

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STUDENT TRANSPORTATION OF AMERICA

Employer

and

Case 04-RC-113131

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

LOCAL 115

Petitioner

**ANSWERING BRIEF TO PETITIONER'S EXCEPTIONS TO HEARING OFFICER'S REPORT
ON CHALLENGED BALLOTS AND OBJECTIONS TO ELECTION**

Employer, Student Transportation of America (hereafter "STA" or "Employer"), submits this brief, pursuant to Section 102.69 of the Board's Rules and Regulations, in response to Petitioner's Exceptions to the Hearing Officer's Report on Challenges and Objections.

I. INTRODUCTION

Pursuant to a Stipulated Election Agreement approved by the Acting Regional Director on September 25, 2013, an election by secret ballot was conducted on November 14, 2013 in the following unit of employees:

Included: All full-time and regular part-time drivers and mechanics employed by the Employer at its 6403 Mill Creek Road, Levittown, PA facility.

Excluded: All professional employees, confidential employees, guards, and supervisors as defined in the Act.

(R.2)¹ On November 20, 2013, Petitioner filed Objections to conduct affecting conduct of the election and, on November 21, 2013, Petitioner filed Amended Objections. As reflected in the Notice of Hearing on Challenged Ballots and Objections to Elections (hereafter “Notice of Hearing”), Petitioner withdrew Objections 7 and 10 during the Region’s investigation.

The Notice of Hearing was issued on March 13, 2014. Pursuant to the Notice of Hearing, a hearing regarding the challenged ballots and remaining objections to election occurred on April 8th through April 10th, 2014 (“the Hearing”). Administrative Law Judge Ira Sandron (“the Hearing Officer”) presided over the Hearing. At the commencement of the Hearing, STA conceded that the seven of the challenged ballots should not be opened because the seven individuals at issue were not employed by STA as of the September 20, 2013 eligibility date. (Tr. at 8-9) Thus, the remaining challenged ballots at issue at the Hearing pertained to only four individuals, namely Matthew Smith, John Evans, Traci Williams, and Rebecca Kurtz. At the Hearing, the Union conceded that *none of these individuals are statutory supervisors*. (R. 2, Tr. 71-72)

On June 18, 2014, the Hearing Officer issued a Report on Challenges and Objections (“the Report”). In that Report, the Hearing Officer recommended that “the challenges to the ballots of Evans and Kurtz be sustained, that the challenges to the ballots of Smith and Williams be overruled and their ballots be opened and counted, and that all of the Petitioner’s objections be overruled.” (R. 24) On July 1, 2014, Petitioner filed exceptions to the following recommendations in the Report: that the challenged ballots of Smith and Williams be overruled and that the Petitioner’s objections 1, 2, 5, 8 and 9 be overruled. Employer then requested and was granted an extension of time until July 16, 2014 to file an answering brief to Petitioner’s exceptions.

¹ References to the Hearing Officer’s June 18, 2014 Report on Challenges and Objections will be cited as R._. References to Volumes 1 through 3 of the Official Report of Proceedings regarding the Hearing in this case will be cited as Tr._. References to Employer’s exhibits will be cited as E._ and references to Petitioner’s exhibits will be cited as P._.

II. GENERAL BACKGROUND

In the Spring of 2013, STA and the Bristol Township School District (hereafter “the District”) effectuated a contractual relationship whereby STA was engaged to operate school buses and handle certain logistics related issues for the District. (Tr. 566-67) STA’s drivers operate several different types of vehicles under its arrangements with the District. Specifically, the drivers operate large buses, mini-buses, and “unlit vans” that do not have the “flashing red and yellow light system” that regular school buses have. (Tr. 612-13) It is undisputed that the driving of all three types of these vehicles is bargaining unit work. (Tr. 217)

III. THE BOARD SHOULD AFFIRM THE HEARING OFFICER’S CONCLUSIONS THAT THE CHALLENGES TO THE BALLOTS OF MATT SMITH AND TRACI WILLIAMS SHOULD BE OVERRULED

A. The Hearing Officer Applied the Proper Test in Determining that the Challenge to Matthew Smith’s Ballot Should be Overruled

