

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TERRY MACHINE CO., a division of
S.P.S. TECHNOLOGIES, INC.

Case No. 7-RC-21581

Employer,

and

INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA (UAW), and its LOCAL 155,
AFL-CIO,

Petitioner.

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**PETITIONER INTERNATIONAL UNION UAW'S AND LOCAL 155'S
EXCEPTIONS TO THE HEARING OFFICERS THIRD REPORT AND
RECOMMENDATION ON OBJECTIONS AND DETERMINATIVE
CHALLENGED BALLOTS PURSUANT TO BOARD REMAND**

Pursuant to Section 102.69 of the National Labor Relations Board's Rules and Regulations, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, and its Local 155, AFL-CIO, the Petitioner (hereinafter "UAW" or "Union"), files these exceptions to the Hearing Officer's Third Report and Recommendation on Objections and Determinative Challenged Ballots Pursuant to Board Remand.

The Hearing Officer relies on incorrect findings (which the UAW previously excepted and briefed) to find supervisory status in his Third Report and Recommendations. The UAW filed Exceptions to the Second Report and Recommendations. Those Exceptions have not been ruled on.

The UAW incorporates the Exceptions to the Hearing Officer's Second Report and Recommendations and its supporting Brief into these Exceptions.

1. The Union Excepts to the recommendation that the area coordinators be found to be supervisors as defined in the Act in the Hearing Officer's Third Report and Recommendations on Objections and Determinative Challenged Ballots Pursuant to Remand issued on November 15, 2005. (Third R&R, pp. 2, 11)¹

2. The Union excepts to the Hearing Officer's finding that there is "no record evidence that the Employer addressed or disavowed the area coordinators' solicitation of signatures on the authorization petition. Consequently, the Employer's campaign did not sufficiently mitigate the coercive solicitation of petition signatures from a significant portion of the unit." (Third R&R, p. 12) This finding is contradicted by the record evidence, that the Employer threatened to discharge the area coordinators if they did not stop engaging in pro-union activities and it disavowed the pro-union activity to employees verbally and in writing. In fact, the Hearing Officer found that pro-union area coordinators were admonished by the Employer that they were supervisors and as such should not be engaging in pro-union conduct. (Third R&R, p. 13)

3. The Union excepts to the Hearing Officer's finding that the area coordinators were supervisors as defined in Section 2 (11) of the Act and that their solicitation of signatures on authorization petitions constituted objectionable, coercive conduct and which materially affected the outcome of the election. (Third R&R, p.13)

4. The Union excepts to the Hearing Officer's application of the decision in *Harborside*

¹ References to the Hearing Officer's Third Report and Recommendations will be made by designating the appropriate page numbers proceeding by (Third R&R, p. ____). References to the Hearing Officer's Second Report and Recommendations will be designated as (Second R&R, p. ____). References to the Transcript and Exhibits of the objection hearing held beginning on September 14, 1999 will be designated as (Post-Election Tr. ____, Post-Election Ex. ____). References to the Post Remand hearing in December 2006 will be designated as (Post-Remand Tr. ____). References to the Transcript of the Pre-Election hearing will be designated as (Pre-Election Tr. ____).

Health Care, 343 NLRB No. 100 (2004) and *SNE Enterprises, Inc.*, 348 NLRB No. 69 (2006), retroactively to actions that occurred in 1999. The Hearing Officer improperly set aside the election because low level supervisors solicited signatures on union authorization petitions even though the solicitations were lawful under existing Board precedent when they occurred; at the time of the solicitations, the supervisory status of the area coordinators was undetermined; the area coordinators did not implicitly or explicitly threaten or make promises to employees, or engage in otherwise coercive conduct; and there were circumstances mitigating any effect of petition signature solicitation, including well publicized anti-union conduct by the Employer and the fact that the Employer threatened the area coordinators that if they engaged in pro-union conduct, they would be fired.

