

**Millsboro Nursing & Rehabilitation Center, Inc. and  
United Food & Commercial Workers Union,  
Local 27, Petitioner.** Case 5–RC–14563

March 17, 1999

DECISION AND CERTIFICATION OF  
REPRESENTATIVE

BY MEMBERS LIEBMAN, HURTGEN, AND  
BRAME

The National Labor Relations Board, by a three-member panel, has considered objections to an election held December 23, 1997, 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 78 for and 53 against the Petitioner, with 1 challenged ballot, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings<sup>1</sup> and recommendations,<sup>2</sup> and finds that a certification of representative should be issued.

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<sup>1</sup> The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

In addition, some of the Employer's exceptions imply that the hearing officer's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the hearing officer's report and the entire record, we are satisfied that the Employer's contentions are without merit.

In adopting the hearing officer's recommendations to overrule the Employer's objections, we do not rely on her finding, with regard to Objection 8, that there is no evidence that any employee other than Shipley "felt" threatened by Corbin's statement. Nor do we rely on her finding, with regard to Objection 4, that employee Finney "stated her belief that" the Employer opposed the Union from the beginning. Similarly, we do not rely on the hearing officer's finding of a lack of evidence with regard to Objection 4 that Shine's statements had any impact on employees Lorraine and Rainey. Under well-established Board precedent, the Board applies an objective test to evaluate 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). Rather, in adopting the hearing officer's recommendations that Objections 4 and 8 be overruled, we rely on the absence of evidence of conduct that would reasonably tend to interfere with employee free choice in the election. *G. H Hess, Inc.*, 82 NLRB 463 fn. 3 (1949).

<sup>2</sup> The Employer has excepted to the hearing officer's ruling quashing the subpoena for production of all records and expense reports of all organizers involved in the organizing campaign at Millsboro, all documents or materials which tend to show the nature of the financial relationship between the International and the Local as to financing of the campaign at Millsboro, the identity of all UFCW organizers who took part in the organizing campaign, and an itemized breakdown of expenditures of the International in connection with the organizing campaign. The Employer seeks the documents in question primarily to support its Objection 2, alleging that the Union paid employees to attend union meetings. The hearing officer specifically found, however, that at the hearing the Employer presented "no evidence . . . to establish that the

The Employer alleges in its Objection 4 that the election proceedings were tainted by the prounion conduct of supervisors, including active support for the Union by the Employer's charge nurses.<sup>3</sup> The hearing officer in her report, pertinent portions are attached as an appendix, applied the well-established two-part test set forth in *Sutter Roseville Medical Center*,<sup>4</sup> and recommended overruling Objection 4 because (1) the Employer clearly communicated its antiunion position to employees early in the campaign, and (2) no threats or promises of benefits were made by any charge nurse. Contrary to our dissenting colleague, we agree with the hearing officer for the reasons set forth in her report and for the additional reasons set forth below.

Our dissenting colleague does not dispute that the hearing officer correctly applied precedent. However, he disagrees with that precedent and would find that supervisory solicitation of authorization cards is inherently coercive and objectionable. For the following reasons, there is no merit in the dissent's position.

The two-part test applied by the hearing officer has been firmly entrenched in Board precedent for more than a quarter of a century. *Stevenson Equipment Co.*, 174 NLRB 865 (1969). Most significantly, the Board's test has been repeatedly approved by the courts. E.g., *Napili Shores Condominium Homeowners Assn. v. NLRB*, 939 F.2d 717 (9th Cir. 1991); *NLRB v. Lake Holiday Manor*,

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Union offered or paid money to any employee for their support of the Union or for their attendance at union meetings." Thus, the record provides no basis on which we may reasonably believe that the desired documents contain evidence of improper payments. Under these circumstances, we agree with the hearing officer that the Employer's broad request for the production of records is a mere "fishing expedition" for which it is not entitled to a subpoena from the Board. See *Brink's, Inc.*, 281 NLRB 468 (1986); and *Burns International Security Services*, 278 NLRB 565 (1986).

