UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RATHGIBSON, INC.	)	
	)	
Employer,	)	
	)	
and	)	Case No. 30-RC-6747
	)	
INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 139, AFL-CIO	)	
	)	
Petitioner.	)	

ANSWERING BRIEF TO EXCEPTIONS ON BEHALF OF PETITIONER, INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139, AFL-CIO

Pasquale A. Fioretto
Patrick N. Ryan
BAUM SIGMAN AUERBACH & NEUMAN, LTD.
200 West Adams Street, Suite 2200
Chicago, IL 60606
Telephone: (312) 236-4316
Facsimile: (312) 236-0241

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RATHGIBSON, INC.	)	
	)	
Employer,	)	
	)	
and	)	Case No. 30-RC-6747
	)	
INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 139, AFL-CIO	)	
	)	
Petitioner.	)	

ANSWERING BRIEF TO EXCEPTIONS ON BEHALF OF PETITIONER IUOE, LOCAL 139, AFL-CIO

The Petitioner, International Union of Operating Engineers Local 139, AFL-CIO (hereinafter "Local 139" or "Union"), by and through its attorneys, submits its brief pursuant to Section 102.46(d) of the National Labor Relations Board Rules and Regulations, in response to the Employer's Exceptions to the Hearing Officer's Report on Challenged Ballots and Objections to Conduct Affecting the Results of the Election with Findings and Recommendations in this case.

INTRODUCTION

On February 20, 2009, Local 139 filed a petition for an election in a bargaining unit of the Employer, RathGibson, Inc.'s ("RathGibson" or "Employer") employees, and on March 2, 2009, the parties stipulated to an election in the underlying bargaining unit (Report, p. 2).[1] The Board conducted a supervised election on April 2, 2009, with the results being 60 ballots in favor of representation, 59 against, with four challenged ballots that could affect the results of the election

[1]References to the Hearing Officer's August 3, 2009 Report on Challenged Ballots and Objections to Conduct Affecting the Results of the Election with Findings and Recommendations will be cited as "Report, p. ___."

(Report, p. 3). The Employer subsequently agreed that the challenge to one of the ballot's should be sustained, leaving three challenged ballots which are sufficient to affect the results of the election (Report, p. 5, fn. 7).

In addition to the challenged ballots, Local 139 filed timely objections to conduct by the Employer which affected the results of the election (Report, p. 3). On May 1, 2009, after conducting an investigation, Region 30 issued a Notice of Hearing on the objections and challenged ballots filed by Local 139 over the election (Id.). Consistent with the Notice, hearings were held on May 21 and 22, and June 2, 3 and 4, 2009 before Hearing Officer Anita O'Neil, resulting in a transcript of nearly 1,400 pages. The parties filed their respective Post-Hearing Briefs on June 22, 2009. On August 3, 2009, Hearing Officer O'Neil issued a 119 page detailed and reasoned Report on Challenged Ballots and Objections to Conduct Affecting the Results of the Election with Findings and Recommendations.

Subsequently, the Employer timely filed 75 Exceptions to the Hearing Officer's Report on Challenged Ballots and Objections to Conduct Affecting the Results of the Election ("Report"), and accompanying 49-page Brief in Support of its exceptions,[2] making Local 139's response due by August 24, 2009. Local 139 timely filed an unopposed request for an extension of time to respond until August 31, 2009, which request was granted by the Board. As stated more fully, *infra*, the crux of the Employer's argument center around the Hearing Officer's credibility determinations. As an initial general matter, here, there is simply no evidence in the record that would require overturning any of the Hearing Officer's credibility determinations.

[2]References to the Employer's Brief in Support of its Exceptions, will be cited, "ER. Brief, p. ___."

I. STATEMENT OF FACTS

A. The Parties

Petitioner, Local 139, is a labor organization as that term is defined in section 2(5) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 152(5) and headquartered in Pewaukee, Wisconsin (Report, p. 5). Local 139 is seeking to represent RathGibson's bargaining unit employees in the unit as stipulated by the parties (Report, p. 5; Bd Ex. 1(a)).

Respondent, RathGibson, is a manufacturing employer with a facility in Janesville, Wisconsin and is engaged in interstate commerce, with its main headquarters located in Lincolnshire, Illinois (Report, p. 4; Tr.[3] 1272, 1444). The Janesville plant is divided into three main work areas: the mill department, back shop, and shipping and warehouse (Id.). Vice President and General Manager of the Janesville facility John Fortin works out of the Janesville plant. At the Hearing, the parties stipulated that Chris Wellnitz is the production supervisor of the first shift; Tina Matykowski is the lean director and production supervisor of the back shop on the first shift; Tony Cichella is the production supervisor of the second shift; and Otto Maldonado is the production supervisor of the third shift (Report, p. 5; Tr. 17-19).

B. The Organizing Campaign and Critical Period

On February 20, 2009, the Union filed a Petition for an election in the following bargaining unit, "All full-time and regular part-time employees at the Employer's facility located at 2505 Foster Avenue, in Janesville, Wisconsin[,]" excluding "All other employees, including clericals, supervisors and guards as defined under the Act." (Report, pp. 2-3; Bd. Ex. 1(a)). On March 2, 2009, the parties

[3]References to the Transcript of the Proceedings frm the Hearing conducted on May 21 and 22, and June 2, 3, and 4, 2009, will be cited as "Tr. ___."

stipulated to an election to be conducted on April 2, 2009 (Report, p. 2; Bd. Ex. 1(a)). During that one month time period, the Employer distributed six (6) letters to the bargaining unit members (Report, pp. 108-115; Un. Exs. 11-16) and required each of the eligible voters to attend four mandatory meetings in the cafeteria (Tr. 183, 423-24, 461-62).

Although the Hearing Officer did not find the various pieces of campaign literature to be objectionable (Report, pp 109-114), they nonetheless should be considered as part of the Employer's overall conduct. Further, during the four mandatory meetings in the cafeteria the Employer presented its employees with various "gloom and doom" scenarios if the Union won the April 2, 2009 election (not to mention the one-on-one meetings between the Supervisors and eligible voters found to be improper by the Hearing Officer, as discussed *infra*)(Tr. 183, 423-24, 461-62).

In the March 13, 2009 letter, for example, Anacker and Fortin mention (Report, p. 109; Un. Ex. 12):

> We are very concerned that, if the union wins the election on April 2, even though RathGibson is already suffering in this economy, the union will still insist on proposals in contract negotiations which would prevent us from surviving and being competitive here in Janesville.

However, prior to sending the letter, Local 139 had not even contacted RathGibson–no Local 139 representatives spoke to Anacker or Fortin or Mike Schwartz or made any demands on the Company (Tr. 1079, 1081-82).

Similarly, in the same March 13, 2009 letter, Anacker and Fortin unilaterally raised the issue of a strike by, *inter alia*, stating (Report, p. 109-110; Un. Ex. 12):

> [W]e would be prepared to take a strike here at RathGibson...We believe that you and your family should be concerned about the risk of an Operating Engineers strike here...before you subject yourself, your family and your friends at RathGibson to the risk of an Operating Engineers strike by voting the Operating Engineers in here, you

> should now some facts about how a strike could hurt your wallet and your job security...

The employees received the various letters distributed by RathGibson during the one month period (Report, p. 108, fn.141).

Additionally, Union Exhibit 13, is a March 17, 2009 letter captioned, "DO YOU REALLY WANT TO TRUST YOUR FUTURE HERE TO THE OPERATING ENGINEERS UNION?" (Un. Ex. 13; Tr. 1082-83, 1343). Interestingly, Anacker did not know on what basis he included the phrase "Typically it is very difficult to get rid of [a union] once it gets in," since he had no personal knowledge (Report, p. 108, fn. 142; Tr. 1085; Un. Ex. 13).

