

SNE Enterprises, Inc. and United Steel, Paper Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC, Petitioner. Case 9-RC-17883

October 31, 2006

DECISION ON REVIEW AND DIRECTION OF
SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On October 6, 2005, the Regional Director for Region 9 issued his Third Supplemental Decision and Certification of Representative (pertinent portions of which are attached as an appendix) on remand from the Board,¹ in which he overruled the objections raised by the Employer to the conduct of the election held on May 20, 2004. The Regional Director found, inter alia, that the solicitation of authorization cards by the Employer's supervisors was not objectionable conduct under *Harborside Healthcare, Inc.* The Regional Director also found that the supervisors' comments and other conduct during the campaign did not constitute objectionable promises of benefits or threats of reprisal and that the conduct of the hearing officer did not warrant overturning the election. The Regional Director therefore certified the Petitioner as the bargaining representative of the Employer's production and maintenance employees.²

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review contending that the lead persons' active role in support of the Union (including soliciting authorization cards), implicit promises of benefits in exchange for support of the Union, and implicit threats of negative consequences if the Union should lose interfered with the employees' right to free choice. The Petitioner filed a brief in opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the entire record, we find, contrary to the Regional Director, that the leads' role in

¹ On May 17, 2005, the Board (Chairman Battista and Member Schaumber, Member Liebman dissenting) granted the Employer's request for review of the Regional Director's Second Supplemental Decision and Certification of Representative, which overruled the Employer's objections. 344 NLRB 673 (2005). The Board remanded the case to the Regional Director for reconsideration in light of *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004).

On remand, a second hearing was held June 14, 2005. The Employer was permitted the opportunity to submit additional evidence. Further testimony was received pertaining to the role the supervisors had played in soliciting cards and campaigning for the Union.

² The tally of ballots showed 87 votes cast for and 82 votes cast against union representation, with 3 challenged ballots.

soliciting authorization cards constitutes objectionable conduct that warrants setting aside the election. Consequently, we grant the request for review and reverse the Regional Director's findings in this regard, set aside the results of the election, and remand the case to the Regional Director for the conduct of a new election. We deny the Employer's request for review in all other respects.³

Facts

This case concerns a unit of approximately 180 production and maintenance employees at the Employer's window and door manufacturing facility. The employees report to leadpersons, each of whom supervises about 20 employees.⁴ Leads Henry Withrow, Chad Edwards, and Ruth Adkins were involved in the union organizing campaign at the Employer's plant that began in January, 2004. Withrow and Edwards were on the Organizing Committee. The Union asked each member of the Organizing Committee to collect at least 10 signed cards; Edwards collected about 10 and Withrow about 6.⁵ Both leads solicited authorization cards from direct subordinates, as well as others, at least until the petition was filed on February 20, 2004, when most card solicitation by the Union ceased. After the petition was filed, the three leads continued to publicly support the Union, making comments that we find nonobjectionable. For instance, Edwards told a number of employees that the Union would help them get better benefits and treatment from the Employer. Likewise, Edwards and Adkins talked to employees about being "at will" and explained that the Union would negotiate a just-cause provision requiring the Employer to give them due process before firing them.⁶

³ Specifically, we find, for the reasons stated by the Regional Director, that the comments made by the Employer's leads during the campaign were not objectionable, as they did not constitute implicit promises of benefits in exchange for support of the Union or implicit threats of negative consequences if the Union should lose. Further, we find that the hearing officer's conduct does not warrant overturning the election. With regard to the Employer's argument concerning the admittance of Petitioner's Exh. 2, we previously denied review of this issue in our May 17, 2005 order, and we decline to revisit this issue.

⁴ As noted below, the lead persons (leads) are supervisors within the meaning of Sec. 2(11) of the Act.

⁵ Contrary to our colleague's assertion, there is no evidence in the record to establish that "the leads did not collect the cards themselves or specifically ask for the return of signed cards." Rather, the Union encouraged the leads to obtain signed cards, and the record does not include a specific description of how Edwards and Withrow came into possession of the cards. Nonetheless, it is reasonable to infer from these circumstances that employees understood that Edwards and Withrow, who were members of the organizing committee, were the appropriate conduits for returning signed cards to the Union.

⁶ The leads also made a number of comments that the Employer alleges constituted threats of reprisal for failing to support the Union or

The lead persons were found to be statutory supervisors in the Acting Regional Director's Decision and Direction of Election, issued on April 21, 2004. At that time, about a month before the election, the lead persons ceased all prounion activities.

Analysis

Board Law on the Supervisory Solicitation of Authorization Cards

In *Harborside*, the Board held that it will look to two factors to determine whether supervisory prounion conduct upsets the requisite laboratory conditions 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, including (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, 343 NLRB at 909.

Under the first prong of the *Harborside* standard, in examining the nature, extent, and context of the supervisors' conduct, the Board held that with respect to the supervisory solicitation of authorization cards, "absent mitigating circumstances," such solicitations have "an inherent tendency to interfere with the employee's freedom to choose to sign a card or not" and thus "may be objectionable." *Id.* at 910. The Board noted the potential for employees to reasonably sense an obligation to support the union after signing a card and the false portrait of union support that supervisor-obtained cards may provide. *Id.* at 911.

The Decision of the Regional Director

In finding that the lead persons' solicitation of cards was not coercive and thus did not materially affect the results of the election, the Regional Director found that

there were mitigating circumstances. According to the Regional Director, these circumstances include: the leads' lack of power to significantly affect the working lives of employees including those directly under them; the employees' perception of the leads as little more than regular employees with no significant authority over their terms and conditions of employment; the fact that in three earlier representation elections, lead persons had been eligible to vote; the fact that the solicitation occurred in otherwise noncoercive circumstances; the Employer's campaign literature, which countered any perceived coercion by telling employees that they could vote against the Petitioner even if they had signed a card; and the cessation of any prounion supervisory conduct a month prior to the election.

Application of the Law to the Facts of this Case

We recognize that there were some mitigating circumstances, but we disagree with the Regional Director that these mitigating circumstances sufficiently negated the inherently coercive effect of the supervisory solicitation of authorization cards on the subsequent election, which the Union won by a very narrow margin.

It is undisputed that in the months prior to the election Edwards and Withrow directed their solicitation of authorization cards—and other prounion activity—towards their subordinates over whom they had the authority to responsibly direct and assign work. Indeed, they purposely targeted the vast majority of their subordinates, who represented a large portion of the voting unit. See *Millard Refrigerated Services*, 345 NLRB 1143 (2005) (setting aside the election based on the supervisory solicitation of cards, where much of the prounion activity was directed at direct subordinates of a group of prounion supervisors working together); compare *Glen's Market*, 344 NLRB 294 (2005) (finding that the supervisors' solicitation of cards could not reasonably have coerced or interfered with employees' free choice in the election where there was no evidence that their prounion activities were directed toward any employee over whom they exercised supervisory authority). Lead Henry Withrow asked at least six employees to sign authorization cards, including employees under his direct supervision. Lead Chad Edwards asked 24 of his direct subordinates to sign authorization cards, and he solicited cards from at least 5 other employees not under his direct supervision.⁷ Nor, as mentioned, do we find that the mitigating circumstances cited by the Regional Director removed the inherent coerciveness of the supervisory card solicitation and its impact on this very close election.

promise of benefits in exchange for union support. For instance, the Employer contends that Withrow and Edwards both suggested that the Employer might retaliate against them and other prounion employees for supporting the Union. As noted above, we find that these comments were not objectionable for the reasons stated by the Regional Director.

⁷ There was no evidence that Lead Ruth Adkins solicited any cards.

The leads were first-line supervisors. They assigned and directed the work of the unit employees on a daily basis and had the authority to issue written warnings known as “contact sheets.” As discussed in *Harborside*, the first-line supervisor has the most day-to-day contact with the employees. While such a supervisor may not necessarily have the authority to hire, fire, transfer, or promote, his or her authority to assign and responsibly direct can impact broadly on subordinates’ daily work lives.

As noted, the coercive supervisory card-solicitations began at the start of the campaign in January, and continued until the petition was filed on February 20. Moreover, the supervisors continued to campaign for the union until the Regional Director’s finding of April 21 that they were indeed supervisors. Thus, because the election was not held until May 21, the supervisors campaigned for the Union for 4 of the 5 months of the campaign. And, of course, they remained supervisors at all times. In our view, the mere passage of time would not mean that the employees who were coerced by the earlier card-solicitations would suddenly become noncoerced.

