

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

In the Matter of:	Case No.	34-CA-12557
<b>CONNECTICUT HUMANE SOCIETY,</b>		34-RC-2351
Respondent/Employer,		
and		
<b>INTERNATIONAL ASSOCIATION OF MACHINISTS &amp; AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 26,</b>		
Charging Party/Petitioner.		
	August 18, 2011	

**CHARGING PARTY/PETITIONER'S ANSWERING BRIEF TO THE BOARD**

I. **INTRODUCTION**

On October 21, 2009, the International Association of Machinists & Aerospace Workers, District Lodge 26 ("the Union" or "Petitioner") filed a petition seeking to represent certain employees of the Connecticut Humane Society (the "Respondent" or "CHS"). On November 2, 2009, the parties entered a Stipulated Election Agreement. Pursuant to that Stipulated Agreement, an election was held on December 4, 2009 which the Union won by a vote of 18 to 15. (ALJD, p.2) On December 11, 2009, the Respondent filed an objection to the election alleging that three employees who were described as "supervisory personnel" were "actively involved in soliciting support during the union organizing campaign, and disseminated implied threats of CHS action against

employees if they did not secure union representation....” (ALJD, pp. 2-5)<sup>1</sup> A week later, on December 18, 2009, the Respondent fired two of the alleged “supervisory personnel” who were listed in the objections letter - Bridget Karchere and Maureen Lord explicitly because of their union activities. (ALJD, p. 20)

The instant proceeding was a consolidated hearing on the Union’s charge that CHS violated Section 8(a)(1) and (3) of the Act by firing Ms. Karchere and Ms. Lord (as well as certain other conduct with employees’ Section 7 rights), and on the Respondent’s objections. The hearing was conducted before Administrative Law Judge Steven Fish on November 17, 18 and 19, 2010. The bulk of the evidence focused on the question of whether Karchere and Lord are statutory supervisors or managerial employees. The ALJ issued his decision on June 8, 2011, finding that Karchere and Lord were not supervisory or managerial employees,<sup>2</sup> that their discharges violated Sections 8(a)(1) and (3) of the Act, that the Respondent engaged in other acts and conduct in violation of Section 8(a)(1) of the Act, and that the Respondent’s objections to the conduct of the election were without merit.

The Respondent filed its exceptions on August 5, 2011, challenging virtually every aspect of Judge Fish’s decision. The Union will not specifically address the Respondent’s exceptions to the ALJ’s unfair labor practice findings, but will instead

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<sup>1</sup> The Respondent’s objection letter also alleged conduct by an additional claimed supervisor, Heather Keith, but no evidence was adduced about this individual during the hearing. We therefore assume that the Respondent’s claims regarding Ms. Keith have been abandoned.

<sup>2</sup> As noted by the ALJ, in its post-hearing briefs the Respondent has conceded that Karchere is not a supervisor within the meaning of the Act. See, ALJD, p. 22.

focus on the exceptions to Judge Fish's decision to dismiss the Respondent's objections. (ALJD, pp. 66-75; Respondent's Exceptions and Brief, pp. 38-47) With respect to the unfair labor practice findings, and most particularly with respect to the conclusion that neither Lord nor Karchere were supervisors or managers, the Union simply states that the ALJ's factual findings and reasoning are thorough, complete and accurate, and accordingly should be fully adopted by the Board. While there certainly could be questions as to whether Karchere could be considered a clerical or perhaps at times a confidential employee, and as to whether Lord's duties might cause her to be characterized as a technical or professional employee, neither was a supervisor or manager as those terms have been interpreted and applied by the Board. Accordingly, the Charging Party fully supports and adopts the points and authorities set forth by the Counsel for the General Counsel in his Answering Brief, and urges the Board to affirm Judge Fish's decision.

II. THE RESPONDENT'S OBJECTIONS ARE FRIVOLOUS AND THE BOARD SHOULD THEREFORE ADOPT THE ALJ'S RECOMMENDATION THAT THEY BE DISMISSED

As a threshold matter, all of the Respondent's Objections to the election are premised on the assumption that Lord was a supervisor within the meaning of the Act, and that both Lord and Karchere were managerial employees. If the Board adopts the ALJ's findings with respect to those issues, it is undisputed that the objections must be dismissed. The Union of course fully agrees with the ALJ's finding that neither of these women were supervisors or managers, and with the conclusion that Board precedent holding that certain supervisory conduct requires the overturning of elections is not necessarily applicable to similar conduct by managers. Nonetheless, we will address

the merits of Respondent's exceptions assuming that Lord and Karchere are supervisors and/or managers.

