

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

DIRECTV U.S. DIRECTV HOLDINGS LLC

and

Case 21-CA-071591

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO,
DISTRICT LODGE 947

MOTION FOR SUMMARY JUDGMENT

Comes now Counsel for the Acting General Counsel, National Labor Relations Board, herein called the Board, and files this Motion for Summary Judgment requesting that the Board make findings of fact and conclusions of law, finding and concluding that DIRECTV U.S. DIRECTV Holdings LLC, herein called Respondent, has engaged in, and is engaging in, conduct in violation of Section 8(a)(1) and (5) of the Act, as alleged in the Complaint, and that the Board issue an appropriate order without the taking of oral testimony herein. In support of this Motion, Counsel for the Acting General Counsel shows as follows:

1. On March 8, 2010, the International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 947, herein called the Union, filed a representation petition in Case 21-RC-21191, seeking to be certified as the collective-bargaining representative of certain employees of Respondent. A copy of this petition is attached and designated as Exhibit A.

2. Pursuant to a Stipulated Election Agreement approved on March 17, 2010, a secret ballot election was conducted on April 16, 2010, in the following described unit:

All full-time production installation technicians, field technicians, service technicians, piece work technicians, who service and install satellite dishes, warehouse employees, dispatchers, and quality control employees, employed by the Employer at its facility located at 19335 South Laurel Park Road, Rancho Dominguez, CA; excluding all other employees, administrative clerical employees, confidential employees, managerial employees, guards and supervisors as defined in the Act.

A tally of ballots served on the parties at the conclusion of the hearing showed that of the approximately 204 eligible voters, 85 cast ballots for, and 80 against, the Union, with no void ballots and two challenged ballots. A copy of the tally of ballots is attached and designated as Exhibit B.

3. Respondent timely filed objections to the conduct of this election and/or conduct affecting the results of the election regarding *inter alia* the pro-union conduct of alleged supervisors, called Field Supervisors (with a team). A copy of Respondent's Objections is attached and designated as Exhibit C.

4. Following an investigation, on May 11, 2010, the Regional Director issued and served upon the parties his Report on Objections and Order Directing Hearing. A copy of this Report is attached and designated as Exhibit D.

5. On June 8 and 9, 2010, a hearing was held on the objections before Region 21 Hearing Officer Robert MacKay. On July 7, 2010, Hearing Officer MacKay issued his Hearing Officer's Report and Recommendations in which he recommended that one of Respondent's objections be sustained, that the election be set aside and that a second election be conducted. A copy of this Report is attached as Exhibit E.

6. On August 19, 2010, the Union filed exceptions to the Hearing Officer's Report and Recommendations and a Brief in support of the exceptions with the Board. A copy of these exceptions is attached and designated as Exhibit F, and a copy of the Brief is attached and designated as Exhibit G.

7. On December 22, 2011, the Board issued a Decision and Certification of Representative, reported at 357 NLRB No. 149, finding, contrary to the Hearing Officer, that the field supervisors do not possess supervisory authority and, therefore, that field supervisors' prounion activity did not constitute objectionable conduct, and certifying that a majority of the valid ballots had been cast for the Union, and that it was the exclusive collective-bargaining representative for the unit. A copy of the Board's Decision and Certification of Representative is attached and designated as Exhibit H.

8. By letter dated December 24, 2011, the Union requested *inter alia* that Respondent initiate negotiations for a collective-bargaining agreement with the Union. A copy of this December 24 letter is attached and designated as Exhibit I.

9. In the same letter described above in paragraph 8, the Union requested that Respondent supply it with information necessary for collective bargaining.

10. By letter dated December 28, 2011, Respondent notified the Union that it is refusing to meet to bargain for a collective-bargaining agreement or to provide the requested information because it is challenging the Board's Certification of Representative. A copy of this letter is attached and designated as Exhibit J.

11. On December 28, 2011, the Union filed the instant charge, alleging that Respondent has refused to bargain with the Union for a collective-bargaining agreement and failed to provide requested information. A copy of the charge and the Affidavit of Service are attached and designated as Exhibits K and L, respectively.

12. By letter dated January 6, 2012, and in connection with the investigation of the unfair labor practice charge described above in paragraph 11, Respondent notified Region 21 of the National Labor Relations Board that Respondent is refusing to meet to bargain for a collective-bargaining agreement or to provide the requested information because the Respondent is challenging the Board's Certification of Representative. A copy of this January 6, 2012, letter is attached and designated as Exhibit M.

13. On January 4, 2012, the Acting Regional Director for Region 21 issued a Complaint and Notice of Hearing, alleging that Respondent is failing and refusing to bargain collectively with the Union and failing and refusing to supply the Union with requested information in violation of Section 8(a)(1) and (5) of the Act. A copy of the Complaint and the Affidavit of Service are attached and collectively designated as Exhibit N.

14. On January 25, 2012, Respondent filed its Answer to Complaint, a copy of which is attached and designated as Exhibit O.

(a) Respondent, in its Answer, denies that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

(b) Respondent, in its Answer, denies that the Union was properly certified as the exclusive collective-bargaining representative of the Unit on December 22, 2011.

(c) Respondent, in its Answer, denies that the following employees of Respondent, herein called the Unit, constitute a unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time production installation technicians, field technicians, service technicians, piece work technicians, who service and install satellite dishes, warehouse employees, dispatchers, and quality control employees, employed by the Respondent at its facility located at 19335 South Laurel Park Road, Rancho Dominguez, CA; excluding all other employees, administrative clerical employees, confidential employees, managerial employees, guards and supervisors as defined in the Act.

(d) Respondent, in its Answer, denies that the Union has been the exclusive collective-bargaining representative of the Unit since December 22, 2011.

(e) Respondent, in its Answer, admits that by letter dated December 24, 2011, the Union made a request that Respondent bargain.

(f) Respondent, in its Answer, states that it was not required to bargain with the Union because the Union was not properly certified as the bargaining representative; thus, Respondent denies that it failed and refused to bargain in violation of the Act.

(g) Respondent, in its Answer, admits that by letter dated December 24, 2011, the Union requested that Respondent furnish it with certain information.

(h) Respondent, in its Answer, denies that the information requested in the December 24, 2011 letter was necessary for the Union to perform its duties as the collective-bargaining representative of the Unit inasmuch as the Union was not properly certified as such.

Counsel for the Acting General Counsel respectfully requests that the Board take official notice of all the documents described above and all other relevant documents in Case 21-RC-21191.

ARGUMENT

In its Answer, Respondent denies easily proven allegations: that the Union is a labor organization within the meaning of Section 2(5) of the Act; that the Unit is an appropriate unit; and that the Union is the Section 9(a) representative of the Unit. Respondent also denies that it refused to bargain or to furnish information. The Respondent's only defense is that the Union was improperly certified. Counsel for the Acting General Counsel contends that Respondent's denials are frivolous and that Respondent's affirmative defenses merely seek to relitigate previously decided issues. Accordingly, the Board should grant summary judgment.

Respondent denies the Union's status as a labor organization, that the Unit is an appropriate unit, and that the Union is the Unit's exclusive collective-bargaining representative. Respondent states that it is refusing to bargain with or furnish information to the Union because the Union was, according to Respondent, improperly certified. However, as mentioned above, despite Respondent's arguments, the Board certified the Union on December 22, 2011. The very fact of certification shows that the Union is a labor organization, that the Unit is an appropriate unit, and that the Union has been and is currently the exclusive representative of the Unit employees for collective-bargaining purposes.

Respondent's arguments regarding the status of the Union as a labor organization, that the Unit is an appropriate unit, and of improper certification are merely attempts to relitigate the issues already litigated in the hearing in Case 21-RC-21191. Those issues were already considered and decided by the Board. In a case involving similar circumstances, the Board noted:

It is well settled that, in the absence of any evidence unavailable at the time of the representation proceeding or any newly discovered evidence, the Board will not reconsider in a subsequent refusal-to-bargain proceeding, matters which have been disposed of in a prior, related representation case

Pepsi-Cola Buffalo Bottling Co., 171 NLRB 157, 158 (1968). *See also, Pittsburgh Plate Glass v. NLRB*, 313 U.S. 146, 162 (1941).

In the instant case, Respondent does not affirmatively allege any newly discovered evidence. Thus, Respondent has failed to establish the existence of any newly-discovered or previously unavailable evidence of the type that would warrant a new hearing. In fact, Respondent's denials in its Answer are identical to its arguments in the objections hearing in Case 21-RC-21191. When Respondent raises the same issues already raised in related representation proceedings, the Board grants a motion for summary judgment. *See, Pittsburgh Plate Glass, supra.*

Based on the above, the attached exhibits, and the record in Case 21-RC-21191, Counsel for the Acting General Counsel respectfully requests that the Board, without taking oral testimony, make findings of fact and conclusions of law finding that Respondent's conduct violated Section 8(a)(1) and (5) of the Act, as alleged in the Complaint, and issue an appropriate order remedying the unfair labor practices found to exist.

REQUESTED REMEDY

Counsel for the Acting General Counsel submits that the appropriate Order should, inter alia, provide the following:

Respondent, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the Unit.

(b) Refusing to furnish the Union with the information requested in its letter dated December 24, 2011.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

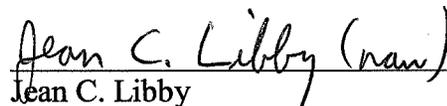
(a) On request, recognize and bargain in good faith the Union, as the exclusive collective-bargaining representative of the Unit employees, regarding terms and conditions of employment for the period required by *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962) and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Furnish the Union with the information requested in its letter dated December 24, 2011.

(c) Post at its facility copies of the Notice to Employees delineating the unfair labor practices found.

(d) In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on the intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means.

Respectfully submitted,



Jean C. Libby
Counsel for the Acting General Counsel
National Labor Relations Board
Region 21

DATED at Los Angeles, California, this 26th day of January, 2012.

STATEMENT OF SERVICE

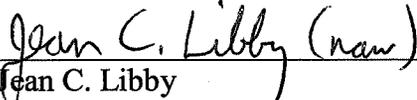
I hereby certify that a copy of Counsel for the Acting General Counsel's **Motion for Summary Judgment** was submitted for E-filing to the National Labor Relations Board on January 26, 2012.

The following parties were served with a copy of said document by electronic mail on January 26, 2012.

Gregory D. Wolflick, Attorney at Law
Wolflick & Simpson
greg@wolfsim.com

David A. Rosenfeld, Attorney at Law
Weinberg, Roger & Rosenfeld
drosenfeld@unioncounsel.net

Respectfully submitted,



Jean C. Libby
Counsel for the Acting General Counsel
National Labor Relations Board

Dated at Los Angeles, California, this 26th day of January, 2012.

EXHIBIT A

UNITED STATES AMERICA NATIONAL LABOR RELATIONS BOARD PETITION	DO NOT WRITE IN THIS SPACE		
	<table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td style="width: 50%;">Case No. 21-RC-21191</td> <td style="width: 50%;">Date Filed 3/8/2010</td> </tr> </table>	Case No. 21-RC-21191	Date Filed 3/8/2010
Case No. 21-RC-21191	Date Filed 3/8/2010		

INSTRUCTIONS: Submit an original and 4 copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located. If more space is required for any one item, attach additional sheets, numbering item accordingly.

Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

PURPOSE OF THIS PETITION (If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.) (Check One)
X RC - CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.
RM - REPRESENTATION (EMPLOYER PETITION) - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
RD - DECERTIFICATION - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer the representative.
UD - WITHDRAWAL OF UNION SHOP AUTHORITY - Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.
UC - UNIT CLARIFICATION - A labor organization is currently recognized by Employer, but Petitioner seeks certification of placement of certain employees: (Check one) in unit not previously certified in unit previously certified in Case No. _____
AC - AMENDMENT OF CERTIFICATION - Petitioner seeks amendment of certification issued in Case No. _____.
 Attach statement describing the specific amendment sought.

2. Name of Employer DIREC-TV	Employer Representative to contact Grace Shappard	Telephone Number (310) 868-1184
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3. Address(es) of Establishment(s) involved (street, city, state, ZIP code) 19335 S. Laurel Park Road, Rancho Dominguez, CA 90220-6036	Telecopier Number (Fax) (310) 868-1694
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4a. Type of Establishment (factory, mine, wholesaler, etc.) Install and service satellite dishes	4b. Identify principal product or service Install and service satellite dishes
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5. Unit Involved (In UC petition, describe present bargaining unit and attach description of proposed clarification.) All full-time production installation techs, service techs, field techs, piece techs, who service and install satellite dishes. Warehouse, dispatchers, lead persons, and quality control employees. Locations: Rancho Dominguez and Santa Ana, CA. Excluded: Administrative clerical employees, confidential employees, managerial employees, all other employees, guards and supervisor, as defined by the Act.	6a. Number of Employees In Unit: 250 Present Proposed (By UC/AC) 6b. Is this petition supported by 30% or more of the employees in the unit* <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No *Not applicable in an RM, UC and AC
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(If you have checked box RC in 1 above, check and complete EITHER item 7a or 7b, whichever is applicable)

7a. G Request for recognition as Bargaining Representative was made on (Date) <u>Petition serves as request</u> and Employer declined recognition on or about (Date) _____ (If no reply received, so state).	7b. G Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.
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8. Name of recognized or Certified Bargaining Agent (If none, so state) None	Affiliation
Address and Telephone Number	Date of Recognition or Certification

9. Expiration Date of Current Contract, if Any (Month, Day, Year)	10. If you have checked box UD in 1 above, show here the date of execution of agreement granting union shop (Month, Day, Year)
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11a. Is there now a strike or picketing at the Employer's establishments Involved? Yes _____ No <input checked="" type="checkbox"/>	11b. If so, approximately how many employees are participating? _____
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11c. The Employer has been picketed by or on behalf of (Insert Name) _____, a labor organization, of (Insert Address) _____ Since (Month, Day, Year) _____	
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12. Organizations or individuals other than Petitioner (and other than those named in items 8 and 11c), which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in unit described in item 5 above. (If none, so state)

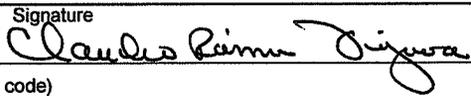
Name	Affiliation	Address	Phone:
			Telecopier No. (Fax)

Full name of party filing petition (if labor organization, give full name, including local name and number) International Association of Machinists & Aerospace Workers, AFL-CIO, District Lodge 947	Phone: (562) 427-8900
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142. Address (street and number, city, state and ZIP code) 535 West Willow Street Long Beach, CA 90806	Telecopier No. (Fax) (562) 427-1122
--	---

15. Name of national or International labor organization of which it is an affiliate or constituent unit (to be filled in when petition is filed by a labor organization)
International Association of Machinists & Aerospace Workers, AFL-CIO

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief

Name: (Print) Claudio Figueroa	Signature 	Title (if any) GLR March 8, 2010
Address (street and number, city, state and ZIP code) 620 Coolidge Drive, Suite 130, Folsom, CA 95630		Telephone No. (916) 985-8101 Fax No. (916) 985-8121

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

EXHIBIT B

DIRECTV U.S. DIRECTV HOLDINGS LLC

Employer

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO, DISTRICT LODGE 947

Petitioner

Case No. 21-RC-21191

DATE FILED
03/08/10

Date Issued 04/16/10

Type of Election:
(Check one:)

- Stipulation
 - Board Direction
 - Consent Agreement
 - RD Direction
- Incumbent Union (Code)

(If applicable check either or both:)

- 8(b) (7)
- Mail Ballot

TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated above, were as follows:

- | | | | |
|---|-------------------|------------|------------|
| 1. Approximate number of eligible voters | | <u>209</u> | |
| 2. Number of Void ballots | | <u>0</u> | |
| 3. Number of Votes cast for | <u>PETITIONER</u> | | <u>85</u> |
| 4. Number of Votes cast for | | | |
| 5. Number of Votes cast for | | | |
| 6. Number of Votes cast against participating labor organization(s) | | | <u>80</u> |
| 7. Number of Valid votes counted (sum of 3, 4, 5, and 6) | | | <u>165</u> |
| 8. Number of Challenged ballots | | | <u>2</u> |
| 9. Number of Valid votes counted plus challenged ballots (sum of 7 and 8) | | | <u>167</u> |
| 10. Challenges are <u>not</u> sufficient in number to affect the results of the election. | | | |
| 11. A majority of the valid votes counted plus challenged ballots (Item 9) has <u>not</u> been cast for | <u>PETITIONER</u> | | |

For the Regional Director

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For EMPLOYER

For PETITIONER

For

For

EXHIBIT C

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

DIRECTV, U.S. DIRECTV HOLDINGS
LLC,

Employer,

and

INTERNATIONAL ASSOCIATION OF
MACHINIST AND AEROSPACE
WORKERS, AFL-CIO, DISTRICT LODGE
947

Petitioner

Case No.: 21-RC-21191

**EMPLOYER'S OBJECTIONS
TO ELECTION**

Date of Election: 4/16/10

Pursuant to Sec. 102.69 (a) of the Board's Rules and Regulations, **DIRECTV U.S. DIRECTV HOLDINGS LLC**, (the "Employer") hereby objects to both the conduct of the election and conduct affecting the results of the election on the following grounds:

1. The Employer's Field Supervisors, who at all relevant times were Supervisors for the purposes of Sec.2 (11) of the Act, unlawfully solicited employees to sign union authorization cards, organized meetings and used their authority as supervisors to influence and demand that employees sign union cards and support the union and otherwise restrained and coerced employees in the exercise of their rights guarantee by Sec.7 of the Act.
2. Subsequent to the filing of the instant Petition, the Employer's Field Supervisors, who were at all times responsible for the direct supervision of the employees eligible to

vote in this election, during Union meetings and in the course of the workday, urged employees to vote for union representation and threatened employees that unless they voted for the union they would suffer poor working conditions, reprisals, and would lose their jobs and be terminated by the Employer. These Field Supervisors acted in concert with the Union and engaged in threats and representations that interfered with, restrained and coerced employees in the exercise of their rights guaranteed by Sec. 7 of the Act. The misconduct by the Field Supervisors occurred throughout the course of the campaign and was well known by all employees and had a lingering affect on the voting employees. The conduct of these Field Supervisors, acting in concert with the Union, was reasonably intended to coerce or interfere with the employees' free choice in the election and such conduct materially affected the outcome of the election as evidenced by the margin of victory.

3. At the time of the election, on April 16, 2010, during the hours of 6:00 a.m. to 9:00 a.m., the union and its supporters engaged in electioneering at the polling place immediately outside the door into the area where the election was conducted. The nature and extent of the electioneering was so intrusive, and so interfered with the employees exercise of free choice, that the Board Agent, on not fewer than four (4) occasions was forced to close the polls, go outside, clear employees away from the immediate entrance so that the election could proceed. Such electioneering by the union and its supporters interfered with the employee's rights under Sec.7 of the Act. These prolonged conversations by representatives of the union which affected voters

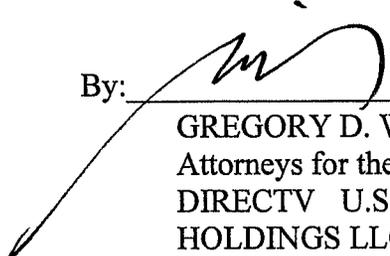
immediately outside the polling area constitutes conduct which in it of itself should invalidate this election.

For the reasons stated above, the Employer respectfully submits that the result of the election should be set aside and a new election conducted to permit the employees to freely exercise their rights in the selection of a bargaining representative.

Respectfully submitted.

WOLFLICK & SIMPSON

DATED: April 23, 2010

By: 

GREGORY D. WOLFLICK
Attorneys for the Employer
DIRECTV U.S. DIRECTV
HOLDINGS LLC

EXHIBIT D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21

DIRECTV U.S. DIRECTV HOLDINGS LLC

Employer

and

Case 21-RC-21191

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO, DISTRICT LODGE 947

Petitioner

REPORT ON OBJECTIONS
AND
ORDER DIRECTING HEARING
AND
NOTICE OF HEARING

This Report¹ contains my recommendations regarding the Employer's objections to the election conducted on April 16, 2010.² The Employer's objections allege that:

- 1) Employer supervisors organized meetings in support of the Petitioner and used their authority as supervisors to solicit and coerce employees to sign Petitioner authorization cards and support the Petitioner;
- 2) Employer supervisors urged employees to vote for the Petitioner and threatened employees that unless they voted for the Petitioner they would suffer poor working conditions, reprisals, and be discharged; and
- 3) the Petitioner electioneered near the polling place during the election.³

¹ This report has been prepared under Section 102.69 of the Board's Rules and Regulations, Series 8, as amended.

² The collective-bargaining unit agreed appropriate in this matter is comprised of: "All full-time production installation technicians, field technicians, service technicians, piece work technicians, who service and install satellite dishes, warehouse employees, dispatchers, and quality control employees, employed by the Employer at, or out of its facility located at 19335 South Laurel Park Road, Rancho Dominguez, California; excluding all other employees, administrative clerical employees, confidential employees, managerial employees, guards, and supervisors as defined in the Act."

As described below, I conclude that Employer's Objection Nos. 1, 2, and 3 shall be considered at a hearing.

Procedural History

The petition in this matter was filed on March 8, 2010. The tally of ballots served on the parties at the conclusion of the election showed that of approximately 204 eligible voters, 85 cast ballots for, and 80 against, the Petitioner. There were zero void ballots and two challenged ballots, which were insufficient in number to affect the results of the election. The Employer timely filed objections to the election, a copy of which is attached hereto as Attachment A. The Objections were timely served upon the Petitioner.

The Objections and Analysis

Objection No. 1

The Employer's Field Supervisors, who at all relevant times were Supervisors for the purposes of Sec. 2(11) of the Act, unlawfully solicited employees to sign union authorization cards, organized meetings and used their authority as supervisors to influence and demand that employees sign union cards and support the union and otherwise restrained and coerced employees in the exercise of their rights guaranteed by Sec. 7 of the Act.

Objection No. 2

Subsequent to the filing of the instant Petition, the Employer's Field Supervisors, who were at all times responsible for the direct supervision of the employees eligible to vote in this election, during Union meetings and in the course of the workday, urged employees to vote for union representation and threatened employees that unless they voted for the union they would suffer poor working conditions, reprisals, and would lose their jobs and be terminated by the Employer. These Field Supervisors acted in concert with the Union and engaged in threats and representations that interfered with, restrained and coerced employees in the exercise of their rights guaranteed by Sec. 7 of the Act. The misconduct by the Field Supervisors occurred throughout the

³ The election was conducted in the training room at the Employer's facility located at 19335 South Laurel Park Road, Rancho Dominguez, California, from 6:00 a.m. to 9:00 a.m.

course of the campaign and was well known by all employees and had a lingering affect [sic] on the voting employees. The conduct of these Field Supervisors, acting in concert with the Union, was reasonably intended to coerce or interfere with the employees' free choice in the election and such conduct materially affected the outcome of the election as evidenced by the margin of victory.

Inasmuch as they are related, I will consider Employer's Objection Nos. 1 and 2 together. In support of these objections, the Employer contends that an employee, hereinafter referred to as Witness A, would testify regarding the above objections.

The Employer contends Witness A would testify that Employer Field Supervisor Nick Fernandez, and possibly other field supervisors, attended Petitioner meetings, solicited employees to sign Petitioner authorization cards, and arranged for Petitioner representatives and supporters to meet employees on job sites for the purpose of soliciting their support. According to the Employer, Witness A would testify that during the course of the campaign, Fernandez told employees that their situation was "hopeless," they "needed" to sign Petitioner authorization cards, and that supporting and voting for the Petitioner was necessary, or else employees would be disciplined, terminated, or otherwise treated poorly at work.

The Employer claims that Fernandez is a statutory supervisor and that his alleged conduct was objectionable under *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004) and *Millsboro Nursing & Rehabilitation Center, Inc.*, 327 NLRB 879 (1999).⁴ The Employer asserts that because the margin of victory in the present case was only 5 votes and because it was well known among all unit employees that field supervisors were actively supporting the Petitioner, such conduct would have an impact on the outcome of the election.

For its part, regarding Employer's Objection Nos. 1 and 2, the Petitioner denies that any objectionable conduct occurred.

⁴ The Employer contends that technicians are organized into approximately 15 teams, with each consisting of 10 to 15 employees. According to the Employer, each field supervisor is responsible for directly overseeing their team, hiring, firing, interviewing, disciplining, and responding to employee questions, among other duties. The Employer further contends that "field supervisors" were not eligible to vote in the election. However, it is noted that the unit agreed to by the parties herein makes no mention of the job classification of "field supervisors."

Inasmuch as there are substantial and material factual and legal issues with regard to Employer's Objection Nos. 1 and 2, I shall order a hearing for these Objections.

Objection No. 3

At the time of the election, on April 16, 2010, during the hours of 6:00 a.m. to 9:00 a.m., the union and its supporters engaged in electioneering at the polling place immediately outside the door into the area where the election was conducted. The nature and extent of the electioneering was so intrusive, and so interfered with the employees exercise of free choice, that the Board Agent, on not fewer than four (4) occasions was forced to close the polls, go outside, clear employees away from the immediate entrance so that the election could proceed. Such electioneering by the union and its supporters interfered with the employee's rights under Sec. 7 of the Act. These prolonged conversations by representatives of the union which affected voters immediately outside the polling area constitutes conduct which in it [sic] of itself should invalidate this election.

In support of Employer's Objection No. 3, the Employer asserts that its election observer, hereinafter referred to as Witness B, would testify regarding this objection.

According to the Employer, Witness B would testify that, on four occasions during the conduct of the election, the Board agent told employees, located immediately outside the door leading into the polling place, to not interfere with the conduct of the election.⁵ The Employer described the employees as an intimidating "mob." The Employer argues that campaigning too close to the polls constitutes objectionable conduct. *Claussen Baking Company*, 134 NLRB 111 (1961); *Continental Can Company*, 80 NLRB 785 (1948); and *The Smithfield Packing Company, Inc., Tar Heel Division*, 344 NLRB 1 (2004). The Employer contends that at least 30 or more of the employees listed on the *Excelsior* list did not vote⁶, and speculates that the conduct described above caused employees to stay away from the polling place, which the Employer reasons could affect the outcome of a close election.

⁵ The investigation of this objection revealed no evidence that the Board agent left the polling place or closed the polls prior to 9:00 a.m., at which time the voting was scheduled to end.

⁶ An inspection of the *Excelsior* list used during the election indicates that 39 of the 204 employees listed thereon did not vote.

In response to Employer's Objection No. 3, the Petitioner denies that its organizers engaged in any objectionable conduct. It further denies that any exuberance, which may have been demonstrated by employees during the election, constitutes coercion, intimidation, interference, or threatening conduct.

Inasmuch as there are substantial and material factual and legal issues with regard to Employer's Objection No. 3, I shall order a hearing for this Objection.

Conclusion

In view of the conflicting positions of the parties and the substantial and material factual and legal issues raised by the above-noted objections, I conclude that Employer's Objection Nos. 1, 2, and 3 can best be resolved by a hearing. Accordingly, pursuant to Section 102.69(d) of the Board's Rules and Regulations, Series 8, as amended, I shall direct a hearing on Employer's Objection Nos. 1, 2, and 3.

ORDER

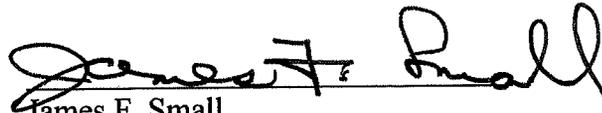
IT IS HEREBY ORDERED that a hearing be held before a duly designated Hearing Officer for the purpose of receiving evidence to resolve the issues raised by Employer's Objection Nos. 1, 2, and 3.

IT IS FURTHER ORDERED that the Hearing Officer designated for the purpose of conducting such hearing shall prepare and cause to be served upon the parties a report containing the resolution of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of Employer's Objection Nos. 1, 2, and 3. The provisions of Section 102.69 of the above Rules shall govern with respect to the filing of exceptions or an answering brief on the exceptions to the Hearing Officer's report.

NOTICE OF HEARING

PLEASE TAKE NOTICE that, on May 25, 2010, **and such consecutive days thereafter until concluded**, at 9:00 a.m., PDT, in Hearing Room 903, Ninth Floor, 888 South Figueroa Street, Los Angeles, California, a hearing will be conducted for the purposes set forth in the above Order, at which time and place the parties will have the opportunity to appear in person, or otherwise, and give testimony.