Next, in the March 23, 2009 letter, Anacker starts a paragraph by explaining, "Based on the latest available wage and fringe benefits survey for this geographical area," yet does not include the survey in the March 23, 2009 letter (Tr. 1086-87). The Survey, according to Anacker, had been compiled by the director of development of Rock County from data back in 2006 (Tr. 1086). Anacker only had one or two conversations with one or two eligible voters in which he shared the results of the Wage Survey, which also included businesses in industries different from RathGibson's (Tr. 1087-88).

In the March 23, 2009 letter, Anacker goes on to assert, "Unions did not prevent many unionized companies from closing their doors and going out of business due to valid economic reasons," yet does not specifically identify those companies (Tr. 1095; Un. Ex. 14). Anacker relied upon information that Laura Manke had pulled from local newspaper articles about the companies in Janesville and the local area (Tr. 1094-95). Moreover, Anacker did not speak to any of the bargaining unit members to share the information from the newspaper articles personally with them

(Tr. 1097). Anacker then theorizes that, "The union did not prevent any unionized companies from shipping their jobs overseas or relocating their businesses to other locations in the United States due to a valid economic reason," however, does not list any specific examples, but rather relies upon Schwartz's experience for the statement dealing with relocations of businesses (Tr. 1097-98; Un. Ex. 14). Finally, Anacker then speculates, "Unions did not prevent many unionized companies from laying off their employees due to valid economic reasons and many of those layoffs became permanent," without listing any concrete example (Tr. 1099; Un. Ex. 14). Instead, Anacker based that statement on "reading the local paper" (Tr. 1099).

C. Employer Holds Multiple Supervisor Meetings

Additionally, Anacker and Fortin, along with their Labor Attorneys, had four (4) meetings with the RathGibson supervisors to discuss the union organizing campaign (including Maldonado, Matykowski, Wellnitz, Cichella, Aston), in the Board Room (Tr.1188-89, 1335-36, 1407). At these meetings, the Supervisors were told that they "should engage the employees on the shop floor." (Tr. 1188, lines 1-4; 1408-09, lines 1-5). According to Fortin, the "RathGibson Strategy Team" asked the supervisors "to engage the employees in the factory and answer their questions regarding the union matters and the information that the company was providing relative to the union, which came from the letters and all the employee meetings and the speeches." (Tr. 1344, line 25; Tr. 1345, lines 1-5). It is undisputed that the supervisors did talk to the bargaining unit members during the critical period, however, Fortin was not present when the supervisors spoke to the employees on the shop floor individually (Tr. 1409-11). Fortin knew, however, that supervisors had been talking to bargaining unit members on the shop floor (Tr. 1409-10).

According to Supervisor Cichella, at the meetings he attended in the Board Room, they discussed having the "supervisors going out and talking to individual employees about the union election" and to "get the information out there." (Tr. 1336, line 21). Cichella, for example, spoke with Bob Powers (Tr. 1330-31). Cichella admitted that he talked to everyone on his shift about the union (Tr. 1338).

Similarly, Supervisor Maldonado testified that Fortin and Anacker instructed him and the other supervisors "to go and talk to employees" and to "ask them about the election and any questions they had." (Tr. 1188, lines 1-4). Accordingly, Maldonado approached bargaining unit employees such as Schultz, Henry and Patchak on several occasions and talked to them about the election (Tr. 1189-92). Indeed, during Supervisor Maldonado's most recent Job Performance Evaluation (Union Exhibit 45) covering the time period February 2008 through April 2009, the Employer praised him for his involvement in the organizing campaign (Tr. 1193-94). Fortin presented the evaluation and spoke to him about its content (Tr. 1194-95). During the evaluation, Fortin not only reviewed Maldonado's wage increase, but Fortin also pointed out that Maldonado had done a "good job" during the campaign (Tr. 1195; Un. Ex. 45)[4]. According to Maldonado, Fortin also told him during the evaluation that, "I was -- he saw that, you know, I was always on the floor talking to the employees if they had any questions and that was about it" (emphasis added)(Tr.

[4]Specifically, the Job Performance Evaluation states (Un. Ex. 45):

> Otto was fully engaged in the Production Employee individual communication discussions that he was asked to participate in and asked to drive for the third shift employees during the Union campaign as Janesville earlier this year. Otto eagerly participated in the Company campaign and worked vigorously in support of the Company position. Otto provided thorough, honest and candid feedback during the overall group reviews, which proved to be extremely helpful to the Company campaign.

1195, lines 13-15). Fortin also asked Maldonado for his opinion as to how the employees were going to vote (Tr. 1199-1200).

D. Facts Regarding the Objectionable Conduct

Local 139 presented the testimony of Brady Schultz, Bob Powers, and Don Striegel in support of its position on objectionable conduct by RathGibson, relating to Objection Nos. 1 and 6.

1. Objectionable conduct directed at Schultz

Brady Schultz has been an employee of RathGibson for approximately two years, and has worked on the third shift as a back shift mill operator for the past several months (Tr. 52-53). His immediate supervisor is Otto Maldonado (Tr. 54).

Schultz had two significant conversations with Maldonado during the critical period (Report, pp. 87-88; Tr. 86). According to his testimony, the first occurred approximately two weeks prior to the election near mill 14, at about 4:00 (Report, p. 87, fn. 109; Tr. 86). Maldonado approached Schultz, and said that he had not had a chance to talk to him about the "union business" (Report, p. 87, fn. 110; Tr. 87). Maldonado asked Schultz several questions about what he thought the union could do for him (Report, p. 87, fn. 109; Tr. 87). Schultz said he thought the Union could help get a contract to keep the wages they had, and Maldonado responded that: "[he] was crazy to think [they]'d be able to keep [their] wages for what [they] are making right now." (Report, p. 87, fn. 111; Tr. 87, lines 24-25). Schultz asked why Maldonado thought that, and Maldonado said RathGibson would not be able to run the company the way it wanted to. (Report, p. 88, fn. 113; Tr. 88, lines 4-5).

A few days before the election, around 5 a.m., as Schultz further explained at the hearing, Maldonado initiated another conversation with Schultz about the Union that lasted an hour or two (Report, p. 88, fn. 115; Tr. 89-90, 93). Schultz was waiting for his partner on the polisher when

Maldonado jokingly commented that Schultz was taking a union break (Report, p. 88, fn. 116; Tr. 91-92, line 2). Schultz and Maldonado again discussed the difference between Toyota and Chrysler, which led to a discussion about seniority (Report, pp. 88-89, fn. 117-118; Tr. 92). Maldonado said not having a union allowed RathGibson to make decisions regarding layoffs based on the skill of employees, rather than seniority (Report, p. 89). Schultz said if they went by seniority, he would not have been bumped to third shift, he would have stayed on second shift, as he preferred (Tr. 92). In response, Maldonado said, "You might not have a job. You would probably be laid off." (Report, p. 89, fn. 120; Tr. 92, line 25, 93, line 1). Maldonado also said that the employees "were crazy for thinking that [they] are going to negotiate for the same wage [they] are making now." (Report, p. 90, fn. 124; Tr. 99, lines 6-8). Maldonado said that "potentially [RathGibson] will lose customers with a union in place because they are not able to buy from a union shop." (Report, p. 90; Tr. 100, lines 11-13).