5. The Union Excepts to the Hearing Officer's finding that the Employer has met its burden of establishing that the area coordinators were supervisors. (Third R&R, pp. 2, 11; Second R&R, p. 8)

6. The Union Excepts to the Hearing Officer's finding that there is sufficient evidence that area coordinators evaluate the performance of temporary or probationary employees. (Third R&R, pp. 2, 11; Second R&R, p. 8; Post-Election Tr. 1259-1260, 1262-1264, 1281-1284, 1375-1376, 1438-1439, 1505-1506; Pre-Election Hearing Transcript 132-133)

7. The Union Excepts to the Hearing Officer's finding that area coordinators can assign overtime. (Third R&R, pp. 2, 11; Second R&R, p. 8; Post-Election Tr. 1266-1268, 1365-1366, 1433-1434, 1498-1499, 1657-1658)

8. The Union Excepts to the Hearing Officer's finding that area coordinators can issue disciplinary action, albeit verbal. (Third R&R, pp. 2, 11; Second R&R, p. 8; Post-Election Tr. 1036-1042, 1098, 1103-1106, 1127-1129, 1168-1169, 1290-1291, 1373-1375, 1435-1436, 1676-1677, 1697; Pre-Election Tr. 152, 160-163)

9. The Union Excepts to the Hearing Officer's finding that area coordinators assign employees work and the implication that this makes them supervisors. (Third R&R, pp. 2, 11; Second R&R, p. 8; Post-Election Tr. 1361, 1430, 1484-1490, 1557, 1654-1655, 1672-1673, 1691-1692)

10. The Union Excepts to the Hearing Officer's finding that the Union withdrew the challenges it made at the election to certain area coordinators. (Second R&R, p. 9, fn. 15) (Post-Election Tr. 989-990; Post Remand Brief on Behalf of Petitioner, UAW (dated June 28, 2005), Post Election Brief on Behalf of Petitioner, UAW (dated October 12, 1999) pp. 18-19)

11. The Union Excepts to the Hearing Officer's finding that area coordinators are statutory supervisors. (Third R&R, pp. 2, 11; Second R&R, p. 9)

Petitioner UAW contends that the Hearing Officer erroneously concluded that the area coordinators were statutory supervisors. The UAW also contends that even if the area coordinators were supervisors, their pro-union activities did not interfere with the election and the UAW should be certified as bargaining representative.

Respectfully submitted,

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Dated: March 26, 2007

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**BRIEF IN SUPPORT OF PETITIONER INTERNATIONAL
UNION UAW'S AND LOCAL 155'S EXCEPTIONS
TO THE HEARING OFFICER'S THIRD REPORT
AND RECOMMENDATIONS ON OBJECTIONS
AND DETERMINATIVE CHALLENGED BALLOTS
PURSUANT TO BOARD REMAND**

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I. INTRODUCTION

The Exceptions and Brief in Support of the Exceptions are exceptions to the Hearing Officer's Third Report and Recommendations on Objections and Determinative Challenged Ballots, some of the Exceptions are to the conclusions reached by the Hearing Officer in his Second Report and Recommendations. The Hearing Officer relies on incorrect findings (which the UAW previously excepted and briefed) to find supervisory status in his Third Report and Recommendations. The UAW filed Exceptions to the Second Report and Recommendations. Those Exceptions have not been ruled on. The UAW incorporates the Exceptions to the Hearing Officer's Second Report and Recommendations and its supporting Brief into these Exceptions.

The UAW also Excepts to the Hearing Officer's conclusion in his Third Report that if the area coordinators were supervisors, they engaged in objectionable conduct which requires a rerun election. The area coordinators' actions in support of the UAW were previously found by the same Hearing Officer not to taint the election in his Second Report and Recommendations and he does not rely on any new evidence was adduced at the Post Remand hearing to overrule his previous ruling.

The UAW Excepts to the retroactive application of the standard new standard announced in *Harborside Health Care* and *SNE Enterprises* to actions that occurred years prior to the issuance of those cases. In fact, the Board has already held that actions of the area coordinators, even if they were supervisors, was not objectionable. 332 NLRB 855, 858 (2000).