In addition, the fact that solicitation of cards all but ceased at the time the petition was filed is insufficient, without more, to negate the inherent coerciveness of the original solicitations. In many cases dealing with the supervisory solicitation of authorization cards, the solicitations will have ceased a month or more prior to the election, as solicitation of cards primarily occurs before a petition is filed. Nonetheless, in *Harborside* the Board explicitly held that supervisory solicitation of authorization cards, just as supervisory solicitation of antiunion petitions, is inherently coercive, even if it occurs outside the critical period. *Supra*, 343 NLRB at 911. As the *Harborside* majority noted, solicitations outside the critical period can impact the election in two ways: (1) employees who have signed cards may reasonably feel obliged to carry through on their stated intention to support the Union; and (2) the number of signed cards may paint a false portrait of employee support for the Union. See *id.*

Our dissenting colleague begins with an attack on *Harborside* and on its retroactive application. Indeed, it is not until part III of her opinion that she purports to apply *Harborside* to this case. The simple answer to our colleague is that these principles are now matters of Board law.

Neither does it matter that the supervisors here engaged in the conduct prior to the time when they were adjudicated to be supervisors. The Board volumes are filled with cases in which employees are found guilty of unlawful or objectionable conduct by persons who had

not been adjudicated to be supervisors when they engaged in the conduct. There is no rational reason to apply a different rule here. Employees can be coerced by conduct of supervisors, even if the supervisors had not been adjudicated to be such at the time of their conduct. Similarly, the fact that the individuals voted in prior elections is not dispositive. The critical point is that they were supervisors when they engaged in the conduct involved herein.

Our colleague makes much of the fact that the supervisors did not explicitly or implicitly threaten reprisal or promise benefits. The contention misses the mark. Under *Harborside*, the issue is whether supervisory conduct interferes with or coerces employees. As we said in *Harborside*, supervisory card solicitations have an inherent tendency to interfere with an employee’s freedom to sign a card, and this may be objectionable, absent mitigating circumstances. Thus, for example, if a supervisor solicits an employee signature on an antiunion petition, the employer can be held liable therefore, even if there is no express threat or promise. There is no reason for a different rule here.

As our dissenting colleague notes, in *Harborside*, the Board held that higher management’s antiunion stance can mitigate a supervisor’s pronoun conduct under certain circumstances if management “takes timely and effective steps to disavow” the conduct of pronoun supervisors. *Id.* at 913. Here, the Employer’s antiunion campaign literature explicitly advised employees that they were not obligated to vote for the Union after signing an authorization card and that it was not in the employees’ interest to unionize. However, we respectfully disagree with our dissenting colleague’s suggestion that the Employer’s antiunion campaign literature amounted to a “disavowal” of the conduct of the pronoun supervisors. The Employer never addressed, much less disavowed, the leads’ coercive conduct. Looking at the circumstances as a whole, we find, contrary to the Regional Director, that the Employer’s campaign literature and its advice to employees was not shown to sufficiently mitigate the coercive solicitation of cards from a significant portion of the unit. The fact that the Employer told employees that they were not *obligated* to vote for the Union does not necessarily lessen in any significant way the continuing pressure an employee would reasonably feel to vote consistent with their earlier stated intention.

Moreover, our colleague’s assertion that the leads took an “informational and collegial approach” to card solicitation is unavailing. The Regional Director did not characterize the leads’ conduct as “collegial,” but even if he had, a friendly encounter would not negate the coercion inherent in supervisory card solicitation. As the Board

has stated, “A supervisor’s statements may be coercive regardless of his friendship with an employee and regardless of whether the remark was well intended.” *Washington Fruit & Produce Co.*, 343 NLRB 1215, 1216 fn. 9 (2004). Supervisory solicitation of authorization cards is “inherently coercive absent mitigating circumstances.” *Harborside*, 343 NLRB at 906. Here, we find nothing in the leads’ conduct that would assure employees that they could vote how they wish or otherwise relieve the solicitation of its inherently coercive nature.⁸ Consistent with the Board’s obligation to carefully scrutinize objections in close elections,⁹ we are not persuaded that the circumstances are sufficiently mitigating to counter the leads’ conduct.

Having found that the lead persons’ solicitation of cards was coercive under the first prong of the *Harborside* standard, we now address the second prong. It is clear that the lead persons’ coercive conduct in soliciting the cards materially affected the outcome of the election under the second prong of the *Harborside* standard. Numerically, the number of employees who signed cards solicited by Withrow and Edwards was more than enough to affect the outcome of the election. More than 35 employees were solicited, at least 30 of whom were direct subordinates, and the vote was 87–82 in favor of the Union, with 3 challenged ballots. It would have taken potentially only one employee to be coerced into voting for the Union for the solicitations to have materially affected the outcome of the election.

Moreover, the impact of the lead persons’ solicitations was not isolated to the thirty-plus persons who were actually solicited. It was widely known among the employees that Withrow and Edwards were active members of the Union Organizing Committee and were soliciting employees to sign authorization cards. Their prounion conduct was extensive and continued up until a month before the election, when they were informed of their supervisory status and ordered to stop. The lingering effect of the lead persons’ solicitations continued up until the date of the election, as it was never made widely known that they no longer were advocating support for the Union. Finally, contrary to the argument of the dissent, we do not rest our conclusion solely on the “legal status of the leads”. Rather, we focus on their possession of supervisory authority and on their conduct vis-à-vis employees.

⁸ Our point here is in response to the dissent’s contention that the leads took an “informational and collegial approach to card signing”. Thus, the focus here is the conduct of the leads. Our prior point, concerning alleged employer mitigation, focuses on the employer.

⁹ See *Robert Orr-Sysco Food Services*, 338 NLRB 614, 615 (2002), and cases cited therein.

CONCLUSION

We find that the lead persons’ solicitation of cards constituted objectionable coercive conduct and materially affected the outcome of the election. Accordingly, we set aside the results of the election and direct a second election.

[Direction of Second Election omitted from publication.]

MEMBER LIEBMAN, dissenting.

This case illustrates the errors of the Board’s divided decision in *Harborside Healthcare*, 343 NLRB 906 (2004), and underscores the unfairness inherent in applying *Harborside* retroactively, under *SNE Enterprises*, 344 NLRB 673 (2005). Here, the majority sets aside an election because two low-level supervisors solicited union authorization cards, even though:

1. The solicitations were lawful under existing Board precedent when they occurred;
2. At the time of the solicitations, the supervisory status of the solicitors was undetermined;
3. The supervisors did not implicitly or explicitly threaten or make promises to employees, or engage in otherwise coercive conduct; and
4. There were circumstances mitigating any effect the card solicitations may have had on employees, including statements by the Employer affirming that employees did not have to vote for the Union, even if they had initially signed authorization cards.

Before *Harborside*, the Board would never have overturned the election in this case. But even under the *Harborside* standard, the behavior of the supervisors did not rise to the level of objectionable conduct. The majority applies *Harborside* to the facts of this case far more aggressively than that decision itself warrants.

I.

In *Harborside*, the Board abruptly abandoned its traditional approach to determining whether prounion supervisory conduct is objectionable. Before *Harborside*, if an employer communicated its opposition to union representation, the prounion conduct of a supervisor was objectionable only where it reasonably tended to coerce employees into voting for the union out of fear of retaliation or hope of reward.¹ Thus, prounion supervisors were free to ask employees to sign union authorization

¹ See, e.g., *Stevenson Equipment Co.*, 174 NLRB 865, 866 (1969); *Sil-Base Co.*, 290 NLRB 1179 (1988).

cards, provided the solicitation was done noncoercively.²

In addition to adopting a new, stricter test for evaluating prounion supervisory conduct generally, the *Harborside* majority directly overruled precedent and held that even where the employer publicly opposes unionization, supervisory solicitation of an authorization card is objectionable, absent mitigating circumstances (which were not identified). *Id.* at 910.

Member Walsh and I dissented in *Harborside*. We pointed out several flaws with respect to the majority's new approach to supervisory card solicitation, apart from its break with precedent: (1) It failed to recognize that a prounion supervisor, acting on his own in the face of an antiunion employer, has "sharply limited power" over employees (in contrast to the power of a supervisor carrying out the anti-union policy of his employer). (2) It forced unions to make an extraordinarily difficult choice in deciding whether to utilize workers whose supervisory status is unclear in an organizing campaign.³ (3) It flouted the time-honored principle of *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961), that conduct must occur during the "critical period"—i.e., *after* authorization-card signatures have been collected and a representation petition filed—in order to be considered objectionable. *Supra*, 343 NLRB at 915.