Approximately a half an hour after his conversation with Maldonado ended, Schultz was approached by the first shift supervisor, Chris Wellnitz, who initiated a conversation (Report, p. 97; Tr. 101-102). As Schultz credibly testified, Wellnitz asked what he thought about all that was going on with the Union, and Schultz said "it's all fucked up. " (Report, p. 97-98, fn. 129; Tr. 101-102, 102 line 2). After their conversation, Wellnitz looked confused and said to Schultz "I don't really know where you stand but I know you will make an educated decision." (Report, p. 98; Tr. 102, lines 10-11).

The Hearing Officer, however, did not credit one witnesses' version over the other (Report, p. 87), but rather assessed credibility with regards to portions of the conversation. In doing so, the

Hearing Officer credited Schultz's version and, as set forth more fully *infra*, found the statements to be objectionable conduct (Report, pp. 90-91).

2. Objectionable conduct directed at Powers

Bob Powers has been employed by RathGibson for fourteen or fifteen years, and has worked the past four or five years as a lab technician in the metallurgical lab (Tr. 310). Power's immediate supervisor is Dave O'Donnell, the Director of Process Improvement (Tr. 311).

Two or three weeks before the election, as Powers credibly testified, Cichella approached him in the lab at about 4 or 5 p.m., and initiated a five minute conversation (Report, p. 53-54, fn. 70; Tr. 345-46, 348). Cichella acknowledged that the employees had legitimate issues but said that organizing was not "the way to go about it." (Report, p. 54; Tr. 346, lines 14-15). Powers said "I don't see why it is going to hurt to have somebody backing us up, you know, somebody to help us out if we need help." (Report, p. 54, fn. 77; Tr. 346, lines 16-18). Cichella said "it is nothing for a corporation like the one that owns us to come in and run a company like this into the ground to keep the union out." (Report, p. 54, fn. 78; Tr. 346, lines 19-21, 374-75). Cichella further said that the company would not work with the union and that when the employees go on strike they would "be out in the street and there would be people taking our place. And then when we finally do get our jobs back, we will be the low man on the totem pole, we will lose all of our seniority." (Report, p. 55, fn. 80; Tr. 347, lines 5-10). Cichella asked Powers "do you really want to drag your fellow coworkers through this?" (Report, p. 55, fn. 80; Tr. 348, lines 16-17). Cichella told Powers that he "needed to do what was right for [him] and [his] family." (Report, pp. 55-56 Tr. 347, lines 20-21). Powers said that he would, and Cichella repeated, "no, you need to do what is right for you and your family." (Report, pp. 55-56, fn. 81; Tr. 347, lines 21-24).

The Thursday before the election, at about 4 p.m., as Powers further testified, O'Donnell approached him near the coil dispenser by mills 15 and 16, and engaged him in a two or three minute conversation (Report, p. 62, fn. 85; Tr. 351-52). O'Donnell asked what "was with this union bullshit" (Report, p. 62; Tr. 351, lines 22-23). Powers said he did not know (Report, p. 62; Tr. 351). Powers said "Tony already had this talk with me" and told O'Donnell that he would "vote no, [he] had settled down and [he] wasn't upset anymore." (Report, p. 62; Tr. 351-52, 352 lines 1-22). O'Donnell said he understood the frustration and even anger over some of the issues, but that he did not see how a union would benefit either the employees or the company (Report, p. 63). Powers said "Tony also told me that they weren't going to work with the union anyway, if we got it in." (Report, p. 63; Tr. 351, lines 4-5). O'Donnell agreed with the statement and went on to say about the company only having $17 million in solvency in its revolver. (Report, p 63, fn. 87; Tr. 351, lines 6-7). Powers asked O'Donnell "what is going to happen to these guys if we don't get a union in, these guys that have been outspoken and wore the hats and the stickers?" (Report, p 63; Tr. 351, lines 9-11). O'Donnell said "'it would be stupid for them to do anything to any of the employees, because it was against the law, but Beaver was very upset' – Bill Anacker – 'was very upset so I would watch out for him.'" (Report, p. 63-64, fn. 88; Tr. 351, lines 11-14).

The Hearing Officer once again did not credit one witnesses' version over the other (Report, p. 53), but rather assessed credibility with regards to portions of the conversation. In doing so, the Hearing Officer credited Powers's version and, as set forth more fully *infra*, found the statements to be objectionable conduct (Report, pp. 56-57, 64-65).

3. Objectionable conduct directed at Striegel

Donald Striegel has worked for RathGibson for 18 years, currently works on the Loeser polisher, and previously worked on the air-under-water and hydro testing machines (Report, p 78; Tr. 480). His supervisors are Tina Matykowski and Tim Armstrong (Id.).

Near the end of March 2009, according to Striegel's credible testimony, Matykowski approached him and initiated a conversation near the wet polisher (Report, p. 78-79; Tr. 496-97). Matykowski asked if Striegel had any questions about the union, and Striegel responded "no, . . it's all pretty self-explanatory." (Report, p. 78; Tr. 497, lines 17-18). Matykowski said "well, that's good, because if things go the wrong way, . . there's going to be big changes around here." (Report, p. 78; Tr. 497, lines 18-20). Matykowski did not explain what she meant by that, and the conversation lasted only a couple minutes (Report, p. 78; Tr. 497-98). The Hearing Officer credited Striegel's version of the conversation, as set forth more fully *infra*, and found the statement to be objectionable conduct (Report, pp. 78-79).

II. ARGUMENT

The Board should overrule the Employer's exceptions and sustain the Hearing Officer's Report and Recommendations. The Hearing Officer correctly found that RathGibson engaged in objectionable conduct during the critical period, which interfered with and coerced employees in the exercise of their Section 7 rights, sufficient enough preclude a free and fair election. Accordingly, the Hearing Officer correctly determined that the election should be set aside and a second election ordered after laboratory conditions have been reestablished, if the opening of the challenged ballots result in a loss to the Union. The Employer filed exceptions to the Hearing Officer's recommendations on objectionable conduct which fall into two broad categories: (1) credibility and

(2) conclusions of law. As detailed below, the Employer's exceptions lack merit and should be overruled.

A. The Hearing Officer Adequately and Accurately Assessed the Credibility of the Witnesses (Response to Exception Nos. 7-18, 20-26, 28-34, 36-39, 41, 43-50, 52-54, 56-58, 75).

The Board should sustain the Hearing Officer's credibility determinations and overrule the Employer's Exceptions (No's 7-18, 20-26, 28-34, 36-39, 41, 43-50, 52-54, 56-58, 75). "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." BFI Waste Services, 343 NLRB 254 fn. 1 (2004) (citing Stretch-Tex Co., 118 NLRB 1359, 1361 (1957)). As the Employer noted, the Board will accord "less weight to the factor of demeanor" when credibility determinations "omitted reference to relevant testimony on critical matters and have mistakenly characterized the state of the record." Jewel Bakery, Inc., 268 NLRB 1326, 1327-28 (1984). As is clear from the Hearing Officer's detailed Report, she gave due consideration to all relevant factors in making her credibility determinations, explaining the relative strengths and weaknesses of the relevant testimony, correctly characterizing the state of the record, and explaining the basis for each discrete determination. The record fully supports the Hearing Officer's credibility determinations, and therefore, they should be sustained.

Perhaps recognizing the difficulty it faces in overturning credibility determinations, the Employer substantially overreaches, essentially arguing that not a single Union witness should be credited at all, and that each and every Employer witness should be credited on every possible area of dispute (ER. Brief, p.9; Exceptions No. 7-9, 11-15, 20, 21, 30, 31, 33, 34, 36, 37, 43, 44, 56, 57). Such an all or nothing argument only highlights the weakness of the Employer's position. The fact

that the Hearing Officer recognized that witnesses were credible on some, but not all points emphasizes the thoroughness and thoughtfulness of her credibility determinations. The Hearing Officer was able to analyze each witnesses' demeanor, recollection and the context of the each conversation first hand.

