

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

Heartland Human Services,)	
)	
Employer,)	
)	
and)	Case No. 14-RD-063069
)	
Cody Phillips,)	
)	
Petitioner,)	
)	
and)	
)	
American Federation of State, County and Municipal Employees (AFSCME), Council 31, AFL-CIO,)	
)	
Union.)	

**UNION'S BRIEF IN RESPONSE TO
EMPLOYER'S EXCEPTIONS TO HEARING
OFFICER'S REPORT AND RECOMMENDATION**

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Introduction

Pursuant to a petition filed by Cody Phillips, Petitioner, on August 22, 2011, and a Stipulated Election Agreement approved by the Acting Regional Director on May 22, 2012, an election was conducted on June 4, 2012, among employees in the following unit represented by the American Federation of State, County and Municipal Employees (AFSCME), Council 31 (Union): “All full-time and regular part-time employees employed by the Employer at its Effingham, Illinois facility, EXCLUDING all office clerical and professional employees, guards, and supervisors as defined in the Act.” Bd. Ex. 1(b), p. 1; Un. Ex. 19. The tally of ballots showed that there were 39 valid ballots counted, with 19 votes cast for representation by the Union and 18 votes cast against representation by the Union, and one challenged ballot. Bd. Ex. 1(b), pp. 1-2; Er. Ex. 3.

The Union filed timely objections to the conduct of the election and conduct affecting the results of the election. On June 18 and 19 and July 11, 2012, a hearing was held before a Hearing Officer designated by the Regional Director on the challenged ballot and on the objections. On July 18, 2012, the Hearing Officer issued her Report on a Challenged Ballot and Objections and Recommendations (HOR). The Hearing Officer found that the Union’s challenge to the ballot of Richard Beagle, challenged on the basis that his name was omitted from the Excelsior list and on the basis that he is a confidential employee, should be overruled. She found further that three of the Union’s objections, Objections 1, 2, and 4, should be sustained, and that the remaining three objections should be overruled. The Hearing Officer found that the challenged ballot should be opened and counted, and that if the revised tally of ballots shows that a majority of valid ballots have been cast for Union representation, then a Certification of Representative should be issued. The Hearing Officer found that if the revised tally of ballots shows that a majority of valid ballots cast

have not been cast for Union representation, then the election should be set aside and a rerun election should be conducted. HOR at 1-2.

The Employer, Heartland Human Services (Employer of Heartland) has filed Exceptions to the Hearing Officer's Report and Recommendation, excepting to the Hearing Officer's findings that Objections 1, 2, and 4 should be sustained.¹ Those objections allege the following:

Objection 1: The Employer failed substantially to comply with the Board's Excelsior list requirement, and such failure interfered with employee free choice in the election. The name and address of Richard Beagle were not included on the Excelsior list provided by the Employer, and Richard Beagle's ballot, which has been challenged, is determinative of the results of the election in this matter.

Objection 2: A few days prior to the election, threatening correspondence was mailed to the home of an eligible voter, threatening her that she would go to jail unless she dropped out of the Union and refrained from voting in the election. Such threat was mailed in the same type of envelope and with the same type of mailing label used by the Employer to mail expense reimbursement checks to employees, and it was mailed using the same type of mailing label and stamps used by the Employer to mail anti-Union literature to employees.

Objection 4: During the time period between the signing of the Stipulated Election Agreement and the election, the Employer interrogated employees as to whether or not they supported the Union.

1 The Union has not filed Exceptions to the Hearing Officer's Report.

The election in this case took place following a private settlement agreement entered into between the Union and Heartland. On November 9, 2011, Heartland unilaterally withdrew recognition from the Union. Tr. 320. On May 14, 2012, the Union and Heartland entered into a private settlement agreement. Pursuant to the agreement, the Union conditionally withdrew five pending unfair labor practice charges filed by the Union against Heartland, and the Employer agreed to rescind its withdrawal of recognition. Un. Ex 9; Tr. 155, 218, 320-1. The Union and Employer also agreed in the settlement agreement to the holding of the election in this case on June 4, 2012. Un. Ex. 9.

An election should be set aside where the number, nature, severity, and circumstances of conduct constituting objectionable conduct, considered together, destroy the laboratory conditions of the election. *VJNH, Inc.*, 328 NLRB 87, 104 (1999). Relevant considerations also include the closeness of the vote and the proximity of the conduct to the election date. *Phillips Chrysler Plymouth*, 304 NLRB 16 (1991); *Detroit Medical Center Corp.*, 331 NLRB 878, 880 (2000). Here, the evidence showed that objectionable conduct occurred and that the nature, severity, and circumstances of the objectionable conduct made a fair and free election impossible. The Hearing Officer correctly found that the sustained objections, especially considered in light of the closeness of the vote and the proximity of the objectionable conduct to the date of the election, warrants setting aside the election.

I. The Hearing Officer correctly found that Objection 1 should be sustained.

Objection 1 alleges that: The Employer failed substantially to comply with the Board's Excelsior list requirement, and such failure interfered with employee free choice in the election. The

name and address of Richard Beagle were not included on the Excelsior list provided by the Employer, and Richard Beagle's ballot, which has been challenged, is determinative of the results of the election in this matter.

On May 14, 2012, the Union and the Employer entered into a private Settlement Agreement.

Un. Ex. 9; Tr. 155, 218, 320-1. The Union and Employer agreed, in part, that:

1. The Employer shall rescind the withdrawal of recognition of the Union upon the NLRB Regional Director or his designee signing NLRB Form 601.²

2. The Union shall withdraw the Unfair Labor Practice charges in Cases 14-CA-063207, 14CA-063212 [sic], 14-CA-065658, 14-CA-069206 and 14-CA-073408 using NLRB Form 601.

Un. Ex. 9, p. 1. The Union and the Employer also agreed in such agreement to the scheduling of an NLRB-conducted election on June 4, 2012. Un. Ex. 9, p. 2.

On May 15, 2012, the Union, in an email from Union counsel to Employer counsel, stated:

I just emailed Kathy Talbott-Schehl the signed withdrawal form. I know that you said that the Excelsior list would be provided today. Would you be able to email it (or have someone do that on your behalf) to Jeff Bigelow and/or me today? Thanks.

Un. Ex. 10. Employer counsel responded the same day with an email stating: "Will do. Thanks."

Un. Ex. 10. Employer counsel in a subsequent email on May 15, 2012, stated: "Here's the list."

