

ORAL ARGUMENT NOT YET SCHEDULED

United States Court of Appeals
for the
District of Columbia Circuit

Nos. 18-1070 and 18-1103

CRANESVILLE BLOCK CO., INC.,

Petitioner,

– v –

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON REVIEW FROM THE NATIONAL LABOR RELATIONS BOARD

FINAL BRIEF FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Petitioner-Cross-Respondent Cranesville Block Co., Inc. discloses it is not a publicly held corporation, it has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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**CERTIFICATE AS TO PARTIES, RULINGS AND
RELATED CASES**

Pursuant to the Court's Order of March 8, 2018 and D.C. Circuit Rule 28(a)(1), Petitioner Cranesville Block Co., Inc., ("Petitioner" or "Cranesville") in Case No. 18-1070 hereby submits this certificate as to parties, rulings, and related cases.

A. Parties and Amici

As part of the proceeding before the NLRB, the following parties appeared:

- (a) Cranesville Block Co., Inc.
- (b) International Brotherhood of Teamsters, Local 294
- (c) National Labor Relations Board – Region Three

In the case now before the Court, there are currently two parties:

(a) **Petitioner**

Cranesville Block Co., Inc.

(b) **Respondent**

National Labor Relations Board, Office of the General Counsel
Appellate Court Branch
Linda Dreeben, Esq.

B. Rulings Under Review

There are two rulings under review. The first is the Board's February 13, 2018 decision in Case No. 03-CA-2019124 (reported at 366 NLRB No. 18), finding that Cranesville Block unlawfully refused to bargain with the International

Brotherhood of Teamsters, Local 294 (“Teamsters”). The second is the Board’s underlying September 6, 2017 decision in representation Case No. 03-RC-190952, denying the Employer’s Request for Review of the Regional Director’s Supplemental Decision and Order on Challenged Ballot and Objections, and resulting in the certification of the Teamsters as the exclusive bargaining representative of certain Cranesville employees.

C. Related Cases

This case has not been previously before this or any other court. Counsel is unaware of any related cases currently pending before this Court or any other court.

JURISDICTIONAL STATEMENT

Pursuant to 29 U.S.C. § 160(b) of the National Labor Relations Act (“NLRA” or the “Act”), the General Counsel (“GC”) of the National Labor Relations Board (“Board” or “NLRB”) issued an unfair labor practice complaint (“ULP”) against Cranesville Block Co., Inc. (“Cranesville”) on November 17, 2017, alleging an unlawful refusal to bargain. Cranesville filed its answer. The GC then filed a motion for summary judgment which Cranesville opposed.

On February 13, 2018, the Board issued its final Decision and Order, granting the GC’s motion for summary judgment, finding that Cranesville violated Section 8(a)(5) of the Act by refusing to bargain with International Brotherhood of Teamsters, Local 294 (the “Union”). This Court has jurisdiction of appeals from the Board’s final orders pursuant to 29 U.S.C. § 160(f).

STATEMENT OF ISSUES RAISED

Cranesville raises the following issues for review:

1. Whether the Union was properly certified as the collective bargaining representative for the unit of mechanics at Cranesville’s Amsterdam, New York facility?
2. Whether the 2-1 Board Majority erred when it found that William Deming, the day-to-day supervisor at the Amsterdam facility responsible for assigning significant tasks and overseeing work, responsibly directing employees,

and effectively recommending discipline and overtime, was not a statutory supervisor under 29 U.S.C. § 152(11) (“§ 2(11)”)?

3. Whether the 2-1 Board majority further erred by refusing to consider whether Mr. Deming’s pro-union conduct of soliciting union authorization cards, threatening employees with termination if they did not vote for the Union, and attending Union meetings, warranted overturning the election?

4. Whether the Board erroneously granted the GC’s summary judgment motion by concluding Cranesville unlawfully refused to recognize and bargain with the Union?

STATUTES AND REGULATIONS

Section 2(11), 29 U.S.C. § 152(11), of the Act provides:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), provides in part:

(a) It shall be an unfair labor practice for an employer:

(1) to interfere with, restrain , or coerce employees
in the exercise of rights guaranteed in Section 7.

Section 8(a)(5) of the Act, provides, in part:

(a) It shall be an unfair labor practice for an employer:

(5) to refuse to bargain collectively with the
representatives of his employees, subject to the
provisions of section 9(a).

