

**Family Fare d/b/a Glen's Market and Local 876,
United Food and Commercial Workers Interna-
tional Union, AFL-CIO. Case 7-RC-22118**

February 22, 2005

**DECISION AND CERTIFICATION OF
REPRESENTATIVE**

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

The National Labor Relations Board has considered objections to an election held on January 18, 2002, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows 28 votes cast for and 20 votes cast against the Petitioner, with 8 challenged ballots.¹

The Board has reviewed the record in light of the exceptions and briefs and has decided to adopt the hearing officer's findings and recommendations, to the extent consistent with the rationale set forth in this decision, and finds that a certification of representative should be issued.

I. BACKGROUND

The Petitioner sought to represent a unit of all of the Employer's clerks, cashiers, meat cutters, and department specialists at the Employer's Oscoda, Michigan grocery store, including the store's department managers. The Employer contended that the department managers are supervisors within the meaning of Section 2(11) of the Act and must be excluded from the unit. The Regional Director issued a Decision and Direction of Election on December 19, 2001,² finding that five of the seven department managers were statutory supervisors and, thus, were ineligible to vote. The Petitioner filed a request for review of this determination with the Board. On February 13, 2002, the Board issued an Order denying review but allowing the five department managers to vote under challenge.

After the election, the Employer filed timely objections, alleging that the prounion activities of Deli Manager Vicki Doran and Bakery Manager Matt Kovachevich prior to the election had interfered with employees' free choice. The hearing officer recommended overruling the Employer's objections in their entirety, finding

"no need to revisit the supervisory issue."³ Rather, he concluded that, even assuming that the department managers were statutory supervisors, their conduct was not objectionable because it was devoid of any threats of reprisal or promises of benefit.⁴

II. FACTS

The record shows that Deli Manager Doran initiated an organizing campaign at the Employer's Oscoda store in mid-October. Bakery Manager Kovachevich also participated in initiation of the union campaign. It is undisputed that the Employer was expressly opposed to the Union. Prior to and/or also during the first union meeting, which was held at Doran's house on October 19, Doran and others explained the advantages of electing the union, including higher wages and better benefits. Doran also indicated at the meeting and prior to it that the unionization of the Oscoda store might result in the elimination of the store's director, Karen Gonsler.

Also in October, Doran approached employee Gail Davis and asked her to fill out a union card. Doran gave Davis additional union cards and asked her to distribute them to other employees. Employee Doug Witkovsky also received union cards from Doran and returned signed cards to her at her request. In addition, Witkovsky testified that Doran called him at home frequently in the early phases of the drive, when he was actively involved in the campaign, to discuss the Union and urged him to join the union organizing committee. Employee Judy Howey also testified that, at some time in October, Doran called her at home to tell her about the organizing campaign and, a week or so later, came to her house to ask her to sign a union card and to explain the benefits of union representation. Neither Davis, Witkovsky, nor Howey worked in Doran's or Kovachevich's departments.

Davis testified that, at the start of the organizing campaign, Doran talked a great deal to her and others about the benefits of union representation, particularly in the employees' breakroom. Witkovsky and Produce Manager Carol Toppi also testified that Kovachevich spoke with them individually about the benefits of unionization and urged them to support the Union.

³ As a result of a stipulation between the parties, the ballots of the department managers who had voted subject to challenge proved non-determinative. See fn. 1, *supra*.

⁴ No exceptions were filed to the hearing officer's finding that it was unnecessary to revisit the Regional Director's ruling on the supervisory status of the department managers. For that reason, we do not review the finding of supervisory status here; rather, we assume the department managers' supervisory status and limit our analysis to the extent of that authority as found by the Regional Director.

¹ One of the challenges was resolved by stipulation of the parties before the hearing. Specifically, the parties stipulated that Bob Erwin was not eligible to vote and that the challenge to his ballot should be sustained. As a result, the remaining challenged ballots are not determinative, as the hearing officer found.

² All dates are 2001, unless otherwise indicated.

III. DISCUSSION

The Employer argues in its exceptions that the hearing officer erred in finding an absence of threats of reprisal or promises of benefit in the conduct of Doran and Kovachevich and also in concluding that their conduct was unobjectionable on that basis. The Employer relies on the Sixth Circuit's decision in *Harborside Healthcare Inc. v. NLRB*, 230 F.3d 206, 212 (6th Cir. 2000), which, the Employer asserts, involved conduct that does not differ significantly from the conduct at issue here.⁵

Although we agree with the Employer's argument that threats and promises are not required in order for prounion supervisory conduct to be coercive, as the Board has recently reiterated in *Harborside Healthcare, Inc.*, 343 NLRB No. 100 (2004), we nevertheless find this case to be distinguishable. Thus, one factor in *Harborside* is "the nature and degree of supervisory authority possessed by those who engage in the prounion conduct."⁶ Here, the conduct at issue was not objectionable because of the lack of evidence that Doran and Kovachevich had supervisory authority over the employees toward whom their conduct was directed. We therefore agree with the hearing officer's recommendation to overrule the Employer's objection based on supervisory taint.

⁵ In *Harborside*, the court found that the supervisor whose conduct was at issue had threatened nursing assistants in the unit with job loss, repeatedly badgered them about attending union meetings and demonstrating support for the union during the critical period, and solicited union authorization cards. The court found that the supervisor had immediate supervisory authority over nursing assistants, including authority to initiate disciplinary action and to provide input on evaluations affecting retention and pay. *Id.* at 211. The court also found supervisory authority over other employees, including the authority to recommend discipline, to direct, to assign schedules, and to recommend prospective hires.

⁶ In *Harborside*, the Board explained that whether prounion supervisory conduct upsets the laboratory conditions necessary for a fair election is determined by two factors:

(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. Slip op. at 4.

In assessing the effect of the conduct on the election, the Board may take into account the antiunion statements of higher company officials, and the extent to which they may disavow coercive prounion conduct of supervisors. *Id.* at 5, fn. 12.

The Regional Director conclusively determined that the department managers are statutory supervisors solely because they have authority to evaluate employees, and their independent assessment of an employee's progress determines how the employee will fare under the reward system.⁷ This authority extends only to the employees in each manager's department. Because we find no evidence in the record that Doran and Kovachevich directed their prounion activities toward any employee over whom they exercised their supervisory authority, we conclude that their conduct could not reasonably have coerced or interfered with employees' free choice in the election. Cf. *Harborside Healthcare, Inc.*, supra, 230 F.3d at 211–212. Accordingly, we adopt the hearing officer's recommendation to overrule the Employer's objections and to certify the petitioner's representative status.⁸

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for the United Food and Commercial Workers International Union, Local 876, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time clerks, cashiers, meat cutters, department specialists, and courtesy clerks employed by the Employer at its facility located at 5463 North Huron Road, Oscoda, Michigan; but excluding store director, assistant store directors, customer services manager, meat manager, deli manager, bakery manager, produce manager, managers in training, seasonal employees, and guards and supervisors as defined in the Act.

⁷ The Regional Director concluded that all of the department managers' other responsibilities, with the exception of the authority to discipline employees, were insufficient to establish supervisory status. As to disciplinary authority, the Regional Director concluded that his findings on evaluations made "moot" a discussion of "their authority to issue lower-level discipline." (HOR at 10 fn. 12.) No party requested review of these findings.

⁸ Although she dissented from the majority's decision in *Harborside Healthcare, Inc.*, 343 NLRB No. 100, Member Liebman concurs here in the decision to overrule the Employer's objections and to certify the Petitioner's representative status.