Dated at Los Angeles, California on May 11, 2010.



James F. Small
Regional Director
Region 21
National Labor Relations Board

EXHIBIT E

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21

DIRECTV U.S. DIRECTV HOLDINGS LLC

Employer

and

Case 21-RC-21191

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO, DISTRICT LODGE 947

Petitioner/Union

**HEARING OFFICER'S REPORT
AND
RECOMMENDATIONS**

This report contains my findings of fact, conclusions, and recommendations regarding the Employer's objections to the election held in the above matter.

For the reasons contained in this report, I recommend that Employer Objection No. 1, alleging *pre-petition* pro-union conduct by supervisors, be sustained; that the election be set aside; and that a second election be held. In brief summary of the recommendation, I have concluded that the alleged supervisors, called Field Supervisors (with a team), are supervisors within the meaning of Section 2(11) of the Act because they have the authority to effectively recommend discipline, up to and including discharge. I have further concluded that the nature and extent of their pro-union conduct, which included the solicitation of authorization cards, rendered the election objectionable under Harborside Health Care, Inc., 343 NLRB 906 (2004).

EXHIBIT NO. GCI A RECEIVED REJECTED

CASE NO. 21-CA-39546 CASE NAME: DIRECTV

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For reasons also explained in this report, however, I recommend that Employer Objection No. 2 (alleging *post-petition* pro-union conduct by supervisors), and Employer Objection No. 3 (alleging electioneering outside of the polling site), be overruled due to insufficient evidence of objectionable conduct.

I. Procedural Background

The petition in this matter was filed by the Union on March 8, 2010. Pursuant to a Stipulated Election Agreement approved on March 17, 2010, a secret ballot election was conducted on April 16, 2010, in the unit agreed appropriate for collective-bargaining.¹

The tally of ballots served on the parties at the conclusion of the election showed that of approximately 204 eligible voters, 85 cast ballots for, and 80 against, the Union. There were zero void ballot and two challenged ballots, which were insufficient in number to affect the results of the election. The Employer timely filed objections to the conduct of this election and/or conduct affecting the results of the election. The Regional Director investigated the objections and, on May 11, 2010, the Regional Director issued and served upon the parties his Report on Objections and Order Directing Hearing, in which he concluded that Employer Objections Nos. 1, 2 and 3 could best be resolved by a hearing. Pursuant thereto, a hearing on the Employer's objections was held in Los Angeles, California, on June 8 and 9, 2010. All parties were given a full opportunity to be heard, to examine and cross-examine witnesses, and to present evidence and oral argument pertinent to the issues.

¹ The collective-bargaining unit agreed appropriate in this matter is comprised of: "All full-time production installation technicians, field technicians, service technicians, piece work technicians, who service and install satellite dishes, warehouse employees, dispatchers, and quality control employees, employed by the Employer at, or out of its facility located at 19335 South Laurel Park Road, Rancho Dominguez, California; excluding all other

Upon the entire record of the hearing and my observation of the witnesses, their demeanor and testimony, I make the following findings of fact, conclusions, and recommendations:

II. Preface

This report is, unless otherwise noted, based on a composite of the credited aspects of the testimony of all witnesses, unrefuted testimony, supporting documents, undisputed evidence, and careful consideration of the entire record, including each party's oral argument on the record.²

Although each iota of evidence, or every argument of counsel, is not individually discussed, all matters have been considered. Omitted matter is considered either irrelevant or superfluous. To the extent that testimony or other evidence not mentioned might appear to contradict the findings of fact, that evidence has not been overlooked. Rather, it has been rejected as incredible or of little probative value. Unless otherwise indicated, credibility resolutions have been based on my observations of the testimony and demeanor of witnesses at hearing. NLRB v. Brooks Camera, Inc., 691 F.2d 912, 915, 111 LRRM 2881, 2881 (9th Cir. 1982); NLRB v. Ayer Lar Sanitarium, 436 F.2d 45, 49, 76 LRRM 2224, 2226 (9th Cir. 1970). Failure to detail all conflicts in testimony does not mean that such conflicting testimony was not considered. Bishop and Malco, Inc., d/b/a Walkers, 159 NLRB 1159, 1161 (1966). Further, the testimony of certain witnesses has been only partially credited. Kux Manufacturing Co. v. NLRB, 890 F.2d 804, 810-811, 132 LRRM 2935 (6th Cir. 1989);

employees, administrative clerical employees, confidential employees, managerial employees, guards, and supervisors as defined in the Act.

² I declined to permit the parties to file briefs in this matter.

NLRB v. Universal Camera Corp., 179 F.2d 749, 754, 25 LRRM 2256 (2nd Cir. 1950), *rev'd on other grounds*, 340 U.S. 474, 27 LRRM 2373 (1951).

III. The Objections

The Employer's objections are as follows:

Objection No. 1

The Employer's Field Supervisors, who at all relevant times were Supervisors for purposes of Section 2(11) of the Act, unlawfully solicited employees to sign union authorization cards, organized meetings and used their authority as supervisors to influence and demand that employees sign union cards and support the union and otherwise restrained and coerced employees in the exercise of their rights guaranteed by Sec. 7 of the Act.

Objection No. 2

Subsequent to the filing of the instant Petition, the Employer's Field Supervisors, who were at all times responsible for the direct supervision of the employees eligible to vote in the election, during Union meetings and in the course of the workday, urged employees to vote for union representation and threatened employees that unless they voted for the union they would suffer poor working conditions, reprisals, and would lose their jobs and be terminated by the Employer. These Field Supervisors acted in concert with the Union and engaged in threats and representations that interfered with, restrained, and coerced employees in the exercise of their rights guaranteed by Sec. 7 of the Act. The misconduct by the Field Supervisors occurred throughout the course of the campaign and was well known by all employees and had a lingering affect [sic] on the voting employees. The conduct of these Field Supervisors, acting in concert with the Union, was reasonably intended to coerce or interfere with the employees' free choice in the election and such conduct materially affected the outcome of the election as evidenced by the margin of victory.

Objection No. 3

At the time of the election, on April 16, 2010, during the hours of 6:00 a.m. to 9:00 a.m., the union and its supporters engaged in electioneering at the polling place immediately outside the door to the area where the election was conducted. The nature and extent of the electioneering was so intrusive, and so interfered with the employees exercise of free choice, that the Board Agent, on not fewer than four (4) occasions was forced to close the polls, go outside, clear employees away from the immediate entrance so that the election could proceed. Such electioneering by the union and its supporters interfered with the employee's rights under Sec. 7 of the Act. These prolonged conversations by representatives of the union which affected voters immediately outside the polling area constitutes conduct which in it [sic] of itself should invalidate this election.

IV. The Evidence

A. Objection Nos. 1 and 2 (alleging pro-union conduct by supervisors)

In support of Employer Objection Nos. 1 and 2, the Employer presented the following witnesses: Mike Schultz (Site Manager), Juan Flores (Field Supervisor - with a team), Emanuel Suflé (Field Technician), and John Beckman (Field Technician).

The Union did not call any witnesses at the hearing.

1. *The Employer's business*

The Employer is engaged in the business of providing digital television entertainment services to residential and commercial customers. Among other facilities, the Employer operates out of a facility located in Rancho Dominguez, California ("Rancho facility"), the only facility involved herein. The Employer has only been operating out of the Rancho facility since in or about August 2009.

The Employer employs, among other employees, Field Technicians. Field Technicians, who will be discussed in more detail below, travel to customer locations and install, modify, or repair digital equipment.

2. *The Site Manager and Operations Managers*

The Rancho facility is overseen by Mike Schultz, Site Manager.

Below him are three Operations Managers: Juan Herrera, Carlos Menendez, and John Walton.

The Site Manager and Operations Managers work primarily at the Rancho facility, and have little direct interaction with the Field Technicians.

3. *Field Supervisors with a team; Field Supervisors without a team*

Below the Operations Managers are two classifications: (1) Field Supervisors with a team, and (2) Field Supervisors without a team.

The Employer takes the position in this proceeding that both classifications are statutory supervisors. The Union disputes the supervisory status of both.

For the remainder of this report, and when discussing Field Supervisors with a team, I will use the term Field Supervisor. When referring to Field Supervisors without a team, I will use the full job title.

There are currently 13 Field Supervisors and 9 Field Supervisors without a team.

(a) Field Supervisors

The 13 Field Supervisors, who wear photo identification badges that specifically list their job title as Field Supervisor, are each assigned to oversee a team of approximately 10-15 Field Technicians.

During the course of the day, and for their team, Field Supervisors respond to telephone calls from their team (e.g. technical questions; requests for equipment; customer cancellations; etc); conduct inspections (at the customer's location) of their work and vehicles; and monitor their statistical performance (i.e. how many jobs they are completing per day).

(b) Field Supervisors without a team

The 9 Field Supervisors without a team are not assigned, and do not oversee, a team of Field Technicians. Rather, they, like Field Technicians, primarily perform installation/repair work in the field. However, they are assigned to "specialty" or "VIP" jobs, which are complicated jobs, and/or jobs of very important customers.

At least some Field Supervisors without a team, in addition to their primary duties, fill in for Field Supervisors who are on vacation, or out sick. No specific evidence was presented regarding how many of the 9 Field Supervisors without a team have performed these fill-in obligations, the time periods involved, and/or what specifically they did during those periods of time.

4. Field Technicians; Warehouse employees; and Dispatchers

There are approximately 215 employees that work at or out of the Rancho location, which fall into one of the following three classifications: Field Technicians

(briefly described above), Warehouse employees (who work at the Rancho facility and are in charge of providing Field Technicians with their equipment), and Dispatchers (who work at the Rancho facility and communicate with customers / Field Technicians during the day).

As mentioned above, the Field Technicians install, upgrade, and/or repair digital equipment at customer jobsites. There are approximately 150 Field Technicians.³

The Field Technicians spend the majority of their day/week working in the field. On average, they are assigned to do 5 installation jobs per day. They use company vehicles to do their work and may drive the vehicles home at the end of the day. Thus, they do not go to the Rancho facility on a daily basis. But, they do go to the Rancho facility to pick-up equipment, and/or to attend team meetings (discussed below).

The night before each work day, Field Technicians receive their job assignments (i.e. a list of customer locations) electronically via a hand-held electronic device (PDA), or they may look up their schedule on the internet.

In assigning the customer locations, the Employer uses a computer program to divide up and assign the jobs. Field Supervisors do not play any role in assigning this initial schedule for a Field Technician.

The record reflects that Field Technicians generally perform their work alone at the customer locations. However, for complicated jobs, other Field Technicians, or their Field Supervisor, may assist them.

³ Field Technicians are further broken down into one of two types: 1) Piece Work Field Technicians (who do initial installs), and 2) Service Field Technicians (who service or trouble-shoot problems for existing accounts). My use of the term Field Technicians in this report refers to both groups, as the distinction is not relevant to the issues in this proceeding.

With regard to scheduling their days and hours (shifts), the Employer's Site Manager and Operations Manager determine these matters.

5. *Field Supervisors - alleged 2(11) indicia*

There is no contention that Field Supervisors have the authority, within the meaning of Section 2(11) of the Act, to hire, transfer, layoff, recall, promote, reward, or responsibly direct their team of Field Technicians, or to effectively recommend such actions.⁴

With respect to the 2(11) authorities being alleged, I will discuss them individually below.

(a) Assign

The Employer contends that Field Supervisors have the authority to assign Field Technicians because they modify a Field Technician's predetermined schedule during the course of a day.

Examples introduced in support of the circumstances in which a Field Supervisor might be called upon to modify a schedule are when a customer cancels, or the customer is not home, or if the Field Technician can not access the customer's property. In these circumstances, the Field Technician now has additional time on his/her hands. In these circumstances, the Field Technician will call his/her Field Supervisor and report the event.⁵

If Field Supervisors are not busy when they receive such calls, they will, using their laptop computers, look over their team's routes to see if another Field Technician on the team is running behind or needs help. If that is the case, the Field Supervisor will reassign the route

⁴The record also does not support a finding that Field Supervisors exercise these authorities.

⁵ Field Technician John Beckman testified that approximately 25% to 30% of his pre-assigned routes end up needing to be modified.

from the Field Technician running behind to the Field Technician that had the cancellation.

If Field Supervisors are too busy, they will tell the Field Technician to call dispatch, and a dispatcher will perform this same task (reviewing routes).

With respect to assigning Field Technicians new or additional jobs at the end of a day, the record reflects that Field Technicians will, in most circumstances, call their Field Supervisor after finishing their last pre-assigned route to let them know they are done. On some occasions, the Field Supervisor will tell a Field Technician that an additional job has come in, and assign the Field Technician to that job.⁶ This will sometimes, therefore, entail the Field Technician working overtime.

(b) Discipline (undocumented verbal warnings)

As will be described later in this report, the Employer has a disciplinary procedure in place, the end result of which is that a Field Technician is issued a written document called an Employee Counseling Form, or ECF.

Outside of a Field Supervisor's involvement in the ECF process, however, the Employer submits that Field Supervisors separately have the authority to give verbal warnings to Field Technicians.

On this subject, Site Manager Schultz and Field Supervisor Flores testified generally as to possessing such authority.

As examples, Field Supervisor Flores testified that he will give a Field Technician a verbal warning if they are tardy to meetings, or if he observes performance issues based on his

⁶ Field Technician Emanuel Sufle' testified that this happens maybe once or twice per week.

site visits. He testified that if he thinks the same problem has happened too many times, he will then initiate the ECF process described next.

Field Supervisors may make a notation about the verbal warning in a personal notebook that they each keep, but the alleged verbal warnings are not otherwise documented in any business record, nor are the notebooks turned over to, or reviewed by, management.

(c) Discipline; Suspend; Discharge (ECFs)⁷

As mentioned above, Field Technicians may receive discipline via a written document, called an Employee Counseling Form, or ECF.

(i) A description of the ECF

The ECF is a form document, containing various sections (calling for certain information) and boxes to check.

The employee's name, date of the incident (resulting in discipline), and the date the ECF will be given to the employee is entered at the top of the ECF. The name of the person's 'Supervisor'⁸ is listed next.

Moving down the document, the next part of the ECF sets forth various categories that describe the nature of the incident (each with a box that can be checked if applicable). The categories are: Attendance; Misconduct; Safety Violation; Insubordination; Performance; and Other.

⁷ I will address authority to discipline, suspend, and discharge, and/or to effectively recommend the same, together in light of the evidence discussed below, and the conclusions I have reached later in this report.

⁸ The Employer introduced examples of ECFs issued to Field Technicians into the record. On these forms, the Field Supervisor's name was listed in the Supervisor section.

Next, the ECF calls for a "Supervisor Statement." Here, a brief description of the incident is to be set forth.

The ECF form next has a section labeled 'Corrective Action,' where information regarding expectations for the future or how to resolve the problem are to be entered. After this is a section labeled 'Action Plan,' where information regarding the possibility of future discipline is entered.

Next, and continuing down the document, the ECF lists levels of discipline. The levels are: Warning (further broken down into Verbal, Written, and Final); Suspension (Days/Dates); and Discharge. There is a box next to each of these options, where the applicable level of discipline given is checked.

Next, the ECF contains a section entitled 'Employee Statement.' This is where the employee, on the date he/she is given the ECF, may enter any comment, response, or defense.

Finally, the ECF contains signature lines at the bottom, calling for the employee's signature, a Supervisor's or Manager's signature, and then a witness signature. These signatures are entered on the date the ECF is given to the employee.

(ii) The ECF process

Field Supervisors do not have the authority to prepare and issue an ECF directly to a Field Technician without it going through the process described below.

The ECF process was testified to by Site Manager Schultz and Field Supervisor Flores and is summarized as follows:

If a Field Supervisor believes that a Field Technician should be disciplined, the Field Supervisor will initiate the ECF process.

In this regard, the Field Supervisor will prepare a draft ECF, entering in the information called for on the ECF, including the level of discipline the Field Supervisor thinks is appropriate.⁹

The Field Supervisor will submit the draft to the Operations Manager that the Field Supervisor reports to. That Operations Manager will review the draft. The Operations Manager may ask the Field Supervisor some questions if they have any. The Operations Manager may make changes to language in the draft.

If the Operations Manager disagrees and does not believe that discipline is warranted, or that the proposed (by the Field Supervisor) level of discipline should be different, the Operations Manager has the authority to reject issuance of the ECF, and/or change the proposed discipline level.¹⁰

After the Operations Manager has reviewed the draft ECF, it is forwarded to the Site Manager for his review. Like the Operations Manager, the Site Manager (currently Schultz) has the authority to decide not to issue the discipline, or change the proposed level of discipline.

In reviewing the draft, Schultz testified that he may take into account and consider the employee's past performance, or other corrective actions taken against the employee in the past. He may also consult with the Operations Manager and/or Field Supervisor.

The proposed ECF document is also reviewed by Human Resources. Human Resources, like the Operations Manager and Site Manager, may disagree and conclude that the discipline

⁹ Site Manager Schultz testified that Field Supervisors have the authority to recommend each of the types of discipline on the ECF.

¹⁰ Site Manager Schultz testified that approximately 15-20 ECFs are issued in a given week to Field Technicians. He estimates that in the same (average week), about 3 ECFs proposed by Field Supervisors are rejected by an Operations Manager. Field Supervisor Flores testified that rarely (approximately 1% of the time) are his recommendations over-ruled by upper management during the review process.

should not be issued, and/or that changes should be made regarding the level of discipline, or the language.

There is no record evidence establishing that during this review process, the Field Supervisor's description of the incident is called into question, or that the Operations Manager, Site Manager, or Human Resources go and speak with the employees to obtain their version before making a decision. Rather, the first time the employee has that opportunity is when he/she is presented with the ECF (discussed below).¹¹

Once the ECF has gone through the review process, the ECF is ready to be issued to the employee.¹²

To issue the ECF, the Field Supervisor will call the Field Technician into the Rancho facility. There, the Field Supervisor will meet with the employee, and will present and explain the ECF. The Field Supervisor will ask the employee if he/she wants to put anything in the employee-comments section. There, the employee can put his/her version, or response to the fairness of the discipline. The Field Supervisor will then solicit the Field Technician's signature. The Field Supervisor signs below the Field Technician's signature.

The Employer's practice is to have a witness sit in with the Field Supervisor during these meetings. There is a signature line for the witness on the ECF. These witnesses may be an Operations Manager or another Field Supervisor.

¹¹ Field Technician Beckman's testimony reflects that he is not aware of there even being an ECF review process.

¹² Regarding recommendations to discharge, the ECF process is only slightly different. In this regard, the Field Supervisor will typically consult with his/her Operations Manager before even preparing the draft ECF. Furthermore, management and Human Resources, during their review of an ECF recommending discharge, will review and take into consideration the overall performance of the employee in deciding whether to approve the recommendation. Field Supervisor Flores testified that he has initiated ECFs with recommendations to terminate, which were approved as recommended.

Even though an Operations Manager may serve as the witness, the meetings are conducted by the Field Supervisor.¹³

After this meeting, the ECF is placed in the employee's personnel file.¹⁴

(d) Adjust grievances

The Employer argues that Field Supervisors have the authority to adjust grievances.

In support of this argument, Site Manager Schultz testified that the Employer has a grievance procedure in place¹⁵ whereby the first step of the procedure calls for the Field Technician to talk with the Field Supervisor about the issue.

Schultz further testified that Field Supervisors have the authority to independently resolve the problems they are presented with. Schultz testified that this happens on a daily basis. He gave examples of the kinds of subjects that could be presented to Field Supervisors: when a Field Technician needs time off; or when a Field Technician needs technical assistance. He further testified that even a sexual-harassment complaint may be presented to a Field Supervisor. However, he did not provide testimony about any actual past request, and/or how the Field Supervisor responded or resolved the specific request.

Field Technicians Sufle' and Beckman were asked questions regarding presenting problems to their Field Supervisor. Sufle' testified that if he has technical problems or problems with his vehicle, he will first call and speak to his Field Supervisor. Field Technician Beckman

¹³ An exception to this practice is that for discharges, the meeting is run by an Operations Manager.

¹⁴ The Employer introduced copies of some previously issued ECFs, along with testimony that they were initiated by certain Field Supervisors who were allegedly involved in the pro-union activity in this case, and that these ECFs were issued to Field Technicians in essentially the form in which they had been proposed by the Field Supervisor. Although the sample ECFs do not encompass every type of violation category, or reflect every level of discipline on the ECF form, the record evidence reflects that Field Supervisors may initiate ECFs for each of the categories, and have recommended discipline levels of suspension and discharge.

¹⁵ There was no evidence presented that these are written procedures; nor were any written procedures introduced.

testified that if he is having problems at work, the first person he will speak with about those problems is his Field Supervisor. However, neither of these witnesses provided testimony about a specific, actual, past request, or how/if their Field Supervisor responded to or resolved that request.

(e) Secondary indicia

The Employer argues that the following secondary indicia of supervisory status exist in this case.

(i) Ratio

The Employer argues that the ratio of supervisors to employees supports a finding of supervisory status. In this regard, and if Field Supervisors are not supervisors, it would mean that the Rancho facility is supervised by four people (one Site Manager and three Operations Managers).

(ii) Field Technicians view Field Supervisors as their supervisor

Field Technicians Sufle' and Beckman both testified that they consider their Field Supervisors to be their supervisors.

(iii) Evaluate

The Employer argues that Field Supervisors have the authority to evaluate employees, and that this is done when they travel to the jobsites.

Regarding travel to jobsites, and as described earlier in this report, Field Supervisors do go out to jobsites and review work performed by Field Technicians on their team. If they see any mistakes or errors, they will point them out to the Field Technician. They may also provide the Field Technician with some additional (presumably hands-on) training.

Also, Field Supervisors will conduct vehicle inspections while out at the jobsite. They will check to see if the license and registration are up to date; if there is any unreported damage to the vehicle; and/or if the vehicle is messy.

Field Technician Sufle' testified that his Field Supervisor visits him once or twice per month. He testified that his Field Supervisor will stay from between 15 minutes to an hour on each visit. During that time, his Field Supervisor will take pictures, talk to him about the job, and point out any mistakes.

Field Technician Beckman similarly testified that his Field Supervisor comes out and visits him maybe once or twice a month. During these visits, his Field Supervisor will inspect his work and his vehicle, and will provide him with feedback and training. Beckman further testified that his Field Supervisor may give him instructions on what additional things may need to be done there or in the future. It is Beckman's understanding that if he does not comply with those instructions, he may be disciplined for insubordination.

No evidence was presented, however, that Field Technicians are formally or periodically evaluated under any type of established evaluation process. As such, I find that these arguments, and this evidence, should and will be more properly considered in addressing the allegations that Field Supervisors have the authority to discipline, or effectively recommend discipline.

(iv) Attend management meetings

Field Supervisors attend weekly meetings at the Rancho facility with the Operations Managers and the Site Manager. During these meetings they discuss, among other subjects, payroll issues, technical changes, and inventory issues.

(v) Conduct weekly meetings with their team

The Field Supervisors conduct at least one and sometimes two meetings a week at the Rancho facility amongst their team of Field Technicians. During these meetings, Field Supervisors, among other things, review and discuss their team's performance (i.e. review reports reflecting their productivity levels), discuss new equipment or procedures, solicit technicians to work holidays, and provide tips on performance.

(vi) Time records

During the Field Supervisor team meetings described above, Field Technicians complete and return to their Field Supervisor time records.

Although not entirely clear, it appears from the record that the Field Supervisor gives the Field Technician a time sheet, reflecting hours worked during a preceding time period. The Field Technicians sign, date, and give the time record back to the Field Supervisor. If a Field Technician sees a mistake on the record (i.e. forgot to clock in one day), the Field Technician makes corrections on the time sheet, and explains the correction to the Field Supervisor.

(vii) Authority to grant time off

Site Manager Schultz testified that Field Supervisors have the authority to grant Field Technicians time off if they are going to be late to work or leave early.

However, this assertion was contradicted by the testimony of Field Technician Sufle', who testified that if he is going to be late, or if he needs time off, he only calls his Field Supervisor as a courtesy. Sufle' testified that regarding getting approval, he has to get approval from an Operations Manager or a Site Manager. He does this by calling a "call-out" telephone number.

In light of Sufle's testimony, which I credit, there is insufficient evidence to conclude that Field Supervisors grant time off.

6. *Field Supervisors without a team*

As outlined earlier, *Field Supervisors without a team* fill in for Field Supervisors when Field Supervisors are on vacation, out sick, on disability, etc. The Employer contends that during these time periods, they exercise the same authority that Field Supervisors do. However, this was only generally asserted. No specific and/or past practice evidence was presented establishing how many of these 9 Field Supervisors without a team have actually filled in; and/or the time periods that are/were involved; and/or what was done by those individuals during those time periods.

7. *Alleged pre-petition pro-union conduct by supervisors*

Evidence was presented that at a minimum,¹⁶ the following individuals engaged in pro-union conduct (soliciting cards, inviting employees to Union meetings, attending Union meetings, speaking at Union meetings) prior to the petition being filed on March 8, 2010:

<u>Name</u>	<u>Job Title</u>
Nicolas "Nick" Fernandez	Field Supervisor
Juan Flores	Field Supervisor
Mario Escada	Field Supervisor
Jose Mendiola	Field Supervisor
Field Supervisor A ¹⁷	Field Supervisor
William Aguilar	Field Supervisor without a team

The witness testimony regarding the pro-union activity of supervisors is described below.

(a) Field Supervisor Flores

Field Supervisor Flores testified that approximately a month-and-a-half before the petition was filed, Field Supervisor Fernandez approached and spoke to him about the Union. During their conversation, Fernandez asked Flores if Flores would solicit authorization cards for the Union from his (Flores') team. Flores agreed. Fernandez also invited Flores to attend an upcoming Union meeting at the Union's office in Long Beach.

Prior to this Union meeting, Field Supervisor Flores went to the jobsites of 8 of the Field Technicians on his team, including Field Technician Emanuel Sufle'.

¹⁶ The record supports an inference that additional Field Supervisors, beyond these listed, engaged in the same alleged conduct. Assuming arguendo additional Field Supervisors were not involved, it would not alter the conclusions I reach later in this report.

¹⁷ While I believe the record clearly establishes who Field Supervisor A is, I will respect the parties' requests that this person's name not be specifically identified.

There, and during one-on-one conversations with the Field Technicians, he would say that "we" are trying to get a union in here, in an effort to try and get better pay, to save "our" jobs, and to help reduce the number of ECFs going around.¹⁸

Of the eight he visited, six of them signed cards and gave them back to Flores. The other two declined to sign cards. Flores later gave those cards to either Field Supervisor Fernandez, or to Field Supervisor without a team Aguilar. Flores is not sure which of the two he gave them to.

Flores next attended two Union meetings, on dates he does not recall, but both of which were prior to the petition being filed. The meetings were held on consecutive Thursday nights, at the Union's Long Beach office.

At the first meeting, Flores saw approximately 15 Field Technicians, Field Supervisor Fernandez, and Field Supervisor without a team Aguilar. He thinks he also saw Field Supervisor Joe Mendiola and Field Supervisor Mario Escada there, but acknowledges they may have only been at the second meeting he went to.

With respect to the events of this first meeting, Flores testified that the meeting was run by Field Supervisor Fernandez. Even though there were a few Union representatives present, Field Supervisor Fernandez led the meeting and did most of the talking.

During the meeting, Fernandez said things such as: that they needed to organize, that they need the Union; that the Employer was screwed up; that they needed a Union to

¹⁸ It is unclear from the record what type of ECFs Flores would be referring to in this regard. However, the record establishes that not all ECFs are initiated by Field Supervisors. An ECF may be initiated by an Operations Manager, or at the direction of an Operations Manager. Furthermore, it appears that some ECFs may be based on performance goals set by the Employer.

help keep their jobs in light of all the ECFs, suspensions, and terminations happening; and that a Union would help them get better pay.

Flores testified that during the meeting, Union authorization cards were passed out. Flores saw either two or three Field Technicians sign the cards.

Flores attended the next Thursday night Union meeting, at the same location. He estimates that there were about 30 people at this meeting, 20 of which were Field Technicians. Also present were Field Supervisors Fernandez, Mendiola, and Escada. Also there was Field Supervisor without a team Aguilar.

Like the first meeting he went to, Flores testified that Field Supervisor Fernandez ran this meeting, and made the same basic statements described above. During the meeting, Flores observed one or two Field Technicians being given and signing authorization cards. He does not recall who distributed the cards, but thinks it was either Fernandez or Aguilar.

