**Sanitation Salvage Corp. *and* Local 108, Waste Material, Recycling and General Industrial Laborers and Local 124, Recycling, Airport, and Industrial Service Employees Union.** Case 02–RC–070804

June 5, 2013

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

The National Labor Relations Board has considered objections to an election held August 16, 2012, and the attached hearing officer's report recommending disposition of them. The election was conducted pursuant to a Notice of Second Election.[1] The tally of ballots shows 10 votes for the Petitioner, 32 for the Intervenor, 2 against the participating labor organizations, and 5 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs and has adopted the hearing officer's findings[2] and recommendations only to the extent consistent with this Decision and Certification of Representative. Specifically, we adopt the hearing officer's findings that Charles Mahr is an agent of the Employer and that his statements to employee Hiram Arocho that the Employer would reduce employees' overtime if the Petitioner won the election constitute objectionable conduct. In addition, we adopt the hearing officer's findings that admitted Supervisor Danny Lally engaged in objectionable conduct by making statements to Arocho and employee Tarrell Sumlin that threatened employees with discharge in retaliation for support of the Petitioner, created the impression that employees' union activities were under surveillance, and conveyed the impression that voting for the Petitioner would be futile.

Contrary to the hearing officer, however, we find that the objectionable conduct reached too few employees to have affected the outcome of the election. Accordingly, we find that a certification of representative should be issued to the Intervenor, the incumbent representative and the winner of the election.

Discussion

The Board will set aside an election when "the objectionable conduct so interfered with the necessary 'laboratory conditions' as to prevent the employees' expression of a free choice in the election." *Dairyland USA Corp.*, 347 NLRB 310, 313 (2006), enfd. sub nom. *NLRB v. Food & Commercial Workers Local 348-S*, 273 Fed. Appx. 40 (2d Cir. 2008). The Board overturns election results if the objectionable conduct, taken as a whole, had "the tendency to interfere with the employees' freedom of choice" and "could well have affected the outcome of the election." *NYES Corp.*, 343 NLRB 791, 791 fn. 2 (2004) (citing *Cambridge Tool & Mfg. Co.*, 316 NLRB 716, 716 (1995)).

The evidence in this case shows that the Employer made several threats to two employees. There is no evidence in the record, however, that the objectionable conduct in this case was disseminated beyond the two employees directly affected by it. When evaluating the extent to which objectionable threats are disseminated, the Board places the burden of proof on the objecting party, and thus does not presume dissemination. *Dairyland USA Corp.*, above at 313 (citing *Crown Bolt, Inc.*, 343 NLRB 776, 777 (2004)). The Petitioner lost the election by 22 votes out of 49 votes cast.

The Board has declined to set aside election results in cases in which the disparity between the vote margin and the number of employees affected by the objectionable conduct was similar to the disparity in this case. For example, in *Werthan Packaging*, 345 NLRB 343 (2005), the Board found that a supervisor interrogated three employees, threatened a fourth employee, and arguably interrogated a fifth employee. Id. at 344. Noting that the union lost the election by 21 votes while the objectionable conduct affected at most five employees, the Board found that a new election was not warranted. Id. at 343. The Petitioner here lost the election by a similarly wide margin, and the Employer's misconduct affected only two employees, even fewer than the number affected in *Werthan Packaging*. See also *M.B. Consultants, Ltd.*, 328 NLRB 1089, 1089 (1999) (finding record insufficient to establish that objectionable statement made to two employees affected outcome of election with six-

[1] An initial election was held on January 25, 2012, pursuant to a Stipulated Election Agreement. After the Petitioner filed objections, the parties agreed to set aside the results of the first election, and the Regional Director issued a Notice of Second Election.

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

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

vote margin).[3] We conclude that the Respondent's objectionable statements, heard by only two employees and not further disseminated, were insufficient to affect the outcome of the election. Accordingly, we shall certify the Intervenor as the collective-bargaining representative.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Local 124, Recycling, Airport, and Industrial Service Employees Union, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time CDL drivers, non-CDL drivers, helpers, mechanics, welders, and laborers employed by the Employer at and out of its facility located at 421 Manida Street, Bronx, NY, but excluding all other employees, including office clerical employees, and guards, professional employees, and supervisors as defined in the Act.

