SNE Enterprises, Inc. *and* United Steelworkers of America, AFL–CIO–CLC. Case 9–RC–17883

May 17, 2005

ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The National Labor Relations Board has carefully considered the Employer's request for review of the Regional Director's Second Supplemental Decision and Certification of Representative (pertinent portions of which are attached as an appendix). The request for review is granted as it raises substantial issues warranting review.

On December 8, 2004, the Board issued a Supplemental Decision, Order, and Direction of Second Election in *Harborside Healthcare, Inc.*, 343 NLRB No. 100 (2004), in which the Board clarified the legal standard for determining when supervisory prounion activity is objectionable.

In light of this decision, we grant review and remand this proceeding to the Regional Director for reconsideration of the supervisors' prounion activity, including but not limited to whether their solicitation of authorization cards constitutes objectionable conduct.[1] The Regional Director may reopen the record, if necessary.

Contrary to our dissenting colleague, we find that applying the Board's decision in *Harborside* to this case is consistent with the *Harborside* ruling itself and longstanding Board practice and would not result in manifest injustice.

First, the Board has already applied the standard set forth in *Harborside* retroactively, in the *Harborside* decision itself. Indeed, the dissent in that case did not even argue the point. Our dissenting colleague now argues that the full majority did not apply the *Harborside* standard retroactively with regard to one allegation—the solicitation of cards—because one member of the three-member majority found that the supervisor at issue did not in fact solicit cards and therefore that member did not rely on that conduct in agreeing to set aside the election. However, it is clear from the decision that a majority of members did in fact apply the standard set forth in *Harborside* retroactively to the facts in that case. Had the Board majority decided in its discretion to apply the standard prospectively only, they would have analyzed the case under pre-*Harborside* principles.

Second, the Board majority's retroactive application of the Harborside standard is consistent with longstanding Board practice. The Board's usual practice is to apply new policies and standards retroactively "to all pending cases in whatever stage." See *Aramark School Services,* 337 NLRB 1063 fn. 1 (2002) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–1007 (1958)).

Under *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947), the propriety of retroactive application is determined by balancing any ill effects of retroactivity against "the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. "See also *Aramark School Services*, 337 NLRB at 1063. Pursuant to this principle, the Board has stated that it will apply an arguably new rule retroactively to the parties in the case in which the new rule is announced and to parties in other cases pending at that time so long as this does not work a "manifest injustice." See *Pattern & Model Makers Assn. of Warren,* 310 NLRB 929, 931 (1993); *Loehmann's Plaza*, 305 NLRB 663, 672 (1991), supplemented by 316 NLRB 109 (1995), review denied by *Food & Commercial Workers, Local 880 v. NLRB*, 74 F.3d 292 (D.C. Cir. 1996); see also *NLRB v. Bufco Corp.*, 899 F.2d 608, 609 (7th Cir. 1990) (citing cases), enfd. *Dunn v. Postal Service*, 960 F.2d 156 (Fed. Cir. 1992).

In determining whether the retroactive application of a Board rule will cause manifest injustice, the Board will consider the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application. See, e.g., *Pattern & Model Makers Assn. of Warren*, 310 NLRB at 931; see also *Consolidated Freightways v. NLRB*, 892 F.2d 1052, 1058 (D.C. Cir. 1989); *Retail Wholesale Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972); *NLRB v. Bufco Corp.*, 899 F.2d at 612.

A balancing of the relevant factors indicates that retroactive application of the *Harborside* standard will not work a manifest injustice in this case. First, there is no evidence that the supervisors here took pre-*Harborside* law into account before engaging in their conduct during the election campaign. Moreover, to the extent that the parties' preelection conduct did rely on pre-*Harborside* law, any prejudice they may have suffered does not rise to the level of a manifest injustice. The instant case concerns the validity of a representation election, not the resolution of an unfair labor practice or other legal liability. In this regard, our dissenting colleague's reliance on *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268

[1] In reply to our dissenting colleague, we do not remand this case "primarily" to determine whether the pre-petition solicitation of authorization cards was objectionable conduct. Rather, we remand the case to the Regional Director for reanalysis of all prounion supervisory conduct alleged in the Employer's request for review, without prejudging whether any of the conduct, alone or in context, is objectionable and warrants a new election.

F.3d 1095 (2001), enfg. in part 331 NLRB 676 (2000*),* is misplaced. In that case, the D.C. Circuit found that it would be a "manifest injustice" to find a violation and require the employer to pay damages to a nonunion employee who was fired because the employee was not permitted to have a coworker present during discussions with his supervisors. At the time of the employer's actions, nonunion employees had no such legal right. See 268 F.3d at 1102–1003. In the instant case, the Board is not finding a violation or ordering any party to pay damages or issuing any kind of order against a party. Although the election may be invalidated and subsequently re-run, no party will suffer the kind of order that concerned the court in *Epilepsy Foundation*.

Further, unlike *Epilepsy Foundation*, *Harborside*, while altering the Board's approach to one aspect of supervisory activity (card solicitations), did not otherwise represent a significant departure from a well-settled area of the law. As the Sixth Circuit noted in its remand of *Harborside* to the Board, Board law has not been consistent on the issue of when prounion supervisory conduct will warrant a new election. See *Harborside Healthcare, Inc. v. NLRB*, 230 F.3d 206 (6th Cir. 2000). Indeed, it was that inconsistency that led the Board to state in *Harborside* its legal standard for determining when supervisory prounion activity is objectionable. To be sure, this clarification of the legal standard did involve overturning certain Board precedent.[2] However, it was a part of the process of clarifying a broader area of Board law that had been inconsistent.

We recognize that setting aside a union victory in an election does represent a setback for the union. However, at bottom, it is employee free choice that is at issue, not the victory or loss of any particular party. That free choice can be undermined by supervisory conduct. In any event, a union's election loss need only be temporary. If the employees freely vote for the union in a second election, the union will have its certification.

Further, to the extent that the Union may be harmed, we believe that the statutory interest in protecting employees' Section 7 rights under the Act and assuring free and fair elections outweigh any injustice resulting from the retroactive application of the *Harborside* standard. We recognize that, should the election ultimately be set aside, the Petitioner would be required to expend further resources in a second electoral campaign and would be subjected to the possibility of ultimately losing the election. However, that harm must be balanced against the employees' interest in a free and fair election and the harm that would result from certifying the results of an election tainted by objectionable conduct interfering with that interest. As stated above, we conclude that the statutory interest in assuring a free and fair election in this case outweighs any harm suffered by the Petitioner from the retroactive application of the *Harborside* standard.