(b) Field Technician Sufle'

Sufle' testified that on a date that he does not recall, his Field Supervisor (Flores) came out to his jobsite and asked him what he thought about the Union. Sufle' told him that he didn't know yet. Flores told him that if he wanted more information, to put his information on a paper Flores was showing him. Sufle' put his information down on it, and signed and dated it. He gave the paper back to Flores.¹⁹ During their conversation, Flores told Sufle' that he thought things would be better with the Union.

¹⁹ Although Sufle' does not recall what the paper said, I believe the record evidence, including Flores' testimony, establishes that this was an authorization card.

(c) Field Technician Beckman

Beckman testified that in or about February or March 2010, Field Supervisor A came out to Beckman's jobsite and spoke with him. There, Field Supervisor A told him that Field Supervisor Fernandez was starting a Union. He told Beckman that the Union is holding meetings once a week in Long Beach and that Beckman should come.

Beckman responded by telling Field Supervisor A that, coincidentally, he (Beckman) had been independently researching the subject of organizing. However, Beckman told Field Supervisor A that he (Beckman) thought it may be premature to organize now, and perhaps they should consider other options.

The next day Beckman spoke with Field Supervisor A. During their conversation, Field Supervisor A told Beckman that he had spoken to Field Supervisor Fernandez, but that Fernandez was committed to organizing now.

In light of this, Beckman decided to attend the next Thursday Union meeting in Long Beach to see what the Union was like. At the meeting he went to, he recalls seeing about 20 Field Technicians, Field Supervisor A, Field Supervisor Fernandez, and Field Supervisor without a team Aguilar.²⁰

According to Beckman, Field Supervisor Fernandez brought the meeting to order and ran the meeting. During the meeting, Fernandez essentially made statements and arguments along the lines of: the Employer has problems with the way they treat their employees; that the employees need protection; and that the employees need the Union for security and better wages. Fernandez also requested that the group should keep the

²⁰ Beckman does not recall seeing Field Supervisor Flores at this meeting. In light of this, and given the differences in testimony between the two about observations of employees signing cards, the record establishes that the meeting Beckman attended is a separate meeting from the two attended by Flores.

organizing quiet, because Jose Sandoval (who was the Site Manager at that time) had a reputation for terminating people associated with union organizing.

According to Beckman, Fernandez also encouraged the group to get their co-workers to sign cards. He told the group that if a co-worker wanted to sign a card, to have them call Field Supervisor without a team Aguilar, and that Aguilar will come out with a card. Fernandez told the group that if the Employer finds out he (Fernandez) was involved, he would be terminated because he is a supervisor.

During the meeting, either Aguilar or a Union representative held up and then distributed a clipboard containing authorization cards. From Beckman's observation, there were no signatures on any of the cards on the clipboard before it was circulated. He testified that he saw 13 Field Technicians signing the cards. When the clipboard came to him, he observed various cards and signatures on it, but he did not sign one.²¹

After this meeting, but prior to the petition being filed, Beckman testified that while working at a jobsite one day, Supervisor A called him and told him that "Nick" needs one more card, so he (Field Supervisor A) was going to stop by and get Beckman's signature on a card. Field Supervisor A said he (Field Supervisor A) also had one more employee in San Pedro that he needed to get a card from.

Later that day, Field Supervisor A came out to Beckman's jobsite. There, Beckman relayed some doubts and concerns he had about the Union. Field Supervisor A told him that Nick has been saying that we have invested a lot of time. Beckman told Field Supervisor A okay then, that he'll sign a card if the rest of the guys want the Union.

²¹ Although the Union, on cross-examination and in its closing statement, called into doubt Beckman's ability to specifically remember or know it was 13, the testimony from Beckman nevertheless establishes that most of the Field

Beckman signed a card and gave it to Field Supervisor A. During their conversation, Field Supervisor A said all the Field Supervisors are behind this and see the need for it.

8. *Alleged post-petition pro-union conduct by supervisors*

No evidence was presented of any pro-union supervisory conduct by Field Supervisors after the Union filed its petition.

Field Supervisor Flores testified that after the Union petition was filed, a group of Field Supervisors, including him, got together. It was explained and/or discussed there that they should cease their Union activity and keep their past Union organizing quiet.²²

9. *The Employer's stance regarding the Union in the post-petition period*

After the Union filed the petition, and during the critical period, the Employer, during meetings with employees,²³ and through letters to employees, communicated its position that the employees should vote "no" in the election.

Technicians in the room signed cards at that time. Furthermore, the Union called no witnesses to rebut any of the testimony about the events at the Union meetings.

²² I do not believe that an alleged threat being made at this meeting is relevant to my conclusions and recommendations. Thus, I do not make any findings or conclusions that any such threat was made.

²³ Site Manager Schultz testified that the Field Technicians attended one meeting a week, over the course of a 4-week period. The meetings were run by the Site Manager, Operations Managers, and DirecTV Executives. Field Supervisors did not speak at the meetings. According to Schultz, their role was to ensure that the Field Technicians were at the meetings. There is no evidence establishing that Field Supervisors, after the petition was filed, through any communications (campaign literature or at Employer-run meetings) announced a position of being against voting for the Union.

B. Objection No. 3 (alleging electioneering at the polling place)

In support of this objection, the Employer called Joanna Alvarado (Dispatcher). She served as the Employer's observer during the election. As mentioned earlier, the Union did not present any witnesses at the hearing.

The election was conducted on April 16, 2010, from 6:00 a.m. to 9:00 a.m., in the Employer's training room²⁴ at the Rancho facility. The training room is a rectangular room, with two sets of side-by-side doors located at opposite ends of the room. One set of side-by-side doors opens up into the hallway and other offices in the building. The other set of side-by-side doors opens up to the outside (street).

During the election, the voters would enter the training room through the set of side-by-side doors that opened up to the outside (herein called the entrance doors).

The entrance doors are made of glass, but they are tinted and not transparent.

Alvarado testified that on four occasions during the election period, she could hear (unnamed and unidentified) "Technicians" talking loudly outside of the entrance doors. She could not make out what they were saying. She does not know what they were doing outside at the time. But, there is a work area immediately outside of the entrance doors where Field Technicians load equipment onto their vehicles, so they may have been there for that work-related purpose.

Alvarado testified that on three of the four occasions, and in response to the loud voices, the Board Agent conducting the election went over to and opened one of the side-by-side entrance doors and, while holding the door open, asked individuals on the other side to clear the polling area.

With respect the fourth occasion, Alvarado testified that the Board Agent opened up one of the doors, but did not say anything.²⁵

V. Discussion

A. Objection Nos. 1 and 2 (alleging pro-union conduct by supervisors)

1. *Are the Field Supervisors statutory supervisors?*

Section 2(11) of the Act defines a supervisor as follows:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

In Oakwood, 384 NLRB 686 (2006), the Board iterated its three-part test, which finds individuals to be statutory supervisors if:

(1) they hold the authority to engage in any one of the 12 supervisory functions listed in Section 2(11), or the authority to effectively recommend such action;²⁶

(2) their "exercise of such authority is not of a merely routine or clerical nature,

²⁴ The Stipulated Election Agreement identified the Employer's training room as the polling place. There is no evidence that the polling place was at any later point in time modified or expanded.

²⁵ Before concluding her testimony on direct, Alvarado was asked by the Employer's Counsel as to whether anything else happened during the election. In response, she testified that, "as the technicians were entering, they were talking about the voting, joking around. They were not asked to be quiet or cut the talking." The Union objected to the introduction of this evidence, arguing it was not reasonably encompassed within the objection. I reserved ruling on the objection at that time, and permitted the introduction of the evidence with that understanding. In reviewing that record evidence, and in looking at Employer's Objection No. 3, I agree with the Union and hereby conclude that the evidence is outside the scope of Objection No. 3, which involved allegations of electioneering outside of the doors of the polling location. Assuming arguendo that the allegation was reasonably encompassed within the objection, I would conclude that the evidence fails to support the finding of any objectionable conduct.

²⁶ In reaching determinations regarding supervisory status, the Board may also examine secondary indicia of supervisory status. See Airport 2000 Concessions, LLC, 346 NLRB 958, 968 (2006). Secondary indicia alone, however, will not support a finding of supervisory status in the absence of evidence that an individual satisfies some of the enumerated indicia. *Id.*

but requires the use of independent judgment"; and

(3) their authority is held "in the interest of the employer."²⁷

The Board affirmed that the "burden to prove supervisory authority is on the party asserting it,"²⁸ that conclusory evidence is not sufficient to establish supervisory status; and a party must present evidence that the employee "actually possesses" the Section 2(11) authority at issue.²⁹ Finally, "whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia."³⁰

A putative supervisor exercises "independent judgment" when he or she: (1) acts, or effectively recommends action, free of the control of others; (2) forms an opinion or evaluation by discerning and comparing data; and (3) uses a degree of discretion that is not routine or clerical in nature.³¹ "[A] judgment is not independent if it is dictated or controlled by detailed instructions" set forth in company policies or rules, a collective-bargaining agreement, or the oral instructions from a higher-level manager.³² But the "mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices."³³

²⁷ Oakwood Healthcare, Inc., supra at 687 (2006) (citing NLRB v. Kentucky River Community Care, 532 U.S. 706, 713 (2001))

²⁸ Oakwood Healthcare, Inc., supra, at 687.

²⁹ Golden Crest Healthcare Center, 348 NLRB 727, 730 (2006). See also Chevron Shipping Co., 317 NLRB 379, 381 n.6 (1995) (conclusory statements without supporting evidence do not establish supervisory authority); Sears Roebuck & Co., 304 NLRB 193, 193 (1991) (same).

³⁰ See Phelps Community Medical Center, 295 NLRB 486, 490 (1989). See also New York University Medical Center, 324 NLRB 887, 908-910 (1997), *enfd.* in relevant part 156 F.3d 405, 412-414 (2d Cir. 1998); Ironton Publications, Inc., 321 NLRB 1048 n.2, 1060 (1996).

³¹ Oakwood Healthcare, Inc., supra at 693

³² Id.

³³ Id.

The Employer argues that Field Supervisors have the authority, under Section 2(11) of the Act to assign, discipline, or effectively recommend discipline, and to adjust grievances. In addition, the Employer argues the existence of various secondary indicia. I will address these below.

(a) Assign

The Board construes the term “assign” “to refer to the Act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e. tasks, to an employee.” Oakwood Healthcare, supra, at 689. The term does not encompass “choosing the order in which the employee will perform a discrete task” or “ad hoc instruction that the employee perform a discrete task.” Id.

The Employer argues that Field Supervisors assign Field Technicians because they modify their schedules, i.e. when there are cancellations, or when they assign a Field Technician a new job at the end of the day, that requires overtime.

Although these do appear to be actions that fit within the definition above, there is insufficient evidence establishing that Field Supervisors exercise the requisite independent judgment in making the assignment.

Regarding the re-assigning of routes, the evidence presented is limited to general testimony that the Field Supervisor will look at a laptop computer and determine if there is a route that can be reassigned. If the Field Supervisor is too busy, this duty is performed by a dispatcher. Under these limited facts, I am unable to conclude that the assignment in these circumstances rises above being routine in nature.

Regarding the assignment of overtime to Field Supervisors, there is insufficient record evidence reflecting or describing the Field Supervisor's role, discretion, or decision-making process when it comes to assigning a new job at the end of the day that will entail overtime. It is unclear how these new calls come about, what instructions are given to the Field Supervisor, and/or what, if any, decision-making process the Field Supervisor goes through in selecting which Field Technician is assigned the additional job. In light of this, I am unable to conclude that Field Supervisors exercise the requisite independent judgment in assigning overtime.

Based on the above, I conclude that the Employer has failed to meet its burden in establishing that Field Supervisors have the authority to assign within the meaning of Section 2(11) of the Act.

(b) Discipline (Verbal Warnings)

Outside of the ECF process (discussed next), the Employer argues that Field Supervisors have the authority to issue verbal warnings to Field Technicians. However, the record evidence on this subject fails to establish that Field Supervisors issue verbal warnings that constitute discipline, or that would be objectively viewed by either the Employer, or employees, as discipline.

Rather, the evidence on this subject merely reflects that as part of their duties, Field Supervisors will comment on, or point out performance-related deficiencies to Field Technicians.

These verbal discussions are not recorded in any type of corporate record, nor is anything placed in the employee's file. Conversely, I note that one of the levels of discipline on the ECF is the issuance of a "verbal warning;" and some of the ECFs

introduced into the record (involving verbal warnings) reflect that it was the employee's first occurrence.

Thus, I conclude that there is insufficient evidence establishing that Field Supervisors have the authority to discipline Field Technicians through the issuance of undocumented verbal warnings.

(c) Discipline, Suspend, Discharge (effectively recommend)

Field Supervisors do not have the authority to independently issue ECFs. Thus, they do not have the authority to discipline, suspend, or discharge on their own.

However, and through the initiation of ECFs, the record evidence establishes that Field Supervisors do have the authority to effectively recommend discipline, up to and including discharge.

First, the record reflects that Field Supervisors initiate a significant number of ECFs on a weekly basis. The ECFs are initiated as a result of such things as the Field Supervisor's inspections of the Field Technician's work or vehicles; their interaction with the Field Technicians during their day; or their monitoring of their attendance and performance levels.

The record reflects that in deciding whether to initiate an ECF, Field Supervisors exercise discretion, i.e. the ECF may be based on the Field Supervisor's belief that the Field Technician's work is deficient; the Field Technician has engaged in insubordination; or the Field Technician has continued to do something wrong.

Furthermore, the Field Supervisor does not merely record the violation on the ECF, he/she also recommends a level of discipline. Thus, Field Supervisors are not

merely reporting violations. They are also making recommendations on the level of discipline.

While the record reflects that the ECFs go through a review process, where language or the level of discipline may be changed, this does not mean that the recommendation is not effective, or that an independent investigation has occurred. See Mountaineer Park, Inc., 343 NLRB 1473, 1476 (2004)(manager consulting with supervisor before deciding on appropriate level of discipline does not constitute independent investigation); Progressive Transportation Services, Inc., 340 NLRB 1044, 1045 (2003)(effective recommendation found even though management decided level of discipline).

Furthermore, the Field Supervisor remains involved during the review process. Conversely, no one speaks with the employee during the review process. Thus, the Field Supervisor continues to have input and his/her assertion of a violation is accepted at face value. The employee is not given an opportunity to respond until the time he/she is issued the ECF. Thus, the review is not an *independent* investigation. Diaz Enterprises, Inc., 264 NLRB 156, 159 (1982)(independent investigation takes place when a recommendation for discipline is not relied upon or given any weight by management when making a final determination); Berthold Nursing Care Center, Inc., 351 NLRB 27, 29 fn. 8 (2007)(discussing counseling with employee *after* discipline decision has been made is not independent investigation).

Next, the testimony from the Employer witnesses was that Field Supervisors have issued ECFs containing various levels of recommended discipline, up to and including

discharge. Aside from this testimony being unrefuted, it is supported by the fact that each of those levels of discipline are set forth on the ECF form.

Finally, the ECFs, after the review process, are issued to Field Technicians by their Field Supervisors. The Field Supervisors explain to them why they are being disciplined and go over the corrective action and action plans. Then, and after the signatures are collected, the ECF is placed in the employee's personnel file, where it may additionally serve as the basis for future disciplinary action.

In light of the above, I conclude that Field Supervisors, through the initiation of the ECFs, have the authority to effectively recommend discipline, up to and including discharge.

(d) Adjust grievances

Although the Employer alleges that Field Supervisors have the authority to adjust grievances, the possession of such authority was only testified to in general and conclusory terms.

There are limited examples of the types of problems that have been told to Field Supervisors. There is no specific or past-practice evidence as to what, if any, steps the Field Supervisor took to adjust any particular grievance.

Thus, it is unclear from the record whether Field Supervisors actually have the independent authority to adjust grievances, and/or if they exercise independent judgment in exercising such authority.

Accordingly, I conclude that there is insufficient evidence to conclude that the Field Supervisors have the authority to adjust grievances within the meaning of Section 2(11) of the Act.

(e) Secondary indicia

Secondary indicia of supervisory status may be taken into consideration by the Board when resolving a supervisory issue, provided the evidence establishes the existence of at least one statutory indicia.

In this case, secondary indicia of supervisory status exist that support a conclusion that Field Supervisors are statutory supervisors.

First, and perhaps most notably in this regard, is what the ratio of supervisors to nonsupervisory employees would be at the Rancho facility if Field Supervisors were not supervisors.

Furthermore, the Field Supervisors are held out to the Field Technicians as being their supervisors. Their job title (Field Supervisor) is specifically written on their identification badges. In addition, they are identified as being the Field Technician's supervisor on the ECF form, and they are also the ones that, in most circumstances, conduct the ECF meeting and issue the ECF.

Field Supervisors also conduct weekly meetings with their team, where they pass along various information on behalf of the company.

Finally, Field Supervisors attend managerial meetings with the Site Manager and Operations Managers.

The above secondary indicia support concluding that Field Supervisors are supervisors within the meaning of the Act.

Based on the above, I have concluded that Field Supervisors are supervisors within the meaning of Section 2(11) of the Act, inasmuch as they have the authority to effectively recommend discipline, up to and including discharge. In addition, there exist various secondary indicia supporting the finding of supervisory status.

2. *Are Field Supervisors without a team statutory supervisors?*

The Employer contends that Field Supervisors without a team are statutory supervisors because they fill in when Field Supervisors are on vacation, or sick; and that when serving in that capacity, they have the same authorities as Field Supervisors.

However, this was only generally asserted. There is insufficient record evidence to conclusively establish which Field Supervisors without a team have served in that role; the time periods they served; and what authorities were exercised during that time period.

In light of this, the Employer has not met its burden of establishing that Field Supervisors without a team fill in on a "regular and substantial" basis such that they may be deemed supervisors, or that, while serving in that capacity, they exercise authorities as defined in Section 2(11) of the Act.

Accordingly, I have concluded that the Employer's allegations of objectionable conduct by Field Supervisor without a team William Aguilar, or any other Field Supervisor without a team, are insufficient, as they are not statutory supervisors.

3. *Did Field Supervisors engage in pre-petition objectionable conduct?*

The Board announced its standard for determining whether pro-union supervisory conduct is objectionable in Harborside Healthcare, Inc., 343 NLRB 906 (2004). This standard includes two factors. First, the Board considers “whether the supervisor’s pro-union conduct reasonably tended to interfere with the employees’ exercise of free choice in the election.” Harborside, 343 NLRB at 909. This factor requires “(a) consideration of the nature and degree of supervisory authority possessed by those who engage in pro-union conduct; and (b) an examination of the nature, extent, and context of the conduct in question.” Id.

The second factor weighs whether “the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.” Id.

In analyzing the facts of this case under the above standards, I conclude that the alleged *pre-petition* pro-union supervisory conduct by the Field Supervisors constituted objectionable conduct.

Factor 1:

(a) Nature and extent of supervisory authority

Field Supervisors are first-line supervisors. Based on my conclusions above, they have the authority to effectively recommend discipline, up to and including discharge, which the Board considers to be meaningful authority. Madison Square Garden Ct., LLC, 350 NLRB 117 (2007). These factors weigh in favor of finding the conduct to be objectionable.

(b) Supervisory conduct

In Harborside, the Board held that the solicitation of authorization cards is inherently coercive conduct, absent mitigating circumstances.

In this case, the unrefuted testimony reflects that at a minimum, Field Supervisor Flores, Field Supervisor A, and Field Supervisor Fernandez solicited authorization cards from a significant number of Field Technicians. Flores solicited six cards from his team. At a minimum, Field Supervisor A solicited a card from Field Technician Beckman. Finally, Field Supervisor Fernandez conducted three Union meetings, during and/or the end of which authorization cards were passed out, signed, and collected.

In addition to soliciting cards, the record establishes that Field Supervisors invited employees to Union meetings; attended Union meetings; spoke in favor of the Union at Union meetings; and informed Field Technicians that the Field Supervisors wanted the Union.

The Union argues that the following mitigating factors should be taken into consideration in analyzing this issue: the conduct took place pre-petition; no threats were made; there were a limited number of Union meetings; and during the critical period, the Employer communicated to employees its position that they should vote against Union representation.

However, given the extent of the card solicitation and other pro-union conduct, I find the above arguments do not suffice in mitigating the conduct.

Although the pro-union conduct occurred pre-petition, that does not mean that the Board won't find the conduct coercive. See SNE Enterprise, Inc., 348 NLRB 1041 (2006)(pre-petition solicitation of cards coercive).

Regarding the argument that only a few Union meetings were testified about, this does not establish a mitigating factor. First, merely because only a few Union meetings were

testified about does not mean that there were not other Union meetings. In fact, an inference can be drawn from the record that the Union conducted weekly meetings at the Union office up until the petition was filed. Furthermore, and even if limited to the three meetings, these three meetings were run by a Field Supervisor. Furthermore, Field Supervisors were inviting their team members to these Union meetings.

With respect to the argument that the Employer campaigned against Union representation during the critical period,³⁴ and that the Field Supervisors did not make any specific threats when they solicited cards, I find that these facts are insufficient to establish mitigation of the pro-union conduct.

Based on the above, and with respect to the first prong of the Board's test in Harborside, I conclude that the Field Supervisors' pro-union conduct reasonably tended to interfere with the Field Technicians exercise of free choice in the election.

Factor 2

(a) Margin of victory in the election

With respect to the margin of victory, the tally of ballots showed 85 cast ballots for, and 80 against, the Union. There were two challenged ballots. The narrow margin of victory, especially in light of the number of authorization cards solicited, supports finding the conduct objectionable.

(b) Conduct widespread or isolated

Here, the conduct was not isolated. Rather, a significant number of authorization cards were collected from Field Technicians, including Field Technicians that were direct subordinates

³⁴ Although the Employer campaigned against Union representation, there is no evidence establishing that Field Supervisors were utilized during the critical period to convey this message.

of the Field Supervisors conducting the solicitation. Furthermore, the solicitation of cards and the Union meetings occurred over multiple weeks.

(c) Timing of the conduct

The pro-union conduct only occurred before the Union filed the petition. Thus, there were a number of weeks that passed before the Union election. Weighing against this, however, is that the pre-petition conduct was both extensive, and involved the solicitation of cards, which the Board has deemed to be inherently coercive absent sufficient mitigating circumstances.

(d) Extent to which the conduct became known

Field Technicians were told Field Supervisors were leading the organizing; were invited to meetings by their Field Supervisors; and attended meetings run by Field Supervisors. The record establishes that the conduct of the Field Supervisors was well known.

(e) Lingering effect of the conduct

Given the level and extent of involvement of the Field Supervisors in the organizing, the conduct would reasonably have a lingering effect on Field Technicians.

In weighing and analyzing the above facts and record evidence, I conclude that with respect to the second prong of the Board's test in Harborside, the Field Supervisors' pro-union conduct materially affected the outcome of the election.

Accordingly, and pursuant to the Board's standards in Harborside, I conclude that the Field Supervisors' *pre-petition* pro-union conduct constituted objectionable conduct and recommend that the Board sustain Employer Objection No. 1, set aside the election, and that a second election be conducted.

4. *Did Field Supervisors engage in post-petition objectionable conduct?*

The Employer's Objection No. 2 alleges pro-union conduct by supervisors subsequent to the filing of the petition. However, no evidence or allegations of any pro-union supervisory conduct, post-petition, were raised or introduced.

Accordingly, I recommend that Employer Objection No. 2 be overruled.

B. Objection No. 3 (alleging electioneering at the polling place)

Election-day electioneering is not per se objectionable. To determine whether electioneering activities undermined the laboratory conditions necessary for a free and fair election, the Board considers: the nature and extent of the electioneering; whether it was conducted by a party to the election or by employees; whether it was conducted in a designated "no electioneering" area; and whether it was contrary to the instructions of the Board agent. See Boston Insulated Wire & Cable Co., 259 NLRB 1118, 1118-19 (1982) enfd. 703 F.2d 876 (5th Cir. 1983).

In Milchem, Inc., 170 NLRB 362 (1968), the Board held that prolonged conversations between representatives of any party and prospective voters in the polling area can constitute conduct which will invalidate an election. Although the Board's holding in Milchem is also applicable to conversations between observers and voters, innocuous comments of a short duration will not be held objectionable. Vista Hill Hospital, 239 NLRB 667 (1978), enfd. 639 F.2d 479 (9th Cir. 1980). Where Milchem is not directly applicable, alleged electioneering by a party to the election is evaluated as to whether, under the circumstances, it impaired the "free choice of voters." Del Rey Tortilleria, Inc., 272 NLRB 1106, 1107 (1978), enfd. 823 F.2d 1135 (1987).

If the actors were not agents of the party, the Board will set aside an election on the basis of third-party conduct only if the conduct is so aggravated that it creates a general atmosphere of fear and reprisal, rendering a fair election impossible. Cal-West Periodicals, Inc., 330 NLRB 599, 600 (2000). The burden of proof lies with the objecting party. Id. The subjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct. Picoma Industries, Inc., 296 NLRB 498, 499 (1989).

The evidence presented in support of Employer Objection No. 3 does not establish that any objectionable conduct took place. First, there is no evidence as to who the voices belonged to. Second, and because there is no evidence as to what was said, there is no evidence of any improper electioneering, threats, etc. Third, there is no evidence that the alleged conduct had any impact on the election, or that it impaired any voter. Furthermore, the polls were never closed. Based on the above, I conclude that there is insufficient evidence of objectionable electioneering.

Accordingly, I recommend that Employer's Objection No. 3 be overruled.

VI. Summary of Recommendations

Having made the above findings and conclusions with respect to the Employer's objections, viewing the alleged objectionable conduct both individually and cumulatively, and upon the record as a whole, I recommend that Employer Objection No. 1 be sustained; that the election be set aside; and that a second election be conducted. I further recommend that Employer Objection Nos. 2 and No. 3 be overruled.

VII. Right to File Exceptions

Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001.

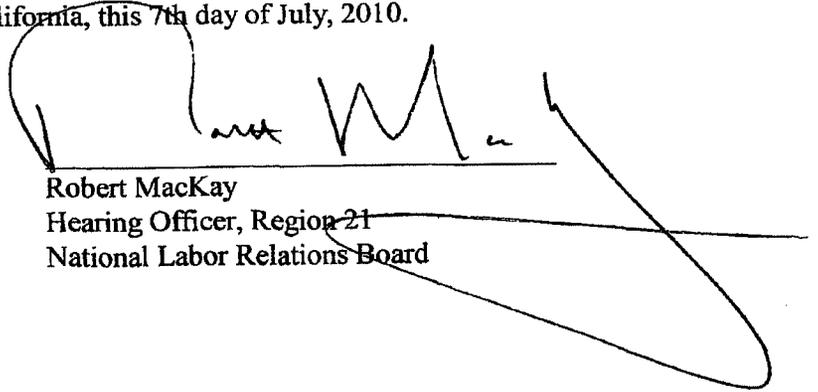
Procedures for Filing Exceptions: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on July 21, 2010, at 5:00 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically.** If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.³⁵ A copy of the exceptions must be served on each of the other parties to the proceeding, as well as to the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select the E-Gov tab, and then click on the E-filing link on the pull down menu. Click on the "File Documents" button under

³⁵ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

DATED at San Diego, California, this 7th day of July, 2010.



Robert MacKay
Hearing Officer, Region 21
National Labor Relations Board

EXHIBIT F

Castellanos

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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 21

DIRECTV U.S. DIRECTV HOLDINGS LLC) Case No. 21-RC-21191

Employer,

and.

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO, DISTRICT LODGE
947

Petitioner/Union

**EXCEPTIONS TO HEARING
OFFICER'S REPORT AND
RECCOMENDATIONS**

The Petitioner takes Exception to the essential finding of the Hearing Officer that the conduct of the Field Supervisors in the solicitation of some authorization cards and otherwise speaking in favor of the union is coercive and thus requires a new election in light of the Board's unfortunate decision in *Harborside Health Care, Inc.*, 343 NLRB 906 (2004).

Petitioner takes Exception to certain factual findings with respect to the supervisory status of the Field Supervisors. These Exceptions are taken because the findings do not adequately reflect the very minimal level of supervisory activity of the Field Supervisors.

