

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25

COMPASS GROUP USA, INC., d/b/a
CHARTWELLS DINING SERVICES

and

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 700, AFFILIATED
WITH UNITED FOOD AND COMMERCIAL
WORKERS UNION, AFL-CIO

Case Nos. 25-CA-134883
25-CA-136328
25-RC-130359

Judge David I. Goldman

EMPLOYER'S POST-HEARING BRIEF

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I. INTRODUCTION

Compass Group USA, Inc., d/b/a Chartwells Dining Services (the “Employer” or “Chartwells”) submits this brief to Administrative Law Judge David I. Goldman (“ALJ”) in unfair labor practice Case Nos. 25-CA-134883 and 25-136328 and Case No. 25-RC-130359, arising from election objections filed by United Food and Commercial Workers Union, Local 700 (the “Union”).

A. Procedural History

An election petition was filed by the Union on June 10, 2014¹, and an election was conducted by the Board on August 26. (General Counsel’s (“GC”) Exhibit 1(k)). The Union lost the election by a tally of 25-18. (*Id.*). Charge No. 25-CA-134883 was filed on August 18 and subsequently amended on August 19 and September 4. (GC Exhibits 1(a)-(f)). Charge No. 25-CA-136328 was filed on September 9. (GC Exhibit 1(g)). On August 28, the Union filed objections to the election.

Following an investigation, the Board issued a Complaint on November 26 and its report on the Union’s objections on December 19. Many of the allegations/objections were withdrawn or dismissed. The remaining allegations were tried before the ALJ on March 24 and 25, 2015.

Those allegations can be categorized as follows:

- **EMPLOYER CAMPAIGN LITERATURE THREATENED JOB LOSS AND PROMISED BETTER BENEFITS.** Per Election Objections 1 and 2, the Union alleged that the Employer distributed literature during the campaign period which contained “threats of job loss if the employees voted for representation by the [Union]” and which “promised benefits and other improved terms and conditions of employment if the employees voted against representation by the [Union].” (GC Exhibit 1(k) and Tr. 11). The allegation related to threatened job loss also was included in Charge No. 25-CA-134883, but it was not included in the Complaint.

¹ Unless specified, all dates refer to 2014.

- **SURVEILLANCE AND INTERROGATION BY DUSTEN TRYON.** During the hearing, the General Counsel alleged that on or around April 2014, the Employer’s Assistant Food Services Director “Dusten Tryon created the impression among Chartwells employees that their union activities were under surveillance and interrogated employees about their union membership activities and sympathies, in violation of Section 8 (a)(1) of the [Act].” (Tr. 10-11). Neither allegation is contained in any unfair labor practice charge. Charge No. 25-CA-136328 contains a general allegation that the Employer “engaged in surveillance of employees” but does not refer to any actions by Tryon and does not accuse any Chartwells agent of creating impressions of surveillance among employees. (GC Exhibit 1(g)).
- **UNLAWFULLY DISCOURAGING EMPLOYEES FROM VOTING DURING THE AUGUST 18 MEETING.** Per Election Objections 8, 9, and 10, the Union alleged that during an August 18 meeting, Chartwells Director of Dining Services, Kellie Short, and Director of Labor Relations, Bill Breslin: 1) “[i]nformed employees that the Anderson University faculty members and students would not be happy if the employees left their jobs to vote in the NLRB election;” 2) “[told] employees that they can decertify the [U]nion in one year if they ‘screw up’ and vote in favor of representation by the [Union];” and 3) “[told] employees that they could only vote on their breaks, before their work shift, or after their work shift.” (GC Exhibit 1(k) and Tr. 11-12).
- **DISCIPLINE OF PETTIGREW.** The General Council alleged that the Employer “by its Food Services Director, Kellie Short, informed and then disciplined its employee, Joyceanna Pettigrew, on June 27, 2014, because Pettigrew, a known union supporter, voiced concerted complaints about employees work schedules during a June 25, 2014 meeting.” (Tr. 11 and GC Exhibit 1(i)).