Finally, our colleague says that "countless organizing campaigns" have been conducted in reliance on pre-*Harborside* law, and "countless elections" are subject to invalidation. No data are given in support of these assertions. We do not know whether, or to what extent, supervisors have engaged in prounion activity that would have been nonobjectionable under pre-*Harborside* law and objectionable now. Pure speculation as to the number of elections invalidated retroactively under the *Harborside* standard does not warrant a departure from our normal retroactivity rule.

For these reasons, we find that retroactive application of the *Harborside* standard would not result in manifest injustice and that retroactive application of *Harborside* is appropriate, as it was in the *Harborside* case itself. Accordingly, we remand this case to the Regional Director for reanalysis in light of the Board's decision in *Harborside Healthcare*.

With regard to the Employer's contentions regarding the hearing officer's admission of Petitioner's Exhibit 2, we deny review without prejudice to the Employer's opportunity to submit additional evidence pertaining to the Employer's stance regarding the Petitioner's organizational campaign.

The Regional Director shall thereafter issue a third supplemental decision.

MEMBER LIEBMAN, dissenting.

I would not remand this proceeding for hearing. Based on my dissenting views in *Harborside Healthcare, Inc.*, 343 NLRB No. 100 (2004), the conduct engaged in by the supervisors in this case was clearly not objectionable. In addition, it would work a manifest injustice on the parties to retroactively apply the new rule set forth in *Harborside* concerning solicitation of authorization cards by prounion supervisors. Accordingly, I would affirm the Regional Director's Supplemental Decision.

The Regional Director found that the three leads whose conduct is at issue in this case were supervisors based only on their limited authority to assign and responsibly direct the work of unit employees. Only 3 of the approximately 21 lead persons engaged in any conduct which is even alleged as objectionable, in a unit of approximately 182 employees. One of the leads told an

[2] Our colleague thus correctly notes that our holding as to supervisory solicitation of cards involved a reversal of precedent. See, e.g., *Millsboro Nursing*, 327 NLRB 879 (1999). But that issue cannot be divorced from the larger issue of prounion supervisory conduct. Indeed, it is an aspect of that larger issue. And, as discussed above, that larger issue had not been consistently treated by the Board.

indeterminate number of employees that the Union would help them get better benefits, and said to three people, referring to a discharged union supporter, "if it happened to Benny, it could happen to you." Another lead told one unit employee that the employees had gone too far to stop in the organizing campaign and they needed to continue. Two of the leads told an unspecified number of employees that they were currently "at will" employees but if the Union were elected it could negotiate protection from discharge unless the Employer had good cause. Finally, two of the leads were on the union organizing committee and attended union meetings and solicited authorization cards. All of the card solicitation was before the critical period between the filing of the petition and the election, except that one lead testified that he may have solicited one card after the petition was filed. Based on credited evidence, and not even considering Petitioner's Exhibit 2, which the Employer argues was improperly admitted, it is clear that the Employer expressed its opposition to union representation for the unit employees during the campaign.

Consistent with the dissenting opinion in *Harborside*, supra, which was entirely consistent with Board law at the time, I would find none of this conduct to be objectionable. In fact, I question whether, even under the majority's *Harborside* test, any of the conduct would be objectionable aside from the solicitation of authorization cards. Thus, it appears that my colleagues are remanding this case primarily to determine whether or not the prepetition solicitation of authorization cards by two lead persons in a unit of 182 employees was objectionable conduct warranting a new election.

In our *Harborside* dissent, Member Walsh and I explained why the majority's view that solicitation of authorization cards by prounion supervisors is objectionable conduct is unwise and unworkable, particularly where that solicitation occurred prior to the critical period. The remand for consideration of that issue in this case, however, raises an additional issue that was not explicitly considered by the majority in *Harborside*. There the majority acknowledged that it was departing from settled Board law in holding that supervisory solicitation of cards will ordinarily be objectionable. See *Harborside*, supra, slip op. at 6; *Millsboro Nursing & Rehabilitation Center*, 327 NLRB 879 (1999). In *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095 (D.C. Cir. 2001), the U.S. Court of Appeals for the District of Columbia Circuit held that the Board erred in giving retroactive effect to its new rule that employees not represented by a labor organization have a right to request representation by a coworker during an investigatory interview that could lead to discipline. Id. At 1102–1103. The court held that the Board's rule had to be applied prospectively only, because it was such an abrupt departure from settled law. Id. That principle applies here.

Although the *Harborside* majority purported to apply its new rule regarding card solicitation by prounion supervisors retroactively in *Harborside,*[1] nowhere did the majority explain why it was doing so (a point my colleagues tacitly concede). Meanwhile, countless organizing campaigns have been conducted in reliance on the pre-*Harborside* law on supervisory solicitation of authorization cards. By retroactively applying the *Harborside* rule, the majority potentially subjects countless elections to unexpected invalidation because of conduct that was nonobjectionable when engaged in. That real possibility, as demonstrated by this case, seems unfair.[2]

My colleagues argue that no true reliance interest is implicated. First, they contend that *Harborside* was "not a departure from a well-settled area of the law." But *Harborside* was, indeed, just such a departure, especially with respect to supervisory card solicitation. The Board there overruled not only *Millsboro Nursing*, 327 NLRB 879 (1999), but the decisions it relied upon. There was nothing unclear or unsettled about the Board's case law on this issue, nor had the appellate courts questioned the Board's approach. Second, my colleagues argue that a union is not truly harmed by setting aside an election that it won under the prior legal standard. That claim is obviously wrong. Certification as the exclusive bargaining representative is a valuable legal interest—none is more important to unions under the Act. Stripping a union of its electoral victory, and requiring it to expend the resources to conduct another electoral campaign (and perhaps pursue related legal proceedings), is a substantial burden. In the context of a retroactivity analysis, there is no meaningful distinction between setting aside an election and imposing monetary or other legal liability.

[1] In fact, the new rule was not actually applied by the full majority in *Harborside* itself. One member of the three-member majority (Member Meisburg) did not find that the supervisor at issue in that case actually solicited any authorization cards from any unit employees she supervised, and thus he did not rely on that particular conduct in voting to set aside the election. See *Harborside*, supra, slip op. at 6 fn. 15. Thus, a majority of the Board did not in fact apply this new principle retroactively. My colleagues insist that, despite Member Meisburg's individual position, the "*standard* set forth in *Harborside*" was applied retroactively. But had supervisory card solicitation been the only issue presented, there would have been no majority to set aside the election there and no retroactivity issue.

