, gratuitous, and irrelevant to any bona fide campaign issue." *Id.* at 848. The Board added that "the appeal was designed to make the employees believe that one group of workers had been fired because the employer could pay another group of employees less and treat that group worse." *Id.*

1. The Richmond Voice Article and Similar Statements by the Virginia NAACP

The May 2010 statements to which the Employer objects are not statements appealing to the racial prejudices of employees but rather are statements regarding unfair working conditions. In the *Richmond Voice* article, Virginia NAACP Executive Director Khalfani states, "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. The Ashland Nursing and Rehabilitation Center has not given these dedicated employees any due process. They have been treated in ways animals wouldn't be treated." (EX. 4). While forcefully expressed, this is not an appeal to racial prejudice. Based on employee accounts, the article describes a number of different instances of unfair treatment at Ashland, including racially discriminatory unfair treatment. (EX. 4). The Employer also supplied evidence that the NAACP put out a press release regarding the unfair treatment and that Mr. Khalfani appeared on radio and television news programs to discuss the unfair treatment of Ashland workers. Again, there were no appeals to racial prejudice in any of this "evidence"—there were only complaints about unfair discriminatory working conditions.

In addition to racial discrimination, the employees quoted in the article stated that they were forced to stay put, to sleep on floors and to eat out of snack machines during the February 2010 winter storm, unfair working conditions in their own right. (Ex. 4). Employees also state that they were forced to submit to an unfair search after a coworker accused the staff of stealing $200. (Ex. 4). Ashland's former director of nursing states in the article that she was undermined in performing her job and that she was "not allowed to communicate with white employees unless another white staff person was present." (Ex. 4). Finally, the article states that Gertha Felix was injured on the job and that the Employer retaliated against her for making previous allegations by refusing her request that a complaint be filed with regard to her injuries. (Ex. 4).

As set forth below, the Employer has provided no evidence that Mr. Khalfani or the Virginia NAACP are agents of the Union in any way. Furthermore, like the statements made by Ms. Walker during the critical period, none of Mr. Khalfani's statements objectively rendered a fair election impossible. Mr. Khalfani certainly portrayed Ashland workers' unfair treatment in stark historical terms, referring to "chattel, enslaved captives." But, this sort of language "simply put[s] these [workplace-related] matters in a historical setting well understood by all, blacks in particular." *See The Coca-Cola/Dr. Pepper Bottling Co. of Memphis*, 273 NLRB 444, 444 (1984). Similarly, Mr. Khalfani's statement that Ashland employees "were treated in ways animals wouldn't be treated" is no different from the union's statement in *Case Farms* that the employer "care[s] more about the **chickens** than any of their workers." *Case Farms of North Carolina, Inc.*, 128 F.3d at 843. And, Mr. Khalfani's statement that workers were denied "due process" by Ashland drives home the point that the workers' complaints were specifically about their working conditions. Certainly, none of these statements rise to the level of those statements made in *Beatrice Grocery Products*, 287 NLRB 302 (1987), where the Board <u>certified</u> the union

despite a union representative's dubious claim that a supervisor had called employees "dumb niggers."

The statements made by the Ashland employees in the article are also not grounds for overturning the election. Aside from their statements regarding unfair discrimination at Ashland, the employees raised a number of other run-of-the-mill complaints about their working conditions during the snowstorm. These unfair working conditions include a search that the Employer's witness admits took place, apologized for, and observed that employees were "visibly shaken" by. They also include an instance of retaliation against an employee for raising previous complaints. Again, these sorts of statements about unfair working conditions are commonplace in a Union election, and neither these employees' statements nor Mr. Khalfani's statements found in the *Richmond Voice* article can accurately be classified as "having no purpose except to inflame the racial feelings of voters in the election." They do not seek to persuade Ashland employees to vote for the Union based on "invidious prejudices they might have against individuals of another race." The statements simply reflect the sentiment that Ashland employees have been unfairly wronged and robbed of human dignity at the workplace. The Ashland employees and the Virginia NAACP were not stoking racial prejudice. They were fighting against discrimination in the workplace. That has never been (and nor should be) grounds for overturning a presumptively valid election.