B. Brief Summary of the Argument

The allegations in this matter are unsupported by the facts and the law and should be dismissed. The literature which the Employer distributed during the campaign contains no threats or promises and is not objectionable. The single witness that the General Counsel called in support of its allegation that Dusten Tryon engaged in unlawful surveillance and interrogation confirmed it never happened. The Union’s allegation that Short and/or Breslin discouraged employees from voting during the August 18 meeting is refuted by the transcript of the meeting and a subsequent meeting that occurred on August 25.

It is undisputed that Pettigrew was verbally counseled on one occasion in late June or early July² for repeatedly interrupting a group meeting. However, her own recollection of the event confirms that the counseling was an innocuous discussion about whether Pettigrew made others in the meeting feel uncomfortable, along with further discussion about a scheduling matter raised during the prior meeting. Pettigrew never received anything in writing regarding her behavior at the group meeting, and she admits that she continued to be one of the most vocal proponents of the Union in the following two months leading up to the election. Moreover, the General Counsel and the Union did not allege or even attempt to introduce any evidence suggesting that the Employer's alleged conduct was disseminated to other employees or that it had any impact whatsoever on the election.

II. STATEMENT OF FACTS

A. The Union files a Petition on June 10 and loses the election on August 26, by a vote count of 25 to 18.

The Employer in this case is a contracted food service provider that began operations at Anderson University in Anderson, Indiana, in July 2013. (Tr. 15-16). It employs approximately 60 employees who provide food service to the University's students. (Tr. 20-21).

The Union filed a Petition on June 10. The election was conducted on August 26. The final vote count was 18 for the Union and 25 against.

This case obviously relates to allegations of unfair labor practices and objectionable conduct filed by the Union. The facts of each allegation are reviewed separately below.

² Short testified that the counseling was issued on July 1. (Tr. 24). Pettigrew testified that it was on June 27. (Tr. 62). For the purposes of this brief, the Company will accept Pettigrew's date as accurate.

B. Facts relating to alleged unlawful threats and promises contained in the Employer's campaign materials.

During the hearing, the Union confirmed that its allegations of unlawful threats and promises are based entirely on the text of Employer campaign materials that are attached to the transcript as Union Exhibits 1 and 2. The Employer and Union stipulated that the materials were distributed during the campaign period, and no additional testimony was offered concerning the interpretation or impact of the materials. On their face, the materials cannot reasonably be interpreted as threatening job loss if the Union won the election or promising beneficial changes in employees' terms and conditions of employment if the Union lost.

C. Facts relating to alleged unlawful interrogation and surveillance of employees by Dusten Tryon.

During the hearing, the General Counsel called only one witness in support of these allegations – former employee Patricia Carter. She testified that in March 2014, months before the petition was filed, Assistant Director of Food Services Dusten Tryon “mentioned” that there was “discussion going around” about the possibility of starting a union. (Tr. 43). According to Carter, Tryon “stated that he really didn’t feel like it was a good idea because that would ... take any decisions that the employees would have about raises and benefits and how many hours they were going to get, and he just didn’t, you know, [he] thought that should stay in the... [m]anagers’ hands, that they should be the ones to make the decisions about that kind of stuff.” In response, Carter “told [Tryon] that – I just thought that [the Union] was a good idea. My opinion was I thought it was a good idea because I felt that this Company needed supervision ... I just didn’t really like the way the Company treated their employees. They kind of didn’t – they never – they don’t – they didn’t listen to us as far as employees. They just kind of did what they wanted to do to you.” (Tr. 43-44). Carter admitted that Tryon “really didn’t respond in ... a lot of detail.” (Tr. 44). He did not say whether Carter was “wrong or right.” (Tr. 45).

During the hearing Carter expressed no concerns about, or objections to, the conversation. To the contrary, she described the exchange as “just conversating” and “just voicing our opinions.” (Tr. 45). She admitted that despite her clear expression of support for the Union, Tryon contacted her later that summer to try and convince her to come back to work for the Employer. (Tr. 50-51)

D. Facts relating to the Union’s allegation the Employer unlawfully discouraged employees from voting during the August 18 meeting.

In support of its allegation that Short and or Breslin unlawfully discouraged employees from voting during the August 18 meeting, the Union relied entirely on a full transcript of the meeting based on a surreptitious recording by Union supporter, Sybilla Bryson. During the August 18 meeting, Short initially advised employees that they should not walk off the job to vote while they were serving a line of students:

[Short]: And when you vote you can’t go like during... if you’re supposed to be working downstairs and there is like a line of students, you can’t just run up here and vote. You need to do it on your break, or at your meal or before or after you come in.