[2] While the majority describes my concern as based on "pure speculation," experience teaches that card solicitation by borderline supervisors is not uncommon. See, e.g., *Millsboro Nursing & Rehabilitation Center, Inc*., 327 NLRB 879, 880 fn. 7 (1999), (and cases cited).

Contrary to the majority, then, I believe it would work a manifest injustice on the parties to apply this new rule to this or any other case that was pending before *Harborside* was decided and while the Board's settled rules were in effect. For this additional reason, I would affirm the Regional Director's decision, and I dissent from my colleagues' decision to remand this case.

APPENDIX

Pursuant to the provisions of a Decision and Direction of Election (the Decision) which issued on April 21, 2004, an election by secret ballot was conducted on May 20, 2004.[1] The Employer timely filed 16 objections to conduct affecting the results of the election. The Acting Regional Director issued a Supplemental Decision, Order Directing Hearing, and notice of hearing on June 15, 2004, dismissing Objections 1 and 2,[2] approving the Employer's request to withdraw Objections 11, 15, and 16, and directing a hearing to be held before a hearing officer to resolve the issues raised by the Employer's remaining objections. A hearing officer thereafter held a hearing on the issues raised by the Employer's remaining objections. The hearing officer then issued her report recommending that the remaining objections be overruled in their entirety and that an appropriate Certification of Representative be issued.

The Employer timely filed 63 exceptions to the hearing officer's finding and recommendations. In general terms, the Employer maintains that the hearing officer erred in her rendition of the testimony and evidence, in her credibility resolutions and factual findings, in her application of the appropriate facts to the law and in her conclusions and recommendations. The Employer also complains of the manner in which the hearing officer handled the admission of Petitioner's Exhibit No. 2, in general complains of what it describes as the hearing officer's bias and seeks a new hearing.

After a review of the record in light of the exceptions and the Employer's brief, and for the reasons set forth in detail below, I find that the hearing officer's conclusions and recommendations are amply supported by the record and the applicable law and that the record does not support any bias on her part. Accordingly, I affirm her findings and recommendations overruling the Employer's remaining objections, as supplemented below, and will issue an appropriate Certification of Representative.

As noted by the hearing officer, the objections generally break down as those related to, (a) supervisors' prounion activity; (b) union agents' presence in the Employer's facility without permission; (c) a union committee person advising an employee that he was ineligible to vote; (d) conversations of employees waiting to vote; (e) the union observer's wearing of a prounion T-shirt; and (f) the cumulative effect of this conduct. I will, therefore, consider the Employer's exceptions and arguments in each of these areas separately.

In my consideration of the objections and the proof available to sustain them, I am mindful that in an objections case, the burden is on the objecting party to prove its case. A Board-conducted representation election is presumed to be valid. *NLRB v. WFMT,* 997 F.2d 269 (7th Cir. 1993); *NLRB v. Service American Corp.,* 841 F.2d 191, 195 (7th Cir. 1988); *Progress Industries*, 285 NLRB 694, 700 (1987). Thus, an objecting party must demonstrate not only that the conduct occurred, but also that the conduct interfered with the free choice of employees to such a degree that it has materially affected the results of the election.

I. SUPERVISORS' PROUNION ACTIVITY

A. Background

As reflected in the decision, the Employer is engaged in the manufacture and sale of windows and doors at its Huntington, West Virginia facility. The only issue which arose with respect to the arrangements for the election in this matter concerned the issue of whether the 19 "lead persons" working at the Employer's facility should be excluded from the unit. The Employer, contrary to the Petitioner, contended that they were supervisors within the meaning of Section 2(11) of the Act. A determination was made in the decision that they were, in fact, supervisors based upon their authority to assign and direct work. There was no contention that the lead persons had any independent authority to discipline or discharge employees and, contrary to the Employer's contentions, the record failed to show that they could recommend the hire of a new employee. The record developed by the hearing officer does not affect the conclusions reached in the decision on these points.

The lead persons relevant to this proceeding are Chad Edwards, Henry Withrow, and Ruth Adkins. Prior to the date of the issuance of the decision, they assumed that they were employees in the unit who would be eligible to vote. This is not surprising sinc prior representation elections, lead persons had been allowed to vote. Once the decision issued, the plant manager held a meeting attended by the lead persons during which they were advised of the determination with respect to their status as well as given and read a printed statement concerning what they could and could not do regarding the union campaign from that day forward. The record indicates that from that point in time, the lead persons in issue ceased their activity in support of the Union. Also after the decision issued, at least Adkins was debriefed by the Employer's human resources manager, Susan Dingess, as to any approaches that she had made to employees with respect to the Union. Dingess also apparently talked to lead persons in general about their opinions concerning the Union after she learned of their status.

B. The Hearing Officer's Factual Determinations

As set forth in detail in her report, the hearing officer concluded that Edwards, Withrow, and Adkins all supported the

[1] The tally of ballots revealed that there were 182 eligible voters; 87 votes were cast for the Petitioner; 82 votes cast against the Petitioner; and 3 ballots were challenged.

[2] Included with the objections was a motion to dismiss. The Employer's Objections 1 and 2 and its motion to dismiss concerned supervisors' solicitation of authorization cards which it maintained could not be counted as part of a showing of interest. An administrative investigation of this allegation was carried out and a determination made that even discounting those authorization cards procured by individuals later determined to be supervisors, the showing of interest in the instant case remained sufficient to support the underlying petition. Objections 1 and 2 were, therefore, dismissed and the motion denied.

Union and that Withrow and Edwards had been on the organizing committee (Edwards wearing a button identifying him as a member of the committee), solicited union cards and attended union meetings. She concluded that Edwards made statements, some of which occurred during the critical period, that the Union would help them get better benefits to an indeterminate number of people; and lamented to three people, "If it happened to Benny, it could happen to any of us" (referring to the discharge of a union supporter).[3] She found that Withrow stated to Edwards and employee Al Clere that they had gone too far to stop and needed to continue. Finally she concluded that Edwards and Adkins had told an unspecified number of employees that they were currently "at will" employees but that if the Union were elected, through negotiations, they would be able to obtain protection from termination except for probable cause and would be able to have their day in court in such circumstances.