2. Statements within the Critical Period

The Employer claimed that it would put on "evidence" that certain statements made four months prior to the critical period were repeated by Union agents during the critical period and that Union agents had circulated copies of the *Richmond Voice* article during the critical period, but the record reflects that the Employer's witnesses were conveniently vague with regard to

which employees made statements, naming only Marcia Walker specifically and saying that she stated—temperately—that the Employer was "firing all the sisters." (Tr. 111-112) (ALJ Rpt. at 6-8). Ms. Wilson testified that Ms. Walker urged employees reading her Facebook page to vote for the Union for "fairness" and commented that the Employer's captive audience meetings were "BS." (Tr. 112).[4] Executive Director Greg Ashley also alleged that Ms. Walker stated that "black people were being written up and white people were not being written up." (Tr. 128). Ms. Walker's alleged statements are notable because it takes a good deal of courage for an employee to stand up to her employer during an organizing campaign, but they are otherwise unremarkable insofar as they were allegations of unfair treatment such as this regularly surface during Union campaigns.

Other witnesses, such as Ms. Howard, failed to name any specific employee who complained of unfair discrimination by the employer, referring instead to "rumors" and "employees." (Tr. 197-203). She also failed to specifically name a single person who had allegedly circulated the Richmond Voice article around the workplace during the critical period. (Tr. 197-203). The ALJ noted that she was "unspecific as to the identity of the speakers and, with one exception, the time period in which [the allegedly objectionable statements] were made." (ALJ Rpt. at 6). On the other hand, Employer witness Debra Mason actually admitted that employees had reason to feel violated when she stated that she personally apologized for unfair treatment perpetrated by the Employer. (Tr. 172-173). The Employer presented no evidence that any particular employee or any Union staff circulated the *Richmond Voice* article at any time, let alone during the critical period.

Not a single statement to which the Employer objects amounts to an exhortation "to vote for or against a Union on the basis of invidious prejudices [employees] might have against

[4] The Union notes that the Employer failed to even introduce the Facebook page into evidence.

individuals of another race." *Sumter Plywood Corp.*, 535 F.2d at 924-925. Instead, all of the statements to which the Employer objects are directly related to the unfair treatment of employees at Ashland and employees' desire to achieve better working conditions. Ms. Wilson acknowledged as much when she specifically stated that employee Marcia Walker related all of these problems to "fairness" at the workplace and complained that the Employer was not telling the truth in it captive audience meetings. And, the Employer's executive director stated that Marcia Walker explained to him the unfairness by stating—again, in the most moderate terms—that "black people were being written up and white people were not being written up." (Tr. 128). Along with employee statements about unfair wages, unfair working conditions, or an unsafe workplace, these sorts of statements regarding unfair discriminatory treatment are to be expected in any union organizing campaign. Indeed, it is axiomatic that employees who are content with the way that they are treated are less likely to seek the benefits of unionization in the first place.

b. The Virginia NAACP is not an Agent of the Union and the Employer has Provided no Evidence that would Suggest Otherwise

In *Herbert Halperin Disrtib. Corp.*, 826 F.2d at 290, the court stated that it would accord "less weight" to statements made by parties other than the employer or union. (*citing NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239, 1242 (4th Cir. 1976). The court explained that "third parties are not subject to the deterrent of having an election set aside, and third party statements do not have the institutional force of statements made . . . by the union." *Id.* The court held, "An election will thus be set aside only if 'the election was held in a general atmosphere of confusion, violence, and threats of violence, such as might reasonably be expected to generate anxiety and fear of reprisal, to render impossible a rational expression of choice as to bargaining representation.'" *Id.* (*citing Methodist Home v. NLRB*, 596 F.2d 1173, 1183 (4th Cir. 1979)).

The ALJ in this case correctly noted, "The Board has declined to hold a union responsible for isolated remarks made by unidentified employees . . ." (ALJ Rpt. at 9).

As discussed, the Employer's "evidence" regarding statements and "rumors" within the critical period was impossibly vague. The only employee to whom the Employer referred specifically with regard to statements made during the critical period was Marcia Walker. Regardless of what Ms. Walker actually said, she cannot be held to be an agent of the Union for the same reasons the court held an outspoken union supporter was not an agent of the union in *Herbert Halperin Distrib. Corp.*, 826 F.2d at 291. There, the company presented no evidence that other employees "viewed [the outspoken union supporters] as union representatives authorized to act for the union." *Id.* The court also found that "the evidence shows that the professional union staff was heavily involved in the campaign, and that it, not the employees, signed and distributed the union's literature, conducted the union's meetings, and kept track of the authorization cards." *Id.*