We find no merit in the Employer's exception to the hearing officer's denial of the parties' request (made on the last day of the hearing) that Board Agent Dennis Randall be called to testify regarding the conduct of certain employees in and outside the voting room. There are important policy reasons for not involving Board employees as witnesses in Board litigation. See generally *Sunol Valley Golf Co.*, 305 NLRB 493 (1991), supplemented by 310 NLRB 357 (1993), enfd. 48 F.3d 444 (9th Cir. 1995); and *Palace Club*, 229 NLRB 1128 fn. 3 (1977), enfd. in part sub nom. *NLRB v. Silver Spur Casino*, 623 F.2d 571 (9th Cir. 1980), cert. denied 451 U.S. 906 (1981). In this case, both parties presented testimony as to whether or not there was interference with employee free choice at the polling site, and the hearing officer was able to resolve the question on the basis of her credibility resolutions. Thus, we find that there are no unusual circumstances here requiring the testimony of the Board agent. In addition, there is no indication in the record that the parties complied with Sec. 102.118 of the Board's Rules by making a written request to the General Counsel that the Board agent be allowed to testify.

<sup>3</sup> The petition, filed October 21, 1997, sought to represent all employees including registered nurses and licensed practical nurses. The Employer contended that the charge nurses were supervisors. During the preelection hearing, on November 12, 1997, the Petitioner amended its petition to exclude all nurses. There was no ruling on the supervisory status of charge nurses, but the hearing officer in her report assumed arguingo that they were supervisors.

<sup>4</sup> *Sutter Roseville Medical Center*, 324 NLRB 218 (1997).

930 F.2d 1231 (7th Cir. 1991); *NLRB v. Cal-Western Transport*, 870 F.2d 1481 (9th Cir. 1989); *NLRB v. Indiana Home Sanitation*, 803 F.2d 345 (7th Cir. 1986); *NLRB v. Hawaiian Flour Mill*, 792 F.2d 1459 (9th Cir. 1986); *Wright Memorial Hospital v. NLRB*, 771 F.2d 400 (8th Cir. 1985); *Fall River Savings Bank v. NLRB*, 649 F.2d 50 (1st Cir. 1981); *NLRB v. Manufacturer's Packaging Co.*, 645 F.2d 223 (4th Cir. 1981); and *NLRB v. San Antonio Portland Cement Co.*, 611 F.2d 1148 (5th Cir. 1980), cert. denied 449 U.S. 844 (1980). Indeed, our dissenting colleague is unable to cite a single case that rejects the Board's two-part test.<sup>5</sup>

Furthermore, the dissent concedes, as it must, that under this precedent the solicitation of authorization cards by supervisors is not objectionable where "nothing in the words, deeds, or atmosphere of a supervisor's request for authorization cards contains the seeds of potential reprisal, punishment or intimidation." *San Antonio Portland Cement*, supra at 1151, quoted in *Sutter Roseville Medical Center*, supra at 219. Accord: *Wright Memorial Hospital*, supra at 405. Here, the hearing officer correctly found that the charge nurses' card solicitations did not contain such coercive "seeds" because there is no evidence of a threat of reprisal or promise of benefit by any charge nurse. The hearing officer's finding that the charge nurses' conduct was not objectionable is further supported by *Hawaiian Flour Mill*, supra at 1464, where the court concluded that a supervisor's giving out authorization cards and telling employees to sign them "was not the kind of pressure that could reasonably tend to coerce employees in their freedom of choice." Accord: *Cal-Western Transport*, supra at 1486. ("A supervisor's signing and giving out authorization cards does not invalidate an election.") In sum, as the Fourth Circuit stated in rejecting the kind of per se rule favored by the dissent:

[W]hether pro-union supervisory activity is sufficient to overturn an election depends on the facts and circumstances of each case. The critical inquiry is whether the supervisors' pro-union activities prevented employees from freely effectuating their collective choice. . . . Employees' free choice is stifled and an election may be set aside if the supervisors' activities "contain the seeds of potential reprisal, punishment, or intimidation." [*Manufacturer's Packaging*, supra at 226 (citations omitted).]

<sup>5</sup> Member Hurtgen declares that the "Board often finds coercive the supervisory questioning of employees concerning their union support," and adds, "Asking an employee to sign a card is even more directly coercive." However, in *Rossmore House*, 269 NLRB 1176, 1177-1178 (1984), petition for review denied *sub nom. Hotel Employees Union, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), the Board renounced a per se approach to allegations of unlawful interrogation and returned to a standard requiring an evaluation of the "totality of the circumstances."

