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

UHS-CORONA, INC. d/b/a CORONA REGIONAL MEDICAL CENTER

Employer

and **Case 21-RC-094258**

UNITED NURSES ASSOCIATIONS OF CALIFORNIA/UNION OF HEALTHCARE PROFESSIONALS

Petitioner

***Jonathan A. Siegel, Esq.* for the Employer**
***Ryan Spillers, Esq.* and *Richa Amar, Esq.* for the Petitioner**

Special Appearances:
***Lisa McNeill, Esq.*, for the National Labor Relations Board**
***Stephen Auer, Esq.*, for the Medical Staff of the Employer**
***Benjamen J. Fenton, Esq.*, for Individual Physicians**

RECOMMENDED DECISION ON OBJECTIONS

MARY MILLER CRACRAFT, Administrative Law Judge. In this post-election objections case, UHS-Corona, Inc. d/b/a Corona Regional Medical Center (the Employer) claims that the majority vote for United Nurses Associations of California/Union of Healthcare Professionals (the Petitioner or the Union) should be set aside and a new election conducted. The Employer's objections allege that non-employee physicians who are independent practitioners interfered with the laboratory conditions during the critical period. The Employer also avers that the Union engaged in objectionable conduct including an appeal to racial prejudice and that a Board agent conducting the election engaged in misconduct.

I find insufficient evidence that any of the critical period events litigated before me had a tendency to interfere with employee free choice. Because there is no evidence of irregularities sufficient to question the fairness and validity of the January 3 and 4, 2013[1] election, I recommend that the Employer's objections be overruled in their entirety and that the election results be certified consistent with these findings.

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[1] Unless otherwise referenced, all dates in January are in 2013. All other dates are in 2012.

I. Jurisdiction and Labor Organization Status

The Employer operates a hospital and other health care facilities in Corona, California. The facilities involved in this proceeding are located at 800 South Main Street (the Main facility) and 730 Magnolia Avenue (the Magnolia facility). The parties stipulated that during the 12-month period preceding the election agreement, which period is representative of the Employer's operations, the Employer derived gross revenues in excess of $250,000 from the operation of its health care institutions, and purchased and received goods valued in excess of $50,000, which goods were shipped directly to the Employer's Corona, California facilities from points outside the State of California. Thus I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The parties further stipulated and I find that the Union is a labor organization within the meaning of Section (5) of the Act.

II. Procedural History

Critical Period: November 8 through January 4

In the unusual circumstances of this case, the parties agree and I find that the critical period should extend from November 8, the date a prior petition for representation was filed in Case 21-RC-092844, until January 4, the date the election was completed in Case 21-RC-094258, the instant case.

The unit set forth in the prior petition for representation in Case 21-RC-092844 included registered nurses at the Main Street facility of the Employer. Following agreement of the parties to the supervisory status of charge nurses, house supervisors, and lead house supervisors, and agreement to inclusion of registered nurses at the Main Street and Magnolia facilities, the request to withdraw the initial petition as well as the instant petition were filed on December 5. Withdrawal of the original petition was approved on December 6. Thus, the parties agree and I find that the circumstances herein are similar to those in *Monroe Tube,* 220 NLRB 302, 305 (1975), holding that the critical period extended from the date of the first petition through the election conducted pursuant to a second petition. At the time of unlawful election interference, the union's first petition was on file. Although the first petition was later withdrawn, the day after its withdrawal a second petition in the same unit was filed resulting in the election at issue.

The facts in this case are nearly identical to those in *Monroe Tube.* On November 8, the Union filed a petition seeking to represent certain nursing employees in Case 21-RC-092844. Following discussions between the Employer and the Petitioner, on December 5, the Petitioner filed a second petition in Case 21-RC-094258, the instant case, seeking to represent certain nursing employees in a nursing unit agreed upon by the parties. On December 6, Region 21 approved the Petitioner's request to withdraw its first petition, the petition in Case 21-RC-092844. Thus, the parties agree and I find that the critical period began on November 8, when the first petition was filed. The parties further agree and I find that the critical period ended on January 4.

The Bargaining Unit

On January 3 and 4, the NLRB conducted a secret ballot election in the following agreed-upon bargaining unit stipulated as appropriate for purposes of collective bargaining within the meaning of Section 9(b):

Included: All full-time and regular part-time and per diem Registered Nurse-ICU; Registered Nurse-PCU; Registered Nurse-ER; Registered Nurse-OP/SS Surgery; Registered Nurse-Recovery; Registered Nurse-Surgery/OR; Registered Nurse-Surgical; Registered Nurse-Special/Specialty Nurse; Registered Nurse-L&D; Registered Nurse-Nursery; Registered Nurse-OB/GYN Nursing; Registered Nurse-PEDS; Registered Nurse-Lactation Consultant; Registered Nurse-Infusion Therapy; Registered Nurse-Medical; Registered Nurse-PHP; Registered Nurse-Psych; Registered Nurse-Home Health; Registered Nurse-Skilled Nursing Unit; Registered Nurse-cardiac Cath Lab; Registered Nurse-Hospice; and Registered Nurse-Special Procedure employed by the Employer at its 800 South Main Street, 730 Magnolia Avenue, and 760 Washburn Avenue, Corona, California facilities. **Excluded:** All other employees, agency employees; Registered Nurse Home Health Coordinator; Registered Nurse Case Manager; Performance Improvement Coordinator/Core Measure; Quality Assurance Coordinator; Quality Coordinator; Wound Care Coordinator/RN Wound Care Enterostomal; Quality Improvement Nurse/UR Coordinator; MCS Coordinator/RN; Operating Room Clinical Educator/Nurse Educator; Care Partner; Community Liaison; Infection Control Nurse; Risk Analyst/Risk Management Analyst; Clinical Systems Analyst; RN Clinical Specialist; Assistant Director-Surgical Services; Director-Infection Prevention; Director-Education; Interim Director – ICU; Director – ICU; Manager – Nursing; Director – Emergency Room; Interim Director OR/Recovery/OPS; Director – Quality Management; Director Women's Health Center/Services; Director – Med/Surg/Telemetry/PCU; Director – Risk Management; Director – Nursing; Rehab Hospital Administrator; Director – Psych Services; Director-Home Health; Director-Rehab/Therapy Services; Director-Case Management; Director-Diagnostic Imaging; Director-Information Systems; Charge Nurses; Lead House Supervisors; House Supervisors; office clerical and administrative employees; confidential employees; other professional employees; guards and supervisors as defined in the Act.