In an earlier ruling in this case, a Board majority voted to grant review and remand the case to the Region for an analysis under the new *Harborside* standard, even though the supervisory conduct in dispute occurred well before the issuance of *Harborside*. I dissented, explaining that retroactive application of the *Harborside* test represented a manifest injustice, by subjecting elections to unexpected invalidation. *SNE Enterprises*, *supra* at 675.

Under the Board's traditional test with respect to supervisory card solicitation, the outcome of this case would be clear. In connection with supporting the union, and soliciting cards, the leadpersons never, either implicitly or explicitly, promised benefits in exchange for Union support or threatened negative consequences if employees refused to sign. Thus, the Board, pre-*Harborside*, would have treated the leads' conduct as unobjectionable. That fact, of course, illustrates the unfairness of applying *Harborside* retroactively. At the

time that the leads here solicited cards, they were entitled to do so, under then-controlling and well-established law.

II.

This case now returns to the Board on the Employer's request for review of the Regional Director's Third Supplemental Decision, where the Regional Director found no objectionable supervisory conduct.

At issue is the conduct of two leadpersons, Henry Withrow and Chad Edwards, who solicited union authorization cards from their subordinates prior to the filing of the petition and before either had been determined to be a statutory supervisor. Leads had been eligible to vote in three prior representation elections.

There is no evidence that either Withrow or Edwards ever made threats or promises, explicit or implicit, to employees in connection with soliciting cards. Indeed, the record establishes that the two leads took an informational and collegial approach. Notably, the leads did not collect the cards themselves or specifically ask for the return of signed cards, further reducing any conceivable pressure on employees.

The supervisory authority of Withrow and Edwards is limited to assigning employees to different production line tasks as needed. None of the tasks are more or less desirable than the others. The Regional Director found, and the majority does not dispute, that employees generally view the nine *production supervisors*—and not the leads, their subordinates—as the individuals responsible for day-to-day employee working conditions.

Both Withrow and Edwards solicited authorization cards from employees, including their direct subordinates. However, the leads' card solicitation of any employees ended when the petition was filed, about 3 months before the election. And all prounion conduct on the part of the Withrow and Edwards ceased when the Regional Director found them to be statutory supervisors, a month before the election.

During the course of the Union's organizing campaign, the Employer disseminated several letters and pieces of campaign literature making clear to employees that it strongly opposed unionization. In these materials, the Employer told employees: (1) that "a 'no' vote is in the best interest of our plant, our customers, and in your best interest;" (2) that electing the Union "would be a big step backward" for the Employer; (3) that the Union organizer's promises were "outrageous" and employees should not "fall for" the Union's false promises; and (4) that the Union "would not hesitate to sacrifice [an employee's] job if it served their purposes to do so." The Employer also advised employees that signing an authorization card did not bind employees to vote for the Union in the election.

² See *Millsboro Nursing & Rehabilitation Center*, 327 NLRB 879, 880 (1999) (collecting cases and noting judicial approval of Board's approach).

³ This case illustrates unions' dilemma. Here, the leadpersons whose conduct is at issue had been found eligible to vote in three prior representation elections. In connection with the current election, they were determined to be supervisors, but their contested conduct predates that determination.

III.

Even applying *Harborside* retroactively, the leads' conduct in this case does not warrant setting aside the election. Under *Harborside*, supervisory solicitation of union authorization cards is regarded as "inherently coercive absent mitigating circumstances." *Chinese Daily News*, 344 NLRB 1071, 1072 (2005). Here, while leads Withrow and Edwards solicited authorization cards, they never threatened employees, made promises to them, or applied pressure in any form, either implicitly or explicitly. Nor did they collect signed cards or ask for the cards' return. In short, there was nothing coercive in fact about their conduct. In turn, the record is replete with evidence of factors mitigating the inherent coercive tendency of the solicitations (per *Harborside*). The majority grudgingly acknowledges that there were "some mitigating circumstances," only to dismiss their significance. But taken together, at the very least, those circumstances dictate upholding the election.

A.

To begin, there is the minimal supervisory authority that the leads exert over their subordinates.

In *Harborside*, the supervisor's "significant supervisory authority" was a key contribution to the Board's holding that the card solicitation was coercive. 343 NLRB at 912 (supervisor had authority to direct employees, assign schedules, initiate disciplinary action, and recommend suspension and termination). Post-*Harborside* decisions involve similar circumstances. See *Millard Refrigerated Services*, 345 NLRB 1143, 1146 (2005) ("overwhelming" evidence that the lead possessed a wide range of supervisory authority, including power to discipline, change schedules, and effectively recommend hires and terminations); *Chinese Daily News*, supra (supervisor had authority to hire, assign work, and approve leave requests).

In contrast to the broad power exercised by the supervisors in *Harborside*, *Millard*, and *Chinese Daily News*, the leads' sole supervisory authority involves assigning employees to different jobs on the production line, where none of the production jobs are more or less desirable than the others. Furthermore, employees perceive the leads as lacking meaningful power with respect to terms and conditions of employment.

The fact that the leads have "the most day-to-day contact with the employees" (a point emphasized by the majority) does not prove that the leads exercise significant supervisory power over them. See *Northeast Iowa Telephone Co.*, 346 NLRB No. 47 (2006) (that the alleged supervisors "[did] not wield the full panoply of supervi-

sory authority" was significant to a finding that the prounion conduct at issue was not objectionable).

B.

A second mitigating factor is the passage of time between the leads' conduct and the election. The card solicitations ceased about 3 months before the election, and the leads stopped all prounion activities about 1 month before the election, in obedience to the Employer's order. Thus, by the time employees in this case voted, there had been an ample cooling-off period: 3 months since cards were solicited, and 1 month without any prounion supervisory conduct.

The majority insists that the "fact that solicitation of cards all but ceased at the time the petition was filed is insufficient, without more, to negate the inherent coerciveness of the original solicitations." But it errs in giving this fact no mitigating weight at all and in failing to recognize that there *is* "more" here by way of mitigating circumstances. The majority also points to the continued campaigning by the leads after card solicitation stopped. The majority, however, does not claim that the supervisors ever implicitly or explicitly threatened employees or made promises of benefits to them after the card solicitations had ceased.

C.

A third mitigating factor was the Employer's antiunion campaign. *Harborside* held that:

In assessing the effect of [prounion supervisory] conduct on the election, the Board may take into account the antiunion statements of higher company officials and the extent to which they may disavow coercive prounion conduct of supervisors.

Id. at 910 fn. 12. In determining the mitigating effect of the employer's efforts, the Board is to consider, among other things, the "levels of supervisory authority," the "extent of the particular supervisor's authority over the solicited employee," and whether management "takes timely and effective steps to disavow" the conduct of prounion supervisors. Id. at 913.

Here, as described, the Employer disseminated antiunion literature to employees throughout the organizing campaign. The literature urged employees to vote against the Union, accused the Union of making false promises to employees, and described the Union as ready to sacrifice employees' jobs if doing so would serve the Union's purposes. Most important, it also explained that employees were not bound to vote for the Union, even if they had initially signed an authorization card.

The Employer's clear antiunion statements, in conjunction with its specific advice concerning authorization

cards, served to alleviate any possible pressure exerted by the leads. This is particularly so given the leads' very limited supervisory authority over their subordinates, who correctly viewed the production supervisors (not the leads) as the managers responsible for day-to-day working conditions.

The majority's counterarguments are unpersuasive. The majority asserts that the "fact that the Employer told employees that they were not obligated to vote for the Union does not lessen the continuing pressure an employee may feel to vote consistent with [his] earlier stated intention." But the majority does not explain why the Employer's statements would *not* have a mitigating effect, i.e., would not (at the very least) "*lessen* the continuing pressure an employee may feel." Nor does the majority identify the source of the "continuing pressure" or explain how it is fairly attributable to the Union.⁴ Rather, the majority simply returns to the fact that the card solicitations took place. If the Union engaged in no subsequent objectionable conduct predicated on the card-signing,⁵ then the employee was under no continuing pressure from the Union, at least where the initial solicitation was not coercive in fact (i.e., accompanied by implicit or explicit threats or promises). Further, the majority misses the mark in stating that "nothing in the leads' conduct . . . would assure employees that they could vote how they wish or otherwise relieve the solicitation of its inherent coercive nature." The relevant analysis properly involves the Employer's antiunion stance, and is not limited to an inquiry into the leads' conduct. In any event, we should recall that Board elections, are conducted by secret ballot, which surely gives employees a measure of confidence that they are free to vote against the Union, despite prior professions of support.

