

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

SPECTRUM HEALTHCARE SERVICES, INC.  
d/b/a CORRECTIONAL MEDICAL SERVICES

Employer

and

Case 4-RC-20761

UNITED FOOD AND COMMERCIAL  
WORKERS INTERNATIONAL UNION,  
AFL-CIO, LOCAL 1358

Petitioner

**HEARING OFFICER'S REPORT ON OBJECTIONS TO ELECTION**

Pursuant to a petition filed on January 8, 2004, and a Decision and Direction of Election issued by the Regional Director on February 20, 2004, an election by secret ballot was conducted on March 18, 2004 in the units described in Section V of the Decision and Direction of Election. Because the petitioned for unit included both professional and non-professional employees, the Regional Director directed a Sonotone<sup>1</sup> election in which the professional employees in Unit A<sup>2</sup> voted whether they wished to be included in a single unit with the non-professional employees in Unit B<sup>3</sup> and, in a separate question, whether they wished to be represented by the Petitioner for the purposes of collective bargaining.<sup>4</sup>

The Tally of Ballots in Unit A showed the following results:

**VOTING UNIT "A" TALLY OF BALLOTS**

Approximate number of eligible voters.....	56
Number of Void ballots.....	2
Number of Votes cast for INCLUSION.....	30
Number of Votes cast for EXCLUSION.....	13
Number of Valid votes counted.....	43
Number of Challenged ballots.....	2
Number of Valid votes counted plus challenged ballots.....	45

Since the majority of the valid votes counted had been cast for inclusion, the Board Agent conducting the election combined the ballots from Unit A with those in Unit B and issued the following tally:

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<sup>1</sup> *Sonotone Corp.*, 90 NLRB 1236 (1956).

<sup>2</sup> Unit "A" includes all full-time, regular part-time, and per-diem Registered Nurses and Nurse Practitioners employed by the Employer at its South Woods State Prison, Bayside Prison, and Southern State Prison facilities.

<sup>3</sup> Unit "B" includes all full-time, regular part-time, and per-diem Licensed Practical Nurses, Infection Control Nurses, Discharge Planner, and Ombudsperson employed by the Employer at its South Woods State Prison, Bayside Prison, and Southern State Prison facilities.

<sup>4</sup> See *Sonotone*, supra, 90 NLRB 1236, and Section 9(b)(1) of the Act.

## VOTING UNIT "A" & "B" TALLY OF BALLOTS

Approximate number of eligible voters.....	110
Number of Void ballots.....	2
Number of Votes cast for Petitioner.....	34
Number of Votes cast against participating labor organization(s)....	56
Number of Valid votes counted.....	90
Number of Challenged ballots.....	2
Number of Valid votes counted plus challenged ballots.....	92

The challenged ballots were not sufficient in number to affect the results of the election.

On March 25, 2004, the Petitioner timely filed Objections to conduct affecting the results of the election which allege as follows:

1. The Employer improperly attempted to interfere and influence the outcome of the certification election on March 18, 2004.
2. The Employer interfered and influenced the election by improperly soliciting employee grievances after the petition was filed.
3. The Employer interfered and influenced the election by revising the performance evaluations of petitioner's witnesses at the Representation hearing and providing additional raises to those individuals.
4. The Employer interfered and influenced the election by threatening employees that they would lose everything and have to start from scratch if petitioner won the election.
5. The Employer interfered and influenced the election by permitting two RNs from Southern State to campaign against petitioner at South Woods while not permitting RNs employed at South Woods to campaign in favor of petitioner at Southern State or Bayside.
6. The Employer interfered and influenced the election by mandating that all employees report to work during the hours of the election on March 18, 2004 even if employees were not otherwise scheduled to work.
7. The Employer interfered and influenced the election by asking employees how they intended to vote in the election.
8. By these and other acts, the Employer wrongfully interfered with the election and affected the result of same by its conduct.