As was the case in *Herbert Halperin*, the Employer has put on no evidence here that any Ashland employees viewed any organizing committee member, let alone Ms. Walker, as "union representatives authorized to act for the union." The Employer only presented evidence that these employees were on the organizing committee, and that certain employees passed out "cards" to "send in to the Union." (Tr. 111). On the other hand, the record reflects that three professional union staff were involved throughout the critical period in the instant case. (Tr. 232). Mr. Hepner testified that the Union professional staff conducted all organizing committee meetings. (Tr. 226). Mr. Hepner also testified that the Union provided no training to organizing committee members. (Tr. 226). The Employer presented no other evidence with regard to the distribution of union literature, tracking of Union authorization cards, or other campaign

functions. As with most of its case, the Employer presents little more than vague assertions with regard to who is a Union agent. It is for this reason that the ALJ correctly rejected the Employer's objections. *See* ALJ Rpt. at 6-7 (recounting the Employer's almost total failure to identify specific employees and circumstances under which the allegedly objectionable statements were made).

Of course, the Employer also points to statements made by the Virginia NAACP—four months prior to the critical period—and the Employer wrongly asserts that the NAACP was an agent of the Union when it made those statements. In addition to the clear acceptability of the statements to which the Employer objects, the Union would also note that the Employer produced no evidence that the NAACP is an agent of the Union, or—as the ALJ pointed out—even a legal theory of agency which might apply to this situation. (ALJ Rpt. at 2). As the court found in *Baltimore Luggage*, the NAACP is simply a proponent of the benefits of unionization, a position that the NAACP and the Union share. *See* 387 F.2d at 748 ("certain [African American] organizations, notably the NAACP, have been preaching unionization to their followers.").

The Employer's "evidence" with regard to the Virginia NAACP's alleged agency relationship with the Union was particularly thin. As Mr. Khalfani testified, the Union's $7,000 worth of contributions made up only a small percentage of the Virginia State Conference of the NAACP's annual budget of $325,000. (Tr. 101-102). Similarly, the Employer asserted that Union executive board member Ken Pinkard's volunteer role as a board member of the NAACP—specifically, labor and employment chair—showed that the Union was able to "control" the Virginia NAACP. But, as Mr. Khalfani testified, Mr. Pinkard is just one of 32 members of the Virginia NAACP board. (Tr. 101). The Union would also note that the Employer presented no evidence that Mr. Pinkard votes as a Union representative when he casts

votes at NAACP board meetings, or that he attends those meetings in anything other than a personal capacity. Mr. Khalfani was also clear that the NAACP does not take instruction from UFCW Local 400 as to the statements it makes or actions it takes. (Tr. 100-101). When viewed in light of these facts, Mr. Khalfani's email referring to his "folks" at the Union is nothing more than a passing reference to the friendly relationship between the Union and the Virginia NAACP, not an indicia of control as the Employer wrongly asserts. (Tr. 42-43)(EX 21).

The Employer also attempts to make something out of the Hanover County NAACP's endorsement letter regarding the Union, which Ms. Waddy noted the Union asked for and received. (Tr. 21). This is the only NAACP statement to which the Employer can connect the Union because the Union asked for the endorsement. However, the endorsement is also completely, undeniably an acceptable campaign tool. There is no case law that stands for the proposition that unions may not accept the endorsement of community groups in general or the NAACP in particular. To the contrary, *Baltimore Luggage* specifically upheld an NAACP endorsement as an unobjectionable campaign tool.

The Union made no attempt to hide its relationship with the NAACP—both organizations are dedicated to human dignity in the workplace and the community as they have been since *Baltimore Luggage* and before—but the evidence (or lack thereof) overwhelmingly demonstrates that the NAACP is not an agent of the Union. Since the Employer cannot show that anyone was acting on behalf the Union except for the Union's own professional staff, its objections must be held to the almost insurmountable standard that "the election was held in a general atmosphere of confusion, violence, and threats of violence, such as might reasonably be expected to generate anxiety and fear of reprisal, to render impossible a rational expression of choice as to bargaining

representation." The foregoing shows that Employer cannot possibly meet this burden on the facts it has presented. As a result, the Board should certify the Union forthwith.

c. The Employer's Specific Exceptions must be Dismissed because the ALJ Carefully Considered the Vague Evidence put forth by the Employer and Applied the Law Correctly

*1. The ALJ correctly held that "**generally** only activity within the critical period may provide a basis for overturning election results"*

The Employer's first objection blatantly misquotes the ALJ's holding with regard to activity occurring outside the critical period. What the ALJ actually wrote was that "**generally** only activity within the critical period may provide a basis for overturning election results." (ALJ Rpt. at 2) (emphasis added). Of course, the Employer (too conveniently) omitted the critical first word "generally" from its objection and, in doing so, completely misrepresented the ALJ's holding. When this omission is corrected and the ALJ's holding is repeated accurately, it is clear that the ALJ stated the existing Board law correctly.