Dated, Washington, D.C. June 5, 2013

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

HEARING OFFICER'S REPORT ON OBJECTIONS

Pursuant to a Notice of Second Election,[1] issued on June 22, 2012,[2] an election by secret ballot was conducted on August 16, in the following unit of employees:

> Included: all full-time and regular part-time CDL drivers, non-CDL drivers, helpers, mechanics, welders, and laborers employed by the Employer at and out of its facility located at 421 Manida Street, Bronx, NY
>
> Excluded: all other employees, including office clerical employees, and guards, professional employees, and supervisors as defined in the Act.

Tl:te tally of ballots showed the following results:

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|---|---|
| Approximate number of eligible voters | 59 |
| Number of Void ballots | 0 |
| Number of Votes cast for LOCAL 108, WASTE MATERIAL, RECYCLYNG, AND GENERAL INDUSTRIAL LABORERS | 10 |
| Number of Votes cast for LOCAL 124, RECYCLYNG, AIRPORT, INDUSTRIAL & SERVICE EMPLOYEES UNION | 32 |
| Number of Votes cast against participating labor organization(s) | 2 |
| Number of Valid votes counted | 44 |
| Number of Challenged ballots | 5 |
| Number of Valid votes counted plus challenged ballots | 49 |

Challenges are (not) sufficient In number to affect the results of the election.

A majority of the valid votes counted plus challenged ballots (item 9) has been for LOCAL 124, RECYCLYNG, AIRPORT, INDUSTRIAL & SERVICE EMPLOYEES UNION

On April 4, the Petitioner filed timely objections to the election.[3] The objections, verbatim, are as follows:

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|---|---|
| Objection No. 1: | The Employer through its supervisors and/or agents, including but not limited to Danny Lally, selectively escorted employees to the polls to promote *I* ensure the participation of people it believed would vote in favor of Local 124 representation. |
| Objection No. 2: | The Employer through its supervisor and/or agents, including but not limited to Danny Lally, Chris Mahr, Ethan Perez, and Chris McGraff,[4] campaigned on behalf of Local 124, including but not limited to, by wearing Local 124 tee shirts and actively lobbying employees to vote for Local 124 representation and/oragainst Local 108. |
| Objection No. 3: | The Employer preferentially permitted Local 124 campaigning on its property and provided resources to promote Local 124, including but not |

[3] *Newburg Eggs, Inc.*, 357 NLRB No. 171 (2011), and *Reliant Energy*, 357 NLRB No. 172 (2011), cited by the hearing officer, are distinguishable from this case on their facts. In both cases, the number of employees affected by the objectionable conduct was substantially larger than the election margin, as all or almost all of the employees in the unit were subjected to at least some of the misconduct. *Newburg Eggs*, above, slip op. at 2; *Reliant Energy*, above, slip op. at 16.

[1] The first election, by stipulated election agreement, was held at the Employer's facility on January 25, 2012.

[2] All dates hereafter are in 2012, unless otherwise specified.

[3] Petitioner's request to withdraw Objections 5 and 6 was approved by the Regional Director, Region 2 on October 5.

[4] Chris Markgraf was incorrectly named as "McGraff" in Objection 2.

limited to, by permitting the posting of Local 124 bumper stickers and signs on its vehicles and property and hosting and making a company grill available for a Local 124 barbecue; while, in contrast, discouraging and/or prohibiting employees from communicating with Local 108 representatives, such as Kajeem Hill.

Objection No. 4: The Employer unlawfully threatened and coerced employees to vote against Local 108 representation, including but not limited to, by threatening that the Employer would respond to Local 108 representation by diminishing employees' terms and conditions of employment and refusing to sign a contract with Local 108; the Employer similarly threateningly identified employees it understood to be Local 108 supporters, such as by referring to them as "Mr. Local108".

In accordance with the notice of hearing on objections issued by the Regional Director on October 5, a hearing concerning the Petitioner's objections was held on October 18. At the hearing the parties were afforded a full a complete opportunity to be heard, to examine and cross-examine witnesses, and to present evidence pertinent to the issues.[5] Upon the entire record of the case,[6] including my observation of the witnesses,[7] I issue the following report:

## Background[8]

The Employer is engaged in the business of waste disposal. Steve Squitteri is the owner and president of the Employer. The parties stipulated that Danny Lally is a supervisor of the Employer within the meaning of Section 2(11) of the Act.

