

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

**FIRST AMERICAN ENTERPRISES  
D/B/A HERITAGE LAKESIDE**

**and**

**UNITED FOOD AND COMMERCIAL  
WORKERS UNION LOCAL 1189**

**Cases 18-RC-212417  
18-CA-211284  
18-CA-212666  
18-CA-21677**

**FIRST AMERICAN ENTERPRISES D/B/A HERITAGE LAKESIDE’S ANSWERING  
BRIEF TO GENERAL COUNSEL’S CROSS-EXCEPTIONS TO THE DECISION OF  
THE ADMINISTRATIVE LAW JUDGE**

**INTRODUCTION**

Petitioner United Food and Commercial Workers Union Local 1189 (“General Counsel” or “Local 1189”), by its Answering Brief, requests that the Board reject Respondent First American Enterprises’ (“First American”) exceptions, filed on March 7, 2019. For the reasons set forth below, the Board should disregard General Counsel’s response and accept Respondents’ exceptions.

**ARGUMENT**

**I. Judge Amchan ruled correctly in concluding that First American did not violate the Act when Joswiak asked Buesser to keep their conversation private.**

The General Counsel contends that the exchange between Joswiak and Buesser was an “interrogation” and suggests that the purpose of this exchange was to discuss “discipline” or, at the very least, constituted a “disciplinary investigation.” (CE Br. at 2–3.)<sup>1</sup> According to the General Counsel, merely asking Buesser to keep the conversation between the two of them

---

<sup>1</sup> First American will refer to General Counsel’s Brief in Support of Cross-Exceptions to the Decision of the Administrative Law Judge as “CE Br.”

interfered with her exercise of protected Section 7 rights. (CE Br. at 3.) This claim is without merit. Notably, the General Counsel does not articulate a right with which Joswiak interfered or for which it alleges Joswiak intended to discipline Buesser. The topic of this conversation was not about Buesser's support of the Local 1189 or her persuading Hafele to join. The reason for this discussion, and the only matter discussed, was that Buesser had allegedly told Hafele that she would lose her job if she did not vote for the union. (Tr. 75:22–76:6; 76:24–78:13.)

Regardless, this conversation was neither a “discussion of discipline” nor a “disciplinary investigation.” (CE Br. at 3.) The decisions that the General Counsel cites are not relevant here. These decisions pertain to employees being able to discuss their discipline with other colleagues so as to help those other employees avoid discipline themselves or defend themselves in the event of discipline. *Central States Southeast and Southwest Areas, Health & Welfare and Pension Funds*, 362 NLRB No. 155, 2015 BL 249786 (addressing a circumstance in which the employee had already been disciplined and was told to remove the warning, which he had posted in his cubicle for all to see, because the employer thought the posting was insubordinate and undermined management's authority); *Inova Health System*, 360 NLRB 1223, 1228–29 (2014) (examining an employer's request that the employee not discuss her suspension with anyone but her husband); *Westside Community Mental Health Center, Inc.*, 327 NLRB 661, 666 (1999) (employee was instructed not to discuss her suspension with anyone).

Unlike those cases, Buesser was *not* disciplined. Moreover, the testimony does not suggest that Joswiak's inquiry was a “disciplinary investigation.” He merely asked to meet with Buesser in private to discuss what he had heard from Hafele. Critically, he did not demand that she keep the conversation private, nor did he threaten her with any consequences if she did not do so, and she did not object to his request. (Tr. 235:4–12.) Furthermore, Buesser did not, in

fact, keep the conversation confidential. She called her union representative when she returned home that day and informed her of the discussion. (Tr. 78:21–79:4.) Buesser never faced any retaliation or other consequences for making that phone call because, as he informed her at the conclusion of the discussion, Joswiak only wanted “to keep this between [them] so that it [didn’t] get out on the floor and rumors are spread with wrong information because [he] wanted to be able to protect [Hafele].” (Tr. 234: 17–20.) In other words, the privacy of the conversation was for Hafele’s benefit, not for First American’s.

Accordingly, Judge Amchan was correct in concluding that Joswiak asking Buesser to keep their conversations related to Hafele’s comments private did not amount to a violation of the Act.