The UAW asserts that the Hearing Officer correctly applied the recent case law under *Oakwood Healthcare*, 348 NLRB No. 37 (2006); *Croft Metals, Inc.* 348 NLRB No. 38 (2006), and *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006) to the area coordinators and came to the proper conclusion that the challenged area coordinators did not possess supervisory status under the standards set forth in those cases.

II. PRIOR PROCEEDINGS

The UAW filed a petition for an election among the production and maintenance employees of Terry Machine on May 25, 1999. A pre-election hearing was held to determine the supervisory status of individuals who held the position of area coordinator. The Employer took the position that area coordinators were supervisors and the Union asserted they were not supervisors. The Regional Director issued a Decision and Direction of election on July 6, 1999 wherein he found that he could not determine whether the area coordinators were supervisors.

The Regional Director scheduled an election and allowed the area coordinators to vote subject to challenge. The election was held on August 5, 1999. There were 76 votes for the Union, 66 votes for no union and 12 challenged ballots. The challenges were outcome determinative. Eleven of the challenged ballots were from area coordinators and the twelfth ballot belonged to Steve Stanton. The Union alleged that Stanton was a supervisor.²

The Employer filed objections to the election and a hearing was held in September 1999. The Hearing Officer issued a Report on November 15, 1999 finding that he could not decide whether the area coordinators were supervisors. The Hearing Officer sustained the challenges to the ballots cast by the seven area coordinators challenged by the Employer, without deciding whether the area coordinators were statutory supervisors. By sustaining the objections to those ballots, the remaining challenges were no longer outcome determinative. The Hearing Officer also held that none of the alleged objectionable conduct interfered with the election.

The Employer filed exceptions to the Hearing Officer's Report and Recommendations. The NLRB affirmed the Hearing Officer's decision on October 24, 2000. (332 NLRB 855 (2000))

² Although the area coordinators could have been challenged by the NLRB, in this case seven pro-union area coordinators were challenged by the Employer. The remaining four area coordinators were challenged by the Union, along with Stanton.

The Employer refused to bargain with the Union. The NLRB issued a refusal to bargain complaint and filed a motion for summary judgment on January 11, 2001. The summary judgment motion remained before the NLRB until May 24, 2005, when the Board issued a decision denying the motion for summary judgment and remanding the case for consideration in light of *Harborside Health Care*, 343 NLRB No. 100 (2004) and *NLRB v. Kentucky River Community Care, Inc.*, 523 U.S. 706 (2004).

In response to the remand, both parties filed briefs with Region 7. The Hearing Officer issued a Second Report and Recommendations on December 16, 2005. The Hearing Officer found the area coordinators were supervisors, but their proven conduct was not objectionable.

The Union filed exceptions to the Second Report and Recommendations, challenging the determination that the area coordinators were supervisors. The Employer also filed exceptions to the Hearing Officer's Second Report and Recommendations. The Board never ruled on the exceptions filed by either party.

On September 30, 2006, the NLRB remanded the case to the Regional Director for consideration in light of three cases dealing with the definition of supervisor under the National Labor Relations Act. *Oakwood Healthcare Center*, 348 NLRB No. 37 (2006); *Croft Metals*, 348 NLRB No. 38 (2006); and *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006).

After the remand order, the NLRB issued its decision in *SNE Enterprises*, 348 NLRB No. 69 (2006). The Employer, in response to the Regional Director's Order to Show Cause, requested that the record be reopened to allow more evidence with respect to supervisory status and pro-union conduct of the area coordinators. A hearing was held on December 18 and 19, 2006 before the Hearing Officer.³

³ It should be noted that this case was previously remanded once for consideration under the (continued...)

III. STATEMENT OF FACTS

A. Supervisory Status.

1. Statement of Facts Presented at Pre-Election and (First) Post-Election Hearings.

There have been three hearings in this case. There was a pre-election hearing dealing with the supervisory status of the area coordinators. In the hearing, the Employer failed to meet its burden to show the area coordinators were supervisors. There was a post-election hearing dealing with the supervisory status of the area coordinators, as well as the alleged objectionable conduct.

