

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

AVI FOODSYSTEMS, INC.,

Employer

-and-

Case 25-RC-259612

TEAMSTERS LOCAL UNION NO. 135,

Petitioner

PETITIONER'S POST-HEARING OBJECTIONS BRIEF

Comes now the Petitioner, Teamsters Local Union No. 135 (the "Union") and submits its Post-Hearing Objections Brief.

I. PROCEDURAL BACKGROUND

On April 24, 2020, the Union filed an RC petition seeking to be certified as the exclusive collective bargaining representative of certain employees of the Employer, AVI FOODSYSTEMS, Inc. (the "Employer"). (Bd. Ex. 1(a); CX 1).¹ Pursuant to a stipulated election agreement, a mail ballot election commenced on May 19, 2020 to determine whether the following employees wished to be represented by the Union for purposes of collective bargaining:

All full-time and regular part-time warehouse employees, vending route drivers, vending delivery/route drivers, delivery route drivers, and general floaters employed by the Employer at its Seymour, Indiana facility; BUT EXCLUDING all office clerical employees, professional employees, customer service attendants, dispatchers, sales representatives, vending install technicians, maintenance employees, mechanics, guards and supervisors as defined in the Act, and all other employees.

¹ In this Brief, "Bd. Ex." refers to Board Exhibits; "CX" refers to Employer Exhibits; "UX" refers to Union Exhibits; and "Tr." refers to the Transcript of the September 23, 2020, hearing.

(Bd. Ex. 1(a)).

The ballot count occurred on June 12, 2020. (Bd. Ex. 1(a)).² The initial tally of ballots showed 7 votes in favor of the Union and 8 votes against the Union. (*Id.*) There were 5 challenged ballots: Shawna Boas, Edward Elliott, Aaron Lucas, Jacob Mendez, and Richard Sutherland. (*Id.*)

On June 18, 2020, the Union filed 4 Objections, as follows:

1. The Employer failed to post the Notice of Petition for Election by April 29, 2020 as required. Instead, the Notice of Petition for Election was distributed electronically on May 2, 2020 at 1:22 p.m. Pursuant to 29 C.F.R. § 102.63, “the employer’s failure properly to post or distribute the Notice of Petition for Election may be grounds for setting aside the election whenever proper and timely objections are filed. ...”

2. The Employer materially altered an employee’s terms and conditions of employment by changing his job from driver to warehouse when he returned from furlough after the petition was filed.

3. At or near the time that the election was set to begin, the Employer sent a detailed letter to all bargaining unit employees informing them it had terminated a well-known Union supporter. The text of this letter, which contains inflammatory and aggressive rhetoric as well as allegations of criminal conduct, is provided in the Union’s Offer of Proof. The Employer has not sent out a similar letter in the past when it terminated employees.

4. On or about May 23, 2020, supervisor Jeff Carpenter told certain employees that if they voted for the Union, they would have to start coming in to work at 3:00 a.m., whereas employees typically start at 6:00 or 7:00 a.m.

(Bd. Ex. 1(a), Attachment A).

² The “critical period” in this case commenced on April 24, 2020, when the petition was filed. *Ideal Electric Mfg. Co.*, 134 NLRB 1275, 1278 (1961). The critical period ended on June 12, 2020, when the ballots were counted at the regional office. *See Nabors Alaska Drilling, Inc.*, 325 NLRB 574, 585 n.24 (1998). All of the evidence related to these Objections occurred between April 24, 2020 and June 12, 2020 and, therefore, all of the facts occurred during the critical period.

On July 16, 2020, the Regional Director issued a Decision on Determinative Challenged Ballots and Objections, Order Directing Hearing and Notice of Hearing. (Bd. Ex. 1(a)). In this decision and order, the Regional Director sustained the challenge of one ballot (Aaron Lucas), overruled the challenges to two ballots (Jacob Mendez and Richard Sutherland), and set the other two challenges (Shawna Boas and Edward Elliott) for a hearing. (*Id.*). The Regional Director also found that the Union's Objections 1, 3, and 4, gave rise to substantial and material issues of fact, credibility, and law bearing on the validity of the election; therefore, the Regional Director set those Objections for a hearing. (*Id.*).