The case cited by the ALJ states the general rule "that the date of filing of the petition rather than the issuance of decision and direction, or of notice of hearing, should be the cutoff time in considering alleged objectionable conduct in contested cases." *Ideal Electric & Manufacturing Co.*, 134 NLRB 1275, 1278 (1961). The only time the Board departs from this rule is when pre-petition conduct "lends meaning and dimension to related postpetition conduct, or assists in evaluating it." *Shamrock Coal, Inc.*, 267 NLRB 625, 625 (1983) (citing cases). As a result, the ALJ in the instant case correctly characterized the law when he stated that "**generally** only activity within the critical period may provide a basis for overturning election results." This correct statement of the law is not grounds for overruling the ALJ's Report in the instant matter and the Employer's first exception must be summarily dismissed.

As the ALJ recounted, most of the statements to which the Employer objects were uttered four months prior to the critical period by and, based on timing alone, are not grounds for overturning the election. Indeed, the case law shows that the Board avoids assessing conduct that takes place pre-petition, unless the conduct is sufficiently egregious or can add "meaning and dimension" to egregious statements uttered or conduct committed during the critical period. The pre-petition statements to which the Employer here objects are not "egregious," but are just like the statements made during the critical period regarding unfair treatment of the employees at Ashland. As described, the Employer's vague "evidence" regarding allegedly objectionable statements during the critical period obviates the need to reach back four months to probe statements made by the NAACP and employees at Ashland, not the Union. *See Data Tech Corp., Plastronics Div.*, 281 NLRB 1005, 1007 (1986) (refusing to review prepetition conduct where there was "no related allegedly objectionable postpetition conduct to which the prepetition conduct might give meaning."); *Weather Wise Conditioning Corp.*, 282 NLRB 273 (1986) (refusing to set aside election based on pre-petition threat of bodily injury and other harm made by union representative).

2. The ALJ correctly held that the NAACP's statements did not constitute a basis for overturning the instant election

Not only did the ALJ correctly state the law with regard to pre-petition statements and conduct, but he also correctly applied the law. It is clear from his decision that the ALJ examined the pre-petition statements to which the Employer erroneously objects. That is, in his Report the ALJ clearly and thoroughly examined the statements of the NAACP director, which were made months prior to the critical period. (ALJ Rpt. at 2-4) (discussing NAACP Director Khalfani's statements). The ALJ also examined whether or not these statements about unfair treatment could lend "meaning and dimension to related postpetition conduct," when he examined the

Employer's specious and unsupported claims that Mr. Khalfani's statements were reiterated during the critical period. (ALJ Rpt. at 6-7) (discussing testimony Employer witnesses Ms. Wilson and Ms. Howard). After examining the testimony, the ALJ concluded that the Employer's "evidence" was simply too vague to lend any meaning or dimension to post-petition conduct. For example, he found, "Wilson did not testify to the identity of any of the persons from whom she heard these [allegedly objectionable] statements." (ALJ Rpt at 6). And, he found that "Howard's testimony about the [allegedly objectionable] rumors she heard is similarly unspecific . . ." (ALJ Rpt. at 6). The ALJ also examined the endorsement signed by the local NAACP that the Union passed out during the critical period. (ALJ Rpt. at 4-5). Simply put, the ALJ could find no evidence on the record that the Virginia NAACP's statements made a free and fair election impossible. Because the ALJ examined the pre-petition statements in light of the post-petition conduct, the ALJ correctly applied the existing Board law. As a result, the Employer's second exception must be dismissed.

3. The ALJ correctly refused to hold that the Virginia NAACP's statements were "an inflammatory appeal to racial prejudice and hostility"

Because the Virginia NAACP's statements were made far outside the critical period and because the Employer failed to provide any evidence that they added "meaning or dimension" to any post-petition conduct, the Employer's objections were correctly dismissed. Significantly, the Employer also could not point to any statement that had "no purpose except to inflame the racial feelings of voters in the election." Rather, all of the statements to which the Employer referred were complaints about unfair working conditions, which are absolutely protected by Section 7 of the Act and routinely raised during organizing campaigns. As the Union has already demonstrated above, the Board has held that complaints of unfair treatment—including disparate

racial treatment—do not constitute appeals with "no purpose except to inflame the racial feelings of voters."