Attached to such email was a list of 38 names, with no addresses. Un. Ex. 11. The name of Richard Beagle was included on the list. Un. Ex. 11, p. 2. Also on May 15, 2012, Union counsel sent an email to Employer counsel stating, in part, "thanks for the employee list. Would you also email a list that includes employee addresses?" Un. Ex. 12. Employer counsel replied with an email stating,

² NLRB Form 601 is a conditional withdrawal form.

in part, "I'll request a list with addresses." Un. Ex. 12. In a subsequent email sent on May 15, 2012, Employer counsel stated: "Here's the list of employees you requested." Un. Ex. 13. Attached to such email was a list of 35 employees and their home addresses. Un. Ex. 13, p. 2. Such list omitted four names that had been included on the first list. Such four names are: Richard Beagle, Marc Heitkamp, Brandie Myers, and Dixon Wells. Such list included one name which had not been included on the first list. Such name is: Bob Dust. Un. Ex. 13, p. 2. In a May 16, 2012, email from Union counsel to Employer counsel, Union counsel stated:

On a quick review, it appears that the following three names were included on the first list you sent me yesterday but not the second:

Mark [sic] Heitkamp
Brandie Myers
Dixon Wells

I believe all three are bargaining unit Residential Case Managers. Is there a reason they were omitted from the second list, or was it inadvertent?

Un. Ex. 15. Employer counsel responded the same day: "I'll find out." Un. Ex. 16. Later on May 16, 2012, Employer counsel sent an email to Union counsel stating:

The second list is correct. The three employees you mentioned are in the unit. The omission on the first list was inadvertent. Thanks.

Un. Ex. 15. Union counsel responded in a May 16, 2012, email stating:

The three employees were omitted from the second list, not the first list. Will you provide [sic] a corrected second list that includes these three employees and their addresses?

Un. Ex. 16. Employer counsel that same day replied: "Yes." Un. Ex. 16. In a subsequent email to Union counsel on May 16, 2012, Employer counsel stated: "Here it is. Let me know if any problems." Un. Ex. 17. Attached to such email was a list of 38 employees with home addresses.

The list included the 35 employee names and addresses that had been included in the second list and also included the names and addresses of employees Marc Heitkamp, Brandie Myers, and Dixon Wells. The list did not include the name or address of Richard Beagle. Un. Ex. 17, p. 2.

The parties signed the Stipulated Election Agreement on May 16, 17, and 18, 2012, and such agreement was approved by the Regional Director on May 21, 2012. Un. Ex. 19. Under the election agreement, the election was scheduled for Monday, June 4, 2012, from 6:00 a.m. to 9:00 a.m. and from 12:00 noon to 6:00 p.m. Un. Ex. 19. The Excelsior list provided by the Employer to the Regional Director included the same 38 employee names and addresses that had been included in the last list provided to the Union on May 16, 2012. Un. Ex. 17, p. 2; Un. Ex. 20, p. 2. In a May 17, 2012, email to Union counsel, Employer counsel stated that:

I have been informed that Bob Dust is a management employee and should not be on the list. Also, Holly Westjohn left the agency yesterday. Rather than get into challenges over these folks, shall we just agree to strike them from the list?

Un. Ex. 18. The Union did not respond to such email. Tr. 327-8.

On Thursday, May 31, 2012, at 12:30 p.m., Employer counsel sent an email to Union counsel stating in part:

We also discovered that a unit member was inadvertently omitted from the Excelsior list. . . . The name is Ryan Beagle.

Un. Ex. 21. Such email did not give the home address of Richard Beagle. Un. Ex. 21. The Employer did not at any time after providing the Excelsior list to the Union provide the Union with Beagle's home address. Tr. 330-1.

Heartland Executive Director Jeff Bloemker testified that the Excelsior list and the earlier versions of the list were all prepared by Heartland's Director of Human Resources, Debra Johnson,

at his instructions. Tr. 220-1. When asked why Beagle's name was omitted from the second list, Bloemker testified:

The best I can tell you is that she – when she tried to merge the mailing list, she merged it with a payroll list potentially to get the addresses. I believe her original collective bargaining unit list didn't have the addresses, and when she was advised that she needed to provide addresses, that that's where the mistake occurred.

Tr. 221. Bloemker could not explain why the names of Dixon Wells, Marc Heitkamp, and Brandie Myers were omitted from the second list. Tr. 222-4. Bloemker testified that the final list (Un. Ex. 17 and Un. Ex. 20) omitted Beagle's name, but could not explain why it was omitted. He testified that Johnson sent him the list to review and that he reviewed it before sending it to Employer counsel to send to the Union. Tr. 225. Bloemker testified that he reviewed all of the lists before they were sent to Employer counsel to provide to the Union. He could not explain why he approved the list with Beagle's name omitted. Tr. 225-7; Un. Exs. 13, 17, 20.

Human Resources Director Debra Johnson testified as follows regarding Beagle's name and address being left off of the Excelsior list:

[W]hen I did the second list, saying that we needed addresses, I pulled from our insurance list which included people that – well, specifically Bob Dust, and it did not include Ryan Beagle, and then I can't really explain the third list other than that when you start making a mistake, you continue, and that's what I did.

Tr. 432-3. Johnson also testified that she maintains a database that has employment information including current addresses for all bargaining unit employees and that the current home addresses for all eligible voters would be in that database. Tr. 441-2. She testified that all employees are eligible for health insurance after three months of employment by Heartland. As of May 2012, Dixon Wells, Brandie Myers, and Marc Heitkamp had all been employed by Heartland for longer than three

months, having been hired in October and November 2011. Un. Ex. 11, p. 2. The name of Kerrie Herd, hired on February 23, 2012, less than three months prior to preparation of the Excelsior list, and therefore not yet eligible for the Employer's insurance at the time of the preparation of the Excelsior list, appeared on all versions of the Excelsior list. Un. Ex. 11, 13, 17, 20. Johnson did not explain why the names Dixon Wells, Brandie Myers, and Marc Heitkamp were left off of the second list of names sent to the Union even though they were all employed longer than three months at the time she prepared the lists in May. Tr. 442-3; Un. Ex. 11. Johnson testified that Beagle is covered by Heartland's insurance. She could not explain why his name would not have been on a list of employees covered by insurance. Tr. 444. Beagle testified that he has been covered by the Employer's health insurance since he completed his probationary period five years ago. Tr. 562.

The evidence showed that on May 21, 2012, Residential Manager Faith Griffin, a 2(11) supervisor (Tr. 14), at the instruction of Johnson and Linda Warner, Director of Case Management and Geriatric Services and a 2(11) supervisor (Tr. 462), called Kerrie Herd and Dixon Wells individually into her office and asked each of them to sign a union membership card or non-union card, and that Herd signed a non-union card and Wells signed a union membership card on such date in Griffin's office. Tr. 17-18 (Wells testimony); Tr. 374-5, 378, 393-5 (Griffin testimony). The evidence also showed that Warner did not require Heitkamp to come in to sign a union membership or non-union card, but that Heitkamp told Griffin that he had already privately signed a union membership card which had not been turned in to the Employer. Tr. 398-9 (Griffin testimony). The evidence showed that Heitkamp and Myers, as of May 21, 2012, had not yet been asked by the Employer to sign and submit and had not yet submitted to the Employer signed union or fair share cards. Tr. 302-3.