The Employer's facility, the sole facility involved here, is located at 421 Manida Street, Bronx, New York. Among other things, the facility contains a yard where garbage trucks are parked, a garage, and several interior offices. Drivers and helpers report to the facility at 5 p.m., receive their assignments, engage in pretrip inspections, and then depart in their respective garbage trucks. The door _leading to the offices and the basement is kept locked. Employees do not have keys to this door and gain entrance by being "buzzed in" or by having someone open the door from the inside or by key from the outside. Employees returning from their routes to the facility at night have keys to open the gate to the yard in order to park their trucks.

The election on August 16 was held from 12:30 p.m. to 3:30 p.m. and 5:30 p.m. to 8 p.m. The polling site was located in the reception area in the basement of the Employer's facility.

In support of its objections, the Petitioner presented the testimony of four witnesses: Frederick Schneider, vice president of Local 108; Kajeem (Q) Hill, a former helper who was briefly hired by the Petitioner to organize employees prior to the election in August; Tarrell Sumlin, a helper who was terminated after the August election; and Hiram Arocho, a driver.

Supervisor Danny Lally testified for the Employer. The Employer also adduced testimony by Charles (Chucky) Mahr, a driver alleged by the Petitioner to be a supervisor and/or agent of the Employer.

### Objection 1

This objection alleges, in substance, that Supervisor Danny Lally selectively escorted employees to the polls whom he believed would vote in favor of the incumbent union, the Intervenor Local 124.

Danny Lally works Monday through Friday from 9 a.m. to 5 p.m. or until all the drivers and helpers report to work. Lally stated that he was "on call" other days. Lally has a key to the office. He stated that part of his duties consists of letting the employees into the office to get their "clipboards," which sets forth their routes, and contains keys as well as a pretrip inspection book. At that time, Lally discusses any issues pertaining to their routes.

On the day of the election, Lally testified that he went "out of his way" to make sure the employees could vote by letting them into the facility before he left work. Lally stated that he told the employees to make sure they went downstairs to vote and then to go upstairs to pick up their paperwork whereupon he would let them out. Lally explained that he did not want to be accused of preventing employees from voting and that he needed to tell them to pick up their work upstairs since the election was being held in or near his office downstairs, which was unavailable. Lally denied going into the yard to find employees to vote.

On the day of the election, Kajeem Hill testified that he stood on the corner of Eastbay and Manida Street during the evening poll and saw Lally repeatedly go into the yard and return to the office with employees. Hill stated that Lally placed his hand on the backs of the employees and whispered to them. Hill admitted that he could not hear what was said. Hill further stated that Lally escorted all the employees in the yard that day to the office in the same manner. When asked what was different about Lally's behavior on the day of the election, Hill stated that Lally usually walked ahead of employees and would not place his hands on their backs.

Hiram Arocho testified that Danny Lally told him to "do the right thing" prior to election and on the day of the election. On previous occasions preceding the election, Arocho stated

[5] Although the Intervenor was served with a notice of the hearing, the Intervenor did not appear at the hearing.

[6] Briefs were filed by the Petitioner and the Employer, and have been duly considered.

[7] On the Petitioner's motion, a sequestration order was in effect throughout the hearing.

[8] I find that all of the events described here clearly took place after the Notice of Second Election issued on June 12, though I note that the critical period stems from the date of the first election, January 25. Star *Kist Caribe,* 325 NLRB 304 (1998).

that after Lally saw him talking to Kajeem Hill near the facility, Lally would make comments like "there goes 108 over there with Q . . . there goes Hiram talking to 108, or there goes the president talking to the vice president." Lally denied making these remarks.

Tarrell Sumlin testified that he did not have any conversations with management on the day of the election.

Based on the evidence discussed above, I find that the Petitioner has failed to show that the Employer attempted to affect the outcome of the election by selectively escorting employees to the Employer's facility. Indeed, the testimony·of Kajeem Hill shows that Lally did not differentiate between employees who may have congregated in the yard waiting to go into the facility and there is no evidence in the record to show these employees were inclined to vote in any particular manner. In that regard, the record fails to show that Lally treated Tarrell Sumlin or Hiram Arocho, who purportedly were known by him to be supporters of Local 108, any different from other employees in terms of allowing them access to the facility during the election.[9] Accordingly, I recommend that Objection 1 be overruled.