On April 15, 2004, the Regional Director issued a Notice of Hearing in which she found that the Objections raised substantial and material issues of fact that could best be resolved on the basis

of record testimony at a hearing.<sup>5</sup> A hearing was held before me on May 13, 2004, in Philadelphia, Pennsylvania. During the hearing, all parties were afforded an opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues, and to file a post-hearing brief. Upon the entire record, briefs and my observation of the witnesses, I find and recommend as follows:

## **OBJECTIONS 1, 5 AND 7**

### **A. FACTS**

Petitioner's Objections 1 and 7, as supplemented by "Attachment B", allege that the Employer, by two nurses from its Southern State facility, interfered with the election by asking employees how they were going to vote and threatening employees with job loss if the Union won the election. In its related Objection 5, the Petitioner alleges that the Employer interfered with the election by permitting nurses from its Southern State facility to campaign against the Union at its South Woods facility while not permitting the nurses at South Woods to campaign in favor of the Petitioner at its Southern State or Bayside facilities.<sup>6</sup>

In support of these Objections, the Petitioner presented LPNs Kim Cochran, Joanne Kimble, Elvira Maldonado and Sabrina Alexander as witnesses. Each of the witnesses impressed me as honest and truthful, and I find their testimony against their current Employer to be particularly trustworthy.<sup>7</sup> The Employer offered no witnesses or documentary evidence with respect to Objections 1, 5 and 7.

LPN Kim Cochran has been employed at the Employer's South Woods facility for approximately three years. Cochran testified that, in the afternoon on March 11, 2004<sup>8</sup>, at approximately 4:00 p.m., Assistant Administrator Shawn Baker<sup>9</sup> approached Cochran and another

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<sup>5</sup> Attached to the Notice of Hearing as "Attachment B" is a copy of Petitioner's summary of its evidence in support of its Objections that it submitted to the Regional Office during the preliminary investigation. This summary was attached to the Notice of Hearing for the purpose of more specifically detailing the matters raised by the Objections.

<sup>6</sup> The Employer's New Jersey operations are divided into two regions. The South Woods, Bayside, and Southern State facilities comprise the Employer's Southern Region. In her Decision and Direction of Election dated February 20, 2004, the Regional Director directed an election in a bargaining unit comprised of the RNs, Lens, Nurse Practitioners, Infection Control Nurses, Discharge Planner, and Ombudsperson who work at the South Woods, Bayside, and Southern State facilities.

<sup>7</sup> *Georgia Rug Mill*, 131 NLRB 1304 fn.2 (1961); *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978).

<sup>8</sup> All dates are in 2004 unless otherwise indicated.

<sup>9</sup> During the hearing the parties stipulated that David Meeker, Christine Claudio, and Shawn Baker are supervisors of the Employer within the meaning of Section 2(11) of the Act. Moreover, as to supervisory status of the foregoing and other individuals, in the Regional Director's Decision and Direction of Election referred to above in note 3, the Regional Director also made the following findings of fact. The three sites in the Southern Region are under the overall direction of Regional Administrator David Meeker. Meeker reports to a Regional Vice President for New Jersey, who is responsible for operations statewide. Meeker works four days a week at South Woods and spends half a day each at Bayside and Southern State. In conjunction with HR and the Regional Vice President, Meeker is also responsible for developing a budget for each facility, approving pay increases of more than three percent, approving all purchases over \$250, and making decisions to suspend and terminate employees.

Regional Director of Nursing Dana Baker helps oversee management of the nursing staffs at all three facilities and is responsible for providing regular in-service training of the nurses. She spends 50 percent of her time at South Woods and splits the rest of her time between Bayside and Southern State. A Regional Medical Director has

nurse named Linda Bey-Hynes. Baker was accompanied by LPN Danielle Rivera and an LPN whose first name is Marilyn, both of whom were employed at the Employer's Southern State facility. Baker asked to speak to Cochran and Bey-Hynes in the pharmacy.<sup>10</sup> Cochran testified that, after they arrived at a small room in the pharmacy, the two nurses from Southern State sat down in chairs in front of Cochran and Bey-Hynes while Baker stood behind the nurses from its Southern State facility.