The evidence also showed that shortly prior to the Employer's unilateral withdrawal of recognition of the Union, the Employer had made a bargaining proposal to remove Beagle's position from the bargaining unit. On August 16, 2011, Heartland, in an email from its counsel to AFSCME Staff Representative Tara McCauley, submitted a collective bargaining proposal that proposed removing Beagle from the bargaining unit on the basis that he is a confidential employee. The proposal stated: "We propose clarifying the bargaining unit by removing the IT Coordinator because we believe the position is a confidential position under the Act." The IT Coordinator position referred to the position held by Beagle. Un. Ex. 24; Tr. 227-8 (Bloemker testimony); Tr. 271-4 (McCauley testimony); Tr. 316-19 (Bigelow testimony). Bloemker testified that the proposal was made in part because: "Mr. Beagle wanted out of the collective bargaining unit" and as a bargaining chip. Tr. 228. Heartland Board member and bargaining committee member Terri Phillips testified that the Employer wanted to remove Beagle's position from the bargaining unit because as the IT person he has access to confidential information. Tr. 459-60. At bargaining negotiations on August 17, 2011, AFSCME Regional Director Jeff Bigelow asked Bloemker what Beagle's responsibilities were that made him confidential, and Bloemker responded that Beagle had access to all of Heartland's confidential files. Tr. 317-18. The Employer's withdrawal of recognition then occurred on November 9, 2011, and, as of that time, the Union had not responded to the Employer's proposal to remove Beagle from the unit. Tr. 319-20. The evidence showed that Bloemker had a close working relationship with Beagle, who, in the course of his job duties, assisted Bloemker with computer and cell phone-related problems on a regular basis. See Un. Ex. 26. See, e.g., Un. Ex. 26-O (April 27, 2012, email from Bloemker to Beagle stating: "Ryan, as always I can count on you . . . Thanks.")

The Union did not receive lists of bargaining unit employees' names from the Employer during the period of time that recognition was withdrawn. Tr. 288-9. The list provided by the Employer to the Union prior to the withdrawal of recognition contained an incorrect telephone number for Beagle. Tr. 319-20, 305-6. The Union did not send any mailings to Beagle during the period prior to the election. Tr. 304-5. Union Organizer Erin Weinstein testified that: "I don't believe we had a correct address for Richard Beagle." Tr. 306-7. She testified that some of the addresses on dues lists provided by the Employer to the Union prior to the withdrawal of recognition were incorrect. Tr. 307. The Employer's Director of Human Resources, Debra Johnson, identified a non-union card signed by Beagle. Tr. 430-1; Er. Ex. 2. Beagle testified that the home address listed on that card is not the same as his address in May and June 2012 at the time of the election in this case. Tr. 538-9.

At the pre-election conference on June 4, 2012, there was no discussion of Bob Dust or Holly Westjohn. The evidence showed that Dust had previously had one subordinate, unit employee Brad Butts, but that as of the time of the election had no subordinates. Tr. 324-5. At the pre-election conference, the Employer's representative stated that the Employer was adding Beagle's name to the Excelsior list at that time, and Bigelow on behalf of the Union stated that the Union objected because it did not have advance notice of his full name and home address and because it did not believe Beagle's name was properly on the list. Tr. 329-30.

The Employer argues that the percentage of omissions from the Excelsior list was small, that the omission of Beagle's name and address were due to inadvertent error, that as of the date of the election it had omitted only one employee's address, and that therefore it substantially complied with the Excelsior list requirement. Heartland's Exceptions at 1-3. In *Woodman's Food Markets, Inc.*,

332 NLRB No. 48 (2000), the Board found that prior cases which focused solely on the percentage of omissions from an Excelsior list failed to adequately effectuate the purposes of the Excelsior rule. The Board found that while it would continue to consider the percentage of omissions, it would consider other factors also, “including whether the number of omissions is determinative, i.e., whether it equals or exceeds the number of additional votes needed by the union to prevail in the election, and the employer’s explanation for the omissions.” The Board found that “the potentially prejudicial effect on the election is most clear where the number of omissions may have compromised the union’s ability to communicate with a determinative number of voters.” 332 NLRB at 504. In *Automatic Fire Systems*, 357 NLRB No. 190 (2012), the Board found that *Woodman’s* adopted a flexible approach under which factors including whether the number of omissions is determinative would be considered, because of the Board’s “concern over instances in which the number of names omitted from an Excelsior list was small, but nonetheless those employees were potentially determinative.” Moreover, even before *Woodman’s Food Markets*, the Board had found that an employer’s claim of inadvertence cannot excuse its failure to afford a union the opportunity to inform eligible voters of its position and the issues raised by an election. *Pacific Gamble Robinson Co.*, 180 NLRB No. 84 (1970).

Here, the Employer omitted one name and address from the Excelsior list, but the ballot of the omitted employee, Beagle, is determinative, and the Hearing Officer correctly relied on such fact in finding that the Employer failed substantially to comply with the Excelsior list requirement. HOR at 13-14. The Employer omitted Beagle’s name and address from the Excelsior list and, even though it provided his name less than four full days prior to the election, the Employer never provided the Union with Beagle’s home address. While the Union had been the exclusive bargaining

representative of employees in the unit in which the election was conducted, the Employer had unilaterally withdrawn recognition in early November 2011, and rescinded such withdrawal only upon the signing of the private settlement agreement on May 14, 2012, three weeks prior to the election. Thus, the Union, during the six-month period from November to May 2012, was not receiving bargaining unit lists from the Employer. The undisputed evidence showed that prior to the withdrawal of recognition the employee addresses on dues lists provided by the Employer contained incorrect addresses, and that the address on the agency fee card signed by Beagle is not the same as his address in May and June 2012.

The Hearing Officer also correctly found that the Employer acted with gross negligence in failing to provide the Union with a correct and accurate Excelsior list. HOR at 14-15. Neither Johnson nor Bloemker offered any rational explanation for the omission of Beagle's name and address from the list. Johnson testified that when she was told to prepare a list of employees that included home addresses she used a list of employees who are on the Employer's health insurance and that her use of such list is what resulted in the omission of Beagle's name and address. However, Beagle testified that he has been covered by the Employer's health insurance since he completed his probationary period five years ago, and Johnson also testified that Beagle was on the Employer's insurance. Johnson also could not explain why the first list that included home addresses omitted not only Beagle's name but also the names of employees Heitkamp, Myers, and Wells, all of whom were employed for longer than three months as of May 2012 and therefore eligible for health insurance. Moreover, the same list included the name of Kerrie Herd, even though she had not yet been employed 90 days as of the date on which such list was prepared. The evidence showed that what Heitkamp, Myers, and Wells had in common was that the Employer, as of the time

it prepared the Excelsior list, did not know whether or not they supported the Union. Bloemker testified that he reviewed all of the lists after they were prepared by Johnson and before sending them to Employer counsel to provide to the Union and the Board. The evidence showed that Bloemker had regular contact with Beagle, since Beagle handled problems with Bloemker's computer and cell phone, and that they were on good terms. It is not credible that Bloemker simply left Beagle's name off the list due to inadvertence. Since the evidence showed that the Employer had, prior to the withdrawal of recognition, specifically proposed removing Beagle from the unit, the Employer's assertion that Beagle's name was inadvertently omitted from the Excelsior list is not credible.

