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

ORCHARD MANOR ALP, LLC D/B/A ORCHARD MANOR REHABILITATION & NURSING CENTER
Employer
and **Case 03-RC-110739**
CSEA, LOCAL 1000, AFSCME, AFL-CIO
Petitioner

HEARING OFFICER'S REPORT ON OBJECTIONS[1]

This report contains my findings of fact, conclusions and recommendations on the Employer's objections. As discussed below, I recommend that these objections be overruled and that the Board issue a Certification of Representative.

Procedural History

Pursuant to a Stipulated Election, a secret ballot election was conducted on September 19, 2013[2] among the employees in the following appropriate collective bargaining unit:

> All full-time and regular part-time Licensed Practical Nurses (LPNs) (except whose primary job assignments is a Charge Nurse), Certified Nurses Assistants (CNAs), Cooks, Food Service Workers, Physical Therapy Aides, Physical Therapy Assistants, Activities Aides, Dietary Aides and Maintenance workers, excluding all Registered Nurses (RNs), Charge Nurses (including LPNs whose primary job assignment is Charge Nurse), confidential employees, managers, and guards and supervisors as defined by the National Labor Relations Act.

The Tally of Ballots issued at the conclusion of the election revealed that of approximately 109 eligible votes, 102 cast ballots, of which 48 were cast for the Petitioner, and

[1] Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this report must be received by the Board in Washington, D.C. on December 6, 2013. Immediately upon filing exceptions, the filing party shall serve a copy to the Regional Director of the Third Region. See Section 102.69(e) for a fuller statement of requirements. If no exceptions are filed, the Board may adopt the recommendations of the Hearing Officer.

40 were cast against. There were 14 challenged ballots, a number sufficient to affect the results of the election. On October 30, 2013, the Regional Director approved a stipulation resolving the challenged ballots. Inasmuch as the parties stipulated that the challenged ballots should be sustained and not counted, a majority of the valid votes counted, plus challenged ballots, has been cast for the Petitioner.

On September 26, the Employer filed timely objections to the election, a copy of which was duly served upon the Petitioner.

On October 30, the Regional Director issued an Order Directing Hearing on Objections and Notice of Hearing indicating that the issues presented by the Employer's objections could be best resolved at the hearing.

Accordingly, a hearing was held before me on November 7 in Buffalo, New York. Full opportunity to be heard and to examine and cross-examine all witnesses was afforded to all parties.

Upon the entire record of the case and my observation of the witnesses, I made the following findings, conclusions and recommendations with respect to issues presented.

Objection 1

In this objection, the Employer maintains the Regional Director was not authorized to make any determinations in this matter or issue a certification because in 2009, when she was appointed to her position, the National Labor Relations Board was comprised of just two members and therefore, lacked a quorum to take any official action, including appointing Regional Directors.

There is no dispute that at the time the Regional Director was appointed the Board was comprised of only two members. In addition, following her appointment, the Supreme Court

[2] All dates are in 2013, unless otherwise noted.

ruled that pursuant to Section 3(b) of the Act, a Board limited to two members did not constitute a quorum. New Process Steel, LP v. NLRB, 130 S. Ct. 2635 (2010). It is also undisputed that on July 6, 2010, a five member Board, four of whom were confirmed by the Senate ratified "en-masse" all administrative and personnel actions, including the appointment of Regional Directors and Administrative Law Judges, taken by the two member Board. Finally, it is undisputed that the election in this matter was conducted pursuant to a stipulated election agreement, signed by all parties, that requires the Regional Director's approval and specifically notes that the election will be conducted under her supervision.[3]

The Employer maintains that inasmuch as the Regional Director was originally appointed by a Board that was not authorized to do so because it lacked a quorum, her appointment was invalid, and that the five member Board's subsequent en-masse ratification of her and other's appointments was insufficient to cure this defect. Therefore, it asserts that she was not authorized to act pursuant to the Board's delegation in Section 3(b) to approve the stipulated election agreement and supervise the election, and is foreclosed from certifying the election results. The Employer argues that the election in this matter is invalid, and that any further proceedings should be stayed until her defective appointment is cured.