The Respondent's exceptions are premised almost entirely on disagreements with the ALJ's findings of fact, or, more particularly, on the contention that Judge Fish should have found facts about conduct engaged in by Lord and Karchere based upon "reasonable inferences" and "logical conclusions" even though the record did not contain a scintilla of evidence that would support such findings of fact. Indeed, the Respondent admits that its factual arguments are "based on speculation rather than hard evidence," and asserts that "the Trial Judge is not constrained by the parameters of the testimony at the hearing." See, Respondent's Exceptions and Brief, p. 45. Thus suffice it to say that the fact that probative evidence may be hard to come by does not permit an administrative agency to make findings of fact based upon speculative assumptions as to what might have occurred where the party with the burden of proof has failed to adduce any real evidence to support such findings. Unlike the Respondent's exceptions, the ALJ's findings were firmly founded upon the record evidence and applicable Board law, and there is simply no colorable basis to sustain the Respondent's objections to the election.

The critical period during which the Board generally considers objectionable representation-election conduct (the critical period) "commences at the filing of the representation petition and extends through the election." E.L.C. Electric, Inc., 344 NLRB 1200, n. 6 (2005). In representation proceedings where, as here, there has been no unfair labor practice allegation or finding by the party that won the election, a party seeking to have a Board-supervised election set aside because of misconduct during

the critical period carries a heavy burden of proof. The Board looks to all of the facts and circumstances to determine whether the election atmosphere was so tainted as to warrant such action. The objecting party must show the conduct in question had a reasonable tendency to interfere with the employees' free and uncoerced choice in the election to such an extent that it materially affected the results of the election. Madison Square Garden Ct., LLC, 350 NLRB 117, 119 (2007) (internal quotations and citations omitted); Quest International, 338 NLRB 856, 857 (2003). In determining whether the conduct has the tendency to interfere with the employees' freedom of choice, [\*23] the Board considers nine factors: (1) The number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. See Cedars-Sinai Medical Center, 342 NLRB 596, 597 (2004), citing Taylor Wharton Division Harsco Corporation, 336 NLRB 157, 158 (2001), et al.; Avis Rent-a-Car, 280 NLRB 580, 581 (1986).

Pro-union supervisory conduct during the critical period of a representation election may be grounds for setting aside an election if the conduct could reasonably induce employees to support the union because they perceive potential supervisory

retaliation or preferential treatment. Harborside Healthcare, Inc., 343 NLRB 906, 907 (2004) n. 12. In determining whether supervisory pro-union conduct breaches the requisite laboratory conditions of a fair election, the Board looks to the following two factors:

(1) Whether the supervisor's pro-union conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election. This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the pro-union conduct; and (b) an examination of the nature, extent, and context of the conduct in question.

(2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.

Perhaps the simplest way to assess the Respondent's objection is to first state that CHS adduced no evidence whatsoever that either Karchere or Lord engaged in any pro-union conduct during the "critical period" between the filing of the petition and the election (October 21, 2009 through December 4, 2009), or that either of them at any time directly solicited or encouraged any other employee to support or vote for the Union, or that they directly communicated any implied threat or promise to any other employee. Instead the Respondent's objections rest entirely on a total of three conversations that Lord and Karchere may have had with an undisputed supervisor between September 18 and September 25 - a month before the petition was filed, and the fact that Lord and Karchere attended two pre-petition union organizing meetings and that they signed a petition. These allegations simply do not meet the straight-face test and could not possibly constitute objectionable conduct.

Because the Board has found that managers with some indicia of supervisory authority attending union organizing meetings and signing authorization cards while other employees are present does not tend to coerce or interfere with employee free choice. (See Northeast Iowa Telephone Co., 346 NLRB 465, 466-467 (2006)), and because, as the ALJ points out, the record contains no evidence whatsoever of any solicitation of authorization cards or even the signing of a card by Lord or Karchere in front of any eligible voter that either of them supervised (see, ALJD, pp. 72-73), we will limit our discussion to the allegation that Lord and Karchere's discussions with Waterford District manager Nancy Patterson in September 2009 constituted objectionable conduct.