(Union Exhibit 3, p. 12). In response to a follow-up question by Bryson, Breslin immediately confirmed that employees did not need to be off the clock to vote. (*Id.*). He and Short also emphasized that the Employer’s only concern was to make sure that employees did not simply walk away from their work stations without back-up coverage while they were serving the students:

[Bryson]: Really? So we have to be off the clock in order to vote?

[Breslin]: No, you’ll be covered, but you can’t just leave your post.

[Short]: You can’t just leave your station to come up here and vote.

[Breslin]: If there's like 8 of you working on a tray line or something -- this may not make sense because I'm not familiar with your operations -- but if 8 of you are on the line, and they let one or two of you go at a time then it doesn't take that long. You go on in and ...

[Short]: We'll have to have you covered is what I'm saying, and I just don't want everybody to -inaudible- because we're going to get in trouble with the University because they know what's going on, and they know it's happening, but you're going to –

-- Interrupting voices --

(*Id.*). Based on the transcript, Pettigrew seemed to misinterpret Short and Breslin's comments to mean that the students were opposed to the Union. Short and District Manager Nick Marcarelli, however, immediately corrected their misunderstanding:

[Pettigrew]: But a lot of the faculty and staff here and a lot of the students have been coming up to me, saying "I hope you guys get it."

[Marcarelli]: She wasn't talking about that – she was talking about...

[Short]: I'm saying [the students] aren't going to be happy if everybody leaves their job.

[Pettigrew]: No, they won't be happy with that.

-laughing-

(*Id.*). In case there was any doubt, another employee, Cathy, confirmed that they understood they were simply being told that they needed to ensure the students were taken care of before leaving their work stations:

[Cathy]: I don't think any of us are ignorant enough to do that anyway—walk away—because the students are our priority. They're our heart.

[Short]: Everybody knows...

(*Id.*). Breslin followed up by emphasizing that everyone would be given the chance to vote. More specifically, he indicated that they should vote even if they had to leave their work stations while students were waiting:

[Breslin]: But make sure you get to vote. If you have the same line of 8 of you, and it's like 2 o'clock and nobody has voted yet, obviously you need to go.

[Short]: We want everybody to go.

[Breslin]: We'll schedule you so everybody gets to go [vote] but again, if you choose not to, when you go in, just go in, sign in, [and] drop a blank [ballot].

(*Id.*). Moreover, Short and Breslin reiterated during a subsequent meeting on August 25 that employees would be given ample opportunity to vote.

[Short]: I just want to say, we are obviously allowing everyone to vote so what's going to happen is different managers are gonna go to different areas they know how to run and then we will release everyone one-by-one ... we do want everyone to be able to vote so we are going to release everyone to vote one-by-one, and a manager will be at your station doing this between the times so I don't want anybody to be worried that they won't have time because we will assure you that you will have time to vote and we will make sure that we are there to release you to come, okay?

[Breslin]: However you're going to vote, vote.

(Employer Exhibit 2, pp. 3, 5).

The transcript also confirms that Breslin never told employees they could “decertify the Union in one year, if they ‘screw up’ and vote in favor of representation by the [Union].” To the contrary, he correctly advised them that if they did not vote for the Union in the upcoming election and were unhappy with that result, they could decide to vote for the Union a year later. Breslin made these comments twice during the August 18 meeting:

[Breslin]: ... You have a vote, use it. You truly don't know what to do? Go in there and don't vote anything, but I would suggest you

vote 'no.' If something happens that doesn't work out, or it does and you choose not to pay dues whatever, and in a year, a year and a day, you can try and hire this union or some other union. ...And if you think, "Gee, [the Company] didn't clean up their problems. We gave Kellie a chance, and we didn't like the way it worked out," we just ask – we respectfully ask that you considering voting 'no.' Give Kellie a chance. Let us straighten things out. All you've got is about a year.