The most recent remand calls for consideration of the supervisory indicia of assignment of work, responsible direction of work and the use of independent judgment on the part of the area coordinators in light of the *Oakwood Healthcare* line of cases. The third hearing added nothing new. A review of the testimony of the area coordinators at the pre and post-election hearings provides the most relevant testimony.

The Hearing Officer properly found that the area coordinators were not supervisors pursuant to the holding of *Oakwood Healthcare*, *Golden Crest Healthcare* and *Croft Metals, Inc.* The UAW, obviously, does not except to this finding.

IV. ARGUMENT

A. The Area Coordinators Were Not Supervisors in 1999.

In the Hearing Officer's Third Report and Recommendations, he adopts the incorrect finding in the Hearing Officer's Second Report and Recommendations (issued November 15, 2005) that the area coordinators were supervisors because they evaluated the performance of temporary service

³ (...continued)

Harborside Health Care standard as enunciated by the Board. The parties were allowed to submit briefs in support of that claim. The Union took the position at this hearing that it was inappropriate to reconsider the supervisory taint issue or allow introduction of evidence on the supervisory taint issue.

supplied probationary employees; they assigned overtime; area coordinators had the authority to issue verbal reprimands; and that area coordinators had the ability to assign employees to their machines and move machine operators among machines in order to complete a “hot job”. (Third R&R, pp. 2, 11; Second R&R, pp. 8-9)⁴

In response to the Hearing Officer’s Second Report and Recommendations finding the area coordinators were supervisors, the UAW filed exceptions to those reports. The Board has never ruled on the UAW’s exceptions to the Hearing Officer’s Second Report and Recommendations.

It is the Employer’s burden to establish that the area coordinators (whose ballots it challenged) were supervisors. Not only did the Employer fail to sustain its burden of proof, but the evidence shows that these individuals were not supervisors. Furthermore, the fact that the Regional Director could not determine the supervisory status of these individuals after two hearings casts doubt on the Hearing Officer’s current conclusion that the area coordinators were supervisors.⁵

With respect to the testimony offered by the Employer concerning the area coordinators’ supervisory authority, the Union requests that the pre-election hearing testimony be reviewed carefully in conjunction with the post-election hearing testimony. In the pre-election hearing, the Employer’s witnesses testified that area coordinators had to clear every action they took through higher supervision. By the time the same witnesses testified in the post-election hearing, their

⁴ References to the Hearing Officer’s Third Report and Recommendations will be designated as (Third R&R, p. __). References to the Hearing Officer’s Second Report and Recommendations will be designated as (Second R&R, p. __). References to the Transcript and Exhibits of the objection hearing held beginning on September 14, 1999 will be designated as (Post-Election Tr. __, Post-Election Ex. __). References to the Post Remand hearing in December 2006 will be designated as (Post-Remand Tr. __). References to the Transcript of the pre-election hearing will be designated as (Pre-Election Tr. ____).

⁵ The record shows that immediately after the election, the Employer made changes to its organizational chart. The “pro-union” area coordinators were “demoted” and the “pro-employer” area coordinators were “rewarded” with the title of supervisor and changed to salaried status. (Post-Election Tr. 85-89) The record is replete with instances of the Employer attempting to manipulate the evidence concerning the supervisory status of the area coordinators including demanding, during the election campaign, that they sign papers admitting their supervisory status. (Post-Election Tr. 99-112)

testimony was quite different.

The Hearing Officer referred to specific testimony and pointed to a few areas of responsibility in making his recommendation in the Second Report and Recommendations. Each of these areas will be reviewed in turn and, where relevant, the testimony of the witnesses mentioned will be reviewed.