Faced with overwhelming Board and court precedent directly on point and contrary to his position, our dissenting colleague would analogize the instant case to cases involving supervisory solicitation of employees to revoke their authorization cards.<sup>6</sup> The analogy, however, is not apt. As the dissent acknowledges at the outset, in the instant case employees were aware that their employer opposed the Union. The charge nurses, on the other hand, favored the Union. Inasmuch as the positions of the Employer and the charge nurses were in conflict, there is no reason for employees to regard the pronoun activities of the charge nurses as anything more than personal expressions of opinion. See *Hawaiian Flour Mill*, supra at 1464; *Wright Memorial Hospital*, supra at 405; and *Sutter Roseville Medical Center*, supra at 219.<sup>7</sup> By contrast, in the cases cited by the dissent, both the employer and the supervisor opposed the union. Therefore, an employee solicited by a supervisor to revoke his authorization card would readily perceive the supervisor as speaking and acting on behalf of higher management. Thus, the two situations vary greatly in their coercive tendencies, and our dissenting colleague errs in treating them as if they were alike.

For all the foregoing reasons, we adopt the hearing officer's report and overrule the Employer's objections to the election.

#### CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for United Food & Commercial Workers Union, Local 27, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

<sup>6</sup> The Board has held that an "employer may lawfully inform employees of their right to revoke their authorization cards, even where employees have not solicited such information, as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance, or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation." *R. L. White Co.*, 262 NLRB 575, 576 (1982). Accord: *Gron-dorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 896 (D.C. Cir. 1997).

<sup>7</sup> The charge nurses' own early efforts to seek representation as part of a broader unit suggests that their fellow employees would not view them as supervisors and thus militates against a finding that their conduct in soliciting authorization cards was "inherently coercive." Virtually identical facts were presented in *NLRB v. Lake Holiday Manor*, supra at 1235, where the Seventh Circuit Court of Appeals stated: "[t]he fact these incidents occurred early in the organizing campaign is significant. At that time, the charge nurses were attempting to obtain union recognition for themselves. Thus, it is likely that employees would have considered Nicholas' and McElroy's actions more as the personal action of peers rather than as coercion by supervisors." Likewise, the Eighth Circuit Court of Appeals held in *Wright Memorial Hospital v. NLRB*, 771 F.2d at 405, that "[i]n evaluating the reasonable impact of the charge nurses' pro-union conduct . . . the employees' perception of the charge nurses as non-management personnel bear[s] on the question whether the employees would have reasonable apprehension that the employees' failure to support the union would result in retaliation by the charge nurses."

All full-time, part full-time, and regular part-time certified nursing assistants, laundry employees/housekeeping employees, assistant food service director, cooks, food service employees, maintenance employees, ward clerks, activities employees, receptionists, admissions coordinator employed by the Employer at its nursing home facility in Millsboro, Delaware, but excluding all other persons employed by the Employer at its nursing home in Millsboro, Delaware including all employees who are licensed and may practice in the State of Delaware as either registered nurses or licensed practical nurses, Director of Nursing, Assistant Director of Nursing, nurse supervisors, resident care coordinators, quality assurance/in-service person, infection control nurse, treatment nurse, charge nurses, MDS coordinator, office clerical employees, bookkeepers, confidential employees, temporary or casual employees, guards and supervisors as defined in the Act.

MEMBER HURTGEN, dissenting in part.

The hearing officer ruled that even if charge nurses Shine and Downing were supervisors their solicitation of cards was not objectionable under current Board law. *Sutter Roseville Medical Center*, 324 NLRB 218 (1997).

I do not agree with current Board law. In my view, supervisory solicitation of cards is coercive and objectionable, absent mitigating circumstances.

The current Board law is as follows:<sup>1</sup>

The prounion activities of statutory supervisors may constitute objectionable conduct warranting setting aside an election in two situations: (1) when the employer takes no stand contrary to the supervisors' prounion conduct, thus leading the employees to believe that the employer favors the union; or (2) when the supervisors' prounion conduct coerces employees into supporting the union out of fear of retaliation by, or rewards from, the supervisors.

I agree with my colleagues with respect to the first part of the test. In the instant case, the Employer *did* oppose unionization, and thus I agree with my colleagues that supervisory solicitation of cards could not have led employees to reasonably believe that the supervisory solicitation reflected a prounion view on the part of the Employer.