According to Cochran, Rivera stated that she and the other nurse from Southern State wanted to discuss their opinions of the Union with Cochran and Bey-Hynes. Cochran testified that Rivera asked Cochran how she was going to vote. Cochran testified that she told Rivera that she was undecided at that time. Rivera stated that she worked for the Employer before, that the Union didn't help her, and told Cochran that her job would be at risk if she voted for the Union. Before Cochran left the room, Rivera asked Cochran if she had changed her mind about the Union, and also asked Cochran if she now knew what her vote was going to be. Cochran testified that she thanked the two nurses for their advice, but stated that she wanted to research the issues for herself. Cochran testified that Bey-Hynes initially told the two Southern State nurses that she was undecided. However, according to Cochran, at the end of the meeting, Bey-Hynes told them that she had changed her mind and was going to vote no for the Union.

Cochran testified that Baker was present during the entire meeting described above. According to Cochran, Baker, who was never more than a couple of feet away from her, overheard the entire conversation, but failed to disavow any of the statements made by the two nurses from the Southern State facility. Cochran testified that, during the meeting, Baker showed her literature about another hospital where the employees were represented by the Union. According to Cochran, Baker stated that, as a result of the Union, that hospital stopped hiring LPNs. Cochran testified that Baker stated that, if the Union won the election, the same thing could happen at the Employer's facility.

LPN Joanne Kimble testified that she has been employed at the Employer's South Woods facility for approximately one and ½ years. Kimble testified that she works 16-hour shifts on Mondays and Thursdays, and one 8-hour shift every other weekend. Kimble testified that, on or around March 12<sup>th</sup>, she attended a mandatory meeting called by HSA Christine Claudio. Kimble testified that the meeting occurred approximately one week after the Southern State nurses campaigned at South Woods. Kimble testified that, during the meeting, she asked HSA Claudio if she and some of the other South Woods nurses could go to the Bayside and Southern State facilities to campaign for the Union. According to Kimble, Claudio stated that the South Woods nurses would have to do it on their 15-minute breaks. It is undisputed that the South Woods facility is approximately 25 miles away from the Southern State and Bayside facilities. Kimble testified that

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duties similar to Baker with respect to physicians and Nurse Practitioners. Baker and the Regional Medical Director report to Meeker, and all three of them have offices at South Woods.

Each of the three sites has a Health Services Administrator (HSA), who is responsible for operations at that location. The HSAs report to Meeker. Each HSA is responsible, among other things, for scheduling employees, ordering supplies, developing initial staffing recommendations, imposing lower levels of employee discipline, and selecting applicants for employment. There is also an intermediate level of management at South Woods, an Associate Health Services Administrator, (AHSA) who reports to the HSA. There is no AHSA at the other two sites. At South Woods, all nurses report to the Director of Nursing (DON). At Bayside and Southern State, nurses report to Supervisors of Nursing, who have duties similar to the South Woods DON.

<sup>10</sup> LPN Kimble testified that she also observed the two nurses being escorted around the facility by Meeker.

she did not know if the Southern State nurses were on the clock while they were campaigning at South Woods, but states that they were at the South Woods facility for most of the day.

LPN Elvira Maldonado has worked for the Employer for approximately five years. Maldonado testified that she observed the two nurses from other facilities at South Woods and later learned that they were campaigning against the Union at the South Woods facility. Maldonado testified that she attended a mandatory meeting held by Regional Administrator David Meeker on or about March 2<sup>nd</sup>. According to Maldonado, when Meeker was questioned about the two nurses from Southern State being allowed to campaign at South Woods, Meeker stated that the two nurses were on their breaks. However, Maldonado was aware that the two nurses were at South Woods for more than an entire shift. This prompted Maldonado to question Meeker about why their breaks were so long. According to Maldonado, Meeker did not give her a direct response. Rather, according to Maldonado, Meeker stated that he didn't think that the Department of Corrections would allow nurses from South Woods to go to the Southern State and Bayside facilities.