D.

Finally, the majority dismisses the fact that in three prior representation elections, the leadpersons were deemed eligible to vote. Thus, during the relevant period, the Union, the leads, and their coworkers had good reason to believe that the leads were *not* statutory supervisors and thus were free to participate fully in the Un-

ion's organizing efforts. Under these circumstances, it is unfair to fault the Union and its employee supporters for the leads' conduct.⁶

IV.

This case illustrates the majority's exceedingly strict scrutiny of prounion supervisory conduct during an organizing campaign. As Member Walsh and I predicted in our *Harborside* dissent,⁷ the Board's new focus is on the mere extent of prounion supervisors' participation in the union campaign, and not on any actual risk of coercing employees. (No such test applies to supervisors' involvement in an employer's antiunion efforts, of course.) With respect to card solicitation, the majority's decision strongly suggests that *Harborside's* reference to "mitigating circumstances" was illusory. If not the facts of this case, it is hard to imagine what scenario would ever convince the majority that card solicitation was not objectionable. Accordingly, I dissent.

APPENDIX

THIRD SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE

I. STATEMENT OF THE CASE

Pursuant to the provisions of a Decision and Direction of Election which issued on April 21, 2004, an election by secret ballot was conducted on May 20, 2004.² The Employer timely filed objections to conduct affecting the results of the election. On June 15, 2004, the Acting Regional Director issued a Supplemental Decision, Order Directing Hearing and Notice of Hearing disposing of five objections and directing a hearing to be held before a hearing officer to resolve the issues raised by the Employer's remaining 11 objections. Following a hearing, the hearing officer issued her report on September 30, 2004 recommending that the remaining objections be overruled in their entirety and that an appropriate Certification of Representative be issued.

The Employer timely filed exceptions to the hearing officer's findings and recommendations. On November 3, 2004, I issued a Second Supplemental Decision and Certification of Representative finding that the hearing officer's conclusions and recommendations were supported by the record and the applicable law. I also found that the record did not support the Employer's claim of bias on the part of the hearing officer. Thus, I issued the appropriate Certification of Representative.

⁴ Compare the situation in *Harborside*, where the majority observed that the supervisor engaged in "continuous, pervasive, and aggressive campaigning on behalf of the Union . . . much of this conducted in a harassing, pressuring, and badgering manner." *Id.* at 912 (citing supervisor's soliciting of cards, requiring an employee to attend a union meeting, requiring an employee to wear a union pin, and repeatedly asking employees if she could "count on" them). See also *id.* at 913 (describing supervisor's tactics as "badgering, harassing, and intimidating in nature").

⁵ For example, the supervisor might tell employees who signed cards that he expected them to honor their commitment by voting for the union and imply adverse consequences if they did not.

⁶ The majority insists that all that matters is that the leads "were supervisors when they engaged in the conduct involved herein." That assertion misses my point, and it rests on the dubious premise that the *legal* status of the leads determines the *practical* effect of their conduct.

⁷ *Supra*, 343 NLRB at 915.

² The tally of ballots revealed that there were 182 eligible voters; 87 votes were cast for the Petitioner; 82 votes cast against the Petitioner; and 3 ballots were challenged.

On January 8, 2005, the Employer filed with the Board a Request for Review and a Supplemental Brief in Support. On May 17, 2005, the Board granted the Employer's request for review in *SNE Enterprises*, 344 NLRB No. 81 (2005) and remanded the proceeding to me for reconsideration of the supervisors' pro-union activity, including, but not limited to, whether their solicitation of authorization cards constitutes objectionable conduct, pursuant to the legal standard articulated by the Board in *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004). In addition, the Board, with respect to the Employer's contentions regarding the hearing officer's admission of Petitioner's Exhibit 2, denied review without prejudice to the Employer's opportunity to submit additional evidence pertaining to its stance regarding the Petitioner's organizational campaign.

On May 31, 2005, I issued an Order Reopening Hearing directing that the hearing be reopened for the purpose of obtaining any additional evidence concerning alleged supervisory pro-union conduct, including mitigating circumstances, as well as the Employer's response to the Petitioner's campaign. On June 14, 2005, the hearing officer conducted an additional evidentiary hearing and on July 15, 2005, issued a Supplemental Report on Objections and Recommendations to the Regional Director on Remand from the Board. The hearing officer found that the evidence submitted did not establish that the supervisors at issue, the Employer's lead persons, engaged in pro-union objectionable conduct which warranted setting aside the election under the criteria established by the Board in *Harborside*, supra. Accordingly, the hearing officer recommended that the Employer's objections be overruled and that the appropriate Certification of Representative issue.

The Employer timely filed 80 exceptions to the hearing officer's findings and recommendations. After a careful review of the record and the briefs of the parties, I find, for the reasons set forth in detail below, that the hearing officer's conclusions and recommendations are supported by the record and the applicable law and that the record does not support the existence of any bias on her part. Accordingly, I affirm her findings and recommendations overruling the Employer's objections and will issue an appropriate Certification of Representative.

II. THE EMPLOYER'S EXCEPTIONS

The Employer maintains, in its exceptions, that the hearing officer erred by permitting the Petitioner to exceed the scope of direct examination and relitigate the supervisory status of leads as well as making incorrect and unsupported credibility resolutions, findings of fact, and conclusions. In addition, the Employer argues that the hearing officer improperly refused to admit certain exhibits offered by the Employer, improperly admitted Petitioner's Exhibit 2, and misapplied *Harborside* and other Board precedent.

In an objections case, the burden is on the objecting party to prove its case. A Board-conducted representation election is presumed to be valid. *NLRB v. WFMT*, 997 F.2d 269 (7th Cir. 1993); *NLRB v. Service American Corp.*, 841 F.2d 191, 195 (7th Cir. 1988); *Progress Industries*, 285 NLRB 694, 700 (1987). Thus, an objecting party must demonstrate not only that the conduct occurred, but also that the conduct interfered with the free choice of employees to such a degree that it has materially

affected the results of the election. Finally, the Board's long-established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the reviewer that they are incorrect. *BFI Waste Services*, 343 NLRB 254 fn. 1 (2004); *Deaconess Medical Center*, 341 NLRB 589 fn. 1 (2004); *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957).

III. THE HARBORSIDE STANDARD

The legal standard articulated by the Board in *Harborside Healthcare*, supra, considers two factors when evaluating whether supervisory pro-union conduct upsets the requisite laboratory conditions for a fair election:

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

(2) Whether the supervisor's pro-union conduct interferes with employees' freedom of choice to the extent that it materially affected the outcome of the election. The factors considered are: (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. The Board specifically noted that it does not require that all factors be satisfied in order to find conduct objectionable.

The *Harborside* decision also established a new rule in connection with the solicitation of authorization cards by supervisors. Specifically, the Board held that supervisory solicitation of union authorization cards is inherently coercive absent mitigating circumstances. The Board extended this rule to both post and pre-petition supervisory solicitations.

IV. FACTUAL TERMINATIONS AND RELATED EXCEPTIONS

(a) *The scope of the authority of the lead persons*

As reflected in the Decision, the Employer is engaged in the manufacture and sale of windows and doors at its Huntington, West Virginia facility where it employs 19 lead persons. The Decision found that the leads were supervisors based upon their authority to assign and direct work. There was no contention that the leads had any independent authority to discipline or discharge employees and the record failed to show that they could recommend the hire of a new employee. The record developed by the hearing officer concerning the supervisory status of the leads does not affect the conclusions reached in the Decision on these points.³

³ In its exceptions, the Employer complains that the Hearing Officer allowed the Petitioner to relitigate the supervisory status of the leads. To the contrary, I find that the Hearing Officer limited the scope of examination to the issues for which I specifically reopened this matter pursuant to the remand of the Board. Although testimony was developed regarding the scope of the authority possessed by the leads, the thrust of this testimony was directed to the degree of supervisory authority the leads

The hearing officer found that the supervisory authority exercised by the leads was extremely limited and that “the leads have only a minor effect on employees’ working conditions.” In this regard, she observed that the leads do not attend management or supervisory meetings, and that supervisors, not leads, conduct those meetings at the beginning of each shift, make announcements and set production rates. The hearing officer also noted that leads are not involved in disciplining employees and that there was no evidence that their input in evaluating employees was given more weight than that of other employees.