Even assuming that the Employer is correct and that the two member Board was not authorized to appoint Regional Directors, I conclude that Objection 1 lacks merit and shall recommend that it be overruled. In this regard, it is undisputed that a duly constituted Board subsequently ratified and adopted the two member Board's original appointment. The Employer claims that an en-masse ratification of all two member Board personnel actions was insufficient to cure the original appointment and suggests that this could only be accomplished on individual case-by-case basis. This position is not supported by any decisions issued by the Board or by any

[3] In addition, the executed stipulated election agreement affords the Regional Director the discretion to reschedule

reviewing tribunal.[4] In my capacity, I have no authority, or inclination, to rule that a personnel action taken by an undisputed duly constituted Board was improper. Given that the Regional Director's appointment was re-affirmed by a Board that constituted a quorum over three years ago and that all actions taken in this matter occurred following this re-affirmation, I shall recommend that Objection 1 be overruled.

I also note that the Employer entered into a stipulation, which is part of the administrative record in this case, that was subject to the Regional Director's approval and provided for her supervision of the entire election process, and only objected to her status for the first time in this post-election proceeding.

The Board has historically treated stipulated election agreements as binding contracts and enforced all clear and unambiguous terms unless they contravene an expressed statutory provision. T&L Leasing, 318 NLRB 324, (1995), Highland Medical Center, 327 NLRB 1049, (1999). Thus, the Board has enforced agreements concerning the composition of the unit[5], the basis for determining the eligibility of per diem employees[6] and voting times for specific employees. [7]

In this case, the Employer entered into a stipulated election agreement that clearly and unambiguously required the Regional Director's approval and authorized her to supervise the election in accordance with the Board's Rules and Regulations. The Employer never questioned the Regional Director's authority prior to voluntarily entering into this stipulation or asked to be released from the agreement before the election. It does not assert that the election was not

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the election if it is postponed or canceled.

[4] The Employer's argument presumably would also apply to Administrative Law Judges that were originally appointed by the two member Board. Research reveals no published cases in which a Circuit Court refused to enforce a Board order that was predicated on a decision issued by an Administrative Law Judge who was originally appointed by the two member Board.

[5] Business Records Corp., 300 NLRB 708 (1990).

[6] Windham Community Memorial Hospital, 312 NLRB 54 (1993).

[7] Dunham's Athleisure Corp., 311 NLRB 175 (1993).

conducted pursuant to the Rules and Regulations or that any party, including the Regional Director, breached the stipulation. Instead, it only challenged the Regional Director's authority to oversee the process after it was apparent that a majority of votes had been cast for the Petitioner. Although the Board has apparently never published a decision enforcing a stipulated election agreement to foreclose subsequent challenges to the Regional Director's authority to oversee the process, I cannot perceive any reason why these clear and unambiguous terms are any less binding than other terms of the agreement.

Consistent with the binding nature of election agreements, it is also well settled that when parties enter into a stipulated agreement, they waive their right to a pre-election hearing and are barred from raising issues that could have been raised in such a hearing in any subsequent proceeding. I.O.O.F. Home of Ohio, Inc., 322 NLRB 921 (1997). In this case, if the Employer believed that the Regional Director's appointment was invalid and that she was not authorized to supervise this process and issue a certification based on the results of this election, it could and should have raised this issue before entering into an agreement that provided otherwise. Thus, having failed to raise the issue prior to entering into the election agreement, the Employer is barred from raising the issue in this or any subsequent proceeding.

Based on all the above, I conclude that Objection 1 is without merit and shall recommend that it be overruled.

Objection 2

In this objection, the Employer alleges that the Petitioner by various acts and statements, "created an atmosphere of confusion or fear of reprisal and thus interfered with the employees' freedom of choice."

The Employer's presentation of evidence to support this objection was somewhat disjointed and it is difficult to discern exactly which conduct the Employer asserts is objectionable. For purposes of this report I have attempted to treat all conduct about which the Employer elicited evidence as allegedly objectionable. As discussed below, I have concluded that none of the conduct, whether evaluated as separate incidents or in the aggregate, warrants setting aside the election.

As noted, the Employer presented a number of witnesses to testify about several incidents, but the primary focus of its presentation was on a single Facebook entry. The facts surrounding this issue are undisputed. As part of its campaign, the Petitioner created a group Facebook page entitled "Bloom600", which was administered by Brian Cornelius, its Director of Organizing, and was identified on the page as "Bloom." This Facebook page was utilized by union supporters and Cornelius to communicate with each other and advocate for the Union. During the hearing, the parties stipulated that the contents of the page were widely disseminated and many employee witnesses, whether they supported the Petitioner or not, acknowledged that they were not only familiar with the page, but had seen the post at issue prior to the election.