With respect to the supervisory status issue, Petitioner takes Exception to the following findings of the hearing officer:

1. To the suggestion that Field Supervisors do have the authority to effectively recommend all discipline up to including discharge. See page 31 of Hearing Officer's report.
2. To the finding of the Hearing Officer that the Field Supervisor exercised discretion with respect to the issuance of ECFs. See Decision page 31.
3. To the suggestion that the fact that the Field Supervisors can recommend a level of discipline suggests that they exercise discretion. See Decision page 31-32.
4. To the failure of the Hearing Officer to recognize that the ECFs go through a review process of at least two or three additional managers before they are issued. See Decision page 32
5. To the suggestion that "his/her assertion of violations accepted at a face value" by the review of managers. See Decision page 32.
6. To the finding of the Hearing Officer that no independent investigation is conducted by the reviewing managers because in fact they do review the ECFs initiated by the field supervisors and take into account other information which they have.
7. To the finding that Field Supervisors "have issued ECFs containing various levels of recommended discipline. . ." All the ECFs offered into evidence contained either recommendations of a verbal or written warning.
8. To the failure of the Hearing Officer to find that all the ECFs which are offered into evidence contain routine discipline or no discretion is involved. For example, almost all the ECFs involve numbers of jobs performed or violation of attendance policies.

Petitioner also takes Exception to the application of *Harborside* to the facts of this case and therefore the decision directing a new election. Petitioner furthermore takes Exception to the *Harborside* decision and asks this new Board to reverse it as incorrectly decided.

With respect to the *Harborside* issues, Petitioner takes Exception to the following findings of the hearing officer:

9. To the failure of the Hearing Officer to find that the employer failed to take any action to prohibit supervisors from supporting the union prior to the filing of the petition. Thus, the employer is at fault for any alleged coercion and cannot take advantage of its own coercion.

10. To the failure of the Hearing Officer to recognize that all of the alleged conduct wholly took place pre-petition and therefore has no effect upon the conduct of the election because nothing coercive occurred during the critical period related to the conduct of the Field Supervisors. See Decision page 37.

11. To the failure of the Hearing Officer to take into account the fact that nothing was said which remotely constituted a threat or was remotely coercive by the Field Supervisors. See Decision page 37.

12. To the failure of the Hearing Officer to find that there were weekly organizing meetings and therefore the Field Supervisors attended only a few of the meetings. See Decision page 37.

13. To the failure of the Hearing Officer to recognize that the employer strongly communicated its opposition to the Union during the critical period and as part of the election campaign. See Decision page 37 – 38.

14. To the failure of the Hearing Officer to recognize that the employer chose not to use the Field Supervisors to campaign against the union. See footnote 34 at page 38. The employer had the power to remedy or repudiate any potential coercion by the Field Supervisors by having them effectively rebut any support they gave for the Union. This would have rebutted any suggestion that the Field Supervisors engaged in improper conduct which had an effect upon the outcome of the election.

15. To the failure of the Hearing Officer to recognize that the employer engaged in coercive campaigning against the Union including holding captive audience meetings during the critical period. These captive audience meetings were far more coercive than any pre-petition conduct of the Field Supervisors. See Decision page 25.

16. To the finding that the solicitation of authorization cards is inherently coercive. See Decision page 39.

17. To the suggestion that there was any lingering effect of the conduct of the Field Supervisors. See Decision page 39.

18. To the Recommended Decision in entirety recommending a new election. To the

contrary, a bargaining order should issue simultaneously with the Certification to remedy the employer's delay in bargaining.

For the above reasons, Petitioner takes Exception to the decision of the Hearing Officer recommending a new election. The Board should reject the Hearing Officer's findings and issue a certification in favor of the Petitioner. The Board should take this opportunity to overrule *Harborside*.

Dated: August 3, 2010

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: 

DAVID A. ROSENFELD
Attorney for Petitioner

124672/581032

PROOF OF SERVICE
(CCP 1013)

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501-1091. On August 3, 2010, I served upon the following parties in this action:

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copies of the document(s) described as:

EXCEPTIONS TO HEARING OFFICER'S REPORT AND RECCOMENDATIONS

BY FACSIMILE I caused to be transmitted each document listed herein via the fax number(s) listed above or on the attached service list.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on August 3, 2010.

/s/Katrina Shaw
Katrina Shaw

EXHIBIT G

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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
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DIRECTV U.S. DIRECTV HOLDINGS LLC

Employer,

v.

INTERNATIONAL ASSOCIATION OF
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WORKERS, AFL-CIO, DISTRICT LODGE
947

Petitioner/Union

) Case No. 21-RC-21191

)
) **BRIEF IN SUPPORT OF**
) **EXCEPTIONS TO HEARING**
) **OFFICER'S REPORT AND**
) **RECOMMENDATIONS**

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I. INTRODUCTION

There are two issues presented by way of these Exceptions: (1) Whether the Board's Decision in *Harborside Health Care, Inc.*, 343 NLRB 906 (2004) should be overruled and (2) Whether *Harborside* is applicable in the circumstances of this case so as to require a new election. Petitioner suggests that it is appropriate for the new Board with a changed membership to overrule *Harborside* in its entirety and revert to the Board law prior to the issuance of *Harborside*. The Board should adopt the reasoning of the Dissent in *Harborside* and adopt it as Board law. We below offer our reasons for these Exceptions. In addition we attached the Dissent in *Harborside* since it perfectly well states the serious flaws in *Harborside* and why the Board should hold that solicitation of authorization cards or other forms of non-coercive support for the union should not serve to set aside an election.

We reluctantly accept the Hearing Officer's Decision that Field Supervisors carry only one indicia of supervisory status. We accept the Hearing Officer's Decision that they lack any other indicia of supervisory status. As noted in the Exceptions however the Hearing Officer has failed to make certain factual findings which would have further minimized the extent of any supervisor control or authority reposed in the Field Supervisors.

We focus our Exceptions, however, on the wrongly decided *Harborside* case and the incorrect application of that decision to the facts in this case.

Our discussion below follows to a large degree the Dissent in *Harborside*. But that Dissent is so compelling we could not ask for anything more than for this Board to accept it. For that reason we have attached it to this brief. Nothing would honor the Chairman's perseverance though almost eight years of the Bush Board's sabotage of employee collective rights than to adopt her Dissent in this case.

II. THE HARBORSIDE CASE SHOULD BE ABANDONED AND THE BOARD SHOULD REVERT TO THE RULE WHICH GOVERNED BEFORE HARBORSIDE

In now Chairman and then Member Liebman's Dissent from the ill-considered *Harborside* decision, she foresaw the very situation the Union confronts here: the *Harborside* test allows employers to challenge a legitimately elected unit through the conduct of their own

agents and low-level supervisors. *Harborside*, 343 NLRB at 906. True to Chairman Liebman's prediction, this case presents: (a) borderline supervisors with marginal supervisory authority, (b) conducting non-coercive prounion activities against a backdrop of the employer's antiunion campaign, (c) during the non-critical period before the election petition was filed, (d) with the employer failing to disavow the supervisors' prounion activities and then citing them as the basis to object to the conduct of the election (e) despite the employer failing to show even a single objectionable effect resulting from the prounion activity. In light of the Field Supervisors' minimal supervisory authority and the absence of any statements resembling threats or promises, this case an even stronger basis than *Harborside* to reaffirm the pre-2004 status quo: elections where supervisors engaged in prounion activities during the pre-critical period are valid. The *Harborside* test, by focusing on the extent of supervisors' involvement in organizing, rather than the potential for their activities to coerce employees, is in danger here of delivering a perverse result. To overturn this election would unfairly penalize the employees and a union for the activities of supervisors whose status they could not predict, while rewarding employers who could control their supervisors to manufacture self-serving and afterthought challenges to an election.

A. THE FIELD SUPERVISORS ARE "BORDERLINE" SUPERVISORS WITH MARGINAL SUPERVISORY AUTHORITY.

Since employees have no means to determine who among them is a supervisor until after the lengthy representation process, many "statutory supervisors" with limited supervisory functions, "are unaware that, under the law's definition, they will turn out to be supervisors." *Harborside*, 343 NLRB at 915. Indeed, "these borderline supervisors may seek union representation for themselves and their coworkers, unaware that they are ineligible and that their participation in the campaign may result in the union's victory being set aside." *Id.* at 916. The broad definition of "supervisor" under § 2(11) of the Act, which includes those having just one

of twelve supervisory functions, heightens the danger that an unwitting employee will be held to be a supervisor after assisting union organizing efforts. Employers likewise may not know an employee's supervisory status under the Act and, in some cases, allow employees to sit on the fence in order to take advantage of their ill-defined status.

The Field Supervisors whose actions are the subject of this litigation fit this "borderline" (or on the "fence") supervisor description. Their organizing activities indicate they were unaware they were considered statutory supervisors, and would be unable to benefit from union protections. The Hearing Officer found Field Supervisors to be statutory supervisors by a single factor, their power to "recommend discipline, up to and including discharge." *Hearing Officer's Report* at 35. He more expressly found that they could not discipline, only recommend discipline. And he expressly found that they did not possess any other primary indicia of supervisory status. This finding of supervisory status rests on one factor alone.

The title "Field Supervisor" does not connote that employees or the employer thought of Field Supervisors as statutory supervisors. The Board has repeatedly held that the label is not conclusive on the issue of status and since the Hearing Officer found that all other indicia of supervisory status did not exist, they could not have thought of themselves as statutory supervisors but rather as lead persons or other employees with additional responsibilities.

The statements attributed to Field Supervisor Fernandez such as, "We' are trying to get a union in here, in an effort to try and get better pay, to save 'our' jobs," make sense when one realizes he, and his colleagues, exercised so little independent judgment they assumed they would be in the bargaining unit. *Hearing Officer's Report* at 21. Fernandez spoke at the organizing meetings not as a supervisor coercing employees, but as a fellow worker hoping to persuade them to organize for the benefit of all. In this situation, following *Harborside* "inhibits

workers who fall near, but not over the supervisory line . . . and threatens to deprive unions of their natural leaders in the workplace.” *Harborside*, 343 NLRB at 916.

B. THE FIELD SUPERVISORS ACTED NON-COERCIVELY, WHILE DIRECTV ACTIVELY CAMPAIGNED AGAINST THE UNION.

The *Harborside* test’s inability to distinguish “persuasion, as opposed to coercion” reveals a fundamental error: the test examines the *extent* of supervisors’ involvement in organizing when it ought to focus, “on the potential for coercion in supervisory conduct.” *Harborside*, 343 NLRB at 916. During the 1980s and 1990s, Board decisions on prounion supervisory conduct recognized evolving conditions in workplaces, where the line between employees and supervisors has blurred. In 1981, the Fourth Circuit noted, “The critical inquiry is whether the supervisors’ prounion activities prevented employees from freely effectuating their collective choice. Employees’ free choice is stifled and the election may be set aside only if the supervisors’ activities, ‘contain the potential seeds of reprisal, punishment, or intimidation.’” *NLRB v. Manufacturer’s Packaging Co.*, 645 F.2d 223, 226 (1981). In *NLRB v. San Antonio Portland Cement Co.*, 611 F.2d 1148, 1151 (1980), the Fifth Circuit commented that “attending a union meeting wearing a union button, without more, does not contain such seeds.” Taking cues from those appellate decisions, the Board proceeded to hold “the solicitation of [union] authorization cards by supervisors is not objectionable” provided the solicitation does not contain seeds of reprisal. *Millsboro Nursing & Rehabilitation Center, Inc.*, 327 NLRB 880 (1999). Furthermore, no particular supervisory act supporting the union, excluding threats or promises, violates the Act *per se* because “whether prounion supervisory activity is sufficient to overturn an election depends on the facts and circumstances of each case.” *Manufacturer’s Packaging Co.*, 645 F.2d at 226. Even the *Harborside* majority recognized “an employer’s antiunion campaign” is one circumstance which may mitigate the potential for coercion in a supervisor’s prounion activities. *Harborside*, 343 NLRB at 914. “Where an employer is opposed to

unionization, a prounion supervisor acting on his own has sharply limited power.” *Id.* at 919. Employees need only complain to the employer to rid themselves of a prounion supervisor, who would likely lose her job as soon as the employer discovered her organizing activities. The employer safeguards employees in this situation; employees feeling threatened by prounion supervisors do not require extra protection from the Board.

The Field Supervisors’ conduct was non-coercive. The Hearing Officer found “no threats were made,” nor did Field Supervisors make promises in return for supporting the union. *Hearing Officer’s Report* at 37. In fact, Field Supervisors’ organizing was confined to “soliciting cards,” attending and inviting employees to Union meetings, and speaking in favor of the Union. *Id.* In finding supervisory violations, the Hearing Officer relied primarily on the *Harborside* holding that “solicitation of authorization cards is inherently coercive conduct.” *Id.* Under the law prior to *Harborside* the Hearing Officer would correctly have found that despite the extent of the Field Supervisors’ involvement in organizing, at no point did they act coercively. The same cannot be said of DIRECTV. It forced Field Technicians to attend weekly meetings, over four weeks, where managers and executives spoke against the Union. *Id.* at 25. Those meetings put employees on notice that they could seek company protection if they feared prounion supervisors. This underlines the inconsistency of *Harborside* in that “antiunion supervisory conduct is now routinely tolerated.” *Harborside*, 343 NLRB at 916. “At the direction of their employer, supervisors – up to the highest company official – may urge their subordinates to vote against unionization . . . in captive audience meetings.” *Id.* at 916. The illogical result is that supervisors may permissibly express antiunion views without sanction from either the NLRB or their employer, but supervisors who support the union risk overturning of an election by the NLRB and termination by their employer. More arbitrary still, *Harborside* has created “a special test for assessing the impact of prounion supervisory conduct,” absent a similar test for antiunion

or other objectionable supervisory conduct. *Id.* at 918. This imbalance turns § 8(c) on its head. Management conduct is protected when it is in management's interest, while non-coercive conduct in support of the union becomes coercive and objectionable.

C. THE FIELD SUPERVISORS' PROUNION CONDUCT OCCURRED EXCLUSIVELY DURING THE NON-CRITICAL PERIOD.

Harborside also "gut[ted]" the *Ideal Electric* Rule, which, for forty-four years had held "that to be considered objectionable, conduct must occur during the 'critical period' i.e., the period between the filing of the union's representation petition and the date of the election." *Harborside*, 343 NLRB at 919, quoting *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961). Even though nearly all the prounion conduct in *Harborside* occurred before the petition, the majority held the "impact of the supervisor's solicitation would ordinarily continue to be felt during the critical period . . . because of the power of the supervisor over an employee." *Harborside*, 343 NLRB at 912. The Dissent highlighted the flaw in the majority's reasoning that it "would seem to apply to any type of coercive conduct by a supervisor before the critical period, because the supervisor's power persists." *Id.* at 919. The disparate treatment of prounion conduct by *Harborside* turns *Ideal Electric* inside out because the Board continues to reject the argument that prepetition misconduct by employers can be the basis for setting aside an election.

In this case, "no evidence was presented of any prounion supervisory conduct by Field Supervisors after the Union filed its petition." *Hearing Officer's Report* at 25. Nor is it clear from the record even how close to the petition the non-coercive conduct occurred. Prior to *Harborside*, pre-petition supervisory conduct was not grounds to overturn an election, but now it may be cause for vacating an otherwise valid election. *Harborside*, 343 NLRB at 919. Effectively, as the *Harborside* Dissent feared, the Hearing Officer has applied *Harborside* so that prounion supervisory conduct is a ground for setting aside the election regardless of how long prior to the election it takes place.

D. DIRECTV FAILED TO DISAVOW THE PROUNION CONDUCT OF ITS OWN SUPERVISORS AND NOW SEEKS TO USE THAT CONDUCT TO SET ASIDE THE ELECTION.

The employer may even rest its objections to an election on supervisory conduct prior to the critical period despite its failure to disavow the prounion conduct of its supervisors. This allows the employer, as in *Harborside*, to wait silently, or even give encouragement, while its supervisors jeopardize the union's election efforts, then object to the outcome of the election. Thus, *Harborside* created opportunity for this kind of deceit by incentivizing collusion between employers and their supervisors. It allows management to deliberately not disavow such conduct so as to use it as a basis to set aside an election if the Union wins. Essentially, the Union and the employees who support it pay the price for the acts of supervisors over whom "[they] ha[ve] no control." *Harborside*, 343 NLRB at 918. Simultaneously, the employer is not held accountable for the actions of its own supervisors. The *Harborside* Dissent, conversely, would not allow an employer "to rely on [supervisors'] conduct as a basis for setting aside the election, having failed to specifically repudiate the conduct to its employees." *Harborside*, 343 NLRB at 921.

Here, DIRECTV appears to have had notice that its Field Supervisors were participating in union organizing, but it still failed to disavow those activities. Field Supervisor Flores testified that sometime after the petition was filed, but before the election, DIRECTV called the Field Supervisors to a meeting where DIRECTV's attorney informed the supervisors the company did not want them to be involved with organizing. *Transcript* at 222-223. Approximately one week after the election, DIRECTV held a second meeting, where Vice President Adrian Dimech said he had information that Field Supervisors had been involved with the union, and requested the Field Supervisors disclose to him their involvement. *Transcript* at 201. Now, DIRECTV is using the non-coercive conduct of its own supervisors, to challenge the legitimacy of the election. DIRECTV had the opportunity at early points in the campaign and even before the petition was

filed to disavow the conduct of the supervisors. It is precisely this calculated tactic Chairman Liebman warned of in *Harborside*. Fairness dictates that DIRECTV waived its right to challenge the election based on supervisory conduct because it failed to address that conduct prior to the election.

E. DIRECTV FAILED TO SHOW ANY OBJECTIONABLE EFFECT RESULTING FROM SUPERVISORY PROUNION CONDUCT SUFFICIENT TO SET ASIDE THE ELECTION.

Even if DIRECTV did not waive the right to challenge the election, the fact remains that DIRECTV failed to demonstrate the supervisory conduct had any effect on the free choice of the employees. Under *Harborside*, however, DIRECTV does not have to show that prounion supervisory conduct actually had coercive effects so long as the conduct is of a type held to have some tendency to coerce. *Harborside*, 343 NLRB at 911. Nevertheless, the *Harborside* Dissent reiterated that “[a]part from deciding what conduct is objectionable, the Board must also decide whether objectionable conduct is sufficient to set aside a particular election.” *Id.* at 918. The sufficiency standard necessary to set aside the election is that the conduct “interfered with freedom of choice to the extent that it materially affected the outcome of the election.” *Id.* at 918. The Dissent properly suggested “that (absent unlikely evidence that the supervisor was acting as the union’s agent) the Board should apply the third-party standard in these cases [involving supervisory conduct] and should set aside an election only where prounion supervisory conduct renders a free election impossible, by creating a general atmosphere of confusion or fear of reprisal.” *Id.* at 918.

There is no evidence that the Field Supervisors were agents of the union, so the third-party standard for sufficiently objectionable conduct for setting aside an election applies here. DIRECTV has not shown conditions remotely resembling “a general atmosphere of confusion or fear of reprisal.” *Id.* at 918. No employees reported they had voted for the union or signed a card

because of pressure from a Field Supervisor or fear of reprisal. Even if card solicitation and pronoun statements by supervisors could be coercive in some instances, the Hearing Officer did not find evidence of objectionable effects at DIRECTV. *Hearing Officer's Report* at 36-39. Therefore, one finds it unlikely that, given the absence of coercion, the supervisory conduct rendered "a free election impossible." *Id* at 36-39.

While we contend the Dissent properly rejected the majority's view in *Harborside*, the facts of this case present an even stronger basis for reaffirming the legitimacy of elections where supervisors have engaged in pre-petition pronoun activities. First, the Hearing Officer found no threats or promises in the Field Supervisors' pronoun statements. *Hearing Officer's Report*, 36-39. In *Harborside*, conversely, the Board found the supervisor in question had threatened subordinates with job loss. *Harborside*, 343 NLRB at 910. Second, the *Harborside* Board remained uncertain whether the supervisor's activity continued after the petition, whereas the Hearing Officer here found no post-petition supervisory conduct. *Id.* at 912, *Hearing Officer's Report*, 25. Finally, the supervisor in *Harborside* "had significant supervisory authority over unit employees, including the ability to both reward and retaliate against them." *Harborside*, 343 NLRB at 910. She possessed the authority "to initiate disciplinary action[.]. . . direct nurses, assign nurses' schedules. . . give the principal input on. . . evaluations (which affect retention and pay raises), immediately suspend and send home employees, . . . and recommend suspension and termination of employees.'" *Harborside*, 343 NLRB at 910. In comparison, the Field Supervisors possessed marginal supervisory authority. *Hearing Officer's Report* at 33.

III. EVEN UNDER THE HARBORSIDE TEST, THE PROUNION ACTIVITIES OF DIRECTV'S FIELD SUPERVISORS CANNOT BE FOUND TO HAVE "INTERFERED WITH" THE ELECTION.

Prior to *Harborside*, the election among the Field Technicians would have been unassailable. Nevertheless, these facts support the election's validity under *Harborside* test as

well. The test of when supervisory conduct is sufficient to set aside an election, as “restated” by the *Harborside* Board, considers two factors:

(1) Whether the supervisor’s prounion conduct reasonably tended to coerce or interfere with the employees’ exercise of free choice in the election.

This inquiry include: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct; and (b) an examination of the nature, extent, and context of the conduct in question.

(2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.

Harborside, 343 NLRB at 909. DIRECTV, as the party moving to overturn the election, has the burden of proof for the test. It fails to meet the burden. The Field Supervisors’ conduct did not reasonably tend to coerce or interfere with the employees’ exercise of free choice in the election. Therefore, the conduct did not interfere with freedom of choice to the extent that it materially affected the outcome of the election.

The Hearing Officer found the Field Supervisors qualified as supervisors on the lone § 2(11) ground that they could recommend discipline up to and including termination, though not initiate or impose discipline. *Hearing Officer’s Report* at 35. Field Supervisors did not exercise independent judgment regarding assignment, time-off, or other supervisory functions. *Hearing Officer’s Report* at 9-19.

While five Field Supervisors solicited cards and showed support for the Union, there is no evidence they used their limited status to coerce subordinates to support the Union at that time or thereafter. The Hearing Officer found only Field Supervisor Fernandez helped facilitate organizing meetings, which occurred outside the workday. *Hearing Officer’s Report* at 20-25. The other four Field Supervisors confined their prounion conduct by attending Fernandez’s

meetings, privately discussing the union with Field Technicians, and collecting signed cards. *Id.* at 20-25. The Field Supervisors believed they too might be able to join the Union, suggesting that, for Union purposes, they viewed themselves as colleagues of the Field Technicians, not authority figures. *Id.* at 20-25. Thus, in this activity Field Supervisors were not acting in a supervisory role. Rather, like many lead persons or low-level supervisors, they were acting outside of any supervisory responsibility. This would have been apparent to any workers interacting with them about signing such cards or supporting the Petitioner. Their conduct cannot be considered to have reasonably coerced or interfered with the Field Technicians' exercise of free choice in the election.

Once again, the activities described are all permitted by supervisors who engage in pro-management conduct. If the Field Supervisors, at the urging of management, had spoken against the Petitioner, discouraged employees from signing cards, or even held captive audience meetings pre-petition (or even post-petition) that would not have been found to be inherently coercive.

The lack of any evidence that supervisory conduct interfered with employees' exercise of free choice obviates the need to continue to the second part of the test. But, examining the remaining factors further demonstrates the immateriality of the Field Supervisors' pronoun activities to the election results. The exact number of cards solicited by Field Supervisors is unknown, but it appears to exceed the five-vote majority by which the union won the election. *Hearing Officer's Report* at 20-25. We, of course, do not know whether those who signed cards voted for or against the union. The Hearing Officer's Report also indicates the conduct was not isolated because Field Supervisor Fernandez led three meetings at which some cards were signed. *Hearing Officer's Report* at 23. This conduct did not occur at all meetings, was not conducted at the worksite, and was only engaged in by selected Field Supervisors. Significantly,

however, all the prounion supervisory conduct occurred prior to the union's petition for election. *Hearing Officer's Report* at 25. While Field Technicians who attended the organizing meetings also attended by Field Supervisors became aware of their activity, the fact that DIRECTV did not directly address the supervisors regarding their organizing activities until after the election suggests knowledge of prounion supervisory conduct was sufficiently limited that management did not discover it until later. *Transcript* at 201.

Finally, none of the evidence indicates the Field Supervisors' conduct had lingering effects. Not only has DIRECTV failed to meet its burden to show supervisory conduct materially affected the election; but the facts also suggest the opposite conclusion. To borrow a phrase from the *Harborside* Dissent, "Only by applying a flawed test in a flawed manner" did the Hearing Officer reach his result. *Harborside*, 343 NLRB at 922. *Harborside* was incorrect when the Board decided it and it continues to produce unjust results today. Here, following *Harborside* would punish the Field Technicians, who elected union representation, for the independent activities of their Field Supervisors.

Moreover, the "supervisors" had so little supervisory authority they hoped to join the union for security. The two Field Technicians who testified said they supported the Union of their own volition. *Hearing Officer's Report* at 22-24. Furthermore, one of them had been planning to organize his colleagues independently of the Field Supervisors. *Id.*

The Board has limited *Harborside* in several cases decided subsequently. In *Northeast Iowa Telephone Co.*, 346 NLRB 465 (2006) managers attended union meetings held at employees' homes, spoke in favor of the union at those meetings, signed authorization cards while other employees were present, and made various prounion statements, even indicating the union would help to prevent layoffs. The Board found such conduct was not sufficiently coercive to set aside the election. There the Board held that "the managers' prounion conduct coupled

with their limited supervisor authority did not reasonably tend to coerce or to interfere with employee free choice." *Id.* at 467. Here the Field Supervisors have less supervisory authority than the managers in that case.

We recognize that in *Northeast Iowa Telephone* there was no evidence of solicitation by the managers of authorization cards. But here, where some cards were solicited, solicitation was not accompanied by any coercive conduct. In *Harborside* there was some coercive conduct engaged in by the supervisor who collected the cards. Furthermore, the Board found that the supervisor had pressured employees to sign cards and support the union, conduct absent in this case.

Chinese Daily News, 344 NLRB 1071 (2005) involved solicitation of cards by a department supervisor. He collected cards from his direct supervisees. *Id.* at 1071-72. In addition, the department supervisor had more authority than the Field Supervisors. We don't read *Harborside* and *Chinese Daily News* as holding that mere solicitation of authorization cards is sufficient to establish objectionable conduct. In *Harborside* the conduct went well beyond merely soliciting cards. Cf. *Werthan Packaging, Inc.*, 345 NLRB 343, 344-45 (2005) (emphasizing that the supervisor involved in the objectionable conduct threatened employees). To the extent *Chinese Daily News* suggests that the mere solicitation of authorization cards without more requires a new election, it should be expressly overruled.

IV. CONCLUSION.

No more DIRECTV employees and organizing efforts should suffer because in 2004 three former Board members decided, over the Dissent, to overturn decades of precedent which found supervisory non-coercive, prounion conduct not to be grounds for an employer to obtain a new election. DIRECTV is attempting to take advantage of the former Board's mistake to obstruct union representation freely chosen by its employees. The Board can prevent this

injustice by reversing the Hearing Officer's Recommended Decision, overruling *Harborside*, and by issuing the appropriate certification to the Union.

The Board should furthermore direct that DIRECTV immediately bargain with the Union, in light of the delay in bargaining caused by these proceedings.

Dated: August 3, 2010

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: 

DAVID A. ROSENFELD
Attorneys for Petitioner

124672/582997

PROOF OF SERVICE
(CCP 1013)

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501-1091. On August 3, 2010, I served upon the following parties in this action:

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copies of the document(s) described as:

BRIEF IN SUPPORT OF EXCEPTIONS TO HEARING OFFICER'S REPORT AND RECOMMENDATIONS

BY FACSIMILE I caused to be transmitted each document listed herein via the fax number(s) listed above or on the attached service list.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda,

California, on August 3, 2010.

/s/Katrina Shaw
Katrina Shaw

**ATTACHMENT TO BRIEF IN SUPPORT OF EXCEPTIONS TO HEARING
OFFICER'S REPORT AND RECOMMENDATIONS**

**Harborside Healthcare, Inc. and Service Employees International Union, Local 47,
AFL-CIO, CLC. Case 8-CA-30592**

December 8, 2004

**SUPPLEMENTAL DECISION, ORDER, AND DIRECTION OF SECOND ELECTION
BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN, SCHAUMBER, WALSH,
AND MEISBURG**

MEMBERS LIEBMAN and WALSH, dissenting.