Here, the vote is 19 for Union representation, 18 against Union representation and one challenged ballot. The challenged ballot is that of Beagle. The Excelsior list omitted the name of an employee whose ballot is determinative of the results of the election. Moreover, the evidence established that the Employer did not provide a rational explanation for the omission of Beagle's name and address from the Excelsior list, that the Employer never provided Beagle's correct and current home address to the Union prior to the election, and that the Employer acted in bad faith in its preparation of the Excelsior list. Accordingly, the Board should adopt the Hearing Officer's recommendation that Objection 1 be sustained.

II. The Hearing Officer correctly found that Objection 2 should be sustained.

Objection 2 alleges that: A few days prior to the election, threatening correspondence was mailed to the home of an eligible voter, threatening her that she would go to jail unless she dropped out of the Union and refrained from voting in the election. Such threat was mailed in the same type of envelope and with the same type of mailing label used by the Employer to mail expense

reimbursement checks to employees, and it was mailed using the same type of mailing label and stamps used by the Employer to mail anti-Union literature to employees.

Linda Shellenbarger testified that she has been employed by Heartland for almost 12 years. She is a Residential Case Manager. Tr. 63. Shellenbarger testified that she received two mailings at her home the week prior to the June 4³ election. She received a mailing on the Thursday before the election at about 3:15 p.m. Tr. 64-5, 82-3; Un. Ex. 2. The content of the mailing was a slip of paper with the following message typed in all capital letters:

WE KNOW YOU WERE INVOLVED IN THE CELL PHONE
INCIDENT.
YOUR UNION FRIENDS RATTED YOU OUT.
YOU'RE GOING TO JAIL.

HERE'S HOW YOU KEEP THAT FROM HAPPENING:
1.) DON'T VOTE IN THE ELECTION ON MONDAY
2.) DROP OUT OF THE UNION

Un. Ex. 2.

Shellenbarger testified that on Friday, June 1, she received a mailing when her mail was delivered at about 3:00 p.m. Tr. 71-2, 83-4; Un. Ex. 3. The mailing was a one-page letter and accompanying double-sided, one-page leaflet about the election. The letter was on Heartland letterhead, urged her to "vote NO" on June 4, and was signed by seven Heartland supervisors and managers, identified in the letter as the "leadership team." Un. Ex. 3. The accompanying leaflet also urged employees to vote no in the election. Un. Ex. 3. The envelope in which the Heartland letter was mailed had a Heartland return address logo. The mailing label on the Heartland letter and the threatening letter were the same size, and the name and address were typed in identical font and

3 Dates are in 2012 unless otherwise noted.

format, with the address aligned to the left of the label; with the last name followed by a comma and then the first name on the first line; with double spacing between the lines; and with the first line, containing the name, slightly indented. The street address on both labels used the identical street notation, “324 S 3rd St” without any periods after “S” or “St”. Un. Ex. 2; Un. Ex. 3. Shellenbarger testified that upon receiving the Heartland mailing:

I noticed that the labels on both were identical. And I noticed but did not want to speculate the fact that this envelope that the label was on in the first letter document, the Union document #2, is one of the – very similar to one of the expense envelopes that we receive from Heartland, when we turn in expenses.

Tr. 71. The envelope is a window envelope, and the mailing label on the threatening letter was placed on top of the window. Un. Ex. 2. Both the Heartland mailing and the threatening letter were mailed in envelopes with 2011 flag stamps. Tr. 72; Un. Ex. 2, 3. Shellenbarger testified that the similarity between the two mailings “just like hit me like a brick.” Tr. 72. The threatening letter was mailed in the identical type of window envelope, with the identical star design on the inside of the envelope, used by Heartland to distribute expense checks to employees. No labels are used in connection with the distribution of expense checks. Rather, the portion of the check showing the employee’s name is placed so that it can be seen in the window of the envelope. Tr. 71-2 (Shellenbarger testimony); Tr. 106-7 (Carlock testimony); Tr. 148-9 (Newman testimony); Un. Ex. 7, 8 (expense envelope and envelope with expense check given to Azure Newman).⁴

4 Shellenbarger testified that she lives in a small town and that until recently her house did not have a street address, that her correct home address is not published anywhere, and, in fact, that the phone book lists an incorrect home address for her, but that she had given her correct home address to Heartland. Tr. 81-2.

The Heartland vote-no mailing signed by Heartland supervisors was mailed to the home addresses of all eligible voters on May 31, and was also posted at Heartland on the same day. Tr. 437-9 (Johnson testimony); Tr. 480-1 (Bloemker testimony). The envelope mailing labels used on the Heartland mailing to other employees, like that on the label on the mailing sent to Shellenbarger, contained a typed, double-spaced address, with the first name first, followed by a comma, and the last name on the first line of the address, with the lines starting on the left of the label, with the last name slightly indented, and with no periods after abbreviations in street names such as “E”, “N”, and “St”. See Un. Ex. 4 (Heartland mailing to Evelyn J. Carlock) and Un. Ex. 6 (Heartland mailing to Azure Newman); Tr. 103-5; 145. Shellenbarger testified that the identical appearance of the unusually formatted mailing labels convinced her that the threatening letter was sent by Heartland. Tr. 88.

Shellenbarger testified that upon receiving the threatening letter on Thursday, May 31, she immediately went over to see her sister and co-worker, Evelyn Jane Carlock, who lives next door to her. Tr. 65. Shellenbarger testified that she had been told several months earlier at the lunch table that there had been an incident involving a former employee, Stephanie, having nude pictures on her phone and someone having taken the phone. Tr. 65-7. Heartland Executive Director Jeff Bloemker testified that the FBI was involved in the cell phone incident involving the former employee. Tr. 479. Shellenbarger testified that on the day she received the threatening letter she tried to reach Union representatives Jeff Bigelow and Tara McCauley by phone but could not reach them, and she then called Heartland employee Anna Beck, who told her that there was a Union meeting until 3:30 and that was probably why she was not able to reach the Union representatives. Tr. 68. Shellenbarger testified that she told Beck about the threatening letter and read it to her. Tr. 68. That

day, Shellenbarger spoke about the threat to Union Regional Director Jeff Bigelow, to Staff Representative Tara McCauley, and to Organizer Erin Weinstein. Tr. 68-9 (Shellenbarger testimony); Tr. 295-6 (Weinstein testimony); Tr. 337-8 (Bigelow testimony). Bigelow went to Shellenbarger's home that day and picked up the letter and envelope. Tr. 68-9, 337-8. On Friday, June 1, Shellenbarger and Carlock gave the originals of their vote-no mailings from Heartland and accompanying envelopes to Weinstein. Tr. 296-8; Un. Exs. 3, 4.