In its Post Hearing Brief, the Employer asserts that "No one knew whether the nurses were paid for their time or on break time." I reject this assertion as the Employer, during the hearing, refused several requests by the Hearing Officer to produce documentation (i.e., payroll records, scheduling sheets, etc.) showing whether the subject nurses were on work time, lunch, break, or were otherwise not scheduled to work on the day in question. Indeed, as the Employer conceded that the records did exist, I advised the Employer that I would allow a recess in order for the Employer to retrieve the records, and further offered the Employer an opportunity, with the Petitioner's consent, to supplement the record with the requested documents after the close of the hearing. The Employer declined to cooperate without explanation or excuse, and produced no documentation. Therefore, I cautioned the Employer that a negative inference might result from its failure to produce the requested records.

Accordingly, I find that the two LPNs from the Southern State facility were on work time when they campaigned against the Union.

## **B. ANALYSIS**

I find that the Employer engaged in objectionable conduct by denying employees at South Woods access to its Southern State and Bayside facilities on working time while allowing anti-union employees from its Southern State facility access to its South Woods facility in order to campaign on behalf of the Employer, by soliciting employees to reject the Union, on working time.

The evidence shows that the two nurses from Southern State were escorted throughout the working areas of the facility by two of the Employer's top management officials, Meeker and Shawn Baker, and that Baker remained present when the two nurses solicited employees to reject the Union and threatened employees with job loss. Baker did not disavow the statements made by those nurses. In fact, the record shows that, during one such meeting with employees, Baker reinforced the statements made by the Southern State nurses by threatening employees that the LPNs would lose their jobs if the Union got in. Under the circumstances described above, the Southern State nurses' interrogations and threats were just as coercive as if they had come from the Baker's own mouth. Accordingly, I find that the agency status of the Southern State nurses has been established by, inter alia, evidence they were escorted around the facility, introduced to the

employees by top management officials, and the uncontroverted testimony that the two nurses threatened employees with job loss and solicited employees to reject the Union in Baker's presence without Baker's disavowal. See, *Transportation Repair & Service, Inc.*, 328 NLRB 107, 112-113 (1999); *Southern Pride Catfish*, 331 NLRB 618, 619 (2000); *Domsey Trading Corp.*, 310 NLRB 777, 801 (1993).

The Employer failed to call Meeker, Baker, or either of the two nurses from the Southern State facility as witnesses. Accordingly, the conduct attributed to them remains uncontradicted and I conclude that when asking employees how they were going to vote and threatening employees with job loss if the Union won the election,<sup>11</sup> the two Southern State nurses were acting as agents of the Employer.

Accordingly, I find that Petitioner's Objections 1, 5 and 7 have merit.

## **OBJECTION 2**

In Objection 2, the Petitioner alleges that the Employer interfered and influenced the election by improperly soliciting employee grievances after the petition was filed. Specifically, the Petitioner asserts that Employer Recruiter Catherine Wright solicited employee grievances.

In support of this Objection, RN Nancy Gottwald testified that, one day, in or around February 2004, Shawn Baker introduced Gottwald to Recruiter Catherine Wright. According to Gottwald, Wright asked her how things were going and if Gottwald had any ideas on how the Employer could recruit new nurses to seek employment in this facility. Gottwald testified that she made a few suggestions, including suggesting that the Employer treat its employees like human beings. Gottwald testified that Wright stated that she agreed that employees should be treated like human beings. Gottwald's testimony revealed that Wright did not question her about specific problems at the facility, did not mention the Union, and did not agree to look into or otherwise remedy Gottwald's concerns. Based on the foregoing, I find that the evidence is insufficient to establish that the Employer's recruiter solicited Gottwald's grievances or impliedly promised to remedy the same.

Accordingly, I find that Petitioner's Objection 2 lacks merit.<sup>12</sup>

## **OBJECTION 3**

### **A. FACTS**

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<sup>11</sup> The Board does not lightly regard serious threats, even those made to just one employee, as isolated. Rather, the Board, relying on past experience, presumes such threats are the subject of discussion and repetition among the electorate. *Coach and Equipment Sales Corp.*, 228 NLRB 440 (1977); *General Stencils, Inc.*, 195 NLRB 1109 (1972).

