CASE NOS. 24-CA-10700 and 24-RC-8566

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GRAPETREE SHORES, INC.
D/B/A DIVI CARINA BAY RESORT

Employer

and

VIRGIN ISLANDS WORKERS UNION

Union

EMPLOYER'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GRAPETREE SHORES, INC. D/B/A DIVI CARINA BAY RESORT -- and -- VIRGIN ISLANDS WORKERS UNION	Case Nos. 24-CA-10700 24-RC-8566

EMPLOYER'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

Employer Grapetree Shores, Inc. d/b/a Divi Carina Bay Resort ("Divi"), by and through its undersigned attorneys, pursuant to Section 102.46 of the National Labor Relations Board's ("NLRB" or "Board") Rules and Regulations, files this brief in support of its exceptions to Administrative Law Judge ("ALJ") Paul Bogas' Decision.

STATEMENT OF THE CASE[1]

On or about June 1, 2007, the Virgin Islands Workers Union ("VIWU") filed a petition seeking to represent certain employees at Divi. (G.C. Ex. 1(a)). The parties entered into a Stipulated Election Agreement and a secret ballot election was held on July 13, 2007. (G.C. Ex. 1(j)). The election results, as reflected on the Board's Tally of Ballots, was a vote of 45 ballots for VIWU, 42 ballots against VIWU, one (1) void ballot, and seven (7) determinative, challenged ballots (one (1) challenged by the Board and six (6) challenged by VIWU). (Id.).

[1] "Tr." refers to the transcript of the November 6, 2007 hearing before ALJ Bogas. "Divi Ex.," "G.C. Ex.," and "C.P. Ex." refer to Divi's, the General Counsel's and VIWU's respective exhibits at the November 6, 2007 hearing.

Following the election, Divi timely filed five (5) election objections. VIWU filed four (4) election objections and Unfair Labor Practice ("ULP") Charge No. 24-CA-10700. Following the Board's investigation of the election objections and ULP charge, the Regional Director administratively dismissed three (3) of VIWU's challenges; Divi conceded two (2) of the challenges; and the Regional Director sent two (2) challenges to a hearing – the Board's challenge to Felicia Dixon's ballot and VIWU's challenge to Matthew Moore's ballot. The Regional Director also found sufficient issues of fact to send all five (5) of Divi's election objections to a hearing. (Id.; G.C. Ex. 1(q)). Finally, the Regional Director issued a complaint on two (2) allegations from VIWU's ULP charge: (i) Divi's alleged, improper announcement of an enhanced 401(k) plan on the eve of the election and (ii) Divi General Manager Richard "Patrick" Henry's alleged, implied threat to a Divi employee. (Id.).

On November 6, 2007, ALJ Bogas conducted a hearing to address the aforementioned, outstanding issues. Following the parties' submission of their respective post-hearing briefs, ALJ Bogas issued his Decision on February 8, 2008 ("ALJ Decision"). In his Decision, ALJ Bogas:

- overruled Divi's first and second election objections, which alleged that Divi employee and well-known VIWU supporter Lucy Edward improperly interfered with the election's laboratory conditions by telling employees that they were the reason why the union lost a previous representation election and that if the union lost the upcoming election, "you will see what happens." (ALJ Decision at 13-14).

- overruled Divi's third and fourth election objections, which alleged that Divi employee and well-known VIWU supporter Lucy Edward improperly interfered with the election's laboratory conditions by walking into the employee dining room the day before the election and stating "I does thank God I don't come to work with a gun because I will kill a lot of people and they will be sorry." (ALJ Decision at 14-17).

- overruled the Board's challenge to Felicia Dixon's ballot (and Divi's arguments in support of that challenge). (ALJ Decision at 9-11).

- upheld VIWU's ULP charge and election objections to the extent they alleged that Divi unlawfully announced a new 401(k) benefit plan two days prior to the representation election. (ALJ Decision at 3-8, 12).

- overruled VIWU's ULP charge and election objections to the extent they alleged that Divi General Manager Henry threatened Divi employees with reprisals prior to the election. (ALJ Decision at 3, 5-6, 12).

QUESTIONS PRESENTED

1. Did the ALJ err in holding that Divi violated the NLRA by notifying its employees prior to the election that the Governor of the Virgin Islands approved a contract requiring Divi to provide certain increased benefits to Divi employees, even though, among other things (i) negotiations between Divi and the Virgin Islands government over the contract at issue commenced in 2005, well before the commencement of VIWU's organizing campaign; (ii) the Governor approved the contract on July 10, 2007; and (iii) Divi had no control or input over whether and when the Governor would approve the contract?

2. Did the ALJ err in holding that former Divi employee Felicia Dixon was eligible to vote in the July 13, 2007 representation election even though (i) Dixon had not worked at Divi for more than six months prior to the representation election; and (ii) unrebutted evidence established that Divi's policy was to terminate employees who were absent from work for more than six months?

3. Did the ALJ err in holding that VIWU and/or well-known VIWU supporter Lucy Edward did not interfere with the election's laboratory conditions even though (i) Edward repeatedly told Divi employees prior to the election that they caused the union to lose a prior

representation election and that if the union lost the July 13, 2007 election, they "will see what happens" to them; (ii) on the day before the election, Edward entered the employee dining room and proclaimed, "I does thank God I don't come to work with a gun because I will kill a lot of people and they will be sorry"; and (iii) notwithstanding Edward's pre-election misconduct, VIWU designated Edward to serve as its official election observer for the July 13 election, further intimidating employees from voting against the union?