Shellenbarger took pictures of the threatening letter, the front of the envelope in which it was received, and the front of the envelope in which the Heartland vote-no mailing was received, on her cell phone. Tr. 72-3. The evidence showed that, prior to voting in the election, the following eligible voters were told about the threatening letter sent to Shellenbarger and the similarities in the mailing labels on the threatening letter and the Heartland vote-no mailing:

- Evelyn Jane Carlock was shown the threatening letter and accompanying envelope the same day it was received by Shellenbarger, Thursday, May 31, and was shown the Heartland mailing sent to Shellenbarger and accompanying envelope the day they were received, Friday, June 1. Tr. 65, 74-5 (Shellenbarger testimony); Tr. 100-3 (Carlock testimony).

- Anna Beck was told about the threatening letter on the day it was received by Shellenbarger. Tr. 68 (Shellenbarger testimony); Tr. 177-8 (Beck testimony), and on June 3 was told about the similarities between the labels on the threat envelope and the Heartland mailing envelope and was shown copies of the threatening letter, the front of the envelope in which the threatening letter was mailed, and the front of the envelope in which the Heartland vote-no mailing was mailed on Shellenbarger's cell phone. Tr. 76 (Shellenbarger testimony); Tr. 179-80 (Beck testimony) .

- Dixon Wells was told by Shellenbarger on Friday, June 1, about the threatening letter and shown the pictures on Shellenbarger's cell phone of the threatening letter and the envelopes of the threatening letter and the Heartland mailing. Tr. 24-8 (Wells testimony); Tr. 72-4 (Shellenbarger testimony).

- Erica John was told on Friday, June 1, by Shellenbarger about the threatening letter and shown the pictures on Shellenbarger's cell phone of the threatening letter and the envelopes of the threatening letter and the Heartland mailing, and discussed with Shellenbarger the similarities in the mailing label formats of the two mailings. Tr. 24-8 (Wells testimony); Tr. 72-4 (Shellenbarger testimony); Tr. 209-11 (John testimony).

- Jodie Weaver was told prior to the election by Dixon Wells that a threat had been made to an employee. Tr. 28 (Wells testimony).

- Nancy Boothby was told by Shellenbarger about the threat and what it said on the day it was received, Thursday, May 31 (Tr. 69, 95 (Shellenbarger testimony); Tr. 124 (Boothby testimony)); on Friday, June 1, discussed the threatening letter with Anna Beck and Brad Butts (Tr. 178-9 (Beck testimony)); and on Sunday, June 3, was told about both the threatening letter and the similarities in the threat and the Heartland mailing envelope label (Tr. 75-6 (Shellenbarger testimony); Tr. 125-6 (Boothby testimony)).

- Kelly Buscher was told by Anna Beck about the contents of the threatening letter on either May 31 or June 1. Tr. 168-9 (Buscher testimony); Tr. 178 (Beck testimony). Buscher was told by Shellenbarger on June 3 about the threat and the similarities in the mailing labels on the threat and Heartland mailing envelopes and was at that time shown the copies of the threatening

letter and the two envelopes on Shellenbarger's cell phone. Tr. 76-7, 95 (Shellenbarger testimony); Tr. 169-70 (Buscher testimony).

- Azure Newman was told about the contents of threatening letter by Erica John on Friday, June 1, in the afternoon and by Jane Carlock on Friday, June 1, at night. Tr. 107-8 (Carlock testimony); Tr. 141 - 3 (Newman testimony); Tr. 212 (John testimony). Carlock discussed with Newman the similarities in the address labels on the threatening letter and the Heartland mailing. Tr. 142-3. Newman was also present for a discussion with other employees – Shellenbarger, Carlock, Boothby, John, and Beck – about the threatening letter and the similarities in the mailing labels on Sunday, June 3. Tr. 143-6 (Newman testimony).

- Brad Butts was told about the threatening letter by Anna Beck on Friday, June 1 (Tr. 178-9 (Beck testimony). Butts was with Union organizer Erin Weinstein when Shellenbarger spoke to Weinstein and the other Union representatives on the phone and told them that she had received the threatening letter and the contents of the letter, and Weinstein told Butts what Shellenbarger had said about the threatening letter and its contents at that time. Tr. 203-4 (Butts testimony). Butts was also told by Jane Carlock on Saturday, June 2, about the threatening letter and about the similarities in the mailing labels of the threatening letter and the Heartland mailing, and that the threatening letter was mailed in an envelope like the one used by Heartland for expense checks. Tr. 108 (Carlock testimony); Tr. 204 (Butts testimony).

- Marc Heitkamp was told about the threatening letter by Jane Carlock on Saturday, June 2 (Tr. 108-9, 121).

- Mark Wiesike was told about the threatening letter by Jane Carlock on Monday, June 4, at about 6:50 a.m., before Wiesike voted in the election. Tr. 109-10 (Carlock testimony).

- Jessica Beck was told by both Jane Carlock and Nancy Boothby about the threatening letter on Monday, June 4, before Beck left work to vote in the election. Tr. 110-11 (Carlock testimony); Tr. 127-8 (Boothby testimony).

- Rose Goeckner was told about the threatening letter by Nancy Boothby on Monday, June 4, at about 6:55 a.m. before Goeckner left work to vote in the election. Tr. 126-7 (Boothby testimony).

The evidence showed that a number of the above employees, when told about the threat, reported that they had already heard about it. Tr. 108-9 (Marc Heitkamp), Tr. 109-10 (Mark Wesike), Tr. 110-11 (Jessica Beck), Tr. 126-7 (Rose Goeckner). Linda Shellenbarger, Jane Carlock, Anna Beck, Dixon Wells, Erica John, Jodie Weaver, Nancy Boothby, Kelly Buscher, Azure Newman, Brad Butts, Marc Heitkamp, Mark Wiesike, Jessica Beck, and Rose Goeckner were all eligible to vote in the election. Un. Ex. 20.

The evidence showed that Shellenbarger's supervisor, Residential Manager Faith Griffin (Tr. 371) and Griffin's supervisor, Linda Warner, already knew about the threatening letter before Shellenbarger went to work on Monday, June 4, the day of the election. Tr. 77-80. Shellenbarger testified that she worked the day shift, 7:00 a.m. to 3:00 p.m. on June 4. She testified that at 10:00 a.m. that morning Griffin asked to speak with Shellenbarger in her office. Tr. 77-8. Shellenbarger testified as follows:

. . . When I walked in the office, she said I heard you got, received a bad letter . . . in the mail. . . And she said, well, she goes do you have a picture, do you have – no, do you have it, can I see it. I said, no, I don't have it. And I said, but I do have photos on my phone.