1. The Fact That the Area Coordinators Filled out Evaluations Is Not Indicative of Supervisory Status.

The record contained evidence that some area coordinators complete performance evaluations and that those are used to determine whether to permanently hire probationary and/or temporary employees.⁶ There was testimony from area coordinators that, although they wrote evaluations and made recommendations regarding probationary employees, their recommendations were not followed. (Post-Election Tr. 1375-1376, 1438-1439, 1505-1506)

Don Simonds, the first shift supervisor in 1999 testified at the pre-election hearing that decisions on probationary employees becoming permanent were made by a “committee” of area coordinator, supervisor (who have input) and Human Resources Director. (Pre-Election Tr. 132-133) At the post-election hearing, his testimony was, essentially, that he really did not have any involvement in the process implying the area coordinators made the decision. (Post-Election Tr. 1259-1260) On cross examination, he could not explain the discrepancy and acknowledged his pre-election testimony was accurate. (Post-Election Tr. 1263-1266) Tim Bickes, another area coordinator, acknowledged that decisions on probationary employees were made by management.

⁶ Robert Logan testified that the employees in his area filled out their own evaluations. (Post-Election Tr. 1490-1494) Scott Hartwick also gave evaluations to his employees to fill out themselves. (Post-Election Tr. 156-166)

(Post-Election Tr. 1281-1284)⁷

Filling out evaluations has not been found to be a supervisory function in circumstances similar to this where the evaluation is merely reportorial and a function of the area coordinators working side by side with the other hourly employees. *Hausner Hard Chrome of Kentucky*, 326 NLRB 426 (1998); *Flamingo Hilton-Laughlin*, 324 NLRB 72 (1997) (reporting objective attainment of proficiency); *PECO Energy*, 322 NLRB 1107 (1997). The Hearing Officer erred in concluding that area coordinators influenced hiring decisions.

2. The Area Coordinators Did Not Assign Overtime.

The Hearing Officer held that the record is clear that the area coordinators can assign overtime both in making the decision to work overtime and who will work overtime. (Second R&R, p. 8) The evidence is that overtime was scheduled by management for the weekends (Don Simonds or Kirk Schaeffer) and mandatory during the week.⁸ (Post-Election Tr. 1365-1366, 1433-1434, 1498-1499, 1657-1658) The Hearing Officer's conclusions are not supported by the record.⁹ In circumstances where overtime is set by higher supervision, the leaders are not supervisors. *Tree-Free Fiber Co.*, 328 NLRB 389 (1999)

3. The Hearing Officer Erroneously Concluded That Area Coordinators Had Authority to Issue Verbal Warnings.

The Hearing Officer correctly concluded that area coordinators have no authority to issue written discipline on their own or to issue attendance related discipline, however, he erroneously

⁷ Area coordinator Don Schaeffer testified that he evaluates probationary employees and recommends action but his recommendations go through management. (Post-Election Tr. 1017-1025, 1086-1087)

⁸ Ernie Miles testified that one employee asked Simonds and Ritchie to work extra overtime and when Ernie Miles suggested he stop working overtime (because he ran bad product), his recommendation was overruled. (Post-Election Tr. 1365-1366)

⁹ The testimony in this case is that the area coordinators challenged by the Employer testified they could not generate overtime on their own. Only Don Schaeffer testified that he could do so. (Post-Election Tr. 1046-1049, 1109) Mr. Schaeffer, who has two brothers in management, perhaps has more authority than other area coordinators. It would be reasonable to conclude that Schaeffer is a supervisor but not other area coordinators who did not possess this ability. (Post-Election Tr. 1266-1268)

concluded that area coordinators had authority to issue verbal discipline. (Second R&R, p. 8) Area coordinators testified they did not have authority to discipline. They explained that they were told what to write on the discipline and/or what to say in the case of a verbal warning, when there was discipline meted out in their areas. (Post-Election Tr. 1372-1375, 1435-1436, 1676-1678, 1697)¹⁰ The testimony of the area coordinators is that they reported incidents that can lead to discipline.¹¹ Even Tim Bickes, an area coordinator who testified for the Employer, acknowledged discipline was written by higher management and then he signed it. (Post-Election Tr. 1289-1291) Under these circumstances a leader is not considered a supervisor. *Tree-Free Fiber Co., supra; Ryder Truck Rental*, 326 NLRB 1386 (1998); *MJ Metal Products*, 325 NLRB 1074 (1997); *Necedah Screw Machine Products*, 323 NLRB 574 (1997).