FACTUAL BACKGROUND

I. DIVI'S FACILITY IN ST. CROIX, UNITED STATES VIRGIN ISLANDS

Divi is a full-service resort facility, primarily geared for leisure travelers, located in St. Croix. It has approximately 150 employees and 200 guest rooms. Divi's facility boasts two restaurants, two lounges and a miniature golf course. Richard "Patrick" Henry, a hospitality professional, manages the Divi facility. Henry has almost thirty years of experience in managing hotels. (Tr. 21).

II. RELEVANT FACTS RELATING TO THE ALLEGATION THAT DIVI VIOLATED THE NLRA BY ANNOUNCING THE GOVERNOR OF THE VIRGIN ISLANDS' FINAL APPROVAL OF A CONTRACT CALLING FOR ENHANCED EMPLOYEE BENEFITS

A. The Virgin Islands' Economic Development Commission

For many years, the Virgin Islands government has operated an Economic Development Commission ("EDC"). The EDC offers valuable tax benefits to companies as an incentive for them to establish and conduct business in the Virgin Islands. (Tr. 22).

As a general matter, the process for obtaining EDC benefits – which can span a number of years – is as follows: (i) a company files an application with the EDC seeking EDC benefits;

(ii) the EDC holds a public hearing to address, among other things, what types of compensation and benefits the company will offer its Virgin Island employees; (iii) following the public hearing, the company and the EDC negotiate a contract addressing what steps the company must take (such as implementing 401(k) and other benefit plans) to receive EDC benefits; and (iv) after the company and the EDC agree to a contract, the contract is forwarded to the Governor of the Virgin Islands for his final approval and signature. (Tr. 24-27). Thus, any contract reached between a company and the EDC does not become legally binding until it is approved by the Virgin Islands' Governor. (Tr. 35, 39). Divi has no influence over how long the Governor will take to decide whether to approve an EDC contract and/or when the Governor will announce his decision. (Id.).

B. The Virgin Islands' Government Awards Divi A 10-Year EDC Benefits Certificate In 1996

In 1995, Divi commenced operation of its full-service resort facility that it had recently purchased and renovated on St. Croix, U.S. Virgin Islands. Divi had also applied for EDC benefits and ultimately reached an agreement with the EDC in 1996 that was approved by the Virgin Islands' Governor. (Tr. 22). Pursuant to the contract between Divi and the EDC, the Virgin Islands government issued a certificate granting Divi EDC benefits for the next ten years. (Tr. 21-22). In exchange for EDC benefits, the 1996 contract required Divi to establish a 401(k) plan and provide other benefits to its employees. Divi complied with its contractual requirements and, consequently, received EDC benefits beginning in 1996. (Tr. 22-24).

C. Divi Begins The Process For Re-Newing Its EDC Certification In 2005, Well Before VIWU Commences Its Organizing Campaign

Divi's ten-year EDC certificate was due to expire in 2006. Accordingly, Divi commenced the application process for renewal of its EDC certification in 2005. (Tr. 23). The EDC held a public hearing on Divi's renewal application in February 2006. (Tr. 26). During the hearing, EDC representatives expressed concern that only one Divi employee was participating in the company's 401(k) plan. Consequently, EDC representatives stated that the renewal of Divi's EDC certification may be conditioned upon, among other things, Divi providing increased incentives for employees to join the 401(k) plan. (Tr. 26-27).

For many months following the February 2006 public hearing, Divi negotiated a contract with the EDC relating to the renewal of Divi's EDC certification. By May 2007, the parties agreed to a contract whereby the EDC would renew Divi's certification provided that, among other things, Divi (i) modified its 401(k) plan so that Divi would contribute up to two (2) percent of full-time employees' base wages to the plan (this company contribution would provide Divi employees with an additional incentive to participate in the 401(k) plan); (ii) provided other enhanced benefits to its employees.[2] (Tr. 27, 32; Divi Ex. 2). The contract subsequently was forwarded to the Virgin Islands' Governor for his final approval. (Tr. 35, 37).

On July 10, 2007, the Governor approved and signed the contract. (Tr. 37-38). Divi became aware of this fact the following day, when it received the signed contract from the Governor's office during the morning of July 11, 2007. (Id.).

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[2] Notably, the EDC proposed the two percent company contribution to the 401(k) plan as early as August 2006, well before the June 2007 commencement of VIWU's organizing campaign. (Tr. 27). In early 2007, Divi advised the EDC that it agreed to this proposal. (Tr. 27, 30-31; Divi Ex. 1).

D. Upon Learning That It Had A Final, Legally-Binding Contract With The Virgin Islands' Government, Divi Legitimately And Properly Notifies Its Employees Of This Fact

Understandably, Divi's management was excited and pleased that the Governor approved a contract that (i) had taken approximately one-and-a-half years to negotiate; (ii) continued to provide important tax benefits to Divi; and, (iii) most importantly for this case, required Divi to provide enhanced benefits to Divi employees. (Tr. 38-39). Consequently, Divi notified its employees on July 11, 2007 – the same day Divi learned about the Governor's final approval of the EDC contract – that pursuant to a legally-binding contract with the Virgin Islands' government, they would receive enhanced benefits. (Id.).[3]

III. RELEVANT FACTS RELATING TO DIVI EMPLOYEE FELICIA DIXON'S ELIGIBLITY TO VOTE IN THE REPRESENTATION ELECTION

A. The Record Before The ALJ Clearly Established That Divi's Policy Is To Terminate Employees Who Are Absent From Work For Any Reason In Excess Of Six Months

At the November 6, 2007 hearing before ALJ Bogas, Divi submitted unrebutted evidence establishing that the company's policy is to terminate any employee who is absent from work for any reason in excess of six months. (Tr. 118-25; Divi Ex. 4). Neither the General Counsel nor VIWU disputed, in any way, the existence of this policy.