So I showed her the photos on my phone. And she goes, oh, my god, that looks like one of our expense envelopes. I said, exactly,

it does look like one of ours. And she goes I just can't believe this; I don't know why they would do something like this to you. And then she says, exact words, I guess, okay, she says I can't believe with everything we've done that they would pull something like this. And she says after everything I've done for that man, after the things he said and done about – done to me, and for them to pull something like this, I mean this was just her conversation with me. And she said I just can't believe it. And she goes it does look just like our expense envelopes.

And she says Linda Warner had asked me because – and I have no idea how Linda Warner knew about it. . . . All I know is that she said to me Linda Warner had asked me if your last name was first and the spacing about the envelope, the spacing of the address and stuff. And I said, yeah, it's identical to both things. She's like, well, I'm going to get to the bottom of this, I can't believe this. And I said, well the bad thing is that the letter that this one contained, contained all of Heartland Human Services management, including your name. And that's when she said I can't believe they did this, why they would jeopardize what we've all worked for to do something like this. And she goes I'm going to get to the bottom of this.

Tr. 78-9.

Shellenbarger testified that Griffin told her that she would talk to Jeff Bloemker about the letter. Tr. 79-80. She also asked Shellenbarger how Union representative Jeff Bigelow was “handling” the letter. Tr. 80-1. Griffin also told Shellenbarger that three people had told her that Shellenbarger had been involved in the cell phone incident, and Shellenbarger responded that she had no involvement in it. Tr. 79.

Shellenbarger testified that on the afternoon of June 4 she had a second conversation with Griffin about the threatening letter. Griffin told Shellenbarger “that she had talked to everybody, and they assured her that they had nothing to do with the letter and that – that was the end of it.” Tr. 81.

Griffin testified that she was told about the threatening letter sent to Linda Shellenbarger on the Wednesday prior to the election by an employee. Tr. 379-80. Griffin testified that that same day

she met with Shellenbarger and that Shellenbarger showed her a picture of the threatening letter on her cell phone. Tr. 380-1. Griffin testified that she did not recall telling Shellenbarger that the envelope looked like a Heartland expense envelope. Tr. 382. Griffin testified that she talked to Jeff Bloemker, Debbie Johnson Outpatient Director Kurt Simon, Chief Financial Officer Chuck Siler, and Linda Warner, almost immediately after speaking with Shellenbarger. Tr. 384-5. Griffin testified that the response of the management team was that they did not know where the threatening letter came from. Griffin testified that she did not talk with Shellenbarger about the letter again. Tr. 386-7. Griffin repeatedly testified that she did not remember whether she had said certain things in her conversation with Shellenbarger, and testified that she was “guessing” as to what she in fact said. Tr. 411.

Heartland Executive Director Jeff Bloemker testified that he was told of the threatening letter sent to Shellenbarger in a management meeting on Thursday, May 31. Bloemker testified that Griffin brought it to the attention of the management team at that time. He testified that Griffin reported that Shellenbarger had received a threatening letter stating that she had been involved with a previous act of blackmail regarding a cell phone incident and that she should refrain from voting or go to jail. Tr. 469. Bloemker testified that it was his understanding that the mailing labels on the Heartland vote-no mailing were prepared on Heartland premises. Tr. 481-2. Bloemker testified that he did not know who at Heartland if anyone had an address label list with employee home addresses formatted and ready to print onto address labels. Tr. 483.

The evidence established that Shellenbarger and the 13 other employees who learned of the threatening letter prior to the election would have reasonably believed that the Employer was involved in the preparation and mailing of the letter, and the Hearing Officer correctly so found.

HOR at 20. The Employer argues that the evidence did not show who mailed the threatening letter and that the evidence is insufficient to meet the standard for objectionable conduct by a third party because the threat was received by only one employee and was not severe. Heartland's Exceptions at 3-5.

Under the standards applicable to third-party conduct, the Board will set aside an election based on the conduct of third parties where the conduct creates a general atmosphere of fear and reprisal that renders a fair election impossible. *Accubilt, Inc.*, 340 NLRB 1337 (2003). The Hearing Officer here correctly found that the evidence established that the circumstances surrounding the threatening letter were so aggravated as to create a general atmosphere of fear and reprisal, rendering a free election impossible. In determining whether a threat is objectionable as third-party conduct, the Board considers the nature of the threat; whether the threat encompassed the entire unit; whether reports of the threat were widely disseminated within the unit; whether the person making the threat was capable of carrying it out and whether employees acted in fear of the threat being carried out; and whether the threat was made at or near the time of the election. *PPG Industries, Inc.*, 350 NLRB 225, 226 (2007).

Here, the threat was severe. The evidence showed that employees were aware of an incident involving a former employee whose cell phone had been lost and who had been the subject of blackmail involving nude pictures on the cell phone and were aware that the FBI had been involved in such incident. Four days before the election, on May 31, Shellenbarger received a threatening letter stating that unless she dropped out of the Union and refrained from voting in the election she would go to jail because she was known to have been involved in the cell phone incident. Shellenbarger immediately recognized the envelope in which the threat was mailed as identical to

Heartland's expense check envelopes. The next day, Shellenbarger received a vote-no election campaign mailing from the Employer signed by the management team, including Bloemker, and it hit her like a "brick" that the uniquely formatted and printed mailing labels on the two mailings were identical. The nature of the threat was severe, and the circumstances of the mailing of the threat made it likely that Shellenbarger would believe that the threat could be carried out.

While the threat was directed to one employee, the evidence showed that the nature of the threat and the facts relating to the similarities in the mailing labels were quickly and widely disseminated throughout the unit. The evidence showed that the threat and mailing label facts were disseminated prior to the election to 13 eligible voters in addition to Shellenbarger herself. Moreover, the evidence showed that it is likely that all eligible voters were aware of the threat, since a number of employees when told about the threat stated that they had already heard about it, and Griffin told Shellenbarger on the morning of the election that she had heard about the letter and that Warner had asked her whether Shellenbarger's last name was first on the mailing label and whether there was spacing in the label, showing that supervisors knew about the threat prior to the election. Shellenbarger reasonably believed that the Employer was involved in the mailing of the threat, and, since the FBI had been called in the earlier incident, Shellenbarger and other employees would reasonably have feared that the threat could be carried out. The threat was received four days prior to the election and was widely disseminated from its receipt to and including the day of the election itself. Particularly in light of the closeness of the vote, the evidence thus showed that the threatening letter constituted objectionable conduct under the standards applicable to third-party conduct, and the Hearing Officer's recommendation to such effect should be adopted by the Board.

Griffin testified that she learned of the threat on the Wednesday prior to the election and that she brought it to the attention of the management team on that day. Bloemker testified that the management meeting at which the threat was discussed occurred on Thursday, May 31. The Hearing Officer credited Shellenbarger's testimony that she received the threat on Thursday, May 31, at about 3:15 in the afternoon and that her first conversation with Griffin about the threat occurred on the morning of Monday, June 4, the day of the election. The Hearing Officer correctly found that the evidence nonetheless showed that Griffin knew about the threat before June 4, as she told Shellenbarger that she had heard that Shellenbarger had received a bad letter and asked to see it. The Hearing Officer correctly found that because the Employer remained silent after it learned of the threat, the evidence established that the threatening letter constituted objectionable conduct under the standard for party conduct. HOR at 23-4.