Tally of Ballots

According to the tally of ballots served on all parties on January 4, of the approximately 306 eligible voters, 155 cast ballots for representation by the Petitioner and 116 cast ballots against representation by the Petitioner. There were 5 void ballots and 3 challenged ballots, which were insufficient in number to affect the results of the election. The Employer timely filed and served 22 objections to the election.

At various dates in March, April, June, and July, 2013 a hearing on objections was held before me in Los Angeles, California to address these election objections. All parties were provided full opportunity to present evidence and examine and cross-examine witnesses. On the entire record, including my observation of the demeanor of the witnesses,[2] and after considering the briefs filed by counsel for the Employer and counsel for the Petitioner, I make the following findings of fact and conclusions of law.

[2] Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

III. The Objections

Objections 1, 2, 3, 4, 5, 6 and 12

These objections involve alleged conduct of non-employee physicians. Despite their non-employee status, the Employer alleges the physicians are its managers. Further, the Employer's objections claim these physicians advocated for the Union, interrogated voters, expressed pro-union sympathy, promised benefits, threatened designated Employer election observers, and threatened discharge and other coercive conduct. The Employer avers these activities were pervasive throughout the critical period and thus interfered with and destroyed the laboratory conditions required in Board elections.

Objection 1: During the critical period preceding the Election and during the Election, certain pro-union managers, supervisors and/or other agents of the Employer, as well as others with apparent authority to speak for the Employer, threatened, intimidated, harassed, interrogated, ordered and otherwise coerced eligible voters and/or engaged in solicitation, promotion and other pro-union conduct and communications toward a substantial number of eligible voters for the purpose of advocating and achieving a Union victory. Such conduct had the coercive effect of interfering with and destroying the laboratory conditions required in Board elections.

Objection 2: During the critical period preceding the Election and during the Election, certain pro-union managers, supervisors and/or other agents of the Employer, as well as others with apparent authority to speak for the Employer, interrogated eligible voters about their union and/or voting preferences.

Objection 3: During the critical period preceding the Election, certain pro-union managers, supervisors and/or other agents of the Employer, as well as others with apparent authority to speak for the Employer, attempted to coerce and/or persuade unit employees to vote for the Union by making pro-union statements to many unit employees at work, publishing and/or distributing pro-union photos, stickers, slogans and other promotional materials and engaging in other conduct advocating for the Union. Such conduct had a coercive impact on eligible voters, interfered with the election and destroyed the laboratory conditions required in Board elections.

Objection 4: During the critical period preceding the Election and during the Election, certain pro-union managers, supervisors and/or other agents of the Employer, as well as others with apparent authority to speak for the Employer and/or prospective employers, engaged in conduct affecting the results of the election, by promising to eligible voters higher wages, increased staffing, improved benefits and/or other things of value, including but not limited to jobs at other union hospitals, in exchange for voting for the Union or on the condition that the Union won the election. Such pro-union conduct had a coercive impact on eligible voters, interfered with the election and destroyed the laboratory conditions required in Board elections.

Objection 5: During the critical period preceding the Election and during the Election, the Union through its officers, agents, authorized representatives and others acting on its behalf and/or with its apparent authority, actual or implied endorsement or ratification, sent and/or displayed to voting unit employees pictures of certain managers, supervisors and/or other agents of the Employer wearing or carrying pro-union slogans, insignia or stickers. Such conduct had a coercive impact on eligible voters, destroyed the laboratory conditions required in Board elections and improperly affected the results of the election.

Objection 6: During the critical period preceding the Election and during the Election, certain pro-union managers, supervisors and/or other agents of the Employer, as well as others with apparent authority to speak for the Employer or the Union, threatened, intimidated, and harassed voting unit employees because they agreed to act as observers for the [Employer]. Such conduct had a coercive impact on eligible voters, destroyed the laboratory conditions required in Board elections and improperly affected the results of the election.

Objection 12: During the critical period preceding the Election and during the Election, certain pro-union managers, supervisors and/or other agents of the Employer, as well as others with apparent authority to speak for the Employer, threatened, intimidated, harassed and otherwise coerced many unit employees to vote for the Union by falsely claiming that they would be fired if the Union lost the Election. Such conduct had a coercive impact on eligible voters, destroyed the laboratory conditions required in Board elections and improperly affected the results of the election.

FACTS

These objections deal with the alleged activity of physicians who practice at Corona Regional Medical Center. Employer newsletters advise that these physicians are independent practitioners and not employees or agents. Indeed, the record contains no evidence that the physicians are employees or agents of the Employer.[3] The 250-300 physicians who practice at the hospital are organized as the Medical Staff, an independent non-profit corporation.[4] However, the Employer alleges these independent, non-employee physicians are "reasonably regarded" as managers based on their conduct and their roles within departmental and hospital committees.

The Employer presented evidence that five of these physicians spoke in favor of or asked questions about unionization during conversations generally at nurses' stations. Although dates and names of those present were vague, the comments attributed to physicians, generally in the context of ongoing conversations at nursing stations, are captured in a few examples:

- Why don't you want the Union? Why don't you want someone to protect you?
- How do you feel about the Union? Do you like it, do you not like it, are you for it?
- You need someone to stick up for you. You need someone to back you up.
- You guys should get the Union in here because it would force the [Employer] to make changes. Maybe you guys would get raises if you guys would get the Union in here. I hope you guys vote yes for the Union so you guys can get things changed that you want to get changed.
- How are you going to vote? What is your opinion of the Union? How do you feel about the Union? Why don't you support the Union?