In this regard, on September 17, Pamela Frasier, a CNA and member of the Petitioner's organizing committee, posted a lengthy comment on the "Bloom600" Facebook page that started:

> "Well if the union does not get voted in, 30 people are losing their jobs. Well (sic) I be at the top of the list. Remember what they did to Barb. Remember what they are doing to Meghan, Chris and Sarah…"

The remainder of the post complained about the manner in which the Employer and its consultants conducted the campaign, accused the Employer of breaking prior promises, and asserted that the employees needed a union to improve resident care and their own job security.

The Employer asserts that Frasier's claim that thirty employees would lose their jobs if the Petitioner did not prevail is objectionable because it is an improper threat or a serious misstatement of fact. As an initial matter, I note that Frasier's membership on the Petitioner's organizing committee and her apparent outspoken support of the Petitioner, standing alone, is insufficient to make her the Petitioner's agent. Pierce Corporation, 288 NLRB 97 (1988), Cornell Forge Co., 339 NLRB 733 (2003). In addition, the Employer presented no additional evidence that could allow for a conclusion that Frasier was a general agent for the Petitioner in this campaign. In this instance, however, Frasier made her posting on a union-sponsored Facebook page. More importantly, the thread of comments following the post reveals that Cornelius, as Bloom, not only saw the post, but commented on and reinforced Frasier's observations about the cost of the consultant's services. Therefore, it is reasonable to conclude that Cornelius, an admitted agent for the Petitioner, not only saw the post, but ratified and condoned it. This is particularly true, whereas here, Cornelius, as administrator, had the capacity to delete the post if it troubled him. In instances where parties are aware of alleged unlawful or objectionable conduct by non-agent employees or third parties, the Board has held them accountable for these activities when they do not disavow the conduct and their response suggests that they are condoning or ratifying it. East Texas Motor Freight, 262 NLRB 868 (1982), Dentech Corp., 294 NLRB 924 (1989) and Service Employees International Union, Local 87, 291 NLRB 82 (1988).

Although, the Petitioner is legally responsible for Frasier's September 17 posting, I conclude that Frasier's observation that thirty employees would be fired if the Petitioner did not prevail does not constitute an objectionable threat. First, read in its entire context, Frasier's comment cannot be reasonably construed as a threat that she or the Petitioner would cause the discharge of employees if the Petitioner did not win the election. Rather, it is clear that she is expressing her concern, whether founded or not, that the Employer would retaliate against union

supporters if the employees did not vote for representation. Even if Frasier's remark could be reasonably interpreted as a threat that she or the Petitioner would cause the discharge of employees if the Petitioner lost, the Board has long held that employees can reasonably be expected to evaluate such remarks as being illogical and unenforceable in the absence of evidence that the Employer was disposed to the Petitioner, because such matters are normally not within an employee's or union's control. Underwriters Laboratories, 323 NLRB 300 (1997), Pacific Grain Products, 309 NLRB 690 (1992).

The Employer also contends that Frasier's Facebook was untruthful and constituted a material misrepresentation of fact. As noted above, Frasier's Facebook post is most reasonably interpreted as an expression of her concern that the Employer would retaliate against union supporters if the Petitioner lost the election. She never represented that she had actual knowledge of the Employer's intentions, but was only making a prediction about the consequences for union supporters based on her perception of what had happened to other employees and the atmosphere of the campaign. Therefore, it is illogical that any employee would read her comment to be a statement of fact. Furthermore, even if the statement could be characterized as a misrepresentation of fact, in Midland National Life Insurance, Co., 263 NLRB 127 (1982), the Board declared that it would no longer examine the truth or falsity of campaign statements, and would no longer set aside elections on the basis of untruthful campaign statements. Accordingly, I conclude that Frasier's Facebook post predicting that union supporters would lose their jobs if the Petitioner lost the election does not constitute objectionable conduct.

The Employer also heavily emphasized a note that was taped to the inside of the nurses station, calling attention to a medication error made by Jamie Hodge to support its claim that the election should be set aside. In late August, Hodge, an LPN who openly opposed the Petitioner, apparently failed to remove a nitroglycerin patch from one of the residents. This alleged error was

discovered the following morning by Kristine Penna, another LPN, and an open union supporter and member of the organizing committee. It is undisputed that Penna reported her discovery to her supervisor, who presented Penna with a medication error report and asked her to summarize her discovery and co-sign the form with the supervisor. This form was subsequently presented to Hodge and the Employer counseled her about the incident.