[Breslin]: ...Again, it's your vote. Might as well use it. You're going to be paying for it whether it be for just a year and not getting what you think you might have coming to you and then next year, you can decide okay, we screwed up, and were gonna vote 'yes' this time or it'll be --

(Union Exhibit 3, pp. 5, 12). Decertification was not even mentioned during either of these discussions.

E. Facts relating to the verbal counseling of Pettigrew.

The General Council alleges that Chartwells unlawfully disciplined Pettigrew because she engaged in protected activity during the Company's June 25 meeting. On June 25 and 26, the Employer held an orientation meeting for employees in preparation for the upcoming school year. (Tr. 55, 103). The meeting was designed to provide a general overview of the Company's policies and procedures, in particular providing cross-training and reviewing safety procedures. (*Id.*). Approximately 40 to 60 employees attended the two-day meeting, which was led by Short. (Tr. 103-04).

During the hearing, Pettigrew admitted that she repeatedly interrupted Short during Short's presentation to employees on the subject of scheduling:

Q. Okay. And you testified that Ms. Short handled [the scheduling] part of the meeting?

A. Yes.

Q. What was said during this part of the meeting, as best as you can recall, what Ms. Short said, and if you said anything, what did you say?

A. Umm, someone had asked about this – about the scheduling – because they always put the schedules up and then they would take it down, and they would change it, and they were asked if, you know, who was responsible if we came in and checked out schedules, and then we didn't show up because they were changed, you know, or something like that, and she just kept telling us that it was our responsibility, so I asked her, I said, "I know – we know that it is our responsibility, but if we do our part, and we come in and we check the schedule today, and they change it tonight, and we are off tomorrow, but they put us on and we don't show up, we get in trouble for it," and I said, "Shouldn't that be [m]anagement's fault, and not our fault?"

She just kept telling me that it was our responsibility, our responsibility. I kept telling her, "I understand that it is our responsibility, but at some point, [m]anagement has got to take responsibility if they are changing the schedule and not getting hold of us."

And she kind of cut me off and told me that we would discuss it later.

(Tr. 58-59). Even after Short asked Pettigrew to stop interrupting and offered to discuss the issue with her after the meeting, Pettigrew continued to interject.

Q. Okay. When you were asking Ms. Short about the issue related to the change in work schedules after they had been posted, at some point did she tell you that she didn't want to talk about it anymore, and you can go out to the hallway or you can talk about it outside of the room?

A. She told me – she told me that she didn't want – that we could discuss this later, that she was done talking about that topic.

Q. Okay.

A. And we could discuss it later in her office.

Q. After she told you that she didn't want to talk about it anymore, did you stop talking about that particular subject at that point?

A. Yes, but I said – I asked her, I said, “Isn't that the purpose of these meetings, to get stuff out in the open so we can all know what is going on?”

Q. And did she say – what did she say to that?

A. She said that she could discuss it with me later.

(Tr. 64-65). As a result of Pettigrew's repeated interjections, Short counseled her for being rude during the meeting. (Tr. 62).

Pettigrew's testimony confirms that any discussion she had with Short during her counseling was limited to her disruptive behavior, in particular that it made other people feel uncomfortable.

Q. What did [Short] discuss with you?

A. Well, she pulled me in the office and she told me that she was giving me an oral warning because I was rude and made everyone feel uncomfortable in the meeting.

Q. Did Ms. Short give you any other reason for your verbal warning?

A. No.

(Tr. 62-63).

No evidence was presented which suggested that this counseling was motivated by Pettigrew's support for the Union or that it impacted Pettigrew, any other eligible voters, or the election result.

III. ARGUMENT

A. **The allegation that the Employer distributed literature containing unlawful threats or promises is without merit and should be dismissed.**

The campaign materials distributed by the Employer leading up to the election contained no impermissible threats or promises. The literature (introduced as Union Exhibits 1 and 2) conveyed common campaign messages to address themes repeatedly advanced during organizing campaigns across the country. The materials warned employees about the costs and risks of organizing, answered common questions employees have about joining a union, and urged employees to “Vote No” on the day of the election. The Employer made no impermissible threats of job loss. In fact, the materials expressly stated that “[t]he Company pledges to abide by the law and sit down and negotiate with the Union to reach a new Collective Bargaining Agreement” if the Union won the election. (Union Exhibit 1(e)).