B. Felicia Dixon Was Absent From Work For More Than Six Months Prior To The Representation Election

Felicia Dixon worked at Divi's Resort in a Housekeeping position. She allegedly suffered an on-the-job injury in 2004, but was absent from work for less than six months due to the injury.

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[3] The final EDC contract did not require Divi to implement all of the enhanced benefits immediately. It did, however, require Divi to implement the specified benefits within a reasonable time-period following the Governor's

Consequently, Divi allowed her to return to work pursuant to company policy. Dixon collected workers' compensation insurance benefits during this absence from work. (Tr. 77-97).

In June 2006, Dixon again allegedly suffered an on-the-job injury and immediately went out on workers' compensation leave. She returned to work in November 2006, having again been absent from work for less than six months. Dixon subsequently worked for a few weeks and then took accrued vacation. Before taking accrued vacation, Dixon presented Divi with a doctor's note (dated December 6, 2006) stating that she could only perform light duty work for Divi. The note explicitly stated that Dixon could not engage in heavy lifting, excessive bending, pushing and pulling. (Id.; C.P. Ex. 1).

Divi did not have any vacant, light duty positions that Dixon could perform. Before she returned from vacation, Divi notified Dixon of this fact and that it was placing her on leave of absence until she was able to perform her regular job duties without restriction. Accordingly, the last day that Divi permitted Dixon to work at the resort was December 14, 2006. (Tr. 77-97).

Notwithstanding the above, Dixon traveled to the resort on January 4, 2007 and worked without permission for three hours. After that date, Dixon never returned to work at Divi. Indeed, following January 4, 2007, Dixon did not attempt to contact Divi about any matter relating to her employment.[4] Consequently, and pursuant to company policy, Dixon's employment terminated no later than July 4, 2007 – six months following the last day she worked

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final approval of the contract. If Divi violated the contract in any manner, it could lose its entitlement to EDC benefits. (Tr. 39).

[4] Dixon's workers' compensation file contains medical evidence establishing that, as of April 2007, she had achieved maximum medical improvement but still was limited to lifting no more than forty pounds. Thus, even if Dixon had attempted to contact Divi about returning to work, her apparent permanent limitation rendered her ineligible for further employment in her prior Housekeeping position, which requires the ability to lift seventy pounds. See Divi Ex. 5; Tr. 122-24).

at Divi. Divi removed Dixon from the company's Housekeeping schedule the week immediately following July 4, 2007. (Tr. 104-08; Divi Exs. 5-6).

IV. RELEVANT FACTS RELATING TO VIWU'S AND/OR LUCY EDWARD'S IMPROPER INTERFERENCE WITH THE REPRESENTATION ELECTION'S LABORATORY CONDITIONS

Divi's election objections allege that the VIWU and/or Lucy Edward interfered with the representation election's laboratory conditions by threatening and intimidating employees so that they would vote in favor of the union.

A. Prior To The Election, VIWU Agent And Well-Known VIWU Supporter Lucy Edward Repeatedly Threatens Employees In The Banquet Department

During the November 6, 2007 ALJ hearing, Divi presented evidence establishing that in the two weeks prior to the election Lucy Edward, a Divi employee and well-known VIWU supporter, repeatedly threatened employees in the Resort's Banquet Department, which consists of seven employees. Specifically, Edward told Banquet Department employees that (i) they were the reason why VIWU lost a prior representation election at the Resort and (ii) if they caused the union to lose again, they would "see what happens." (Tr. 64-66). Divi submitted unrebutted evidence showing that the Banquet Department employees considered Edward's comments to be a direct threat to their physical and/or financial well-being and as an indication that VIWU had a way of knowing how individual employees voted even though the representation election was supposed to be conducted in secret.

For example, Banquet Department employee Phyllis Blackman testified that, in the two weeks preceding the representation election, Edward "would tell us the union is coming back and we – should we with the union didn't get in the first time and if we don't let them in this time, we

will see and I consider[ed] that as a threat." (Tr. 64). Edward also made it clear that VIWU believed that the Banquet Department caused it to lose the last election and "was blaming us banquet workers [for losing the last election]." (Tr. 65). Edward and other union supporters made these comments to the Banquet Department employees "every time we go for lunch, every day" in the two weeks prior to the election and used a tone of voice that "was threatening us." (Tr. 64-66).