Statutory supervisors who support a union act at their peril. Not only are they fair game for employers who oppose unionization, but their participation in the union's organizing campaign also may prevent the union from being certified after winning an election. This is true even when their supervisory status was uncertain at the time, and even though their actions were no more than an antiunion supervisor would be permitted to do, with the blessing of the employer and the Board. That seems to be the lesson of the Board's decision here.

Ostensibly in response to a remand by the United States Court of Appeals for the Sixth Circuit, the majority offers a "restatement" of the law governing the prounion conduct of supervisors in the context of representation elections. Instead of simply clarifying the issue raised by the Sixth Circuit—whether an actual threat or promise of benefit by the supervisor is required to find objectionable conduct (it is not, and never has been)—the majority adopts a new legal test, without the benefit of briefing. That test minimizes the importance of a key factor: the employer's *antiunion* stance, which the Board has long recognized as limiting the impact of a *prounion* supervisor's conduct. As part of its effort,

the majority expressly overrules prior Board decisions, including decisions holding that mere supervisory solicitation of a union authorization card is not objectionable conduct. That ruling alone jeopardizes the outcome of many elections, where cards will be solicited by persons who are unaware that, under the law's definition, they will turn out to be supervisors.

In its disregard for prior decisions, its use of broad new language, and its neglect of workplace realities, the majority's new test signals a radical break with the Board's established approach. It will result in unwarranted obstacles to union representation. The majority is headed down a slippery slope.

After describing the current state of Board law and explaining the flaws in the majority's new test, we address its application to this case. In directing a new election, the majority relies on conduct that would not reasonably tend to coerce employees, even if it had been backed by the full weight of the employer's authority. In any event, it is impossible to conclude that any arguably coercive conduct could have materially affected the outcome of the election here.

I. THE BOARD'S HISTORIC APPROACH TO PROUNION SUPERVISORY CONDUCT

The majority shows little real interest in how the Board traditionally has analyzed prounion supervisory conduct. The Board's basic approach has been established since 1969.¹ If an employer has communicated its opposition to union representation (a key factor), the prounion conduct of a supervisor is objectionable (and thus may warrant setting aside the election, depending upon its possible effect on the outcome) only where

it reasonably tends to coerce employees into voting for the union, based on the fear of retaliation or the hope of reward.² The Board takes into account the “nature and degree of authority possessed by those engaged in the prounion activity, and their concomitant ability to reward or punish unit employees.” *Sutter Roseville Medical Center*, 324 NLRB 218, 219 (1997).³ The extent of the supervisor’s prounion conduct is also considered.⁴

Neither an explicit threat or promise,⁵ nor proof of actual (as opposed to possible) coercion,⁶ is required to find conduct objectionable. On the other hand, “[m]ere supervisory participation in a union’s organizing campaign does not, without a showing of possible objectionable effects, warrant setting aside an election.” *Gary Aircraft Corp.*, 220 NLRB 187, 187 (1975). A prounion supervisor is free to express his personal opinion, endorsing the union and pointing out the benefits of union representation.⁷ In addition, a prounion supervisor may ask employees to sign union authorization cards.⁸

II. THE SIXTH CIRCUIT’S REMAND

The Sixth Circuit remanded this case because it concluded that the Board had applied an incorrect legal standard, i.e., a standard contrary to the court’s own standard.⁹ The court apparently read certain Board decisions as requiring, or at least strongly implying, that an explicit threat or promise was required. *Harborside Health Care, Inc. v. NLRB*, 230 F.3d 206, 211–213 (6th Cir. 2000). In fact, none of the cases cited by the court applied such a requirement, nor has the Board ever done so. Nevertheless, the

language used by the Board in some decisions is open to misinterpretation. While the majority is wrong in implying that the decisions actually “strayed from extant Board law,” it is right to disavow any inadvertent suggestion in the language of the decisions that prounion supervisory conduct is objectionable only when an explicit threat or promise is made.

That is all the Board needed to do here. Instead, the majority, abandoning judicial restraint, goes farther. On its face, the Board’s new test¹⁰ may not seem an abrupt departure. But, as we will explain, the new test is applied here in a way that belies appearances. In the case of card solicitations by prounion supervisors, for example, the new test serves as an excuse to overrule precedent.

III. THE MAJORITY’S NEW TEST AND ITS FLAWS

Today’s decision suggests that prounion supervisory conduct may be objectionable based solely on the extent of the supervisor’s participation in the union’s campaign, on the theory that the supervisor’s involvement (at least beyond some unspecified level) necessarily destroys the laboratory conditions required for an election. That principle is at odds with current Board law, which focuses on the potential for coercion in supervisory conduct—and it could never be applied to a supervisor’s involvement in an employer’s *antiunion* campaign without a dramatic reversal of current Board law. Apart from its dubious approach to determining what conduct is objectionable, the majority also fails to fully explain when and why objectionable conduct will be sufficient to set aside an election.

Depending on its application, the effect of the Board's test could be to frequently overturn elections where statutory supervisors actively supported the union. The notion of a prounion supervisor is not as strange as it may seem.¹¹ The Act's definition of a supervisor sweeps in many workers whose authority is quite limited and whose legal status is highly debatable.¹² Before their status is determined, these borderline supervisors may seek union representation for themselves and their co-workers, unaware that they are ineligible and, indeed, that their participation in the campaign may result in the union's victory being set aside. To the extent that it inhibits workers who fall near, but not over, the supervisory line, the majority's approach threatens to deprive unions of their natural leaders in the workplace.

A. The Shift from Coercion as the Focus of the Inquiry

The Board's prior decisions on prounion supervisory conduct, in the context of employer opposition, have centered on the possibility of employee coercion: the fear of retaliation or the hope of reward. The majority today phrases the inquiry as "[w]hether the supervisor's prounion conduct reasonably tended to coerce *or interfere with* the employees' exercise of free choice in the election." Presumably, then, the majority envisions, by its use of the words "interfere with," that even where an employer's antiunion position has been communicated to employees, and even where employees cannot reasonably fear retaliation or hope for a reward based on the supervisor's conduct, an election might still be set aside. But the majority never explains what sort of conduct might fall in this category or why it would be objectionable.

If the majority is implying that the degree of the supervisor's authority, plus the extent of his participation in the union's campaign, can make noncoercive conduct objectionable, then its position is inconsistent with the Board's prior decisions.¹³ On that view, indeed, *antiunion* supervisory conduct that is now routinely tolerated would be found objectionable. At the direction of their employer, supervisors—up to the highest company official—may urge their subordinates to vote against unionization. Indeed, employers are free to compel employees to listen to their antiunion message, in captive audience meetings, one-on-one encounters, and other settings, while excluding union representatives.¹⁴ The Board rightly has held that there is “no reason to view a supervisor's *prounion* statements with more suspicion than a supervisor's *antiunion* statements.” *U.S. Family Care San Bernadino*, 313 NLRB 1176, 1176 (1994) (emphasis added). So long as a supervisor is engaged in persuasion, as opposed to coercion, his conduct remains proper.¹⁵

Whatever the majority's new test means, it may not be applied to treat prounion supervisory conduct *less* tolerantly than antunion conduct. Indeed, there are powerful reasons to treat prounion supervisory conduct as less likely to coerce employees. Where employers oppose union representation (as they typically do, often with vigor), the prounion conduct of a supervisor will tend to coerce employees into supporting the union far less often than comparable conduct by an antiunion supervisor acting on behalf of an antiunion employer. The Board long has recognized that a supervisor's ability to harm or

help employees is derived from the employer's ultimate authority and that an antiunion employer is unlikely to tolerate coercion by a prounion supervisor.¹⁶

Nor does it have to. Because supervisors are not protected by the Act, an antiunion employer is free to discipline them for their prounion views or actions.¹⁷ For this reason, notably, the courts have refused to permit employers who knowingly tolerated prounion supervisory conduct to pursue related election objections.¹⁸

Given the risks of supporting a union for a supervisor who is not protected by the Act, it is not surprising that prounion supervisors often are workers with such limited authority that they and their coworkers fail to recognize that they *are* statutory supervisors, as opposed to ordinary employees, and that they cannot be represented by the union if it wins the election. This consideration, too, diminishes the potential coercive effect of prounion supervisory conduct, as the Board has observed for many years.¹⁹

The majority's opinion, in a footnote, observes that

[i]n assessing the effect of the conduct on the election, the Board may take into account the antiunion statements of higher company officials, and the extent to which they may disavow coercive prounion conduct of supervisors.

In our view, the employer's public stance bears on whether prounion supervisory conduct is objectionable at all, and not simply on whether the conduct affected the election. Prior

decisions—which reflect the Board’s considered expert judgment about workplace realities over more than thirty 30 years—make clear that an employer’s antiunion position is critical. In that context, a prounion supervisor acts against his employer’s expressed interests, sometimes contrary to the employer’s direct orders, and always at the risk of lawful discharge. In most workplaces, employees have little to fear from such a supervisor: they need simply bring his actions to the attention of another manager.²⁰

B. Assessing the Effect of Objectionable Conduct

Apart from deciding what conduct is objectionable, the Board must also decide whether objectionable conduct is sufficient to set aside a particular election. The majority identifies the factors to consider in determining whether that conduct “interfered with freedom of choice to the extent that it materially affected the outcome of the election.” But it never explains why a special test for assessing the impact of prounion supervisory conduct, as opposed to other types of objectionable conduct, is necessary.

In cases involving the misconduct of a party, the Board has such a test, which overlaps with the majority’s test, but which is not identical.²¹ The majority’s test omits two factors that, it seems to us, may well bear on cases like this one: the degree to which the conduct can be attributed to a party and the mitigating effect of misconduct by the other party. To which party (union or employer) should the conduct of a prounion supervisor be attributed, when the employer is opposed to unionization? To what extent is the employer responsible for the supervisor’s conduct in such circumstances and thus should be estopped from objecting to it? Why should the supervisor’s conduct effectively be attributed to the union, if it has no control over him?

Admittedly, these are difficult issues, but the Board should grapple with them. It may well be that (absent unlikely evidence that the supervisor was acting as the union's agent) the Board should apply the *third-party* standard in these cases and should set aside an election only where prounion supervisory conduct renders a free election impossible, by creating a general atmosphere of confusion or fear of reprisal.²²

IV. APPLICATION OF THE MAJORITY'S NEW TEST

Even if we applied the majority's new test to the facts of this case, we would find no basis to set aside the election. Here, the Union's margin of victory was 11 votes. To find a material effect on the outcome of the election, then, the conduct of prounion supervisor Robin Thomas must have potentially affected at least *six* employee-voters.²³ At most, however, only *four* voters were affected (employees Lynne Pavelchak, Monica Thyme, Frankie Jackson, and an unidentified housekeeping employee), and we dispute even that figure. There is no evidence, meanwhile, that Thomas' conversations with Pavelchak, Thyme, or Jackson were overheard by other employees or otherwise disseminated, or that the conversation with the housekeeping employee was overheard by anyone in the bargaining unit other than Pavelchak.²⁴

To reach beyond those four voters and achieve the desired outcome, then, the majority wrongly:

(1) relies on a supervisor's solicitation of union authorization cards and signatures on a pronoun petition, although such conduct has not been objectionable under established law, which the majority today overrules;

(2) infers that objectionable threats were made to some employees simply because supposed threats were made to *other* employees, although even the original statements were not objectionable under established law; and

(3) relies on the supervisor's explanation to employees of the benefits of unionization, conduct which is clearly proper and which would never support the result here if *antiunion* statements were at issue.

Even considering the four employees most directly involved, the majority errs in finding the supervisor's conduct potentially coercive. The majority relies on statements that were not objectionable under established law, creating an arbitrary double standard. It also fails to give proper weight to both the employer's antiunion stance and the supervisor's minimal authority over these employees. Four votes, in any case, can make no difference here.

A. Conduct Involving More than the Four Employees

We turn first to the majority's attempt to find more than four voters potentially affected by objectionable conduct.

1. Solicitation of union card and petition signatures

The majority attempts to magnify the potential effect of Supervisor Thomas' conduct by citing a dozen employees whom Thomas asked to sign union cards and three to four employees whom Thomas asked to sign a union petition. But this conduct was

not objectionable, under well-established Board law, endorsed by the courts. See footnote 8, *supra* (collecting cases).²⁵ As the Board has held:

[T]he 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.”

Millsboro Nursing, *supra*, 327 NLRB at 880, quoting *NLRB v. San Antonio Portland Cement Co.*, 611 F.2d 1148, 1151 (5th Cir. 1980), cert. denied 449 U.S. 844 (1980). There is no evidence in the record of special circumstances surrounding Thomas’ solicitations or of accompanying statements that might make the solicitations reasonably likely to coerce employees into voting for the Union in a secret-ballot election.²⁶

Reaching out to decide an issue not raised by the Sixth Circuit’s remand, the majority now reverses the established rule that supervisory card solicitation is presumptively permissible.²⁷ It holds that supervisory solicitation of an authorization card is objectionable, even where the employer publicly opposes unionization, “absent mitigating circumstances,” which are not identified. Our colleagues assert that “[b]y definition, a supervisor has the power to affect—for good or for ill—the working life of the employee.” But as the Board’s decisions long have recognized, where an employer is opposed to unionization, a prounion supervisor acting on his own has sharply limited power.

The majority's ruling puts unions in an extraordinarily difficult position. To avoid creating a basis for setting aside an election, unions must now avoid using any person who might later be found to be a statutory supervisor to solicit authorization cards. Making such supervisory determinations is, to say the least, difficult even for the Board.²⁸ As we have pointed out, many prounion supervisors are unaware of their own supervisory status. If unions err on the side of caution, the number of potential card solicitors will be reduced significantly, excluding many people who might be natural leaders. The union will thereby be deprived of the talents of effective advocates. If, on the other hand, unions guess wrong, the results of many elections will be subject to challenge. Either way, employees who want union representation lose.

There are no good reasons to reverse the Board's current approach. According to the majority, card solicitation by a supervisor should be treated no differently than a supervisor's solicitation of signatures on an *antiunion* petition. But for reasons already explained, the situations are not comparable in their tendency to coerce employees, at least where the employer opposes unionization. In such a case, employees reasonably have little to fear or hope from a prounion supervisor, who is acting against employer policy, at his peril. Treating different situations as if they were the same is not even-handed, as the majority claims; it is arbitrary.

The majority fails to excuse another flaw in its new rule: it contradicts the long-established principle of *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961), that to be considered objectionable, conduct must occur during the "critical period," i.e., the period between the filing of the union's representation petition and the date of the election.

Supervisory solicitation of authorization cards, which are used to support the filing of a petition, typically occurs *outside* the critical period. Our colleagues assert that the “impact of the supervisor’s solicitation would ordinarily continue to be felt during the critical period” “because of the power of the supervisor over an employee.” This principle would seem to apply to *any* type of coercive conduct by a supervisor before the critical period, because the supervisor’s power persists. But unless it is limited to a prounion supervisor’s card solicitation, it guts the *Ideal Electric* rule.

The majority attempts to justify such a limitation by citing *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973), which involved a union’s offer to waive initiation fees for employees who signed authorization cards before the election. But, as the Supreme Court’s decision made clear, the offer was objectionable because it amounted to the promise of a benefit. The union could “buy endorsements.” *Id.* at 277. It was in that context that the Court observed that employees who signed cards, in exchange for the fee waiver, might “feel obliged” to vote for the union. *Id.* at 277–278. Nothing in *Savair* suggests that absent even an implicit promise or threat by the supervisor, supervisory card solicitation is objectionable.

In limited instances in the past, when the Board has treated a union’s solicitation of authorization cards as objectionable where accompanied by a threat of job loss or a waiver of initiation fees, it has expressly recognized that it was carving out an exception to the *Ideal Electric* rule and has carefully limited that exception to the precise factual circumstances presented. Contrary to our colleagues’ assertions, those cases provide no support for the decision here.²⁹

Finally, only by creating what seems to be a broad prohibition against card solicitation by any supervisor, from any employee, can the majority achieve the desired result. As we will explain, while Thomas is a supervisor, there is no evidence that she had meaningful control over any of the dozen or so unidentified employees from whom she solicited cards or the three or four employees from whom she solicited petition signatures. The majority insists that Thomas' solicitation must be viewed in light of her allegedly objectionable statements made to *different* employees (namely Pavelchak, Thyme, Jackson and a housekeeper). However, in the absence of evidence that the statements were directed at the same employees from whom she solicited cards, or that these employees learned of the statements and were likely to be influenced, the statements are plainly irrelevant.³⁰

2. Inference of threats to other employees

As we will explain, the majority finds that Thomas made objectionable threats to four employees; we disagree, on the basis of controlling Board precedent. But even assuming that Thomas did threaten the four, the majority errs its finding that Thomas' conversations with other employees are objectionable, based on an "inference" that when Thomas spoke with these employees she "did not limit her remarks to permissible expressions of opinion about the Union, but rather threatened them as well with the prospect of losing their jobs in the event the Union lost the election."

The asserted basis for this "inference" is the "nature of Thomas' discussions with Pavelchak, Thyme, and Jackson," which occurred on entirely separate occasions. That is no basis at all. We doubt that the Board would make a comparable inference about a

supervisor's conduct in the context of an employer's antiunion campaign. (If we are wrong, of course, the Board will have to regularly set aside elections where the record establishes that one or more employees were threatened by the supervisor and that the supervisor made undetermined campaign-related statements to other employees.) Here, there is simply no evidence about the actual content or circumstances of Thomas' conversations to suggest that she went beyond unobjectionable statements of her opinion about the benefits of unionization.³¹

3. Explanation of benefits of unionization

The majority's assertion, in turn, that Thomas's conversations with numerous employees explaining the benefits of unionization are objectionable is at odds with well-established law.³² The Board repeatedly has found that such statements by a prounion supervisor working for an antiunion employer—and even analogous statements by an antiunion supervisor of an antiunion employer—are not “inherently coercive.”³³ The Supreme Court has made clear that “[a]n employer is free to communicate to his employees any of his general views about unionism or any specific views about a particular union.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618–619 (1969). An employer and his supervisors are surely as free to communicate prounion views as they are antiunion views. See, e.g., *Admiral Petroleum Corp.*, supra, 240 NLRB at 896 (citing *Gissel*). Statements that stress the benefits of unionization in terms of job security constitute permissible campaigning.³⁴ Contrary to the majority's view, the law does not apply more harshly to prounion supervisors expressing personal views about the benefits

of unionization, in conflict with the views of their employer, than to antiunion supervisors, who may bring to bear not only their own day-to-day authority over employees, but also the absolute authority of an openly antiunion employer.³⁵

B. Conduct Involving the Four Employees

Aside from its contention that the vote of virtually every employee with whom Supervisor Thomas had contact was potentially tainted, the majority relies on Thomas' statements concerning job security and the importance of supporting the Union to employees Pavelchak, Thyme, Jackson, and an unidentified housekeeping employee.³⁶ None of these statements could have reasonably tended to coerce even these four employees. They were not objectionable threats under Board law.³⁷ Even if, considered in isolation, the statements had a tendency to coerce employees, it was undercut, given the employer's open opposition to the Union and Thomas' minimal authority over the employees.

Remarkably, the majority asserts that Thomas' repeatedly urging Pavelchak to attend union meetings is objectionable. This finding is utterly inconsistent with the well-established principle that management may hold repeated captive audience meetings to express its opposition to unionization. *S & S Corrugated Paper Machinery Co.*, 89 NLRB 1363, 1364 (1950); see also *Livingston Shirt Corp.*, supra, 107 NLRB at 405-407. If compelled attendance at multiple meetings demanded by the employer is not objectionable, then surely the lobbying of a single supervisor is proper.

As for Thomas' statements to Pavelchak, Thyme, and Jackson about the need for a union to insure employees' job security, they cannot be viewed as threats of job loss that would reasonably tend to coerce employees into supporting the Union. Under the circumstances, no reasonable employee could believe that Thomas was conveying a threat from the Employer or that she was in a position, given the Employer's opposition to the Union, to retaliate against prounion employees. At most, Thomas stated her in own conviction that there was no job security for the employees at Harborside. She clearly did not indicate that she herself would use her own authority to get them fired. Treating such statements by a prounion supervisor as having the power to coerce employees into supporting the union is contrary to *B. J. Titan Service Co.*, 296 NLRB 668 (1989), which the majority adds to the list of decisions overruled today, on dubious grounds.³⁸

But in any case, none of these statements, with the possible exception of that to Pavelchak, could be regarded as objectionable threats. Only to Pavelchak did Thomas specifically state that, because Pavelchak had made her initial support for the Union known to the Respondent by signing a union card, the Respondent was sure to retaliate against her if the Union was not elected. Arguably, such a statement could cause an employee, who has reason to believe that her support for the union is known, to feel pressured to vote for the Union as the only means to protect herself. Here, however, there is no indication that Thyme or Jackson had ever taken a prounion position or done anything to openly show support for the union. Nor does the record show that they or anyone else overheard or otherwise learned of Thomas' statement to Pavelchak regarding

her open union support and the certainty of retaliation. Clearly, then, Thomas' comments could not reasonably have tended to coerce these employees to vote for the Union.³⁹

Even after the overruling of *B.J. Titan*, the Board still must consider the circumstances in which the comments were made, including the Employer's opposition to the Union and Thomas' minimal authority over the employees potentially affected by her statements. These circumstances further weaken our colleagues' already dubious position.

The majority asserts that the Respondent's open opposition to unionization is not a mitigating factor, because there is no evidence that the Respondent informed its employees that it had instructed Thomas to cease her prounion activities⁴⁰ and because Thomas had day-to-day control over employees. However, it is clear that the Employer made its antiunion views generally known, and the evidence is clear that employees who felt threatened by a prounion supervisor could—and did—turn to their employer. Pavelchak filed a grievance with the Employer regarding Thomas' prounion conduct, strongly suggesting not only that she was aware of the employer's antiunion views, but also that she expected that the Employer would be sympathetic to her complaint against Thomas.

Moreover, Thomas essentially never had direct authority over the employees to whom she made the allegedly objectionable statements. Although Pavelchak's and Thyme's testimony indicates that they recognized Thomas' supervisory authority in her position as a charge nurse, their testimony also establishes that Thomas was not the charge nurse under whom they usually worked. As the majority recognizes, Thomas

never acted as Thyme's immediate supervisor. Thomas was assigned as Pavelchak's charge nurse for only 1 day and was assigned as Jackson's charge nurse for all of 45 minutes before Jackson himself was reassigned. It is clear that these employees viewed their regular charge nurse as the person having authority to evaluate *their* performance, write *them* up, or send *them* home. Contrary to the majority, Pavelchak, Thyme, and Jackson could not reasonably have viewed Thomas as having substantial authority to reward or punish them.⁴¹

For all of these reasons, even if the votes of the four employees were enough to affect the outcome, there is no proper basis to conclude that they might have been tainted by Thomas' pronoun conduct.

V. CONCLUSION

Supervisor Thomas was an energetic advocate for the Union. But she never made promises or threats, explicit or implicit, to employees. Even if she had, employees had no good reason to believe, given the Employer's opposition to the Union and Thomas' limited authority, that Thomas could have acted effectively to punish or reward them. And even assuming, against the evidence and the law, that Thomas strayed into objectionable conduct with respect to a handful of employees, their votes did not make the difference here. Following well-established Board law leads inescapably to the conclusion that the Employer's objections should be dismissed and that the Union should be certified as the bargaining representative of the employees. Only by applying a flawed test in a flawed manner does the majority reach a different result. Accordingly, we dissent.

¹ See *Stevenson Equipment Co.*, 174 NLRB 865, 866 (1969).

² See, e.g., *Sil-Base Co.*, 290 NLRB 1179 (1988).

³ E.g., *Cal-Western Transport*, 283 NLRB 453, 453-455 (1987), enfd. 870 F.2d 1481 (9th Cir. 1989).

⁴ *Id.* at 453.

⁵ See, e.g., *FPA Medical Management*, 331 NLRB 936, 938 (2000) (assumed supervisors' statements not objectionable where no "threats or promises of benefits—explicit or implicit").

⁶ As the Board has observed, the issue is whether there is a "possibility that a supervisor's pronoun conduct could coerce employees into supporting the union." *Cal-Western Transport*, supra, 283 NLRB at 453 (emphasis added).

⁷ See, e.g., *Millsboro Nursing & Rehabilitation Center*, 327 NLRB 879, 880 (1999); *Sutter Roseville Medical Center*, supra, 324 NLRB at 219.

⁸ See *Millsboro Nursing*, supra, 327 NLRB at 880 (collecting cases); *Sutter Roseville*, supra, 324 NLRB at 219 fn. 5; *Cal-Western Transport*, supra, 283 NLRB at 455-456. The Board's established rule on this point, which the majority overturns today, has been enforced by the courts. See *NLRB v. Cal-Western Transport*, 870 F.2d 1481, 1486 (9th Cir. 1989); *NLRB v. Hawaiian Flour Mill, Inc.*, 792 F.2d 1459, 1463-1464 (9th Cir. 1986); *Wright Memorial Hospital v. NLRB*, 771 F.2d 400, 405 (8th Cir. 1985). See also *NLRB v. Manufacturer's Packaging Co.*, 645 F.2d 223 (4th Cir. 1981) (pronoun supervisory conduct, including solicitation of cards, did not require setting aside of election).

⁹ We put aside the question of whether the court was warranted in rejecting what it understood to be the Board's approach, apparently based on its own view of the proper test. Compare *NLRB v. Browning-Ferris Industries of Louisville, Inc.*, 803 F.2d 345, 347 (7th Cir. 1986) (characterizing review of Board's decision as "extremely limited" and noting deference to "Board's selection or rules and policies to govern a particular election"). See also *Napoli Shores Condominium Homeowners' Assn. v. NLRB*, 939 F.2d 717, 718-719 (9th Cir. 1991).

The Act itself does not specifically address the issue posed here. As a result, establishing a standard for assessing the effect of pronoun supervisory conduct on employee free choice is surely a matter committed to the Board's expertise and discretion, not the courts'. See *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990) ("We will uphold a Board rule as long as it is rational and consistent with the Act . . . even if we would have formulated a different rule had we sat on the Board"). See also *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330 (1946) ("Congress has entrusted the Board with a wide range of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees").

¹⁰ The majority states:

When asking whether supervisory pronoun conduct upsets the requisite laboratory conditions for a fair election, the Board looks to two factors.

(1) Whether the supervisor's pronoun conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election.

This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the pronoun conduct; and (b) an examination of the nature, extent, and context of the conduct in question.

(2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b)

whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.*/

*/ In assessing the effect of the conduct on the election, the Board may take into account the antiunion statements of higher company officials, and the extent to which they may disavow coercive pronoun conduct of supervisors.

¹¹ See *NLRB v. Regional Home Care Services*, 237 F.3d 62, 68 (1st Cir. 2001).

¹² See generally *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001) (addressing supervisory status of nurses under Sec. 2(11) of Act).

¹³ See, e.g., *Admiral Petroleum Corp.*, 240 NLRB 894, 896–897 (1979).

¹⁴ See, e.g., *Frito Lay, Inc.*, 341 NLRB 515 (2004) (supervisors sent on 10–12 hour “ride-alongs” with individual employee drivers); *Andel Jewelry Corp.*, 326 NLRB 507 (1998) (employer’s chief financial officer conducted daily meetings with employees in each department for last 2-1/2 weeks before election); *Flex Products*, 280 NLRB 1117 (1986) (employer’s president called 120 of 164 unit employees into plant manager’s office for individual meetings); *Electro-Wire Products*, 242 NLRB 960 (1979) (employer’s president spoke to at least half of eligible employees individually at work stations on election day); *Associated Milk Producers*, 237 NLRB 879 (1978) (plant manager spoke individually to nearly every eligible employee, at work stations, on morning of election); *NVF Co.*, 210 NLRB 663 (1974) (general manager called 95 percent of eligible voters into office in groups of five or six to express opposition to union and solicit votes); *Livingston Shirt Corp.*, 107 NLRB 400 (1953) (captive audience meeting).

The statement of the employer in *Flex Products*, *supra*, is emblematic: “I’m allowed to talk to anybody I want. This is my company.” 280 NLRB at 1117. We do not necessarily endorse these decisions, but we do recognize them as controlling law. See *Andel Jewelry*, *supra*, 326 NLRB at 507 fn. 4 (personal statement of Member Liebman).