Even if the Board fully credits the relevant portions of Patterson's testimony as did Judge Fish (ALJD, pp. 6-8, fn.11), the most that the Respondent could possibly show is that: 1) Lord made a phone call to Patterson in which she expressed her concerns about working conditions at the Newington facility, told her that employees were meeting with a union representative, and asked Patterson to inform her staff that these meetings were taking place so that they would have the opportunity to participate; 2) During that conversation Lord mentioned that it would be safe to meet with the union because the meetings would take place offsite and if they sign a petition their jobs would not be jeopardized; 3) Patterson informed her staff about the phone call from Lord, polled them each individually about the subject of unionization, and that each employee confirmed what Patterson herself had suspected - that they had no interest whatsoever in a union drive; 4) While having these discussions with her employees, Patterson made clear that she herself was not in favor of bringing in a union because

her loyalties were with CHS's President, Richard Johnson; 5) Patterson had a subsequent call from Lord at home, after which Patterson's husband told her she needed to inform upper management about this right away; 6) On or about September 25, after the two calls from Lord, Karchere called Patterson and asked her to give Karchere's cell phone number to the Waterford employees; and that, 7) Patterson offered Karchere's phone number to her staff but they all either threw it away or otherwise reaffirmed their lack of interest in a union organizing campaign, and that there is no evidence that any Waterford employee ever contacted Karchere or Lord. (See, CP Ex. 1; Tr. 470-475, 483-484, 486, 488-499).

At most, Patterson communicated to her employees that there was some interest in organizing a union by the Respondent's employees in Newington, that Karchere and Lord might be involved and had wanted to know if any Waterford employees were interested in attending a meeting, and that Patterson determined (by unlawfully polling her employees) that her staff had no interest whatsoever in such an endeavor, a sentiment she obviously agreed with and supported. This communication by Patterson was in no way designed to encourage her staff to support the union, nor did it have that effect. Indeed, even an invitation to attend a union meeting made directly by a supervisor who supports a union campaign, particularly where that supervisor has no direct supervisory authority over the employee, is not a sufficient basis to overturn an election. (See, ALJD, pp. 70-71) In any event, there is no evidence in this record that any supervisor or manager ever invited any employee to attend a union meeting, or solicited any employee to sign an authorization card, or otherwise sought to persuade

any employee to support the union campaign at any time. The conclusory assertions in the objections were demonstrated to be without any factual basis.

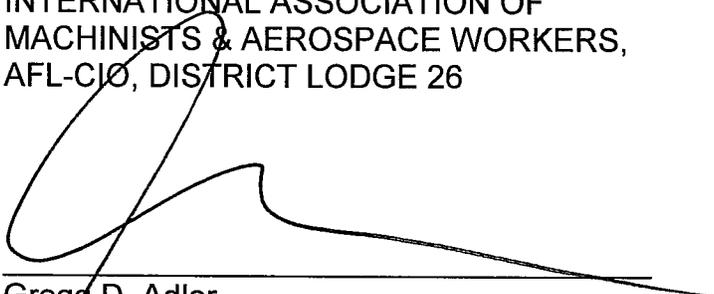
The Respondent failed to present even an iota of evidence that either Karchere or Lord engaged in any conduct with respect to any employee that could possibly be construed as coercive. In the absence of evidence that a supervisor's pro-union conduct is at least impliedly coercive, there can be no finding that their conduct was impermissible under Harborside. The Respondent's objections in this case are blatantly frivolous and should be summarily dismissed, regardless of whether Karchere and Lord are found to be supervisors or managers.

### III. CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the Answering Brief submitted by Counsel for the General Counsel, the Respondent's exceptions should be rejected in their entirety, the ALJ's recommended conclusions and Order should be fully adopted, and the Board should certify the Union as the exclusive bargaining agent of the Respondent's employees in the stipulated unit.

CHARGING PARTY/PETITIONER,  
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MACHINISTS & AEROSPACE WORKERS,  
AFL-CIO, DISTRICT LODGE 26

By:



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**CERTIFICATION OF SERVICE**

This is to certify that the foregoing Charging Party/Petitioner's Answering Brief to the Board was electronically filed and was sent by email on this 18th day of August, 2011 to the following:

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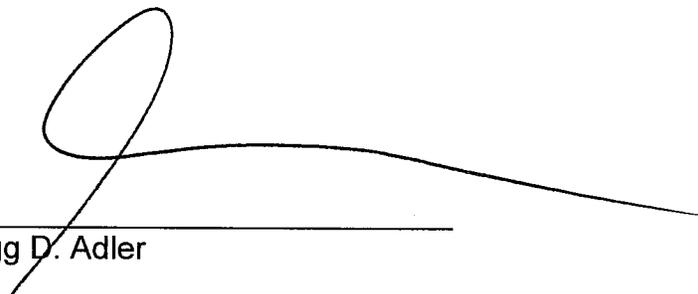
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