I disagree as to the second part of the test. Under that test, the supervisory solicitation is coercive only if the supervisor actually threatens retaliation for not signing the card or promises a benefit for signing the card. By contrast, I believe that supervisory solicitation is coercive, even in the absence of an explicit threat. By definition, the supervisor has control over the terms and condi-

tions of employment of employees.<sup>2</sup> That is, the supervisor, using independent judgment, can affect one or more of the matters listed in Section 2(11) of the Act, or can effectively recommend same. Indeed, the supervisor, even more than higher management, is the person who has the closest day-to-day control of the employee. Further, when a supervisor asks an employee to sign a union authorization card, the employee is asked, in a most graphic way, to openly declare himself on the issue of unionization. Similarly, if a supervisor asks an employee to withdraw a union authorization card, the employee is being asked to openly declare himself on the issue of unionization. Since the latter conduct is objectionable,<sup>3</sup> I believe that the former is objectionable as well. In both instances, the employee can reasonably believe that supervisory power (see *supra*) will be brought to bear—reprisal for the “wrong” response, favorable treatment for the “right” response. The solicitation itself, by a supervisor to a vulnerable employee, contains the “seed” of coercion. Inasmuch as supervisory solicitation for withdrawal of a union card is impermissible, I believe that supervisory solicitation for the signing of a union card is also impermissible. Indeed, the Board often finds coercive the supervisory questioning of employees concerning their union support as coercive. Asking an employee to sign a card is even more directly coercive.<sup>4</sup>

I hasten to add that supervisory “talk,” for or against the union, is not coercive. In those instances, the employee is not being “put on the spot” to declare his allegiance.

My colleagues cite several court cases which hold that supervisory solicitation of authorization cards is not objectionable conduct. However, in none of these cases does the court deal with the disparity between the Board's treatment of prounion supervisory solicitation and its treatment of antiunion supervisory solicitation. I would deal with this issue, and I would treat evenhandedly the two situations.

My colleagues unsuccessfully seek to explain their lack of even-handedness. They say that an employer can lawfully inform employees of their right to revoke authorization cards. However, they concede that the employer cannot attempt to ascertain whether the employees have in fact revoked their cards. They also concede that

<sup>2</sup> See Sec. 2(11) of the Act.

<sup>3</sup> *American Linen Supply Co.*, 297 NLRB 137, 138 (1989), *enfd.* 945 F.2d 1428, 1991 (8th Cir. 1991); *Arkansas Lighthouse for the Blind*, 284 NLRB 1214, 1220–1221 (1987), *enf. denied* 851 F.2d 180 (8th Cir. 1988); *Fugazy Continental Corp.*, 265 NLRB 1301, 1308 (1982), *enfd.* 725 F.2d 1416 (D.C. Cir. 1984); and *International Mfg. Co.*, 238 NLRB 1361 (1978). See also *NLRB v. Monroe Tube Co.*, 545 F.2d 1320, 1327 (2d Cir. 1976), *denying enf.* 220 NLRB 302 (1975).

<sup>4</sup> I agree with my colleagues that supervisory questioning of an employee concerning union support is not per se unlawful. However, the instant case involves more than the questioning of an employee. The supervisor directly asked that the employee sign a union card. In addition, as indicated above, I have acknowledged that there can be mitigating circumstances which might privilege a supervisory solicitation.

<sup>1</sup> See *Sutter*, *supra*.

the employer cannot create a situation where employees would tend to feel imperiled if they do not revoke their cards. I assume from this that my colleagues would condemn a situation where the supervisor gives the employee a revocation form and asks that it be signed. That is the analogue here, where the supervisor presented a card and asked that it be signed.

My colleagues also note that the Employer opposed the Union and they thereby infer that the supervisor was acting on her own. However, my concern is not that upper management would seek reprisal if the employee refused to sign the card. (Presumably upper management would not do so.) My concern is that the employees would believe that *the supervisor* would seek reprisal for a failure to sign, or grant favorable treatment if the employee signed. It is this fear of reprisal, or expectation of benefit, which taints the election atmosphere.

In sum, based on the above, I would remand this case. If the solicitors are supervisors, I would find their conduct objectionable, absent mitigating factors. If the conduct affected the election, I would set the election aside.

#### APPENDIX

##### HEARING OFFICER'S REPORT ON OBJECTIONS

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#### Objection 4

The election proceedings were tainted by inappropriate pronoun supervisory action and activities, including, but not limited to, active support for the Union by the Employer's charge nurses, including threats and coercion of employees by these supervisors to sign union authorization cards, threatening and coercing employees to vote yes in the election, and engaging in unlawful and objectionable interrogation and promise of benefits. Moreover, these supervisory charge nurses actively campaigned for and supported the Union, creating the impression among voting employees that the Employer, through its management representatives, supported the Union and/or that retaliation would be taken by management against employees if they did not support the Union.