B. Prior To The Election, VIWU Agent And Well-Known VIWU Supporter Lucy Edward Makes Intimidating Statements To Potential Voters In The Resort's Employee Dining Room

The night before the representation election, Edward entered the Resort's employee dining room and proclaimed to a number of potential voters that "I does thank God I don't come to work with a gun because I will kill a lot of people and they will be sorry." (Divi Exs. 6-7). The employees in the dining room were shocked and startled by Edwards' inappropriate and threatening comment. Indeed, Divi employees Brandi Pereira and Melissa Pereira submitted sworn testimony (unchallenged by VIWU or the General Counsel) that they interpreted Edward's comments to mean that she would shoot or otherwise attempt to injure any employees who voted against the union. (Id.; Tr. 132-34).[5]

C. Notwithstanding Edward's Highly Inappropriate Pre-Election Conduct, VIWU Designates Her As Its Official Election Observer

VIWU continued to interfere with the representation election's laboratory conditions by designating Edward as its official election observer responsible for distributing ballots to

[5] Through no fault of its own, Divi was unable to subpoena Brandi Pereira and Melissa Pereira to present live testimony at the ALJ hearing . Therefore, Divi submitted sworn declarations from each of these individuals. (Tr. 8-9; 132-34; Divi Exs. 6-7). Notably, VIWU freely stipulated that, had Brandi Pereira and Melissa Pereira appeared at the hearing, their testimony would have been entirely consistent with their sworn declarations. (Tr. 132-34).

employees and otherwise observing the administration of the election on the union's behalf. (Tr. 66). Given Edward's threatening and inappropriate pre-election comments to eligible voters, VIWU's designation of Edward as its election observer further intimidated eligible voters from voting against the union. (Tr. 66-67).

ARGUMENT

I. THE ALJ ERRED IN HOLDING THAT DIVI VIOLATED THE NLRA BY MAKING A PRE-ELECTION ANNOUNCEMENT THAT THE GOVERNOR APPROVED THE EDC CONTRACT

A. Applicable Legal Standards

It is well-settled that an employer may not grant new benefits immediately prior to a representation election outside the normal course of its business and for the purpose of influencing the election's outcome. See NLRB v. Exchange Parts Co., 375 U.S. 405, 409 (1964). However, it is equally well-settled that an employer does not violate the NLRA by making pre-election announcements about, or explanations of, existing benefits. See, e.g., Beverly Enterprises, Inc. v. NLRB, 139 F.3d 135, 141 (2d Cir. 1998). Furthermore, an employer does not violate the NLRA by making pre-election announcements of new or enhanced benefits if, as is the case here, it commenced the process for securing the benefits *before* the union's organizing campaign. See, e.g., Weather Shield of Connecticut, 300 NLRB 93, 96-97 (1990); Raley's, Inc. v. NLRB, 703 F.2d 410, 414-15 (9th Cir. 1983) (holding employer's pre-election announcement that employees would receive increased benefits did not violate NLRA and was protected speech under Section 8(c) because such benefits were granted in normal course of employer's business); NLRB v. Tommy's Spanish Foods Inc., 463 F.2d 116, 118-19 (9th Cir. 1972) (holding employer's

pre-election announcement that it may improve insurance benefits was lawful because "it is uncontradicted that the Respondent's initial effort in the matter of increasing insurance predated the Union's appearance on the scene and, accordingly, cannot be characterized as simply a strategem in response to the threat of unionism[.]").

In sum, employers have the right to make pre-election announcements about increases in employee benefits if the process for obtaining such benefits commenced prior to the union organizing campaign and was done in the employer's normal course of business.

B. The ALJ Wrongly Held That Divi's Pre-Election Announcement Violated The NLRA

The ALJ held that Divi unlawfully notified its employees on the eve of the election that the Virgin Islands' Governor approved a new EDC contract calling for enhanced employee benefits. For a number of reasons, the ALJ's decision, which misstates the record and the law, is without merit and should be overruled.

First, the ALJ completely glossed over the key, undisputed fact that Divi commenced the process for renewing its EDC certificate (and, consequently, improving employee benefits) in 2005, *well before* the union commenced its organizing campaign in June 2007. This fact, standing alone, wholly undercuts any notion that Divi's pre-election announcement violated the NLRA. Rather, it establishes that (i) the improved benefits specified in the new EDC contract were developed independent of any union organizing campaign; and (ii) the intent of the improved benefits could not have been to undercut VIWU, but to garner support from the EDC for an extension of Divi's favorable tax concessions from the Virgin Islands government.

Second, the ALJ completely missed the mark by (i) emphasizing that Divi's announcement of the Governor-approved EDC contract was made only two days prior to the representation election and (ii) concluding that Divi was required to provide a substantial business justification, apparently to the ALJ's satisfaction, supporting the timing of its pre-election announcement. (ALJ Decision at 5-8).

As a threshold matter, case-law makes clear that where, as here, the process for obtaining the benefits at issue commenced before the union organizing campaign, an employer may notify employees about these benefits any time prior to the election without running afoul of the NLRA. See pages 11-12, supra. The Board's decision in Weather Shield of Connecticut, 300 NLRB 93 (1990) is particularly instructive on this point.

In Weather Shield, approximately one year before the union arrived on the scene, the employer was purchased by Huttig Sash and Door Company ("Huttig"). The day before the representation election, the employer notified its employees – for the first time – that employees of non-union Huttig companies were eligible to participate in pension plans and that, "[a]fter this company has been part of Huttig for one year we will go to the Board of Directors for ratification." Id. at 96. Although the employer had been aware of Huttig's pension policy for some time, it waited until the eve of the election to notify its employees about the policy. Like the ALJ here, the ALJ in Weather Shield incorrectly held that the employer violated the NLRA by (i) focusing solely upon the timing of the employer's announcement and (ii) requiring the employer to justify the timing of its announcement. Id. at 105.