Although the literature asked employees to consider how the Employer’s client would react to unionization based on their own experience and knowledge, there was no statement or indication that work would be lost or that the client would have a negative reaction. It is certainly not a violation of the Act to ask employees to consider the impact of their vote. *See Action Mining, Inc.*, 318 NLRB 652, 657 (1995) (finding the employer’s remark that it did not know “how any of our customers would react” did not violate the Act).

It is well settled that it “is not unlawful, disparaging, or denigrating to the Union or its supporters to point out the risks of union representation and collective bargaining and to urge that those risks be avoided. *Portola Packaging, Inc.*, 2014 NLRB LEXIS 974 at *143 (Dec. 16, 2014); *see also Poly-America, Inc.*, 328 NLRB 667, 669 (1999), *aff’d in part and rev’d in part by* 260 F.3d 465 (5th Cir. 2001) (“It is well settled that Section 8(c) . . . gives employers the right to express their views about unionization or a particular union as long as those communications

do not threaten reprisals or promise benefits”); *Trailmobile Trailer, LLC*, 343 NLRB 95 (2004) (argument involving disparaging remarks is left routinely to the good sense of employees). The Employer’s communications here clearly complied with established precedent and did not convey improper threats or promises. Notably, the General Counsel and Union produced **no evidence** that any employee who received the literature felt threatened or in any way coerced based on the content of the materials. They have failed to meet their burden to establish a violation of the Act.

B. The allegation that Dusten Tryon engaged in unlawful surveillance and/or interrogation is without merit and should be dismissed.

Initially, any allegation that Tryon unlawfully created an impression of surveillance among employees or that he unlawfully interrogated employees must be dismissed because these allegations were never the subject of an unfair labor practice charge. In addition, any such allegations were refuted by the General Counsel’s only witness, Carter. Carter testified that she and Tryon simply discussed their opinions of unions. Based on her testimony, he did not ask her any questions, and he did not say or imply that he or anyone else was engaged in unlawful surveillance. These allegations are without merit and should be dismissed.

C. The allegation that the Employer discouraged employees from voting during the August 18 meeting is without merit and should be dismissed.

The Union purely relies on misstatements of the record to support its allegation that Chartwells discourage employees from voting during the August 18 meeting. First, Short simply stated that employees should not leave their shift all at once to vote as doing so would affect their ability to service the students. Even when Pettigrew appeared confused by Short’s directive, Short and Marcarelli immediately clarified that the students would be unhappy if everyone just “leaves their job.” (Union Exhibit 3, p. 12). The fact that another employee responded that the employees were not “ignorant enough” to simply walk away from their shift clearly

demonstrates the employees understood that Short was not trying to discourage them from voting. (*Id.*). Moreover, while Short initially stated that employees who were in the process of serving students needed to vote on their breaks, Breslin immediately clarified her statement, explaining that employees would be released one-by-one during their shift to vote. Short and Breslin then reiterated several times during the August 18 and August 25 meetings that everyone would get a chance to vote.

Breslin also never told employees that if they “screwed up” in voting for the Union, they could decertify the Union in a year—although it is difficult to imagine how such a statement would help convince employees to vote against the Union. In fact, decertification was never mentioned. Instead, Breslin suggested that if the employees considered voting ‘no’ and gave Short “a chance,” they could vote in favor of the Union the following year if they were dissatisfied with the outcome. Moreover, Breslin continued to emphasize throughout the August 18 and 25 meetings that employees should “just vote”—“however you’re going to vote, vote.” (Employer Exhibit 2, p. 5). As such, this allegation is without merit and should be dismissed.

D. The allegation that the Employer unlawfully disciplined Pettigrew is without merit and should be dismissed.

The Complaint suggests that the Employer, through Short, issued Pettigrew a verbal warning because she complained about a work scheduling matter and to discourage employees from engaging in protected, concerted activities. The evidence produced at the hearing, however, establishes that Pettigrew never actually received any form of progressive discipline based on her conduct. In addition, even if the brief conversation between Short and Pettigrew could be considered discipline, which it should not, such discipline is not unlawful under established Board precedent. Finally, any violation of the Act based on Short’s alleged actions would be *de minimis* and insufficient to overturn the election.