Objection 2

This objection alleges that the Employer, by Danny Lally and Chris Mahr,[10] campaigned on behalf of Local 124 by wearing Local 124 tee shirts and by lobbying employees to vote for Local 124 and/or against Local 108.[11]

Days before the election, Arocho testified that he had several conversations with Mahr concerning the upcoming election. Mahr urged Arocho to "do the right thing" or they would lose their overtime. More specifically, Arocho testified that Mahr told Arocho that he supported Local 124 and that if Local 108 won the election, the Employer would take away their overtime by putting two more garbage trucks on the routes.[12]

On August 14, 2 days before the election, Kajeem Hill photographed Charles Mahr wearing a Local 124 tee shirt outside the Employer's premises. (Petitioner Exh. 4.) Standing next to Mahr in the picture was a driver identified by Hill as "John."[13]

The Employer did not question Mahr about his alleged statements to Arocho and therefore Arocho's testimony in that regard is unrefuted. The Employer contends, however, that Mahr is not a supervisor, or presumably an agent, of the Employer.

Mahr, a former shop steward for Local 124, testified that he is a "senior" truckdriver. Mahr works Sunday through Thursday from midnight to 10 a.m.[14] and drives a truck each night. The Employer's facility is closed after midnight and he is the only one with a key to the facility and the garage. Employees are instructed to call Lally before midnight and Mahr on his cell phone after midnight if they encounter problems completing their routes, such as flat tires, brake problems, accidents, police incidents or anything that would cause a truck to break down. Mahr denied he had the power to hire, fire, or discipline employees. Mahr stated that he instructed employees seeking leave to call Danny Lally and that Lally was responsible for finding relief employees.[15] Mahr testified that he reported to Lally and that Lally prepared the route assignments. Mahr stated he would open the garage to change tires if there were spares available. If a problem involved a possible expenditure of money, such as for towing or tire services, Mahr testified that he called the owner, John Squitteri, for approval. Mahr stated that he conducted road tests of applicants and that he made recommendations directly to the owners of the company regarding their fitness to drive. Mahr stated that sometimes his recommendations were rejected.

Mahr stated that he notified Kajeem Hill that he had been fired. Mahr stated that Dave Bryant instructed him to inform Hill that he had been fired for driving a truck without a COL license "because it was Sunday and I was the only one there."

Tarrell Sumlin and Hiram Arocho identified Mahr as a night supervisor and the supervisor on Sundays. Indeed, Arocho stated that Mahr told Arocho that he was a supervisor and that Arocho was to report to him. On one occasion, Arocho testified that Mahr said that he had hired someone. Arocho stated he witnessed Mahr write up and fire employees. Arocho said that Mahr bragged that he had fired Jose (Lulu) Bonilla "on the spot" after an accident near the garage and that Mahr called "the company" afterwards. Mahr, for his part, denied informing Bonilla that he had been fired and claimed that he did not know who made the decision to fire Bonilla.

Citing *Mid-South Drywall,* 339 NLRB 480 (2003), the Petitioner contends that Mahr is an agent of the Employer because Mahr performed essentially the same duties as Lally after midnight and on Sundays. Thus, the Employer deliberately invested Maher with apparent authority in the same manner as the lead man in *Mid-South Drywall.* The Petitioner further argues that the evidence shows that the Employer conferred actual authority upon Mahr to speak on its behalf by designating him to inform Kajeem Hill that he had been fired, adding that the record clearly shows the employees believed Mahr to be a supervisor.

[9] The testimony of Arocho as to the remarks allegedly made to him by Lally during their walk to the facility that day will be discussed infra with respect to Objection 4.

[10] At the hearing, counsel for the Petitioner indicated that the alleged objectionable conduct set forth in the objections were limited to the actions of Lally and Mahr.

[11] For the purposes of clarity, the evidence purporting to show the Employer campaigned on behalf of Local 124 is discussed primarily with respect to Objection 2 while the Petitioner's related allegations that the Employer actively discouraged employees from voting for Local 108 is discussed in detail infra with regard to Objection 4.