After counting the ballots of the two voters whose challenges were overruled, the Regional Director issued a revised tally of ballots showing 8 votes for and 9 votes against the Union. (Bd. Ex. 1(j)).

The Regional Director and the Employer entered into an agreement resolving the challenge to the ballot of Shawna Boas by agreeing, for purposes of this election only, that the challenge to her ballot should be sustained, and that her ballot should not be counted. (Bd. Ex. 1(j), Attachment A). This rendered the lone remaining challenged ballot (Edward Elliott) non-determinative; thus, on September 18, 2020, the Regional Director issued a Supplemental Order Directing Hearing in which she directed a hearing only on the three Objections (Objections 1, 3, and 4) that remained unresolved. (*Id.*).

On September 23, 2020, Administrative Law Judge Arthur J. Amchan conducted a hearing on Objections 1, 3, and 4. At the hearing, the parties presented testimonial and documentary evidence pertaining to each of the three Objections. At the conclusion of the hearing, Judge Amchan granted the parties' request to file post-hearing briefs and directed

the parties to submit their post-hearing briefs on or before October 9, 2020. (Tr. 153-54).

II. STATEMENT OF FACTS

A. Objection 1: The Notice of Petition for Election

The first Objection protests that the Company failed to post the Notice of Petition for Election (“Notice”) as required by the Board rules and regulations, and that, instead, the Employer distributed the Notice via an email on May 2, 2020.

There is no dispute that the Employer’s Branch Manager at the Seymour, Indiana, location, Tom DePriest, was served with a copy of the RC Petition in this matter on April 24, 2020. (Tr. 60; CX 1). In addition to the petition, the Employer was also served with the “Description of Representation Case Procedures in Certification and Decertification Cases” document. (CX 1 pp. 7-10). This document states, *inter alia*,

Within 2 business days after service of the notice of hearing, the employer must post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted, and it must also distribute it electronically if the employer customarily communicates with its employees electronically.

(CX 1 p. 8).

On April 27, 2020, Mr. DePriest was served via email with the Petition, Notice, Notice of Hearing, Description of Procedures in Certification and Decertification Cases, and the Statement of Position Form and Commerce Questionnaire. (CX 2). In addition, the email included a letter, marked “Urgent,” which explained the Employer’s obligations with respect to the Petition. (CX 2 pp. 12-17). The first page of the letter states:

You must post the enclosed Notice of Petition for Election *by April 29, 2020* in *conspicuous places*, including all places where notices to employees are customarily posted.

(CX 2 p. 12) (emphasis added).

There is no dispute that the Employer did not post the Notice on April 29, 2020. (Tr. 71). However, the Employer says that it posted the Notice on April 30, 2020, and then re-posted it on May 1, 2020. (Tr. 66, 69).

There are two bulletin boards at the Seymour location, one in the office and one in the warehouse/drivers' room. (Tr. 72). Mr. DePriest testified that he posted the Notice on the bulletin board in the "office area" on April 30, 2020. (Tr. 67, 72). The Employer introduced into evidence two photographs (CX 4 and 6) of the Notice on the office area bulletin board on April 30 and May 1, 2020. (Tr. 67, 69, 112). The warehouse workers do not go into the office area. (Tr. 150). While the drivers do go into the office area, during this period the drivers were restricted from going into the office area because of COVID restrictions. (*Id.*). Driver Chris Kaufman testified, without contradiction, that "when COVID restrictions hit ... nobody but office workers and management were allowed to go into the office area." (Tr. 151).

Mr. DePriest admittedly did not post the Notice in the drivers' room. (Tr. 72). Mr. DePriest claimed that another company official, Laura Poole, posted the Notice in the drivers' area. (Tr. 72-73). Ms. Poole did not testify at the objections hearing. Molly Clark, the office supervisor, also testified that the Notice was posted in the office area. (Tr. 110). Ms. Clark also testified that the Notice was also posted in the warehouse (*id.*); however, she admitted that she does not see the warehouse bulletin board often. (Tr. 111). No photographs of the alleged posting on the warehouse/drivers' room board posting were introduced into evidence.