<sup>12</sup> The Employer produced Recruiter Lynne Davis who testified that it was she, not Wright, who visited the South Woods facility and engaged in a conversation with Gottwald. However, in view of my finding that the Objection lacks merit, it is not necessary to resolve the dispute concerning the identity of the recruiter involved.

Objection 3 alleges that the Employer interfered and influenced the election by revising the performance evaluations of Petitioner's witnesses who attended the representation hearing and providing additional raises to these individuals.

Nancy Gottwald is employed as a RN at the Employer's South Woods facility. Gottwald began working for the Employer in 1998 and testified that prior to her 2004 evaluation, she had received good evaluations and a three percent raise each year. However, Gottwald testified that she received a performance evaluation in or around January 2004 that resulted in her receiving a raise of only two and ½ percent. Gottwald testified that, thereafter, on January 20, 2004, she was present at the National Labor Relations Board when the Employer's Regional Administrator David Meeker testified during the initial representation hearing in the instant matter. According to Gottwald, Meeker testified that employees received annual raises of up to three percent, but that an employee could receive a raise of up to five percent with Meeker's approval. Gottwald testified that, just after Meeker testified, she approached Meeker and complained that she had just received a raise of two and ½ percent, but that she thought she should have received a larger raise based on her job performance. According to Gottwald, Meeker told her that he would review her evaluation and get back to her. Gottwald testified that employees Diane Fermento and Kevin Frank were present during her conversation with Meeker.

According to Gottwald, approximately one week later, Meeker approached Gottwald with her evaluation and instructed Gottwald to review each part of the evaluation and make written comments explaining why she deserved a larger raise. Gottwald did as instructed by Meeker, and testified that, approximately three to four days later, she was called into HSA Christine Claudio's office. According to Gottwald, Claudio reevaluated Gottwald, gave Gottwald a higher performance score, and told Gottwald that she would receive an additional ½ percent raise.

RN Kevin Frank testified that he received a stellar evaluation in November 2003, but complained to Regional Director of Nurses Dana Baker because he only received a 2 and ½ percent wage increase. Frank testified that Baker stated that the Employer was only allowing raises of up to three percent that year and that, in order for an employee to receive the entire three percent raise, HSA Claudio's approval was required. Frank testified that he advised Claudio that he was not happy with his pay increase and requested that Claudio review his evaluation. According to Frank, Claudio agreed to get back to him, but failed to do so.

Similar to Gottwald, Frank testified that he approached Meeker just after Meeker testified at the representation hearing at the Board on January 20, 2004. Frank testified that, during his discussion with Meeker, Frank questioned the fairness in his receiving a stellar evaluation, yet receiving the identical raise as another employee who had disciplinary problems and was ultimately discharged. According to Frank, Meeker stated that the Employer was working on trying to correct problems with the performance evaluations. Frank testified that Meeker agreed to personally review Frank's evaluation and get back to him.

According to Frank, approximately one month after the foregoing conversation with Meeker, Meeker approached Frank at the facility, slapped Frank on the back and stated that Frank deserved a larger pay increase. Meeker told Frank that he was increasing Frank's raise to three percent. Frank testified that, after the representation hearing on January 20<sup>th</sup>, Meeker approached Frank once every week or so up until the time of the election to ask Frank if he had any concerns or issues. Neither Gottwald nor Frank was aware of any prior instance where employees received revised evaluations.

## B. ANALYSIS

In *ARA Food Services*, 285 NLRB 221, 222 (1987), the Board stated the “well-established principle”:

[W]hen a benefit is granted during the critical period before an election, the burden of showing that the timing was governed by factors other than the pendency of the election is on the party who granted the benefit. The logic behind this legal principle is clear: only the party granting the benefit can explain why it chose to do so. An employer meets that burden if it presents evidence which establishes justification for its action.