[12] On cross-examination, Arocho admitted that he and Mahr had a physical altercation at some point, adding, "Nobody gets along with Chucky."

[13] Sumlin testified that he did not speak to Mahr about the election.

[14] The uncontroverted testimony of Hiram Arocho further establishes that Mahr works "as a supervisor" at the facility on Sunday at 5 p.m. when Arocho reports to work. Indeed, Mahr admitted that he took over for Lally on Sundays.

[15] Lally did not testify in detail about his job duties.

The Employer asserts that the record is devoid of any evidence that Mahr had the authority to hire, fire, discipline, promote, or reward employees or that he could approve leave requests or even order supplies. Therefore, the Employer argues that Mahr is not a supervisor and his remarks cannot be attributed to the Employer.

In *Mid-South Drywall* Co., the Board declared:

> It is well established that where an employer places a rank-and-file employee in a position in which employees would reasonably believe that the employee speaks on behalf of management, the Respondent has vested that employee with apparent authority to act as the Respondent's agent, and the employee's actions ar. attributable to the employer. See *Panaston* Co., 336 NLRB, 305, 305–306 (2001). In determining whether statements made by individuals to employees are attributable to the employer, the test is whether, under all the circumstances, the employees "would reasonably believe that the employee in question [alleged agent] was reflecting company policy and speaking and acting for management." *Zimmerman Plumbing & Heating* Co., 325 NLRB 106 (1997), enfd. in relevant part 188 F.3d 508 (6th Cir. 1999), quoting *Waterbed World,* 286 NLRB 425, 426–427 (1987), enfd. 974 F.2d 1329 (1st Cir. 1992).

339 NLRB at 480. The Board found that the "lead man" was an agent of the employer, citing, inter alia, the fact that he: (1) was often the highest-ranking employee on the jobsite; (2) directed the daily job activities of the employees; (3) regularly answered their questions concerning their work duties; (4) communicated management decisions to employees; and (5) was perceived by employees to be a supervisor. Id.

In the case at bar, there is no question that Mahr acted as an agent for the Employer. Employees took directions from Mahr and no one else for a significant a portion of each weekday and during his full shift in place of the admitted supervisor, Lally, on Sundays. The unrefuted testimony of Arocho further shows that Mahr identified himself as a supervisor to employees and the record shows that employees regarded him as such. Furthermore, the evidence shows that Mahr, the highest-ranking official on duty at the time, was used by the Employer to inform Kajeem Hill that he had been terminated even though it appears this could have been done by the owner by phone instead. At a minimum, it is clear that Mahr was regularly used as a "conduit" by management to convey work-related messages of importance to drivers and helpers during their shifts. See *Mid-South Drywall,* 339 NLRB at 480–481; *J.J. Cassone Bakery,* 350 NLRB 86, 95 (2007); *Poly-America, Inc.,* 328 NLRB 667 (1999); *Waste Stream Management,* 315 NLRB 1099, 1122 (1994); *Spirit Construction Services,* 351 NLRB 1042, 1043 (2007).

Based on the record, I find Charles Mahr to be an agent of the Employer. Accordingly, I am bound to determine whether Mahr's conduct, as alleged, has "the tendency to interfere with the employees' freedom of choice." *Cambridge Tool Mfg.,* 316 NLRB 716 (1995). 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 misconduct 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.

*Taylor Wharton Division Harsco* Co., 336 NLRB 157, 158 (2001). The test is an objective one—whether the conduct has a tendency to interfere with employee free choice. *Hopkins Nursing Care Center,* 309 NLRB 958 (1992). Objectionable conduct—conduct which may interfere with the "laboratory conditions" for an election—need not amount to the standard of interference, restraint commonly violative of Section 8(a)(1). *Stabilus, Inc.,* 355 NLRB 836 (2010). Conduct that creates an atmosphere making the exercise of free choice improbable warrants overturning the election even where the voting margins are substantial. *Newburg Eggs,* 357 NLRB No. 171 (2011); *Reliant Energy,* 357 NLRB No. 172 (2011). The burden of proof is upon the party "seeking to have a Board-supervised election set aside," and that burden is a "heavy one." *Crown Bolt,* 343 NLRB 776, 779 (2004).