In reversing the ALJ, the Board noted that the ALJ glossed over the dispositive facts that (i) the employer's pension plan (through Huttig) "was granted to employees in the normal course of events unrelated to their union activity," and thus (ii) pursuant to Huttig policy, employees would have been eligible to participate in the pension plan *even if* the union had never arrived on the scene. Id. at 96-97. Given these facts, the Board held that this was precisely the type of case where an employer could lawfully make a pre-election announcement about employee benefits without having to provide further justification for the timing of its announcement. Id.[6]

The Board's decision in Weather Shield is fully applicable here. There is no dispute (and can be no dispute) that (i) Divi sought a new EDC contract calling for enhanced employee benefits in the normal course of its business and prior to the commencement of VIWU's organizing campaign; and (ii) Divi's employees would have received the enhanced benefits contained in the new EDC contract *even if* there had never been a VIWU organizing campaign. Consequently, Divi had every right under the NLRA to announce the Governor's approval of the new EDC contract (and the benefits contained therein) prior to the representation election.

Third, even assuming, arguendo, that the ALJ correctly required Divi to provide a legitimate business justification for the timing of its announcement, Divi satisfied this requirement. The unrebutted record evidence confirms that (i) Divi commenced the process for securing a new EDC contract well before the VIWU's organizing campaign; (ii) the EDC contract did not become legally-binding until the Governor approved it; (iii) Divi had no control over whether and when the Governor would approve the new EDC contract; and (iv) the Governor did

[6] The cases cited by the ALJ to support his decision are inapposite insofar that, unlike here, (i) the employer did not commence the process for granting enhanced benefits prior to the union arriving on the scene; (ii) the employer alone

not approve the new EDC contract until July 10, 2007, less than three days prior to the representation election. All of the above facts provide a legitimate business justification for why Divi announced the Governor's approval of the new EDC contract on July 11, 2007. See Weathershield of Connecticut, 300 NLRB at 98 (noting that employer satisfied any potential burden of providing legitimate reason for announcing benefits information on election eve by showing that the pension plan at issue was "developed long before the onset of the union campaign.") (Stephens, concurring).

Finally, to artificially bolster his faulty legal analysis, the ALJ's decision repeatedly focuses on irrelevant facts and, even worse, mischaracterizes certain facts. For example, the ALJ asserted that the Governor's approval of the new EDC contract did not "finalize" any enhanced employee benefits because Divi could have elected to ignore its obligations to provide such benefits under the contract. Therefore, according to the ALJ, the timing of Divi's announcement was improper because the enhanced employee benefits had not technically been finalized and/or fully-implemented when the Governor approved the new EDC contract. (ALJ Decision at 7-8). There are a host of problems with this position.

As a threshold matter, Divi did not have to provide a business justification for the timing of its pre-election announcement. See pages 11-12, supra. In any event, the ALJ's unsupported speculation that Divi may choose to default on its contractual obligations is ridiculous.[7] Divi spent considerable time and resources negotiating a new EDC contract over an almost two-year

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controlled when the enhanced benefits would be approved and granted; and/or (iii) the employer did not approve the enhanced benefits in the normal course of its business.

[7] Further undercutting the ALJ's position is that Divi General Manager Patrick Henry confirmed that, as of November 6, 2007 (the date of the ALJ hearing), Divi had implemented many of the enhanced benefits contained in the new EDC contract and/or taken steps to implement such benefits in the near future. (Tr. 39, 58).

period between 2005 and 2007. It makes absolutely no sense that, following the Governor's final approval of the new contract, Divi would subsequently decide to forfeit its entitlement to valuable EDC tax benefits and refuse to implement the enhanced employee benefits contained in the contract. In sum, there can be no legitimate argument that the new EDC contract became final and binding following the Governor's approval of that contract on July 10, 2007. The ALJ's tortured attempts to assert otherwise confirms that neither the facts nor the law support his holding that Divi violated the NLRA by making the pre-election announcement that the Governor approved the new EDC contract.

For all of the foregoing reasons, the Board should overrule the ALJ's decision that Divi's pre-election announcement violated the NLRA.

II. THE ALJ ERRED IN HOLDING THAT FELICIA DIXON WAS ELIGIBLE TO VOTE IN THE REPRESENTATION ELECTION

Divi submitted unrebutted evidence establishing that (i) its policy is to terminate employees who are absent from work for any reason for more than six (6) months; and (ii) Divi employee Felicia Dixon was absent from work for more than six months prior to the July 13, 2007 representation election. Notwithstanding these and other undisputed facts, the ALJ flatly dismissed as "frivolous" (ALJ Decision at 10) Divi's assertion that Dixon was ineligible to vote in the election.

A. Applicable Legal Standards

The proper legal standard to apply in determining the voting eligibility of an employee who has been on an extended absence from work has caused a substantial amount of disagreement with the Board. See, e.g., Home Care Network Inc., 347 NLRB No. 80 (2006). In

his decision, the ALJ adopted the position taken by the majority in Home Care Network, which is that an employee on sick or disability leave is presumed to be eligible to vote in a representation election absent an affirmative showing that the employee has resigned or been discharged. (ALJ Decision at 10). Divi respectfully submits, as it did before the ALJ, that the proper standard to apply here is the one advocated by the Home Care Network dissent, which is that the Board should apply the traditional "reasonable expectation of recall test."[8]

Notwithstanding the above, even under the more stringent analysis adopted by the majority in Home Care Network Inc., the ALJ incorrectly held that Felicia Dixon was eligible to vote in the representation election.

B. Felicia Dixon Was Ineligible To Vote Because She Was Not A Divi Employee On The Date Of The Representation Election

The ALJ's holding that Felicia Dixon somehow was an "employee" of the company at the time of the representation election – even though she had not worked at the company for more than six months prior to the election and made no effort to inquire about returning to the company – is premised upon a number of faulty conclusions.