Voting unit employees Aaron Lucas and Edward Elliott testified that they never saw the Notice posted anywhere at the Seymour facility. (Tr. 41, 50). Elliott and Lucas both testified that they were actively looking for the Notice (Elliott up through the date of election and Lucas until he was terminated on May 14, 2020), but neither of them ever saw it posted. (Tr. 41, 50). Elliott testified that he walks by the bulletin board in the warehouse/drivers' room "several times a day" and never saw the Notice posted on it. (Tr. 41). Lucas testified that he checked the bulletin board twice every day and never saw the Notice posted on it. (Tr. 50). Kaufman testified that he never saw the Notice until one month prior to the Objections hearing (Tr. 18, 21), which was after the Objections had been filed and the Regional Director issued her decision setting the Objections for a hearing. (Bd. Ex. 1(a)).

The only way that Kaufman, Elliott, and Lucas were notified of the Notice was in an email from Jeff Wharry, the Employer's Director of Human Resources. (Tr. 18, 41, 51; UX 4). In this email, which Mr. Wharry sent to the voting unit employees on Saturday, May 2, 2020 at 1:22 p.m., Mr. Wharry explained that an election petition had been filed by the Union, and that "[b]ecause you are in one of those job titles [covered by the petition], we have elected to provide you with a copy of the attached Notice of Petition for Election." (UX 4). In the same email, Mr. Wharry stated, "We hope you conclude that we do not require an outside party to be involved in our day-to-day operation and interactions." (*Id.*).

B. Objection 3: The Aaron Lucas Letter

Aaron Lucas was a driver who was in the unit covered by the petition. (Tr. 49). He was well known to be one of the Union's most fervent and outspoken supporters. (Tr. 120).

On May 14, 2020, the Employer terminated Mr. Lucas because it alleged that he had solicited a former employee to steal the ballot of a current employee who Mr. Lucas considered to be improperly included as an eligible voter by the Employer. (Tr. 49, 115; UX 2).

On the same day that it fired Mr. Lucas, the Employer sent a detailed letter to all the employees in the voting unit. (UX 2; Tr. 119). This letter stated as follows:

Dear Valued AVI Team Member,

I hope that you are remaining healthy as this pandemic continues to interrupt our daily routines.

I would like to take a moment of your time to address the sudden and unfortunate termination of our fellow team member, Aaron Lucas. Please draw your attention to the attached images of a Facebook Messenger exchange from Wednesday, May 6, between Mr. Lucas and another individual to fully understand the grounds for our decision. It has been discovered that Mr. Lucas strongly requested an individual to intercept a family member's U.S. Postal mail from the National Labor Relations Board and steal the ballot. Furthermore, he indicates in the Facebook Messenger exchange that he wants a 100% unanimous decision. There are only two ways in which that could be achieved. Was he going to dispose of the stolen ballot? Or, was his intent to illegally vote the stolen ballot YES, forge the family member's signature and send the envelope back to the NLRB unlawfully completed? Regardless of how Mr. Lucas set out to achieve his goal, both ways were deceitful. While Mr. Lucas appears to have violated federal mail and wire fraud laws, he just as importantly corrupted the NLRB's Union Election Requirement that states the proceedings leading up to an election must be conducted under "laboratory conditions." Additionally, we strongly disagree with Mr. Lucas' assertion that the team member in question is ineligible to vote, because as a General Floater, this team member is definitely part of the unit as set forth in the petition for the election. That being said, the election process does provide for a resolution of this issue by challenging the ballot at the time of the ballot count.

Before dismissing Mr. Lucas of his responsibilities here at AVI Seymour, we confronted him with copies of the exact conversation you have attached to this communication. We then granted him an opportunity to provide an explanation. After thoroughly considering his response, we proceeded with

our decision to discharge him.