As the ALJ acknowledged a number of times in his decision, the employees at Ashland certainly felt that their employer had wronged them. But these sorts of sentiments, even when forcefully stated in historical terms, do not constitute "inflammatory appeals to racial prejudice." Moreover, with regard to those statements about unfair treatment that the Employer alleges were racially inflammatory, the ALJ found, "[I]t is not clear that the allegations regarding mistreatment during the winter storms were exclusively or even predominantly made as examples of racial prejudice." (ALJ Rpt. at 7-8). The ALJ considered all of the allegedly "racially inflammatory" statements and simply could not conclude that those statements had "no purpose except to inflame the racial feelings of voters." He correctly refused to hold that the statements upon which the Employer fixated at hearing did not have any such purpose and the Employer's third exception should be dismissed accordingly.

4. The ALJ correctly held that the NAACP was not an agent of UFCW Local 400

The ALJ considered the record and all of the Employer's arguments and refused to hold that the Virginia NAACP is now or at any time was an agent of the Union. Again, the ALJ's refusal to find that the Virginia NAACP is an agent of the Union was correct for a number of reasons. First, as stated above, the record is clear that the Virginia NAACP is not an agent of the Union. The Employer's argument regarding an alleged agency relationship between the NAACP is squarely rebutted by the evidence of the case. Indeed, the record shows that the Union gave a series of small contributions to the Virginia NAACP, but that these contributions made up a very small percentage of the NAACP's budget—$7,000 out of a $325,000 budget. (Tr. 101-102). And, while a Union board member sits on the Board of the NAACP, he is only one member of a

32-member board of directors. (Tr. 101). Mr. Khalfani, the Virginia NAACP director who was called by the Employer, also testified unequivocally that the NAACP does not take instruction from UFCW Local 400 as to the statements it makes or actions it takes. (Tr. 100-101). And, again, the Virginia NAACP director's passing mention to Union representatives as "my folks" in a private email is nothing more than informal reference to the relationship Mr. Khalfani had with those representatives, not a statement about legal control or agency. (Tr. 42-43) (EX. 21).

Second, as the ALJ pointed out, it was not clear at the hearing or from its post-hearing brief whether "the Employer contend[ed] that Khalfani [and by extension the NAACP] is or was an agent of the Union within the meaning of the Act." (ALJ Rpt. at 2). The employer never set forth a clear theory regarding the alleged agency relationship between the Virginia NAACP and the Union. The Employer cannot now seriously claim that the ALJ failed to understand or examine a theory it failed to even explain.

5. The ALJ correctly refused to hold that there were any "inflammatory appeals to racial prejudice"

As discussed, the NAACP's statements during the organizing campaign were simply not "inflammatory appeals to racial prejudice." Similarly, the statements that the Employer alleges were made during the critical period were not "inflammatory appeals to racial prejudice." The ALJ recognized that Employer's "evidence" with regard to those statements was so vague as to be of little value when he stated that Ms. Wilson and Ms. Howard's statements were "unspecific." (ALJ Rpt. at 6). Putting aside the low quality of the evidence regarding the alleged statements to which the Employer objects, none of those statements are actually objectionable. As with all of the statements from the NAACP from outside the critical period, these alleged statements were all complaints about unfair working conditions.

As the ALJ held, the Employer's reliance on the *Zartic, Inc.* and *M&M Supermarkets, Inc.* cases is totally misplaced. In *Zartic, Inc.* the Board overturned an election result where the Union "attempted to connect the Employer directly" with the Ku Klux Klan in a flyer it handed out to the predominantly Hispanic workforce during the critical period. 315 NLRB 495, 497 (1994). At one point during the events leading up to the election this culminated in a near riot amongst the employees. *Id.* at 504. The Board held that the false implication that the employer supported the Ku Klux Klan along with numerous other racially-charged statements "constituted a sustained, irrelevant, inflammatory appeal to the ethnic sentiments of the Employer's Hispanic employees which so interfered with election conditions that the election must be set aside." *Id.* at 496.