Significantly, while the Employer argues that some of the Union's witnesses should be discredited due to bias (ER. Brief, p. 8, n. 2), the Employer fails to address the inherent bias of each of its witnesses who were supervisors or managers. As a supervisor or manager without Section 7 rights, the Employer's witnesses were subject to termination if they did not tow the company line. The Board has held that "the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests." The Jewish Home for the Elderly of Fairfield County, 343 NLRB 1069, 1069 (2004), enfd., 174 Fed. Appx. 631 (2nd Cir. 2006) (quoting, Flexsteel Industries, 316 NLRB 745, 745 (1995), enfd., 83 F.3d 419 (5th Cir. 1996)).

The witnesses who testified in support of Local 139's objections had absolutely nothing to gain by so testifying, as they were and are employees of RathGibson providing testimony that contradicted their supervisors. Notwithstanding the Employer's aggressive cross-examination, the bargaining unit witnesses stood by their testimony on direct regarding the objectionable statements made by their supervisors. They each testified candidly, mostly from their own recollection, and with great details to the exchanges. Conversely, the supervisors and agents of RathGibson merely denied making such statements in response to specific, leading questions. The bargaining unit employees put their livelihoods on the line to testify, the supervisors and managers would have put more on the line had they refused to testify or support the Employer's position.

It is axiomatic that a Hearing Officer's primary role is that of a fact finder. On credibility issues, Hearing Officers are directed to:

> not only pay careful attention to witnesses' substantive testimony, but also to their demeanor. The hearing officer should. . . look for the specificity of the witness' testimony; how detailed it was; its vagueness; whether the witness answered questions even on cross-examination in a direct non-combative manner; the witness' consistency on both direct and cross; whether the witness provided conclusionary responses or implausible explanations; to what extent the witness' testimony contradicted documentary evidence or the testimony of other witnesses; and internal inconsistencies. The hearing officer may evaluate the inherent probability of events in assessing consistency or the truthfulness of the witness and may discredit a witness in part and credit a witness in part. When assessing a witness' credibility, the hearing officer should keep in mind that not every inconsistency or vague response necessarily warrants discrediting that witness or that one does not have to discredit all of a witness's testimony. NLRB Hearing Officer's Guide, pp. 168-69 (citation omitted).

To the extent a witness's testimony differs from his or her Board affidavit, the Hearing Officer "may weigh the witness' testimony at the hearing against the prehearing statement" for purposes of determining credibility. Id., p. 150. In this case, unit employees gave board statements in response to the questions asked by the investigator. Neither counsel for the Union nor the Employer were present when the employees' gave their respective statements, and therefore do not know the scope of the discussions between the investigator and witness. That the Board investigator may not have delved as far into the facts as counsel at the hearing in no way impacts the credibility of the witnesses. As the Board has explained, Kentucky General, Inc., 324 NLRB 1077, 1083 (1997) (quoting Redway Carriers, 274 NLRB 1359, 1371 (1985)):

> Given the nature of the preliminary investigation, allegations that a witness gave prior contradictory testimony in his affidavit or that the affidavit is a more reliable indication of the truth than the witness' testimony at the hearing should be weighed carefully and with due regard to the context in which the prior statement was made. For example, when a witness testifies to facts which are contained in his investigatory affidavit, a finding of contradictory testimony, i.e., impeachment by

> omission ordinarily is not warranted unless the context of the affidavit indicates a probability that the facts would have been included in the narrative if they were true. Additionally, due consideration must be given for the fact that in the present case certain words or phrases meant one thing to one witness and a different thing to another.

Where the Board reverses credibility determinations, it is typically when testimony has been credited over more reliable documentary evidence. Sutton Realty Co., 336 NLRB 405, 407 (2001) (testimony regarding hiring dates contrary to payroll records); Granite Construction Co., 330 NLRB 205, 208 fn. 11 (1999) (letter more credible than inconsistent testimony); Royal Motor Sales, 329 NLRB 760, 762 fn. 10 (1999)(evidence of written proposal more credible than testimony regarding impasse status). That is not the case here, where the credibility determinations concern only what was said by the parties to various one-on-one conversations. Due to the nature of one-on-one communications, the Hearing Officer should be given deference on credibility findings. Over the course of the five-day Hearing, the Hearing Officer was able to "evaluate the inherent probability of events in assessing consistency or the truthfulness of the witness," thus allowing her to "discredit a witness in part and credit a witness in part." Moreover, the Employer's reliance on the "do's and don'ts" list in an attempt to establish that it supervisors could not have made statements on the "don't" list is facially flawed and unsupported by the record (ER. Brief, pp. 9-10). It is one thing to tell supervisors not to make threats; quite another for individual supervisors to determine whether what they are saying is a threat under Board law.

In other cases, credibility determinations were reversed where the ALJ or hearing officer "misstated or confused certain of the relevant record evidence and testimony[.]" Humes Electric, Inc., 263 NLRB 1238, 1238 (1982). The Employer has not and cannot identify any confusion or inconsistency in the record in this case. There simply is not any documentary or objective evidence

that mandates a conclusion that one party's version of the conversations is more credible than the other's. Accordingly, the Hearing Officer's credibility determinations should be sustained.

1. The Hearing Officer's credibility determinations regarding the conversation between Striegel and Matykowski should be sustained.

Based on the record and her explanation, the Hearing Officer's credibility determination as to the conversation between Don Striegel and Tina Matykowski should be sustained. The Employer attacks Striegel's credibility due to his testimony regarding some daily meetings attended by Tim Armstrong (ER. Brief, p. 11). However, the Hearing Officer thoroughly explained why she discounted that isolated incident (Report, fn. 105), and explained why she found Matykowski's denial that she said there would be big changes if the Union won less credible (Report pp. 78-80). The Hearing Officer reasonably relied on Matykowski's supervisory status and her demeanor on the stand, as well as the fact that Striegel was testifying against his pecuniary interests and his demeanor (Report, p. 79). Nothing in the record establishes by a preponderance of the evidence that the Hearing Officer's determination was based on an incorrect or confused understanding of the record evidence. Accordingly, the Hearing Officer's credibility determination as to the conversation between Matykowski and Striegel should be sustained.

2. The Hearing Officer's credibility determinations regarding the conversations between Schultz and Maldonado should be sustained.

Similarly, the Hearing Officers' credibility determinations regarding the conversations between Brady Schultz and Otto Maldonado should also be sustained. The Hearing Officer weighed the respective interests of Maldonado (a supervisor without Section 7 rights) and Schultz (an employee testifying against his interest in maintaining employment), and concluded that neither should be credited wholesale over the other (Report, p. 87). In arguing that Maldonado should be

credited fully over Schultz, the Employer fails to acknowledge the inherent bias Maldonado has as a supervisor, or that testifying against interest supports Schultz's credibility (ER. Brief, pp. 17-21). In light of Maldonado's inherent bias, the Hearing Officer found some of his testimony incredible because it "sounds like something contrived to be exculpatory" and "calculated." (Report, p. 88, n. 112). This determination is consistent with the record and highlights the Hearing Officer's thoroughness in analyzing the witnesses.

The Hearing Officer's determinations should be sustained because, as she noted, neither witness demonstrated complete recollection of whether statements were made in their first or second conversation (Report, p. 87, n. 108). In its claim that Schultz's testimony it not credible, the Employer fails to acknowledge the Hearing Officer's findings that Maldonado's testimony was at times confusing and therefore not reliable (Report, pp. 87, n 110, 88, n. 116). It simply would not be reasonable to credit one witness wholesale over another when both were found to have imperfect memory.[5] Moreover, for each discrete statement or aspect of their conversations, the Hearing Officer explained the basis for her crediting of one witness over the other, noting any inconsistencies in their testimony (Report, pp. 87-90). Indeed, the Hearing Officer basis many findings of facts while relying on competing witnesses when making her conclusions.