The hearing officer organized her report by summarizing the testimony of the various witnesses called by the Employer in support of the objections in this area. She then relied upon her review of the testimony, coupled with credibility resolutions, to develop a summary of the lead persons' prounion conduct. Many of the Employer's exceptions pertain to her synthesis of testimony. Due to the large number of such objections, I hesitate to specifically address them, but because I believe the demonstrable incorrectness of these exceptions highlights the Employer's general tendency in its exceptions and supporting brief to state as fact that which is not actually reflected in the record, I will do so. The witnesses are set forth below in the same order as they appear in the hearing officer's report.

Joseph Mccoy

Lead Person Joseph McCoy testified in general with respect to four union meetings he attended and one in particular. The Employer takes issue with the hearing officer's statement that McCoy did not indicate how many of the Employer's 182 employees attended the meeting and contends that his testimony indicates that "a lot of employees attended." A review of the record indicates that the hearing officer was correct in her statement that McCoy did not indicate how many employees attended. The transcript page cited by the Employer to the contrary, contains only the following as possible support for the Employer's challenge:

> Q. [W]as everybody given the opportunity to ask questions?
> A. Yes
> Q. Did a lot of people ask questions?
> A. There were a few, yes.

This certainly does not indicate that there were "a lot" of employees in attendance at the meeting as the Employer asserts.

[3] On August 23, 2004, a consolidated complaint issued in Case 9–CA–40915, et al., alleging, inter alia, that the Employer discharged employee Benny Moore on February 23, 2004, in violation of Sec. 8(a)(1) and (3) of the Act.

Alvin Clere

The Employer excepts to the hearing officer's statement that "Clere denied that Edwards promised that he would receive extra benefits for helping the Union." The Employer asserts that at least such was implied. In fact, the hearing officer acknowledged that Clere *believed* that Edwards was indicating that he might receive some reward although Edwards did not actually say so. The following appears in the record and clearly supports the hearing officer's summary of Clere's testimony on this point:

> Q. Did Chad ever indicate that you would receive extra benefits for helping out?
> A. Not so much extra benefits, but, you know, I believe there was an understanding there. I mean, if I—you know, I'd probably be rewarded for my help if I gave any. There was a give and take there.
> . . . .
> HEARING OFFICER FRY: Tell me exactly what the words were.
> THE WITNESS: He told me that in a way being a former supervisor, and I guess I have a lot of clout around. There's been a lot—I've been there eight years. There's people that's worked for me that are still there, numerous employees that are still there. He told me, he said, man, if you sided with us, we could be[at] [sic] them hands down. We'd have it locked in.
> . . . .
> Q. What was in that for you?
> A. Well, he didn't say, you know, you're going to get this, this, this and this, but it was kind of implied. I mean, you could tell by facial expressions and gestures, you know.

The Employer takes exception to the hearing officer's statement that, according to Clere, Withrow felt that "maybe the Company would come after them for getting it [the Union] started." In describing what Withrow said to him, Clere testified, "They felt maybe the Company would come after them forgetting it started." In attempting to state it in more precise terms, Clere said that it was felt that there was a worry they might "just start firing people for getting it started." Thus, the hearing officer's summation of Clere's testimony on this point is certainly reflected in the record.

Finally, with respect to Clere's testimony, the Employer excepts to the hearing officer's conclusion that "Clere testified that he knew the Employer opposed the Union." The Employer argues that all Clere testified to was that he received letters that advised him to vote his conscience and that there is no evidence that he was presented with anything indicating the Employer was against the Union. The following appears in the record on this point:

> HEARING OFFICER FRY: Were they saying, we don't care which way you won the Union or did they point out –
> THE WITNESS: Oh, no, they was definitely—they were—they wanted people to vote against the Union. I
> MR. FREE: I thought that's what I asked. BY MR. FREE:

Q. So, there wasn't any doubt in your mind that the Company's position was against the Union?

A. No doubt in my mind.

As will be dealt with later, from the material distributed by the Employer and received in the record in this matter, recipients of such would hardly have any doubt as to how the Employer wanted them to vote.

Chad Edwards

The Employer excepts to "the Hearing Officer's characterization of Chad Edwards' testimony as indicating that he told employees that Waymon Free was the Union representative and that he got answers to questions from Waymon Free." The testimony from Edwards on this point follows:

> Once we got the organizing committee we solicited the cards, we would have meetings weekly, we would let people know when they was, get the word out. People were full of questions and you would invite them to the meetings, told them who was representing us, Waymon was his name. Any questions they may have he could—if he didn't know the answer he could get it.

The hearing officer's summation of this testimony reads somewhat differently than stated by the Employer in its exceptions. To wit, "He told employees that Waymon Free was the union representative and got answers to questions from Waymon for employees who did not attend the meetings." Thus, she correctly mirrors the.somewhat ambiguous testimony of Edwards on whether Edwards told employees that he got answers from Free. Moreover, since Edwards was the Employer's witness—and from the record it would seem a nonhostile one—being questioned by the Employer at the time he made the statement, and the Employer did not seek to clarify what he meant, it hardly seems appropriate for the Employer, who has the burden of proving its case, to complain of any reasonable interpretation of Edward's testimony.

The Employer excepts to "the Hearing Officer's conclusion that Edwards never promised anything to employees." In his testimony, as the hearing officer indicates, Edwards related that he gave employees his opinion of the advantages of unionization. His testimony on this point follows:

> Q. You told them that they get the right to bargain? A. Yes.
>
> Q. Did you ever tell them that they'd get anything else?
>
> A. Everything was open on the bargaining table. I never promised anyone or any certain person nothing because I didn't have the authority to do that.

Thus, the hearing officer correctly incorporated this testimony from Edwards into her summation.

The Employer took exception to the hearing officer's conclusion that Edwards was aware of the Employer's opposition to the Union. The following testimony supports the hearing officer's finding:

> HEARING OFFICER FRY: Did the Company have an official position about the Union?
>
> THE WITNESS: Official?
>
> HEARING OFFICER FRY: Whether they were for it, against it, or whatever? THE WITNESS: Evan? [sic?]
>
> HEARING OFFICER FRY: Yes.
>
> THE WITNESS: Yes, against it.
>
> HEARING OFFICER FRY: Did they tell employees about that? THE WITNESS: Yes.

Edwards then went on to testify as to how he arrived at this conclusion from speeches given and movies shown by the Employer.

