

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

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**800 River Road Operating Company, LLC
d/b/a Woodcrest Health Care Center**

and

Case No. 22-RC-073078

**1199 SEIU, United Healthcare
Workers East**

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**PETITIONER’S OPPOSITION TO RESPONDENT’S
MOTION TO REOPEN THE RECORD**

1199 SEIU, United Healthcare Workers East (“Union” or “Petitioner”) opposes the motion of 800 River Road Operating Company, LLC, d/b/a Woodcrest Health Care Center’s (“Employer” or “Woodcrest”) to reopen the record in the above-captioned case.

The Employer moves to reopen the record based on information its attorneys obtained on January 29, 2013 from unit clerk Dawn Maria Sormani. Sormani allegedly told counsel for the Employer that former environmental services supervisor, Israel Vergel de Dios, engaged in prounion conduct prior to the representation election at Woodcrest. The Employer argues that Sormani’s statement constitutes newly discovered evidence and proves that the hearing officer’s failure to issue additional subpoenas was not harmless error. The Employer’s motion should be denied for the reasons set forth below.

According to Section 102.65 of the Board Rules and Regulations, the Board will reopen a record only because of extraordinary circumstances and only based on newly discovered evidence. The Board defines newly discovered evidence as “facts in existence at the time of the hearing which could not be discovered by reasonable diligence.” *Point Park University*, 344 NLRB 275, 276 (2005).

On January 23, 2012,¹ the Union filed a petition for a representation election covering a unit of approximately 200 Woodcrest employees. The Union won the election, which was held on March 9. On March 16, the Employer filed objections to conduct affecting the results of the election.²

In search of evidence to support its objections, the Employer's attorneys interviewed approximately 150 Woodcrest employees, the overwhelming majority of unit employees. Specifically, the Employer sought evidence establishing that four supervisors, including Vergel de Dios, engaged in objectionable prounion conduct. While Sormani was one of the many employees interviewed, the Employer's attorneys failed to ask her about Vergel de Dios. According to the Employer, it failed to ask Sormani about Vergel de Dios because 1) it conducted a large number of interviews in four days; 2) Sormani was one of the first individuals interviewed and the allegations related to Vergel de Dios were not yet well-developed; and 3) counsel for the Employer chose to focus Sormani's attention on the three supervisors with whom she was most familiar.

At the subsequent objections hearing in May, the Employer called ten witnesses, none of whom presented competent evidence of objectionable conduct. *Woodcrest Health Care Center*, 359 NLRB No. 48 (2013). The Employer did not call Sormani as a witness, nor did it make an offer of proof related to her potential testimony. On June 4, the hearing officer issued his report recommending that the objections be overruled. On January 9, 2013, the Board adopted the Hearing Officer's report and certified the Union as the exclusive collective-bargaining representative of the Employer.

¹ All dates herein refer to 2012 unless otherwise indicated.

² Only two of these objections, both alleging prounion conduct by supervisors, were scheduled for hearing which was held on May 10, 11 and 14.

In January of 2013, the Employer again interviewed Sormani and, this time, asked her about Vergel de Dios's conduct during the Union campaign. Sormani allegedly told the Employer that, in January or February, she heard Vergel de Dios tell employees, four of whom were eligible voters, to vote for the Union so that they could receive better benefits. The Employer then requested second interviews with these four employees, none of whom confirmed Sormani's account. According to the Employer, Sormani also stated that sometime prior to the election, Vergel de Dios, while in an area where environmental services employees worked, "randomly" told people they should vote in favor of the Union. Sormani provided no evidence that Vergel de Dios's comments were directed to, or heard by, unit employees.³

The information gathered from Sormani in January of 2013 is not "newly discovered" because the Employer easily could have discovered it during their initial investigation. The Employer interviewed Sormani prior to the objections hearing and needed only to have asked her about prounion conduct by Vergel de Dios. Furthermore, the Employer was not required to conduct all of its investigatory interviews in four days and could easily have interviewed Sormani again as the allegations related to Vergel de Dios became more developed. The Board's requirement that parties exercise reasonable diligence while investigating objectionable conduct would be meaningless if an employer could successfully move to reopen a record because, after losing before the Board, it realizes it should have conducted a more thorough investigation.⁴

³ Sormani's alleged statement also fails to establish that the comments by Vergel de Dios were made during the critical period. It cannot be assumed, based on claims that the statements were made "prior to the election" or in "January of February," that the statements were made after the filing of the petition on January 23. The objecting party has the burden to establish that objectionable conduct occurred during the critical period. *Int'l Ship Repair & Marine Services*, 329 NLRB No. 27 (1999).