Here, after Griffin on the morning of June 4 expressed concern to Shellenbarger with respect to the threat and promised to bring it to her superiors, she returned to Shellenbarger that afternoon only to quietly tell her that she had talked to everyone and that they had said that they had had nothing to do with the threat. No mention was made of any investigation being initiated into the circumstances of the sending of the threatening letter. Although the entire management team was aware of the threat, the Employer took no action to disavow the threat. Where an employer allows a third party to carry the Employer's vote-no message to employees, the actions of the third party are attributable to the Employer, particularly where the Employer does not clearly disavow the actions of the third party. *Star Kist Samoa, Inc.*, 237 NLRB 238, 245-6 (1978); *Cagle's Inc.*, 234 NLRB 1148, 1149 (1978), *enforced*, *Cagle's Inc. v. NLRB*, 588 F.2d 943 (5th Cir. 1979); *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 472 (1995). Here, the evidence showed that the threat was severe and

widely disseminated immediately prior to the election; the evidence showed that the Employer may have been involved with the threat; and the evidence showed that the Employer had knowledge of the threat prior to the election but took no action to disavow it. Prior to the opening of the challenged ballot, the vote margin is one vote in favor of Union representation.

The Board should therefore sustain the Hearing Officer's recommendation that Objection 2 be sustained both under the standards applicable to third-party conduct and under the standards applicable to party conduct.

III. The Hearing Officer correctly found that Objection 4 should be sustained.

Objection 4 alleges that: During the time period between the signing of the Stipulated Election Agreement and the election, the Employer interrogated employees as to whether or not they supported the Union.

Residential Case Manager Dixon Wells, an employee eligible to vote in the election, and her supervisor, Residential Manager Faith Griffin, testified with respect to Objection 4. Tr. 14, 15; Un. Ex. 17. Wells has been employed by the Employer since November 28, 2011, and works the second shift, 3:00 p.m. to 11:00 p.m. Tr. 15, 29. Wells testified that she had asked Griffin to communicate with her by text message if possible if she needed to reach her out of work, as she had unlimited text messaging but limited air-time minutes on her cell phone plan. Tr. 17. Wells testified that she was scheduled to work the 3:00-to-11:00 shift on May 21. Prior to going to work that day, she received two text messages from Griffin. The first text message, sent at about 1:00 p.m., stated: "I need you to come to the center prior to going on shift today. I just need u to sign something. It won't take but a few minutes." Tr. 15; Un. Ex. 1, p. 1. Wells testified that she responded with a text message saying

“Ok.” Wells testified that she then received a second text message from Griffin just after 1:30 p.m. asking: “Hey, are you interested in working day shift or stay with 3 to 11?” Tr. 16; Un. Ex. 1, p. 1. Wells responded with a text message saying: “3 to 11 works for me.” Tr. 16; Un. Ex. 1, p. 1.

Wells testified that she went to Griffin’s office at the Employer’s main offices at about 2:15 p.m. on May 21. When she arrived at the office, another employee, Kerrie Herd, and Griffin were present in Griffin’s office. Wells testified that Griffin and Herd were “chitchatting” about Herd’s shirt. Linda Warner, Griffin’s supervisor, then came in to the office and joined in the small talk. Then Herd and Warner both left the office, leaving only Griffin and Wells in the office. Tr. 17-18. Wells testified that she then had the following conversation with Griffin:

She then presented two cards, told me one was for the Union and one was not for the Union. She then told me that I needed to choose and decide which one to sign. I asked if I could have some time to think about it. She then told me no, that they needed to get this because of the vote, and that I should have had that done a week ago but she had gotten busy. So since I didn’t have a choice, I signed my card, and she said thank you very much.

Tr. 18.

Wells testified that prior to May 21, 2012, she had not distributed any Union literature at the Employer’s facility, did not wear any Union buttons or insignia, and did not in any way publicly support the Union. Tr. 52-3.

Wells testified that after signing the card in Griffin’s presence, she left the office and, as she headed for her car, called and left a message for co-worker Azure Newman and sent Newman text messages. Wells then called Union representative Erin Weinstein. Tr. 18-20. Dixon testified that she then had a conversation with Newman at work that day in the office of AD House, one of the Employer’s residential houses, at about 5:30 or 6:00 p.m. while clients were eating dinner. Wells

testified with respect to her conversation with Newman that she: “Told her exactly what had happened in the office with Faith and what Faith told me that we needed the cards so she could have a good idea for the vote.” Tr. 19. Dixon testified that she also told Newman that “I kind of felt on the spot because I had to make a decision right there.” Tr. 19. Wells testified that she reached Weinstein right after leaving Griffin’s office, and that she told Weinstein the same thing she told Newman. Tr. 20. Wells testified that prior to the election she also told two other co-workers, Erica John and Marc Heitkamp, the same thing she had told Newman and Weinstein about her conversation with Griffin. Tr. 20. Newman testified that Wells sent her a text message on May 21 at 1:40 p.m. stating: “Okay. They just offered me dayshift.” Tr. 132; Un. Ex. 5. Newman testified that Wells called her by phone after her meeting with Griffin and told her that Griffin had presented her with a union membership card and a fair share card and told her that she had to sign one or the other; and that Wells asked Griffin if she could have more time, and Griffin told her that she could not and that she would have to sign one card or the other that day. Tr. 138.

Weinstein testified that on May 21 Wells called her and told her the following:

Dixon called me on May 21st when – after she had been called into Faith Griffin, her supervisor’s office, and she told me that she was told by her manager to sign either a union or non-union card, that she did not – she asked her if she could wait and think about it. Dixon asked if she could wait and think about it and Faith had said no, that Faith needed to know for the upcoming vote. Before that meeting, she said she had received text messages from Faith offering her first shift, which she felt was a bribe

Tr. 302.

Griffin’s conversation with Wells in which Griffin required Wells to choose to sign a Union or non-union card was disseminated to Marc Heitkamp by Newman the same day it occurred,

May 21. Tr. 138-9. Griffin's conversation with Wells was disseminated on May 21 to both Marc Heitkamp and Brandie Myers by Weinstein. Weinstein testified that she told both Heitkamp and Myers about the incident because they, like Wells, had been hired during the period of time in which the Employer had withdrawn recognition from the Union, and they had not been asked to sign a Union or fair share card. Weinstein told Heitkamp and Myers that Wells had been called in and asked by Griffin to sign a Union or non-union card, that Wells had asked for time to think about it, and that Griffin had told her that she could not have time because she needed to know for the vote. Tr. 302-3.

Griffin's conversation with Wells was disseminated to Erica John. John testified that Wells called her shortly after her meeting with Griffin, and at least a week before the June 4 election, and told her that Griffin had offered her day shift, and "had asked her to sign yes or no for the Union and she needed it for the vote, and she wasn't comfortable meeting with her, and she signed yes for the Union." Tr. 212-13, 214 (John testimony).