Section 9(a) of the Act, 29 U.S.C. § 159(a), provides in part:

Representatives designated or selected for the purposes
of collective bargaining by the majority of employees in
a unit appropriate for such purposes, shall be the
exclusive representatives of all the employees in such
unit for the purposes of collective bargaining in respect to

rates of pay, wages, hours of employment, or other conditions of employment.

STATEMENT OF THE CASE

A. Nature of the Case

This case involves a ULP alleging that Cranesville refused to bargain with the Union in violation of Sections 8(a)(1) and 8(a)(5) of the Act. Cranesville refused to bargain in order to test the validity of the Union certification issued in the underlying representation proceeding between the parties.

B. Course of the Proceedings and Disposition Below

The Union filed a representation petition for the mechanics at the Amsterdam facility on January 9, 2017, and an election was held on February 8, 2017. At the election, two votes were cast for the Union and one vote was cast against the Union; there was one challenged ballot. (*See Tally of Ballots at JA-277*). Cranesville challenged the ballot of William Deming, contending that he was a § 2(11) supervisor under the Act.

Cranesville also filed timely objections to the election, alleging that Mr. Deming was a statutory supervisor and that his conduct of soliciting Union authorization cards, threatening employees with termination if they did not vote for the Union, and engaging in other pro-union activities tainted the election and should render the certification invalid. (*See Respondent's Objections at JA-5-6*).

The Regional Director of Region Three ordered a hearing on Mr. Deming's challenged ballot and the Employer's objections. Despite significant evidence to the contrary, the Hearing Officer concluded that Mr. Deming was not a statutory supervisor and that his conduct did not taint the election. (*See* Hearing Officer's Report at JA-236). The Regional Director of Region Three issued a Supplemental Decision affirming, in large part, the Hearing Officers' Report. (*See* Region Three's Supplemental Decision at JA-250).

Cranesville filed a Request for Review with the Board of the Region Three Supplemental Decision. The 2-1 Board majority denied the Request for Review on September 6, 2017, (*see* Board's Decision Denying Request for Review at JA-275), resulting in certification of the Union as the collective bargaining representative for the mechanics at the Amsterdam facility, (*see* Certification at JA-278). After the Union requested bargaining, Cranesville, in order to challenge the underlying certification before this Court, refused to bargain. (*See* GC Motion to Transfer Case to Board at JA-283-84).

The Union filed an unfair labor practice charge regarding the refusal to bargain, the GC issued a Complaint and then moved for summary judgment on that Complaint. The Board granted the GC's motion for summary judgment, holding that Cranesville violated § 8(a)(5) of the Act by refusing to bargain, thus providing

Cranesville the opportunity to petition for review of the Board's findings regarding the supervisory status of William Deming and his interference with the election.

STATEMENT OF FACTS

A. The Nature of the Business and Supervisory Structure

Cranesville is a ready-mix concrete producer that manufactures and delivers ready mix concrete to customers in New York State. Cranesville also operates a block division, which manufactures and delivers concrete masonry units. (JA-18). The Company operates 10 maintenance facilities, or garages, which service approximately 120 ready mix concrete trucks. (JA-17). John Tesiero, IV is the general manager of Cranesville, overseeing the plant operations and maintenance facilities. (JA-17). Rich Dwyer, who serves as Fleet Manager, oversees the 10 garages. Mr. Dwyer travels to the various garages throughout the course of a week, traveling as far south as Newburgh, New York, as far west as Rochester, and as far north as Watertown, New York. (JA-37 -38). Each individual garage has a supervisor assigned to it. (JA-19-20). The facility at issue in this proceeding was a maintenance garage of four to five employees in Amsterdam New York, and the supervisor at the garage was William Deming. (JA-20).

B. William Deming's Supervisory Responsibilities

Mr. Deming was the only supervisor present at the Amsterdam garage. The overwhelming weight of evidence at the hearing established that Mr. Deming had

supervisory authority over the mechanics in the maintenance garage on a day-to-day basis. Indeed, he oversaw their duties, independently made significant job assignments, and effectively recommended discipline and overtime assignments.