4. The Fact That Area Coordinators Assigned Work in Their Areas Does Not Make Them Supervisors.

The Hearing Officer's finding that the area coordinators' assignment of employees to machines, movement of machine operators in order to complete "hot jobs" is indicia of supervisory status, directly contradicts the Hearing Officer's Third Report and Recommendations which held that the exact same actions by the area coordinators did not meet the standards set in *Oakwood Healthcare* with respect to the exercise of authority, the responsibility to direct and the definition of "assign." (Second R&R, pp. 8-9; Third R&R, pp. 8-10)

¹⁰ Troy Van Schoik did testify that he received the discipline from Keith Martin and Rick Schaeffer. (Post-Election Tr. 1197-1201) Mr. Martin testified he was told what to do with respect to Mr. Van Schoik by Rick Schaeffer. (Post-Election Tr. 1676-1678)

¹¹ In the pre-election hearing, Don Schaeffer testified that he went to the Human Resources Director and First Shift Supervisor to discuss what was going on and if the person needs a *verbal* or written warning. (Pre-Election Tr. 152, 160-163) In the post-election hearing, he testified that he issued discipline on his own but acknowledged that supervisors and Human Resources were involved in the entire process. (Post-Election Tr. 1036-1042, 1098, 1103, 1106, 1127-1129, 1168-1169) The Hearing Officer did not consider the Employer's repeated attempts to exaggerate the authority of area coordinators.

The Hearing Officer's Third Report and Recommendations also found that area coordinators' assignment of employees or movement of employees to machines in order to complete "hot jobs" did not require the use of independent judgment involving a degree of discretion that rose above routine or clerical. (Third R&R, p. 10)

It is incomprehensible how the Hearing Officer could have ignored his correct findings in the Third Report and Recommendations, taking into account the Board's new definitions of "assign", "responsibly direct" and "use of independent judgment", but allowed his previous incorrect recommendation that the area coordinators "assigned" work to stand.

Moreover, while the Hearing Officer noted that area coordinators make work assignments, this does not make the area coordinators statutory supervisors. See *Tree-Free Fiber Co.*, *supra*; *MJ Metal Products*, *supra*; *PECO Energy*, 322 NLRB 1107 (1997); *Joy Recovery Technology Corp.*, 320 NLRB 356 (1995). Furthermore, the fact that the area coordinators worked on machines side by side with employees for most of the time precludes a finding that they are supervisors. (Post-Election Tr. 1361, 1430, 1484-1490, 1557, 1654-1655, 1672-1673, 1691-1692) *MJ Metal Products*, 325 NLRB 1074 (1997); *Quality Chemical, Inc.*, 324 NLRB 328 (1997).¹²

5. Other Evidence Presented at the Hearing Supports a Finding That the Area Coordinators Are Not Supervisors.

As stated above, each of the area coordinators challenged by the Employer, Logan, Miles, Hensley, Martin, Hartwick, Powell, and Blanton, worked alongside other hourly employees on a daily basis. (Post-Election Tr. 527, 1361, 1430, 1489-1490, 1557, 1655, 1672-1673, 1692). While area coordinators were able to recommend merit increases for employees in their respective areas, each area coordinator testified to circumstances where his recommendations were rejected. Area

¹² Don Schaeffer testified he works on a machine only 5% of his time. This is another reason to consider holding that some area coordinators are supervisors while most are not. (Post-Election Tr. 1138)

coordinators could recommend wage increases but their recommendations had to be approved by higher management and often were not approved. (Post-Election Tr. 1362-1363, 1370-1371, 1376, 1431, 1452, 1494-1495, 1558-1560, 1674, 1692-1693).¹³ Area coordinators were not allowed to know what the wages were of employees in their own areas. (Post-Election Tr. 1364, 1493, 1559). There was also evidence that higher supervision would grant wage increases with no input by the area coordinators. (Post-Election Tr. 1491). There was evidence presented that area coordinators did not have control over transfers and in fact area coordinators had their recommendations for transfers rejected. (Post-Election Tr. 1136-1137, 1501-1502, 1693-1695).