In addition, the Employer presented evidence that on January 3, the first day of the

[3] The Employer does not argue that the non-employee physicians are its agents. The Employer's argument that physicians were agents of the Union is treated infra.

[4] Throughout these proceedings, the Medical Staff objected to allegations that physicians threatened nurses and stated that there are other procedural venues afforded under California law and available to the Employer to address such allegations. The Medical Staff filed a post-hearing letter in the nature of a brief reiterating their concerns. The existence of other procedural venues for addressing disruptive physician behavior is irrelevant to this proceeding and thus I reject the Medical Staff letter.

election, a Union e-mail was sent to 25 nurses showing a physician who practiced at the hospital with a Union sticker on his forehead stating, “YES! IT IS TIME!” The Union e-mail message stated that the doctor supported the nurses’ fight for patient and nurse safety. On the other hand, the Employer also produced evidence that a physician told nurses that they needed to be careful because if the Union was voted in, the hospital might close and nurses would lose their jobs.

Finally, the Employer presented evidence that on December 26, a physician was present in the human relations department when an Employer meeting of its election observers took place. Although the physician was told he should feel free to pass through the group of assembled Employer observers, he decided to wait. The observers were told which sessions to attend and what time to arrive. On the following day in the kitchen of the obstetrics unit, this physician told one of the Employer observers whom he had seen at the meeting the previous day that he was “kind of shocked that she was going that way. . . . You deserve more. You deserve someone to back you up.” The nurse smiled and said she did not need anyone to back her up.

ANALYSIS

Laboratory Conditions

The Board does not lightly set aside a representation election. *Madison Square Garden,* 350 NLRB 117, 119 (2005), and cases cited therein. However, the Board has long required that its elections be conducted in an atmosphere allowing freedom of choice. In 1948, the Board stated in *General Shoe Corp.,* 77 NLRB 124, 126:

> "When we are asked to invalidate elections held under our auspices, our only consideration derives from the Act which calls for freedom of choice by employees as to a collective bargaining representative." [quoting *P.D. Gwaltney,* 74 NLRB 371, 373 (1947)] Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice. An election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammeled choice for or against a bargaining representative. For this reason the Board has sometimes set elections aside in unconsolidated representation cases, in the absence of any charges or proof of unfair labor practice. When a record reveals conduct so glaring that it is almost certain to have impaired employees' freedom of choice, we have set an election aside and directed a new one. [footnote omitted] Because we cannot police the details surrounding every election, and because we believe that in the absence of excessive acts employees can be taken to have expressed their true convictions in the secrecy of the polling booth, the Board has exercised this power sparingly. [footnote omitted] The question is one of degree.
>
> We think that the Board should apply no different standards in those occasional representation cases which happen to be consolidated with unfair labor practice proceedings for purposes of hearing and decision. On this record, therefore, although the respondent's activities immediately before the election, as described in the Intermediate Report, are not held to constitute unfair labor practices within the meaning of the amended Act, certain of them created an atmosphere calculated to prevent a free and untrammeled choice by the employees.

Ultimately, the issue is whether the conduct had a reasonable tendency to interfere with employees' free choice to such an extent that it materially affected the results of the election. *Madison Square Garden,* supra, 350 NLRB at 119. In evaluating alleged objectionable conduct, "the subjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct." *Picoma Industries,* 296 NLRB 498, 499 (1989), quoting *Emerson Electric Co.,* 247 NLRB 1365, 1370 (1980), enfd. 649 F.2d 589 (8th Cir. 1981). The focus is on the reasonableness of an employee's fears as reflected by objective facts. *Electra Food Machinery,* 279 NLRB 279, 280 (1986).

Of course, the party asserting objectionable conduct has the burden of proving that certain specific conduct by agents or other persons had an undue and adverse impact on the election and that the conduct occurred in the critical period. *Ideal Electric Mfg. Co.,* 134 NLRB 1275, 1278 (1961). In order to balance the interests of insuring that employees have a fair chance to vote their preference against the interest of finality of the results, an election will be set aside only by meeting the standards set forth in *Taylor Wharton Harsco Corp.,* 336 NLRB 157, 158 (2001), as follows:

> [T]he proper test for evaluating conduct of a party is an objective one – whether it has "tendency to interfere with the employees' freedom of choice." *Cambridge Tool Mfg.,* 316 NLRB 716 (1995). In determining whether a party's misconduct has the tendency to interfere with employees' freedom of choice, the Board considers: (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, e.g., *Avis Rent-a-Car,* 280 NLRB 580, 581 (1986).

As to objections 1, 2, 3, 4, 5, 6, and 12, the Employer claims that the non-employee physicians' pro-Union conduct during the laboratory period had an adverse effect on the election due to physicians' "substantial managerial authority." The Employer notes that unit employees, i.e., staff nurses, spend 10 percent of their working time involved in patient care. This involves utilizing patient care protocols, procedures, practices, order sets, and written and verbal instructions from the physicians dictating the staff nurses' daily job functions. Thus, the Employer asserts that the physicians' pro-Union conduct warrants setting aside the election.

Contrary to the Employer, I find that these non-employee physicians do not qualify under the managerial employee exception because they are not employed by the Employer. Moreover, even if non-employees might fall within the managerial employee definition, I find that the physicians' statements did not have a tendency to interfere with the employee free choice. Further, I find that the physicians were not apparent agents of the Union. Finally, I find that under third-party standards, the physician's statements do not warrant a new election.