Ruth Adkins

The Employer excepts to the hearing officer's crediting of Ruth Adkins that Adkins had stated to an indeterminate number of employees that "right now, employees were 'at will' employees and with the Union they could take it and negotiate it." The Employer does not challenge that Adkins' testimony supports this conclusion, but instead believes that the hearing officer, whom it characterizes as biased and prejudiced, should not have credited her. It points to the testimony of Human Resources Manager Susan Dingess as being contrary to Adkins—this simply is not the case. Dingess testified that after it was determined that lead persons were supervisors, Dingess spoke with Adkins about what she may have said to others about the Union. Dingess learned that Adkins had "discussed with them employment at will. . . ." She further testified "[I]n my discussion with her, she had said that she had just discussed employment at will." There is no indication that Dingess was told by Adkins that Adkins told employees that this would automatically end with any selection of the Union. The Employer also points to the testimony of employee Heather Daniels as being contradictory to Adkins on this point. Daniels testified, "The only thing she said about being fired was that they couldn't fire you unless they had a good probable cause to be firing you." The Employer protests the hearing officer's crediting of Adkins on this point.

The Board's long-established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the reviewer that they are incorrect. *BFI Waste Services,* 343 NLRB No. 35 fn. 1 (2004); *Deaconess Medical Center,* 341 NLRB 589 fn. 1 (2004); *Stretch-Tex Co.,* 18 NLRB 1359, 1361 (1957). I find no basis in the instant case for concluding that the hearing officer's findings are a result of bias or that they are otherwise shown to be incorrect.

Heather Daniels

The Employer excepts to "the Hearing Officer's failure to recognize the intimidation felt by Heather Daniels when she was approached by both Chad Edwards and Ruth Adkins regarding the Union." The Employer bases this conclusion on what it characterizes as Daniels having "testified that Ruth Adkins implied that her work life would be more difficult if she crossed Adkins and did not support the Union." The Employer points to a section of the record indicating that Adkins had threatened someone else, as the hearing officer correctly notes, over a matter unrelated to the Union. Daniels testified:

HEARING OFFICER FRY: Was there any indication that she would make it harder on people that [did not] support the union?

THE WITNESS: I don't know. Just personally the one day that I was talking to her about that. Because I'm not around her every day. Just kind of every so often. So just that one day, I would say in a way she would.

In light of such tentative testimony it is hardly surprising that the hearing office did not include any definitive finding that Daniels was intimidated by Adkins, much less Edwards, neither of whom was her lead person.

The Employer excepts to the hearing officer's statement that, with respect to a conversation between Daniels and Edwards, "She did not say whether this occurred after February 20." (This date being the beginning of the critical period.) The Employer claims that the questions to Daniels were specifically limited to the "last few months." The section of the record it cites in support of this contention specifically contained the query to Daniels, "During the last few months, were you ever approached by *Ruth Adkins* regarding the union?" [Emphasis added.] The questioning that prompted testimony regarding *Edwards* began with "Were you ever approached by any other lead person?" No time limitation was indicated. Therefore the hearing officer's factual summation on this point is correct.

The Employer excepts to the hearing officer's summary of Daniels' testimony that "[w]hile she spoke about problems she had working with Adkins, who was not her lead, Daniels denied that the problems were caused because she did not agree with Adkins' Union views." On redirect Daniels was asked, since Adkins had never specifically said anything to make her fear retaliation regarding the Union, did Adkins do anything to make her afraid? Daniels related that her experiences with Adkins since Daniels had worked there brought her to this conclusion. Then Daniels gave an example of a work-related problem and indicated that Adkins had only recently begun speaking to her after that. These were the only problems with Adkins that Daniels described in her testimony. After this testimony, the following transpired:

Q. Did you think she did this because you didn't agree with her and her union views?

A. Union views? No.

Therefore, the hearing officer's summary of her testimony is correct.

In summation, the hearing officer's factual conclusions are supported by the record in this matter and I find no reason to disturb her credibility resolutions. Moreover, having carefully reviewed the entire record, I find no evidence supporting the Employer's contention that the hearing officer was biased.

C. The Hearing Officer's Legal Analysis and Conclusion

In her report, the hearing officer applied the two-pronged test utilized by the Board in evaluating whether prounion conduct is objectionable and warrants the holding of a new election. As summarized by the Board in *Terry Machine Co.,* 332 NLRB 855, 856 (2000):

> [T]he pro-union activities of statutory supervisors may constitute objectionable conduct warranting setting aside the election in two situations: (1) when the employer takes no stand contrary to the supervisors' pro-union activity, thus leading employees to believe that the employer favors the union; or (2) when the supervisors' pro-union activity coerces employees into supporting the union out of fear of retaliation by, or rewards from, the supervisors. [Footnote omitted.] *Sutter Roseville Medical Center,* 324 NLRB 218 (1997), cited with approval in *Millsboro Nursing & Rehabilitation Center,* 327 NLRB No. 153 (1999). Thus, Board and court precedent establish that an election is not per se invalid simply because there is evidence of pro-union supervisory activity, any more than an election is considered per se invalid because supervisors have campaigned *against* the union. *Evergreen Healthcare, Inc. v. NLRB,* 104 F.3d 867, 874 (6th Cir. 1997) (denying enforcement of *Evergreen Healthcare, Inc.,* 318 NLRB 200 (1995), *Wright Memorial Hospital v. NLRB,* 771 F.2d 400, 404 (8th Cir. 1985).

With respect to the first prong of the test, the hearing officer concluded that from employees' descriptions of meetings and movies shown to employees, it was clear that the Employer's opposition to the Union was made known to employees. The Employer does not contend that it was not, in fact, opposed to unionization, but asserts that what it sought to do was give employees information that they could utilize in making their own choice. As can be ascertained by anyone familiar with "campaigns," it is clear that supposed informational material directed at voters can convey a clear message that the purveyor of the "information" desires that the individuals to whom it is directed will vote a particular way. Moreover, it is clear from a review of documentary evidence appearing in the record, (which on occasion does, in fact, indicate a desire on the Employer's part that employees vote no) that this is, in fact, the sort of campaign the Employer waged which would have left no doubt in an employee's mind as to the position taken by his/her employer.[4] Indeed, one particular lengthy item given employees regarding bargaining and strikes ends with the statement, "We hope the facts help you in making your decision. We hope you will vote NO."