1. Pettigrew was not disciplined.

Pettigrew's testimony during the hearing establishes that her interaction with Short following the June 25 group meeting was completely innocuous. She admits that Short orally told her that she was "rude and made everyone feel uncomfortable in the meetings." (Tr. 62-63) Pettigrew apologized but stated that she did not think she made everyone feel uncomfortable and that "[the employees] still never got answers to the questions [they] were asking about the scheduling." (Tr. 63). That was it. Pettigrew admits that she received no written warning or other document. (*Id.*) It is additionally undisputed that the conversation between Pettigrew and Short was not part of the Employer's progressive discipline system. (Tr. 121) In fact, on the "Verbal Warning" document submitted into evidence during the hearing (which Pettigrew never saw), none of the boxes in the "Action Taken" section were marked – proving that the counseling had no impact as "discipline" under the Employer's policies. (*Id.*; GC Exhibit 2)

Under these circumstances, the unofficial discussion between Short and Pettigrew is not discipline sufficient to support a violation of the Act. *See U.S. Postal Service*, 2004 NLRB LEXIS 450 at *8, n. 4 (Aug. 13, 2004) ("unofficial discussion" did not constitute discipline as it was outside of the established discipline policy); *Ballou Brick Co.*, 277 NLRB. 41, 58 (1985) (*aff'd in part and rev'd in part by* 798 F.2d 339 (8th Cir. 1986)) ("Clearly, talking to an employee to improve his attitude does not constitute discipline in any form.").

2. Pettigrew was not verbally counselled for her alleged protected, concerted activity.

Even if the informal conversation between Short and Pettigrew could be considered discipline, such discipline did not violate the Act because it was based on Pettigrew's disrespectful and insubordinate conduct in failing to follow instructions during the June group meeting – not her alleged protected, concerted activity. It is well-settled that an "employer has

[the] right to maintain decorum at such meetings,” and the Board and ALJs have determined that employees may be disciplined for disrespectful or insubordinate conduct without running afoul of the Act. *See Burger King & Michigan Workers Organizing Comm.*, 201 LRRM. 1099, 2014 NLRB LEXIS 742 at *37 (Sept. 29, 2014) (employer did not violate the Act by telling an employee who was loudly complaining about being “underpaid and underappreciated” to calm down and sit if she was to remain at a meeting and refusing to permit the same employee from asking questions at the end of the meeting).

Here, Short credibly testified that during the meeting in question, Pettigrew was repeatedly disruptive, despite Short’s repeated requests that Pettigrew continue the discussion with her after the meeting:

We had a meeting that I put together with an agenda for the day, and when we were discussing policies and procedures, it got brought up about meals and breaks that [m]anagement receives more meals and breaks than other employees, and [Pettigrew] was continually disruptive and disrespectful in front of all of the other associates, wanting more information and badgering me in regards to meals and breaks, and then it got brought up in regards to the – their schedules, scheduling conflicts, and discussing if there was a scheduling conflict, who would call, and I stated that it was the employee’s responsibility.

[Pettigrew] continued to be disruptive. I could not get a sentence out. She continued to disrupt me the whole meeting. During these times, I asked her to – told her that we could take it outside and discuss it. If she would like to discuss further, I would be more than happy to meet with her in my office afterwards, and we could discuss this, but that I was conducting a meeting and that we were on an agenda, and...she was just extremely disruptive multiple times during that.

(Tr. 27). Based on Pettigrew’s insubordinate and disrespectful conduct, Short did not violate the Act by verbally counseling her.

E. None of the alleged violations are sufficient to overturn the election.

In determining whether to set aside an election, the Board considers “the number of violations, their severity, the extent of the dissemination, the size of the unit, and other relevant factors.” *Durham Sch. Servs., L.P.*, 2014 NLRB LEXIS 304, *63 (NLRB April 25, 2014) (citing *Clark Equipment Co.*, 278 NLRB 498, 505 (1986)). It may also consider “the closeness of the election, proximity of the conduct to the election date, [and the] number of unit employees affected.” *Bon Appetit Management Co.*, 334 NLRB 1042, 1044 (2001). The Board will decline to overturn an election if the violation or conduct is deemed *de minimis*. *Durham Sch. Servs., L.P.*, 2014 NLRB LEXIS 304 (NLRB April 25, 2014). A violation or conduct will be deemed *de minimis* if it does not have a “tendency to interfere with the employees’ freedom of choice” and does not “affect[] the outcome of an election.” *Cambridge Tool & Manufacturing Co.*, 316 NLRB 716, 716 (1995). “The burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one. . . . An objecting party must show by specific evidence not only that the improper conduct occurred, but also that it interfered with the employees’ exercise of free choice.” *Werthan Packaging, Inc.*, 345 NLRB 343, 344 (NLRB 2005).