Hearing Officers are admonished to "keep in mind that not every inconsistency or vague response necessarily warrants discrediting that witness or that one does not have to discredit all of a witness's testimony." NLRB Hearing Officer Guide, pp. 168-69. That is precisely what the

[5]Similarly, it does not follow that one witness is credible because the other is not. It is common for courts, ALJ's and hearing officers to find neither witness credible.

Hearing Officer did in this case. However, the Employer conveniently glosses over this fact in its Exceptions.

As the Hearing Officer further explained, to the extent the Employer argues that Schultz's testimony was inconsistent with his Board affidavit, the Employer failed to make that clear on the record (Report, p. 90, n. 124). NLRB Hearing Officer's Guide, p. 150 ("Normally, the portion of the affidavit that is inconsistent with the witnesses' testimony should be read into the record."); Maryland State Teachers Assoc., 344 NLRB 819, 819 fn. 2 (2005) (only evidence of statement was Board affidavit, which was not read into record, so could not be considered). Even if there was inconsistency between the Board affidavit and his testimony, the Hearing Officer properly weighed it against his testimony, as required by the Hearing Officer's Guide, p. 150 (Report, p. 91, n. 126). See also, Kentucky General, 324 NLRB at 1083. Likewise, testimony in response to leading questions is but a factor in weighing credibility, not the be all and end all that the Employer demands. In this case, the leading questions were limited in use to jog the witness's memory (hardly "flagrant," as the Employer contends), not to elicit a string of yes or no answers. There is probative value in testimony elicited through such questions, and the Hearing Officer weighed it appropriately. Accordingly, the record supports the Hearing Officer's credibility determinations as to the conversations between Schultz and Maldonado.

3. The Hearing Officer's credibility determinations regarding the conversations between Powers, Cichella and O'Donnell should be sustained.

The Employer also argues that its supervisors and managers, Tony Cichella and Dave O'Donnell, should be credited wholesale over the Union's witness, Bob Powers (ER. Brief, pp. 27-30, 36-40). As stated, *supra*, there is no shortage of detail in the Hearing Officer's report for the

basis for each discrete credibility determination, including weighing omissions in Power's Board statement in assessing his credibility (Report, pp. 53-56, 62-64). The bulk of the Employer's argument simply concerns discrepancies between Power's Board statement and his testimony (ER. Brief, pp. 27-29). Consistent with the directive in the Hearing Officer's Guide (p. 150), the Hearing Officer properly weighed omissions and discrepancies between Power's testimony and Board statement in making her credibility determinations (Report, pp. 54-55, n. 78, n. 80; p. 64, n. 88). See also, Kentucky General, 324 NLRB at 1083. The Employer has not established that the Hearing Officer misstated or confused relevant evidence which calls into question her credibility determinations. Accordingly, the Hearing Officer's credibility determinations should be sustained.

B. The Hearing Officer correctly found that the Employer engaged in objectionable conduct that warrants a new election (Response to Exception Nos. 1-3, 17-19, 24-27, 35, 39-42, 49-51, 53-55, 59-73, 75).

Based on the Hearing Officer's findings of fact, she correctly found that the Employer engaged in objectionable conduct that interfered with its employees' free choice, and which mandates that the election be set aside pending the outcome after the challenged ballots are opened and counted. Accordingly, the Employer's Exceptions (No.'s 1-3, 17-19, 24-27, 35, 39-42, 49-51, 53-55, 59-73, 75), should be overruled.

In General Shoe Corp. , 77 NLRB 124, 127 (1948), the Board first stated:

> In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.

The Board further held that Section 8(c) did not apply to representation cases, and that conduct which was not an unfair labor practice may still preclude a fair election. Id. Nevertheless, conduct which violates Section 8(a)(1) interferes with employees' Section 7 rights in an election unless it is "so minimal or isolated that it is virtually impossible to conclude that the misconduct could have affected the election results." IRIS U.S.A., Inc., 336 NLRB 1013, 1013 (2001) (citation and internal quotations omitted). In considering objections to an election, the Board objectively considers "whether the conduct of a party to an election has the tendency to interfere with the employees' freedom of choice." Hopkins Nursing Care Center, 309 NLRB 958, 958 (1992) (citations omitted).

Even if RathGibson's conduct did not violate Section 8(a)(1) of the Act (which the Hearing Officer did not decide), it still precluded the unit employees from exercising their Section 7 rights, and warrants setting aside the election. As explained in Phillips Chrysler Plymouth, 304 NLRB 16, 16 (1991) (citation omitted):

> In deciding whether the employees could freely and fairly exercise their choice in the election, the Board evaluates the following factors: (1) the number of incidents of misconduct; (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 date; (5) the degree of persistence of the misconduct 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 in canceling out the effect 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.

Here, the conduct discussed, *infra,* consists of sufficient actions that undermine the possibility of conducting a fair election, includes several hallmark violations (threats of closure, job loss, and futility), was directed at sufficient employees to affect the results, was unquestionably proximate to the election, was not offset by misconduct by Local 139, and is all clearly attributable to the

misconduct of RathGibson. Moreover, the final vote was exceedingly close, with the Union receiving only a one (1) vote advantage (60 to 59) (pending the results of the challenged ballots). Assuming the three challenged ballots which will be opened are for the Employer, the difference would be two votes in favor of no representation (62 against, 60 for). As described more fully, *infra*, the Employer developed a strategy shortly after receiving the Union's Petition and sought to interfere with the April 2, 2009 election, disrupting the laboratory conditions and having an impact on the outcome of the election.

Additionally, RathGibson's conduct is not protected by Section 8(c), which states, 29 U.S.C. § 158(c):

> The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form shall not constitute or be evidence of an unfair labor practice under any of the provisions of the subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

The standard for determining whether an Employer's statement is protected by Section 8(c) was set forth in NLRB v. Gissel Packing Co., Inc., 395 U.S. 575, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969). The analysis of the Employer's statements "must take into account the economic dependence of the employees on their Employer, the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." Id. at 617. As the Supreme Court explained, an Employer's statements, id. at 618-19:

> . . . . must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat

> of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.

"Absent the necessary objective facts, employer predictions of adverse consequences arising from unionization are not protected by Section 8(c); rather, they constitute threats that violate Section 8(a)(1)." Homer D. Bronson Company, 349 NLRB 512, 513 (2007), enfd., 184 LRRM 2213 (2nd Cir. 2008). Presently, the Employer has failed to offer any reason to overturn the Hearing Officer's findings and conclusions.

1. The Hearing Officer correctly found that during the critical period the Employer threatened the bargaining unit members with, *inter alia*, closure or relocation of the business and replacing existing employees if they voted for Local 139.

Two of Local 139's Objections, sustained by the Hearing Officer, specifically deal with threats made by RathGibson, including (Bd. Ex. 1(c)):

> **Objections 1**: The Employer Sought to Interfere and Coerce the Employees in the Exercise of Their Section 7 Rights By Threatening Employees With Closure or Relocation of the Business, as well as Replacing Existing Employees If the Employees Voted For Local 139 in the Election.
>
> **Objection 6**: The Employer Sought to Interfere and Coerce the Employees in the Exercise of Their Section 7 Rights Through Other Threats or Actions During the Critical Period.

The Hearing Officer correctly found that the Employer, through its supervisors and agents, made specific threats to individual employees, including threats of plant closure and other threats of adverse action (some specified, some not). Accordingly, the Employer's exceptions to the Hearing Officer's conclusions should be overruled (Exception Nos: 1-3, 17-19, 24, 25, 27, 35, 39, 40, 42, 49-51, 53-55, 59, 61-73, 75).