Non-Employee Physicians Are Not Managerial Employees Because They Are Not Employed by the Employer

The "managerial employee" distinction developed in representation cases in which unions sought to organize professional employees.[5] As early as 1943, the Board held that managerial employees were not to be included in bargaining units with non-managerial employees because they were closely related to management. *Bendix Aviation Corp.,* 47 NLRB 43, 47 (1943). This policy was explained in *Ford Motor Co.,* 66 NLRB 1317, 1322 (1946), as follows:

> We have customarily excluded from bargaining units of rank and file workers executive employees who are in a position to formulate, determine and effectuate management policies. These employees we have considered and still deem to be "managerial," in that they express and make operative the decisions of management.

Later, in *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 289 (1974), the Court endorsed the Board's definition of managerial and held that such individuals were not employees within the meaning of the Act:

> In sum, the Board's early decisions, the purpose and legislative history of the Taft-Hartley Act of 1947, the Board's subsequent and consistent construction of the Act for more than two decades, and the decisions of the courts of appeals all point unmistakably to the conclusion that "managerial employees" are not covered by the Act. [footnote omitted]

Managerial employees are defined as "those who formulate and effectuate management policies by expressing and making operative the decisions of their employer and who have discretion in the performance of their jobs independent of their employer's established policies." *NLRB v. Yeshiva University*, 444 U.S. 672, 682-683 (1980). The faculty involved in *Yeshiva* were employees of the university. The Employer offers no authority to support a finding that a non-employee may qualify as a "managerial employee." Moreover, my review of precedent reveals that the Board has never held a non-employee to constitute a "managerial employee."

Similarly, the Employer's reliance on *FHP, Inc.,* 274 NLRB 1141, 1142-1143 (1985), enforcement denied in relevant part, 731 F.2d 1384 (9th Cir. 1984)(committees on which doctors serve perform managerial functions), and *Idaho Falls Consolidated Hospitals,* 257 NLRB 1045, 1046 (1981)(departmental directors who prepare budgets, provide teaching for staff, and provide overall department administration excluded as managers), is flawed as the "managerial employee" doctors in those cases were directly employed by the hospitals. Cf., *Montefiore Hospital and Medical Center,* 261 NLRB 569, 571-572 (1982)(committee duties of staff doctors did not necessarily fall outside the professional duties of doctors primarily incident to patient care).

[5] Physicians have long been recognized as professional employees of their employers. See, e.g., *Ohio Valley Hospital Assn.,* 230 NLRB 604, 605 (1977).

Were the physicians "managerial employees," their conduct did not reasonably tend to interfere with the conduct of the election

Assuming, however, that a managerial employee finding is warranted, I further find that the alleged actions of the physicians did not affect the results of the election. My finding is based on application of *Harborside Healthcare, Inc.,* 343 NLRB 906 (2004) (on remand, 230 F.3d 206 (6th Cir. 2000)), by analogy (setting forth standard for analyzing the effect of supervisory pro-union conduct). I note that in *Northeast Iowa Telephone Co.,* 346 NLRB 465, 466-468 (2006), the Board applied *Harborside* in analyzing the activities of two managers with limited supervisory authority.

Harborside sets forth the following criteria for determining whether supervisory pro-union conduct upsets the laboratory conditions required for a fair election:

> (1) Whether the supervisor's prounion 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 prounion 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.

Harborside applies to supervisory pro-union activity and can only be applied by analogy to the facts of this case because the physicians are not supervisors.[6] Assuming for purposes of this analysis that *Harborside* is the appropriate analytical framework for managerial employees and further assuming that the non-employee physicians are managerial employees, I find that such authority could only be based on participation of physicians in medical committees that formulate patient care policies. Such authority is focused on delivery of patient care and not on the terms and conditions of employment of nurses.

The record reflects that there are ten standing Medical Staff committees. In addition, each department of the hospital has a quality review council on which physicians serve. Medical policies may originate from Medical Staff meetings. These policies are then subjected to review by the Medical Executive Committee and the Employer's Board of Governors. Certainly, some of the physicians involved in these proceedings have served on such committees and participated in formulating the medical policies of the Employer. The record, however, further indicates that physicians do not effectuate these policies. An entire hierarchy of Employer

[6] The Employer discusses numerous physician indicia of supervisory authority but does not argue specifically that the physicians are supervisors. Specifically, the Employer asserts that physicians responsibly direct nurses, provide feedback about nurses, interview nurses, make requests for specific nurses, and provide nursing training. Except for responsibly directing nurses in providing medical care, I find insufficient evidence to prove the physicians have any other indicia of supervisory authority. But regardless of this finding, the Employer does not provide any basis for finding the non-employee physicians are supervisors. Thus, in analyzing alleged interference with the election under the *Harborside* standard, the supervisory indicia of responsibly directing nurses is irrelevant. Moreover, the record clearly reflects that an entire supervisory hierarchy including charge nurses, managers, and administrators supervise nurses in providing patient care.

administrators, managers and charge nurses effectuate these policies as far as the registered nurses performance is concerned. In any event, for purposes of this analysis, I will assume managerial authority of the non-employee physicians.

According to the Employer's evidence, which I will accept for purposes of this analysis, five physicians expressed pro-Union sentiment by making statements that the nurses needed someone to stick up for them, discussing the advantages of Unions, asking nurses how they felt about the Union and asking why they didn't support the Union.[7] A sixth physician made an anti-Union remark but also urged voting for the Union. These conversations were during the course of casual encounters at busy nursing stations and sometimes in surgery and post-surgery rooms. I credit the testimony of one physician presented by the Employer who described the last few days of the critical period as follows:

> Every single unit and every single nurse and just about every single doctor, it [the Union] was all they were talking about 24/7 during those last few – because the hospital was buzzing with all these anti-Union – and I just call them anti-Union. All of the UHS employee hired guns, I guess. Whoever. I don't know. Lawyers and assistants and – so – I probably did [have conversations about the Union]. Everyone was having conversations about the Union. "Hey, what's going to happen," blah, blah, blah, you know.