The Hearing Officer found, and the Union does not dispute, that Matthew Smith was hired by STA as a driver on or about August 28, 2013. (R. 9; E-12) The Hearing Officer correctly concluded that Mr. Smith should be included in the unit “because he spent over 50 percent of his time driving” during the undisputed relevant time period of August 28, 2013 (the commencement of the school year) through September 20, 2013 (the eligibility date) and therefore “had a substantial interest in the unit’s wages, hours, and conditions employment.” (R. 10) (citing *Butler Asphalt*, 352 NLRB 189, 190 (2008); *Halsted Communications*, 347 NLRB 225, 225 (2006); *Caesar’s Tahoe*, 337 NLRB 1096, 1097 (2002)).² In reaching his conclusion that Mr. Smith spent more than 50 percent of his time driving during the relevant time period, the Hearing Officer relied on Mr. Smith’s earning statements and time

² The Hearing Officer also correctly concluded that Mr. Smith arguably would be a unit employee based on the language in the parties’ stipulation and that the extrinsic evidence leads to the conclusion that the parties’ intended to include Mr. Smith in the unit because Petitioner agreed to eliminate the exclusion of “all others” in the unit (R. 10) (citing *Butler Asphalt*, supra.) **Petitioner does not except to these particular conclusions.** Nor does Petitioner except to the Hearing Officer’s conclusion that “Mr. Smith was not a management employee because he did not exercise the requisite “executive type of authority.” (R. 10) (citing *NLRB v. Yeshiva University*, 444 U.S. 672, 682-83 (1980)).

sheets which showed that he spent 41.5 hours driving during this time period and 33 hours performing office/clerical work. (R. 10, P. 19) He relied on these particular documents because he reasonably concluded that they were the most reliable evidence of how much driving that Mr. Smith did “vis-à-vis office clerical work”:

I consider [Mr. Smith’s earning statements and time sheets] the more reliable evidence of how much driving Smith did vis-à-vis office clerical work. Because STA was paying him more to drive than to perform office clerical duties, I have to assume that it would not have paid him for more driving time than the driving hours to which he was entitled. Conversely, I do not believe that Mr. Smith would have underreported his driving time, for which he was paid more than for his office work.

(R. 9-10)

In its exceptions, Petitioner argues that the Hearing Officer improperly relied on “the Employer’s records” in concluding that Mr. Smith spent more than 50 percent of his time driving because such records are “inconclusive”. However, in support of this argument, the Petitioner disingenuously cites on testimony by STA’s Terminal Manager, Kelly Wood, that the Company’s *driving logs* at the beginning of the school year were incomplete. As explained above, the Hearing Officer did not rely on such driving logs in reaching his conclusion about Mr. Smith’s driving time.³ (R. 21) Rather, the Hearing Officer relied on the Employer’s earning statements and time sheets in reaching his conclusions – documents which Petitioner does *not* claim, nor can it claim, are inconclusive. In fact, Petitioner is silent regarding these documents, conveniently ignoring the fact the Hearing Officer relied on the same type of documents – i.e., time sheets -- in concluding that the challenge to the ballot of John Evans should be *sustained* because they did not demonstrate that Mr. Evans spent more than 25% of his time driving.

Because the Company’s time sheets and earning statements are *not* inconclusive, and because they establish that Mr. Smith spent more than 50% of his working time driving during the relevant time period, it is unnecessary and inappropriate to evaluate other terms and conditions of Mr. Smith’s employment under a community of interest analysis, as Petitioner’s argues should have been done.

Rather, as the Hearing Officer correctly stated in his Report, once it has been determined that an

³Therefore was no reason for the Hearing Officer to rely on STA driving logs in determining Mr. Smith’s driving time, as STA’s driving logs do not purport to track the number of hours that STA’s employees drive each day. (P.21)

employee performs unit work for sufficient periods of time, “*it is unnecessary and inappropriate to evaluate other aspects of the dual-function employee’s terms and conditions of employment in a second tier community-of-interest analysis*”. (R. 9) (citing *Continental Cablevision*, 298 NLRB 973, 973 (1990); *Oxford Chemicals*, 286 NLRB 187, 188 (1987)).

For all of the reasons above, the Board should affirm the Hearing Officer’s conclusion that the challenge to the ballot of Matthew Smith should be overruled.⁴

B. The Hearing Officer Applied the Proper Test in Determining that the Challenge to Traci Williams’s Ballot Should be Overruled.