(a) Assignment of Tasks and Recommending Overtime

General Manager Tesiero testified that Mr. Deming assigned job tasks without any oversight based on the aptitude and ability of the four mechanics he supervised at the facility. (JA-21). In fact, Mr. Deming had nearly exclusive responsibility for deciding who would perform the work and how it would be performed throughout the day. (JA-91, 104). A mechanic who worked under Mr. Deming testified that it was only Mr. Deming who was there on a day-to-day basis to oversee the work, ensure it was being performed properly, answer questions regarding the work, and further testified that “Bill would always let me know what was going on, you know what I mean, and what I have to work on, what’s most priority.” (JA-107, 123, 138-139).

More specifically, the tasks within and outside the garage area varied, and Mr. Deming would decide which mechanic would perform the various duties, the priority of the tasks, and the scope of the work. (JA-56). In assigning tasks, Mr. Deming would consider who was qualified and able to perform the work, and he had full freedom to make decisions in assigning those tasks throughout the day. (JA-45, 67). For example, four witnesses testified that Mr. Deming would decide

which person would be the right mechanic to send for repairs on a breakdown. (JA-30, 86, 88, 93, 109, 175). These breakdowns could happen as frequently as two or three times a week, and these breakdowns were significant events because they could result in mechanics traveling hours to perform the repairs. (JA-109).

In addition to deciding who to send out for breakdown repairs, Mr. Deming individually decided which mechanics would be assigned to “clean” tasks, and which ones would be assigned to “dirty” tasks (terms of art in the automotive industry). (JA-30-31, 109). He was also responsible for determining who was capable of performing more laborious jobs such as jackhammering or hammering dry concrete. (JA-30-31).

Mr. Deming was the point person for Mr. Augustine, who was the plant manager for the ready-mix portion of Cranesville, and Mr. Augustine would work with Mr. Deming to determine when trucks must be fixed and available to assist with the needs of the ready-mix facility. (JA-145). Mr. Augustine specifically testified that Mr. Deming was his point person on a daily basis, and after these communications, Mr. Deming would distribute work assignments in order to ensure the trucks would be ready in time to meet the needs of the plant manager. (JA-146).

In addition to assigning tasks on a daily basis, Mr. Deming would determine the priority of those tasks and would inspect the employees’ work. (JA-139-140,

216). Mr. Deming admitted, “I probably make suggestions, you know, instead of working on that, you know, a mixer’s more important than, you know, a block truck they’re not using or whatever.” (JA-218). Despite Mr. Deming’s attempt to downplay his role at the facility, this admission highlights that he was responsible for assigning priority of work and who should be working on a particular project. Indeed, this testimony was consistent with the testimony of the other four witnesses (Mr. Tesiero, Mr. Dwyer, Mr. Augustine and mechanic James Green) who all indicated that Mr. Deming was independently responsible for assigning tasks and the priority of those tasks as the in-garage supervisor. (JA-30-31, 53, 56, 58-61, 63, 67-70, 77, 86, 88, 93, 109, 145-146, 175).

In addition to specifically assigning tasks, Mr. Deming also would evaluate whether the workload required overtime and would make recommendations to Mr. Tesiero on who should perform this overtime. (JA-22, 60, 63, 90).

(b) Authority to Discipline and Effectively Recommend Discipline and Training

Mr. Deming, as the only supervisor present at the garage to observe the behavior of the mechanics, had the authority to recommend formal discipline and to orally reprimand individuals, particularly when they were working in an unsafe manner. (JA-58-59, 110-111). Mr. Deming regularly gave oral reprimands with respect to the day-to-day performance and oversaw employees’ work – addressing quality issues with employees as he observed them. (JA-23, 181). In addition,

because Mr. Deming was the only supervisor present on a day-to-day basis, he was responsible for advising Mr. Dwyer and Mr. Tesiero if an employee was not able to perform a task and should be subject to discipline. (JA-21).

At the hearing, there were also two specific examples of Mr. Deming recommending more formal discipline. In the first, Mr. Deming witnessed an employee working unsafely and causing damage to a vehicle. Mr. Deming recommended that the employee be disciplined, and while the discipline was ultimately a lesser punishment than that proposed by Mr. Deming, Mr. Deming's advice to discipline the employee was still followed. (JA-22, 46). Mr. Deming first attempted to downplay his role in recommending discipline; however, when pressed, he admitted to recommending discipline for the employee. Specifically, Mr. Deming testified, when asked by the Hearing Officer, "Did you make a recommendation," he stated: "No. Well, that's what I told Richie [the Fleet Manager], that's what I should do, is kick his assignment [*i.e.*, terminate him] until he listens." (JA-221). Despite his attempts to downplay his role, a non-supervisory line employee would simply have no basis for making such a recommendation to a Fleet Manager. Indeed, Mr. Deming's testimony corroborates the two other witnesses, Mr. Dwyer and Mr. Tesiero, who testified that he did in fact recommend discipline. (JA-22, 46, 58-59). As for the second

incident, Mr. Deming admitted he recommended giving a written warning to an employee named AJ who was chronically late. (JA-172-173, 204).