The Employer excepts to the hearing officer’s conclusions concerning the scope of the leads’ supervisory authority and their impact on employees’ working conditions.⁴ Specifically, the Employer excepts to the hearing officer’s statement that “leads simply move employees to maximize production under the Employer’s demand flow technology system” and her statement that “the leads’ authority is limited to shifting employees temporarily to maximize production on the line.” The hearing officer’s statements are not inconsistent with the Decision’s findings that “the lead persons here do much more than make work assignments to equalize employees’ work on a rotational or other rational basis.” The leads’ exercise of independent judgment in assigning and redirecting work in order to meet production goals, is consistent with the hearing officer’s statements. Accordingly, I find that the hearing officer’s finding on this point is fully supported by the record.

held rather than being directed to the question of whether the leads were supervisors. Accordingly, I find that the Employer’s exceptions on this issue are without merit.

The Employer also asserts that the Hearing Officer committed *error* by permitting the Petitioner’s cross-examination of witnesses to exceed the scope of the direct examination. The Employer does not cite to a particular instance or instances in which the Petitioner purportedly was permitted to examine witnesses beyond the scope of direct. I conclude that the Hearing Officer did not commit error. In this regard, I note that a representation proceeding is nonadversarial in nature and that the Hearing Officer is charged with developing a complete record. I find that her rulings and questioning of witnesses were geared toward achieving that end.

⁴ In particular, the Employer excepts to the Hearing Officer’s failure to credit the testimony of Plant Manager Tim Dragoo and Human Resources Manager Susan Dingess with regard to the supervisory authority of the leads, her crediting of the Union’s witnesses and her failure to draw a negative inference against the Union for subpoenaing but failing to call employees Pam Smith and George New to testify. The Employer asserts that had Smith been called, she would have testified to the “broad” authority of the leads. The Employer characterizes the Petitioner’s decision to call some witnesses and to not call others as “clear evidence of an attempted fraud.” I note that these employees were not under the exclusive control of the Petitioner and that the Employer could have called these witnesses itself had it chosen to do so. In fact, the Employer did call New. There is no evidence as to what testimony Smith would have given had she been called. I decline to draw a negative inference from the Petitioner’s failure to call Smith as a witness when she was equally at the disposal of the Employer. There is no evidence to suggest that she would have testified a certain way if called, and the Employer has not cited to any authority for the proposition that a negative inference is required or warranted under such circumstances. Accordingly, based on the above and the record as a whole, I find again that there is no basis on which to overturn the Hearing Officer’s credibility findings and I affirm her findings.

The Employer excepts to the hearing officer’s conclusions that leads are constantly under the authority of a supervisor who oversees two related or adjacent lines and that the near constant presence of supervisors on the line rebuts any inference that leads are the principal contact with management. The record discloses that supervisors are constantly or frequently present or near the lines they oversee, and for which they are responsible. Further, the Employer’s exception ignores the fact that many of the supervisors arc over adjacent lines and presumably may exercise oversight of both lines simultaneously. In any event, whether the supervisors’ presence is constant or frequent, I find the result is essentially the same and I affirm the hearing officer’s conclusion on this point.

Similarly, there is no support for the Employer’s exception to the hearing officer’s conclusion that “leads are not involved in discipline,” or its’ exception to her conclusion that “the ability of the leads to reward or punish employees *is* minimal.” In fact, the record establishes that leads may be involved in oral counseling but that they are almost never involved in written discipline which is, in any event, subject to review and approval by higher supervision. The record shows that the reward or punishment of employees is limited to the leads’ ability to make temporary assignments and this is further circumscribed by the need to maximize production and by supervisory review of such assignments.

The Employer also excepts to the hearing officer’s conclusion that “no jobs on the line were more desirable or less desirable.” I note that in my Second Supplemental Decision I found that the lead person’s supervisory status hinged only on their ability to assign and direct employees. I found in this regard that the leads on occasion may move employees from one position to another and although there may be some positions which are marginally more desirable than others, the leads do not have the authority to move employees into higher paying jobs. Regarding the hearing officer’s conclusion on this point, I note that when the phrase quoted by the Employer is considered in context, that the hearing officer’s statement is accurate. Thus, the hearing officer noted, “*Even the Employer’s witnesses testified* that while the lead could theoretically move them from an easier to a harder job, no jobs on the line were more desirable or less desirable.” (Emphasis added.)⁵ Accordingly, and based on the record evidence, I find that the hearing officer’s statement on this point is fully supported by the record. Moreover, based on the record, I do not find it to be inconsistent with my earlier pronouncement that some positions may be marginally more desirable than others.

The Employer also excepts to the hearing officer’s conclusion that leads do not select employees for training and that there was inconclusive evidence concerning the weight given to the recommendations leads made for training. In this regard, the Employer points out that the Decision found that “[Lead per-

⁵ For example, Employer witness Edward Frye testified as follows to questions from the Employer’s attorney:

Q: Are there certain jobs that you don’t like to do on the line?

Q: Are there certain jobs that are less desirable than others?
A. No.

sons are responsible for training and cross-training of employees on their line. There are no set guidelines for this training and cross-training, and lead persons exercise their own judgment when determining which employees to train on which jobs.” The credited testimony contained in the post-election hearing regarding cross-training is minimal. It continues to appear, however, consistent with the Decision, that leads are involved with cross-training decisions and that assembly work in particular is an area in which leads encourage cross-training and in which they make cross-training assignments. Although there appears to be a system or progression of training in place on some lines for cross-training, the leads in other departments are apparently permitted to devise their own parameters for cross-training employees. Accordingly, to the extent that the hearing officer’s statement regarding leads’ involvement in cross-training employees cannot be reconciled with the findings in the decision, I hereby disavow the hearing officer’s finding on this point. However, I do not find that my disavowal materially alters the factual underpinnings or the rationale for the hearing officer’s conclusion that the authority of the leads to affect the working conditions of employees is minimal.

(b) *The prounion conduct of the lead persons*

The hearing officer found that the only leads who engaged in prounion conduct were Chad Edwards, Henry Withrow, and Ruth Adkins and that their union activities were limited to the following acts of prounion conduct:

1. Edwards told an indeterminate number of employees at union meetings and at the plant that without a union they would not get anywhere with the Employer and a union would help them get better benefits and treatment.

2. Edwards’ statement to Withrow and Lead Joe McCoy that, “if it happened to Benny, it could happen to any of us,” referring to the discharge of former employee and union supporter Benny Moore,⁶ was overheard by only one unit employee, Al Clere.⁷ Withrow told Edwards

and Lead McCoy at a union meeting that if they [he and Edwards] quit now, they would lose their jobs, referring to possible retaliation by the Employer because of their pro-union activities.⁸

4. Edwards and Adkins spoke separately to an unspecified number of employees about being “at-will employees.” Both indicated that employees were currently “at-will” employees but that if the Union came in, the Employer would have to negotiate or have probable cause for discharge or that employees would have a “day in court” and they also indicated to employees that such benefits would be a result of bargaining or negotiations.⁹

5. Edwards, Withrow and Adkins all supported the Union. Edwards and Withrow were on the organizing committee and attended meetings. Edwards wore a button indicating he was on the organizing committee.

6. Withrow told Edwards and employee Clere, in separate conversations, that they had gone too far to stop, they needed to continue.

7. Withrow solicited five or six authorization cards from employees,, including employees on the black line, where he was lead *until* about March 2004. Edwards solicited ten cards from employees, including five from employees on the red line where he was the lead.¹⁰ Although Adkins did not generally

is no evidence that the remark was heard by any employee other than Clere. Accordingly, I hold that the hearing officer’s finding on this point is fully supported by the record.

⁸ The Employer excepts to the hearing officer’s conclusion that there was no evidence that bargaining unit employees heard Withrow’s statement. The record reflects that Withrow made this statement during a conversation with fellow leads Edwards and McCoy. Withrow’s testimony neither indicated that the statement was overheard by a large group nor that it could have been interpreted as an indication that the plant would close. Rather, he merely speculated in response to a leading question that if someone overheard his remark, it could have been mistaken for anything. The only evidence that a unit employee heard Withrow make this or a similar remark was the testimony of employee Al Clere. Notably, Clere places this remark by Withrow as having occurred in a one-on-one conversation between the two of them and he did not recall that Withrow said anything about anyone losing their job. Withrow’s statement to Clere, as testified to by Clere, was found by the hearing officer to constitute a separate act of pro-union conduct. Accordingly, I hold that the hearing officer’s findings on these points are fully supported’ by the record.