The Hearing Officer found, and the Union does not dispute, that Traci Williams was a route coordinator and substitute CDL driver during the relevant time period from August 28th through September 20, 2013. (R. 6) The Hearing Officer also correctly concluded that Ms. Williams was not a managerial employee. (R. 13, 14) He reached this conclusion because of [Ms. Williams] “limited authority with respect to routing, her “direct and immediate supervision by [Terminal Manager Frank] Koziel, then Wood”, and her “serving more as a conduit than a decision maker.” (R. 13-14) (citing *NLRB v. Yeshiva University*, 444 U.S. 672, 682-83 (1980)).

Just as he did with Mr. Smith and Mr. Evans, the Hearing officer looked to Ms. Williams’s time sheets to determine whether she performed unit work for a sufficient period of time to demonstrate that she had a substantial interest in the unit’s wages. These time records showed that during the relevant time period of August 28, 2013 through September 20, 2013, Ms. Williams had 59.5 hours of driving time and 106 hours of “office” time. (R. 14; E. 15) Thus, the Hearing Officer correctly concluded that “since Williams drove almost 3/8 of her working time during the relevant period, she meets the threshold of eligible driver as a dual-function employee.” (R. 14)

⁴ Even if the Board were to apply the community of interest test set forth in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), Matthew Smith would still appropriately be found to be in the unit, as he has an overwhelming community of interest with the other drivers at STA. Indeed, Petitioner does not cite, nor can it cite, to any differences between Mr. Smith and his fellow drivers with respect to his job duties and/or his pay and benefits.

Significantly, Petitioner does not, nor can it, challenge the Hearing Officer's findings with respect to the amount of driving that Ms. Williams performed during the relevant time period. Nor does Petitioner challenge the Hearing Officer's conclusion that Ms. Williams was not a managerial employee. Rather, Petitioner argues that the Hearing Officer failed to consider Ms. Williams' community of interest with regard to the other drivers included in the unit, based on her general terms and conditions of employment. However, Petitioner's argument is entirely misplaced. As noted above, once it has been determined that an employee performs unit work for sufficient periods of time, it is unnecessary and inappropriate to evaluate other aspects of the dual-function employee's terms and conditions in a second tier community-of-interest analysis. (R. 9) (citing *Continental Cablevision*, supra.; *Oxford Chemicals*, supra.) Thus, because Ms. Williams' undisputedly drove more than 25% of her working time during the relevant time period, it is irrelevant whether Ms. Williams may have had certain working conditions which may have differed from those of other drivers in the unit⁵.

For all of the reasons set forth above, the Board should affirm the Hearing Officer's conclusion that the challenge to Ms. Williams' ballot should be overruled.

V. THE BOARD SHOULD AFFIRM THE HEARING OFFICER'S CONCLUSIONS THAT PETITIONER'S AMENDED OBJECTIONS # 1, # 2, # 5, # 6, # 8, and # 9 SHOULD BE OVERRULED.

In ruling upon Petitioner's amended objections, the Hearing Officer correctly noted that "[T]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees...[T]he burden of proof on parties seeking to have a Board-supervised election set aside is a 'a heavy one'." (R. 15) (citing *Crown Bolt, Inc.*, 343 NLRB 776, 777 (2004) (internal citations omitted); *Dairyland USA Corp.*, 347 NLRB 310, 313 (2006), enfd. sub nom. *NLRB v. Food & Commercial Workers Local 34-8-S*, 273 Fed. Appx. 40 (2nd Cir. 2008) ("[A]n election will not lightly be

⁵ Even if the Board were to consider Ms. Williams' pay and benefits under a "second tier" community of interest standard, such an analysis would establish that Ms. Williams did, in fact, have a community of interest with the drivers. Indeed, her pay and benefits were indistinguishable to that of the drivers during the relevant time period, with the exception that she received holiday pay on Labor Day. (P. 23; Tr. 507; 525-527)

set aside.”). The Hearing Officer also properly noted that the Board will set aside an election only when “the objectionable conduct so interfered with the necessary ‘laboratory conditions’ as to prevent the employees’ expression of a free choice in the election.” *Sanitation Salvage Corp.*, 359 NLRB No. 130, slip. Op. at 2 (2013) (citing *Dairyland USA Corp.*, *ibid.*) (R.15)⁶

A. Objection #1: The Hearing Officer Did Not Erroneously Find that Traci Williams Was a Proper Person to Serve as an Observer to the Election.