The controversy resulting from this incident arises from a second note. During the last week of August, someone taped what was described as a witness account form on the desk at the nurses station. The note was folded over so the contents of the witness account form were not readily visible and Hodge's name was written on the outside flap.[8] The witness account form described the details of Hodge's alleged medication error and reportedly revealed the name of the resident. Hodge testified that although the form was sloppily 'signed" she recognized the handwriting to be that of Kristine Penna.[9] Hodge testified that she destroyed the form without showing it to anyone else and the record reveals no evidence that any other eligible employee saw the contents of the form.

Penna insists that she did not prepare or post such a form. The Employer, however, indefinitely suspended her for several days based on its apparent belief that Penna publicly displayed the witness account form containing what it felt was confidential employee and resident information. Eventually, shortly after the election, the Employer reinstated Penna with backpay.

Even assuming, without finding that Penna prepared the form in question,[10] this incident presents no basis for setting aside the election in this matter. First, the record contains no

[8] Although the form was folded, the evidence indicates that anyone could have lifted the flap to read it.

[9] It is not clear from the record whether Hodge's recalled if Penna's signature appeared on the form or whether she recognized the handwriting as Penna's. For the reasons discussed below, the distinction does not affect my disposition of this allegation.

[10] I am very hesitant to credit Hodge's testimony that she recognized the handwriting or signature on the form to be Penna's. I found Hodge's testimony to be rambling and not always responsive to the questions. At other times she was extremely defensive or exhibited considerable hostility. In addition, her destruction of the form before reporting her complaint to the Employer eliminates any possibility that her claim could be fully investigated or

evidence that Penna taped the form to the nursing station.[11] Second, as noted earlier, standing alone, Penna's participation on the Petitioner's organizing committee is insufficient to make her its agent and generally responsible for her actions. Pierce Corporation, supra; Cornell Forge Co., supra. Finally, there is no basis to conclude that the taping of the witness account form to a nurses station somehow improperly affected the results of this election. In this regard, there is no evidence on the record that the witness account form, which Hodge destroyed before anyone else could examine it, contained a threat of any kind, or referred to the organizing campaign or Hodge's opposition to the Petitioner. In fact, there is no record evidence establishing a nexus linking this incident to the campaign. The Employer asserts that the posting of this witness account violated a confidentiality policy. Presumably, if that was the case, the Employer was free to discipline the culprit, but employee misconduct is not automatically transformed into objectionable conduct just because it occurs during an organizing drive. Therefore, I find that the anonymous public display of a witness account form whose contents are confined to a description of work performance issues could not have interfered with employees "exercise of free choice" and does not warrant setting this election aside.

The Employer also relies on two incidents involving Tiffany Stickley, another outspoken opponent of the Petitioner, to support its claim that the election occurred in an atmosphere of fear and confusion. The record reveals that both alleged incidents[12] occurred after the polls closed on September 19, 2013. The Board has held that conduct occurring after an election can not affect

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corroborated. In contrast, I found Penna's testimony that she did not prepare or tape such a form to the nurses station to be credible. Unlike Hodges, it was apparent that she tried very hard to understand each question she was asked and to answer the question in a coherent and direct manner.

[11] It is noteworthy that Heidi Smith, the Employer's Director of Nursing, acknowledged that she was unable to determine who hung the form.

[12] According to Stickley, after the polls closed and the ballots were counted, an unidentified car containing unidentified occupants followed her to a neighboring town until she pulled into a gas station. In addition, after the election, Brandi Bruggeman, a union supporter, posted what Stickley characterized as a threatening Facebook comment to her. She was unable to describe the exact content of the post and it is not clear based on her testimony that the contents of the Facebook post were threatening.

the results of that election, and cannot serve as a basis for setting aside an election. Head Ski Company, Inc., 192 NLRB 217, 218 (1971) and Mountaineer Bolt Inc., 300 NLRB 667 (1990). Inasmuch, as the record reveals that both incidents about which Stickley complained and testified occurred after the polls closed and the ballots were counted, they cannot serve as grounds for overturning this election.