As for additional disciplinary authority, Mr. Deming was responsible for identifying drug and alcohol issues among employees, (JA-50); he recommended additional training, both for safety issues or performance issues, for certain employees, (JA-63, 69-70); and admitted to signing at least one accident form as a supervisor, (JA-170).

C. Mr. Deming Solicits Union Authorization Cards and Union Support Including Threatening Employees with Termination if they Failed to Vote For the Union

During the Union organizing campaign, Mr. Deming approached a number of employees regarding Union representation, and was integrally involved in starting the push for a union. (JA-111-113). Mr. Deming testified that he was present at Union meetings where at least three eligible voters and a Union representative were present; he specifically solicited employees to sign Union authorization cards; and admitted to threatening employees that they would be terminated if they did not vote for the Union. (JA-113, 115-116, 203-204, 223).

SUMMARY OF ARGUMENT

Cranesville has not engaged in an unlawful refusal to bargain with the Union because the certification of representative in this case was invalid. Under established Board precedent, Mr. Deming was a statutory § 2(11) supervisor, and

his admitted conduct of soliciting Union authorization cards, threatening the mechanics that they would be terminated if they did not for the Union, and other pro-union activity warrants overturning the election.

As former Board Chairman Miscimarra succinctly stated, “there is considerable, largely un rebutted evidence that Mr. Deming has the authority to assign tasks to other mechanics, to responsibly direct them, and to effectively recommend discipline.” (JA-276). The hearing included four witnesses that testified to Mr. Deming’s supervisory authority, and Mr. Deming admitted he had these responsibilities, thus warranting a finding of supervisory status. The Board majority’s decision on supervisory status to the contrary is unsupported by substantial evidence, misapplies established law and departs from legal precedent without adequate justification.

In addition, Mr. Deming’s conduct of soliciting Union authorization cards, attending Union meetings, and threatening employees that they would all be terminated if they did not vote for the Union, is sufficient misconduct to warrant overturning an election. There are few examples of more inherently coercive supervisory misconduct than soliciting a union card and explicitly threatening job loss if employees do not vote for the Union. However, the 2-1 Board majority adopted this portion of the Regional Director’s decision without discussion.

Accordingly, if Mr. Deming is found to be a supervisor, his admitted conduct must result in the election results being overturned.

STANDING

Cranesville has standing because it has been “aggrieved by a final order of the Board.” 29 U.S.C. § 160(f). Cranesville is aggrieved because the Board’s order forces Cranesville to negotiate with a Union that was not properly certified as the bargaining representative.

ARGUMENT

A. Standard of Review

“Board orders will not survive review when the Board’s decision has no reasonable basis in law,” or “when the Board has failed to apply the proper legal standard” or “when it departs from established precedent without reasoned justification.” *Titanium Metals Corp. v. NLRB*, 392 F.3d 439, 445-446 (D.C. Cir. 2004). “Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administration decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.” *NLRB v. Brown*, 380 U.S. 278, 291 (1965). In addition, this Court sets aside decisions of the Board when the Board has “erred in applying established law to the facts, or when its findings of fact are not supported by ‘substantial evidence’ in the record considered as a whole.” *ConAgra v. NLRB*, 117 F.3d 1435, 1438 (D.C. Cir. 1997).

B. The Board Improperly Found that William Deming Failed to Independently Exercise Several of the Indicia of Supervisory Status

Section 2(11) of the Act defines supervisor as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is clear from the statutory language and from well-established Board precedent that if an individual has authority with respect to any one of the twelve listed powers, the individual is a supervisor within the meaning of § 2(11). *American Commercial Barge Line, Co.*, 337 NLRB 1070, 1070 (2002) (“The Board has held that the possession of any one of the indicia specified in Section 2(11) is sufficient to confer supervisory status on an individual if the statutory authority is exercised with independent judgment and not in a routine manner”); *see also, Public Service Co. of Colorado v. NLRB*, 271 F.3d 1213 (10th Cir. 2001) (“Because this section is framed in the disjunctive, the existence of any one of the

listed powers, as long as it involves the use of independent judgment, is sufficient to support a determination of supervisory status”) (quotation omitted). The Board has held that an individual’s “judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority or in the provisions of a collective-bargaining agreement.” *Oakwood Healthcare, Inc.*, 348 NLRB 686, 693 (2006).