With respect to Objection #1, Petitioner objected to the fact that Ms. Williams served as the Company observer at the hearing on the grounds that Ms. Williams was closely aligned with management. The Hearing Officer recommend that Objection #1 be overruled based on his conclusion that Ms. Williams was “not managerial or reasonably perceived as management as being such.” (R. 16) As explained above, his conclusion that Ms. Williams was not managerial was based on her “limited authority with respect to routing”, her “direct and immediate supervision by [Terminal Manager Frank] Koziel, then Wood”, and her “serving more as a conduit than a decision maker.” (R. 13-14) (citing *Yeshiva University*, *supra.*) With respect to his conclusion that Ms. Williams was not “perceived as managerial by drivers”, the Hearing Officer correctly reasoned as follows with respect to Ms. Williams, as well as the other three individuals whose ballots were challenged by the Union:

Evans and Williams had their own private offices in the suite of offices which included the office of STA’s terminal manager, as well as Township transportation management. This is a factor weighting in favor of finding that drivers would reasonably have considered them aligned or closely identified with management. See *First Student, Inc.*, 355 NLRB 410 (2010); *Sundward Materials*, 304 NLRB 780 (1991). However, outside of driving, the job duties of all four challenges were essential office clerical in nature in the August 28-September 20 time frame. Drivers’ regular daily routes were utilized based on availability, not a determination of their qualifications. Further, the routing system was computerized, and facility at all times had a facility manager. None of the four wore special uniforms or attire vis-à-vis the drivers. In all of these circumstances, I do not believe that drivers would have reasonably perceived them as managerial. . .

⁶ The Hearing Officer also properly cited and considered the nine factors that the Board considers in determining whether conduct is objectionable. (R. 15-16) (citing *Cedar Sinai Medical Center*, 342 NLRB 596, 597 (2004)). Thus, Petitioner’s argument that the Hearing Officer failed to consider certain factors (such as the closeness of the election) in ruling on the Objections is without merit.

[T]he fact that they may have voiced opposition to unionization and been viewed as pro-management by the Petitioner does not change the conclusion.

(R. 16)

The Hearing Officer's conclusions with respect to Objection #1 are not only consistent with the Board's analyses in *First Student* and *Sunward Materials*, supra., but also with the Board's more recent analysis in *Ozburn-Hessey Logistics, LLC*, 357 NLRB No. 136 (2011). In that case, the Board upheld the decision of the Administrative Law Judge (ALJ) that it was not objectionable conduct for an employee with certain human resource responsibilities to serve as an election observer. In reaching his conclusion, the ALJ concluded that "it has not been shown that [the employee] could reasonably be viewed by employees as closely identified with management." The ALJ was persuaded in *Ozburn-Hessey Logistics* by the employer's arguments that the individual in question "did not possess nor does she show indicia of possessing any management or supervisory authority; and that [she] is an hourly employee who processes paperwork, and acts at the direction of the HR manager or other supervisors or managers." *Id.* Like the employee in *Ozburn-Hessey Logistics*, Ms. Williams also did not show any indicia of possessing any managerial or supervisory authority; rather, she was a bargaining unit employee who performed clerical duties and acted at the direction of the Terminal Manager. As such, it was not improper, under any existing Board law, for Ms. Williams to serve as an election observer. In fact, as a bargaining unit employee, she had the statutory right to do so.

Petitioner does not appear to find fault with the Hearing Officer's reliance on the analysis set forth in *First Student* or *Sunward Materials* – to the contrary, Petitioner cites both cases in its brief (at page 7). Rather, Petitioner argues that the Hearing Officer "misapplied the law" to the "facts of this case". However, the only purported "fact" which Petitioner mentions in support of this argument is the purported fact that Ms. Williams wore a shirt "worn by STA managers and supervisors" on election day. Not only is this single purported fact insufficient to overcome the other factors on which the Hearing Officer relied upon in including that Ms. Williams was not reasonably perceived by the drivers as managerial, but this

single purported fact is not even accurate. While the Hearing Officer *did* conclude that Ms. Williams wore a black collared shirt with an STA logo on election day; he did *not* find, and there is absolutely no record evidence, *that such a shirt was worn by any STA managers or supervisors*. Thus, the fact that Ms. Williams wore such a shirt on election day would not reasonably cause the drivers to perceive her as managerial.