⁹ The Employer excepts to the hearing officer’s finding that Edwards and Adkins always told employees that “for cause” employment was subject to negotiations and that “the alleged promises of leads that ‘at will’ employment would end with the Petitioner’s did (sic) not have reasonably affected employee free choice.” As pointed out by the hearing officer, Edwards and Adkins testified that they told the employees to whom they spoke that the benefits of unionization were subject to negotiation. Moreover, the Employer’s campaign literature specifically responded to the claims about job security by pointing out that such security did not come from the Petitioner and that the Petitioner could keep its promises only by obtaining the agreement of the Employer. Accordingly, I find that the Employer’s exceptions on this issue are without merit.

¹⁰ The Employer excepts to the hearing officer’s “assertion that ‘the evidence does not support a finding that [Edwards] handed [employees on his line] cards with a request or direction to sign.’ Edwards’ testimony indicates that his approach to soliciting authorization cards was

⁶ The Hearing Officer noted that on August 23, 2004, a consolidated complaint issued in Case 9–CA–40915, et al., alleging, inter alia, that the Employer discharged employee Benny Moore on February 23, 2004, in violation of Sec. 8(a)(1) and (3) of the Act. The Employer asserts that the Hearing Officer committed error by taking administrative notice of the consolidated complaint issued against the Employer in Case 9–CA–40915, et al. It is well settled that the Board may take administrative notice of its own proceedings and files. See *Catholic Healthcare West*, 344 NLRB 790 (2005); *Lord Jim’s*, 264 NLRB 1098 (1982). Accordingly, hereby affirm the hearing officer’s decision to take administrative notice of the pending unfair labor practice matter as well as the prior petitions filed by the Carpenters Union in which the leads were sought and included in the prospective bargaining units pursuant to Stipulated Election Agreements entered into by the parties. In affirming the hearing officer on these points, I note, however, that these related matters are of tangential relevance to this proceeding.

⁷ The Employer excepts to the hearing officer’s conclusion that there was no evidence that Edwards’ statement was heard by any employee other than Clere. The testimony regarding this statement was vague and in every instance was prompted by a leading question from the Employer’s attorney prior to exhausting the witness’ recollection. A review of the relevant testimony reveals that although other employees may have been in the vicinity when the purported statement was made, there

solicit cards from employees, she did obtain a card for her son, James, who is an employee.¹¹

The hearing officer concluded that there was no evidence that leads indicated that they would use their supervisory authority to reward or punish employees who did not agree with their position regarding the Petitioner. Although two employees presented by the Employer as witnesses, Al Clere and Heather Daniels testified that they thought they might glean some benefit¹² or suffer some negative impact¹³ there was nothing in the

of a passive nature. Thus, after asking employees if they had signed a card or whether anyone else had talked to them about the Union campaign, Edwards states that, "If they hadn't [signed a card] I would ask if there was any questions that I may help you with." Although Edwards testified that he asked individuals on his line to sign cards, this is not inconsistent with the finding of the hearing officer as noted above. There was no evidence that Edwards required any employee to accept or refuse an authorization card. Edwards followed an informational approach to solicitation as described above and more fully in the hearing officer's report. Accordingly, I hold that the hearing officer's finding on this point is fully supported by the record.

¹¹ The Employer excepted to this finding by the hearing officer and to her crediting of Adkins' testimony. The Employer asserts that according to the testimony of Plant Manager Dragoo and Human Resources Manager Dingess, Adkins had told them during a postelection meeting that she had "solicited employees in the plant." The record supports the hearing officer's finding that there is no credible evidence that Adkins gave any employee, other than her son, a union authorization card as well as the hearing officer's reasons for discrediting the testimony proffered by Dragoo and Dingess on this point. Although employee Heather Daniels testified that Adkins asked her if she had signed a card, she did not testify that Adkins had provided her with a card or requested that she sign a card.

The Employer also asserts that the hearing officer erred by rejecting its Exhs. 5 and 6. Exh. 5, purporting to be notes taken by Dingess of a meeting that she and Dragoo held with Adkins, is a hearsay document. Further, there is no evidence that these notes were adopted by Adkins. Exh. 6 is a double hearsay document because it is based on Exh. 5 and perhaps also on the context of the meeting as relayed to the Employer's attorney by Dingess and Dragoo. The Employer does not cite to a single Board or court case for the proposition that the hearing officer's decision to reject these two exhibits was error. These notes were never adopted by Adkins. Adkins was not called by the Employer as a witness at the remand proceeding and, therefore, was not afforded an opportunity to confront any statements contained in Dingess' short form notes. Clearly, these documents were prepared in anticipation of possible litigation and are not records kept in the regular course of business. Accordingly, I conclude that the hearing officer properly rejected Employer's Exhs. 5 and 6 and I shall give them no weight in my consideration of this matter.

¹² The hearing officer, as described in the Second Supplemental Decision, found that Clere *believed* that Edwards was indicating that Clere would receive extra benefits if he were to speak out in favor of the Union although Clere testified that Edwards did not actually say this.

¹³ The Employer excepts to the hearing officer's "failure to recognize the intimidation expressed by Heather Daniels" as a result of her conversations with Edwards and Adkins regarding the Petitioner. Although Daniels indicated in her testimony that she felt intimidated when approached by lead persons, questioning by the hearing officer, the Employer's attorney, and the Petitioner's representative failed to yield any concrete explanation for this "intimidating" feeling other than her testimony that she and Adkins had a work-related dispute on another occasion and anecdotal testimony that Adkins had a work-related dispute on yet another occasion with another employee. In this regard, Daniels testified that she did not believe that the

record to lend any support for the validity of this feeling. "(The Board applies an objective test when evaluating alleged objectionable conduct and 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 hearing officer found that only Edwards was shown to have spoken to employees under his supervision about the Union during the period 2 to 3 months prior to the election. The record discloses that Withrow and Adkins may have talked to employees about their support for the Petitioner or in a positive manner regarding the Union between the filing of the petition and the issuance of the Decision declaring the leads to be supervisors. However, there is no evidence that any employees they spoke to during that timeframe were employees who worked under their direction. In this regard, the record reflects that in the months leading up to the election, Adkins supervised a line consisting of temporary employees who are not part of the Unit. I also note that the hearing officer found, in conjunction with this conclusion, that the Employer failed to show that Edwards coerced or interfered with any employees in connection with solicitation.¹⁴ Accordingly, based on the record evidence, I hold that the hearing officer's finding on this point is fully supported by the record.

The hearing officer also found that once the Decision issued, the plant manager held a meeting attended by the leads during which they were advised of the determination with respect to their status and were given and read a printed statement concerning what they could and could not do regarding the Petitioner's campaign from that day forward. The record indicates

work-related dispute between she and Adkins had anything to do with Daniels' disagreement with Adkins' union views. Based on the record evidence, I find that the hearing officer was correct in failing to accord any substantive weight to this vague and unfocused testimony.

The Employer also excepts to the hearing officer's conclusion that neither Edwards nor Adkins were Heather Daniels' lead. In fact, Daniels testified that her lead was Kevin Russell and that Russell had never spoken to her about the Petitioner. She had never worked under Adkins' direction and had "helped out" only for an hour or two on a single occasion on a line where Edwards was the lead. I find that this fact as stated by the hearing officer is fully supported by the record.

¹⁴ The Employer excepts to the hearing officer's conclusion that the record does not include details of the solicitation of each card by Edwards. The Employer then concedes, "Although the record may not provide a [sic] explicitly detailed description of the solicitation of each and every attempt by Edwards to obtain an authorization card, the record is replete with testimony of both Edwards and those he solicited with regard to his efforts to obtain cards and encourage others to support the union." The fact of the matter is that the record supports the hearing officer's statement. No details are provided about the circumstances surrounding each instance in which Edwards may have solicited an authorization card. Rather, the record on this point consists of generalized and conclusory statements with the exception of some details provided in connection with conversations that Edwards had with Clere, and employees Daniels and John DeBoard, Jr. Here, the Employer has answered its own exception by conceding that the record is lacking in details about solicitation. Accordingly, and based on the record evidence, I hold that the hearing officer's finding on this point is fully supported by the record.

that from that point in time, the lead persons in issue ceased their activity in support of the Union.¹⁵

The hearing officer further found that “the Employer had ample opportunity to rebut” the activities of the leads prior to the election. The Employer excepts to the hearing officer’s “representation that [Human Resources Manager] Dingess `admitted that she had spoken to Adkins about her activity following the Decision’ and that the Employer had knowledge of the leads’ activities long before the election.” I find, in agreement with the hearing officer, that Dingess spoke to Adkins in some detail about her union activities prior to the election.¹⁶ Moreover, the record evidence establishes that prior to the filing of the petition the Employer learned that Edwards and Withrow were union adherents as they were listed as members of the employee organizing committee on a letter from the Petitioner to the Employer dated February 6, 2004. Further, contrary to the Employer’s assertions, it is also clear from the record that about a month prior to the representation election, the Employer was aware that some leads were actively supporting the Petitioner’s organizing campaign. I find that the hearing officer’s conclusions are fully supported by the record.