**II. Judge Amchan’s decision that the conversation between Joswiak and Hafele regarding her union dues did not constitute an unlawful interrogation was proper.**

The General Counsel uses the word “interrogation” to distort the context of this meeting. (CE Br. at 5, 7.) Contrary to its insinuation, not every instance in which a manager has a discussion with an employee that touches on union matters is per se an interrogation that warrants an evaluation pursuant to *Rossmore House*. This strained argument is apparent in The General Counsel’s use of *Britwell Investments* to claim that it is a violation of the Act to “ask[] an employee how she felt about the union ... [and] how she was going to vote.” (CE Br. at 6 (citing *Britwell Investments II, Inc.*, 324 NLRB 368 (1997)).) There, the Board found that the employer’s “repeated questioning” of the employee as to how she felt about the union and how she planned to vote violated the Act. But here, there is no evidence that either Joswiak or Everson asked Hafele how she was going to vote in the election or how she felt about Local

1189. Instead, they asked her only whether she still wanted to join the union, and only because *she approached her employer* to ask what her options were with respect to union membership.

This series of events started when Hafele approached Jackie Damaske, who Hafele identified as the individual responsible for payroll, to ask if was “too late to stop payroll deductions” and whether she could “stop being—quit—not be in the union.” (Tr. 162:24–163:10.) Joswiak followed up with Hafele to inform her that “he didn’t really know how it worked ... with canceling [her] Union paper that she [had] filled out, so he would have to get back to [her] on that but that [she] could be in the Union if [she] wanted to or not.” (Tr. 165:3–7.) It was at that time that Hafele told Joswiak that Buesser had informed her that “the Union was going to be the only thing that was going to save [her] job.” (Tr. 165: 10–14.)

A few days later, after Joswiak spoke with Darla privately, (Tr. 79:5–10), Joswiak met with Hafele, Eric Everson (First American’s Senior Vice President of Operations), and Buesser in Joswiak’s office to clarify the matter. (Tr. 167:3–18.) (This is not surprising given Hafele’s confusion regarding the union and her job security and her indecision with respect to union membership.) Joswiak told Hafele that “he just wanted to make sure that [she] didn’t feel like [she] was being pressured either way, but [Buesser] ... was upset that she thought that she pressured [Hafele] to join the Union.” (Tr. 167:19–23.)

The General Counsel suggests that the fact that Buesser was present in this meeting was somehow coercive or contributed to the conclusion that it was an “unlawful interrogation.” (CE Br. at 7.) They cite to no authority and offer no explanation, however, to support the allegation that having a union steward<sup>2</sup> present in a meeting with an employee to discuss whether she

---

<sup>2</sup> The General Counsel, in its Answering Brief, alleges that Buesser was not a union steward. (GC Br. at 6.) Joswiak testified that his interactions with “Union officials” consisted of “Jennifer Christensen as well as their—their Union stewards, so Darla Buesser and Ann Richter.” (Tr. 226:7–13.) Buesser did, however, answer in the negative when asked whether she “h[eld] any special position in the Union,” but this response was ambiguous as to timing. (Tr.

wanted to withdraw her union membership would somehow dissuade that employee from supporting the union. In fact, it could be argued that doing so was *less* coercive, as both the employer's and the union's interest were represented, and Hafele would not feel pressured to agree to whatever "side" was in the room. Moreover, Hafele testified that Joswiak, on more than one occasion, emphasized that it was up to her whether she wanted to join the union. (Tr. 165:24–166:2; 168:11–13.) And, in fact, Hafele confirmed at the conclusion of the meeting that she wanted to remain in the union. (Tr. 168:6–23.)

It is apparent, given the circumstances surrounding and the conversations leading up to this meeting, that Judge Amchan was correct in determining that confirming with Hafele what she wanted to do about her union membership and dues was not a violation of the Act.

**III. Judge Amchan ruled correctly that there was insufficient evidence that Kern acted improperly in expressing her opinion that Anderson should vote "no" in the union election.**

The General Counsel alleges that Melissa Kern, First American's dietary manager, "repeated[ly] solicit[ed] ... Anderson's vote against the Union" and that she, "on multiple occasions, told her subordinate employees that the employer needed them to vote no, [and] pressured and threatened employee Anderson to come in to vote." (CE Br. at 9.) The record, however, supports Judge Amchan's conclusion to the contrary. Indeed, the testimony upon which the General Counsel relies does not support a finding of coercion. Anderson stated that "there was this one time that [Kern came] in and she had told [them] that—that that Heritage needed people to vote no in the election." (Tr. 60:16–18.) She later testified that Kern "asked [her] to come in and vote ... a couple of different times." (Tr. 61:6–10.) Merely asking

---

70:6–8.) Whether Buesser was a union steward is not material to the determination of any issues raised by either First American or the General Counsel.