In *Exchange Parts Company*, 375 U.S. 405 (1964), the Supreme Court described the potential evil of the use of grants of wage increases and other benefits during an organizing campaign:

The danger inherent in well-timed increases in benefits is the suggestion of a fist inside a velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

Prior to the time of the Union's petition, Respondent had a well-established practice of annually evaluating the job performance of its employees, and, based on that evaluation, granting merit wage increases. The record indicates, and it is undisputed that the HSA at each facility is empowered to grant annual wage increases of up to three percent for each employee but must seek approval from the Regional Administrator in order to provide a pay increase greater than that amount.

RNs Gottwald and Frank testified that, as a result of their performance evaluations, in January 2004 and, late November or early December 2003 respectively, they each received a raise of 2 and ½ percent. However, Gottwald testified that, her evaluations for the prior four years resulted in her receiving a three percent raise. Frank testified, when he complained to Regional DON Dana Baker about the amount of his raise, Baker told Frank that the Employer was only allowing raises of up to three percent and that, in order for employees to receive the entire three percent, HSA Claudio's approval was required. However, Frank credibly testified that, when he requested that Claudio review his evaluation, Claudio agreed to get back to Frank, but failed to do so.

Gottwald and Frank testified that, during the initial representation hearing in this matter on January 20, 2004, Meeker testified that he had authority to grant raises of up to five percent, they complained to Meeker about having received 2 and ½ percent raises, and Meeker agreed to review their evaluations and get back to them. A week later, Gottwald's evaluation was revised and she was granted a 3 percent raise. Approximately one month after the hearing, Meeker approached Frank, slapped him on the back, stated that Frank deserved a larger pay increase, and told Frank that he would receive a 3 percent wage increase.

In the instant case, at first glance, it appears that the Employer's granting larger raises to employees after they attended the representation hearing on behalf of the Petitioner is a classic example of a "fist inside a velvet glove." However, the Employer did not initially grant Gottwald or Frank less than 3 percent raises because of the foregoing as the representation hearing was held after the Employer set their initial raises. In Frank's case, the Employer set his initial raise outside of the critical period – in November 2003, before the filing of the petition on January 8, 2004.

Although the Employer failed to produce Meeker or any other witness to offer a justification for revising employees evaluations and granting employees larger raises, the record shows that the timing of Employer's conduct was based on factors other than the pendency of the election. Indeed, I find that the Employer's revising Gottwald and Frank's evaluations and granting them larger raises was based on their having asked Meeker to do so. Accordingly, I cannot find that the Employer's conduct to be objectionable.<sup>13</sup>

## **OBJECTION 4**

### **A. FACTS**

Objection 4 alleges that the Employer interfered and influenced the election by threatening employees that they would lose everything and have to start from scratch if Petitioner won the election.

LPN Maldonado testified that, during the mandatory meeting with Regional Administrator Meeker in the Emergency Care Unit (ECU) on or about March 2<sup>nd</sup>, where approximately ten nurses were present, Meeker stated that, if the employees selected the Union, the Employer would take away the benefits they currently had. According to Maldonado, Meeker told employees that the parties were "going to start from scratch." On cross-examination, Maldonado testified that, during the meeting, Meeker also stated that benefits could go up during negotiations, but consistently testified that Meeker told employees that their wages would be cut. Maldonado testified that Dianne Fermento and Sabrina Alexander were present during this meeting. According to Maldonado, Meeker was the only manager who attended this meeting and this was not the same meeting where employee Paula Payton walked out.

LPN Sabrina Alexander testified that she attended the same mandatory meeting with Meeker in the ECU on March 2<sup>nd</sup>. According to Alexander, Meeker told employees that, if they voted the Union in, they could probably negotiate better benefits, but that employees' wage rates would decrease. Alexander also testified that, Meeker stated that, if the Union got in, they would start from scratch and that employees could lose everything they had at that time. Alexander testified that this was the same meeting where employees questioned Meeker about the two Southern State nurses who campaigned against the Union at South Woods.