Finally, the hearing officer found that the Employer conducted an anti-union campaign prior to the election and that employees were generally aware that the Employer opposed the Petitioner.¹⁷ The Employer’s campaign material is, for the most part, contained in the Petitioner’s Exhibit 2 which is a compilation of the Employer’s anti-union literature that was disseminated to employees during the election campaign. The Employer has again excepted to the hearing officer’s conduct at the initial hearing in reopening the record out of the presence of the Employer’s counsel for the purpose of admitting the Petitioner’s Exhibit 2, and by admitting into evidence and relying on Exhibit 2. I have previously rejected this argument and hereby rely upon my earlier position on this issue. Additionally, I note that the Board denied review of this issue without prejudice to the Employer’s opportunity to submit additional evidence pertaining to the Employer’s stance regarding the Petitioner’s organizational campaign. *SNE Enterprises*, supra.

¹⁵ During the remand hearing on June 14, 2005, Edwards testified that some employees still approached him about the Petitioner following issuance of the Decision. He told employees who approached him following issuance that he was, “no longer allowed to talk about it. I could just say good things about the Company.”

¹⁷ The Employer excepts to the hearing officer’s conclusion that Edwards was aware of the Employer’s opposition to the Petitioner. The record reflects that Edwards testified that he attended meetings conducted by the Employer’s Regional Director of Manufacturing, Art Steinhafner, and that former Plant Manager Jim George spoke to him in opposition to the Petitioner many times. Edwards then went on to testify that he also based his conclusion that the Employer opposed the Petitioner from speeches given and movies shown by the Employer. In addition, the campaign literature prominently posted and mailed to employees by the Employer further supports this conclusion. Accordingly, I find that the hearing officer’s finding on this point is fully supported by the record.

V. LEGAL ANALYSIS

1. The hearing officer’s application of *Harborside*

Pursuant to the Board’s remand, the hearing officer reconsidered the leads’ prounion activity, including, but not limited to, whether their solicitation of authorization cards constitutes objectionable conduct wider the legal standard articulated by the Board in *Harborside Healthcare*, 343 NLRB 906 (2004).

In *Harborside*, the Board disavowed language in prior Board cases requiring an explicit threat or promise in order to establish objectionable pro-union supervisory conduct. Additionally, the Board reversed prior law concerning the solicitation of union authorization cards by supervisors by holding that such supervisory solicitations are inherently coercive absent mitigating circumstances. *Harborside* left unresolved the question of precisely what constitutes mitigating circumstances, although the Board provided some guidance for the resolution of this question in its decision. In this regard, the Board noted that the conduct of the supervisor in *Harborside*, “together with her significant supervisory authority” reasonably tended to coerce or interfere with employee free choice in the election. *Id.* at 916; see also *Chinese Daily News*, supra at 1072. (Supervisory prounion conduct found objectionable based in part on the nature and extent of authority of the supervisor involved.) The Board also noted that in assessing the effect of the conduct on the election that it, “may take into account the antiunion statements of higher company officials, and the extent to which they may disavow coercive prounion conduct of supervisors.” The hearing officer thus proceeded to consider all the evidence concerning the involvement of the leads in soliciting authorization cards, both pre and postpetition, for the purpose of assessing the existence of “mitigating circumstances.”

Applying *Harborside*, the hearing officer concluded that the pro-union supervisory conduct of the leads did not reasonably tend to coerce or interfere with employees’ exercise of free choice in the election and that the conduct did not materially affect the results of the election. Additionally, with regard to the solicitation of authorization cards, the hearing officer concluded that the Employer failed to show that the leads’ participation in the solicitation of cards could reasonably have interfered with or coerced employees in the exercise of free choice in the election. In so finding, the hearing officer relied on her recitation of facts surrounding the solicitation of authorization cards. These facts reflect that there are several mitigating circumstances involved in this matter that dissipate the inherent tendency of such card solicitations to interfere with employees’ freedom to choose to sign a card or not.

Specifically, the hearing officer found that leads do not have any power to significantly affect the working lives of employees, even the employees working under them. In this regard, the record discloses that leads have assignment and direction authority, but their ability to affect employees’ wages, hours, or other working conditions is quite limited given the nearly 1 to 2 ratio of frontline supervisors to leads, their limited potential to punish or reward employees in connection with temporary assignments and training, and their lack of any other significant primary indicia of supervisory authority.

Further, leads are not perceived as having significant authority over other employees. In this regard, there may be a variance from line to line. Indeed, many of the leads spend 50 percent or more of their work time performing hands on work on their respective lines alongside the other employees. Several employees testified that they had not considered the leads to be supervisors prior to issuance of the decision. In addition, several employees testified that they had only known leads to make temporary transfers or assignments for purposes of enhancing productivity. I also note that prior to the date of the issuance of the decision, the leads themselves assumed that they were employees in the unit and would be eligible to vote, which is not surprising since in at least three earlier representation elections, lead persons had been eligible to vote.

Finally, the hearing officer made the following findings:

(a) the only solicitation which occurred was in noncoercive circumstances; (b) months before the election, Leads Withrow and Adkins were transferred to other production lines away from the employees to whom they had voiced their pro-union sympathies; (c) the Employer's literature countered the coercive effect of the cards by plainly telling employees that they did not need to follow through after signing a card but could vote against the Petitioner; and (d) the leads stopped all of their pro-union activities after issuance of the Decision, one month prior to the date of the election.

Based on the above mitigating circumstances, the hearing officer also found that the solicitation of cards by leads did not materially affect the results of the election. Accordingly, the hearing officer recommended that the Employer's Objections to the conduct of the election be overruled and that the Petitioner be certified as the exclusive collective-bargaining representative of the Employer's employees in the petitioned-for unit. I conclude that the hearing officer's application of *Harborside* to the facts and circumstances of the subject matter was well founded and considered and I hereby affirm her in this regard.

2. Discussion of *NLRB v. Hawaiian Flour Mill*, 792 F.2d 1459 (9th Cir. 1986)

The Employer takes issue with the hearing officer's reliance on *Hawaiian Flour Mill*, a case specifically cited to by the Board in *Harborside* in enunciating the proper inquiry in cases involving prounion supervisory conduct. *Id.* at 910. The hearing officer noted in two separate instances in her Supplemental Report, while discussing prounion supervisory conduct generally, that the Ninth Circuit Court of Appeals, in focusing on the authority and actual prounion activity of supervisors, held that employee freedom of choice was not interfered with when low level supervisors gave employees their personal views on the union and told them to sign cards. The Employer contends that *Hawaiian Flour Mill* does not reflect the Board's policy that supervisory solicitation of authorization cards inherently interferes with employee free choice. I note that the Board discussed *Hawaiian Flour Mill* in the context of its discussion related to supervisory pro-union conduct and restated the Board's legal standard to be applied in cases involving objections to an election based on such conduct. The hearing officer discusses *Hawaiian Flour Mill* in the same context. Accordingly, I find that

the hearing officer's discussion of and reliance on *Hawaiian Flour Mill* is appropriate.

3. The appropriateness of presuming dissemination

The Employer contends that the hearing officer erred by failing to presume dissemination of certain remarks attributed to leads, including the remark that, "if it happened to Benny it could happen to any of us," and the remark that they "had gone too far to stop now." The Employer relies on *United Broadcasting Co.*, 248 NLRB 403 (1980), and *Standard Knitting Mills, Inc.*, 172 NLRB 1122 (1968), for the proposition that comments directed at one individual during an election campaign can reasonably be expected to have been discussed, repeated, and disseminated among the employees. Thus, if the above statements attributed to the leads can somehow be construed as threats of job loss then, under the cases relied on by the Employer, such threats are presumed disseminated throughout the Unit even if they were heard by only one employee. See *Springs Industries*, 332 NLRB 40 (2000).