The uncontroverted evidence shows that on several occasions prior to the August 16 election Mahr told driver Hiram Arocho to "do the right thing" or they would lose their overtime. The record further shows that Mahr stated to Arocho that he supported Local 124 and that if Local 108 won the election, the Employer would take away their overtime by putting two more garbage trucks on the routes. Moreover, in these circumstances, Mahr's exhortation to "do the right thing" took on added meaning when, as discussed infra, Danny Lally said the same thing to Arocho as they walked to the facility on the date of the election.

Election campaign statements by supervisors which reasonably cause prounion employees to fear reprisal or to expect a reward if they exercise their Section 7 rights in a particular manner will ordinarily be attributed to the employer and found objectionable. *Harborside Healthcare,* 343 NLRB 906, 907 (2004). There is no reason to depart from such precedent here. Mahr's statement that the employees' overtime would be reduced if Local 108 won the election amounts to a threat by the Employer to reduce overtime. The Board considers threats to reduce wages or hours to be "hallmark violations," that is violations which are among "the most flagrant forms of interference with Section 7 rights and are more likely to destroy election conditions for a longer period of time than are other unfair labor practices because they tend to reinforce the employees' fear that they will lose their employment if union activity persists." *Milium Textile Services,* 357 NLRB No. 169 (2011); *Armon Co.,* 279 NLRB 1245, fn. 2 (1986). See *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969). In short, Mahr's threat the Employer would

reduce overtime if Local 108 won the election is objectionable conduct. See, e.g., *Interstate Truck Parts,* 312 NLRB 661, 663 (1993), enfd. mem. 52 F.3d 316 (3d Cir. 1995) (threat to reduce wages and benefits reasonably tended to interfere with employees rights under the Act); *Truss-Span Co.,* 236 NLRB 50 (1978), enfd. in relevant part 606 F.2d 266 (9th Cir. 1979) (threat to eliminate pension and profit-sharing plans interfered with conduct of election).

It could be argued that the objection should not be sustained because the misconduct of Mahr (and Lally) appear to be confined to Hiram Arocho and Tarrell Sumlin while the voting spread between the Intervenor and the Petitioner was 22 votes (32–10). Nevertheless, I find it conceivable that the election might have turned out differently absent Employer misconduct. The voting differential really amounts to a potential swing of 11 votes from the Intervenor to the Petitioner, which hardly seems unlikely given the approximate size of the unit (59). Elections are supposed to be conducted under laboratory, not tainted, conditions.

Based on the record before me, I find that the Employer, by the conduct of its agent, Charles Mahr, reasonably tended to coerce employees in the election and, as such, engaged in objectionable conduct. I recommend, therefore, that Objection 2 be sustained.[16]

Objection No. 3

In essence, this objection alleges the Employer unlawfully permitted Local 124 to campaign on its property, including the posting of Local 124 bumper stickers and signs on its vehicles and property and by making a company grill available for a Local 124 barbecue, while discouraging employees from communicating with Local 108 representatives, such as Kajeem Hill.

On the afternoon of August 14, the undisputed evidence shows that Local 124 conducted a barbecue across the street from the Employer's facility. Employees of Employer attended the barbecue where the following items were distributed: a campaign-related leaflet; a description of a Local 124, prepaid legal plan; and the dismissal letter addressed to Kajeem Hill from the Board's Regional Office pertaining to his unfair labor practice charge against Local 124. At the conclusion of the barbecue, the testimony of Local 108 representative Frederick Schneider and Kajeem Hill establish that the representatives of Local 124 rolled the barbecue grill across the street into the yard of the Employer and left it there. Both Schneider and Hill further testified that Danny Lally was standing nearby at the time. Danny Lally testified, not credibly, that he did not remember seeing the grill on company property. The following day, employees Chris Markgraf, Ethan Perez, and another employee were spotted by Schneider and Hill eating from the grill on the Employer's property. There was no evidence that representatives of Local 124 were present, that the food was supplied by Local 124, that the grill was owned by Local 124 or that any type of election campaigning took place. Moreover, there is no evidence the Employer made any effort to inform employees food was available, much less that it was being provided by Local 124.