The hearing officer further concluded that the second prong of the test had not been met (i.e., the lead persons had made no promises beyond normal prounion electioneering concerning the benefits of unionization), and there was no evidence that they indicated that they would use their supervisory authority to reward or punish employees. Although the Employer argues in its brief that the current facts are distinguishable from certain precedent cited by the hearing officer, the lead persons' con-

[4] The Employer has raised an issue concerning the events surrounding the admission of P. Exh. 2, which is a packet of campaign material. As set forth in more detail below, I believe that these documents may properly be considered by me in this matter. I note, in any event, that in addition to the meetings and movies relied upon by the hearing officer for her conclusion that employees would have known the Employer opposed unionization, P. Exh. I clearly demonstrates that prior to the election the Employer made known to employees specifically it wanted employees to vote no.

duct in the instant case appears little different from that found in a number of other cases in which the Board determined that supervisory prounion conduct was not objectionable, including *Terry Machine,* supra, cited by the hearing officer. Thus, in *Terry Machine,* supervisors who signed and then solicited signatures from employees on showing of interest petitions; attended organizational meetings for the union; encouraged employees to attend union meetings; spoke in favor of the union at the workplace and at union meetings; distributed union literature; encouraged employees to support or vote for the union; wore and distributed union paraphernalia (buttons and T-shirts); and signed and solicited signatures on a second petition, which sought commitments from employees to vote for the union prior to the election, were found not to have engaged in coercive activity, nor did their conduct have a tendency to imply retaliation or reward.[5]

As stated in *Terry Machine,* supra, 332 NLRB at 856, and equally applicable to the instant case:

> Contrary to the Employer's contentions, we find that such activity is not coercive, nor does it have a tendency to imply retaliation or reward. As we stated in *Sutter,* supra, 324 NLRB at 219, quoting *NLRB v. San Antonio Portland Cement Co.,* 611 F.2d 1148, 1151 (5th Cir. 1980), solicitation is not objectionable where "nothing in the words, deeds, or atmosphere of a supervisor's request . . . contain[s] the seeds of potential reprisal, punishment, or intimidation." [Footnote omitted.] Similarly, "supervisory statements endorsing the union and pointing out the possible benefits of union representation . . . are not inherently coercive and are not objectionable when made without threats of retaliation or reward." [Footnote omitted.] Under these circumstances, such statements are "permissible expressions of personal opinion." *Wright Memorial Hospital,* supra, 771 F.2d at 405.

The hearing officer concluded that there was no evidence that lead persons indicated in any way that they would use their supervisory authority to reward or punish employees who did not agree with their position regarding the Union. While the two employees presented by the Employer indicated that they may have somehow thought that they might glean some benefit (Clere) or somehow suffer some negative impact (Daniels), there was nothing in the record to lend any support for the validity of this feeling. "[T]he Board applies an objective test when evaluating alleged objectionable conduct and the subjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct."' *Picoma Industries,* 296 NLRB 498, 499 (1989), quoting *Emerson Electric Co.,* 247 NLRB 1365, 1370 (1980), enfd. 649 F.2d 589 (8th Cir. 1981); *Terry Machine Co.,* supra, 332 NLRB at 857.

Although the applicable standard contemplates an examination of the deeds or words of supervision to see if they indicate some threat of retaliation or offer of benefit to employees, the indicia of authority a supervisor possesses is also a factor to be considered in evaluating whether his or her prounion activity could reasonably tend to coerce employees. *Dai-Ichi Hotel Saipan Beach,* 326 NLRB 458 (1998). In the instant case, the lead persons' supervisory status hinges only on their ability to assign and direct employees. While they on occasion may move employees from one position to another, and there may be some positions that are marginally more desirable than others, they do not have authority to move employees into higher paying jobs. Although they may have some input into whether an employee receives training which might enable an employee to move into a higher paying position, this is certainly not an ability to have any immediate impact on an employee. Thus, there appears no basis for an employee developing any expectation that agreeing or disagreeing with a lead person's position on unionization might have some great impact on the employee's work life.

While the Employer points to statements by Edwards and Withrow expressing fear that employees who supported the Union might be retaliated against by discharge, this is not, under the circumstances, objectionable conduct. *Terry Machine Co.,* supra, 332 NLRB at 856–857. There was certainly no indication that the lead persons were in a position to take such action or had any special knowledge that this would occur. Rather, they were expressing their opinion apparently based upon what allegedly happened with respect to employee Bennie Moore.

The Employer attempts to distinguish the instant case by arguing that at least Edwards and Withrow were agents of the Union due to their position on the organizing committee and their conduct associated with the committee. The Board, however, does not equate "membership" in an organizing committee as automatically conveying agency status. *Cornell Forge Co.,* 339 NLRB 733 (2003). Nevertheless, assuming for the sake of a discussion on this point that the committee members were cloaked with authority by the Union in their position as committee members to warrant concluding that they were agents, this appears to be irrelevant at least in the context of this case. Nothing was said to employees which was objectionable if said by employer agents, union agents, or dual agents.

Finally, I note that any prounion conduct on the part of the lead persons apparently ceased approximately a month before the election. The Employer claims that it had no reason to know of its lead persons' prounion conduct, but this is questionable based upon Dingess' testimony indicating that she, in fact, had discussions with at least some of them on this topic following the ruling on their status. In any event, the campaign material disseminated by the Employer in many respects countered what lead persons had indicated were the advantages of unionization.[6]

[5] See, also *FPA Medical Management*, 331 NLRB 936 (2000) (assuming physicians were supervisors, their conduct did not taint the election even though they regularly wore union buttons, confronted management in the presence of employees concerning campaign and related matters, circulated a "Message of Support" and told staff employees that they should vote for the union); *U.S. Family Care San Bernadino,* 313 NLRB 1176 (1994) (statements by three team leaders, including telling employees that benefits of having a union included better pay and benefits and job protection, and telling an employee that there were "pros to go with the union," did not constitute coercion).

[6] For example, apparently one of the arguments made by Edwards in favor unionization centered on the benefits enjoyed by employees at a

II. UNION AGENTS' PRESENCE IN THE EMPLOYER'S FACILITY WITHOUT PERMISSION

This objection concerns the presence of the union agents in the Employer's facility without specific permission on the day of the election while either traveling to the polling area or waiting to go into the polling area for the beginning of the second session of balloting. The hearing officer found nothing objectionable in such conduct. For the reasons set forth by the hearing officer, I agree.