On their face, the facts of the *Zartic* case are completely different from the present case where even the most starkly expressed statements only sought to draw a historical analogy with regard to unfair working conditions. And, certainly the Ashland employees did not respond by rioting. There is no evidence on the record that there was even so much as a heated debate amongst the employees regarding the unfair working conditions at Ashland. Of course, as mentioned, the Employer actually provided almost no specific evidence with regard to statements allegedly made during the critical period, the identity of the employees who made those statements, or the effect the alleged statements had on the Ashland employees. Thus, as the ALJ found with regard to *Zartic*, "The case is easily distinguishable from the instant case . . ." (ALJ Rpt. at 9).

Similarly, *M&M Supermarkets, Inc.* must also be distinguished. There, as the ALJ correctly noted, an outspoken and clearly identified union advocate made virulent anti-Semitic remarks about the owner of the company, which little to do with working conditions and

everything to do with the owner's ethnicity. *M&M Supermarkets, Inc. v. NLRB*, 818 F.2d 1567, 1570 (11th Cir. 1987). The 11th Circuit Court of Appeals found that the union advocate's remarks about the ethnicity of the owner "were so inflammatory and derogatory that they inflamed racial and religious tensions against the Jewish owners of the company and destroyed the laboratory condition necessary for a free and open election." *Id.* at 1574.

Again, no such remarks were made in the present case. There were no statements about any specific representative of the Employer directed at that representative's ethnicity. The statements here were all "limited to alleged conduct by the employer related to the workplace." (ALJ Rpt. at 9). As the ALJ pointed out, the Employer also failed to clearly identify persons responsible for making the allegedly inflammatory remarks. (ALJ Rpt. at 9). And, most importantly, even the most boldly stated complaints about unfair working conditions were altogether different from the statements in *M&M*, which the ALJ correctly held amounted to an "attack on Jews generally [sic], worthy of Joseph Goebbels . . ." (ALJ Rpt. 9). It is clear from the record and the ALJ's Report that the allegedly "inflammatory" statements here were nothing more than complaints about unfair working conditions, and certainly did not make a free and fair election impossible.

For these reasons and the rest of the reasons detailed above, the ALJ correctly refused to hold that there were inflammatory appeals to racial prejudice, and the Employer's exception to the contrary must be dismissed.

6. The ALJ correctly held that the NLRB's test for ordinary campaign misrepresentations is the appropriate standard to apply in situations where there is no inflammatory appeal to racial prejudice

Because the ALJ refused to hold that any statement made during (or before) the critical period was an inflammatory appeal to racial prejudice, he correctly applied the NLRB's test for

ordinary campaign misrepresentations. In cases similar to the present one, the Board has specifically rejected the argument that the accuracy of these statements had any bearing on its analysis. It held:

> The right to raise the issue in a union campaign is not limited to situations where a white employer, or even the NLRB, believes that blacks have been unfairly treated. Nor is it any more necessary for blacks to establish the truth of the claim before they raise the issue than it is for any other employees to establish the truth of their claims of unfair treatment, for any reason, at the hands of their employers. The question of whether employees have been unfairly treated, for whatever reason, is always a legitimate topic of discussion in a union campaign.

The Coca-Cola/Dr. Pepper Bottling Co. of Memphis, 273 NLRB 444 at 445. *See also Beatrice Grocery Products*, 287 NLRB 302 (1987) (holding that union representative's statement that a supervisor had called employees "dumb niggers" was "part of a comment on the Employer's treatment of its employees that was made in response to employee complaints about that treatment" even though "it may well be an untrue report of what any representative of the Employer actually said."); *Zartic, Inc.*, 315 NLRB 495, 500 (1994) ("Comments 'obviously' designed to express the views that blacks had not been treated fairly by their employer and that they needed to do something about it have been held to be comments directed to black employees' perceived relationships with their employer and their dissatisfaction with the terms and conditions of their employment. The question of whether employees have been unfairly treated for whatever reason is always a legitimate topic of discussion in a union campaign.").

Thus, the Board will not inquire into whether employees' statements regarding discriminatory mistreatment are true or false. Here, the Employer attempts to force such an inquiry, but it is irrelevant. The Employer is free to litigate the EEOC claims filed by these employees in other venues; it should not be allowed to do so before the Board.

Despite this clear Board precedent, the ALJ allowed the Employer ample leeway to make its case with regard to misrepresentations. Discussing the truth or falsity of the allegedly objectionable statements in the present case, the ALJ held, "It is also not clear from this record that all the allegations regarding what happened on snow days were false." (ALJ Rpt. at 8, n.14). Again, the ALJ recounted the vague and/or ambiguous evidence put on by the Employer. (ALJ Rpt. at 8, n.14). He also pointed out that—assuming *arguendo* that all the statements were false—"the employer had months to respond to them, including during its multiple [captive audience] meetings with employees during the critical period." (ALJ Rpt. at 8, n.14).