Azure Newman, Erica John, Marc Heitkamp, and Brandie Myers were all eligible to vote in the election. Un. Ex. 20.

Griffin testified that just prior to her meeting with Wells in which she asked Wells to sign a Union or non-union card she had met with Kerrie Herd, another employee hired at about the same time as Wells, and asked Herd to sign a Union or non-union card. Griffin testified that she had asked Herd to come in before the start of her shift that day to sign a Union or non-union card. Tr. 374, 378, 393-5. Griffin testified that she asked Wells to sign a Union or non-union card, but testified that the reason was so that she could process payroll. Tr. 374-5. Griffin testified that she was instructed by Warner to ask Herd and Wells to sign cards. She testified that Warner handled Marc Heitkamp's

card signing, but that Heitkamp was allowed extra time to sign because his mother-in-law was ill and he said that he did not have enough money to buy gas to make an extra trip to work. Tr. 377-8, 401-2. Griffin also testified that Heitkamp, in asking not to have to come in to sign a card, told her that he had already signed a union card and given it to someone at his home. Griffin testified that Heartland did not have Heitkamp's card, but could not explain why Heartland needed a signed Union or non-union card from Wells in order to run payroll but was able to run payroll without a card from Heitkamp. Tr. 398-9.

Human Resources Director Debra Johnson testified that prior to the withdrawal of recognition of the Union in November 2011, she handed union membership cards and non-union cards to employees at orientation but did not require them to return them to her right away. Tr. 428-9. Johnson testified that she asked Griffin to ask Wells to sign a Union or non-union card because it was needed to process payroll. Johnson could not explain why payroll could be processed without Marc Heitkamp's signing a card but could not be processed without Wells' signing a card. Tr. 449-51.

The standard for determining whether an interrogation is coercive is whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. *Sikorsky Support Service, Inc.*, 356 NLRB No. 144 (2011); *Lackawanna Electrical Construction, Inc.*, 337 NLRB 458, 464 (2002). A speaker's purported innocent intent in conducting the interrogation or questioning is not a defense. *Correctional Medical Services, Inc.*, 356 NLRB No. 48 (2010); *The Smithfield Packing Company, Inc.*, 344 NLRB 1, 2 (2004). The actual effect on employees also is not considered. *Scripps Health*, 347 NLRB 52 (2006); *Miller*

Electric Pump & Plumbing, 334 NLRB 824 (2001). Coercive interrogation is violative of Section 8(a)(1) of the Act. *Lackawanna Electrical Construction, Inc.*, 337 NLRB 458, 464 (2002).

The Board has found that:

A violation of Section 8(a)(1) found to have occurred during the critical election period is, a fortiori, conduct which interferes with the results of the election unless it is so de minimis that it is “virtually impossible to conclude that [the violation] could have affected the results of the election.” *Enola Super Thrift*, 233 NLRB 409, 409 (1977). . . . In determining whether the unlawful conduct is de minimis, the Board considers the number of incidents, their severity, the extent of dissemination, the size of the unit, and other relevant factors.

Airstream, Inc., 304 NLRB 151, 152 (1991). Conduct which is violative of Section 8(a)(1) has been found to warrant the setting aside of an election

“because the test of conduct which may interfere with the ‘laboratory conditions’ for an election is considerably more restrictive than the test on conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1).” *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962).

Longview Fibre Paper and Packaging, Inc., 356 NLRB No. 108 (2011). In *Enola Super Thrift*, 233 NLRB 409 (1977), the Board found that coercive statements warranted setting aside an election in a unit of 24 employees, where the vote was 7 for and 16 against union representation with 1 challenged ballot, where the Board found that the coercive statements were directed to 2 employees in the unit. In so finding, the Board found that:

We have long held that statements made during election campaigns can reasonably be expected to have been disseminated and discussed among the employees.

233 NLRB at 409.

Here, the evidence showed that two weeks prior to the election, Wells, a six-month employee who was not an open Union supporter, was called into her supervisor's office and, in a private meeting with Griffin, was told that she had to decide then and there to sign a Union or non-union card in her supervisor's presence. When Wells asked if she could have some time to decide, Griffin told her that she could not because Griffin needed to know for the vote. While Griffin denied that Wells asked for more time and asserted that she told Wells that she needed the card for payroll purposes, the Hearing Officer credited Wells' testimony over Griffin's. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence shows that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). Here, all the relevant evidence supports the Hearing Officer's credibility findings. Griffin repeatedly testified to what she thought she might have said and guessed at what she said and was evasive in her answers. The evidence also showed that Wells immediately called both Newman and Weinstein after her meeting with Griffin to tell them that she had been forced to choose to sign a Union or non-union card in Griffin's office, had been told Griffin needed it for the vote and had asked for but been denied time to think about it. The evidence showed that the facts of the interrogation were disseminated to four eligible voters, Newman, John, Heitkamp, and Myers.

Moreover, the evidence also showed that just prior to her meeting with Wells, Griffin met with employee Kerrie Herd, also an eligible voter, in her office and asked her to sign a Union or non-Union card.

While the Employer argues that the interrogation of Wells by Griffin was de minimus (Heartland's Exceptions at 5-6), the evidence establishes that that is not the case. The Hearing Officer correctly found that looking at the totality of the circumstances, Griffin's requiring Wells to

choose to sign a Union or non-union card in her presence had the tendency to interfere with employee free choice. HOR at 33-4. The evidence showed that the interrogation took place one on one in the supervisor's office; Wells was not an open Union supporter prior to the meeting with Griffin; Griffin did not offer a legitimate purpose for the questioning; the interrogation took place two weeks prior to the election and was disseminated prior to the election to four other eligible voters; and prior to the opening of the challenged ballot there is a one-vote margin in favor of Union representation. The Board should therefore sustain the Hearing Officer's recommendation that Objection 4 be sustained.

Conclusion

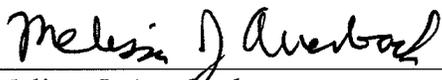
For the foregoing reasons, the Hearing Officer's findings that Objections 1, 2, and 4 should be sustained should be adopted by the Board. As found by the Hearing Officer, the challenged ballot should be opened and counted and, if the revised tally of ballots shows that a majority of valid ballots cast are in favor of Union representation, a Certification of Representative should be issued. If the revised tally of ballots shows that a majority of valid ballots cast are not in favor of Union representation, a rerun election should be conducted.

Respectfully submitted,

Dated: August 20, 2012

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CERTIFICATE OF SERVICE

I, Melissa J. Auerbach, an attorney, hereby certify that on August 20, 2012, I caused the foregoing **Union's Brief in Response to Employer's Exceptions to Hearing Officer's Report and Recommendation** to be filed electronically with the National Labor Relations Board. I further certify that I have caused service upon the following by the methods shown below:

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