Along with the usage of inappropriate and derogatory language, Mr. Lucas not only appears to have violated federal law, but infringes upon the very foundation AVI was built: integrity, excellence, sensitivity and accountability. According to our Core Values, we describe integrity as honoring truth, fairness and honesty above all else and treating integrity as a constant and absolute. As a family, together we strive to uphold these Core Values for the prosperity of our customers as well as our team members. Therefore, when Mr. Lucas blatantly ignored the culture in which we all believe, he simultaneously ignored YOU. He alone created an extremely distasteful environment that supports cheating, immoral and illegal activity, one that AVI refuses to tolerate under any circumstances. We will not disregard or snub a person's unalienable right to freely cast a vote based on their independent opinion, and because of this, we made the difficult decision to terminate Mr. Lucas' employment with our company. Consequently, we also feel it is absolutely necessary to inform you of just how far Mr. Lucas was willing to go for his own personal gain.

Respectfully,

Tracie Mavrogianis
Vice President for Human Resources

(UX 2).

The Employer does not have a practice of sending out letters to employees when their co-workers are terminated or otherwise informing them why one of their co-workers has been terminated. (Tr. 121, 129). In fact, the author of the letter, Ms. Mavrogianis, has been with the Company in Human Resources for 24 years, and she testified that she has never sent out a letter regarding an employee's termination to his or her co-workers. (Tr. 129). Ms. Mavrogianis testified that there have "absolutely" been employees in the past who have been fired for something that could have been a violation of the law, and even in those instances she did not send out a letter to all of the employee's co-workers. (Tr. 132). The difference in this instance, Ms. Mavrogianis admitted, was that there was an organizing

campaign going on and Mr. Lucas was one of the Union's chief supporters. (Tr. 132).

According to Ms. Mavrogianis, she sent out the letter because:

I was very concerned with how the team members of the Seymour plant were going to portray his termination. ... So that was the absolute reason why I wanted to send out the letter, to make sure that our reputation wasn't tarnished, and that we did the right thing making sure that we were transparent with them, so that no one could questions what had been done.

(Tr. 116-17). In other words, Ms. Mavrogianis claimed that she wanted to make sure that the employees knew Mr. Lucas was not terminated because he was a Union supporter. (Tr. 130).

However, Ms. Mavrogianis did not put anything in the letter to assure employees of that.

(Id.).

On these employees' end, the Lucas letter sent "shockwaves" across the group of employees who were in favor of the Union. (Tr. 44). Employees were "nervous," and "very scared" that "the same thing could happen to them." (Tr. 25-26; 44, 46).

C. Objection 4: The Carpenter Threat

On Saturday, May 23, 2020, warehouse supervisor Jeff Carpenter arrived to work early at 3:30 a.m. to unload a truck. (Tr. 144-45). Four warehouse employees, Arath Caceres, Alan Caceres, Jacob Mendez, and Elliott Daniels arrived at their usual starting time of 6:00 a.m. (Tr. 144). At approximately 6:00 or 6:30 a.m., Carpenter told the group of warehouse workers that "if this passed, we would have to come in at 3:00 or 3:30 in the morning to unload the trucks, the big trucks, on a Saturday." (Tr. 29-30).

Later that day, Elliott Daniels sent a text message to Chris Kaufman stating, "Jeff told us that if the Union passes we have to come in on Saturday, 3:30 a.m. in the morning. Is this true? Please text me back and let me know." (Tr. 22). In another text message string, Union

organizer Dustin Roach recounted a conversation he had with one of the warehouse workers who told him that Mr. Carpenter said, “they’d have to start at 3am if they vote yes.” (UX 5). Elliott Daniels was on this group text, and he responded that “Jeff said that to me to today too,” and, “He scared me too.” (*Id.*). Elliott Daniels testified that he was scared because “we were going to have to start earlier than we normally start” if the group voted for the Union. (Tr. 36). The following Monday, Alan Caceres, Arath Caceres, and Jacob Mendez all approached Edward Elliott and told him what happened. (Tr. 43).

Mr. Carpenter denied that he ever told the employees that they would have to come in at 3:00 or 3:30 a.m. if the Union won the election. (Tr. 143-44). According to Mr. Carpenter, he only asked the employees whether they would be interested in driving a forklift. (Tr. 142). One of the employees, according to Mr. Carpenter, said yes, and Mr. Carpenter asked him if he would like to come in at 3:30 to “watch and observe how we do this[,] walk him through it how we take stuff off the truck.” (Tr. 143).

