



United States Government

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

June 6, 2016

Mark J. Langer, Clerk
United States Court of Appeals
for the District of Columbia Circuit
E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue, NW, Room 5423
Washington, DC 20001

Re: *Ozburn-Hessey Logistics, LLC v. NLRB*, Nos. 14-1253, 14-1289, 15-1184, 15-1242

Dear Mr. Langer:

This letter responds to the June 1, 2016 letter submitted by OHL, pursuant to FRAP Rule 28(j), apprising the Court of the recent decision in *Manorcare of Kingston PA, LLC v. NLRB*, ___ F.3d ___, 2016 WL___ (D.C. Cir. May 20, 2016).

OHL asserts that the decision supports its position that the Board erred when it overruled an election objection that employee Hughes had engaged in objectionable conduct when he told an employee that he would rip off her (anti-union) shirt. OHL's reliance on *Manorcare* is misplaced. *Manorcare's* conclusion that two employees engaged in objectionable conduct does not affect this case. There, the Court noted that it "was widely known" that one of the employees had been in past fights and, at the time she made threats, had a hand injury from a knife fight. (Slip op. at 10.) In these circumstances, the Court found that other employees could reasonably believe that the threats could be carried out. No such similar evidence exists here.

Moreover, Hughes' remark in this case was made to only one other employee with no evidence of dissemination. (359 NLRB 1, 17; Board Br. 27.) This sharply contrasts with *Manorcare*, where the Court emphasized that the remarks of two employees were disseminated to at least 13 other employees. (Slip op. at 9.) Significantly, *Manorcare* does not disturb the longstanding principle that, when evaluating employee misconduct as opposed to the conduct of a party or its agent, the party asserting that the conduct is objectionable must make a particularly compelling showing of impropriety. (See Board Br. 28.) Accordingly, nothing in *Manorcare* undermines the Board's reliance here on the fact that Hughes' remark was isolated and there was no evidence that the remark was "disseminated in manner that would affect the election." (359 NLRB at 17.)

Very truly yours,

Linda Dreeben
Deputy Associate General Counsel

By: /s/David Seid
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