Even witnesses presented by the Employer acknowledged that area coordinators had to clear any actions with upper supervision. Timothy Bickes acknowledged that, for discipline, it was written up by higher management and then he signed it. (Post-Election Tr. 1290-1291). Bickes also acknowledged that transfers of employees had to go through a chain of command to be approved and that he did not have authority to effectuate transfers himself. (Post-Election Tr. 1292, 1294, 1299). Employees who were cross examined on these points also acknowledged that upper level supervision had to approve most everything. (See e.g. Post-Election Tr. 160, 163, 168, 375, 531-532) Employees were aware that area coordinators required approval for their actions from higher supervision.

Finally, the Union relies on its argument that the secondary indicia of supervisory status, such as ratio of supervisors to employees and the fact that the area coordinators are hourly employees who wear the same uniform as hourly employees, demonstrates that the area coordinators

¹³ Amy Denkins testified that she did not get a wage increase while she worked with Miles and Hensley. (Post-Election Tr. 362) Both Miles and Hensley testified that they recommended Denkins for a raise. (Post-Election Tr. 1363, 1692) Miles testified that he thought she received the increase, but Denkins' memory in this regard is probably more accurate. Miles' and Hensley's recommendation was obviously not followed.

are not supervisors under the Act.¹⁴

6. The Area Coordinators' Pro-union Actions Did Not Constitute Objectionable Conduct.

In the Hearing Officer's Second Report and Recommendations, he held that under the NLRB's new two factor test set forth in *Harborside Health Care*, the pro-union actions of the area coordinators were not objectionable. (Second R&R, pp. 9-10) Remarkably, although no new evidence adduced at the second Post-Remand hearing in December 2006, the same Hearing Officer reverses his prior decision applying the same case, *Harborside Health Care*, to the exact same set of facts without any explanation. (Third R&R, pp. 12-13)

As found by the Hearing Officer in his Second Report and Recommendations, area coordinators' conduct on behalf of the Union did not involve threats or promises. (Second R&R, p. 10) The Employer mounted an extensive anti-union campaign in opposition to the UAW organizing drive and there is little question that the employees knew exactly where the Employer stood by the time the election was held. (Second R&R, p. 10) Therefore, the Board should uphold the Hearing Officer's finding in his Second Report and Recommendations that even if the area coordinators were low level supervisors under Section 2(11) of the Act, their pro-union conduct was not objectionable under *Harborside Health Care*.

¹⁴ The Employer operated three shifts during the critical period. One shift supervisor was assigned to each shift. There were 94 employees (undisputed) on the first shift with an additional 11 area coordinators (for a total of 115). Some area coordinators were responsible for a small number of employees (Adam McCallum -2; Troy Blanton - 4)(Er. Ex. 50). On the first shift, 10 of the employees reported to the quality manager and the lab manager (reducing the number of first shift employees reporting directly to the first shift supervisor to 95). There were 8 employees who reported to the maintenance manager (reducing the number to 87). There were 11 employees who reported to the shipping manager (76). This left 76 employees reporting to the first shift supervisor. However, there were also two other managers present during the first shift who acted in a supervisory capacity, Don Dubord, the manufacturing manager, and Kirk Schaeffer, the Production Control Manager. This made a ration of approximately 3 supervisors to 76 employees (or a ratio of 1 to 25). The Employer acknowledged in its brief in support of its exceptions that the area coordinators worked directly with only 38% of the employees.