Based on the record, there was no evidence that the use of the grill by employees on company property on the day before the election was intended, or could have been reasonably perceived to influence employees to vote for either the Employer or Local 124. Even assuming otherwise, the picnic activities complained of constitute the type of de minimus conduct the Board has found not to be objectionable. See *Chicago/and Television News,* 328 NLRB 367 (1999) (12-hour party on the day before the election not objectionable, in part, because the cost of the event was not excessive); *Jacqueline Cochran, Inc.,* 177 NLRB 837 (1969) (union's distribution of Thanksgiving turkey and Christmas party during critical period not objectionable).

Based on the above evidence, I recommend that Objection 3 be overruled.

Objection No. 4

This objection essentially alleges that the Employer, by Danny Lally, coerced employees to vote against Local 108 by disparaging employees it understood to be Local 108 supporters and by threatening that the Employer would respond to Local 108 representation by diminishing employees' terms and conditions of employment and by refusing to sign a contract with Local 108.

As discussed above, on previous occasions preceding the election, Hiram Arocho testified that after Danny Lally spotted him talking to Kajeem Hill near the facility, Lally would make remarks to Arocho like "there goes 108 over there with Q . . . there goes Hiram talking to 108, or there goes the president talking to the vice president." Thereafter, Hiram Arocho stated that Danny Lally urged him to "do the right thing" prior to election and on the day of the election.

Tarrell Sumlin testified that Lally called him "Mr. 108" frequently after Sumlin had spoken to Kajeem Hill or other Local 108 representatives near the Employer's facility. Sumlin further stated that Lally said, "I don't know why you were around Mr. Q and the other 108 people because you going to end up like Q with no job." On another occasion in the office, Sumlin stated that Lally told him, "I don't know why you guys is voting for 108 because we're not going to sign any paperwork like nothing, you're not going to get no nothing for at least like two or three years." Sumlin stated that these conversations took place two or three days prior to the election.

Lally denied making any of these remarks. On direct examination, Lally stated that he did not know that Sumlin was "part of" the union (Local 108). Lally denied that he instructed

[16] While supervisors may engage in campaigning to present their employer's views or preferences there must be an "absence of supervisory involvement in the distribution process or other evidence that management pressured employees into making an observable choice or open acknowledgement concerning their campaign position." *Schwartz Mfg.* Co., 289 NLRB 874, 879 (1988). In that regard, I find that the mere wearing of a Local 124 tee shirt by Mahr 2 days prior to the election did not "threaten to create a sense of obligation on the part of employees" to reveal their voting sentiments and therefore is not objectionable conduct. *Atlantic Limousine,* 331 NLRB 1025, 1029 (2000).

employees not to talk to Kajeem Hill but volunteered that Hill "talks to them on his own, outside the business property, every night, even recently." Lally explained that he did not care about the election because it did not apply to him. On cross-examination, the following exchange took place:

> Q. In the run-up to the election, did you have any conversations about the election in general with anybody?
>
> A. Anything is possible. If I did, that's whatever they voted, they voted for.
>
> Q. My question is did you have any—did the election ever come up with just with employees, did they ever say—
>
> A. Well, that's all they, that's all they talked about.
>
> Q. And you'd never talk to them about the election?
>
> A. It has nothing to do with me.
>
> Q. You never—
>
> A. I mean I'll talk about a lot of things. They want to talk about the election, I have nothing to do with it, so I can't help them out. I can't tell them who to vote for, because it doesn't—my opinion means nothing to them and vice versa.
>
> Q. You never mentioned your opinion at any time?
>
> A. Because I don't vote. It doesn't make a difference.

I fully credit the testimony of Arocho and Sumlin here. First, their testimony about their separate conversations with Lally was consistent. Second, in contrast to Lally, Arocho and Sumlin testified in a straightforward manner and appeared to be doing their best to answer the questions put to them on direct and cross-examination. This is evident from both the record and their demeanor at trial. For instance, Arocho candidly admitted that he had a minor altercation with Mahr and Sumlin readily acknowledged that he had a fight with a coworker. Third, Arocho, a current employee, was testifying against his own interests, that is, "against" his supervisor, Lally. Fourth, the testimony of Sumlin and Arocho about the threats made to them by Lally is similar in tone and content and echo Arocho's testimony concerning the threats made to him by Charles Mahr, i.e., that Mahr urged Arocho to "do the right thing" or they would lose their overtime.