For all of the above reasons, the Board should affirm the Hearing Officer's conclusion that Objection #1 should be overruled.

B. Objection #2: The Hearing Officer Did Not Erroneously Apply the Law or Disregard Relevant Facts in Concluding that Objection # 2 Should be Overruled

With respect to Objection #2, Petitioner objected to the purported fact that Ms. Williams wore a black, short-sleeved collared shirt with an "STA logo" while serving as an election observer on November 14, 2013. As noted above, the Hearing Officer did, in fact, conclude that Ms. Williams wore such a shirt with an STA logo while serving as an election observer. However, the Hearing Officer did *not* find that such a shirt "was worn by STA supervisors, by STA management, or by anyone else." (R. 17) He also noted that the shirt was devoid of any message on how to vote. (R. 17)

In concluding that Objection #2 should be overruled, the Hearing Officer correctly reasoned that the Board does not prohibit observers from wearing campaign insignia. (R. 17) (citing *Union-Haul Co. of Nevada, Inc.*, 341 NLRB 195, 196 (2004) citing *Larkwood Farms*, 178 NLRB 226 (1996) ("Vote" no message on hat worn by observer not objectionable). Likewise, Petitioner itself acknowledges that both Board law *and* the Board's Representation Case Handling Manual do not prohibit election observers from wearing insignia. Petitioner further acknowledges that "the Board has traditionally held that the mere wearing of clothing identifying a party to an election does not rise to the level of objectionable conduct that would warrant the setting aside of an election." (Petitioner's brief, page 9) (citing *U-Haul of Nevada*, supra.) Nevertheless, Petitioner argues that the Board should stray from this established Board precedent

and its own policies and procedures. However, no reason exists for the Board to do so, particularly given the fact that the shirt worn by Ms. Williams was not worn by STA managers or supervisors and, the fact that the shirt was devoid of any express message on how to vote.

For all of the reasons set forth herein, the Board should affirm The Hearing Officer's conclusion that Objection # 2 be overruled.

C. Objection #5: The Hearing Officer Did Not Erroneously Apply the Law or Disregard Relevant Facts in Concluding that Objection #5 Should be Overruled

With respect to Objection #5, Petitioner objected to the purported fact that Rebecca Kurtz stood outside the polling area and engaged in prolonged conversations with the voters. In overruling this objection, the Hearing Officer found that Ms. Kurtz was not a managerial employee nor was she perceived as such. (R. 15, 16) He also found that Ms. Kurtz did not engage in any prolonged conversation with the voters; rather, based on the testimony of Petitioner's own witness, Barbara Hansell, the Hearing Officer concluded that Ms. Kurtz stood in the hallway and simply said "Hi" to persons who entered the polling area. (R. 19) He also concluded based on Ms. Hansell's own testimony, that Ms. Kurtz "did not tell employees how to vote or say anything about the election." (R. 19)

On excepting to Objection #5, Petitioner relies on two cases *Michem*, 170 NLRB 362 (1968) and *Lowes HIW, Inc.*, 349 NLRB 478 (2007), for the proposition that an election may be set aside when a party representative engages in prolonged conversations with prospective voters waiting in line to cast their ballots. However, "the *Michem* rule", as cited in the *Lowes*, supra., requires (1) conduct **by a party** that (2) involves prolonged conversations with employees waiting in line to vote. Thus, the *Michem* rule is inapplicable to Objection #5 because Ms. Kurtz was not a party representative. Indeed, the Hearing Officer correctly concluded Ms. Kurtz herself was not a managerial employee; reasoning that she exercised limited decision-making authority and that the facility at all times had an on-site management. (R. 15)