In *SNE Enterprises*, supervisory pro-union conduct was analyzed under the standards set forth in *Harborside Health Care*. 348 NLRB No. 69 slip op. at 1 (2006) The Board stated that it would look to two factors to determine whether the pro-union conduct upset the requisite laboratory conditions for a fair election:

1. Whether the supervisor's pro-union 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 engaged in pro-union conduct and (b) an examination of the nature, extent, and context of the conduct in question.
2. Whether the conduct interfered with the freedom of choice to the effect 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 Health Care, 343 NLRB No. 100 slip op. at 4, *SNE Enterprises*, 348 NLRB No. 69 slip op. at 2 (2006).

In *Harborside Health Care*, the Board held that supervisory card solicitations have an inherent tendency to interfere with an employee's freedom to sign a card and this conduct may be objectionable, absent mitigating circumstances. 343 NLRB No. 100 slip op. at 3. However, an employer can, through its anti-union actions, mitigate a supervisor's pro-union conduct under certain circumstances. *Id.*

Applying the *Harborside Health Care* analysis in *SNE Enterprises*, the Board found that when supervisors solicit union authorization cards, it is coercive under the first prong of *Harborside Health Care*. 348 NLRB No. 69 slip op. at 2. Therefore, the second prong must be analyzed to determine whether such coercive conduct materially affected the outcome of the election.

The UAW does not dispute that area coordinators solicited petition signatures and that the pro-union views of some of the area coordinators was known among employees. However, there are mitigating factors to this conduct. First and foremost, the Employer admittedly engaged in an extensive anti-union campaign of which every employee was aware. (Post-Election Tr. 89-112) Additionally, several area coordinators campaigned against the UAW. (Post-Election Tr. 90, 95)

Another mitigating factor that is present in this case, but was not present in *Harborside Health Care* and *SNE Enterprises*, is the fact that here the Employer told pro-union area coordinators to stop campaigning for the Union and that if they did not, they would be discharged. (Post-Election Tr. 98-112) The threat to fire area coordinators who did not actively support the Employer was communicated to the employees within the plant. The Employer also specifically disavowed the pro-union actions of the area coordinators to its employees. (Post-Election Tr. 93; Pet. Exs. 1, 4) This disavowal was specifically addressed in letters from Terry Machine to all its employees as well as verbally. (Pet. Ex. 1, 4) In *SNE Enterprises* and *Harborside Health Care*, the Board stated that if management takes timely, effective steps to disavow the pro-union conduct of supervisors, it mitigates the pro-union conduct. 348 NLRB No. 69, slip op. at p 3; 343 NLRB No. 100, slip op. at 9

Here, the mitigating factors cited by the NLRB in *Harborside Health Care* and *SNE Enterprises* are present, so the actions of the area coordinators were mitigated to the extent that their conduct was not objectionable.

7. The Holding of *Harborside Health Care* and *SNE Enterprises* Should Not Be Retroactively Applied to Actions by Area Coordinators in 1999.

The NLRB issued its decision in *Harborside Health Care* in 2004. The Board issued its decision in *SNE Enterprises, Inc.* on October 31, 2006. The election in this case occurred in

September 1999. As the Board previously held, the “objectionable” actions of the area coordinators would not have been objectionable in 1999. *Terry Machine*, 322 NLRB 855 (2000) The standard of conduct for the area coordinators should be the standard in place at the time the election occurred. The area coordinators’ actions should not be held to the standard first announced in 2004 and expanded in 2006. (See member Liebman’s dissent in *SNE Enterprises, Inc.*, 348 NLRB No. 69 slip op. 5-7)

V. CONCLUSION

The first hearing in this case was held nearly eight years ago. In *September 1999*, the employees of Terry Machine voted to be represented by the UAW and their wishes have been thwarted by the many years it has taken to decide the issues in this case. A review of the entire record and the offers of proof made by the Employer makes clear that the area coordinators were not supervisors under any standard. Even if the area coordinators were supervisors, their actions did not destroy the laboratory conditions necessary for a free and fair election even under the holdings of *Harborside Health Care* and *SNE Enterprises*. The results of the election should be certified.

Respectfully submitted,

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Dated: March 26, 2007

CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2007, I electronically filed the foregoing paper with the National Labor Relations Board using the E-filing system and served same upon:

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