First, the ALJ incorrectly held – in the face of undisputed evidence to the contrary – that the company did not have a policy whereby employees were terminated if they were absent from

[8] Divi respectfully submits that the dissenting opinion in Home Care Network, Inc. states the proper standard to apply here because it is unreasonable to find that simply because an employee has not resigned or been formally terminated that he/she is eligible to vote, even if there is virtually no chance that he/she will ever return to the unit. If there is no foreseeable prospect that the employee will ever return to the job, he/she does not have a community of interest with the employees performing unit work and the vote should not be counted. That is the situation here, as the facts show that Dixon had no expectation of being rehired at Divi. Indeed, her workers' compensation file contains medical evidence establishing that, as of April 2007, she had achieved maximum medical improvement and was still limited to lifting no more than forty pounds. (Joint Ex. 4, at p. 2). Moreover, during the November 6, 2007 hearing, the union submitted a more recent doctor's note limiting Dixon's lifting to no more than ten pounds. (C.P. Ex. 2). Either of these limitations rendered Dixon ineligible for further employment in her prior Housekeeping position, which requires the ability to lift seventy pounds. (Divi Ex. 5; Tr. 122-24).

employment for more than six months. The only record evidence on this issue was submitted by the company. Specifically, Divi General Manager Patrick Henry clearly testified that, pursuant to company policy, an individual's employment terminates if he/she is absent from work for any reason for longer than six months. (Tr. 118-22). VIWU made no attempt to dispute the existence of such a policy.

Nevertheless, the ALJ surprisingly and disturbingly went to great lengths to manufacture a basis for rejecting this indisputable fact. For example, the ALJ's Decision states that Henry's testimony cannot be credited because Henry stated that the company's policy derived from a proposed labor contract provision relating to the termination of seniority rights (as opposed to termination of employment). Based solely upon this fact, the ALJ leaped to the conclusion that the company did not, in fact, have a policy of terminating an individual's employment if he/she was absent from work for any reason for more than six months, because "[a]n individual without seniority rights may still be an employee." (ALJ Decision at 10) ("the [labor contract] provision cited by Respondent does not say anything about termination of employment after 6 months, but rather concerns the termination of *seniority rights*.") (emphasis in original).

The ALJ reached this unwarranted conclusion even though Henry's unrebutted testimony explicitly rejects the ALJ's distinction between the termination of seniority rights and the termination of employment. Indeed, although Henry testified that Divi's policy is partially modeled after the proposed labor contract provision cited by the ALJ, he made it emphatically clear, under direct questioning from the ALJ, that there was significant differences between the

proposed labor contract provision (which requires termination of seniority rights) and the company's policy (which requires termination of employment):

> JUDGE BOGAS: the collective bargaining agreement that you were citing, it says seniority rights will be terminated for any of the following reasons. And *you interpret that, seniority rights . . . as being the same thing as employment termination*?
>
> THE WITNESS: *As employment terminating, yes*. Because if you don't, you're still keeping them on the payroll, because we do keep seniority rights.
>
> . . .
>
> JUDGE BOGAS: I guess what I'm wondering is can someone – *could someone's seniority rights be terminated and continue to be an employee*?
>
> THE WITNESS: *No*. It's the only place –
>
> JUDGE BOGAS: Your point is that the seniority rights –
>
> THE WITNESS: And employment rights –
>
> JUDGE BORAS: -- termination – is that same thing as a termination?
>
> THE WITNESS: *Right*.

(Tr. 124-25) (emphasis added). Given Henry's clear testimony on this issue, it is difficult to fathom how the ALJ came to any conclusion other than that the company's policy is to terminate employees who are absent from work for any reason for more than six months.

In addition to wholly ignoring key portions of Henry's testimony, the ALJ also made tortious attempts to minimize the impact of Henry's testimony. For example, the ALJ's decision quotes a small portion of Henry's testimony stating that "*[b]asically*, we [the company] have a 6-month policy that *allows* for anyone that is in excess [of] 6 months is without employment any longer." (ALJ Decision at 11) (emphasis in original). This statement is wholly consistent with

Henry's other testimony relating to the company's policy for employees who are absent from work for more than six months. Nevertheless, and consistent with his cherry-picking of the record, the ALJ concluded that Henry's use of the words "basically" and "allows" in the quoted testimony somehow casts doubt on whether Divi, in fact, has a policy of terminating employees who are absent from work for more than six months. (Id.). This nit-picking of a witness' unrebutted testimony was entirely unwarranted, particularly given the ALJ's candid observation that he had little reason to question Henry's testimony because he "was generally a confident witness." (ALJ Decision at 11).

Second, the ALJ also concluded that, in any event, Divi did not terminate Dixon's employment (notwithstanding its policy) because it failed to affirmatively notify Dixon of her employment termination and, therefore, "failed to make the necessary affirmative showing that she had resigned or been discharged." (ALJ Decision at 10). This analysis is just plain wrong.

As a threshold matter, nothing in Divi's policy requires the company to affirmatively notify an employee that he/she has been terminated for being absent from employment for more than six months. Moreover, an employer's failure to notify an employee of his/her termination does not compel the conclusion that the employee was not terminated; particularly where, as here, there is a plethora of other evidence showing that the employee was terminated. See J.C. Penny Corp., 347 NLRB No. 11 (2006) (holding that individual was terminated and ineligible to vote in representation election despite lack of formal or informal communication of employment termination to voter); Hercules, 225 NLRB 241 (1976) (similar). Indeed, the record here confirms that (i) consistent with its policy, Divi removed Dixon from its weekly work schedule

after she was absent from work for more than six months; and (ii) Dixon candidly admitted that at no time since January 2007 did she contact Divi about returning to work; submit follow-up doctor's notes; or request extensions of her medical leave. (Tr. 96-97).[9] These facts, coupled with the undisputed evidence of Divi's termination policy, clearly were sufficient to establish that Dixon's employment terminated prior to the representation election, rendering her ineligible to vote.