Nine employer witnesses testified to issues concerning Employer's Objection 4: Deborah Bailey, Theresa Eisenhour, Tanesia Finney, June Fisher, Lisa Mears, Barbara Rainey, Deane Payne, Anna Shine, and Linda Shipley. The Petitioner presented Patrick Burgwin, Ronnie Corbin, Carol Daniels, and Doris White.

Deborah Bailey testified that around the first week in November, shortly after Halloween, Anna Shine visited her home with a union representative (later identified as John Clough). Bailey testified that "they came and wanted to talk to me. And I told them I wasn't interested and they left a paper with a meeting date for Tuesday to come to a Union meeting." During this visit she was not asked to sign a card.

Bailey further testified that on a separate occasion Shine asked her to sign a card, however, there is no evidence that Bailey signed as requested by Shine. Bailey did not testify that Shine threatened her in any way or that Shine made promises of anything that would be given in exchange. The record does not establish Shine as Bailey's charge nurse.

Theresa Eisenhour testified that Shine asked her to sign a card at the beginning of the campaign. Eisenhour did not initially sign the card, instead she took it and returned it to Shine the next day. Eisenhour did not work on Station 2, the station on which Shine was charge nurse. Eisenhour did not testify that Shine threatened her in any way, nor does her testimony establish that Shine made promises to be granted in exchange for signing the card.

Eisenhour also testified that the Employer held meetings regarding the union campaign, first saying that there were many meetings and later stating that they occurred a couple of times.

Theresa Finney testified that she was first approached by Cindy Nichols to sign a card and then twice by Shine, both times at the beginning of the campaign. There is no testimony that Shine threatened Finney or promised anything in exchange for her signature. At the time Finney was approached by Shine, she was working on Station 2 on the same shift as Shine.

Finney further testified regarding one occasion in which Shine said to her, "If I were you, I would vote yes." According to Finney this took place after she returned from an employer held meeting where employees were shown videos showing strikes, riots, fighting, vandalism, and facility closings. Finney testified that she responded to Shine by saying, "I don't think I am," and "No, I don't think so."

Finney further testified that on another occasion Shine told her and a group of CNAs, "If I were you, I would vote yes." According to Finney, Shine also said that they should think about all the things that had happened in the past. Again, Finney responded by telling Shine that she was going to vote no. No other employee testified regarding this incident.

Finally, Finney expressed her belief that from the beginning the Nursing Home was opposed to the Union.

June Fisher testified that the Employer had fliers regarding the campaign everywhere.

Lisa Mears testified that sometime in November charge nurse, Sandra Downing, asked her to sign a card. Downing explained to Mears that it was just to get to a vote and Mears agreeingly signed it. Downing was not Mears' charge nurse and Downing did not threaten Mears or make promises of benefits in exchange for her signature.

Barbara Rainey, CNA, testified that she began working at the Nursing Home on October 1, 1997, and that sometime during her first week of work Shine approached her about signing an authorization card. Shine was Rainey's charge nurse at the time. Shine told Rainey that they were getting ready to get a Union and gave her a card, saying, "Here, sign this." At that time, Rainey did not ask Shine any questions about the card because Shine did not give her time to do so. Rainey further testified that she signed a second card which was solicited by Theresa Sample. Before doing so she told Sample that she was not really interested in it but she would sign it for her sake although, "I knew what I was going to do, at the time."

The testimony of Deane Rayne, CNA, established that she had already signed a card when Shine asked if she had been approached about a union card. During the conversation Shine told Rayne that she was involved in the Union and hoped others would see why they needed a union and not let her down. Rayne identified Shine as being an LPN, although Shine was the charge nurse on Rayne's station. Over the course of the campaign Rayne signed three cards, none of them for Shine.

Anna Shine's testimony established that she obtained signed authorization cards from about 20 to 25 employees who worked

all over the Nursing Home, including 4 charge nurses who were not eligible to vote in the election. The record establishes that three of the eligible employees—Deane Rayne, Barbara Rainey, and Tanesia Finney—worked on Station 2, day shift, where Shine worked as a charge nurse. Shine testified that in soliciting signatures her requests were not accompanied by threats or promises because she did not have the authority to do either. Shine admitted that on one occasion she told an employee by the name of Lorraine, “[t]he best thing for you to do is sign a card, do it.” The record does not establish that Lorraine signed the card as requested by Shine or that Lorraine worked on Shine’s station. Shine obtained authorization cards at a union meeting because Corbin said, “Get all the cards signed that you can get signed.”