Simply put, the ALJ gave the Employer's assertions regarding truth and falsity far more weight than they were actually due under existing Board law. Despite this generous interpretation, he refused to find that any statement made a free and fair election impossible. The Board should hold similarly in rejecting the Employer's sixth exception to the ALJ's report.

7. The ALJ correctly refused to apply the standards and burden shifting for inflammatory appeals to racial prejudice because there were no such appeals

The Employer's seventh exception again makes the incorrect assumption that there were any inflammatory appeals to racial prejudice in the present case. As the Union has shown, there were no such appeals in this case. Because the Employer failed to present any evidence that the Union or Union agents made inflammatory appeals to racial prejudice, the ALJ correctly refused to apply the legal standards and burden shifting for cases in which there are such appeals. As a result, the seventh exception must be dismissed.

8. The ALJ correctly analyzed the events and the vague and unsupported "evidence" presented by the Employer

Employer's eighth exception requires a similarly brief response. The foregoing and the ALJ's Report both clearly show that the ALJ correctly analyzed the events presented by the

Employer. After a thorough examination of the record, the ALJ refused to hold that statements made four months prior to the critical period were inflammatory appeals to racial prejudice or that these comments had any significant effect on the atmosphere during the critical period. Bolstering this conclusion was the fact that the record reflects that the Employer's evidence with regard to the critical period was entirely vague and/or ambiguous. The Employer failed to present the ALJ with any real evidence—i.e., dates, times, names or places—that objectionable conduct had occurred at anytime during or prior to the critical period. It is thus entirely correct and unsurprising that the ALJ could not conclude that a free and fair election was impossible under the circumstances. As a result, the ALJ's conclusion should be upheld and the Employer's eighth exception should be rejected.

9. The ALJ correctly exercised his discretion in limiting the Employer's subpoenas and refusing to rule that the Virginia NAACP is an agent of Local 400, or that such an agency relationship was even relevant in the instant matter

The Employer's ninth exception must also fail because the ALJ acted within his discretion in limiting the Employer's subpoenas. During the course of the hearing, the ALJ allowed the Employer a day and a half to present its severely flawed case during which the Employer called two representatives of the Virginia NAACP as witnesses and subjected them to burdensome and irrelevant questioning. The ALJ allowed the Employer to elicit this testimony over the strong objections of the Union that the Employer's intent was to put pressure on and harass an ally of the Union for the purpose of making that ally hesitant to support the Union in the future. Apparently recognizing the potential for abuse by the Employer, the ALJ limited the Employer's ability to pry into the private affairs and constitutionally protected associations between the Union and the Virginia NAACP by limiting the Employer's subpoenas to both the Union and the Virginia NAACP. The Board should reject the Employer's exception to the ALJ's

evidentiary rulings because the ALJ did not abuse his discretion in making those rulings. Furthermore, the Board should also reject this exception because through its overbroad and irrelevant subpoenas, the Employer attempted to (and partially succeeded in) unlawfully infringing on the First Amendment rights of both the Union and the NAACP to associate and to keep aspects of that association private.

As a preliminary matter, an ALJ's decision to revoke a subpoena is reversed by the Board only for abuse of discretion. *Skyline Builders, Inc.*, 340 NLRB 109, 109 (2003). Furthermore, an ALJ is not required to seek enforcement of a subpoena sua sponte. *Id.* This is particularly true in cases, such as the one here, where the employer failed to even request additional time to petition the General Counsel to enforce a subpoena. *Id.*

At no time during the hearing in the present case did the Employer request time to seek request that the General Counsel seek to enforce its subpoenas to the Union or the NAACP. It is clear from the record that the Employer had ample opportunity make such a request of the ALJ, but it failed to do so. (Tr. 93-95). In the absence of such a request, the ALJ partially revoked the Employer's subpoenas, limiting their scope and allowing the record to be re-opened after the hearing for new evidence to be submitted. (Tr. 190-191). Based on that ruling, the Employer requested that certain documents be entered into the record after the end of the hearing and the ALJ granted those requests without objection from the Union. (ALJ Order, 12/20/10).