someone to vote, or even asking an employee to vote against the union, is not by itself coercive or threatening. *See, e.g., In re Admiral Petroleum Corp.*, 240 NLRB 894, 896–97 (1979); *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

Indeed, Anderson later confirmed that Kern never asked, demanded, or required her to vote or to vote a certain way: “Q.: Did Mel Kern ever tell you that you had to vote—that you had to vote yes or no in the election? A.: No. (Tr. 65:25–66:3.)<sup>3</sup> Kern confirmed this account, testifying that she did not require anyone to vote in the election or to vote a certain way. (Tr. 216:21–217:3.) Simply put, there is insufficient evidence to maintain a finding that First American violated the Act when Kern asked Anderson about the upcoming union election.

**IV. Judge Amchan’s conclusion that Kern’s statements about being a “good boss” or “bad boss” did not constitute an illegal threat was correct.**

The General Counsel again misuses the term “interrogation” to describe the brief conversation between Kern and Lily Swanson, a dietary aide, in which Kern asked Swanson if she was going to vote in the union election. (Tr. 152:20.) The evidence does not suggest that Kern’s inquiry was threatening or otherwise improper, even if Kern did imply that she wanted Swanson to vote against unionization. *See, e.g., Admiral Petroleum Corp.*, 240 NLRB at 896–97; *Gissel Packing Co.*, 395 U.S. at 618 (“Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a ‘threat of reprisal or force or

---

<sup>3</sup> Judge Amchan noted, as the General Counsel points out, that “Kern pressed Anderson about coming to work to the point that Anderson thought that Kern was threatening her job.” (Decision at 4:33–35); (CE Br. at 8.) However, Anderson did not recall what Kern had said that she found threatening. (Tr. 61:13–18.) Because Judge Amchan could not evaluate whether this statement could have reasonably been construed to be threatening, he was correct in disregarding it in concluding that Kern’s actions were not in violation of the Act. *See Smithers Tire and Automotive Testing of Texas, Inc.*, 308 NLRB 72, 72 (1992) (noting that “the test to be applied is whether a remark can reasonably be interpreted by an employee as a threat. The test is *not* the actual intent of the speaker or the actual effect on the listener.”).

promise of benefit.’’)) Furthermore, Kern testified that she never told Swanson that “having a Union was not compatible with having a good relationship with [her]” or that “voting for the Union was not compatible with [employees] having a good relationship with [her].” (Tr. 214:18–215:3.) Kern also did not, as the General Counsel avers, “warn[] Swanson” about voting in the election. (CE Br. 10.) Swanson testified only that Kern “ask[ed] [her] if [she] was going to vote.” (Tr. 152:20.) Moreover, Kern stated that she did not ask Swanson how she voted, (Tr. 212:16–17), and Judge Amchan found similarly, noting that neither Swanson nor Anderson testified that Kern “asked them how they planned to vote.” (Decision at 4:40–41.)

In any event, there is no “threat” at issue here. Kern did not, for example, tell her employees or even intimate that there would be some consequence or other reprisal if they were to vote in favor of the union. She was simply stating the idea that, if her employees thought she was doing a poor job, a union may be able to assist, but if they thought she was doing a good job, there may be no need for unionization. *See* (Tr. 214:13–17.) It is important to note, too, that many of the kitchen staff are high school students who, given their age and work experience, have likely never come across or been involved with a union election. *See* (Tr. 175:4–6; 176:1–3.) It is not surprising that Kern used a plain, straightforward explanation with them to describe whether unionization would be an advantage to them. But regardless of what terminology was used, there is no evidence that demonstrates that Kern threatened any employee

Judge Amchan, therefore, correctly concluded that there is no precedential support for the allegation that encouraging employees to vote in the union election violates the Act, and the facts do not otherwise support such a finding.

**V. Judge Amchan concluded properly that, even if Kern had asked Hafele for her assistance in requesting that Swanson vote against the union, doing so was not a violation of the Act.**

In concluding that it was not unlawful for Kern to ask Hafele to assist in convincing Swanson that unionization was not necessary, Judge Amchan correctly noted that, “[a]s a general rule, an employer does not violate the act by encouraging employees to vote against union representation, or seeking the help of employees to convince others to vote against union representation.” (Decision at 7:43–45.) In *Modern Manufacturing Company*, the Board stated that an employer’s request that an employee vote “no” “might justifiably infer that his job is dependent on how he votes” *if* the employer was also “engaged in various unlawful activities, including threats, coercive interrogations, and terminations based on employee union activities.” 261 NLRB 534, 535 (1982). Kern neither threatened nor interrogated any employee regarding the election, and no employees were terminated as a result of union activities.