In one of its exceptions based on this alleged conduct, the Employer takes issue with the hearing officer's statement that there was no evidence that any employees even saw the Union representatives walking unescorted. Support for this exception is based on a Union agent's testimony that she observed people working in the facility. The Employer asserts that "if they could see them, they could see the four union representatives." Admittedly this possibility exists—however, evidence that these workers ever, in fact, noticed the Union representatives is lacking. If this is a necessary element of the objection, it was the Employer's burden to establish it. I do not, however, view it as having any great import. If workers saw the union representatives and did happen to know who they were, they would, at most, have seen them walking towards the area in which the election was to take place just before the election was to be held. I fail to see how this in anyway could impact the election. The same applies to the union representatives standing in the area of the stairs leading to the election site, perhaps briefly talking with a tow motor operator and to the Union's observer.

III. UNION COMMITTEE PERSON ADVISING AN EMPLOYEE THAT HE WAS INELIGIBLE TO VOTE

For there reasons set forth in her report, I agree with the hearing officer's findings and conclusion with respect to this objection. Whatever impact committee member Edward Frye had on employee Tim McMillan (whose actual first name Frye recently learned is Leon) by initially advising him that he was not eligible to vote was mitigated by Frye further advising McMillan that he needed to go to the human resources office to check on the matter. I take administrative notice that the election records in this matter reflect that there was only one McMillan eligible to vote—Leon T. McMillan—and that he did, in fact, vote.[7] Even were I not to take such notice, it is the burden of the Employer to prove its objection, which in this case would include that Frye's action had some impact on the election. It did not in any manner attempt to prove that McMillan did not vote and there was no reason offered why it did not request any records on this point or could not have called McMillan as a witness. The Employer therefore did not prove that this Objection impacted the election.

While the Employer speculates that statements such as that made by Frye to McMillan were likely to have been made to other employees, it offers no proof whatsoever to support such speculation. Instead it relies on Board authority involving threats which can reasonably be expected to be discussed, repeated, and disseminated among employees. The instant situation does not involve a threat nor does it involve any statement which, if other employees learned of it, would in any way dissuade them from voting or influence which way they would vote.

IV. CONVERSATIONS OF EMPLOYEES WAITING TO VOTE

For the reasons set forth in her report, I agree with the hearing officer's findings and conclusion with respect to this objection. The Employer in its exceptions and supporting-brief, attempts to inflate a single instance when prospective voters began talking loudly and were admonished by the Board agent conducting the election, and a single statement regarding standing in an unemployment line or flipping hamburgers (obviously meant to be a humorous anti-union quip), to such a degree that it would justify meeting the Board's standard for third-party conduct warranting setting aside the election.

As the hearing officer correctly noted, the Board's *Milchem* rule, raised by the Employer in its exceptions and brief,[8] applies to conduct of the parties, not that of employees. See *Crestwood Convalescent Hospital,* 316 NLRB 1057 (1995). "Third-party conduct must be 'so disruptive' as to require setting aside the election." *Boston Insulated Wire & Cable Co.,* 259 NLRB 1118 fn. 11 (1982).[9] Thus, *Milchem's* scope does not encompass sustained conversations between voters. Although apparently employees waiting in line to vote in the instant case did talk among themselves, there is no prohibition on such conversations and such are not grounds for setting aside an election. See, e.g., *Masoneilan International,* 223 NLRB 965, 971 (1976); *Dumas Bros. Mfg. Co.,* 205 NLRB 919, 929 (1973). Moreover, a loud outburst in the polling area by a nonagent, even involving a partisan message, does not rise to the level of objectionable third-party conduct.[10]

unionized facility operated by the Employer. Much of the Employer's campaign literature was meant to diminish the impact of such arguments and included items such as the management-right clause pertaining to the unionized facility and the statement that the Union had caved-in and agreed to virtually all of the Employer's demands in the last round of bargaining.

[7] The Board may take administrative notice of its own files. *Lord Jim's,* 264 NLRB 1098 (1982). Moreover, the Board need not await a motion by a party to take administrative notice of its own documents. *Reno Hilton,* 319 NLRB 1154, 1157 fn. 16 (1995). See also *Piper Industries,* 212 NLRB 474, 475 (1974), where a Regional Director relied on election records which indicated the number of employees who had voted in different areas as part of his investigation of objections.

[8] See *Milchem, Inc.,* 170 NLRB 362 (1968).

[9] In its brief the Employer cites *Boston Insulated Wire & Cable Co.* for the proposition that in carrying out its duty to safeguard the election process, the Board is extremely zealous in preventing conduct which intrudes upon the actual conduct of the election. That case involved the conduct of a party. The Board also noted in that case:

> While the Board seeks to establish election conditions as ideal as possible, "elections must be appraised realistically and practically, and should not be judged against theoretically ideal, but nevertheless artificial, standards." [Footnote omitted.] A representation election is often the climax of an emotional, hard-fought campaign and it is unrealistic to expect parties or employees to refrain totally from any and all types of electioneering in the vicinity of the polls.

[10] See, e.g., *NLRB v. Hood Furniture Mfg. Co.,* 941 F.2d 325, 329 (5th Cir. 1991) (election results upheld even though union won by only single vote and one of employer's objections based on presence of two terminated employees in polling area who were cutting up and laughing

With respect to the statement regarding an unemployment line or flipping hamburgers, such attempts at levity, uttered by a nonagent, are not considered to rise to the level of objectionable conduct.[11]

V. UNION OBSERVER'S WEARING OF A PROUNION T-SHIRT

For the reasons set forth in her report, I agree with the hearing officer's findings and conclusion with respect to this objection. In essence, she concluded that the back of the nion observer's T-shirt, which contained a prounion message, was not at any time visible to a voter. I also note, as acknowledged by the Employer in its brief, that even were any voter to have noticed the back of the observer's shirt, "the mere display of partisan insignia by observers during an election without more, does not warrant setting aside an election." *VanLeer Containers v. NLRB,* 841 F.2d 779 (7th Cir. 1988). Thus, the wearing of prounion T-shirts by observers has specifically been found not to constitute the basis for a valid objection. *Queen Kapiolani Hotel,* 316 NLRB 655, 668 (1995).

Nevertheless, the Employer argues "that the cumulative effect of the Union's propaganda combined with other objectionable conduct demonstrated at the hearing is sufficient to overturn the election." The Employer claims that the observer's wearing of the T-shirt is part of this "pattern of conduct exhibited by the Union." I see no pattern of which the wearing of the T-shirt was a part. Indeed, the Employer has failed to demonstrate that the Union engaged in any even marginal improper conduct which could provide any context for elevating the simple wearing of the shirt to objectionable conduct.