Conversely, the testimony of Danny Lally was unconvincing. His testimony that he did not see the Local 108 grill on company property did not square with his subsequent testimony that he did not "remember" seeing the grill on the property. Such prevarication on a relatively minor issue does not inspire confidence in his testimony generally. Moreover, at times, Lally's testimony was clearly evasive. For instance, when asked on direct examination if he had conversations with employees about the election, Lally responded, "Anything is possible." Lally's brief moments of candor were revealing, however, such as his testimony that the election was "all they [the employees] talked about" and that Kajeem Hill, presumably in his capacity as an organizer for Local 108, talked to the employees "every night, even recently." In short, Danny Lally's testimony that he did not care about the election and did not say anything about it to employees is not credible when compared with the forthright testimony of Hiram Arocho and·Tarrell Sumlin concerning Lally's separate conversations with them.

As discussed above, I find that Danny Lally stated to Hiram Arocho, "there goes 108 over there with Q . . . there goes Hiram talking to 108, or there goes the president talking to the vice president." At a minimum, an employee would reasonably assume that Lally had placed the union activities of Arocho and other employees under surveillance. Furthermore, Lally made this remark repeatedly to Arocho and also to Sumlin. Under the circumstances, I find Lally's conduct coercive and destructive to the employees' freedom of choice in the August 16 election. See *Double J. Services,* 347 NLRB No. 58 (2006) (not reported in Board volumes) (creation of an impression of surveillance, and interrogation objectionable).

I further find that Lally stated to Tarrell Sumlin, "I don't know why you were around Mr. Q and the other 108 people because you going to end up like Q with no job." This statement unlawfully implies the Employer will retaliate against employees by discharging them because of their support for Local 108. The Board has found that threats of discharge are inherently coercive and destructive of Section 7 rights. See *Allied Mechanical,* 343 NLRB 631, 631–632 (2004) (Board directed a second election where Employer discharged two overt union supporters, disciplined another overt union supporter, and threatened employees).

I find that Lally further stated to Sumlin, "I don't know why you guys is voting for 108 because we're not going to sign any paperwork like nothing, you're not going to get no nothing for at least like two or three years." This statement by Lally has the tendency of discouraging employees from exercising their right to choose a union of their choice by indicating that it would be futile to do so and as such is objectionable. See *Smithfield Foods,* 347 NLRB 1225, 1235 fn. 29 (2006); *Adam Wholesalers,* 322 NLRB 313 (1996); *Fieldcrest Cannon,* 318 NLRB 1 (1995).

For the reasons stated above, I recommend that Objection 4 be sustained.

In the instant matter, I have determined that (1) Chris Mahr is an agent of the Employer; (2) the Employer by Mahr, threatened employees with a reduction in overtime if Local 108 won the election; (3) the Employer, by Danny Lally, created the impression employees' activities on behalf of Local 108 were under surveillance; (4) the Employer, by Danny Lally, threatened to discharge employees because of their support for Local 108; the Employer, by Danny Lally, conveyed

the impression to employees that voting for Local 108 would be futile; and (5) that the foregoing actions of the Employer all took place within the critical period.

While I recognize that the Intervenor, Local 124, is not the transgressor here, I am constrained to determine whether, under all the circumstances, the employees were able to freely exercise their collective right to vote. I find that the Employer's conduct, as alleged, reasonably had a tendency to interfere and coerce employees in the election. I recommend, therefore, that the election conducted on August 16 be set aside.

## Conclusions and Recommendations

As I have found Petitioner's Objections 2 and 4 to have merit, it is recommended that they be sustained. I further recommend that Objections 1 and 3 be overruled. Having found that the conduct found objectionable had a reasonable tendency to interfere in the election, I accordingly recommend that the election be set aside and a new election be conducted at a date and time to be determined by the Regional Director, Region 2.[17]

December 5, 2012

[17] Pursuant to the provisions of Sec. 102.69 of the Board's Rules and Regulations, any party may, within 14 days from the date that this report is issued, file exceptions with the Board. In order to be timely, exceptions must be received by the Board in Washington, D.C. by the close of business at 5:15 EDT on December 19, 2012.