Again, I note that the Employer failed to call Meeker as a witness. Accordingly, Meeker did not deny making the statements attributed to him by Maldonado and Alexander. As Meeker may

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<sup>13</sup> The record is remarkably sparse given the Petitioner's contention. There are approximately 110 employees in this unit, yet the record reveals that the revised evaluations and subject wage increases were given to only two of these employees. This too, is another basis for overruling Petitioner's Objection 3.

reasonably be assumed to be favorably disposed to the Employer, and the Employer made no claim that Meeker was no longer a Supervisor or otherwise unavailable, I draw an adverse inference regarding all the factual issues on which Meeker is likely to have knowledge. See, i.e., *International Automated Machines*, 285 NLRB 1122 (1987).

Instead of calling Meeker as a witness, the Employer presented Discharge Planner Sheila Reineck who voted in the election and served as the Employer's observer at the South Woods polls. Reineck testified that she attended three meetings about the Union. On direct-examination, Reineck testified that she attended the same meeting as Maldonado and Alexander on March 2<sup>nd</sup>, but denied that Meeker made the statements attributed to him by Maldonado and Alexander. Contrary to the Alexander and Maldonado, Reineck testified that Shawn Baker was also present during the meeting. Reineck also testified that this was the same meeting as the meeting where employee Paula Payton walked out. By the end of Reineck's testimony, it was not clear that Reineck attended the same meeting as that Maldonado and Alexander attended on March 2<sup>nd</sup>. Additionally, Reineck's testimony was uncertain and hesitant.

Contrary to Reineck's testimony, employees Maldonado and Alexander testified confidently and without hesitation. They impressed me as truthful witnesses and I have already found their testimony to be particularly trustworthy. Therefore, I credit their testimony.

## B. ANALYSIS

There are a number of reported decisions where the Board has addressed the lawfulness of statements by employers that bargaining "begins from scratch," "starts at zero," "starts with a blank page" or similar statements. The terms are synonymous. The principles to be followed in assessing the lawfulness of such statements under Section 8(a)(1)<sup>14</sup> are found in the opinion in *Coach & Equipment Sales Corp.*, 228 NLRB 440, 440-441 (1977), where the Board states:

"Bargaining from scratch" is a dangerous phrase which carries within it the seed of a threat that the employer will become punitively intransigent in the event the union wins the election. The Board has held that such "hard bargaining" statements may or may not be coercive, depending on the context in which they are uttered. Thus, where a bargaining-from-scratch statement can reasonably be read in context as a threat by the employer either to unilaterally discontinue existing benefits prior to negotiations, or to adopt a regressive bargaining posture designed to force a reduction of existing benefits for the purpose of penalizing the employees for choosing collective representation, the Board will find a violation. [footnote omitted]

Having credited the testimony of LPN's Maldonado and Alexander that Meeker's statement to employees that bargaining would "start from scratch", was accompanied by statements that, if the Union won the election, employees' wages would be cut and that employees could lose everything they had, I find that the Employer's "bargaining from scratch" statements constituted objectionable threats of economic reprisals.

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<sup>14</sup> Because objectionable conduct is analyzed under a more lenient standard than are unfair labor practices, it follows that a violation of Section 8(a)(1) is "a fortiori, conduct which interferes with the results of an election." *VJNH, Inc.*, 328 NLRB 87, 103 (1999); *Airstream, Inc.*, 304 NLRB 151, 152 (1991).

Moreover, as the evidence established that the Meeker, during the March 2<sup>nd</sup> meeting, blatantly threatened employees that their wages would cut if the Union won the election, I find that the Employer engaged in further objectionable conduct. See, i.e., *Petrochem Insulation, Inc.*, 341 NLRB No. 60 (2004); *Oklahoma City Collection District at Browning Ferris, Inc.*, 263 NLRB 79, 82-83 (1982); *Coach and Equipment Sales Corp.*, supra.

Accordingly, I find that Petitioner's Objection 4 has merit.

## **OBJECTION 6**

### **A. FACTS**

In Objection 6, the Petitioner alleges that the Employer interfered and influenced the election by mandating that all employees report to work during the hours of the election on March 18, 2004, even if employees were not otherwise scheduled to work.

RN Gottwald testified that she believed that she was regularly scheduled to work on March 18, 2004. However, Gottwald testified that she observed a notice hanging at the nurses' station that indicated that all employees who were not regularly scheduled to work on March 18<sup>th</sup> would nevertheless be scheduled to work for two or four hours so that they could be there to vote. The Employer denied having knowledge of any such note.