This environment is reflected in testimony throughout the record. A consulting firm retained by the Employer held meetings with management as well as with eligible voters to explain the election process and advocate for the Employer. There is no evidence that non-employee physicians attended these meetings. The Chief Executive Officer (CEO) asked nurses to vote no telling them they could speak for themselves without a union. The CEO also attended meetings in all units to explain inaccuracies in pro-union literature. The Chief Nursing Officer (CNO) met with groups of eligible voters urging them to vote no and consistently told them that her experience with the Union was a very negative one and she did not feel a union was needed. Both CEO and CNO made rounds throughout the hospital just prior to the election speaking to individual voters, showing an anti-Union video, and asking nurses to vote no. Vote No stickers were worn by various managers and supervisors. Literature was distributed, posted throughout the hospital, and mailed to nurses' homes by the Employer urging nurses to note no.

The Employer also presented the testimony of a physician who admitted stating that the hospital might close if the Union won the election and, somewhat inconsistently, that nurses should vote for the Union or they might lose their jobs. These statements were made to charge nurses in the presence of staff nurses. Such statements can only be added to the general mix of conversations occurring during the critical period. Further, while the record strongly reflects

[7] I reject the testimony of the director of the medical/surgical department that a physician stated that he had pulled some of his patients from the hospital and would not return his patients to the hospital until it was unionized. The director could not recall if this statement was made during the critical period and the description of the timing – right before and during the initial push for unionization (which began in August) – when the patient census dropped from September through November – fails to prove a critical period date.

(although the Employer denies the relevance) that the Employer campaigned vigorously against unionization, only five physicians were involved in making statements in support of the Union.[8]

Moreover, were there such a tendency to coerce or interfere, the statements attributed to physicians did not affect the outcome of the election. The testimony is vague regarding how many voting employees heard these alleged statements and how frequently such alleged statements were made and I resolve this against the Employer as the bearer of the burden of proof by finding that the statements, if made, were generally not heard by those nearby and were not repeated day to day. There is no evidence of dissemination. The margin of victory, 155 to 116, is substantial and decisive. Given that the physicians had no supervisory authority[9] and any managerial authority would be limited to formulation of policy regarding patient care, I find the lingering effect of any pro-Union statements, if made by a non-employee physician manager, would be slight. Thus, I conclude that if the physicians were managers and if *Harborside* were the appropriate framework for analyzing pro-Union managerial statements, the statements attributed to physicians did not affect the outcome of the election.

The Conduct of the Physicians as Third Parties did not so Substantially Impair Employee's Exercise of Free Choice as to require that the Election be set Aside

In assessing third-party conduct not involving threats, the applicable standard is "whether the conduct at issue so substantially impaired the employees' exercise of free choice as to require that the election be set aside. *Rheem Mfg. Co.,* 309 NLRB 459, 463 (1992); *Southeastern Mills,* 227 NLRB 57, 58 (1976)." *Independence Residences, Inc.,* 355 NLRB 724, 729 (2010), quoting *Hollingsworth Mgt. Service,* 342 NLRB 556, 558 (2004). As the Board noted, this heightened standard for objections based on third-part conduct reflects its recognition of the unfairness of saddling parties with the consequences of conduct which they cannot control. *Independence Residences,* supra, 355 NLRB at 729.

For purposes of this analysis, I assume that five physicians made the comments attributed to them such as: Why don't you want the Union? Why don't you want someone to protect you? How do you feel about the Union? You need someone to stick up for you. You guys should get the Union in here because it would force the Employer to make changes – maybe you would get raises. How are you going to vote? I also note the e-mail sent by the Union to 25 voters depicting one physician as supporting the nurses. Finally, I note the vigorous Employer campaign to defeat the Union, the equally vigorous Union campaign to win the

8 The Employer also offered testimony of an election day conversation in which a physician asked, "What is going to happen to the staff who want the Union at the facility? Are they going to get fired?" The physician denied this statement. There was one voting unit nurse in the area. The assistant director of surgical services, who was present, told the voting unit nurse that nurses who voted for the Union would not get fired. The Employer argues that this conversation constitutes an admonition to "vote for the Union to keep [your job]." I find that even if credited and assuming the physician was a managerial employee, the assistant director of surgical services immediately supplied the proper response to the physician's question. Given these circumstances, I am unable to conclude that statement attributed to this physician reasonably tended to coerce or interfere with employee free choice. Moreover, this was a single isolated incident.

9 The objection reports mentions conduct of one stipulated supervisor, Myrna Gloriani, who allegedly promised employees benefits and/or employment at other unionized facilities. The Employer presented Gloriani who testified that she did not discuss the Union with any voters. No other witness contradicted her testimony. Thus, this allegation fails for lack of proof.

election, and the general discussions among voters and other personnel about the election independent of the campaigns.

In this context, it is impossible to conclude that the statements attributed to these five physicians could have substantially influenced the outcome of the vote by impairing employee free choice. The remarks attributed to the physicians were limited statements or questions made in the general context of ongoing discussions about the election. They were somewhat isolated in nature. The record does not contain evidence of persistent or extended remarks by the five physicians nor of dissemination of the remarks.

The Physicians are not Agents of the Union

Although the record clearly reflects that the Union did not ask physicians to engage in pro-Union activity, the Employer argues alternatively that the physicians are apparent agents of the Union and their pro-Union conduct destroyed laboratory conditions because it created an impression that managers and supervisors were aligned with the Union. I have already found that the physicians were not managers or supervisors of the Employer. Accordingly, it would follow that any pro-Union conduct undertaken as apparent agents of the Union could only create an impression that physicians (but not managers or supervisors) were aligned with the Union. Whether physician pro-Union conduct was undertaken with or without the apparent authority of the Union is totally irrelevant because the only physician pro-Union conduct litigated was speaking in favor of unionization or interrogating employees about how they would vote. No electioneering, misrepresentation, promise of benefit, waiver of initiation fees, or videotaping by physicians has been alleged.