VI. THE CUMULATIVE EFFECT OF THE CONDUCT

The Employer attempts to argue that the cumulative effect of the conduct described in its objections interfered with employees' right of free choice. It cites *NLRB v. Monark Boat Co.,* 713 F.2d 355, 360 (8th Cir. 1983), for the proposition "even where an incident of misconduct, not insubstantial in nature, is insufficient by itself to show that an election was not an expression of free choice, two or more such incidents, when considered together in the totality of the circumstances, may be deemed sufficient to support such a conclusion." While this is so, the Employer still bears the burden of establishing that the cumulative conduct found to have occurred interfered with the free choice of employees to such a degree that it would materially affect the results of the election. In the instant case, the Employer has failed to raise any incidents of objectionable misconduct, and has failed to establish that the conduct found to have occurred could materially effect the results of the election.

VII. EVENTS SURROUNDING THE RECEIPT OF PETITIONER'S EXHIBIT NO. 2; ALLEGATIONS OF HEARING OFFICER BIAS; AND THE EMPLOYER'S REQUEST FOR A NEW HEARING

The Employer complains of the manner in which Petitioner's Exhibit 2, a packet of Employer campaign material given to employees, was admitted into the record. The material was made an exhibit and identified on the last day of the initial hearing in this matter. The Union indicated its intent to have it admitted. The Employer challenged whether a sufficient basis had been laid.

The Union then laid a foundation for its authenticity. The documents were utilized by the Union in examining the witness who introduced them and a subsequent witness thereafter. The documents were not, however, formally received into evidence prior to the closing of the record and the Employer's departure from the hearing room. When the court reporter advised the hearing officer that the packet had not been admitted, she reopened the record and, despite the absence of the Employer, admitted the documents over the Employer's earlier objections. The Employer thereafter filed an emergency appeal of the hearing officer's admission of the exhibit. The Employer, in a subsequent motion, requested that the hearing be set aside in its entirety and rescheduled under a different hearing officer on the grounds that the hearing officer's conduct in reopening the record and admitting the exhibit and her conduct toward the Employer's witnesses during the hearing demonstrated bias that mandated a change in hearing officer. Thereafter, the Employer's motion to set aside the hearing and reschedule with a new hearing officer was denied. The appeal on the admission was sustained and an Order issued reopening the record for the limited purpose of considering the admissibility of Petitioner's Exhibit 2. At the reconvened hearing the Employer did not challenge the authenticity of the documents. A more complete background on the documents was developed and they were admitted. As part of the reconvened proceeding, the Employer called a witness to address certain aspects of the documents.

In its exceptions, the Employer renews its call for a new hearing in the instant case should a new election not be ordered. It has not, however, presented any valid reason for doing so. It claims a denial of due process because "the Employer presented a good portion of its case based on the now incorrect assumption that Petitioner's Exhibit 2 was not admitted." I note, however, the documents were not identified in the record until well after the Employer had finished its case, as part of the Union's case. In addition, the Employer has not explained how it was prejudiced since it was given full opportunity to participate in the reconvened hearing. I see no lack of due process under these circumstances.

The Employer also relies upon the argument that a record may be reopened for the receipt of evidence only if the evidence is newly discovered. As noted by the Employer in its brief, this is a requirement for evidence which could have been discovered before the proceeding had the movant seeking to introduce it exercised reasonable diligence. *Fitel/Lucent Tech-*

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and told an employee, "You know damn well the way you are supposed to vote," and told another employee the same and that they should "stick together") *Kux Mfg. Co. v. NLRB,* 890 F.2d 804, 807 (6th Cir. 1989) (employee in the polling area yelled two or three times that it was employees' last chance to change their minds and vote for the union).

[11] See *Kux Mfg. Co.,* id at pp. 807 and 810 (union supporter yelled to group of employees on their way to vote that he would pay them $50 to vote for the union would have been taken as a joke); *Masoneilan International,* 223 NLRB at 971 (momentary laughter by one or two employees in connection with a remark by one of them in the voting line about "25 paid holidays," was intended and understood as a joke, and did not interfere with employees' freedom of choice).

nologies, Inc., 326 NLRB 46 fn. 1 (1998). The instant case is distinguishable from a situation where a party due to lack of diligence fails to discover relevant evidence until after a hearing closes and must suffer the effect of its lack of efforts. In the instant case the documents were produced at the hearing, the party opponent was put on notice that they were going to be introduced, and they were actually used in the examination of witnesses.[12] The exhibit's nonadmission was admittedly overlooked by the hearing officer who sought to correct the oversight by reopening the record and admitting the document over what she perceived to be the Employer's objection. Any prejudice that resulted from this being done in the absence of the Employer was dealt with by allowing the Employer to appear at the reconvened proceeding. Therefore, no prejudicial error occurred.

The Employer claims that the hearing officer's action with respect to Petitioner Exhibit No. 2 shows bias. I fail to see it as indicating anything but her attempt to rectify an oversight.

The Employer also argues that the hearing officer's treatment of witnesses was somehow inappropriate and showed bias, and that this further adds to the need for a new hearing. The hearing officer's actions specifically pointed out by the Employer in the record appear to be no more than the hearing officer attempting to pin down what actually occurred, rather than allowing witnesses to summarize or merely offer an impression. This is certainly appropriate conduct for the trier of fact and I find no bias demonstrated by such action.

[12] See, e.g., *Glendale Associate, Ltd.,* 335 NLRB 27, 33 fn. 4 (2001) (no party sought to introduce a relevant settlement agreement at the hearing. The ALJ later decided that the document should be made an exhibit and reopened and reclosed the record to admit it.)

VII. CONCLUSION

Based on the foregoing, and having carefully reviewed the entire record, the hearing officer's report and recommendations and the exceptions and arguments made by the Employer in its brief, I adopt the hearing officer's recommended order overruling the objections and deny the Employer's request for a new hearing.

ORDER

It is hereby ordered that the Employer's objections to the election be overruled in their entirety. Accordingly, as the Petitioner has received a majority of the votes cast, I will issue an appropriate Certification of Representative.

CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that a majority of the valid ballots has been cast for United Steelworkers of America, AFL–CIO–CLC and the labor organization is certified as the exclusive collective-bargaining representative of the employees of the Employer in the following unit within the meaning of Section 9(c) of the National Labor Relations Act, as amended:

> All production and maintenance employees employed by the Employer at its 750 West 10th Avenue, Huntington, West Virginia facility, but excluding temporary employees, leased employees, sales and marketing employees, engineers, confidential employees, salaried employees, office clerical employees, and all professional employees, guards, the lead persons and all other supervisors as defined in the Act.