As explained below, Mr. Deming had the independent authority with respect to three of the listed powers in § 2(11): (1) assigning tasks to other mechanics; (2) responsibly directing staff; and (3) effectively recommending discipline.

(a) William Deming Had the Independent Authority to Assign Significant Job Duties

As recognized by Member Miscimarra in his dissent, there is significant un rebutted evidence that Mr. Deming assigned significant tasks and exercised independent judgment in doing so.

In *Oakwood*, the Board held that the term “assign” as used in § 2 (11) referred to “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee.” 348 NLRB at 689. The Board further clarified that “assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night) *or to certain*

significant overall tasks (e.g., restocking shelves)” supported supervisory status.

Id. (emphasis added).

Here, Mr. Deming, at least two to three times a week, made the decision on who would be responsible for handling breakdowns occurring throughout the State. These were significant tasks. In addition, on a daily basis, Mr. Deming decided the priority of performing overall tasks, and also oversaw how they were being performed. Mr. Deming also made decisions about who could handle more difficult tasks such as jackhammering or dealing with dry concrete issues, and deciding who would work on particular trucks. Again, Mr. Deming was the only supervisor present at the Amsterdam location, and was responsible for dealing with questions and providing tasks on a daily basis.

(b) William Deming Had Authority to Responsibly Direct Staff

Mr. Deming also had the power to responsibly direct other employees. The Board has held that “the authority ‘responsibly to direct’ is not limited to department heads.” *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 691 (2006). As long as “a person on the shop floor has ‘men under him,’ and if that person decides ‘what job shall be undertaken next or who shall do it,’ that person is a supervisor, provided that the direction is both ‘responsible’ . . . and carried out with independent judgment.” *Id.* Moreover, “to constitute ‘responsible’ direction the

person performing the oversight must be held accountable for the performance of the task, and must have some authority to correct any errors made.” *Id.* at 695.

Mr. Deming admitted that he: (1) suggested the priority of work to be performed; and (2) fixed the errors of mechanics working under him. In addition, testimony from the other four witnesses established that Mr. Deming regularly sent out workers on breakdowns, decided who would be responsible for more laborious and difficult projects, and as the only supervisor present in the garage on a day-to-day basis, was ultimately responsible for the performance of the mechanics working under him.

In addition, Mr. Deming had the authority to effectively recommend overtime assignments and to recommend when an employee required additional training. These are significant decisions, and reflect Mr. Deming’s supervisory authority.

(c) Mr. Deming Had the Authority to Discipline Mechanics Working Under Him

“Under Section 2(11) of the Act, individuals are supervisors if they have the authority, in the interest of the employer, to discipline other employees, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” *Berthold Nursing Care Ctr., Inc.*, 351 NLRB 27, 28 (2007).

Mr. Deming disciplined and effectively recommended formal discipline, within the meaning of the Act, of at least two employees. The fact that Mr. Deming's recommendation was not specifically followed in one of these instances is not fatal to a finding of supervisory status. *Venture Indus., Inc.*, 327 NLRB 918, 918 (1999) (holding that supervisors had authority to effectively recommend discipline when they could recommend suspension of an employee, even though the recommendations were not always followed); *Mountaineer Park, Inc.*, 343 NLRB 1473, 1474 (2004) (holding that "assistant supervisors" had the authority to effectively recommend discipline when they could bring employee rule infractions to their supervisor and recommend the level of discipline to be imposed). Mr. Deming understood that he had the authority to recommend discipline, including termination, and in fact, he exercised that authority.

In addition, Mr. Deming had the power to investigate and evaluate the drug and alcohol use of employees under him, and frequently verbally warned and reprimanded mechanics working under him. Accordingly, there is no evidentiary and/or legal basis for the Board's finding that Mr. Deming failed to exercise supervisory authority under § 2(11).