The Employer also cites two incidents of vehicular vandalism to buttress its claim that the election occurred in a tainted environment. Jamie Hodge testified that on September 4, when she returned to the car during the work day, she discovered that someone had "keyed" her car, leaving a gouge on her passenger door. Brian Dales, a CNA and another admitted open anti-union employee, testified that some day before the election, he does not know exactly when, he discovered a large dent in his car when he left at the end of his work shift that was not there when he arrived.[13] Both Hodge and Dale testified that they do not know who is responsible for the damage to their vehicles, and the record otherwise contains no evidence that the Petitioner's supporters, let alone its agents, were responsible for either of these acts. Likewise, the record contains no evidence that either of these incidents were linked to the campaign. Given the absence of any evidence that the Petitioner or its supporters are responsible for the indeterminate amount of damage to Hodge's and Dale's vehicles, I find that the incidents in question do not rise to the level of objectionable conduct.

The Employer relies on other relatively minor instances of what it believes constitute some form of improper conduct by employee supporters of the Petitioner or its supporters to butrees its assertion that the election was conducted in an atmosphere of "fear and confusion." Laurie Seager, who was openly opposed to the Petitioner, described an incident where Amy Cheatham, a nursing employee who openly supported the Petitioner and served on the organizing

committee, ignored her request for assistance with a fallen resident. Seager and other employees also testified that a picture of a mentally incompetent resident wearing a pro-union sticker was posted on the Petitioner's Facebook page. The record contains no evidence that the Petitioner or any of its supporters placed the sticker on the resident,[14] but Brian Cornelius, as administrator of the Facebook page apparently posted the photo when it was provided to him.

Neither of the incidents described by Seager constitutes objectionable conduct. Cheatham's alleged failure to respond to Seager's request for assistance arguably could be characterized as neglect of duty, and the Employer could have, at its own peril, imposed discipline. As noted previously, however, workplace conduct or performance issues do not transform into objectionable conduct only because they arise during the campaign. Cheatham did not threaten Seager or reference the campaign and although the Employer may believe that Cheatham's reaction to Seager's request for help was fueled by Cheatham's feelings about Seager's opposition to the Petitioner, the record contains no evidence to support this speculation. Under these circumstances, there is no basis to conclude that the failure of one employee to assist another with a work assignment another interfered with employees' exercise of free choice and cannot serve as a basis for setting the election aside.

Likewise, the Employer may have found the Petitioner's use of a resident's photograph in its organizing campaign distasteful, and could have, again at its own peril, disciplined an employee who helped stage or take the photo, but the Union's use of the photo of a resident wearing a pro-union sticker is not the type of conduct that by its nature, tends to interfere with employees freedom of choice. It does not convey a threat of any type or portray any form of

[13] The record does not reveal the extent of the damage. The Employer did not offer photographs of the gouge in Hodge's vehicle and the dent in Dale's car or provide any evidence about the repair costs for either vehicle.
[14] The picture also included the resident's granddaughter, a former employee of the Employer.

violence. Accordingly, I find that it does not constitute objectionable conduct that would require the election to be set aside.

The Employer called Shannon Tanner as a witness, and strangely appears to rely on her description of two perfectly legitimate contacts she had with the Petitioner or its supporters to buttress it claim that the election should be set aside. Tanner testified that at some point during the campaign, she did not specify the exact date, Sarah Gates, a union supporter and member of the organizing committee, told her in the presence of a resident that after their shift, she was going to give her an authorization card to sign. Tanner also testified on some unspecified date, the Petitioner's staff organizers visited her home and attempt to convince her to vote yes, and added that if the Petitioner won, the employees' pay would increase and staffing would improve.

Neither of these incidents constitutes objectionable conduct. Although Tanner did not specify the date on which Gates talked to her about meeting after work to sign a card, it is widely accepted that cards are signed and gathered before a petition is filed. As a general rule, the Board will only consider conduct objectionable if it occurs between the filing of the petition and the election, also known as the "critical period." Ideal Electric & Mfg. Co., 134 NLRB 1275 (1961). In addition, "it is the objecting party's burden to demonstrate that the objectionable conduct occurred during the critical period." Accubuilt, Inc., 340 NLRB 1337 (2003). The principal exception to this general rule arises in those cases where a union improperly threatens employees, or promises a benefit that is within its control to provide while soliciting authorization cards, [15] or enlists a statutory supervisor to solicit authorization cards. [16]

In this case, the Employer has not satisfied its burden that Gates' short conversation with Tanner occurred after the petition was filed, nor does her statement to Tanner fall within the

[15] NLRB v. Savair Mfg Co., 414 U.S. 270 (1973) and Royal Packaging Corp., 284 NLRB 317 (1987).
[16] Harborside Healthcare, Inc. 343 NLRB 906 (2004); Madison Square Gardens Ct., LLC., 350 NLRB 117 (2007).

limited exception to the general rule that the Board will not set aside elections based on events occurring outside the critical period.