Here, as discussed above, Clere was the only non-lead who testified to having heard the above remarks or remarks of a similar nature. In agreement with the hearing officer, I find that these statements were an expression of fear by prounion leads that the Employer might retaliate against them (leads) because of their support for the Petitioner, and that the statements could not reasonably be interpreted by employees as threats of job loss or plant closure. I note that Clere did not testify that he repeated the lead's remarks to anyone, nor did he name employees who might have overheard these remarks. I find additionally that the Employer did not merely presume that these remarks by Edwards and Withrow had been overheard by other employees, but actively sought to elicit testimony to establish that other employees did, in fact, overhear them. The Employer was unsuccessful in this regard.¹⁸

Regardless of the extent of dissemination here, when other mitigating factors are considered, the prounion supervisory conduct of the leads falls short of establishing that the election should be set aside. These other factors include the small number of instances of alleged misconduct, the vague nature of the statements attributed to them, and the substantial size of the bargaining unit as compared to the number and severity of the purported prounion conduct.

4. Leads as agents of the Union

The Employer attempts to distinguish the instant case by arguing that at least Edwards and Withrow were agents of the Petitioner because of their position on the organizing committee and their conduct associated with the committee. The Board,

¹⁸ Moreover, although not dispositive here, I note that the Board recently overruled *Springs Industries* and all other decisions in which the Board presumed dissemination of plant closure threats or other kinds of coercive statements. *Crown Bolt, Inc.*, 343 NLRB 776, 781 (2004). The Board held in *Crown Bolt* that, "Where proof of dissemination of coercive statements, including threats of plant closure, is required, the objecting party will have the burden of proving it and its impact on the election by direct and circumstantial evidence." *Id.* The Board applied the rule of *Crown Bolt* prospectively only and as this matter was pending at the time of that decision's issuance the rule of *Springs Industries* applies.

however, does not equate “membership” in an organizing committee as automatically conveying agency status. *Cornell Forge Co.*, 339 NLRB 733 (2003); *Advance Products Corp.*, 304 NLRB 436 (1991). Moreover, it is well settled that the burden of proving an agency relationship rests on the party asserting that relationship. *Millard Processing Services*, 304 NLRB 770, 771 (1991).

Here, I note that there is no evidence that the Petitioner vested members of the in-house organizing committee with actual or apparent authority to act on its behalf except for the limited purpose of soliciting authorization cards. In this regard, I note that the Petitioner’s nonemployee organizer regularly conducted campaign meetings for interested employees and that he was directly involved in orchestrating the course of the Petitioner’s campaign. See *S. Lichtenberg & Co.*, 296 NLRB 1302 fn. 4 (1989). Additionally, the most active of the prounion leads on the organizing committee, Edwards, routinely advised employees to come to the union meetings to obtain information about the Petitioner or told employees who were unable to attend that if they had questions, he would attempt to obtain the answers for them from the Petitioner’s organizer. Under these circumstances and based on the record as a whole, I find that the evidence affirmatively establishes that the organizing committee members, including the leads listed as such on the letter from the Petitioner to the Employer, did not generally act as actual or apparent agents of the Petitioner. Accordingly, their conduct apart from obtaining authorization cards cannot be attributed directly to the Petitioner. Moreover, even assuming for the sake of a discussion on this point that the committee members were union agents, there is no evidence they said anything to employees that would be objectionable.

Finally, I note that any prounion conduct on the part of the leads appears to have ceased approximately a month before the election. Although the Employer claims that it had no reason to know of its leads’ prounion conduct, this is not plausible based upon Human Resources Manager Dingess’ original testimony, as credited by the hearing officer, indicating that she, in fact, had discussions with at least some of the leads on this topic following the ruling on their status. In any event, the campaign material disseminated by the Employer in many respects countered what leads had indicated were the advantages of unionization.¹⁹

5. The applicability of *Glen’s Market*, 344 NLRB 294 (2005)

The Employer takes issue with the hearing officer’s reliance on *Glen’s Market* to support her conclusion that the conduct of the leads did not reasonably tend to coerce or interfere with employees’ free choice. In this regard, the Employer points out that in *Glen’s Market*, the authority of the supervisors in issue

was limited to evaluating employees who worked under them in their respective departments, whereas a limitation of supervisory authority along departmental lines is not present in this matter. Concededly, the delineation of supervisory authority is not as clear in this matter as it was in *Glen’s Market*. However, there is significant record evidence that employees are primarily supervised by a single lead and that lead is the individual who regularly oversees and directs their work. In addition, the leads make temporary production assignments as well as training assignments under circumscribed conditions, including receiving directives from admitted supervisors on temporary staffing needs and training employees in general for purposes of enhancing flexibility and thereby, productivity. Accordingly, *Glen’s Market* is relevant because there was no evidence that at the time of the election or in the 2 to 3 months preceding the election, that Adkins or Withrow directed prounion supervisory conduct at employees who worked under them. Edwards’ prounion supervisory conduct ceased about a month prior to the election. Therefore, the lack of recent pro-union supervisory conduct directed at employees over whom the leads regularly supervised constitutes a factor mitigating against the objectionable nature of their conduct generally and their solicitation of cards specifically.

6. Statements of leads concerning the fate of Benny Moore

The Employer asserts that the statement attributed to Edwards, that if employee Benny Moore had been fired any of them could be fired, implies that individuals who had supported the Petitioner could not change their minds and if they did not work to get the Petitioner elected, that they would be out of a job. To the contrary, in agreement with the hearing officer, I conclude that this is an expression of fear of possible retaliation against employees who continued to support the Petitioner. Moreover, as the hearing officer noted, the statement is not connected to any indication that employees would be protected by continuing to support the Petitioner. Perhaps most significantly, however, there is no evidence that this particular statement was heard by any member of the bargaining unit other than Clere. Given the minimal exposure of the statement and that the more reasonable inference to be drawn is that employees might be *afraid* to support the Petitioner following the discharge of Moore, I concur with the hearing officer’s conclusion that this statement cannot be reasonably interpreted as interfering with employee’s freedom to choose to not support the Petitioner. See, e.g., *B.J. Titan*, 296 NLRB 668 (1989), and cases cited therein. In this regard, I note, as did the hearing officer, that the Board in *Harborside*, supra at 912–913, 918 fn. 24, only overruled *B. J. Titan* to the extent that it holds that a prounion supervisor’s linking of job security to support of a labor organization is never objectionable. Certainly, there is no direct linkage of support of the Petitioner to the “Benny Moore” statement and I find that such cannot reasonably be inferred.

7. The hearing officer’s purported bias

The Employer continues to argue in multiple exceptions that the hearing officer’s credibility findings, factual findings, and conclusions of law were based on her bias, citing her treatment of witnesses as being somehow inappropriate, and continues to

¹⁹ For example, apparently one of the arguments made by Edwards in favor of unionization centered on the benefits enjoyed by employees at a unionized facility operated by the Employer. Much of the Employer’s campaign literature was meant to diminish the impact of such arguments and included items such as the managements right’s clause pertaining to the unionized facility and the statement that the Union had caved in and agreed to virtually all of the Employer’s demands in the last round of bargaining.

maintain that this conduct requires a new hearing. The hearing officer's actions specifically pointed out by the Employer in the record appear to be no more than the hearing officer attempting to pin down what actually occurred, rather than allowing witnesses to summarize or merely offer their impression. This is certainly appropriate conduct for the trier of fact and I find that such conduct does not demonstrate any bias on the part of the hearing officer. Moreover, I do not find any basis to conclude that the hearing officer engaged in an incorrect analysis of *Harborside* or of any other applicable precedent. The hearing officer's factual conclusions are supported by the record in this matter and I find no reason to disturb her credibility resolutions. Indeed, having carefully reviewed the entire record, I find no evidence supporting the Employer's contention that the hearing officer was biased and I again deny the Employer's request for a new hearing before a different hearing officer.

VI. CONCLUSION

Based on the foregoing, and having carefully reviewed the entire record, the hearing officer's report and recommendations and the exceptions and arguments made by the Employer in its brief, I adopt the hearing officer's recommended order overruling the objections and deny the Employer's request for a new hearing.

ORDER

IT IS HEREBY ORDERED that the Employer's objections to the election be overruled in their entirety. Accordingly, as the Petitioner has received a majority of the votes cast, I will issue an appropriate Certification of Representative.

CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that a majority of the valid ballots has been cast for United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC, and said labor organization is certified as the exclusive collective-bargaining representative of the employees of the Employer in the following unit within the meaning of Section 9(c) of the National Labor Relations Act, as amended:

All production and maintenance employees employed by the Employer at its 750 West 10th Avenue, *Huntington*, West Virginia facility, but excluding temporary employees, leased employees, sales and marketing employees, engineers, confidential employees, salaried employees, office clerical employees, and all professional employees, guards, the lead persons and all other supervisors as defined in the Act.