Threats made by supervisors and agents are attributable to the Employer. Sysco Food Services of Cleveland, Inc., 347 NLRB 1024, 1034 n. 23 (2006). The threats made by several RathGibson supervisors and agents, although made to only one employee at a time, were made to several unit employees, some of whom disseminated the threats to other unit employees. Crown Bolt, Inc., 343 NLRB 776, 779 (2004). As the results of the election are exceedingly close (either 60 to 59 in favor of the Union, or 62 to 60 against the Union), the number of individuals aware of the Employer's unlawful threats are sufficient to have effected the results.

Moreover, the Employer did not repudiate the objectionable conduct. The Employer correctly identifies the standard for repudiation, that "the repudiation must be timely, unambiguous, and specific in nature to the illegal conduct; it must contain assurances to employees that, in the future, the employer will not interfere with their Section 7 rights; there must be adequate publication to the employees involved; and the employer cannot engage in other proscribed conduct." Cintas Corporation, 353 NLRB No. 81, slip op., p. 18 (January 31, 2009). The Employer effectively concedes that the Passavant standards were not met, arguing instead that the law should be changed to find repudiation when an employer somehow takes action directed at a threat it is not aware of (ER. Brief, pp. 25-26). The Employer's position is illogical and without merit. First, one cannot logically repudiate something of which one is not aware. Second, the Employer's theory would give employers a free pass to have their supervisors threaten employees in isolated conversations, so long as the employer sends out a letter or holds a captive meeting making statements consistent with what the law allows. Such a position would reward an employer's willful ignorance as to what its supervisors are saying. Third, RathGibson gave its supervisors minimal guidance and told them to go forth and covert the masses. It cannot now claim that it should not be held responsible for when

its supervisors failed to abide by the "do's and don'ts," by threatening and unlawfully interrogating the employees to whom they were directed to talk.

Looking at conduct that has been found to be objectionable and/or a violation of the Act, it is beyond dispute that the threat of layoffs is a violation of Section 8(a)(1) and (3), and destroys laboratory conditions. Evergreen America Corp. , 348 NLRB 178, 181 (2006), enfd., 531 F. 3d 321 (4th Cir. 2008) (citation omitted). Threats to close the business if a Union wins an election is objectionable conduct warranting invalidation of an election. Daikichi Corp. , 335 NLRB 622, 623-24 (2001). In Daikichi, the Board found that a supervisor's statement to unit employees that the employer "might" close if the union won the election violated Section 8(a)(1) and constituted objectionable conduct warranting setting aside the election. Id. The employer "failed to cite any objective facts that would tend to show that if the employees voted to unionize, the Respondent would no longer be able to compete and might have to close for reasons beyond its control." Id. at 624. The Board noted that the employer "presented no evidence that the Union made any demands at all, let alone demands that, if met, would have the 'demonstrably probable consequence' of driving the Respondent out of business." Id. (citing, *inter alia*, AP Automotive Systems, 333 NLRB 581, 581(2001) ("employer engaged in objectionable conduct by conveying to employees that union, if selected, would inevitably make exorbitant demands leading to plant closure"). An employer statement predicting a plant closure "phrased . . . as a possibility rather than a certainty" does not nullify the threat or its impact on the election. Id.

Of course, an employer need not make a specific threat of reprisal to interfere with an election; unspecified threats of reprisal can violate the Act and constitute objectionable conduct. Valerie Manor, Inc., 351 NLRB 1306, 1318 (2007). Statements that an employer "would do

anything necessary to keep the union out[,]" and written comments "nothing to lose? No, . . . you have everything to lose!" and "don't be a kamikaze . . . Vote NO Union," were found to be threats of unspecified reprisals if the Union won, and therefore objectionable conduct. Id. at 1318, 1321, 1322. As detailed below, the Hearing Officer's conclusions and recommendations that the Employer made several threats of futility, plant closing, and other reprisals, that such threats interfered with employees' Section 7 rights, and that a new election, if necessary, be conducted should be sustained.

(a) Conversations between Maldonado and Schultz

The Hearing Officer correctly found that Maldonado made objectionable threats of futility and/or reprisal by stating that Schultz "was crazy" to think they would keep their current wages if the Union won (Report, pp. 91, 93-94). Tawas Industries, Inc., 336 NLRB 318, 321 (2001). As the Hearing Officer explained (Report, p. 91):

> [w]ith this statement, Maldonado is not describing how bargaining is a give and take process; rather, he is telling Schultz that if the Union wins the election, the employees, in the negotiation process, will not be able to even achieve their current level of wages, and he is implying that their wages will be reduced. Maldonado, thus, is conveying both that unionization will be futile and that there will be reprisals, lower wages, if the employees select the Union as their bargaining representative.

Moreover, the Hearing Officer correctly found a heightened coercive quality to Maldonado's statement given recent statements by the CEO that the Employer did not plan to reduce wages (Report, p. 91, n. 125, p. 94, n. 128). "In this context, Maldonado's statement conveys that although the Employer is not planning on reducing wages, the Employer is prepared to retaliate against employees by reducing their wages if they do vote the Union in." (Report, p. 91, n. 125). Maldonado's statements, particularly when viewed in the context of the organizing campaign (which includes the distribution of six (6) letters to the bargaining unit members and four (4) mandatory

meetings), are objectionable and contributed to the overall atmosphere of fear in the bargaining unit that tainted the laboratory conditions and interfered with the April 2, 2009 election. As such, the Employer's Exception should be denied.

(b) Conversations between Cichella and Powers

The Hearing Officer correctly found that Cichella's statements that the Employer would "run a company like this into the ground to keep the union out" was an objectionable threat to stop operating, "akin to a threat of plant closure." (Report, p. 56). Cichella's statement was a clear threat that the company would stop operating if the Union won the election, leaving the employees out of work. Daikichi, 335 NLRB at 623-24. Cichella's statement further made it clear that the company would cease operating in retaliation for the election, and provided no objective facts as to why the company would have to take such action. Instead, Cichella's comments amount to pure speculation. Likewise, the Hearing Officer's conclusion that Cichella threatened loss of seniority was an objectionable threat of retaliation should be sustained (Report, p. 57). Fred Wilkinson Associates., 297 NLRB 737, 737 (1990); Unifirst, 335 NLRB, 706, 707 (2001). Without a basis to set aside the Hearing Officer's conclusions, the Employer's Exceptions should be denied.

(c) Conversation between O'Donnell and Powers

The Hearing Officer correctly found that O'Donnell's "affirmation of Cichella's comment that the Employer would not work with the Union if the Union got in, as well as his comments about how the Employer's poor solvency situation would not allow the Employer to do things any differently," were threats of futility (Report, p. 64). Fred Wilkinson Associates, 297 NLRB at 737. Likewise, the Hearing Officer is correct that O'Donnell's statement that Anaker "was very upset so I would watch out for him" was an objectionable threat of unspecified reprisal (Report, p. 64).

O'Donnell's comment made clear that RathGibson knew it could not retaliate against Union supporters, but that there was still cause for supporters to be wary of unspecified retaliatory action. Valerie Manor, 351 NLRB at 1318.

Moreover, the record supports the Hearing Officer's conclusion that O'Donnell's threat of futility was disseminated to at least two other unit members (Report, p. 65). There is no minimum level of dissemination required for objectionable conduct beyond the requirement that it potentially affect the results of the election. Double J Services, Inc., 180 L.R.R.M. 1156, 1160 (2006) ("In light of the fact that a swing of only two votes in the election would change the outcome, Terris' dissemination of Jones' objectionable conduct to just one other employee, Morrison, is sufficient to warrant setting aside the election."). As there is a one or two vote difference pending the results of the challenged ballots, Power's dissemination is more than sufficient to affect the election, particularly in light of the conduct directed at two other unit employees. RathGibson has offered no basis to overturn the Hearing Officer's conclusions.