Equally, as important, the conduct at issue is not objectionable. The Employer suggests that Gates did something improper when she told Tanner she would give her a card later, merely because the conversation occurred on work-time in the presence of a resident. The Board has never declared that a conversation is unlawful or objectionable just because it occurs on work time. Instead, in recognition that the employees have the right to expect that work-time be used for work, the Board, with the Supreme Court's approval, permits employers to implement rules limiting solicitation and even talking to non-work time and to enforce those rules by imposing discipline, provided they do so in a non-discriminating manner that does not treat Section 7 related activity differently than non-Section 7 activity. Republic Aviation v. NLRB, 324 U.S. 793 (1945), Our Way, Inc., 268 NLRB 394 (1984), Capitol EMI Music, Inc., 311 NLRB 997 (1993), Emergency One, Inc. 306 NLRB 800 (1992). In this case, if the Employer had a pre-existing uniformly enforced rule prohibiting employees from talking about non-related work topics in the presence of patients, it perhaps could have taken action against Gates. If it had no such rule or did not uniformly enforce a ban on talking, Gates was engaged in protected activity when she mentioned that she would give Tanner a card after work. As noted before, a possible work rule violation does not equate to objectionable conduct. Therefore, this incident does not require that the election be set aside.

Furthermore, the Employer's reliance on the Petitioner's use of home visits to communicate with employees is misplaced. Simply put, the Board recognizes that home visits are a perfectly legitimate means for unions to communicate with employees during an organizing drive. Randell Warehouse, 347 NLRB 591 (2006). In fact, an employee who accompanies union representatives on home visits is engaged in protected activity while doing so. Publix Super

Markets, Inc. 347 NLRB 1434 (2006). Therefore, the Petitioner's use of home visits to Tanner and any other employee's home is permissible campaign conduct and cannot serve as a basis for setting aside the election.

To the extent that the Employer alleges that the Petitioner acted improperly when its representatives told Tanner that it would obtain higher pay and better staffing for employees, I also conclude that this conduct is not objectionable. The Board has held that union promises to obtain improved terms and conditions of employment are not objectionable because employees are presumed to understand that a union cannot bestow better benefits on employees simply by winning an election but that such improvements must be obtained through the give and take of collective bargaining, and that employees easily recognize that union promises of improved employment terms are generally dependant on contingences beyond a union's control. FleetBoston Pavilion, 333 NLRB 655 (2001), Lalique N.A., Inc., 339 NLRB 1119 (2003). Accordingly, whatever remarks the Petitioner's representatives made about the prospects for higher pay and improved staffing are insufficient to overturn the election results.

The Employer also asserts that the election should be set aside because Brandi Bruggeman, an open union supporter, threatened a fellow employee with bodily harm. In this regard, Christopher Allen, a unit employee, testified that Bruggeman told him she would kick his butt. Allen was manifestly uncomfortable testifying and could not recall when the statement was made, or the context in which it occurred. Bruggeman candidly testified and provided additional details about the incident. She claims that on some indeterminate date, while on lunch break, she asked Allen how he felt about the Petitioner. According to her, he responded that his boss would kill him if he supported the Petitioner, and that she jokingly, said that she would kick his butt if he did not and observed that she would be discharged if the Petitioner lost. Bruggeman was suspended for two days over this incident, but was reinstated and compensated for her lost wages

because another employee who witnessed the incident confirmed that Bruggeman was only joking.

This incident does not constitute objectionable conduct. First, there is insufficient evidence that the exchange between Bruggeman and Allen occurred during the critical period and as noted previously, as the objecting party, the Employer has the burden of establishing that the conduct occurred between the date the petition was filed and the day of the election. Second, Bruggeman is not a member of the organizing committee and her open support for the Petitioner, by itself, is insufficient to make her the Petitioner's agent. Thus, given her status as a third party, and only if the incident occurred within the critical period, which the Employer failed to establish, Bruggeman's remark to Allen would be objectionable only if it could be construed as a serious threat of physical violence that contributed to a general atmosphere of fear and reprisal that rendered a fair election impossible. Accubuilt Inc., supra. Westwood Horizons Hotel, 270 NLRB 802 (1984). In determining whether a threat is serious, the Board examines, among other things the nature of threat, whether the threat was disseminated and whether the person making the threat was capable of carrying it out. Westwood Horizons Hotel, supra.