¹⁵ Employers’ antiunion campaigns routinely use company officials, from front-line supervisors to senior managers, to persuade employees to vote against unionization. As a practical matter, even lawful conduct of this sort influences employee free choice on a regular basis—just as it is designed to do. That an opinion may derive its persuasive force in part, or even primarily, from the speaker’s position of authority does not make it objectionable. In the early days of the Act, the Board, sensitive to the powerful influence of employers over their employees, required employers to remain strictly impartial. That requirement did not survive First Amendment scrutiny by the Supreme Court and the enactment of Sec. 8(c) as part of the Taft-Hartley Act. See 1 American Bar Association, Section of Labor & Employment Law, *The Developing Labor Law* 87–88 (4th ed. 2001) (Patrick Hardin & John E. Higgins, Jr., eds.) (collecting cases and discussing history of doctrine).

¹⁶ See, e.g., *Stevenson Equipment Co.*, *supra*, 174 NLRB at 866.

¹⁷ See, e.g., *Medcare Associates, Inc.*, 330 NLRB 935, 935–939 (2000).

¹⁸ See, e.g., *NLRB v. Columbia Cable TV Co.*, 856 F.2d 636, 639 (4th Cir. 1988) (“[A]n employer might well contest a representation petition on the merits and then seek a second bite of the apple by objecting to the result based on the ‘fifth column’ activity of its own supervisors”); *NLRB v. Manufacturer’s Packaging Co.*, 645 F.2d 223, 226 (4th Cir. 1981).

¹⁹ See *William B. Patton Towing Co.*, 180 NLRB 64, 65 (1969). See also *Millsboro Nursing*, *supra*, 327 NLRB at 880 fn. 7. The Board’s observation has been endorsed by the courts. See *Regional Home Care Services*, *supra*, 237 F.3d at 70; *NLRB v. Lake Holiday Associates, Inc.*, 930 F.2d 1231, 1235 (7th Cir. 1991); *Wright Memorial Hospital v. NLRB*, *supra*, 771 F.2d at 406.

²⁰ See *Turner's Express, Inc.*, 189 NLRB 106, 107 (1971), enf. denied 456 F.2d 289 (4th Cir. 1972).

²¹ See, e.g., *Taylor Wharton Division*, 336 NLRB 157 (2001). There, the Board stated:

In determining whether a party's misconduct has the tendency to interfere with employees' freedom of choice the Board considers: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the conduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party.

Id. at 158, citing *Avis Rent-a-Car*, 280 NLRB 580 (1986).

²² See generally *Cal-West Periodicals*, 330 NLRB 599 (2000).

²³ E.g., *Coca-Cola Bottling Co.*, 232 NLRB 717, 718 (1977) (unlawful interrogations of two employees in a unit of 106 represented "isolated incidents" insufficient to affect the results of the election in which union lost by eight-vote margin).

²⁴ See *Caron International*, 246 NLRB 1120 (1979) (general foreman's threat to union activist employee did not warrant setting aside election, because threat was isolated incident and no evidence that it was overheard by or disseminated to other employees). Compare *Lancaster Care Center, L.L.C.*, 338 NLRB 671 (2002) (nursing supervisor's threat to union supporter warranted setting aside election based on evidence of dissemination to other unit members).

²⁵ Although supervisory solicitation may invalidate a showing of interest in support of a representation petition, the Board made clear in *Millsboro Nursing, Sutter Roseville, and Cal-Western Transport*, supra, that such conduct is not a basis for setting aside an election. Id. Cf. *Dejana Industries*, 336 NLRB 1202 (2001) (representation petition dismissed based on supervisor's direct solicitation of cards). Here, as in *Cal-Western Transport*, the Respondent is objecting to the allegedly coercive effect of Thomas' prounion conduct on the election. Thus, the question is not whether the Union's showing of interest was tainted by Thomas' card solicitation, but rather whether the employees solicited by Thomas were reasonably likely to have been coerced to vote for the Union.

²⁶ Cf. *Gibson's Discount Center*, 214 NLRB 221, 221-222 (1974) (solicitation of cards accompanied by promise that initiation fee would be waived objectionable); *Lyons Restaurants*, 234 NLRB 178 (1978) (solicitation of authorization cards accompanied by threats of job loss objectionable).

²⁷ The majority states that it is overruling *Millsboro Nursing*, but, of course, the Board's current rule long predates that case.

²⁸ This is acutely so in the nursing context. See *Kentucky River*, supra; *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571 (1994).

²⁹ See *Lyon's Restaurants*, supra, 234 NLRB at 179; *Gibson's Discount Center*, supra, 214 NLRB at 222 fn. 3. In *Lyon's Restaurant*, cited by the majority, the union threatened to enforce a nonexistent union-security clause against employees who did not pay dues and solicited authorization cards on that basis. The employer, in turn, deducted union dues well into the critical period. On those facts, the Board concluded that the prepetition threat could have interfered with the election. This case is not analogous. *Gibson's Discount Center*, also cited by the majority, involved a *Savair* violation, i.e., the promise of a benefit as an inducement to sign a card. The Board observed that "it would severely circumscribe the doctrine of *Savair*

to limit application to postpetition waiver of initiation fees.” 214 NLRB at 22. The *Savair* doctrine, as we have shown, has no application here.

³⁰ It is true that Thomas’ subsequent statements to employee Pavelchak about the risk to her job security in failing to support the Union did, in one instance, refer back to Pavelchak having signed a card. But we assume for the sake of argument that Pavelchak herself was coerced. It is other employees who are at issue.

³¹ The majority relies particularly on Thyme’s testimony that she saw Thomas having conversations with these other employees that were “similar” to her own conversations with Thomas in which Thomas stated “there is no job security [at Harborside].” In fact, the record shows that Thyme simply stated, in reply to Counsel for the Respondent’s question on direct examination “Did you see [Thomas] have *similar* discussions with other employees?” (emphasis added), that she had. There is no evidence that Thyme actually *heard* these conversation, and, in any event, to the extent she may have overheard Thomas mention job security that fact would not render Thomas’ statements objectionable.

³² The only evidence that Thomas made statements to other employees in support of the Union is Pavelchak’s general testimony that she observed Thomas “explaining to other people that were working on the floor with her what the Union was going to do for them, how great it was going to be, and telling them that they needed to vote for the union,” and Thyme’s testimony that she observed Thomas telling employee Lolisa Starr and a “numerous amount” of other employees that it would benefit them to vote for the Union. The record tells nothing about the precise content or circumstances of these conversations.

³³ *Sutter Roseville Medical Center*, supra, 324 NLRB at 219. Compare *NVF Co.*, supra, 210 NLRB at 663 (employer’s preelection meetings with unit employees in small five-to-six person groups to explain the employer’s reasons for opposing unionism and solicit employees to vote against the union were not per se coercive).

³⁴ *NLRB v. Superior Coatings*, 839 F.2d 1178, 1181 (6th Cir. 1988); *Sutter Roseville Medical Center*, supra, 324 NLRB at 219; *Smith Co.*, 192 NLRB 1098, 1101 (1971).

³⁵ See supra at fn. 13.

³⁶ Specifically, Thomas told Pavelchak that, because she had signed a union authorization card and “her name was on the list, that [Harborside] would fire [her] anyway, so [she] had better vote for the Union and pray they got in,” and also repeatedly urged Pavelchak to attend union meetings. Thomas also told Jackson that he could lose his job if he did not vote for the Union. Similarly, she stated to Thyme that she had “no job security here” and that Harborside could fire her “at will.” Finally, according to Pavelchak’s testimony, Thomas stated to a housekeeping employee “I can count on your vote, right? I really need to have your vote.” Although the housekeeping employee was not identified and did not testify, Pavelchak testified that she overheard Thomas pressuring the employee to vote for the Union.

³⁷ Member Walsh finds it unnecessary to reach this conclusion because even assuming that Thomas’ statements were objectionable threats, they were made to only four employees, and there is no evidence that they were disseminated to other voters. Therefore, Thomas’ conduct could not have materially affected the outcome of the election. (As stated earlier, the Union’s margin of victory in this case was 11 votes. Thus, a shift in six votes would be necessary to change the election result.)

³⁸ The majority’s discussion of *B. J. Titan* effectively rejects the well-established principle that a prounion supervisor’s statements stressing the need for a union to ensure job security constitute permissible campaigning. See, e.g., *NLRB v. Superior Coatings*, supra, 830 F.2d at 1181; *Sutter Roseville Medical Center*, supra, 324 NLRB at 219; *Smith Co.*, supra, 192 NLRB at 1101. Our colleagues say that such statements are permissible “provided they cannot reasonably be construed as a threat of loss of continued

employment if the employee does not vote for the union." But the majority implies that employees could *always* reasonably construe such statements as a threat, even when the employer demonstrably opposes unionization, so long as the supervisor has firing authority.

³⁹ There is no basis for the view that when a prounion supervisor tells an employee, who has *not* expressed a position regarding unionization, that the employer will retaliate against him if he *does* support the union, such a statement could reasonably coerce the employee into supporting the union. Just the opposite is true. Such an employee would likely be discouraged from supporting the union.

⁴⁰ The majority's argument here raises more questions than it answers, for it is doubtful whether the Respondent is now free to rely on Thomas' conduct as a basis for setting aside the election, having failed to specifically repudiate the conduct to its employees. See *Hadley Mfg. Corp.*, 106 NLRB 620, 621 (1953) (employer estopped from relying on supervisor's conduct in challenging election, because employer "did not communicate to the employees any disavowal of [the particular supervisor's] activities," notwithstanding employer's instruction to supervisor to cease prounion activities and employer's circulation of antiunion letters). See also *Decatur Transfer & Storage, Inc.*, 178 NLRB 63 (1969); *Talladega Cotton Factory, Inc.*, 91 NLRB 470, 472 (1950). Here, although the Respondent spoke with Thomas and circulated a letter to its employees urging them in general terms to disregard harassment by prounion employees, it at no point specifically disavowed Thomas' particular statements or conduct.

⁴¹ Thus, when Jackson was asked on direct examination whether Thomas threatened or otherwise intimidated him when urging him to support the Union in order to protect his job security, he stated "[i]f I'd have worked up under her, I'm pretty sure she would have." Given that none of the employees to whom Thomas made these statements "worked up under" Thomas, they would not reasonably have perceived Thomas as being in a position to punish or reward them.

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EXHIBIT H

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

DIRECTV U.S. DIRECTV Holdings LLC and International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 947, Petitioner. Case 21-RC-21191

December 22, 2011

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN PEARCE AND MEMBERS BECKER AND HAYES

The National Labor Relations Board has considered objections to an election held on April 16, 2010, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 85 ballots cast for, and 80 ballots cast against, the Petitioner, with 2 challenged ballots, a number insufficient to affect the outcome of the election.

The Board has reviewed the record in light of the exceptions and briefs, and has decided to adopt the hearing officer's findings and recommendations¹ only to the extent consistent with this decision.

The Board conducted the election in the stipulated unit of technicians, warehouse employees, dispatchers, and quality control employees at the Employer's Rancho Dominguez, California facility. A majority of the employees voted for representation by the Petitioner. At issue here is the Employer's objection alleging that its field supervisors are supervisors within the meaning of the Act, and that the field supervisors' prounion activities during the preelection period interfered with the employees' free choice in the election.² The hearing officer recommended sustaining the Employer's objection. First, the hearing officer found that, based on their authority to effectively recommend discipline, the field supervisors are statutory supervisors. Second, the hearing officer found that, pursuant to *Harborside Healthcare, Inc.*, 343

¹ In the absence of exceptions, we adopt pro forma the hearing officer's recommendations to overrule Objections 2 and 3.

² The Employer filed two objections alleging that the field supervisors engaged in improper prounion activity. Objection 1—which is the sole objection before the Board for consideration—alleges that the field supervisors engaged in improper *prepetition* prounion activity; Objection 2 alleges that the field supervisors engaged in improper *postpetition* prounion activity. The hearing officer recommended overruling Objection 2, on the ground that the Employer failed to present any evidence that the field supervisors actually engaged in any postpetition prounion activity. We have adopted that recommendation in the absence of exceptions.

NLRB 906 (2004), the field supervisors' prounion activity constituted objectionable conduct warranting a new election.

For the reasons set forth below, we find, contrary to the hearing officer, that the field supervisors do not possess supervisory authority.³ Accordingly, we find that the field supervisors' prounion activity did not constitute objectionable conduct, and we conclude that a certification of representative should be issued.

I. FACTS

The Employer provides digital television services to residential and commercial customers. At its Rancho Dominguez facility, the Employer employs approximately 215 employees in the following classifications: field technicians, warehouse employees, and dispatchers. The vast majority of these employees are field technicians, who install or repair digital equipment at customers' locations. In addition, the Employer employs a site manager, 3 operations managers, and 22 field supervisors. Of the 22 field supervisors, 13 are designated "field supervisors with a team" [hereinafter referred to as "field supervisors"], and 9 are designated "field supervisors without a team." Each field supervisor oversees a team of approximately 10 to 15 field technicians. In contrast, "field supervisors without a team" do not oversee anyone; rather, they primarily perform installation and repair work on complex jobs or jobs for important customers.

Field supervisors respond to their team members' telephone calls seeking answers to technical questions, requesting additional equipment, or reporting problems with particular job assignments (e.g., a customer is unavailable or a site is inaccessible). In addition, field supervisors monitor the productivity of the field technicians on their team, examine their work, and inspect their vehicles. Field supervisors have the authority to give verbal warnings to technicians for performance issues or for tardiness, such as being late to a team meeting. Such verbal counselings are documented by field supervisors in "manager notes," which are not reviewed by management and not retained in employees' personnel files.

If a field supervisor determines that a technician's performance or infraction warrants more than a verbal counseling, he has the authority to initiate the disciplinary process associated with an employee consultation form (ECF).⁴ Field supervisors do not have the authority to

³ We note that our conclusion in this regard provides an additional basis upon which to overrule Objection 2. See fn. 2 above.

⁴ The format and content of the ECF are described in detail at pp. 11-12 of the hearing officer's report. In brief, the ECF requires the initiator to identify the employee involved, the date, the supervisor, and the category of offense; to describe the incident for which the discipline was imposed; to provide inform;

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prepare and issue ECFs directly to technicians; rather, ECFs are subject to management review. More specifically, after a field supervisor prepares a draft ECF, the ECF is reviewed, first, by the operations manager to whom the field supervisor reports; next, by the site manager;⁵ and, finally, by the human resources department.⁶ At each stage of review, the reviewer may alter the language of the ECF, change the proposed level of discipline, or decide that the ECF should not be issued.⁷ Following that review, the field supervisor meets with the technician to present and explain the ECF. The field supervisor thereafter affords the technician the opportunity to set forth his version of events, or add other comments, on the ECF form. Finally, the field supervisor asks the technician to sign the ECF form and then signs it himself, after which the ECF is placed in the employee's personnel file.⁸

II. HEARING OFFICER'S REPORT

The hearing officer concluded that the Employer's field supervisors are supervisors within the meaning of Section 2(11) of the Act. Although the hearing officer rejected the Employer's contentions that the field supervisors possess authority to assign, discipline, suspend, or

future and the possibility of future discipline; and to identify an appropriate level of discipline.

⁵ Site Manager Mike Schultz testified that, in deciding whether to approve an ECF, he reviews—possibly in consultation with the operations manager and/or the field supervisor—the employee's past performance and any prior corrective measures. Additionally, Schultz indicated that he might look at the employee's file or ask questions about the employee.

⁶ With respect to recommendations for discharge, however, the field supervisor typically consults with his operations manager *before* he prepares the draft ECF. In this regard, Field Supervisor Juan Flores testified that a discharge recommendation has "to go through [the operations manager] first." Also with respect to discharge recommendations, management and human resources review and consider a technician's overall performance in deciding whether to approve the recommendation.

Although the record is not free from ambiguity, testimony from Field Supervisor Flores suggests that the review process when an ECF recommends suspension is identical to the above-described process for discharge recommendations.

⁷ Site Manager Schultz testified that, per week, the Employer issues 15 to 20 ECFs and rejects 3 to 5 ECFs initiated by field supervisors. Field Supervisor Flores testified that management rarely declines to issue ECFs that he initiates (i.e., only about 1 percent of the time); more commonly, management modifies his ECFs to correct errors or make stylistic changes.

⁸ The Employer submitted into evidence 16 ECFs, all but 2 of which were designated "verbal warnings." The two ECFs that were designated "written warnings" do not specify whether or how many verbal warnings preceded them. With the exception of one ECF that reflects a safety (driving) violation, all of the ECFs in evidence relate to attendance or productivity. Each of the eight productivity-based ECFs in evidence states, using identical boilerplate language, that the designated employee failed to satisfy the Employer's minimum standard of productivity (an average of four jobs per day).

discharge the technicians, or to adjust their grievances,⁹ he found that they possess authority to effectively recommend discipline, up to and including discharge, by virtue of their initiation and ultimate issuance of ECFs. The hearing officer found that field supervisors exercise discretion in exercising this authority, by deciding whether to initiate an ECF and by making recommendations regarding the appropriate level of discipline. The hearing officer further found that, although various levels of management review the ECFs initiated by field supervisors, they do not conduct an independent investigation. Rather, he found that management reviewers accept the field supervisors' version of events at face value and do not afford the technicians an opportunity to provide input or comments until after the ECF is issued.

The hearing officer also determined that various secondary indicia of supervisory status support the conclusion that field supervisors are statutory supervisors: the ratio of supervisors to nonsupervisory employees would be unusually high if the field supervisors were not deemed to be supervisors; field supervisors are held out to the technicians as their supervisors; field supervisors hold weekly meetings with their teams, during which they convey information on behalf of the Employer; and field supervisors attend management meetings with the site manager and operations managers.¹⁰

III. DISCUSSION

Section 2(11) of the Act defines a "supervisor" as

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is well established that the burden to prove supervisory authority rests with the party asserting it. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006) (citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001)). Here, as set forth above, the hearing officer concluded that the Employer satisfied that burden by establishing that field supervisors possess one indicium of supervisory status—the authority to effectively recommend discipline.

⁹ No party excepted to the hearing officer's findings that the field supervisors lack these indicia of supervisory authority.

¹⁰ The hearing officer rejected the Employer's contention that the "field supervisors without a team" are also statutory supervisors. In the absence of exceptions, we adopt the hearing officer's findings in this regard.

The authority to “effectively recommend” an action “generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed.” *Children’s Farm Home*, 324 NLRB 61, 61 (1997). Contrary to the hearing officer, we conclude that the evidence in this case fails to demonstrate that the field supervisors’ authority to recommend discipline satisfies that standard.

Although Field Supervisor Flores testified that management declined to issue only about 1 percent of the ECFs that he initiated, and Site Manager Schultz testified that, in an average week, the operations managers reject 3 to 5 of the 15 to 20 ECFs recommended by field supervisors, the record does not establish what weight, if any, the various managers accord field supervisors’ recommendations or the extent to which their approvals are based on their own independent analyses. Accordingly, this evidence demonstrates, at most, that the supervisors’ recommendations are “ultimately followed” in the majority of instances, not that the recommended action is taken without independent investigation by the managers.

Indeed, it is undisputed that *all* of the ECFs that are initiated by the field supervisors are subject to three levels of review: by the operations manager, the site manager, and the human resources department. Further, the evidence establishes that, at the site manager level, ECFs are subject to independent investigation. Site Manager Schultz testified that, in deciding whether to approve an ECF, he reviews—possibly in consultation with the appropriate operations manager and/or the field supervisor—the employee’s past performance and any prior corrective measures issued to the employee. He also indicated that he might look at the employee’s file or ask questions about the employee. This evidence concerning the nature of review at the site manager level is uncontradicted.

Even if we were to assume that Schultz’ review of the ECFs does not constitute an “independent investigation,” it is merely one step in a three-level review process. The Employer adduced no evidence regarding the extent, or the components, of the review processes utilized by the operations managers or the human resources department. In the absence of any such evidence, we cannot find that the field supervisors effectively recommend discipline.¹¹

¹¹ Contrary to our dissenting colleague’s contention, we do not suggest that the mere fact that the field supervisors’ ECFs are subjected to a three-level review process necessarily forecloses a finding of effective recommendation of discipline. Rather, we merely emphasize that, as discussed above, the absence of evidence that the managers at each level of review accept the field supervisors’ recommendations without conducting an independent investigation warrants a conclusion that the field supervisors do not effectively recommend discipline. Indeed,

See *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999) (any lack of evidence in the record is to be construed against the party asserting supervisory status).¹²

Equally important, there is no evidence whatsoever regarding the impact of field supervisors’ ECFs on the technicians’ job status or tenure. As the Board has consistently held:

[T]he issuance of written warnings that do not alone affect job status or tenure do not constitute supervisory authority.

...

[F]or the issuance of reprimands or warnings to constitute supervisory authority, the warning must not only initiate, or be considered in determining future disciplinary action, but also it must be the basis of later personnel action without independent investigation or review by other supervisors.

Phelps Community Medical Center, 295 NLRB 486, 490 (1989) (quoting *Passavant Health Center*, 284 NLRB 887, 889–890 (1987)) (quotation marks omitted)(ellipsis in original); accord, *Jochims v. NLRB*, 480 F.3d 1161, 1170 (D.C. Cir. 2007). Here, the Employer did not introduce evidence establishing the existence of a progressive disciplinary system or otherwise explain how the verbal or written warnings contained in ECFs in the record were linked to future disciplinary action.¹³ Moreover, the Employer has presented no

regardless of how frequently field supervisors’ recommendations have been followed, under our prior precedent such evidence alone would be insufficient to establish the authority to effectively recommend within the meaning of Sec. 2(11). See *Brown & Root, Inc.*, 314 NLRB 19, 23 (1994); *Hawaiian Telephone Co.*, 186 NLRB 1, 2 (1970).

¹² *Mountaineer Park, Inc.*, 343 NLRB 1473 (2004), cited by the hearing officer, is not to the contrary. Although the Board majority in that case concluded that a manager did not conduct an independent investigation of a purported supervisor’s disciplinary recommendation in circumstances in which the record was silent regarding the scope of the manager’s “review,” the majority’s finding of effective recommendation rested heavily on the manager’s testimony that he routinely “signed off on” the purported supervisor’s recommendations, as well as evidence that the manager had approved *all* of the alleged supervisor’s recommendations during the prior year. No comparable evidence exists in this case.

¹³ In *Progressive Transportation Services*, 340 NLRB 1044 (2003), the Board cited disciplinary notices that are similar to the ECFs in this case as evidence in support of its finding that the employer maintained a progressive discipline policy. In that case, however, the Board additionally relied on the fact that suspension notices issued to employees by the alleged supervisor *expressly referenced* prior, lesser disciplinary sanctions meted out to those same employees by the supervisor. There is no similar evidence here. Indeed, the highest level of discipline reflected by the ECFs submitted into evidence is a “written warning”; neither of the two “written warnings” in the record refers to any prior infraction by the recipient. Moreover, the documentary evidence re-

documentary evidence of suspensions or discharges issued or recommended by field supervisors. Neither Site Manager Schultz' testimony that there have been terminations based on the recommendation of field supervisors, nor Field Supervisor Flores' testimony that he has initiated ECFs for suspensions and discharges, is sufficient to demonstrate that field supervisors possess the authority to make effective recommendations, for there is no evidence that management has suspended or discharged any technicians without an independent investigation.¹⁴ For all the foregoing reasons, we find that the Employer's field supervisors do not possess the authority to effectively recommend discipline.

In sum, the Employer has failed to establish that the field supervisors possess any statutory indicia of supervisory authority. In the absence of such evidence, the secondary indicia of supervisory authority on which the hearing officer relied are immaterial. See *Ken-Crest Services*, 335 NLRB 777, 779 (2001) (secondary indicia are insufficient by themselves to establish supervisory status). For all these reasons, we find that the field supervisors are not supervisors within the meaning of Section 2(11) of the Act.

In light of that finding, *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004), is inapplicable here,¹⁵ and we conclude that the field supervisors' prounion activity did not constitute objectionable conduct. Accordingly, we reverse the hearing officer and overrule the Employer's objection.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for the International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 947, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time production installation technicians, field technicians, service technicians, piece work technicians, who service and install satellite dishes, warehouse employees, dispatchers, and quality control employees, employed by the Employer at, or out of its facility located at 19335 South Laurel Park Road, Rancho Dominguez, California; excluding all

veals that, although one employee received two ECFs for the same infraction (attendance violations), the employee received two verbal warnings, the latter of which made no reference to the first.

¹⁴ Indeed, Field Supervisor Flores' testimony that he must first speak to his operations manager before even preparing a draft ECF recommending termination (or, apparently, suspension) suggests that the field supervisors cannot even recommend those levels of discipline without the prior review and approval of a manager.

¹⁵ We therefore find it unnecessary to consider the Petitioner's exceptions urging the Board to overrule *Harborside*.

other employees, administrative clerical employees, confidential employees, managerial employees, guards, and supervisors as defined in the Act.

Dated, Washington, D.C. December 22, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

I would affirm the hearing officer's findings that the field supervisors are statutory supervisors and that their prepetition prounion conduct was objectionable under *Harborside Health Care, Inc.*, 343 NLRB 906 (2004). In particular, I disagree with my colleagues that the Employer has failed to meet its burden of proving that the prounion field supervisors in dispute have statutory supervisory authority to use independent judgment in effectively recommending discipline.

As recounted by the hearing officer in the appended report, the record clearly establishes that the field supervisors have the independent discretionary authority to issue ECFs to field technicians for a variety of work infractions. Merely because an ECF initiated by a field supervisor is subject to a three-level review process does not negate that the field supervisor "effectively recommends" discipline and does not reflect a lack of Section 2(11) authority. *Mountaineer Park, Inc.*, 343 NLRB 1473, 1476 (2004) (putative supervisor effectively recommended discipline even though reviewed by manager before issuance to employee).¹ Accord: *Caremore, Inc. v.*

¹ The majority contends that in *Mountaineer Park, Inc.* the majority's finding of effective recommendation "rested heavily" on the manager's testimony that he routinely signed off on the purported supervisor's recommendations. The evidence here, as in *Mountaineer Park, Inc.*, shows that the review of the disciplinary recommendations by higher authorities is not an independent investigation. Further, the finding of "effective recommendation" in *Mountaineer Park, Inc.* turned, not on the manager's testimony, but on his "weighty" reliance on the supervisor's recommendation as the record showed the manager consistently followed them. *Mountaineer Park, Inc.*, supra at 1476. Similarly here, the evidence shows that the field supervisors' disciplinary recommendations are routinely followed by the Employer 70 percent or more of the time. *Venture Industries*, 327 NLRB 918, 919 (1999) (finding supervisory authority to discipline where employer followed such recommendations 75 percent of time).

The cases cited by my colleagues, *Brown & Root, Inc.*, 314 NLRB 19 (1994), and *Hawaiian Telephone Co.*, 186 NLRB 1 (1970), are inapposite. In neither case was there evidence that the employers followed the safety inspectors' written citations (*Brown & Root*) or the

NLRB, 129 F.3d 365, 369–370 (6th Cir. 1997) (rejecting the Board’s argument that LPN charge nurses did not effectively recommend discipline because their recommendations were subject to review by a higher authority). Indeed, multiple levels of review are a virtual necessity to assure procedural compliance of proposed disciplinary actions with myriad Federal and State employment law regulations. The existence of such a review process certainly does not preclude finding that a front-line supervisor who initiates the process does not effectively recommend discipline, particularly where, as here, the ECFs include specific recommendations for disciplinary action that have ultimately been followed in all but a few instances.

I also disagree with my colleagues that there is a lack of evidence that ECFs affect a field technician’s job status or tenure. The record establishes that different

traffic supervisors’ initial warnings (*Hawaiian Telephone*). Instead the evidence showed that the citations and warnings simply reported incidents or problems to higher-level supervisors who independently conducted an investigation and then decided whether to take disciplinary action. Here, there is no evidence of any independent investigation as part of the three-level review. Furthermore, inasmuch as the vast majority of the time the discipline issued after review follows the field supervisor’s recommendation, the recommendation is plainly “effective.” Even if the recommendation was subject to investigation, that would not detract from the field supervisor having effectively recommended discipline using independent judgment. See, e.g., *Eastern Greyhound Lines v. NLRB*, 337 F.2d 84, 89 (6th Cir. 1964) (dispatchers effectively recommended discipline using independent judgment despite recommendations being subject to independent investigation before final action).

levels of discipline are listed on the ECF, up to and including discharge. The field supervisor initiating the ECF process recommends a level of discipline on this form. The hearing officer credited uncontradicted testimony that field supervisors’ ECF disciplinary recommendations, up to and including discharge, have been approved and implemented. With respect to lesser degrees of discipline, it is undisputed that at the end of the review process, the field supervisor explains the discipline to the technician and a copy is placed in the personnel file, where it may be used as the basis for future disciplinary action.