Mr. Carpenter also testified that when he was in management at another unionized employer, Ben Franklin, only unionized employees could operate the forklifts. (Tr. 141). He understood that it was “acceptable” to share the experiences he had in unionized facilities with the employees. (Tr. 141-42).

Mr. Carpenter testified that if someone testified that he told them they would have to come in at 3:30 a.m. if the Union vote passes, they would be lying. (Tr. 148). However, Mr. Carpenter agreed that Mr. Daniels was a long-term employee (18 years) who was dependable, loyal, and with whom he has never had an issue with lying. (*Id.*).

III. ARGUMENT

A. Standard of Review

The Board's standard for overturning an election is "whether the conduct of a party to an election has the tendency to interfere with the employees' freedom of choice" and "could well have affected the outcome of the election." *Cambridge Tool & Mfg. Co., Inc.*, 316 N.L.R.B. 716 (1995). "In making this determination the Board examines several factors: (1) the number of incidents; (2) the severity of the incidents and whether they are likely to cause fear among employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists on the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party." *Pacific Coast Sightseeing Tours & Charters, Inc.*, 365 NLRB 131, 2017 NLRB LEXIS 474, at * 57 (2017) (citing *Taylor Wharton Division*, 336 NLRB 157 (2001); *Cedars-Sinai Medical Center*, 342 NLRB 596 (2004)).

B. Objection 1 should be sustained because the evidence is undisputed that the Employer did not post the Notice on April 29, 2020 as required; and because the totality of the credible evidence shows that if the Notice was posted at all, it was posted in the office area where the employees were prohibited from entering, and the only manner in which the Employer actually distributed the Notice to the employees was in an email that contained an anti-union message.

29 C.F.R. § 102.63(a)(2) states, "The employer's failure properly to post or distribute the Notice of Petition for Election may be grounds for setting aside the election whenever

proper and timely objections are filed.”

The evidence in this case is undisputed that the Employer did not properly post the Notice. That is, it is undisputed that the Notice was not posted on April 29, 2020, as required. The Employer admits this. (Tr. 71).

What is disputed is whether the Notice was ever actually posted at all. The Union submits that the credible evidence establishes that, at most, it was posted on the office area bulletin board—and the office area bulletin board only—a day late. The office is an area in which the warehouse workers never go, and in which the drivers were prohibited from entering during the relevant period because of COVID-19 restrictions. During this period, the evidence is undisputed that the drivers were required to do their business in the office through a window and were not permitted to enter the office. Therefore, even if the Notice was posted in the office area, that is insufficient because the regulations require it to be posted in “conspicuous places.” Certainly, an area in which the voting group of employees either never enter or are restricted from entering is not a “conspicuous place.”

Three employees—Chris Kaufman, Edward Elliott, and Aaron Lucas—all credibly and unequivocally testified that the Notice was not posted on the warehouse/drivers’ room bulletin board.³ Edward Elliott was actively looking for the Notice every day up to the date of the election, and he never saw it. Aaron Lucas looked for it twice a day every day until he was fired, and he never saw it.

The Employer has presented no actual evidence to refute this overwhelming

³ Kaufman testified that the first time he saw it there was one month prior to the objections hearing, which is too late, and suggests an attempt by the Employer to cover its tracks after the Objections were filed and scheduled for a hearing.

testimony. Mr. DePriest said that Ms. Poole posted the Notice on the warehouse/drivers' room bulletin board, but her testimony was conspicuously absent from the hearing. Ms. Clark's testimony as to the warehouse/drivers' room bulletin board should be given little weight because it was vague and she admitted that, as an office employee, she would rarely see the warehouse/drivers' room bulletin board.

Furthermore, photographs of the office area bulletin board were presented into evidence. (CX 4, 6). Why were there no photographs of the Notice posted on the warehouse/drivers' room bulletin board? To ask the question is to answer it: because the Notice was not posted there.

If the failure to post the Notice was not bad enough, the way the Employer distributed the Notice to the employees is even worse. On May 2, 2020—4 days after the Notice should have been posted on the warehouse/drivers' room bulletin board—the Employer's Director of Human Resources sent the Notice to the employees in an email that included an anti-union message encouraging the employees to “conclude that we do not require an outside party to be involved in our day-to-day operation and interactions.” (UX 4).