Finally, were the non-employee physicians managers or supervisors of the Employer and were there evidence of apparent authority, the evidence would not support a finding of interference with the election. Viewing the evidence about physician statements in a light most favorable to the Employer, the physician questions about how employees felt about the Union, how employees were going to vote and statements that the employees needed someone to represent them and maybe they would get a pay raise if the Union were elected would not interfere with the election even if made by a Union agent. See, e.g., *J.C. Penney Food Dept.*, 195 NLRB 921 n.4 (1972)(union polling employees about how they will vote in election did not upset laboratory conditions); *American Beef Packers,* 180 NLRB 634, 635 (1970)(union promise of wage increase part of the give and take of campaigning and not objectionable).

In conclusion, I find that the non-employee physicians are not managerial employees because they are not employed by the Employer. Moreover, assuming that non-employee physicians were managerial employees, I find that the statements and questions attributed to them did not reasonably tend to interfere with the conduct of the election. Further, viewing the non-employee physicians as third parties, I find that the statements and questions attributed to them did not so substantially impair employees' exercise of free choice as to require that the election be set aside. Finally, I find the physicians were not agents of the Union. Accordingly, I recommend that Objections 1, 2, 3, 4, 5, 6, and 12 be dismissed.

Objections 7, 8, 9, 10, and 11

These objections deal with alleged Petitioner coercion of employees who agreed to act as Employer observers and employees who were opposed to the Petitioner, alleged Petitioner appeal to racial prejudice, and alleged Petitioner threat of vandalism.

- Coercion

Objection 7: During the critical period preceding the Election, the Union, through its officers, agents, authorized representatives and others acting on its behalf and/or with its apparent authority, actual or implied endorsement or ratification, threatened, intimidated, harassed and coerced voting unit employees because they agreed to act as observers for the [Employer]. Such conduct had a coercive impact on eligible voters, destroyed the laboratory conditions required in Board elections and improperly affected the results of the election.

Objection 8: During the critical period preceding the Election, the Union, through its officers, agents, authorized representatives and others acting on its behalf and/or with its apparent authority, actual or implied endorsement or ratification, threatened, harassed and/or coerced voting unit employees who either expressed opposition to unionization or support for the [Employer]. Such conduct had a coercive impact on eligible voters, destroyed the laboratory conditions required in Board elections and improperly affected the results of the election.

Employer observers and supporters who testified in this proceeding provided no evidence to support any coercion by the Union. Thus, I recommend that objection 7 be dismissed for lack of evidence. As to objection 8, a progressive care registered nurse, a unit employee, testified that on January 3 she received two phone messages from unknown individuals. Both messages urged her to vote yes for the Union. One of the messages said, "Come in and vote. You haven't voted yet. And vote yes for the Union." The portion regarding not yet having voted was adduced through a leading question. In any event, the progressive care nurse had not yet voted. She cast her ballot on the following day. This is the sum of the evidence that was presented in support of objection 8.

There is no evidence that the Union was responsible for these calls. The progressive care nurse could not remember if the callers identified themselves as being with the Union. Nevertheless, the Employer argues that these two phone calls constitute unlawful surveillance by the Union citing *Ballou Brick Co. v. NLRB,* 798 F.2d 339, 346 (8th Cir. 1986)(unlawful impression of surveillance created where employer indicated it had observed which employees attended a union meeting). There is no evidence to tie the statement "You haven't voted yet" to the Union. On this basis, I recommend that objection 8 be dismissed.

- Appeal to Racial Prejudice

Objection 9: During the critical period preceding the Election, the Union, through its officers, agents, authorized representatives and others acting on its behalf and/or with its apparent authority, actual or implied endorsement or ratification introduced and/or appealed to ethnic and/or racial prejudices by encouraging certain ethnic groups to vote, as a group, in favor of the Union as a sign of loyalty to their ethnic and/or racial group and/or by disparaging other ethnic and/or racial groups for opposing the Union. Such conduct had a coercive impact on eligible voters, destroyed the laboratory conditions required in Board elections and improperly affected the results of the election.

Objection 10: During the critical period preceding the Election, the Union, through its authorized agents, representatives, and individuals acting on its behalf and/or with its actual or implied endorsement introduced and/or appealed to racial prejudices.

In support of these objections, the Employer presented the testimony of an emergency room registered nurse, a unit employee. She testified that a Filipino man who identified himself

as from the Union [name unknown] visited her home in the afternoon about 2 weeks before the election. He asked her to "sign a paper" and to vote in the election. The paper she was asked to sign depicted many Union supporters including Filipinos. When she noticed the picture she said, "Oh," and the man from the Union said, "Oh, yeah, a lot of Filipinos are for the union." The emergency room registered nurse's rendition of this conversation altered on further examination. She stated later that the photo caught her attention because there were a lot of Filipinos in the picture of Union supporters and she told the man that there were a lot of Filipinos for the Union. To this the unidentified man said, "Okay. Don't forget to vote on January 3 and 4."

Although the emergency room registered nurse's testimony was credible and uncontroverted, it is insufficient evidence to support objections 9 and 10 and I recommend that they be dismissed. My recommendation is based initially on failure of proof. It is unclear whether the unidentified man from the Union made the statements or the nurse made the statements herself. Moreover, there is no evidence that the man identified as "from the Union" was an agent of the Union. Further, the statements, viewed in the totality of the circumstances, even if made by the unidentified man and assuming apparent authority to speak for the Union, were not made to inflame racial prejudice but rather constituted a mere statement of fact. There were a lot of Filipinos depicted in the picture of Union supporters.