Contrary to the *Michem* rule, Petitioner argues that Ms. Kurtz' purported conduct is objectionable based on the purported fact that she was perceived as being managerial by the drivers. Petitioner ignores the fact that it is *not* objectionable conduct, under *any* existing Board law, for an individual who is *perceived* as being managerial to have prolonged conversations with voters on his or own initiative. Petitioner also ignores the factors that the Hearing Officer properly considered in reaching the correct conclusion that Ms. Kurtz was not perceived as managerial, such as the fact that her duties were essentially clerical in nature.⁷ (R. 16) Finally, Petitioner ignores the fact that Ms. Kurtz did not engage in any prolonged conversations with any voters whatsoever. In fact, the undisputed record evidence shows that Ms. Kurtz had *absolutely no* conversations with the voters other than a brief "hello". Such a brief statement, as the Board found in *Lowes*, supra., does not constitute a prolonged conversation encompassed by the *Michem* rule, as a matter of law.

For all the above reasons, the Board should affirm the Hearing Officer's conclusion that Objection #5 should be overruled.

D. Objection #6: The Hearing Officer Applied the Proper Test in Concluding that John Carey Did Not Significantly Interfere with Petitioner's Preelection Activities or Give the Impression of Surveillance

With respect to Objection #6, Petitioner objected to the fact that John Carey, a member of STA's management team, maintained a "nearby presence" as Union representatives attempted to speak with and distribute literature to employees on the morning of the election. As the Hearing Officer correctly concluded, John Carey was not in the drivers direct chain of command; rather, he was responsible for "mergers and acquisitions" and "special projects" at STA. (R. 20, Tr. 494) The Hearing Officer also concluded that, on the morning of the election, Mr. Carey stayed in the vicinity of Union representative Charlie Argeros, but that Union representative Nicole O'Donnell walked away from Carey and was able to hand out leaflets to the drivers. (R. 20) Based on these findings, the Hearing Officer correctly

⁷ Petitioner relies on only one piece of evidence in support of its claim that Ms. Kurtz was reasonably perceived as being managerial by the drivers – the fact that Ms. Kurtz sat in on disciplinary interviews of two individuals. However, Petitioner also ignores the fact that *neither of the individuals who were disciplined during these interviews, Michele Felder and Antoine Mitchell, voted in the election.* (P-22; E-17; Tr. 395-401) In fact, Antoine Mitchell was not even employed by STA on election day. (P-22; 399-400)

concluded that the evidence failed to establish that Carey either significantly interfered with the Petitioner's pre-election activities or gave the impression of surveillance. (R. 20-21) In doing so, he correctly noted that "it is well established that management officials may observe open and public union activity on or near the employer's premises as long as they do not engage in behavior that is out of the ordinary. (R. 20) (citing *Partylite Worldwide, Inc.* 344 NLRB 1342, 1342 (2005) (citing *Arrow Automotive Industries*, 258 NLRB 860 (1981)); see also *Roadway Package Sys., Inc.*, 302 N.L.R.B. 961 (1991) (holding "[i]t is well settled that where, as here, employees are conducting their activities openly on or near company premises, open observation of such activities by an employer is not unlawful.")(citing *Southwire Co.*, 277 N.L.R.B. 377, 378 (1985)). The Hearing Officer also distinguished Mr. Carey's conduct from the conduct found to be unlawful surveillance in *Partylite*, noting that *Partylite* is distinguishable in the number of management representatives (eight); their positions over unit employees; their locations within the parking lot; the number of times (three) that they were present; and the fact that several employees testified that the presence of these supervisors was "surprising" and "an unusual occurrence". (R. 20-21)

Petitioner does not challenge any of the Hearing Officer's findings of fact with respect to this objection. Nor does Petitioner argue that Mr. Carey's conduct is similar to the conduct found to be objectionable in *Partylite*. Rather, Petitioner appears to argue *only* that the Board should find Mr. Carey's conduct to be objectionable simply because it occurred on the day of the election. It cites no Board law or precedent in support of this argument. While the proximity of conduct to the election is one of many factors that the Board may consider in determining whether interference with laboratory conditions has occurred, Petitioner conveniently ignores the multitude of other factors discussed by the Hearing Officer, all of which support his finding that Mr. Carey's conduct did not significantly interfere with Petitioner's pre-election activities and/or give the appearance of surveillance. These factors included the fact that Mr. Carey was the only management person present in the parking lot; the fact that Mr. Carey did not supervise any of the bargaining unit employees; the fact that Ms. O'Donnell freely walked away from Mr.