The purpose of the notice requirement is “so that all employees are timely notified of the initiation of the election process and advised of its procedures and their rights.” 79 FR 74308, 74424 (Dec. 15, 2014). This purpose is thwarted if the Employer can fail to post the Notice and distribute it to employees late in an email which includes an anti-union message. This conveys to the employees a lack of respect for the Board's rules and interferes with their right to obtain information on the election process in an unbiased way.

Accordingly, Objection 1 should be sustained.

C. Objection 3 should be sustained because the Lucas letter was clearly inflammatory and aggressive, gratuitous, and would clearly cause fear in the mind of a reasonable employee.

There are virtually no undisputed facts regarding this Objection. The letter “says what it says.” There is no dispute that the letter was disseminated to every employee in the voting unit. There is no dispute that the Employer had never sent out such a letter before, regardless of the nature of the misconduct for which the employee was terminated.

There is a dispute, however, as to how to characterize the letter. The Union submits the letter was inflammatory, aggressive, and accused Mr. Lucas of crimes. The Company denies that the letter accused Mr. Lucas of criminal conduct. However, the letter states, “Mr. Lucas appears to have violated federal mail and wire fraud laws,” and, “Mr. Lucas not only appears to have violated federal law.” The Company points to its use of the word “appears” to deny that it accused Mr. Lucas of criminal conduct; however, this type of parsing of words is misplaced considering the focus is on how a reasonable employee would interpret the letter, not how a lawyer or a judge would. The Union submits that any reasonable employee reading this letter would interpret it as accusing Mr. Lucas of having committed crimes.

Ms. Mavrogianis admitted that she sent the letter was because there was an organizing campaign going on and Mr. Lucas was a well-known Union supporter. (Tr. 132). This admission destroys any argument the Employer may make that the letter was unrelated to the organizing campaign or Mr. Lucas’s Union support.

Ms. Mavrogianis also claimed that she sent the letter because she wanted to assure the

employees that Mr. Lucas was not fired because of his support for the Union. (Tr. 130). However, that is not credible because that assurance is not contained anywhere in the letter. In the absence of such assurance, a reasonable employee would conclude—or at least be justifiably concerned—that the same thing could happen to them if they supported the Union.

In any event, the test for objectionable conduct is an objective one; the Employer's subjective motivations are irrelevant. From an objective standpoint, any reasonable employee would have been intimidated by this letter; thus, it had the tendency to interfere with the employees' free choice, constituting objectionable conduct. In fact, the evidence demonstrates that the Lucas letter sent "shockwaves" across the voting unit employees and made them "very scared."

Accordingly, because the letter was likely to—and did—cause fear in the mind of the voting unit employees, and considering that the letter was sent to all voting unit employees and the closeness of the election, Objection 3 should be sustained.

D. Objection 4 should be sustained because the credible evidence proves that Supervisor Carpenter told the employees that if the Union won, they would be required to start work at 3:00 or 3:30 a.m. to unload trucks, and this comment constitutes a threat to impose less favorable working conditions if the Union won.

The threshold issue which must be determined in connection with this Objection is whether the comment was made. The Union submits this boils down to a credibility determination between Mr. Daniels, who testified that Mr. Carpenter told him and three other warehouse workers that they would have to start at 3:00 or 3:30 a.m. to unload the trucks if the Union won the election (Tr. 29); and Mr. Carpenter, who denies saying that (Tr.

143-44).

The Union submits that Mr. Daniels's testimony should be credited because he was very credible and specific. Mr. Daniels is a long-term, dependable, and loyal employee who has never had an issue with lying. He testified, unequivocally, that Mr. Carpenter told him and three other employees that if the Union vote passes, they would have to come in at 3:00 or 3:30 a.m. to unload the trucks. Mr. Daniels's testimony is corroborated by the contemporaneous text messages to Chris Kaufman and Union Organizer Dustin Roach telling them that Mr. Carpenter had told him that if the Union vote passes, he would have to come to work at 3:00 or 3:30 a.m. and that Mr. Carpenter's comment scared him. Mr. Daniels's testimony is also corroborated by the fact that the following Monday, Jacob Mendez, Alan Caceres, and Arath Caceres all approached Edward Elliott about Mr. Carpenter's comment. (Tr. 43). Given the sincerity and credibility of Mr. Daniels's testimony and the corroborating evidence, there is simply no basis to believe that Mr. Daniels was not telling the truth during his testimony.