Further, there is no evidence that race or ethnicity was a significant, pervasive aspect of electioneering, a requirement of a finding of objectionable conduct. *Sewell Mfg. Co.,* 138 NLRB 66, 70-72 (1962) (employer propaganda inflamed and tainted atmosphere); cf. *Allen-Morrison Sign Co.,* 138 NLRB 73, 75 (1962) (employer's temperately-toned letter advising of facts concerning union expenditures to eliminate segregation did not constitute objectionable conduct). Finally, in any event, this was a single, isolated incident. See, e.g., *Brightview Care Center,* 292 NLRB 352, 352-353 (1989)("isolated remarks made by unidentified employees, apparently in the course of casual conversations among employees," did not provide an adequate basis for setting aside a representation election). Accordingly, I recommend that objections 9 and 10 be dismissed.

- Vandalism

Objection 11: During the critical period preceding the Election, the Union, through its officers, agents, authorized representatives and others acting on its behalf and/or with its apparent authority, actual or implied endorsement or ratification, threatened, intimidated and otherwise coerced voting employees by engaging in acts of vandalism on [Employer] property.

No evidence was presented to support this objection and I recommend it be dismissed on that basis.

C. Objections 15, 16, 17, 18, 19, 20, 21, and 22[10]

These objections allege that specific misconduct, either by a Board Agent or by Union representatives or both, occurred during the election, as follows:

- The Challenged Ballot List

Objection 15: During the Election, the Board Agent at the Magnolia Campus voting location (the "Magnolia Board Agent") interfered with the fair conduct of the Election by permitting a Union

[10] Objections 13 and 14 were withdrawn.

agent to photograph a list of voters in the presence of other observers who were eligible to vote in the election. This conveyed to voting unit employees that the Union was keeping track of and could identify which employees had voted, thereby compromising the anonymity of voters, undermining the credibility of the process and raising the specter of possible future retaliation. By permitting the Union to take this photograph, it also conveyed to voting unit employees that the Board was partial to and acting on behalf of the Union.

There is no dispute that after the last polling period closed on January 3 and 4, a Union organizer was allowed to take a cell phone picture of the challenged ballot list at the Magnolia campus polling area. This occurred in the presence of the observers and an Employer attorney who was also examining and making notes from the challenged ballot list. This Employer attorney did not testify although he was present at times throughout the hearing. I draw an adverse inference that his testimony would be consistent with the Union organizer's testimony. I further infer that the pictures produced by the Union organizer showing that only the challenged voter list was photographed are accurate and correct.[11] Aside from the observers, no other eligible voters were present and the polls had closed.

In order to set aside an election based on Board agent conduct, the facts must raise a "reasonable doubt as to the fairness and validity of the election." *Polymers, Inc.*, 174 NLRB 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970). No such doubt is presented here. Under the circumstances, the polls had closed and both Employer and Union were interested in obtaining the names of challenged voters. The fact that the Union used a cell phone picture to obtain the list while the Employer made notes from the list is of no consequence. There can be no doubt that the fairness and validity of the election was not impaired. Thus I recommend that objection 15 be dismissed.

- Alleged Impression of Surveillance

Objection 16: During the Election, the Union, through its officers, agents, authorized representatives and others acting on its behalf and/or with its apparent authority, actual or implied endorsement or ratification, interfered with the fair operation of the Election by asking the Magnolia Board Agent, in the presence of voting unit employees, to confirm whether a specific employee had voted. By this conduct, the Union created an impression of surveillance, thereby raising the specter of possible future retaliation. Such conduct had a coercive impact on eligible voters, destroyed the laboratory conditions required in Board elections and improperly affected the results of the election.

Objection 17: During the Election, the Magnolia Board Agent interfered with the fair operation of the Election by identifying to the Union, in the presence of voting unit employees, a specific employee who had voted during a voting session. This indicated to voting unit employees that the Magnolia Board Agent was not an impartial third party but was instead acting on behalf of the Union. It also created an impression that the union was keeping a list of voters, thereby raising the specter of possible future retaliation.

Objection 19: During the Election, the Union, through its officers, agents, authorized representatives and others acting on its behalf and/or with its apparent authority, actual or implied endorsement or ratification, interfered with the laboratory conditions required in Board elections, when a Union agent entered the Magnolia Campus building and escorted a Union

[11] Testimony that the picture might have included other items on the table is specifically discredited to the extent it was not retracted.

observer to the polling room while the polls were open. For eligible voters who were either in the polling room or in the immediate proximity of the designated polling area, this created the impression of union surveillance, special union access to the voting area and that the union was able to identify who was voting. Such conduct by the Union had a coercive impact on eligible voters, interfered with the election and destroyed the laboratory conditions required in Board elections and affected the results of the election.

There is no evidence that any Union representative asked any Board Agent conducting the polling whether a specific employee had voted. Accordingly I recommend that objections 16 and 17 be dismissed for lack of proof.

Similarly, there is no evidence that any Union representative escorted an observer into a polling area during a polling session. In fact, the unrebutted evidence reveals that all observers were escorted by both a Union and an Employer representative and these representatives did not enter the polling area while the polls were open.

There is, however, evidence that a Union representative escorted a late-arriving observer to the lobby of the Magnolia building and asked a security guard to take the observer to the polling area. The Union representative and the observer were seen walking down a hallway toward the polling area by the director of human resources. Whether the director's observation was before or after the security guard was encountered is unclear. However, neither she nor any other witness testified that they saw the Union representative enter the polling area. Thus, I recommend that objection 19 be dismissed for lack of proof.

- Erroneous NLRB Observer Identification Pin

Objection 18: During the Election, the Magnolia Board Agent interfered with the fair operation of the Election by pinning a Union observer pin on the [Employer's] designated observer. This falsely conveyed to voting unit employees that the [Employer] observer had, at the last minute, changed to a Union supporter. By this conduct the Board agent also conveyed to voting unit employees that the Board favored the Union and was acting on behalf of the Union.