(d) Conversation between Matykowski and Striegel

The Hearing Officer's conclusion that Matykowski threatened Striegel with unspecified reprisals should be sustained (Report, p. 80). As the Hearing Officer explained, "[b]y saying there will be *big* changes *if* things go the *wrong way*, Matykowski is clearly implying that there will be substantial and negative changes in terms and conditions of employment if the Union prevails in the election." (Report, p. 80) (emphasis in the original). The Hearing Officer was correct to reject the Employer's argument that Matykowski was merely telling employees that their relationship would change, because "[s]he is telling Striegel that there will be negative and significant consequences for employees if the employees do not vote the way the Employer wants them to–against the Union."

(Report, p. 80). Given the Employer's overall conduct, the Hearing Officer is correct that Matykowski's comments contained implicit threats of unspecified action in the event of a Union victory. Valerie Manor, 351 NLRB at 1318.

2. The Hearing Officer correctly found that the Employer disrupted the laboratory conditions by interrogating employees during the critical period regarding how they would vote in the April 2, 2009 election.

Local 139's Objection No. 4 specifically reads (Bd. Ex. 1(c)):

> **Objection 4**: The Employer Sought to Interfere and Coerce the Employees in the Exercise of Their Section 7 Rights By Interrogating Employees During the Critical Period Regarding How They Were Going to Vote in the Election.

The Employer's Exceptions (No.'s 1, 2, 3, 26, 41, 60, 75), should be overruled because the Hearing Officer correctly found that at least two unit employees were interrogated about their position on Local 139 and/or the election by different managers and supervisors of RathGibson during the critical period. Indeed, the Supervisors had been instructed and encouraged to do so by Anacker and Fortin at the four "Supervisors Meetings" conducted during the campaign.

As established in the record, at these meetings, the supervisors were told that they "should engage the employees on the shop floor." (Tr. 1188, lines 1-4; 1408-09, lines 1-5). According to Vice President and General Manager Fortin, the "RathGibson Strategy Team" asked the supervisors "to engage the employees in the factory and answer their questions regarding the union matters and the information that the company was providing relative to the union, which came from the letters and all the employee meetings and the speeches." (Tr. 1344, line 25; Tr. 1345, lines 1-5). At the Hearing, Fortin conceded that he (Tr. 1399, lines 14-22):

> [A]sked all of my production supervisors including Otto Maldonado to be specifically my eyes and ears to the direct labor employees out in the factory, and I've asked my production supervisors including Otto Maldonado to specifically become

> very directly engaged with the employees and in this particular topic surrounding the union campaign to answer their questions about the information that we were providing in the letters, the speeches, and the all-employee meetings and to open up communication channels with their employees.

Additionally, even according to Supervisor Cichella, during these supervisory meetings, they discussed having the "supervisors going out and talking to individual employees about the union election" and to "get the information out there." (Tr. 1336, line 21). Cichella acknowledged not only speaking to Bob Powers, but also to everyone on his shift about the union (Tr. 330-31, 1338). Similarly, Supervisor Maldonado testified that Fortin and Anacker instructed him and the other supervisors "to go and talk to employees" and specifically to "ask them about the election and any questions they had." (Tr. 1188, lines 1-4). The Employer, therefore, initiated these conversations. It is undisputed that Maldonado approached Schultz, Henry and Patchak on several occasions and talked to them about the election (Tr. 1189-92). Particularly when considered in the context of the Employer's other objectionable conduct (along with the various mailings and mandatory meetings), the interrogations themselves are objectionable and support setting aside the election.

An employer's interrogation of unit employees may constitute objectionable conduct when such "interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by the Act." Millard Refrigerated Servs., 345 NLRB 1143, 1146 (2005). In such instances, the Board will consider the "totality of the circumstances," including: "whether the interrogated employee is an open and active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, the place and method of the interrogation, the truthfulness of the reply, whether a valid purpose for the interrogation was communicated to the employee, and whether the employee was given assurances against reprisals."

Id. Interrogations "need not be accompanied by an express threat of reprisal or promise of benefit to constitute objectionable conduct." Id. In Millard, the Board reversed the decision of the hearing officer, and found the interrogations to be coercive because they were done in the context of other coercive conduct, "made by supervisors with broad authority over their crews" and because "there is no evidence that the interrogated employees were open and active union supporters." Id. at 1146-47. Therefore, the Board found that "in conjunction with the other conduct that we find objectionable, the supervisors' actions in this case could have interfered with employee free choice to such an extent that it materially affected the outcome of the election." Id. at 1147.

The Hearing Officer's finding that O'Donnell interrogated Powers is supported by the record and should be sustained. As the Hearing Officer found, O'Donnell's questioning of Powers was "negative in tone and conveys hostility toward the Union and implied hostility toward Union supporters." (Report, p. 65). The coercive nature of the questioning was highlighted by the fact that Powers told O'Donnell "that he was going to vote no." (Report, p. 65). Moreover, the interrogation occurred in the context of threats of futility and reprisals (Report, p. 65). Millard Refrigerated Services, Inc., 345 NLRB 1143,1146 (2005).

The Hearing Officer also correctly found that Striegel was interrogated by his supervisor, Matykowski. The Hearing Officer noted that Matykowski's question whether Striegel had questions about a letter recently sent by the Employer would not have been objectionable but for "the threat of unspecified reprisals [] made in *conjunction* with the inquiry." (Report, p. 81) (emphasis in the original). The Hearing Officer explained: "given that Striegel was not an open supporter, and that the threat directly related to how Striegel should vote, and that it was uttered in combination with the inquiry about the letter, the interrogation was coercive and constituted objectionable conduct."

(Report, p. 81). Moreover, this incident was an objectionable interrogation because the interrogation was conducted one-on-one by Striegel's immediate supervisor and there were no assurances against reprisal. Millard Refrigerated, 345 NLRB at 1146.

When these incidents of interrogation are considered in the context of the Employer's conduct throughout the critical period, they fully support a finding that the laboratory conditions were tainted by the Employer's objectionable conduct, including the interrogations. Although the content of what each supervisor said is different, the overall theme remained identical. The supervisors received their marching orders to talk to the bargaining unit employees and question them about the Union. Accordingly, the Hearing Officer correctly found the Employer's conduct to be sufficiently egregious to set aside the election and schedule a new one, once the laboratory conditions have been reestablished.

3. The Hearing Officer correctly found that the Employer's objectionable conduct tended to interfere with the employees' free and fair choice in the election.

While only the threats made by O'Donnell to Powers were disseminated to other unit employees, dissemination of each threat is not required to warrant setting aside the election. Rather, the Board will consider, Phillips Chrysler Plymouth, 304 NLRB 16, 16 (1991) (citation omitted):

> the following factors: (1) the number of incidents of misconduct; (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 date; (5) the degree of persistence of the misconduct 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 in canceling out the effect 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.

Moreover, the Board has held that dissemination to just one person warrants a new election where the number of affected members is sufficient to affect the results. Double J Services, Inc., 180 L.R.R.M. 1156, 1160 (2006) ("In light of the fact that a swing of only two votes in the election would change the outcome, Terris' dissemination of Jones' objectionable conduct to just one other employee, Morrison, is sufficient to warrant setting aside the election.").