Carey and was not prevented from leafleting, the fact that he was not situated by an entrance whereby employees were required to pass; the fact that he only allegedly engaged unlawful interference/surveillance on one occasion; and the fact that not one employee testified that Mr. Carey's presence was either surprising or unusual. (R. 20-21) In fact, there is no basis in the record for concluding that Mr. Corey's presence in the parking lot on the morning of the election was anything "out of the ordinary". Given all of these circumstances, the fact that Mr. Carey's conduct may have occurred on election day does not automatically convert his otherwise lawful conduct into objectionable conduct sufficient to overturn an election, as Petitioner would suggest.

For all of the above reasons, the Board should affirm Hearing Officer's recommendation that Objection #6 be overruled.

E. Objections # 8: The Hearing Officer Applied the Proper Test When He Concluded that Timothy Krise's Statements Regarding the STA's Contract Did Not Constitute Objectionable Conduct Warranting a New Election.

With respect to Objection #8, the Hearing Officer found, based on the testimony of Ms. Hansell, that during a 45 minute meeting that occurred on September 25, 2013, attendance at which was voluntary, STA Vice President Tim Krise stated that STA's contract with the [District] provided that STA "had an out or could walk away if (operations) became too costly." (R. 20-21) The Hearing Officer further found that Mr. Krise also added that he "wanted the facility to succeed" and "wanted to be in it for the long haul". (R. 21) He further concluded that Mr. Krise mentioned the contractual option to walk away at a second meeting that occurred during the first week of October, but that he did not mention this topic at three subsequent meetings that occurred.

Based on the above undisputed findings, the Hearing Officer concluded that Mr. Krise's statements regarding STA's contract with the Township was not an unlawful threat of retaliation. (R. 23) In doing so, he correctly relied on the well-settled standards set forth by the Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 595 (1969) noting that employers may make statements regarding economic consequences of unionization, so long as they are "carefully phrased on the basis of objective

fact to convey its belief as to demonstratively probable consequences beyond its control”. He also properly noted that in the absence of other coercive circumstances, an employer’s reference to possible negative consequences of unionization does not remove the communication from the protections of Section 8 (c) of the Act. (R. 22) (citing *UARCO, Inc.*, 55, 58 (1978), petition for review denied sub nom.. 865 F. 2d 258 (6th Cir. 1988)); general principle confirmed in *DHL Express, Inc.* 355 NLRB 1399 (2010). Applying the above law, the Hearing Officer correctly concluded that the following circumstances warranted the overruling of Objection #8: Mr. Krise did not state or even imply that unionization would necessarily cause STA to walk away from contract and close the facility; that “any negative impact of Krise’s statements was mitigated by his stating that he wanted to be there for the long haul and for the facility to succeed; that the statements were brief and not the focus of the meetings which were 45 minutes to an hour in length; and the meetings occurred more than five weeks prior to the date of the election. (R. 23)

In excepting to the Hearing Officer’s conclusions, Petitioner argues that “threats to close a business if a Union wins an election” is objectionable conduct warranting invalidation of an election. However, Petitioner’s argument is misplaced because Mr. Krise did not threaten to close the business if the Union won the election. To the contrary, ***not one employee*** testified that he or she viewed these comments to be a threat to walk away if the Union won the election – or to be any sort of threat whatsoever. Nor did Petitioner’s witnesses provide ***any context*** during the hearing which would reasonably cause the employees to view Mr. Krise's comments as a threat – rather, these comments undisputedly were made in the context of Mr. Krise discussing the fact that he wanted the facility to succeed and that he was in it for the long haul. Moreover, Mr. Krise did not “tie” the contractual ability to walk away from the contract with the District to the employee’s ***selection of Union representation***. Indeed, unlike the supervisor in *Daikichi Corp.*, 335 NLRB 622, 623-234 (2001), the primary case relied upon by Petitioner, Mr. Krise made no ***assumption*** that unionization ***would*** increase costs for STA; to the contrary, he simply noted the District’s ability to walk away if, and only if, costs became too high – an