⁴ The Employer's motion inexplicably also claims that it was previously unable to secure the evidence it has now collected due to the "manifest reluctance" of employees to disclose the conduct of a manager who had retaliatory power over them. However, the Employer admits that Sormani was not supervised by Vergel de Dios and makes no claim that she was ever reluctant to disclose the information provided in January of 2013. In fact, the Employer provides no evidence to support its claim that Vergel de Dios influenced employees' decision not to share

In addition, Sormani's statements have no bearing on the Board's ruling that the Hearing Officer's failure to grant additional subpoenas was harmless error. The Board held that while the Hearing Officer should have *issued* the subpoenas requested by the Employer, the Hearing Officer had the authority to, and would have, precluded any additional witnesses from testifying for whom the Employer could not make an offer of proof. *Woodcrest Health Care Center*, 359 NLRB No. 48 (2013) (hearing officer acted reasonably to halt the Employer's manifest fishing expedition). The recent statements obtained by Sormani do not change the fact that, at the time of the Hearing, the Employer failed to present any witness with competent evidence of objectionable conduct and could not make an offer of proof for any of the witnesses for whom it sought additional subpoenas. Sormani was not even one of the employees for whom the Employer sought a subpoena.

Furthermore, Sormani's statements, even if adduced and credited, would have no impact on the hearing results because the conduct alleged is not objectionable. It is well-established that prounion speech by a supervisor, without more, is not objectionable. *Harborside Healthcare Inc.*, 343 NLRB 906 (2004) (to be objectionable, prounion conduct must reasonably tend to coerce or interfere with employees' free choice); *see also Pacific Physicians Serv., Inc.*, 313 NLRB 1176 (1994) (not objectionable for supervisors to tell employees that unionization would mean better pay, benefits and job protection because prounion statements are no more suspicious than antiunion statements). Because expressing an opinion about unionization is not inherently coercive, supervisors are free to express personal opinions, even strong ones, for or against unionization. *See e.g. Northeast Iowa Tel. Co.*, 346 NLRB 465 (2006). Prounion statements are

information with the Employer. The Employer's claim, based on numerous employees' decision not to be interviewed, turns the *Johnnie's Poultry* rights on their head by treating an employee's decision not to speak to Employer's counsel as evidence of a cover-up. Furthermore, Vergel de Dios's presence at a local Dunkin' Donuts establishes only that he, like the Employer's attorneys, occasionally enjoys donuts or coffee, and is irrelevant to the Employer's motion to reopen the record.

even less likely to be coercive when the employer's opposition to the union is clear.⁵ *See Pacific Physicians Serv.*, 313 NLRB at 1176. Vergel de Dios would have been well within his rights to tell employees his belief that voting for the Union would help them secure better benefits.⁶

Finally, the Employer's motion to reopen the record should be denied because it is not timely. According to the Board's Rules and Regulations 102.65(e)(2), a motion to reopen the record shall be filed "promptly" upon the discovery of the new evidence sought to be adduced. Here, the Employer interviewed Sormani on January 29, 2013, yet it waited until March 2, 2013 to file its motion to reopen the record. The Employer provided no explanation for this lengthy delay.

For the foregoing reasons, the Board should reject the Employer's motion to reopen the record.

March 13, 2013

Respectfully submitted,

s/ Katherine H. Hansen
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⁵ Here, there is no dispute that the Employer engaged in a "robust" antiunion campaign. *Hearing Officer's Report* at 8, fn. 5.

⁶ Furthermore, even if established and considered objectionable, Sormani's claims are insufficient to affect the outcome of the election. While Sormani claims Vergel de Dios told four unit employees to vote for the Union, in order to overturn the election results the Employer had to prove objectionable conduct affecting the votes of twenty election-eligible employees. Sormani's vague statements that Vergel de Dios "randomly" said people should vote for the Union does not allege that these comments were made to, or heard by, any unit employees.

CERTIFICATE OF SERVICE

The undersigned certifies that on March 13, 2013, the forgoing was filed electronically with the NLRB and served on counsel for the Employer, Jedd Mendelson, via email at jmendelson@littler.com.

s/ Katherine H. Hansen
Katherine H. Hansen