The Board law is clear that the ALJ was not required to seek enforcement of the Employer's subpoena sua sponte. It is further clear that the Employer waived its objection to the ALJ's treatment of its subpoena when it failed to even request time to enforce its subpoena during hearing. The Board should thus dismiss the Employer's exception regarding the way in which the ALJ handled its subpoena.

Furthermore, the Board should affirmatively hold that the Employer's subpoena impermissibly burdened the Union's right to associate with the NAACP under the First Amendment. The First Amendment protects the Union and the NAACP's right to associate with each other, other organizations and individuals without interference from the government. *See Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 543 (1963) ("This Court has repeatedly held that rights of association are within the ambit of the constitutional protections afforded by the *First* and *Fourteenth Amendments*.") (emphasis in original). This protection extends to situations in which governmental action has a chilling effect on Local 400's associational rights. *Gibson*, 372 U.S. at 557 (holding that government attempts to uncover membership lists had a substantial "chilling effect" on the NAACP and its members' associational rights). And, First Amendment protections apply in civil discovery situations analogous to the present one, where a court—i.e., a governmental entity—may exercise its authority to compel discovery. *See, e.g., Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987) (weighing the relevance, need, nature and ability to receive the evidence from other sources before holding that First Amendment considerations trumped party's right to discovery); *International Union v. Garner*, 102 F.R.D. 108, 116-17 (M.D. Tenn 1984) (denying motion to compel signed union authorization cards and names of employees who attended organizational meeting because the requests "infringe[d] constitutional rights too greatly to be justified by the interest defendant assert[ed] in proving the extent of damages").

Here, the Employer attempted to and partially succeeded in infringing on the First Amendment associational rights of the Union and the Virginia NAACP by harassing both organizations with overbroad subpoenas with no relevance to the present case. The record shows that the NAACP became virtually uninvolved in matters related to the Employer after June 2010,

months prior to the critical period. (Tr. 77-78). The fact that the Virginia NAACP removed itself from involvement with any issue regarding the Employer well before the critical period suggests that there was absolutely no need to involve any representative of the NAACP in the present proceedings, and that doing so was a harassment tactic calculated to send a message to the Union's allies about supporting the Union or the rights of workers to organize. The Employer's overbroad subpoena requesting documents, including emails, further hammered home the chilling message. This was a message that harms the Union's ability to associate with outside groups, who support its mission and goals, a clear infringement on the Union's First Amendment rights.

The need to drag representatives of the NAACP into the Employer's crusade against its employees' right to organize was further obviated by the fact that the Employer was able to seek discovery from the Petitioner Union. The Employer's case had to begin and end with the activities undertaken and statements made by the Union during the critical period. The Employer was simply unable to show that any objectionable conduct happened anywhere near the critical period, let alone that such conduct could be linked to the Union or any Union representative. Its inability to make any such showing should have put an end to the Employer's abusive attempts to seek overbroad discovery from the Union's allies. To some extent, the Employer's vague and ambiguous evidence with regard to statements from within the critical period seem to have convinced the ALJ that further harassment of the NAACP was unnecessary, since he exercised his discretion to limit the Employer's subpoenas.

Still, make no mistake, the Employer inflicted some damage to the Union's ability to associate by forcing the Virginia NAACP and its representatives to spend their time and resources responding to the Employer's federal administrative subpoenas. The Employer's

message that supporting the Union has costs—i.e., the threat of being dragged into litigation—was sent. The Union urges the Board not to inflict further damage on the Union's First Amendment associational rights and to dismiss the Employer's ninth exception regarding its overbroad and irrelevant subpoenas.

10. The ALJ applied the proper standard in the present case before dismissing the Employer's objections

The extent to which the Employer's tenth exception is different from it sixth exception is unclear to the Union. Nevertheless, the Union would point out again that since the ALJ refused to hold that any statement was an inflammatory appeal to racial prejudice, he properly applied the standards for cases in which there is no inflammatory appeal to racial prejudice. The *Midland Life Insurance Co.* test is one of those standards, and the ALJ acted correctly in making an assessment of the Employer's vague "evidence" under that test.

IV. CONCLUSION

For the foregoing reasons, the Employer's exceptions must fail and the Board should uphold the Union's certification as exclusive bargaining representative of the Employees at Ashland Nursing and Rehabilitation Center without delay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to the parties' agreement, I hereby certify that on February 22, 2011, this Brief in Opposition to Respondent's Exceptions to the Administrative Law Judge's Report and Recommendations on Respondent's Objections was delivered by email to:

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