Among other factors the Board considers in determining whether an election should be overturned are the lapse of time between the alleged misconduct and the election, *see Keeler Brass Automotive Group*, 301 NLRB 769, 775 (NLRB 1991) (finding that two unfair labor practices occurring between two weeks and almost two months prior to the election were *de minimis* and too isolated to justify overturning the election), and the closeness of the ballot count. *See Werthan Packaging, Inc.*, 345 NLRB 343, 345 (NLRB 2005) (finding that evidence of a supervisor interrogating three employees, threatening a fourth employee, and arguably interrogating a fifth employee was insufficient to overturn an election that the union lost by 21

votes); *Sanitation Salvage Corp.*, 2013 NLRB LEXIS 396, 4-5 (NLRB June 5, 2013) (holding that the employer's objectionable statements, heard by only two employees and not further disseminated, were insufficient to affect the outcome of an election lost by 22 votes); *M.B. Consultants, Ltd.*, 328 NLRB 1089, 1089 (1999) (finding the record insufficient to establish that objectionable statement made to two employees affected outcome of election with six-vote margin).

Here, the Union and General Counsel did not even attempt to meet their burden of overturning the August 26 election. They offered no evidence that any of the eligible voters were impacted by any of the alleged unlawful conduct. With respect to the alleged unlawful discipline of Pettigrew, the Union and General Counsel rested their cases without introducing evidence that any other employees even knew about the counseling.³ By her own admission, it did not impact Pettigrew because even after the counseling, she continued to be one of the two most vocal union supporters during the campaign period. (Tr. 117). She admitted that during the subsequent August 18 meeting, which was attended by all employees, she repeatedly expressed disagreement with Breslin and accused him of making untrue statement. (Tr. 114-115). In fact, according to the transcript of the meeting, she spoke up 28 times. According to the Union's transcript of the August 25 all-employee meeting, she again spoke up 20 times during a 20-minute meeting. Five of her comments during this meeting are specifically described as "interruptions." Among other comments she made during the employee meetings were: "I don't agree with that," "that's not true," "that don't have nothing to do with the Union," and "if the

³ After the General Counsel and Union rested, during the Employer's case the ALJ asked if Pettigrew had told anyone if she was "disciplined." She responded that she had "asked some of them if I made them feel uncomfortable." (Tr. 118-19). She never identified who she discussed this with or even whether they were in the bargaining unit. Neither the General Counsel nor the Union followed up, and there is no evidence of any further dissemination of Pettigrew's "discipline."

CEO makes two million dollars a year, they could spread that money around.” (Employer Exhibit 2, pp. 2, 4-5; Union Exhibit 3, p. 10).

Based on the undisputed evidence, it is clear that Pettigrew’s counseling, which occurred almost two months before the election, had no impact whatsoever on her free choice or her support for the union. Not only did she continue to aggressively assert her pro-union views, she did so during mandatory meetings in plain sight of all of the other eligible voters. The entire workforce saw her repeatedly interrupt management and support the Union without any further discipline or consequences. Under these circumstances, there is no reason to believe that the free choice or expression of the other employees was impacted – even if they had known about Pettigrew’s earlier counseling.

IV. CONCLUSION

For all of the foregoing reasons, Chartwells respectfully requests that the unfair labor practice charges and objections be dismissed in their entirety.

Respectfully submitted,

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SERVICES

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2015, I caused the foregoing Employer's Post-Hearing Brief to be electronically filed with the Division of Judges:

Honorable David I. Goldman
Administrative Law Judge
National Labor Relations Board
Division of Judges, Region 25
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E-filed with the Division of Judges at www.nlr.gov

I further certify that I caused a copy to be served via electronic mail upon the following:

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