In *Beverly California*, the Board found that, by interrogating an employee “concerning her union sympathies and by soliciting [the employee] to sign an antiunion petition” during a 45 to 50 minute meeting, the employer violated the Act. *Beverly California Corp.*, 326 NLRB 232, 276–277 (1998). There is no evidence here that Kern “interrogated” Hafele about her union sympathies, let alone during a lengthy meeting, and there certainly is nothing to suggest that any employee was made to sign an anti-union petition. (Tr. 212:25–213:5.) This is true even if Kern’s testimony is discredited and Hafele’s account of the events is taken as true. (Tr. 179:13–18.) Kern did, however, state that she did not have any conversations with Hafele regarding Swanson, nor did she ask Hafele to convince Swanson to vote “no” in the election. (Tr. 212:25–213:5.)

Accordingly, the General Counsel has failed to set forth any evidence or legal precedent to credibly refute Judge Amchan’s findings with respect Kern’s discussion with Hafele.

**VI. Judge Amchan’s decision that Kern’s conduct was lawful and, therefore, not a basis upon which to overturn the election, was proper.**

As set forth above, Kern’s dialogue with Hafele did not constitute an unlawful interrogation under to the Act. Judge Amchan also found correctly that Kern did not inquire as to how either Kayla Anderson, a kitchen employee, or Swanson intended to vote. (Decision at 4:40–41.) The General Counsel maintains, however, that Kern’s “unlawful conduct affected at least three of the kitchen employees—Kayla Anderson, Lily Swanson, and Carolyn Hafele—and that her coercive misconduct occurred *even on the day of the election.*” (CE Br. at 14.) The General Counsel does not articulate what conduct, specifically, it alleges is unlawful. Regardless, this statement has no foundation in the record. Anderson did not testify about any interaction that she had with Kern on the day of the election, and she stated that Kern did not tell her that she had to vote yes or no in the election. (Tr. 65:25–66:3; 211:20–24.) Swanson testified that Kern encouraged her to vote, but did not tell her that she was required to do so. (Tr. 156:12–14.)<sup>4</sup> With respect to Hafele, it is not clear from her testimony that the alleged conversation in which Kern asked Hafele to “work on Lily” took place before Hafele voted. (Again, Kern denies this conversation even took place. (Tr. 212:25 –213:8.)) Clearly, if Hafele had already voted when Kern entered the kitchen that morning, any comment Kern may have made would have no effect on Hafele’s vote. Even if Hafele had not voted at that point, Hafele testified only that Kern told her that she needed her to “help [her] work on Lily to vote no for the Union.” (Tr. 179:13–18.) Not only does the context suggest that Hafele already voted—and

---

<sup>4</sup> Swanson also stated that Kern told her that she “had to vote no if [Kern] was a good boss, so pretty much [Kern] told [her] to vote no.” (Tr. 157:19–21.) She did not, however, indicate that Kern threatened her in any way or coerced her into voting against the union. Even so, Kern denied this conversation happened, (Tr. 212:11–17), though even if it had, Kern is permitted to tell employees that she does not believe they should vote in support of unionization. *See Admiral Petroleum Corp.*, 240 NLRB at 896 (“It is clear that an employer may, in the course of a union organizing campaign, express an opinion that a union would not benefit its employees and the employer is opposed to a union.”).

voted against the union—but Kern’s alleged request had nothing to do with Hafele and was neither threatening nor coercive.

Accordingly, the General Counsel has failed to set forth sufficient evidence to support its contention that Kern engaged in unlawful conduct and that this conduct affected how employees voted in the election such that it should be overturned.

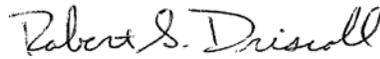
### CONCLUSION

For the foregoing reasons, First American respectfully requests that the Board reject the General Counsel’s exceptions.

Dated this 4th day of April, 2019.

Reinhart Boerner Van Deuren s.c.  
1000 North Water Street, Suite 1700  
Milwaukee, WI 53202

Mailing Address:  
P.O. Box 2965  
Milwaukee, WI 53201-2965  
Telephone: 414-298-1000  
Facsimile: 414-298-8097



---

Robert S. Driscoll  
WI State Bar ID No. 1071461  
rdriscoll@reinhartlaw.com  
Attorneys for Respondent First American  
Care Facilities, Inc.