In sum, the hearing officer correctly found that the field supervisors have supervisory authority within the meaning of Section 2(11) of the Act. He also correctly found that authorization card solicitation and other prepetition prounion activity by certain field supervisors materially affected the outcome of an election decided by a 5-vote margin. Accordingly, I dissent from my colleagues’ failure to adopt the recommendation to sustain the Employer’s Objection 1, set aside the election results, and direct a second election.

Dated, Washington, D.C. December 22, 2011

Brian E. Hayes,

Member

NATIONAL LABOR RELATIONS BOARD

EXHIBIT I

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PATRICIA M. GATES, Of Counsel
 ROBERTA D. MARRINE, Of Counsel
 RICHARD T. DRURY, Of Counsel
 NINA FRENDEL, Of Counsel
 ANA M. RALLEGOS, Of Counsel

- Also admitted in Arizona
 -- Admitted in Hawaii
 --- Also Admitted in Nevada
 ---- Also Admitted in Illinois
 ----- Also admitted in Missouri
 ***** Also admitted in New York

December 24, 2011

EMAIL

Gregory D. Wolflick
 Wolflick & Simpson
 130 North Brand Blvd., Suite 410
 Glendale, CA 91203

Re: Bargaining With Machinists District Lodge 947

Dear Mr. Wolflick:

This letter is written on behalf of District Lodge 947. The Union has now been certified by the NLRB as the representative of the employees in the unit in case 21-RC-21191.

We recognize that DirectTV may attempt to delay bargaining with the Union by refusing to bargain.

Under current Board law your client may not make unilateral changes after the date of the election conducted on April 16, 2010. Now that the certification has issued that obligation continues.

Any such unilateral changes would become unfair labor practices now that the Board has issued its certification. We intend to impose the greatest risk upon your client if it chooses that unreasonable course.

We are, therefore, putting you on notice. We insist that, henceforth, you make no unilateral changes with respect to the terms and conditions of employment of any employee in the bargaining unit without affording an opportunity to District Lodge 947 to bargain over the decision and effects of such change. The following is a list of those changes which we insist not be made without bargaining over the decision and the effects. The list is not inclusive but is simply illustrative of all those changes.

1. No promotional position should be filled without bargaining;
2. No employee should have his/her hours changed without bargaining;

December 24, 2011
Gregory Wolflick
Page 2

3. No employee should be warned, counseled, disciplined or terminated without bargaining;
4. No one should be hired without bargaining over the person who should fill the position;
5. No employee should be laid off without bargaining;
6. No health and welfare, pension or other fringe benefits should be denied without bargaining;
7. No positions outside the bargaining unit should be filled without bargaining over the question of transfer or promotion;
8. No work location, assignment, classification or any other aspect of employment should be changed without bargaining;
9. No discipline should be imposed without affording the employee the Weingarten rights which we hereby demand;
10. No changes in the method and manner by which work is being performed may be made without bargaining;
11. No introduction of any new work techniques without bargaining;
12. No subcontracting, closures, relocation or any changes in the workplace should be made without bargaining.
13. No jobs should be bid or commenced without bargaining.
14. No routes should be changed without bargaining.

In considering this list you should consider the risk which your client bears if it chooses to make those changes without bargaining. If positions open in this unit or some other unit and your client does not bargain over the filling of those positions, we will argue that someone is entitled to back pay and your client may end up paying back pay for a lengthy period of time. If your client chooses to promote one individual and refuses to bargain over the person who should be promoted, we will take the position that someone else is entitled to the additional pay. If your client terminates or disciplines someone without bargaining over the decision and the effects of that termination (or other discipline), we will take the position that your client should reinstate the person and/or owe back pay. Please do not discipline anyone for any reason without first offering the union an opportunity to bargain over the decision and the effects of any such discipline. If your client lays off any individuals, we will take the position that your client should have bargained over the decision as well as the effects and you will owe back pay over those layoffs. It should be apparent that the economic penalty for refusing to bargain with the Union forthwith may be severe.

Although we are reluctant to begin our relationship with these kinds of threats, it is sometimes necessary to make employers understand that there is a substantial economic penalty for delaying

December 24, 2011
Gregory Wolflick
Page 3

bargaining. We are hoping that your client will agree immediately to down and bargain with the chosen representative of the employees.

We, of course, demand that if there are any wage increases or benefit increases which would have normally occurred without the Union, those should be implemented in the normal course of business. We insist, however, being notified in advance of any such changes so that we can bargain over those changes. Included in the bargaining will most likely be a demand that the wage increases or other benefit changes be better than otherwise proposed. Nonetheless, Board law requires these changes be put into place and furthermore requires that you afford the Union a chance to bargain over those decisions as well as the effects of those decisions.

Please provide the following information for bargaining for the bargaining unit. The information is sought for the period April 1, 2010 unless otherwise indicated to the present:

1. A list of current employees including their names, dates of hire, rates of pay, job classification, last known address, phone number, date of completion of any probationary period, and employee identification number.
2. A copy of all current company personnel policies, practices or procedures.
3. A statement and description of all company personnel policies, practices or procedures other than those mentioned in Number 2 above.
4. A copy of all company fringe benefit plans including pension, profit sharing, severance, stock incentive, vacation, health and welfare, apprenticeship, training, legal services, child care or any other plans which relate to the employees.
5. Copies of all current job descriptions.
6. Copies of any company wage or salary plans.
7. Copies of all disciplinary notices, warnings or records of disciplinary personnel actions for the period April 1, 2010 to present.
8. A statement and description of all wage and salary plans which are not provided under number 6 above.

December 24, 2011
Gregory Wolflick
Page 4

9. A list of all employees who worked in the bargaining unit from April 1, 2010 to present who no longer work in the unit including their names, dates of hire, rates of pay, job classification, last known address, phone number, date of completion of any probationary period, and employee identification number and termination date and last date work.
10. A Copy of all customer complaints made about any employee in the unit and/or any work or jobs performed by any unit employee for the period April 1, 2010 to present. Please provide a copy of all reports and all records with respect to each such complaint including any company investigatory files, memo or documents referring to each complaint.
11. A copy of and personnel rules, practices which were in existence on April 16, 2010 and which have been changed or modified in any way since that date.
12. A list of all current routes serviced by each member of the unit.
13. All job requirements for unit employees including any goals or minimum standards.
14. Any manuals or documents describing the work to be performed including any documents describing the installation and repair work done by unit members or provide to them or made available to them.
15. Any documents showing the productivity of field technicians in the unit for the period April 1, 2010 to present.
16. All evaluations of unit employees for the period January 1, 2010 to present.
17. All employee consultation forms issued with respect to any employee in the unit for the period April 1, 2010 to present.
18. All manager notes for the period of April 1, 2010 to present showing or mentioning any discipline including but not limited to verbal warnings.
19. Please the union access to the company intranet to the same degree unit employees have such access so the Union can review what material is available to all employees.

Please consider this letter to be a continuing demand.

If DirectTV believes that there are any confidentiality concerns or other concerns over which it wishes to bargain about these information requests your client should make that demand now. If it fails to do so we will assert it has waived its right to do so.

Please provide dates when your client can bargaining immediately.

We expect at least 5 dates in January to commence bargaining.

December 24, 2011
Gregory Wolflick
Page 5

If DirectTV has not affirmatively agreed to bargain by December 28, we will assume the employer will continue in its violation of the National Labor Relations Act. We will file a charge on December 29.

The workers have waiting now 18 months and will wait no further.

Sincerely,

David A Rosenfeld

DAR/dr

124672/649653

EXHIBIT J

WOLFLICK & SIMPSON

ATTORNEYS AT LAW

TEL (818) 243-8300

130 NORTH BRAND BOULEVARD, SUITE 470
GLENDALE, CALIFORNIA 91203
Labor & Employment Law and Litigation

FACSIMILE (818) 243-0122

December 28, 2011

Via Electronic & U.S. MailDavid A. Rosenfeld, Esq.
WEINBER, ROGER & ROSENFELD
1001 Marina Village Parkway, Suite 200
Alameda, California 94501-1091**Re: DIRECTV Home Services
NLRB Case No.: 21-RC-21191**

Dear Mr. Rosenfeld:

We are in receipt of your letter dated December 24, 2011 demanding that our client, DIRECTV Home Services ("DTVHS") commence bargaining with IAM District Lodge 947 ("Local 947") in the unit at issue in NLRB Case No.: 21-RC-21191. Among other demands, you assert that DTVHS "may not make unilateral changes" with respect to such issues as promotions, hours of work, route changes, hiring, discipline, the method and manner by which work is performed and wages and benefits unless they would have "normally occurred," without bargaining with Local 947.

As you know, the NLRB issued a decision in this matter on December 22nd in which it rejected the findings of the Hearing Officer upholding the Employer's objection and recommending that the results of the April 16, 2010 election be set aside and that a new election be conducted. DTVHS believes the Board's decision is unsupported by substantial evidence and imposes and relies upon an incorrect legal standard for determining supervisory status. As a result, we are prepared to contend the NLRB improperly certified the results of the election. Given such, DTVHS declines to recognize Local 947 as the representative of the unit employees and declines to commence negotiations or to produce the information you requested regarding the unit employees.

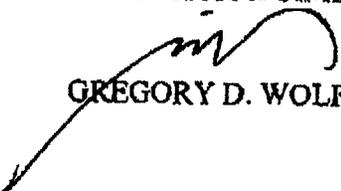
EXHIBIT B

David A. Rosenfeld, Esq.
Re: DIRECTV Home Services
December 28, 2011
Page 2

It is always been DTVHS' goal to allow the outcome of this matter to be determined by a lawfully conducted election. Unfortunately, the original election was tainted by the conduct of our former Field Supervisor, Nick Fernandez, and perhaps others working in concert with Local 947 to unlawfully coerce DTVHS's employees from exercising their free choice. Local 947 declined to resolve this matter last year by participating in a second election after the Hearing Officer upheld the Employer's objections. Perhaps because of the risk of a different outcome, Local 947 chose instead to appeal the Hearing Officer's ruling to the NLRB. This delayed the resolution of the case for over a year, so Local 947 shares in the undue delay of which you complain. Like Local 947, DTVHS will now exercise its lawful appeal rights by declining to recognize Local 947 in an effort to bring about review of what we believe is both a flawed and outcome determinative decision by the NLRB.

If you have any questions regarding this matter or wish to discuss the case further, I invite you to contact my office.

Very truly yours,
WOLFLICK & SIMPSON


GREGORY D. WOLFLICK

GDW:mk

EXHIBIT K

INTERNET
FORM NLRB-501
(2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

FORM EXEMPT UNDER 44 U.S.C. 3512

DO NOT WRITE IN THIS SPACE	
Case 21-CA-071591	Date Filed 12-28-11

INSTRUCTIONS:

File an original with NLRB Regional Director for the Region in which the alleged unfair labor practice occurred or is occurring

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT	
a. Name of Employer DIRECTV U.S. DIRECTV Holdings LLC	b. Tel. No. c. Cell No. f. Fax No. (310) 868-1694
d. Address (Street, city, state, and ZIP code) 19335 S Laurel Park Road Rancho Dominguez, CA 90220	e. Employer Representative Adrian Dimech
i. Type of Establishment (factory, mine, wholesaler, etc.) T.V. Programming	g. e-Mail h. Number of workers employed 200+
j. Identify principal product or service T.V. Programming	
k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) subsections) (5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.	
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices) Within the last six months the above named employer has refused to bargain in good faith with the Charging Party. The employer has furthermore refused to provide information to the Charging Party necessary and relevant to collective bargaining. Relief under Section 10(j) of the Act is requested.	
3. Full name of party filing charge (if labor organization, give full name, including local name and number) Machinists District Lodge 947	
4a. Address (Street and number, city, state, and ZIP code) 535 West Willow Street Long Beach, CA 90806-2830	4b. Tel. No. (562) 427-8900 4c. Cell No. 4d. Fax No. (562) 427-1122 4e. e-Mail
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) International Association of Machinists and Aerospace Workers, AFL-CIO	
6. DECLARATION	
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.	
By <u>David A. Rosenfeld</u> (signature of representative or person making charge)	David A. Rosenfeld (Print type name and title or office, if any)
Address: 1001 Marina Village Parkway, Suite 200, Alameda, CA 94501	
12/28/11 (date)	
Tel. No. (510) 337-1001 Office, if any, Cell No. Fax No. (510) 337-1023 e-Mail	

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for this information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes. 1/649880

EXHIBIT L

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIRECTV U.S. DIRECTV HOLDINGS LLC

Charged Party

and

**MACHINISTS DISTRICT LODGE 947,
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO**

Charging Party

Case 21-CA-071591

AFFIDAVIT OF SERVICE OF CHARGE AGAINST EMPLOYER

I, the undersigned employee of the National Labor Relations Board, state under oath that on December 29, 2011, I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

ADRIAN DIMECH, REPRESENTATIVE
DIRECTV U.S. DIRECTV HOLDINGS LLC
19335 S LAUREL PARK RD
RANCHO DOMINGUEZ, CA 90220-6036

December 29, 2011

Date

Neil A. Warheit, Designated Agent
of NLRB

Name

Neil A. Warheit

Signature

EXHIBIT M

WOLFLICK & SIMPSON

ATTORNEYS AT LAW

TELEPHONE (818) 243-8300

130 NORTH BRAND BOULEVARD, SUITE 410
GLENDALE, CALIFORNIA 91203
Labor & Employment Law and Litigation

FACSIMILE (818) 243-0122

January 6, 2012

VIA ELECTRONIC AND U.S. MAIL

Jean C. Libby
Board Attorney
National Labor Relations Board, Region 21
888 South Figueroa Street, Ninth Floor
Los Angeles, CA 90017-5449

**Re: DIRECTV U.S. DIRECTV Holdings LLC
NLRB Case No. 21-CA-071591**

Dear Ms. Libby:

This will respond to your letter of December 30, 2011, inviting our client, DIRECTV U.S. DIRECTV Holdings LLC ("DTVHS") to address the above referenced Charge filed by the International Association of Machinists and Aerospace Workers, Machinists District Lodge 947 ("Local 947").

I. Relevant Background Facts

On April 23, 2010 DTVHS filed objections to the results of the election in NLRB Case No. 21-RC-21191 which was held at the company's Rancho Dominguez facility. DTVHS's objections contend in part that the Respondent's Field Supervisors, who at all relevant times were supervisors for the purposes of Section 2(11) of the Act, unlawfully solicited employees to sign union authorization cards and invited employees to attend meetings at the union hall and used their authority as supervisors to influence employees to support the union rendering the results of the election objectionable under *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004).

On July 7, 2010, the Hearing Officer issued his report and recommendations in which he concluded that the Field Supervisors in question were supervisors for the purposes of 2(11) of the Act, that the Field Supervisors did engage in unlawful conduct by soliciting employees to sign union authorization cards, inviting them to attend union meetings and otherwise support the union and that such conduct, under *Harborside, supra*, constituted grounds to set the election aside.

On August 3, 2010, Local 947 filed Exceptions to the Hearing Officer's Report and Recommendations.

On December 23, 2011, the NLRB issued its decision in which it declined to adopt the Finding and Recommendations of the Hearing Officer and instead concluded that the Field Supervisors were not supervisors for the purposes of Section 2(11) of the Act and that therefore, their alleged misconduct was not unlawful under *Harborside* and ordered the results of the election certified.

II. The Recent Demand to Recognize and Bargain

On December 24, 2011, Local 947, through its counsel David Rosenfeld of Weinberg, Roger & Rosenfeld, demanded that DTVHS recognize the union as the representative of the unit employees in 21-RC-21191, demanded that the parties commence negotiations, that there be no change in the unit employee's terms or conditions of employment unless negotiated with the union and that DTVHS provide Local 947 with certain information with regards to the unit employees. A true and correct copy of Mr. Rosenfeld's letter is attached hereto as Exhibit "1".

On December 28, 2011, DTVHS responded to Local 947's demand for recognition by way of the letter prepared by our office directed to Mr. Rosenfeld and attached hereto as Exhibit "2".

As our letter to Mr. Rosenfeld makes clear, DTVHS believes that the NLRB's decision is unsupported by substantial evidence and imposes and relies upon an incorrect legal standard for determining supervisory status. As a result, DTVHS contends that the NLRB improperly certified the results of the election and thereby, DTVHS declined to recognize Local 947 as the representative of the unit employees, to commence negotiations, or produce the information requested.

DTVHS has, since July 7, 2010, agreed to participate in a new election for the unit employees, one which is not tainted by the unlawful conduct of Field Supervisors and which will permit the unit employees to exercise their choice free of unlawful coercion.

It is the intent of DTVHS to ultimately seek review of the NLRB's recent decision in 21-RC-21191 to the appropriate Court of Appeals. Of course, this will not occur until the Board has issued a final order with regards to the instant Charge.

III. Section 10(j) Relief is Not Appropriate in the Present Case

Your letter of December 30, 2011 asks DTVHS to specifically address whether injunctive relief under Section 10(j) of the Act would be appropriate in the current circumstances. It is difficult to address this inquiry as your letter fails to set forth the nature or extent of injunctive relief sought in the present case. However, as further discussed below, DTVHS firmly believes that such injunctive relief would be inappropriate under the current circumstances.

A. Standard for 10(j) Relief

The court, in determining if 10(j) relief is appropriate in a given circumstance, relies on traditional equitable principals. Accordingly, a party seeking an injunction pursuant to 10(j) must demonstrate:

1. That he or she is likely to succeed on the merits;
2. That irreparable harm is likely in the absence of preliminary relief;
3. That the balance of equities tips in favor of such relief; and
4. That an injunction is in the public interest. (*Winter v. Natural Res. Def. Counsel, Inc.*, 129 S.Ct. 365, 374 (2008); *American Trucking Association, Inc. v. City of Los Angeles*, 559 Fed.3d 1046, 1052 (9th Cir. 2009).

An injunction cannot issue merely because it is *possible* that there will be an irreparable injury to the plaintiff; rather, it must be likely that there will be injury. As the U.S. Supreme Court held in *Winter* "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. *Id.* at 375-376.

B. Section 10(j) Relief Would Not Be Appropriate in the Current Case

Applying the four factors identified above it is clear that injunctive relief would not be appropriate in the current case.

1. The Board Is Not Likely To Ultimately Succeed On The Merits

The current Charge is nothing more than a vehicle for Respondent to seek review of the Board's recent decision in 21-RC-21191. Of course, if the Court of Appeals reverses the recent decision of the NLRB, Respondent's conduct in the present case would be lawful and there would be no violation of the Act. Therefore, the question of ultimate success in the present case is based on whether the Court of Appeals will uphold the Boards recent holding in 21-RC-21191.

Judging the "likelihood of success" we note that the Board's recent decision in 21-RC-2119, is based in large part on a factual conclusions which differs significantly from those of the Hearing Officer regarding the supervisory status of the Field Supervisors in question. The unrefuted evidence before the Hearing Officer established that the Field Supervisors in fact regularly issued discipline and engaged in termination of unit employees as evidenced by their testimony, the testimony of the unit employees, and the numerous disciplinary notices submitted into evidence. Under similar facts, the Courts have long held that such individuals are supervisors for the purposes of the Act (See: *NLRB v Chicago Metallic* 794 F.2d 527 (9th Cir. 1986) Supervisory status found where the individual in question issued written reprimands signed by him as "supervisor"; *NLRB v Island Film Processing Co. Inc.*, 784 F.2d 1446 (9th Cir.

1986) head printers found to be supervisor because they issued reprimands to employees). Unless the Court of Appeals intends to reverse many decades of case law, we are confident that they will affirm that Field Supervisors are supervisors for the purposes of section 2(11) of the Act and that therefore, under *Harborside Healthcare, Inc. 343 NLRB 906 (2004)*, the Field Supervisors pro-union activities did in fact constitute objectionable conduct warranting a new election as the Hearing Officer recommended.

Furthermore, both Region 21 and Local 947 have recognized that the Respondent's Field Supervisors are in fact "supervisors" for the purposes of the Act. In 21-CA-39655 Local 947 accused DTVHS of violating the Act based on alleged threats and discrimination by a Field Supervisor, Alvaro Ramos, against a unit employee, Victor Toube. Certainly, if Ramos was not a 2(11) supervisor, his alleged threats and discrimination would not have been unlawful and could not, as a matter of law, served as a basis to support a Charge. Both the Region and Local 947 argued that Ramos, as a Field Supervisor, allegedly engaged in unlawful conduct based on his status as a 2(11) supervisor. It seems legally inconsistent that Local 947 would contend otherwise now. Based on the Region's earlier investigation of this Charge, we can only assume that it concurs with the conclusion of DTVHS that the Field Supervisors are indeed supervisors for the purposes of the Act and that DTVHS will indeed be successful in challenging the Board's recent decision. This alone should preclude the Region from seeking 10(j) relief in the present case.

2. There Is No Evidence Of Irreparable Harm In This Present Case

Again, the Regional Directory must establish that irreparable harm is likely, not just possible, in order to obtain a preliminary injunction (*Winter, supra, at 374*). There is no such evidence in the present case. To the contrary, because it is unlikely that the Board's recent decision will withstand scrutiny on review by the Court of Appeals, there actually will be no harm of any sort suffered by the unit employees. Certainly, there is no suggestion that DTVHS has been engaging in a reorganization or mass layoffs or reducing the pay of unit employees nor is there any evidence that DTVHS has been terminating alleged union supporters or engaging in any other kind of conduct that would typically constitute "irreparable harm" and justify the imposition of 10(j) relief.

3. The Balance of Equities Does Not Tip in Favor of Such Relief

The balance of the equities in the present case most certainly does not tip in favor of injunctive relief. To the contrary, a fair reading of the facts in this case shows that Local 947 unlawfully used Field Supervisor to coerce unit employees to sign union cards and attend union meetings in support of the petition. The Hearing Officer found that this conduct tainted the election and recommended that the results of such be set aside and that a new election be held. DTVHS has agreed to participate in a new election for over 18 months but Local 947 has declined. Granting an injunction in the present case would allow the union to benefit from its unlawful conduct and this certainly would not be "equitable" under the circumstances.

4. **The Injunction Is Not In The Public Interest**

In 10(j) cases, the “public interest” is to ensure that an unfair labor practice will not succeed because litigation of the underlying issue takes too long to adjudicate. *Frankl v. HTH Corporation*, 650 F.3d. 1334,1365 (9th Cir. 2011). Only where the District Director makes a showing of “likelihood of success” and “likelihood of irreparable harm” can there be a conclusion that a preliminary relief is “in the public interest”. *Frankl, supra, at 1365*. As discussed above, the Regional Director will not be able to establish either. Accordingly, the injunction in the current case will not be in the public interest and once again 10(j) relief would not be appropriate.

IV. **Request to Interview Witnesses**

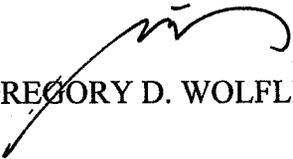
Finally we note that you have asked to speak with any Company official who participated in the decision to reject the Union’s demand for recognition. As you know, such decision is a legal one aimed at obtaining the Court of Appeals’ review of the Board’s recent decision in 21-RC-21191. Given that there appears to be no dispute that DTVHS has declined to recognize Local 947, there would be no reason to conduct such interviews and unnecessarily consume Board resources. Furthermore, as you would anticipate, the decision to refuse to recognize Local 947 was conducted in the presence of legal counsel, both internal and external, and all such communications would therefore be privileged.

V. **Conclusion**

For the reasons set herein above, Respondent firmly believes that 10(j) relief would be inappropriate in the present case and will be denied by the District Court.

I believe this responds to your request for information in the present case. If, you have further questions or wish to discuss the matter, I invite you to contact my office.

Very truly yours,
WOLFLICK & SIMPSON


GREGORY D. WOLFLICK

GDW:mk
Enclosures (Exhibit 1 and 2)

Exhibit “1”

STEWART WEINBERG
DAVID A. ROSENFELD
WILLIAM A. SOKOL
VINCENT A. HARRINGTON, JR.
BLYTHE MICKELSON
BARRY E. HINKLE
JAMES RUTKOWSKI
SANDRA RAE BENSON
CHRISTIAN L. RAISNER
JAMES J. WESSER
THEODORE FRANKLIN
ANTONIO RUIZ
MATTHEW J. GAUGER
ASHLEY K. IKEDA
LINDA BALDWIN JONES
PATRICIA A. DAVIS
ALAN G. CROWLEY
KRISTINA L. HILLMAN ***
EMILY P. RICH
BRUCE A. HARLAND
CONCEPCIÓN E. LOZANO-BATISTA
CAREN P. SENCER
ANNE I. YEN
KRISTINA M. ZINNEN
JANNAH V. MANANSALA
MANUEL A. BOIGUES ****

WEINBERG, ROGER & ROSENFELD

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LESLIE V. FREEMAN ****
EZEKIEL D. CORDER *****
YURI Y. GOTTESMAN
ADAM J. LUETTO
MONICA T. GUIZAR
SARAH R. WRIGHT-SCHREIBER
RUSSELL NAYMARK
SEAN D. GRAHAM

PATRICIA M. GATES, Of Counsel
ROBERTA D. PERKINS, Of Counsel
RICHARD T. DRURY, Of Counsel
NINA FENDEL, Of Counsel
ANA M. GALLEGOS, Of Counsel

• Also admitted in Arizona
** Admitted in Hawaii
*** Also admitted in Nevada
**** Also admitted in Illinois
***** Also admitted in Missouri
***** Also admitted in New York

December 24, 2011

EMAIL

Gregory D. Wolflick
Wolflick & Simpson
130 North Brand Blvd., Suite 410
Glendale, CA 91203

Re: Bargaining With Machinists District Lodge 947

Dear Mr. Wolflick:

This letter is written on behalf of District Lodge 947. The Union has now been certified by the NLRB as the representative of the employees in the unit in case 21-RC-21191.

We recognize that DirectTV may attempt to delay bargaining with the Union by refusing to bargain.

Under current Board law your client may not make unilateral changes after the date of the election conducted on April 16, 2010. Now that the certification has issued that obligation continues.

Any such unilateral changes would become unfair labor practices now that the Board has issued its certification. We intend to impose the greatest risk upon your client if it chooses that unreasonable course.

We are, therefore, putting you on notice. We insist that, henceforth, you make no unilateral changes with respect to the terms and conditions of employment of any employee in the bargaining unit without affording an opportunity to District Lodge 947 to bargain over the decision and effects of such change. The following is a list of those changes which we insist not be made without bargaining over the decision and the effects. The list is not inclusive but is simply illustrative of all those changes.

1. No promotional position should be filled without bargaining;
2. No employee should have his/her hours changed without bargaining;

LOS ANGELES OFFICE
3435 Wilshire Boulevard, Suite 620
Los Angeles, CA 90010-1907
TEL 213.380.2344 FAX 213.381.1088

SACRAMENTO OFFICE
428 J Street, Suite 520
Sacramento, CA 95814-2341
TEL 916.443.6600 FAX 916.442.0244

HONOLULU OFFICE
1099 Alakea Street, Suite 1602
Honolulu, HI 96813-4500
TEL 808.528.8880 FAX 808.528.8881

3. No employee should be warned, counseled, disciplined or terminated without bargaining;
4. No one should be hired without bargaining over the person who should fill the position;
5. No employee should be laid off without bargaining;
6. No health and welfare, pension or other fringe benefits should be denied without bargaining;
7. No positions outside the bargaining unit should be filled without bargaining over the question of transfer or promotion;
8. No work location, assignment, classification or any other aspect of employment should be changed without bargaining;
9. No discipline should be imposed without affording the employee the Weingarten rights which we hereby demand;
10. No changes in the method and manner by which work is being performed may be made without bargaining;
11. No introduction of any new work techniques without bargaining;
12. No subcontracting, closures, relocation or any changes in the workplace should be made without bargaining.
13. No jobs should be bid or commenced without bargaining.
14. No routes should be changed without bargaining.