RN Frank testified that, about one week before the election, he received a telephone call from the Employer's scheduler who told Frank that he was required to work mandatory overtime on the day of the election. Frank further testified that, on the same day, he observed a notice posted next to the time clock stating that nurses would be required to work mandatory overtime on March 18<sup>th</sup>. According to Frank, the notice he saw was signed by an administrator. Frank also recalled that the Employer sent notices to employees' homes wherein he stated that a no vote or a no show for the vote would be the same as a vote for the Union.<sup>15</sup> As to prior instances where nurses were required to work mandatory overtime, Frank testified that general mandates had occurred in other instances involving state emergencies, snow emergencies, prison lockdowns, and riots.

LPN Cochran also testified that she saw a notice posted at the time clock that stated that, on the day of the election, some nurses would have to be scheduled about two hours, so that everyone would be able to vote.

LPN Kimble testified that she saw a notice posted concerning mandatory overtime on the day of the election. According to Kimble, the notice stated that it was mandatory for all nurses to come in to work on election day in order to attend the voting.

LPN Maldonado testified that, the day before the election, she saw a notice from the Employer that instructed employees to check their schedule to see if they were required to work on the day of the election. Maldonado testified that she was not scheduled to work, and did not work, on the day of the election.

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<sup>15</sup> The Petitioner did not offer a copy of this Notice into evidence.

The Petitioner did not introduce into the record a copy of any of the subject notices and the witnesses who testified about them did so from memory. The Petitioner also failed to present evidence of the number of employees normally assigned to each area or the actual number of employees assigned to work on the day of the election. Frank testified that there were so many nurses working on the day of the election that employees “were stepping all over each other.”

## **B. ANALYSIS**

While the Petitioner argues that the Employer interfered with the election by “mandating that all employees report to work during the hours of the election,” its proof failed to support this contention. Thus, while Gottwald and Kimble testified that the Employer’s notices required “all” employees to report to work on the day of the election, Cochran testified that the notice said that “some” employees would be required to do so. Moreover, Maldonado testified that she was not scheduled to work, and did not work, on the day of the election.

In its post-hearing brief, the Employer asserts that extra nurses were placed on the schedule in order to provide coverage for other nurses when they went to vote as there was no release schedule in place on the day of the election and the employees were free to vote any time they wanted during the polling hours. While a perfectly plausible theory, and likely the basis for the Employer’s actions, the Employer failed to provide testimony or other evidence in support of that contention. Nevertheless, on the evidence before me, the Petitioner has simply failed to establish as a factual matter that the Employer required “all” employees to work on the day of the election, nor that it did so to interfere with a fair and free election.

Accordingly, I find that Petitioner’s Objection 6 lacks merit.

## **OBJECTION 8**

Petitioner’s Objection 8 alleges that by the foregoing and other acts, the Employer wrongfully interfered with the election and affected the result of the same by its conduct. Aside from the evidence already considered, the Petitioner presented no evidence on any other issues that are reasonably encompassed within the scope of the specific objections set for hearing by the Regional Director.

Accordingly, I find no additional objectionable conduct based on Petitioner’s Objection 8.

## **RECOMMENDATION**

Having found no merit to Petitioner’s Objections 2, 3, 6 and 8, I recommend that they be overruled. Having found merit to Petitioner’s Objections 1, 4, 5 and 7, and having concluded that the conduct alleged therein reasonably tended to interfere with the unit employees’ free and uncoerced choice in the election, I recommend that Objections 1, 4, 5 and 7 be sustained, the election be set aside, and that a second election be directed.<sup>16</sup>

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<sup>16</sup> Under the provisions of Sections 102.69 and 102.67 of the Board’s Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, D.C. Exceptions must be received by the Board in Washington, D.C. by **August 18, 2004**.

Signed at Philadelphia, Pennsylvania this 4<sup>th</sup> day of August, 2004.

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DONNA D. BROWN  
Hearing Officer  
National Labor Relations Board