economic necessity beyond STA's control.⁸ In this regard, Mr. Krise's comments were akin to the employer's statement in *Enjo Contracting Co., Inc.*, 340 NLRB 1340, 1340 (2003), *enfd.*, Fed. Appx. 769 (2005) which the Board found to be lawful - i.e., the statement "[If] the Union gets in **and** starts making demands, we wouldn't be able to compete with our competitors." Finally, unlike the statements at issue in *Daikichi Corp.*, Mr. Krise's statements undisputedly did not take place "against the backdrop of any unfair labor practices", such as substantiated threats to discharge employees who engaged in union activity. See *Daikichi Corp.*, *supra.* at 624. Rather they were brief comments made during the course of lengthy, voluntarily attended meetings, at which no coercive conduct or unfair labor practices occurred.

In sum, there is simply no basis for the Board to conclude that Mr. Krise's comments constituted unlawful threat of retaliation – let alone a threat which is sufficient to meet the heavy burden necessary to invalidate an election. For all of the above reasons, Board should affirm the Hearing Officer's recommendation that Objection #8 be overruled.

F. Objection # 9: The Hearing Officer Applied the Proper Test When He Concluded that Timothy Krise's Statements Regarding a Christmas Bonus Did Not Constitute Objectionable Conduct Warranting a New Election.

With respect to Objection #9, the Hearing Officer found the following, again based on the testimony of Petitioner's witness, Ms. Hansell: During the above referenced meeting that occurred on September 25, 2013, while reciting benefits that STA offered, Mr. Krise mentioned a Christmas bonus. (R. 21) Someone asked "What Christmas bonus?" and Mr. Krise "responded with surprise" that the employees did not know about the bonus. (R. 21) He then indicated that he could not discuss it further because of the pending election. (R. 21-22) No mention of the Christmas bonus was made at any future meetings. Based on these undisputed findings, the Hearing Officer recommended that Objection #9 be overruled for the following reasons: the hiatus between Krise's statement about the Christmas bonus and the election was approximately 6 weeks; Mr. Krise said nothing again on the subject in any meeting after

⁸ In *Daikichi Corp.*, *supra.*, the Board found objectionable a supervisor's statement that the employer might close its operation "if [the employees'] selected union representation, because union demands would increase costs of production". In other words, in that case, unlike the present case, the supervisor made an assumption that unionization would increase costs to the business.

the first one; the statement was not tied in any way to the outcome of the vote; and its utterance appears to have been a result of an unintentional error rather than a preplanned and deliberate effort to promise a benefit to drivers if they voted against union representation. (R. 23)

Relying on the Board's decision in *County Window Cleaning Co.*, 328 NLRB 190, 196 (1999), Petitioner argues that Mr. Krise's statements constitute an implied promise of benefits. However, in *County Window Cleaning Co.*, the employer mentioned the possibility giving its employees a pay raise and new benefits *directly in response* to the employees' statement that they wanted to continue with the Union because they wanted better benefits and a better future. Thus, in that case, there was a reasonable basis for concluding that the employer was tying a promise of new benefits to the employees abandoning support of the Union. In the present case there was no plausible reason for any employee to reasonably infer that Mr. Krise was promising a new benefit in the form of a Christmas bonus tied to the rejection of the Petitioner as its Union representative – particularly given the fact that Mr. Krise undisputedly spoke of this bonus as if it were a foregone conclusion of which the employees were already aware.⁹

For the above reason, as well as for the other reasons cited by the Hearing Officer in his Report, the Board should affirm the Hearing Officer's recommendation that Objection #9 be overruled.

⁹ Petitioner also argues that Mr. Krise had the burden of explaining the "timing" behind his "implied promise of benefits." However, such an argument is *inapplicable* to the instant case because, as the Hearing Officer correctly concluded, no implied promise of a new benefit was made or could reasonably be inferred from Mr. Krise's comments.

VI. CONCLUSION

For all of the reasons set forth above, the Board should affirm the Hearing Officer's conclusions regarding the challenges to the ballots of Matthew Smith and Traci Williams, as well as his conclusions regarding Objections # 1, # 2, # 5, # 6, # 8 and # 9.

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CERTIFICATE OF SERVICE

On this 16th day of July, 2014, I hereby certify that I have served this Brief in Support of Employer's Petition Regarding Challenged Ballots and Amended Objections on opposing counsel, Norton Brainard, via email.

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