The Hearing Officer correctly applied these standard in concluding that the Employer's conduct did tend to interfere with the election (Report, pp. 115-17). Three unit employees were directly threatened with plant closure, futility and reprisals (Report, pp. 100-01, 116). One of those threats (of futility and unspecified reprisals) was disseminated to two other unit employees (Report, p. 117). Moreover, two of those unit employees were coercively interrogated as to their sympathies in the election (Report, pp. 100, 116). Given the closeness of the election (initially, 60 to 59 in favor of the Union; presumably now 62 to 60 against), coercive actions by the Employer affecting five unit employees is clearly sufficient to affect the election. The Hearing Officer properly relied on several cases noting the weight given to the closeness of the election, including Cambridge Tool & Manufacturing Co., 316 NLRB 716, 716 (1995), in which the Board found objectionable conduct directed at three individuals sufficient to set aside the election where two votes separated the results.

C. The Hearing Officer Properly Denied RathGibson's Motion to Supplement the Record with the Company's Bankruptcy Petition (Response to Exception No. 4).

On July 14, 2009, three weeks after filing its Post-Hearing Brief and nearly six (6) weeks after the Hearing Officer officially closed the record, RathGibson sought to reopen the record to supplement its arguments by filing a Motion to Supplement the Record with the Company's

Bankruptcy Petition. As with most of its arguments, the Employer claimed, without any support, in paragraph 5 of its Motion:

> That the Employer is now in Bankruptcy reconfirms that all of the statements by its managers and supervisors about the Company's dire financial situation and its ongoing fight for survival were factual, objective, true, and are not objectionable.

However, the Employer filing a voluntary Chapter 11 Bankruptcy Petition was not relevant to the supervisory or clerical status of the remaining challenged ballots. Moreover, a voluntary Chapter 11 Bankruptcy Petition, filed six months after Local 139 filed its petition and several months after numerous supervisors made illegal threats and interrogations to bargaining unit members, is similarly not relevant.

As the Union argued in its Response to Employer's Motion, the mere filing of a Chapter 11 Petition for reorganization does not prove anything, let alone "that all of the statements by its managers and supervisors about the Company's dire financial situation and its ongoing fight for survival were factual, objective, true, and are not objectionable." The Employer failed to offer any evidence during the five days of hearing that any of the managers or supervisors had knowledge that the Employer considered filing for Chapter 11 protection when they made the numerous, illegal threats and interrogations in February and March 2009. Indeed, no evidence exists which would establish that any of the bargaining unit members were ever told of any bankruptcy possibilities.

The Hearing Officer properly refused to consider any evidence after the close of the hearing and denied the Motion. In a footnote in her Report, the Hearing Officer held (Report, p. 4, fn. 2):

> I deny the Employer's motion. The Chapter 11 filing did not occur during the critical period and is not relevant to the matters to be decided in this case.

The Employer has offered no new reason in its Exception which would require supplementing the record with the Chapter 11 filings–especially in light of the credibility objections upon which the Employer predominantly basis its Exceptions. As stated in the Union's Post-Hearing Brief, what matters in the Hearing Officer's determination of the objections is the statements made by the Employer's agents at the time of the organizing campaign. The Employer misses the point–the Hearing Officer did not deny the request simply because the filing occurred after the close of the hearing, but rather, because it is not relevant to her determination. The Employer has failed to offer any basis to have the record supplemented. Therefore, the Board should affirm the Hearing Officer's decision to deny the Employer's Motion to Supplement the Record.

D. The Hearing Officer's Failure to Specifically Find Robert Jon Dibble's Ballot Should be Counted and Failure to Make an Affirmative Finding that Dibble is not a Statutory Supervisor is a Moot Point (Response to Exception Nos. 5, 6 and 74).

Finally, in Exception Nos. 5, 6 and 74, the Employer complains that the Hearing Officer failed affirmatively to find and conclude that Robert John Dibble ("Dibble") is not a statutory supervisor and should specifically direct that Dibble's ballot be opened and counted. Although the Union agrees that Dibble's ballot should be opened and counted (as contemplated by the Hearing Officer's Report, even though not specifically stated), the reason is not because of the Union's failure to meet its burden of proof, but rather because the Union withdrew its challenge to Dibble's ballot before the Hearing Officer issued her Report.

When the Union filed its timely challenges, Local 139 challenged, *inter alia*, the ballots of Al Kilcoyne, Timothy Armstrong and Dibble on the basis that they were supervisors as defined by the Act. The Employer subsequently agreed by letter dated April 29, 2009 that the challenge to the

ballot of Al Kilcoyne should be sustained, leaving two challenged ballots on the basis of supervisory status which the Union admittedly had the burden to establish in the underlying proceedings. On June 17, 2009, prior to the issuance of the Hearing Officer's Report, the Union sent the Regional Director a letter withdrawing the challenge to Dibble's ballot. The Regional Director granted the request. For purposes of resolving any questions concerning representation in the underlying RC matter, Dibble is eligible to vote and his ballot should be opened and counted. Accordingly, no need existed for the Hearing Officer to render a finding since the issue of Dibble's supervisory status was no longer in front of the Hearing Officer. Indeed, just as the Hearing Officer had no basis to make an affirmative finding that Al Kilcoyne is a Supervisor and, therefore, not eligible to vote, (because in the Employer's April 29, 2009 letter, the Employer agreed that the challenge to Kilcoyne's ballot should be sustained), the Hearing Officer is not required to make an affirmative finding that Dibble is not a supervisor. From a procedural standpoint, Kilcoyne's ballot will not be opened and Dibble's ballot should be opened and counted. However, the Union does not believe that it would be appropriate for the Board to make an affirmative finding that Dibble is not a statutory supervisor since that particular issue was not in front of the Hearing Officer at the time she issued her Report.

III. CONCLUSION

Based on the evidence elicited at the hearing and the Board law discussed, *supra*, Local 139 respectfully requests that the Board reject the Employer's Exceptions in their entirety, and instead, adopt the Hearing Officer's Report on Challenged Ballots and Objections to Conduct Affecting the Results of the Election, set aside the results of the election conducted on April 2, 2009, and schedule a new election.

Respectfully submitted,

/s/ Pasquale A. Fioretto
One of the Attorneys for International Union of Operating Engineers Local 139, AFL-CIO

Pasquale A. Fioretto
Patrick N. Ryan
BAUM SIGMAN AUERBACH & NEUMAN, LTD.
200 West Adams Street, Suite 2200
Chicago, IL 60606
Telephone: (312) 236-4316
Facsimile: (312) 236-0241

Date: August 28, 2009
I:\139\RathGibson\response to exceptions.wpd

CERTIFICATE OF SERVICE

The undersigned, an attorney of record, hereby certifies that on or before the hour of 4:30 p.m. this 31st day of August 2009, he electronically filed **Answering Brief to Exceptions on Behalf of Petitioner, International Union of Operating Engineers, Local 139** and caused said document to be served on the following via electronic mail:

Mr. Irving E. Gottschalk
Regional Director
Ms. Ms. Anita C. O'Neil
Hearing Officer
National Labor Relations Board, Region 30
310 West Wisconsin Avenue, Suite 700
Milwaukee, WI 53203-2211

Mr. Anthony Dombrow
Mr. Lawrence Weiner
Laner Muchin Dombrow, Becker, Levin and Tominberg, Ltd.
515 North State Street, Suite 2800
Chicago, Illinois 60654

/s/ Pasquale A. Fioretto

Pasquale A. Fioretto
Patrick N. Ryan
BAUM SIGMAN AUERBACH & NEUMAN, LTD.
200 West Adams Street, Suite 2200
Chicago, IL 60606
Telephone: (312) 236-4316
Facsimile: (312) 236-0241
I:\139\RathGibson\response to exceptions.wpd