Shine stated that she may have told Rayne that she hoped everyone would understand and not let her down. She also recalled having asked Finney to vote in favor of the Union on several occasions.

Shine additionally testified that she accompanied John Clough, a union representative, on visits to the homes of Naomi Courdry, Debbie Bailey, and Barbara Rainey. These visits took place “way before the [pre-election] hearings.” The purpose of the visits, as explained by Shine, was to visit employees who had signed cards and reinforce what had been done, to make sure that what they were hearing was true, and to get them involved. During the visit to Bailey’s home, Shine stated that Clough discussed things that Bailey might want to have in the contract, such as health insurance. Shine told Bailey that she should really vote for it.

Shine asserted that her involvement with, and support for, the Union ended during the preelection hearing, at the time that she learned the Union was going to drop LPNs from its requested bargaining unit. Shine said she dropped her support “[b]ecause I didn’t like the way we got the raw deal.”

Further testimony by Shine revealed that management knew of Shine’s involvement with the Union and that prior to the hearing, management did not instruct her not to solicit signatures or support the Union.

Linda Shipley testified that she works in laundry and reports to Linda Bailey. Shipley recalled that she was approached by Shine to sign an authorization card. Shipley told Shine no, and Shine was not pushy. Shipley could not pinpoint when she was solicited by Shine.

Testifying for the Petitioner, Patrick Burgwin, International representative, UFCW International Union, stated that Shine solicited 22 cards overall, with 14 of these being from employees eligible to vote on the day of the election. He further testified that the last signature Shine obtained was on October 2.<sup>3</sup> Burgwin stated that Shine suspended all activity on behalf of the Union during the preelection hearing.

Burgwin’s testimony established that 110 employees on the *Excelsior* list signed cards after the hearing and that there were 145 eligible voters on the date of the election.

Ronnie Corbin testified that Shine was not a part of the core committee in the nursing home campaign.

Carol Daniels was called to testify by the Petitioner. Daniels testified that she could not recall when the Employer began to post and mail literature regarding the election. She did, however, testify that Petitioner’s Exhibit 10, a notice to employees

informing employees of a hearing scheduled by the Labor Board for November 6, 1997, was posted by the timeclock, after the petition was filed and before the preelection hearing. In this notice the Employer stated, “The Company’s position is quite clear and definite. We think that there is no need or desire for a Union here.”

Daniels further testified that the Employer disseminated a document entitled *Questions to Ask the Union*, by placing a stack on the receptionist’s desk where it was available to employees. The document, entered into the record as Petitioner’s Exhibit 11, lists 50 questions dealing with subjects such as strike, fines, and violence associated with UFCW International and Local 27. Although she could not recall when the stack of documents were placed on the receptionist’s desk, she stated that it was apparently after Petitioner’s Exhibit 9 was received by employees, “Because it addresses some of the guarantees, the phony guarantees.” Petitioner’s Exhibit 9, distributed to employees by mail on December 16, is a list of guarantees made by Local 27.

When questioned as to how many pieces of literature were prepared by or for the Nursing Home during the course of the campaign, Daniels was evasive. The record established that more than 16 separate documents were prepared and in some way disseminated by the Employer. Daniels’ testimony also revealed that employees were required to attend meetings where videos depicting strike violence, corruption in Local 27, arrests of members, facility closings, and other negative aspects of unionization, were shown.

Daniels also testified that she learned of Shine’s involvement with the Union in September and that she never advised Shine or other charge nurses not to engage in union activity. She also stated that she did not inform the charge nurses that the Employer felt they were supervisors.

Doris White testified that during a meeting with employees to discuss insurance, Daniels told employees that “[t]hey didn’t need a third person coming in, that we could work things out.”

#### Analysis and Recommendation

The supervisory status of charge nurses has not been decided. Assuming, arguendo, that the charge nurses are supervisors under the Act then the following standard applies: The prounion activities of statutory supervisors may constitute objectionable conduct warranting setting aside of the election in two situations: (1) when the employer takes no stand contrary to the supervisors’ prounion conduct, thus leading the employees to believe that the employer favors the union; or (2) when the supervisors’ prounion conduct coerces employees in to supporting the union out of fear of retaliation by, or rewards from, the supervisors. *Sutter Roseville Medical Center*, 324 NLRB No. 38 (1997); *Family Care San Bernadino*, 313 NLRB 1176 (1994).