C. If Mr. Deming is a Supervisor, His Conduct of Soliciting Union Authorization Cards and Threatening Employees that they Would Lose Their Jobs Warrants Invalidating the Election Results

In cases of alleged supervisory pro-union election misconduct, the Board announced in *Harborside Healthcare* the following two-step analysis to determine if such pro-union conduct warrants setting aside the election:

- (1) Whether the supervisor's prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election. This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct; and (b) an examination of the nature, extent, and context of the conduct in question.

- (2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the

conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.

Harborside Healthcare, Inc., 343 NLRB 906, 909 (2004).

The Board went on to hold that absent mitigating circumstances, supervisory solicitation of authorization cards has “an inherent tendency to interfere with the employee’s freedom to sign the card or not,” and thus may be objectionable. 343 NLRB at 911. This is particularly true, where, as here, the supervisor soliciting the card is a front line supervisor with day-to-day contact with the employees. *See Madison Square Garden Ct., LLC*, 350 NLRB 117 (2007).

(a) Mr. Deming’s Conduct Was Coercive

In *Madison Square Garden*, under circumstances similar to those here, the Board found that the first line supervisors’ conduct of soliciting union authorization cards was coercive under the first prong of the *Harborside Healthcare* analysis. Specifically, the *Madison Square Garden* Board held that as first line supervisors, they had day-to-day employee interaction, and therefore, had “substantial authority over an ... employee’s job status.” *Madison Square Garden, supra*, at 121. Additionally, the Board found that the supervisors continued campaigning for the union throughout the campaign up and until the election. Despite some evidence that upper management communicated reasons it believe

unionization was unnecessary, the Board held that this was not sufficient to mitigate the impact of the supervisors' "inherently coercive" card solicitations.

Here, as in *Madison Square Garden*, Mr. Deming was the front-line supervisor for the Amsterdam garage employees. Indeed, Mr. Deming was the supervisory person with whom those employees had the most interaction and could recommend discipline and additional training for employees having performance or behavioral issues. Accordingly, as in *Madison Square Garden*, Deming significantly impacted employees' job status. In addition, unlike in *Madison Square Garden*, there was zero evidence of any communications from upper management regarding the upcoming election, and therefore, no evidence to mitigate the impact of Mr. Deming's inherently coercive card solicitations.

In addition, Mr. Deming specifically threatened employees that they would all lose their jobs if they did not vote for the Union. It is difficult to imagine a more coercive statement from a supervisory employee – this alone warrants overturning the election. In fact, it is these kinds of statements regarding job loss that are significant enough to justify bargaining orders if made by supervisory employees, so there should be no legitimate contention that this is insufficient to warrant overturning an election. *See, e.g., Tri-City Paving, Inc.*, 205 NLRB 174 (1973); *The Great Atlantic & Pacific Tea Company*, 230 NLRB 766, 770 (1977)

(threats to bump employees out of positions in the face of unionization violate Section 8(a)(1) and provide grounds for a bargaining order).

(b) Mr. Deming's Conduct Materially Impacted the Election

Under the second prong of the *Harborside* analysis, Mr. Deming's conduct clearly materially impacted the outcome of the election. Given that the bargaining unit was only four members – two eligible employees voted for the union and one voted against – a single vote impacts the election. Mr. Deming admitted to soliciting at least one authorization card. This is enough to materially impact the results of the election, particularly given the small size of the unit and vote count. *Madison Square Garden, supra*, at 122-123.

Additionally, Mr. Deming testified that he made his threatening statement concerning continued employment if the Union was not voted in at the meeting which three of the four employees attended. This too was sufficient to materially impact the results of the election. To reiterate, a front-line supervisor stating that employees will lose their jobs unless they vote for or against the Union is considered by the Board to be one of the most egregious forms of election interference. Accordingly, if Mr. Deming is a supervisor, the election results must be overturned.

CONCLUSION

The Court should dismiss the ULP against Cranesville because the certification of the Union as the bargaining representative was improperly issued. Mr. Deming exercised § 2(11) supervisory authority, and his conduct in soliciting union authorization cards and threatening employees that they would lose their jobs if they did not vote for the Union, was coercive and warrants overturning the results of the election.

Dated: August 14, 2018

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,612 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

Dated: August 14, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2018, I electronically filed the foregoing **FINAL PAGE PROOF PRINCIPAL BRIEF OF PETITIONER**, with the Clerk of the U.S. Court of Appeals for the District of Columbia Circuit for service on:

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