In sum, that the ALJ had to go to such painstaking and inappropriate lengths to undercut Divi's unrebutted evidence confirms that Divi's position was not "frivolous," but entirely credible and correct. Accordingly, the Board should overrule the ALJ's decision that Dixon was eligible to vote in the representation election.

III. THE ALJ ERRED IN HOLDING THAT VIWU AND/OR LUCY EDWARD DID NOT UNLAWFULLY INTERFERE WITH THE ELECTION'S LABORATORY CONDITIONS

A. Applicable Standards

Representation elections must be conducted in "laboratory conditions" free from behavior that improperly influences the outcome. See NLRB v. Kentucky Tennessee Clay Co., 295 F.3d 436, 441 (4th Cir. 2002). Consequently, "an election will be set aside for improper conduct by a union or a union agent if threats, acts or coercion, or other improprieties occurred and 'materially affected the election results.'" Id. at 442 (citation omitted). The test, an objective one, is whether the union's conduct has the tendency to interfere with the employees' freedom of choice. See Harsco Corp., 336 NLRB 157, 158 (2001).

[9] In an attempt to undercut this fact, the ALJ stated that "[d]uring the week of the election, the Respondent [Divi] still listed Dixon as an employee on a work schedule that it posted and distributed to employees." (ALJ Decision at 10).

In cases where the individual(s) who engaged in pre-election conduct is not a union agent, an election must be set aside if the individual's conduct created a "'general atmosphere of confusion, violence, and threats of violence, such as might reasonably be expected to generate anxiety and fear of reprisal, to render impossible a rational uncoerced expression of choice as to bargaining representation.'" Id. at 442 (citations omitted).

Regardless of whether the individual in question was a union agent or a third party, the Board must pay particularly close attention to pre-election threats and other misconduct where, as here, the election results were particularly close. See Robert Orr-Sysco Food Servs., LLC, 338 NLRB 614, 615 (2002); see also John M. Horn Lumber Co. v. NLRB, 859 F.2d 1242, 1244 (6th Cir. 1988) (reversing Board and holding election unfair regardless of whether perpetrators were union agents or not; noting that hearing officer and Board erred by "fail[ing] to give adequate consideration to the small size of the unit and the closeness of the election."); NLRB v. Custom Displays Studios, 590 F.2d 637, 639 (6th Cir. 1978) ("[a] close election is a factor which demands that even minor infractions be scrutinized carefully.").[10]

Applying the aforementioned standards to the facts, the ALJ erred in holding that VIWU and/or Lucy Edward (as a union agent or third-party) did not interfere with the July 13, 2007 election's laboratory conditions.

However, as the ALJ later acknowledged and the record clearly confirms, this was an inadvertent error that the company immediately corrected. (ALJ Decision at 10 n. 11; Tr. 104-08; C.P. Exs. 5-6).

B. The ALJ Improperly Discredited Divi's Evidence That VIWU And/Or Lucy Edward Engaged In Improper, Pre-Election Conduct That Interfered With The Election's Laboratory Conditions

The ALJ made a number of errors in overruling Divi's election objections and holding that neither the VIWU nor VIWU-supporter Lucy Edward engaged in pre-election misconduct that interfered with the election's laboratory conditions.

First, the ALJ incorrectly held that there was insufficient record evidence to establish that Lucy Edward (i) repeatedly threatened Divi's Banquet department employees in the two weeks before the election by telling them that they were the reason why VIWU lost a previous representation election and that if they caused the union to lose another election, they "will see" what happens (Tr. 64); and (ii) walked into the employee dining room on the eve of the election and proclaimed that "I does thank God I don't come to work with a gun because I will kill a lot of people and they will be sorry." (Divi Exs. 6-7).

With respect to the former point, Divi employee Phyllis Blackman credibly testified that, in the two weeks prior to the election, Edward and other union supporters repeatedly singled out Banquet Department employees and told them they were responsible for the VIWU's defeat in a prior representation election. Edward also went a step further and threatened Banquet Department employees by telling them that they "will see" what happens if they voted against the union this time around.[11] These types of implicit threats were clearly made to intimidate

[10] Although the ALJ explicitly referenced this principle when considering VIWU's election objections, he ignored it when considering Divi's election objections. (ALJ Decision at 12).

[11] The ALJ viewed Edward's "we will see" comment in a vacuum and noted that such a comment, standing alone, is a "benign statement" that should not have intimidated Divi employees. (ALJ Decision at 14). That is not how an ALJ should consider pre-election statements such as Edward's. Rather, such statements must be viewed in context. Here, there is no question that under the circumstances (and given Edward's other pre-election misconduct), Edward's "we will see" comment was clearly and reasonably construed by Divi employees as a threat designed to intimidate them into voting for the union.

employees into voting for the union, a fact that Blackman confirmed at the November 6, 2007 hearing. (Tr. 63-67).