In this case, the Employer clearly communicated its anti-union position to employees beginning early in the campaign. As Daniels testified a notice was posted near the timeclock stating, “[t]he Company’s position is quite clear and definite. We think that there is no need or desire for a Union here.” Throughout the campaign, the Employer continued to communicate its position to employees through the distribution of campaign literature and employee meetings. The record further shows that the message made an impression on employees. Tanesia Finney stated her belief that the Nursing Home opposed the Union basically from the beginning and testified to

<sup>3</sup> According to the Board’s Exh. 4, the last date a card was successfully solicited by Shine was October 6.

the antiunion nature of the videos shown by the Employer. June Fisher testified that the Employer had fliers regarding the campaign everywhere and although Fisher went on to state that the fliers said to vote what you feel, there were no neutral fliers of this sort introduced into the record. Theresa Eisenhower spoke of attending meetings held by the Employer to discuss the Union campaign. Finally, Doris White testified that Daniels spoke openly of the owner's opposition to a union.

Having established that the Employer took an antiunion stance and communicated its position to employees, the latter factor must be examined—did the pronion conduct of the charge nurses coerce employees into supporting the union out of fear of retaliation by, or rewards from, the charge nurses?

The Employer's objection alleges threats and coercion of employees by charge nurses to sign union authorization cards, threatening and coercing employees to vote "yes," and engaging in unlawful objectionable interrogation and promise of benefits.

There is no testimony to establish that threats or promise of benefits were made by any charge nurse. Shine admitted prodding Lorraine, telling her to sign a card, but Lorraine was not called to testify and there is no evidence to establish the effect of Shine's statement on Lorraine. There is also no evidence that Lorraine signed a card, or that Lorraine worked Shine's station. Other employees, including those who worked with Shine, clearly were not intimidated by her pronion expressions. On two occasions, Tanesra Finney responded to Shine's appeals to vote yes by stating directly to Shine that she intended to vote no. Barbara Rainey testified that she was not interested in the union and that she knew what she was going to do. Deane Rayne had signed a card before she was approached by Shine, and signed two more cards over the course of the campaign, neither of them for Shine. Linda Shipley, who did not work with Shine, testified that she said no when asked by Shine to sign a card, and that Shine was not pushy.

Sandra Downing is the only other charge nurse known to have supported the Union. Although Downing asked Lisa Mears to sign a card, Downing was not Mears' charge nurse

and Downing did not threaten Mears or make any promise of rewards. In response to questions which Mears posed, Downing simply suggested that Mears attend Union meetings.

Similarly, the evidence presented by the Employer to support its allegation of unlawful interrogation falls short. On one occasion Shine asked Rayne if she had been approached about a union card, but did not ask who approached her or if she had signed a card. There is nothing in the record to indicate that this incident differed from any other in which Shine solicited employees to sign authorization cards.

Even if Shine and Downing were supervisors under the Act, their solicitation of cards and personal expressions of support for the Union do not necessarily constitute objectionable conduct. The solicitation of authorization cards by supervisors is not objectionable where "nothing in the words, deeds, or atmosphere of a supervisor's request for authorization cards contains the seeds of potential reprisal, punishment, or intimidation." *Sutter Roseville Medical Center*, supra. "Similarly, supervisory statements endorsing the union and pointing out the possible benefits of union representation, including the possibility of better wages and benefits and protection from job loss, are not inherently coercive and are not objectionable when made without threats of retaliation or reward." *Sutter Roseville Medical Center*, supra; *Family Care San Bernadino*, supra; *Sil-Base Co.*, 290 NLRB 1179, 1181 (1988). Considering these standards, the only evidence which in any way might be construed to be objectionable were Shine's statements to Rainey—" [h]ere, sign this" and to Lorraine—" [t]he best thing for you to do is sign a card, do it." The evidence does not establish, however, that either Rainey or Lorraine was swayed in any way by Shine's statements.

Considering these circumstances, I do not find it necessary to determine the supervisory status of the charge nurses. Regardless of their status, based on the foregoing I do not find their conduct to be objectionable. Therefore, I recommend Employer's Objection 4 be overruled.