In considering this list you should consider the risk which your client bears if it chooses to make those changes without bargaining. If positions open in this unit or some other unit and your client does not bargain over the filling of those positions, we will argue that someone is entitled to back pay and your client may end up paying back pay for a lengthy period of time. If your client chooses to promote one individual and refuses to bargain over the person who should be promoted, we will take the position that someone else is entitled to the additional pay. If your client terminates or disciplines someone without bargaining over the decision and the effects of that termination (or other discipline), we will take the position that your client should reinstate the person and/or owe back pay. Please do not discipline anyone for any reason without first offering the union an opportunity to bargain over the decision and the effects of any such discipline. If your client lays off any individuals, we will take the position that your client should have bargained over the decision as well as the effects and you will owe back pay over those layoffs. It should be apparent that the economic penalty for refusing to bargain with the Union forthwith may be severe.

Although we are reluctant to begin our relationship with these kinds of threats, it is sometimes necessary to make employers understand that there is a substantial economic penalty for delaying

bargaining. We are hoping that your client will agree immediately to down and bargain with the chosen representative of the employees.

We, of course, demand that if there are any wage increases or benefit increases which would have normally occurred without the Union, those should be implemented in the normal course of business. We insist, however, being notified in advance of any such changes so that we can bargain over those changes. Included in the bargaining will most likely be a demand that the wage increases or other benefit changes be better than otherwise proposed. Nonetheless, Board law requires these changes be put into place and furthermore requires that you afford the Union a chance to bargain over those decisions as well as the effects of those decisions.

Please provide the following information for bargaining for the bargaining unit. The information is sought for the period April 1, 2010 unless otherwise indicated to the present:

1. A list of current employees including their names, dates of hire, rates of pay, job classification, last known address, phone number, date of completion of any probationary period, and employee identification number.
2. A copy of all current company personnel policies, practices or procedures.
3. A statement and description of all company personnel policies, practices or procedures other than those mentioned in Number 2 above.
4. A copy of all company fringe benefit plans including pension, profit sharing, severance, stock incentive, vacation, health and welfare, apprenticeship, training, legal services, child care or any other plans which relate to the employees.
5. Copies of all current job descriptions.
6. Copies of any company wage or salary plans.
7. Copies of all disciplinary notices, warnings or records of disciplinary personnel actions for the period April 1, 2010 to present.
8. A statement and description of all wage and salary plans which are not provided under number 6 above.

9. A list of all employees who worked in the bargaining unit from April 1, 2010 to present who no longer work in the unit including their names, dates of hire, rates of pay, job classification, last known address, phone number, date of completion of any probationary period, and employee identification number and termination date and last date work.
10. A Copy of all customer complaints made about any employee in the unit and/or any work or jobs performed by any unit employee for the period April 1, 2010 to present. Please provide a copy of all reports and all records with respect to each such complaint including any company investigatory files, memo or documents referring to each complaint.
11. A copy of and personnel rules, practices which were in existence on April 16, 2010 and which have been changed or modified in any way since that date.
12. A list of all current routes serviced by each member of the unit.
13. All job requirements for unit employees including any goals or minimum standards.
14. Any manuals or documents describing the work to be performed including any documents describing the installation and repair work done by unit members or provide to them or made available to them.
15. Any documents showing the productivity of field technicians in the unit for the period April 1, 2010 to present.
16. All evaluations of unit employees for the period January 1, 2010 to present.
17. All employee consultation forms issued with respect to any employee in the unit for the period April 1, 2010 to present.
18. All manager notes for the period of April 1, 2010 to present showing or mentioning any discipline including but not limited to verbal warnings.
19. Please the union access to the company intranet to the same degree unit employees have such access so the Union can review what material is available to all employees.

Please consider this letter to be a continuing demand.

If DirectTV believes that there are any confidentiality concerns or other concerns over which it wishes to bargain about these information requests your client should make that demand now. If it fails to do so we will assert it has waived its right to do so.

Please provide dates when your client can bargaining immediately.

We expect at least 5 dates in January to commence bargaining.

December 24, 2011
Gregory Wolflick
Page 5

If DirectTV has not affirmatively agreed to bargain by December 28, we will assume the employer will continue in its violation of the National Labor Relations Act. We will file a charge on December 29.

The workers have waiting now 18 months and will wait no further.

Sincerely,

David A Rosenfeld

DAR/dr

124672/649653

Exhibit “2”

WOLFLICK & SIMPSON

ATTORNEYS AT LAW

TEL (818) 243-8300

130 NORTH BRAND BOULEVARD, SUITE 410
GLENDALE, CALIFORNIA 91203
Labor & Employment Law and Litigation

FACSIMILE (818) 243-0122

December 28, 2011

Via Electronic & U.S. Mail

David A. Rosenfeld, Esq.
WEINBER, ROGER & ROSENFELD
1001 Marina Village Parkway, Suite 200
Alameda, California 94501-1091

**Re: DIRECTV Home Services
NLRB Case No.: 21-RC-21191**

Dear Mr. Rosenfeld:

We are in receipt of your letter dated December 24, 2011 demanding that our client, DIRECTV Home Services ("DTVHS") commence bargaining with IAM District Lodge 947 ("Local 947") in the unit at issue in NLRB Case No.: 21-RC-21191. Among other demands, you assert that DTVHS "may not make unilateral changes" with respect to such issues as promotions, hours of work, route changes, hiring, discipline, the method and manner by which work is performed and wages and benefits unless they would have "normally occurred," without bargaining with Local 947.

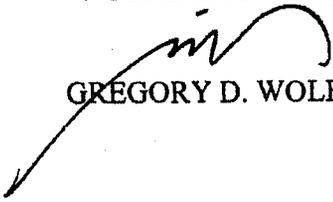
As you know, the NLRB issued a decision in this matter on December 22nd in which it rejected the findings of the Hearing Officer upholding the Employer's objection and recommending that the results of the April 16, 2010 election be set aside and that a new election be conducted. DTVHS believes the Board's decision is unsupported by substantial evidence and imposes and relies upon an incorrect legal standard for determining supervisory status. As a result, we are prepared to contend the NLRB improperly certified the results of the election. Given such, DTVHS declines to recognize Local 947 as the representative of the unit employees and declines to commence negotiations or to produce the information you requested regarding the unit employees.

David A. Rosenfeld, Esq.
Re: DIRECTV Home Services
December 28, 2011
Page 2

It is always been DTVHS' goal to allow the outcome of this matter to be determined by a lawfully conducted election. Unfortunately, the original election was tainted by the conduct of our former Field Supervisor, Nick Fernandez, and perhaps others working in concert with Local 947 to unlawfully coerce DTVHS's employees from exercising their free choice. Local 947 declined to resolve this matter last year by participating in a second election after the Hearing Officer upheld the Employer's objections. Perhaps because of the risk of a different outcome, Local 947 chose instead to appeal the Hearing Officer's ruling to the NLRB. This delayed the resolution of the case for over a year, so Local 947 shares in the undue delay of which you complain. Like Local 947, DTVHS will now exercise its lawful appeal rights by declining to recognize Local 947 in an effort to bring about review of what we believe is both a flawed and outcome determinative decision by the NLRB.

If you have any questions regarding this matter or wish to discuss the case further, I invite you to contact my office.

Very truly yours,
WOLFLICK & SIMPSON


GREGORY D. WOLFLICK

GDW:mk

EXHIBIT N

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21

DIRECTV U.S. DIRECTV HOLDINGS LLC

and

Case 21-CA-071591

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO, DISTRICT LODGE 947

COMPLAINT
AND
NOTICE OF HEARING

Machinists District Lodge 947, herein correctly designated as International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 947, and called the Union, has charged that DIRECTV U.S. DIRECTV Holdings LLC, herein called Respondent, has been engaging in unfair labor practices as set forth in the National Labor Relations Act, 29 U.S.C. Sec. 151, et seq., herein called the Act. Based thereon, the Acting General Counsel, by the undersigned, pursuant to Section 10(b) of the Act and Section 102.15 of the Rules and Regulations of the National Labor Relations Board, herein called the Board, issues this Complaint and Notice of Hearing and alleges as follows:

1. The charge in this proceeding was filed by the Union on December 28, 2011, and a copy was served on Respondent by regular mail on December 29, 2011.

2. (a) At all material times, Respondent, a California corporation, with an office and place of business located at 19335 South Laurel Park Road, Rancho Dominguez, California, herein called the facility, has been engaged in the business of providing digital television entertainment services to residential and commercial customers.

(b) During the 12-month period ending January 4, 2012, a representative period, Respondent, in conducting its business operations described above in paragraph 2(a), derived gross revenues in excess of \$100,000, and purchased and received at its Rancho Dominguez, California facility goods valued in excess of \$50,000 directly from points outside the State of California.

3. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

4. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

5. The following employees of Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

All full-time production installation technicians, field technicians, service technicians, piece work technicians, who service and install satellite dishes, warehouse employees, dispatchers, and quality control employees, employed by the Respondent at its facility located at 19335 South Laurel Park Road, Rancho Dominguez, CA; excluding all other employees, administrative clerical employees, confidential employees, managerial employees, guards and supervisors as defined in the Act.

6. (a) On December 22, 2011, the Union was certified as the exclusive collective-bargaining representative of the Unit.

(b) At all times since December 22, 2011, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

7. (a) On or about December 24, 2011, the Union, by letter, requested that Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit.

(b) On or about December 28, 2011, Respondent, by letter, rejected the Union's request to bargain collectively and since that date has failed and refused to bargain with the Union as the exclusive collective-bargaining representative of the Unit.

8. (a) On or about December 24, 2011, the Union, by letter, requested that Respondent furnish the Union with the information set forth in the letter attached hereto as Exhibit A.

(b) The information requested by the Union, as described above in paragraph 8(a), is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit.

(c) On or about December 28, 2011, Respondent, by letter, rejected the Union's request for information described in the letter attached hereto as Exhibit A, and since that date has failed and refused to furnish the Union with the information requested by it as described in said letter.

9. By the conduct described above in paragraphs 7(b) and 8(c), Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

10. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be received by this office on or before January 25, 2012, or postmarked on or before January 24, 2012.

Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

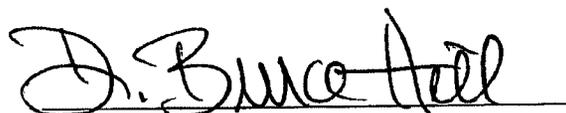
An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file

containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT if necessary, a hearing will be conducted at a time, date, and location to be determined later before an Administrative Law Judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

DATED at Los Angeles, California, this 11th day of January, 2012.



D. Bruce Hill
Acting Regional Director, Region 21
National Labor Relations Board
888 South Figueroa Street, Ninth Floor
Los Angeles, CA 90017-5449

Attachments

STEWART WEINBERG
 DAVID A. ROSENFIELD
 WILLIAM A. BORDI
 VINCENT A. HARRINGTON, JR.
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 RICHARD T. ORRERY, Of Counsel
 ANA FRENDEL, Of Counsel
 ANA M. RALLEBOS, Of Counsel

- Also admitted in Arizona
 - Admitted in Nevada
 - Also admitted in Nevada
 - Also admitted in Illinois
 - Also admitted in Missouri
 - Also admitted in New York

December 24, 2011

EMAIL

Gregory D. Wolflick
 Wolflick & Simpson
 130 North Brand Blvd., Suite 410
 Glendale, CA 91203

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December 24, 2011
Gregory Wolflick
Page 2

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December 24, 2011
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Page 3

bargaining. We are hoping that your client will agree immediately to down and bargain with the chosen representative of the employees.

We, of course, demand that if there are any wage increases or benefit increases which would have normally occurred without the Union, those should be implemented in the normal course of business. We insist, however, being notified in advance of any such changes so that we can bargain over those changes. Included in the bargaining will most likely be a demand that the wage increases or other benefit changes be better than otherwise proposed. Nonetheless, Board law requires these changes be put into place and furthermore requires that you afford the Union a chance to bargain over those decisions as well as the effects of those decisions.

Please provide the following information for bargaining for the bargaining unit. The information is sought for the period April 1, 2010 unless otherwise indicated to the present:

1. A list of current employees including their names, dates of hire, rates of pay, job classification, last known address, phone number, date of completion of any probationary period, and employee identification number.
2. A copy of all current company personnel policies, practices or procedures.
3. A statement and description of all company personnel policies, practices or procedures other than those mentioned in Number 2 above.
4. A copy of all company fringe benefit plans including pension, profit sharing, severance, stock incentive, vacation, health and welfare, apprenticeship, training, legal services, child care or any other plans which relate to the employees.
5. Copies of all current job descriptions.
6. Copies of any company wage or salary plans.
7. Copies of all disciplinary notices, warnings or records of disciplinary personnel actions for the period April 1, 2010 to present.
8. A statement and description of all wage and salary plans which are not provided under number 6 above.

December 24, 2011
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9. A list of all employees who worked in the bargaining unit from April 1, 2010 to present who no longer work in the unit including their names, dates of hire, rates of pay, job classification, last known address, phone number, date of completion of any probationary period, and employee identification number and termination date and last date work.
10. A Copy of all customer complaints made about any employee in the unit and/or any work or jobs performed by any unit employee for the period April 1, 2010 to present. Please provide a copy of all reports and all records with respect to each such complaint including any company investigatory files, memo or documents referring to each complaint.
11. A copy of and personnel rules, practices which were in existence on April 16, 2010 and which have been changed or modified in any way since that date.
12. A list of all current routes serviced by each member of the unit.
13. All job requirements for unit employees including any goals or minimum standards.
14. Any manuals or documents describing the work to be performed including any documents describing the installation and repair work done by unit members or provide to them or made available to them.
15. Any documents showing the productivity of field technicians in the unit for the period April 1, 2010 to present.
16. All evaluations of unit employees for the period January 1, 2010 to present.
17. All employee consultation forms issued with respect to any employee in the unit for the period April 1, 2010 to present.
18. All manager notes for the period of April 1, 2010 to present showing or mentioning any discipline including but not limited to verbal warnings.
19. Please the union access to the company intranet to the same degree unit employees have such access so the Union can review what material is available to all employees.

Please consider this letter to be a continuing demand.

If DirectTV believes that there are any confidentiality concerns or other concerns over which it wishes to bargain about these information requests your client should make that demand now. If it fails to do so we will assert it has waived its right to do so.

Please provide dates when your client can bargaining immediately.

We expect at least 5 dates in January to commence bargaining.

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Gregory Wolflick
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If DirectTV has not affirmatively agreed to bargain by December 28, we will assume the employer will continue in its violation of the National Labor Relations Act. We will file a charge on December 29.

The workers have waiting now 18 months and will wait no further.

Sincerely,

David A Rosenfeld

DAR/dr

124672/649653

**SUMMARY OF STANDARD PROCEDURES IN FORMAL HEARINGS HELD
BEFORE THE NATIONAL LABOR RELATIONS BOARD
IN UNFAIR LABOR PRACTICE PROCEEDINGS PURSUANT TO
SECTION 10 OF THE NATIONAL LABOR RELATIONS ACT**

The hearing will be conducted by an administrative law judge of the National Labor Relations Board who will preside at the hearing-as an independent, impartial finder of the facts and applicable law whose decision in due time will be served on the parties. The offices of the administrative law judges are located in Washington, DC; San Francisco, California; New York, N.Y.; and Atlanta, Georgia.

At the date, hour, and place for which the hearing is set, the administrative law judge, upon the joint request of the parties, will conduct a "prehearing" conference, prior to or shortly after the opening of the hearing, to ensure that the issues are sharp and clearcut; or the administrative law judge may independently conduct such a conference. The administrative law judge will preside at such conference, but may, if the occasion arises, permit the parties to engage in private discussions. The conference will not necessarily be recorded, but it may well be that the labors of the conference will be evinced in the ultimate record, for example, in the form of statements of position, stipulations, and concessions. Except under unusual circumstances, the administrative law judge conducting the prehearing conference will be the one who will conduct the hearing; and it is expected that the formal hearing will commence or be resumed immediately upon completion of the prehearing conference. No prejudice will result to any party unwilling to participate in or make stipulations or concessions during any prehearing conference.

(This is not to be construed as preventing the parties from meeting earlier for similar purposes. To the contrary, the parties are encouraged to meet prior to the time set for hearing in an effort to narrow the issues.)

Parties may be represented by an attorney or other representative and present evidence relevant to the issues. All parties appearing before this hearing who have or whose witnesses have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603, and who in order to participate in this hearing need appropriate auxiliary aids, as defined in 29 C.F.R. 100.603, should notify the Regional Director as soon as possible and request the necessary assistance.

An official reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the administrative law judge for approval.

All matter that is spoken in the hearing room while the hearing is in session will be recorded by the official reporter unless the administrative law judge specifically directs off-the-record discussion. In the event that any party wishes to make off-the-record statements, a request to go off the record should be directed to the administrative law judge and not to the official reporter.

Statements of reasons in support of motions and objections should be specific and concise. The administrative law judge will allow an automatic exception to all adverse rulings and, upon appropriate order, an objection and exception will be permitted to stand to an entire line of questioning.

All exhibits offered in evidence shall be in duplicate. Copies of exhibits should be supplied to the administrative law judge and other parties at the time the exhibits are offered in evidence. If a copy of any exhibit is not available at the time the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the administrative law judge before the close of hearing. In the event such copy is not submitted, and the filing has not been waived by the administrative law judge, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

Any party shall be entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. In the absence of a request, the administrative law judge may ask for oral argument if, at the close of the hearing, it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.

(OVER)

In the discretion of the administrative law judge, any party may, on request made before the close of the hearing, file a brief or proposed findings and conclusions, or both, with the administrative law judge who will fix the time for such filing. Any such filing submitted shall be double-spaced on 8½ by 11 inch paper.

Attention of the parties is called to the following requirements laid down in Section 102.42 of the Board's Rules and Regulations, with respect to the procedure to be followed before the proceeding is transferred to the Board:

No request for an extension of time within which to submit briefs or proposed findings to the administrative law judge will be considered unless received by the Chief Administrative Law Judge in Washington, DC (or, in cases under the branch offices in San Francisco, California; New York, New York; and Atlanta, Georgia, the Associate Chief Administrative Law Judge) at least 3 days prior to the expiration of time fixed for the submission of such documents. Notice of request for such extension of time must be served simultaneously on all other parties, and proof of such service furnished to the Chief Administrative Law Judge or the Associate Chief Administrative Law Judge, as the case may be. A quicker response is assured if the moving party secures the positions of the other parties and includes such in the request. All briefs or proposed findings filed with the administrative law judge must be submitted in triplicate, and may be printed or otherwise legibly duplicated with service on the other parties.

In due course the administrative law judge will prepare and file with the Board a decision in this proceeding, and will cause a copy thereof to be served on each of the parties. Upon filing of this decision, the Board will enter an order transferring this case to itself, and will serve copies of that order, setting forth the date of such transfer, on all parties. At that point, the administrative law judge's official connection with the case will cease.

The procedure to be followed before the Board from that point forward, with respect to the filing of exceptions to the administrative law judge's decision, the submission of supporting briefs, requests for oral argument before the Board, and related matters, is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be served on the parties together with the order transferring the case to the Board.

Adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations. If adjustment appears possible, the administrative law judge may suggest discussions between the parties or, on request, will afford reasonable opportunity during the hearing for such discussions.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21**

DIRECTV U.S. DIRECTV HOLDING LLC

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO, DISTRICT LODGE 947

Case 21-CA-071591

DATE OF MAILING January 11, 2012

AFFIDAVIT OF SERVICE OF Complaint and Notice of Hearing with Form NLRB-4668 Attached

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by postpaid regular mail and or certified mail upon the following persons, addressed to them at the following addresses:

DirecTV U.S. DirecTV Holding LLC
19335 Laurel Park Road
Rancho Dominguez, CA 90220-6036
(7003 3110 0004 5471 6697)

International Association of Machinists and
Aerospace Workers, AFL-CIO, District
Lodge 947
535 West Willow Street
Long Beach, CA 90806-2830

Gregory D. Wolflick, Attorney at Law
Wolflick & Simpson
130 North Brand Boulevard, Suite 410
Glendale, CA 91203

David A. Rosenfeld, Attorney at Law
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501

/s/Mildred Washington

/s/Delia Acaylar

**Subscribed and sworn to before me this 11th
day of January, 2012.**

DESIGNATED AGENT

NATIONAL LABOR RELATIONS BOARD

EXHIBIT O

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21**

**DIRECTV U.S. DIRECTV
HOLDINGS LLC**

and

Case 21-CA-071591

**INTERNATIONAL ASSOCIATION
OF MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO, DISTRICT
LODGE 947**

RESPONDENT'S ANSWER

RESPONDENT, DIRECTV U.S. DIRECTV HOLDINGS LLC, within the time set forth by the Board's Rules and Regulations, hereby answers the Complaint filed by the Regional Director in the above-referenced matter as follows:

Answering the introductory paragraph preceding paragraph 1 of the Complaint, Respondent is without sufficient information or knowledge to form a belief with regards to the allegation of such and on that basis denies each and every allegation contained therein.

1. Respondent admits the allegations of paragraph 1 of the Complaint.
- 2(a). Respondent admits the allegations of paragraph 2(a) of the Complaint.
- 2(b). Respondent admits the allegations of paragraph 2(b) of the Complaint.
3. Respondent admits the allegations of paragraph 3 of the Complaint.
4. Respondent is without sufficient information or knowledge to form a belief with

regards to the allegation of paragraph 4 of the Complaint and on that basis denies each and every allegation contained therein.

5. Respondent is without sufficient information or knowledge to form a belief with regards to the allegations of paragraph 5 of the Complaint and on that basis denies each and every allegation contained therein.

6(a). In answering paragraph 6(a) of the Complaint, Respondent admits that on or about December 22, 2011 the NLRB issued a decision rejecting the recommendations of the Hearing Officer who had concluded that the Field Supervisors in question were in fact supervisors for the purposes of Section 2(11) of the Act and that such Field Supervisors had acted unlawfully by soliciting Union authorization cards from employees, inviting employees to union meetings, and attending union meetings with employees all of which constituted objectionable conduct warranting a new election in violation of *Harbor Side Health Care, Inc.* 343 NLRB 906 (2004). Respondent further avers that the NLRB's decision is unsupported by substantial evidence, imposes and relies upon an incorrect legal standard for determining supervisory status, and is both legally and factually inconsistent with the Board's previous treatment of Respondent's Field Supervisors in other NLRB proceedings. As a result, DTVHS contends that the NLRB improperly certified the results of the election and thereby, DTVHS has declined to recognize Local 947 as the representative of the unit employees. Except as expressly admitted or asserted herein, Respondent denies each and every allegation of paragraph 6(a) of the Complaint.

6(b). In answering paragraph 6(b) of the Complaint, Respondent admits that on or about December 22, 2011 the NLRB issued a decision rejecting the recommendations of the Hearing Officer who had concluded that the Field Supervisors in question were in fact supervisors for the purposes of Section 2(11) of the Act and that such Field Supervisors had

acted unlawfully by soliciting Union authorization cards from employees, inviting employees to union meetings, and attending union meetings with employees all of which constituted objectionable conduct warranting a new election in violation of *Harbor Side Health Care, Inc.* 343 NLRB 906 (2004). Respondent further avers that the NLRB's decision is unsupported by substantial evidence, imposes and relies upon an incorrect legal standard for determining supervisory status, and is both legally and factually inconsistent with the Board's previous treatment of Respondent's Field Supervisors in other NLRB proceedings. As a result, DTVHS contends that the NLRB improperly certified the results of the election and thereby, DTVHS has declined to recognize Local 947 as the representative of the unit employees. Except as expressly admitted or asserted herein, Respondent denies each and every allegation of paragraph 6(b) of the Complaint.

7(a). Respondent admits the allegations of paragraph 7(a) of the Complaint.

7(b). In answering paragraph 7(b) of the Complaint, Respondent admits that on or about December 28, 2011, Respondent, by letter, rejected the Union's request to bargain collectively and has refused to bargain with the Union collectively because, the Respondent believes that the NLRB's decision certifying the Union as the representative of the employees is unsupported by substantial evidence, imposes and relies upon an incorrect legal standard for determining supervisory status, and is both legally and factually inconsistent with the Board's previous treatment of Respondent's Field Supervisors in other NLRB proceedings. On that basis, Respondent denies each and every allegation of paragraph 7 (b) of the Complaint.

8(a). Respondent admits the allegations of paragraph 8(a) of the Complaint.

8(b). Respondent denies each and every allegation in paragraph 8(b) of the Complaint.

8(c). In answering paragraph 8(c) of the Complaint, Respondent admits that on or about December 28, 2011, Respondent, by letter, rejected the Union's request to bargain

collectively and has refused to bargain with the Union collectively because, Respondent believes that the NLRB's decision certifying the Union as the representative of the employees is unsupported by substantial evidence, imposes and relies upon an incorrect legal standard for determining supervisory status, and is both legally and factually inconsistent with the Board's previous treatment of Respondent's Field Supervisors in other NLRB proceedings. On that basis, respondent denies each and every allegation of paragraph 8 (c) of the Complaint.

9. Respondent denies each and every allegation in paragraph 9 of the Complaint and further avers that the NLRB and its decision certifying the Union as the representative of the employees is unsupported by substantial evidence and imposes and relies upon an incorrect legal standard for determining supervisory status.

10. Respondent denies each and every allegation in paragraph 10 of the Complaint.

FIRST AFFIRMATIVE DEFENSE

11. The decision of the NLRB certifying the Union as the representative of the employees in question is unsupported by substantial evidence and imposes and relies upon an incorrect legal standard for determining supervisory status. As such, Respondent intends to appeal the Final Order of the Board to the appropriate Court of Appeals challenging the recent decision of the NLRB.

SECOND AFFIRMATIVE DEFENSE

12. The conduct of Respondent in refusing to recognize the Union and to commence negotiations is protected because the NLRB improperly certified the results of the election.

THIRD AFFIRMATIVE DEFENSE

13. The conduct of Respondent in refusing to provide information requested by the Union is protected because the decision of the NLRB certifying the Union as the representative of the employees in question is unsupported by substantial evidence and imposes and relies upon an incorrect legal standard for determining supervisory status.

FOURTH AFFIRMATIVE DEFENSE

14. The conduct of Respondent in refusing to recognize the Union as the representative of the employees is protected because the original election conducted in this matter was tainted by the misconduct of Field Supervisors under *Harbor Side Health Care, Inc.*, 343 NLRB 906 (2004).

FIFTH AFFIRMATIVE DEFENSE

15. The Field Supervisors at issue in 21-RC-21191 are in fact supervisors for the purposes of Section 2(11) of the Act and their conduct in soliciting Union Authorization Card from employees, inviting employees to Union meetings and attending Union meetings on behalf of employees was unlawful and tainted the results of the election pursuant to *Harbor Side Health Care, Inc.*, 343 NLRB 906 (2004).

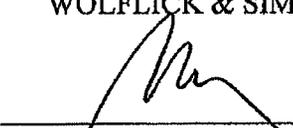
SIXTH AFFIRMATIVE DEFENSE

16. The NLRB should be legally, factually and administratively estopped from finding that Respondent's Field Supervisors are not supervisors pursuant to section 2(11) of the Act because such a conclusion is inconsistent with the Board's previous treatment of Respondent's Field Supervisors in other NLRB proceedings.

Respondent, having fully answered all accounts and allegations in the Complaint, respectfully moves that the Complaint be dismissed on all counts.

DATED at Glendale, California this 24 day of January, 2012.

WOLFLICK & SIMPSON

By: 

Gregory D. Wolflick, Esq.
Counsel for
RESPONDENT, DIRECTV U.S.
DIRECTV HOLDINGS LLC

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 130 N. Brand Boulevard, Suite 410, Glendale, California 91203.

On January 24, 2012, I served the foregoing document(s) described as:
RESPONDENT'S ANSWER on the interested parties in this action by placing a true copy thereon enclosed in sealed envelope(s) addressed as follows:

**D. Bruce Hill, Acting Regional Director
National Labor Relations Board, Region 21
888 South Figueroa Street, Ninth Floor
Los Angeles, California 90017-5449**

**International Union of Machinists and
Aerospace Workers, District Lodge 947,
AFL-CIO
535 West Willow Street
Long Beach, California 90806**

**David A. Rosenfeld, Esq.
WEINBER, ROGER & ROSENFELD
1001 Marina Village Parkway, Suite
200Alameda, California 94501-1091**

XXX (BY U.S. MAIL) as follows: I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Glendale, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit of mailing in affidavit.

XXX (BY STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 24, 2012, at Glendale, California

MARGO KAZARYAN