With respect to the latter point, two former Divi employees – Brandi Pereira and Melissa Pereira – submitted consistent, written declarations confirming that Edward made the alleged comments in the employee cafeteria on the day before the election. (Divi Exs. 6-7). Notably, VIWU stipulated that, had these employees been available to testify in person, they would have testified consistently with their respective affidavits. Notwithstanding this fact, the ALJ came to the mind-boggling conclusion that the affidavits were entitled to diminished weight because they contained identical descriptions of the comments that Edward made in the employee cafeteria. (ALJ Decision at 15-16). If anything, this fact reinforces the veracity and credibility of the two declarants. In a further unwarranted attempt to discredit the two declarants' testimony, the ALJ stated that "since neither witness took the stand, there was no opportunity to address the possibility that, as employees of the Respondent, they felt pressured to sign declarations that were favorable to the Respondent." (ALJ Decision at 16). This type of unsubstantiated speculation, particularly in the absence of <u>any</u> record evidence suggesting that Divi pressured the declarants, is wholly inappropriate.

Finally, the only evidence that VIWU submitted to contradict Divi's evidence was Edward's testimony. Although Edward predictably and mechanically denied engaging in any improper conduct, even the ALJ had to acknowledge that she was not a "highly credible witness" and that her testimony appeared "rehearsed." (ALJ Decision at 15). Given this fact, and given that VIWU did not submit <u>any</u> other evidence on this issue, any credibility determinations should

have been resolved in favor of Divi as to whether Edwards, in fact, engaged in improper, pre-election conduct.

In sum, the record before the ALJ and Edward's wholesale lack of credibility fully contradict the ALJ's conclusion that there was insufficient evidence that Edward engaged in repeated, pre-election misconduct.

Second, the ALJ erred in holding that Edward was not a union agent. (ALJ Decision at 16). In determining whether an agency relationship exists between an individual and a union, "'[t]he question is not so much one of 'agency,' in its purest sense as it is of whether the Union should be held accountable' for the employee's conduct." Kentucky Tennessee Clay Co., 295 F.3d at 442 (citation omitted). Moreover, "'the question of whether the specific acts performed were actually authorized or subsequently ratified [by the union] shall not be controlling.'" Id. (citation omitted). Rather, "'[t]he final inquiry is always whether the amount of association between the Union and the [employee organizers] is significant enough to justify charging the Union with the conduct.'" Id. (citation omitted).

Applying this above standards to the facts, Edward's status as a strong union supporter; her pre-election misconduct; and the VIWU's subsequent decision to designate Edward as its official election observer were more than sufficient for Edward to be deemed a VIWU agent during the relevant time-period.

Finally, regardless of whether Edward is deemed to be a VIWU agent or a third-party, her conduct before and during the election satisfies any standard applicable to the determination of whether she improperly interfered with the election's laboratory conditions. Edward made a

number of verbal threats to Divi employees suggesting that they may be harmed if they voted against the union. Indeed, three Divi witnesses (Phyllis Blackman, Brandi Pereira and Melissa Pereira) testified or submitted sworn declarations that Edward made numerous pre-election comments that they reasonably interpreted to mean that (i) VIWU and/or Edward would harm them if they voted against the union and (ii) VIWU could find out how employees voted, even though their votes are supposed to be secret. That Edward served as VIWU's designated election observer on the day of the election further reinforced this fact.

In sum, there can be little doubt that Edward's and/or VIWU's conduct interfered with the election's laboratory conditions, thereby warranting the setting aside of the election results. See, e.g., Kentucky Tennessee Clay Co., 295 F.3d at 439, 445-46 (pre-election statements made to employees that the union would remember individuals who did not support it unlawfully interfered with election's laboratory conditions); John M. Horn Lumber Co., 859 F.2d at 1243 (holding that regardless of whether union agent or third party standard applied, statement made by union supporter two to three weeks before election to purported anti-union employee that "[t]here's a m- f-, I'm gonna blow his brains out and I'm looking straight at him" unlawfully interfered with election's laboratory conditions); Robert Orr-Sysco Food Servs., 338 NLRB at 614-17 (setting aside election due to pre-election misconduct that satisfied both union agent or third party standards). This is particularly so given how close the vote is in the election. Given these facts, the Board should overrule the ALJ's decision and uphold Divi's election objections and order that, if it is ultimately determined after all of the properly cast ballots are counted that

the union won the election, the election should be set aside and a new election run free of the Union and Edward's unlawful conduct.

CONCLUSION

For all of the foregoing reasons, Divi's exceptions to the ALJ's decision should be upheld and the Board should vacate the ALJ's decision on these issues.

Dated: March 21, 2008

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CERTIFICATE OF SERVICE

I do hereby certify that on this 21st day of March 2008, a true and correct copy of the foregoing document was served by electronic filing with the Office of the Executive Secretary and eight (8) copies by Federal Express, postage prepaid, addressed to:

National Labor Relations Board
Office of the Executive Secretary
1099 14th Street, NW, Room 5400 East
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and have advised the following by telephone of the filing and have placed one (1) copy of the same with Federal Express, postage prepaid, addressed to:

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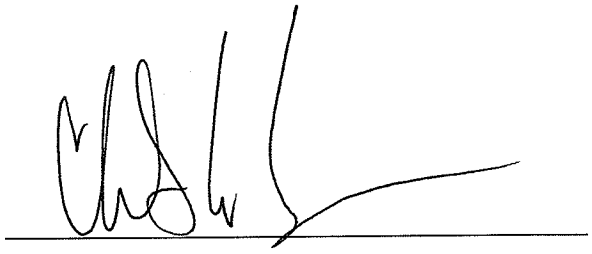

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