In this instance, given all the circumstances and my own observations of Bruggeman and Allen, Bruggeman's remarks do not qualify as a serious threat. In this case, it's apparent that the alleged threat occurred in the context of a relaxed conversation and was precipitated by Allen's own exaggeration that his supervisor would kill him if he supported the Petitioner. The Employer itself concluded that Bruggeman was only joking and that she did not intend to actually threaten Allen, when it decided not to impose any discipline over the incident. Thus, the nature of the remark and the circumstances under which the exchange took place mitigate against a conclusion that it was a serious threat. There is also little basis for concluding that anyone, including Allen, would believe that Bruggeman was capable of carrying out the threat. The record contains no

evidence that Bruggeman has threatened or carried out acts of violence against other employees. Thus, Allen had no reasonable basis to believe, based on past experience, that Bruggeman was actually inclined to "kick his butt." Equally as important, given the physical stature of Bruggeman and Allen, it is highly unlikely that any reasonable person would find the remark to be a credible threat of violence. Overstating the obvious, Bruggeman is female, Allen is a male. Although Allen is, at most, average size, he is still significantly bigger than Bruggeman. Given this disparity, it is unlikely that someone of Allen's physical stature, would fear physical retaliation from Bruggeman. It is perhaps even less likely that any other employee who heard about the incident would seriously believe that Bruggeman would physically attack Allen. Finally, the Employer adduced no evidence that this remark was widely disseminated. Furthermore, the Employer by its own actions seemingly concluded that Bruggeman did not contend to convey a threat of physical harm. For the reasons mentioned above, there is no basis for any reasonable person to believe that Bruggeman was disposed to act violently toward Allen or that her stature suggested that she was physically capable of carrying out such a threat. Finally, the record reveals that the remark was directed at only one employee and there is no evidence that it was disseminated to other employees. In addition, the record contains no additional evidence of physical threats or violence. Thus, there is no basis to consider the cumulative effect of Bruggeman's conduct. Therefore, for all the reasons discussed above, I conclude that her actions do not constitute objectionable conduct.

Throughout the hearing, the Employer attempted to elicit evidence that pro-union employees were rude and disruptive during captive audience meetings held by the Employer. At most, employees testified in vague terms that unidentified union supporters were too loud or talked while the Employer's representatives attempted to speak. Its questioning implied that in some instances pro-union employees turned their backs on presenters, threw furniture and stormed

out of meetings, but these inquiries produced no evidence that any conduct of this nature actually occurred. Even if employees behaved in the manner that the Employer's questioning suggested they did, it is unlikely that the conduct would qualify as objectionable, but in this instance, there is insufficient evidence to even allow for a conclusion that pro-union employees engaged in misconduct at captive audience meetings.

Finally, the Employer suggests in its objection that the cumulative effect of the conduct described above created an atmosphere of fear and confusion that tainted the election. This is the standard that the Board utilizes to determine whether an election should be set aside when there is evidence of serious widespread third party threats of physical harm, acts of violence or destruction of property. In this case, the evidence pertaining to the only arguable threat of physical harm is insufficient to conclude that it occurred within the critical period, or that it was in fact a serious threat. The record reveals no evidence of actual acts of violence. The only damage to property was relatively minor and there is insufficient evidence that the Petitioner or any of its agents were responsible for it. Therefore, the third party conduct in question did not taint the atmosphere in which the election was held. The other conduct about which the Employer complains is not objectionable by any standard and the cumulative effect of non-objectionable conduct is not a factor of consideration in determining whether an election should be set aside. Based on all the above, I conclude that Objection 2 lacks merit and shall recommend that it be overruled.

Conclusions and Recommendations

I conclude that the Employer's objections lack merit and recommend that they be overruled and that a Certification of Representative issue.

Dated at Buffalo, NY, this 22nd day of November, 2013

/s/Paul J. Murphy

Paul J. Murphy, Hearing Officer
Region 3, Buffalo, NY 14202