On the other hand, while Mr. Carpenter denies making the comment, his testimony was not credible. He says that he only asked Jacob Mendez if he wanted to learn how to drive the forklift, and when Mendez said yes, he told him to come in at 3:30 a.m. to watch him. (Tr. 143). However, if this was true, how do you explain the text messages from employees other than Jacob Mendez that day to the contrary? Furthermore, the Employer elicited testimony from Mr. Carpenter that he had previously worked for a unionized employer where only the union employees were allowed to operate a forklift, and that he considered it permissible to "share his experiences" with the employees. (Tr. 140-42). This

testimony makes no sense if Mr. Carpenter did not make the comment.

Mr. Carpenter's comment clearly conveyed to the employees that selecting the Union would mean they would have to start coming to work at 3:00 or 3:30 a.m. to unload trucks. Threats to impose less favorable working conditions on employees if the Union wins the election are routinely held to be violative of Section 8(a)(1). *See, e.g., Hertz Corporation*, 316 NLRB 672, 686 (1995) (telling the employees that if the union wins, they will not be allowed to have coffee or a cigarette found to be unlawful); *Betha Baptist Home*, 310 NLRB 156, 159-60 (1993) (finding unlawful the comment that if the union wins, the employees will no longer get free lunches); *Aldworth Co., Inc.*, 338 NLRB 137, 205 (2002) (supervisor's comment that if the union wins he would consider employees' requests for time off less favorably constitutes an unlawful threat to impose less favorable working conditions on employees if they selected the union); *Personnel Hygiene Services, Inc.*, Nos. 1-CA-38609, 1-CA-38779, 1-CA-38797, 2001 NLRB LEXIS 737, at *68 (ALJ, 2001) (holding unlawful the employer's statement to employees that if the union won the election, the employer would revert to strict 8-hour days and the employees would lose their ability to use company vehicles).

Here, Mr. Carpenter's comment was not phrased as a possible consequence of unionization based on his prior experience in a unionized company. It was phrased as a "this is what will happen if the Union wins," making the statement unlawful. The testimony about Mr. Carpenter's prior experience in a unionized company was obviously meant to explain why Mr. Carpenter made the comment if the Judge finds the comment to have been made. However, even if Mr. Carpenter intended to make an innocent comment to share his experiences with the employees, motive is irrelevant under 8(a)(1). *Homer D. Bronson Co.*, 349

NLRB 512, 539 (2007).

While it is not necessary for conduct to violate 8(a)(1) to constitute objectionable conduct sufficient to set aside the results of an election, *see Dal-Tex Optical Co., Inc.*, 137 NLRB 1782 (1962), the Board has held that:

It is the Board's usual policy to direct a new election whenever an unfair labor practice occurs during the critical period since conduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammelled choice in an election. The only exception to this policy is where the misconduct is de minimis: such that it is virtually impossible to conclude that the election outcome has been affected.

Bon Appetit Mgmt. Co., 334 NLRB 1042, 1044 (2001). Here, the Board's usual policy rather than the exception should be applied since the unlawful comment was made to 4 employees in a unit of 24 voters, and the election was decided by 1 vote.

Accordingly, Objection 4 should be sustained.

IV. CONCLUSION

For the foregoing reasons, the Union requests that Objections be sustained, the results of the election be set aside, and a re-run election be ordered. The Union further requests that the Notice of Election for the re-run election include the *Lufkin Rule* notice.

The Lufkin Rule Co., 147 NLRB 341 (1964).

Respectfully submitted:

/s/ David T. Vlink

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CERTIFICATE OF SERVICE

I certify that I e-filed a copy of this Brief via the Board's e-filing system and that I emailed a copy of it to the following persons on 9th day of October 2020.

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