A hospice nurse served as an Employer observer from 2 to 4 pm on Friday, January 4. When she reported to the Magnolia polling area prior to the opening of the polls, a Board agent told her where to sit and gave her an observer button to put on. Before pinning on the button, the hospice nurse did not read the button. Although she did not know any of the voters, she marked off their names as the Board agent instructed her. After the polls closed and the hospice nurse removed and returned the observer button without reading it, she was told by a female observer, whom she did not know and could not identify, that this female observer thought the hospice nurse was a Union observer because she had been wearing a Union observer button.

The Union organizer who entered the polling area after the close of voting, testified he observed only two Union observers, both sitting to the left of the voter list. He knew both of these individuals and knew they were the designated Union observers. He did not know the hospice nurse and could not testify whether she was in the polling area as an observer or not but there were only the two designated Union observers that he observed. He agreed that there was a third woman "there" and that he asked the Board agent who she was. The Board agent responded that the third woman was a Union observer. The Union organizer told the Board agent that she was not a Union observer. The Union organizer never discovered the name of the third woman and he did not see the third woman's observer button.

Although the Employer called an Employer observer at the 2 to 4 pm January 4 Magnolia voting session, she was not asked to corroborate any portion of the hospice nurse's testimony. I draw an adverse inference that, if questioned on the issue, the Employer observer would not have been able to corroborate the Employer's claim that the hospice nurse was given or wore a Union observer button. Indeed, careful examination of the hospice nurse's testimony reveals that she did not testify that she read the button herself. Rather, her only awareness that she might have worn a Union observer button was based on an unidentified woman's statement to her after the polls closed.

No witness, including the hospice nurse and the Union organizer, had any firsthand knowledge regarding how the hospice nurse's observer button identified her. The Employer's evidence relies on unsupported hearsay: that after the polls closed, an unidentified woman told the hospice nurse that she had on a Union observer button. This fails to prove the fact. This woman was not presented for examination. Accordingly, there is a lack of proof that the hospice nurse, an Employer observer, wore a Union observer button. Moreover, even if she wore a Union observer button, by her own admission she was unaware of this fact throughout the voting session and never informed the Board agent of the alleged error. Further, by her own admission, she knew none of the voters. Under these circumstances, even if she pinned a Union observer button on herself, I find this button error could not reasonably have affected the outcome of the election and I recommend dismissal of Employer objection 18.

- Permitting Observers to leave Polls Unattended and to Communicate with Potential Voters

Objection 20: During the Election, the Board Agents failed to properly and fairly conduct the Election by permitting observers to leave the voting room unattended while polls were open.

Objection 21: During the Election, the Board Agents failed to properly conduct the Election by permitting observers to communicate with potential voters and other unit employees while the polls were open.

The Employer presented no evidence regarding these objections. Thus, I recommend that objections 20 and 21 be dismissed for lack of proof.

- Permitting Electioneering in or near Voting Area

Objection 22: During the Election, the Board Agent, failed to fairly conduct the election by permitting apparent union supporters to congregate in large numbers outside the polling area and discuss the election audibly in the presence of voting unit employees while the polls were open. This created the impression that the board favored the Union because it was allowing it to campaign outside the polling area while the polls were open. Similarly, the Union through its officers, agents, authorized representatives and others acting on its behalf and/or with its apparent authority, actual or implied endorsement or ratification, interfered with the election by congregating its supporters in large numbers outside the polling area while the polls were open. The foregoing destroyed the laboratory conditions required in Board elections and improperly affected the results of the election.

The nurse manager in the medical/surgical department and her boss both testified that around 8 a.m. on January 3 that there was a gathering of staff outside the office where they were talking loudly. That office is by a set of elevators which are around the corner and down a long hallway from one of the polling areas. After a few minutes, the people moved on. They

were not sure who the people were. They heard the noise because the door was ajar but they were talking and not really paying attention to the hallway activity. The director of marketing and volunteer services arrived in this area around 8 a.m. and noticed 5-8 nurses congregated by the elevator. She walked on to her own office down the hall.

The Employer witnesses did not hear what the unidentified people at the elevator were discussing. Moreover, the evidence indicates that the elevator area was some distance from the polling area which was down a long hallway (one estimate was 25 feet) and around a corner from the elevators. Finally, there is no evidence that any of those congregated by the elevators was an agent of the Union.

Once the polls open, employees waiting to vote are entitled to be free of electioneering. See, *Milchem, Inc.,* 170 NLRB 362, 362-363 (1968). Any interference by an employer or a union during this time is improper. *Tyson Fresh Meats, Inc.,* 343 NLRB 1335, 1336 (2004)(*Milchem* rule applies to parties to the election). A third-party standard applies to non-parties such as employees. *Rheem, supra,* 309 NLRB at 462-463 (actions of pro-union employees who talked to other employees who were waiting in line to vote did not substantially impair employee free choice). Viewing the record in a light most favorable to the Employer reflects that 5-7 nurses were gathered at least 25 feet from the polls, talking loudly. The nature of their conversation is unknown. Under the third-party standard and consistent with *Rheem,* I find that the Employer's evidence does not support its objection and recommend dismissal of objection 22.

Conclusion

I recommend that the Employer's Objections to conduct allegedly affecting the outcome of the election be overruled in their entirety and that the election be certified.

RECOMMENDED CERTIFICATION OF RESULTS OF ELECTION

It is certified that a majority of the valid ballots have been cast for United Nurses Associations of California/Union of Healthcare Professionals and that it is the exclusive representative of the bargaining unit employees.[12]

Dated, Washington, D.C. November 15, 2013

Mary Miller Cracraft
Administrative Law Judge

[12] Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, DC within 14 days from the date of issuance of this Report and recommendations. Exceptions must be received by the Board in Washington DC by November 29, 2013.