Madison Square Garden CT, LLC *and* Council 4, AFSCME, AFL–CIO, **Petitioner.** Case 34–RC–1812

June 28, 2007

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND LIEBMAN

SUPPLEMENTAL DECISION ON REVIEW AND DIRECTION OF SECOND ELECTION

On July 14, 2005, the Regional Direction for Region 34 issued a Second Supplemental Decision on Remand, in which he overruled objections raised by the Employer to the conduct of a May 31, 2000 election that the Petitioner won by a vote of 27 to 22.[1] The Regional Director found that the supervisors' prounion conduct, including their solicitation of union authorization cards, did not constitute objectionable conduct under *Harborside Health Care, Inc.*, 343 NLRB 906 (2004). The Regional Director also concluded that, assuming the supervisory prounion conduct was objectionable, the conduct did not materially affect the election outcome. Therefore, the Regional Director recommended overruling the Employer's objections and certifying the Petitioner as the bargaining representative of the Employer's event staff employees.

Thereafter, pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's Second Supplemental Decision on Remand. The Employer argued, inter alia, that the supervisory solicitation of authorization cards was inherently coercive under *Harborside*, supra, and *Chinese Daily News*, 344 NLRB 1071 (2005), there were no mitigating circumstances, the supervisors' prounion conduct reasonably tended to interfere with employees' free choice in the election, and the supervisors' behavior materially affected the election's outcome.[2] On September 27, 2005, the Board[3] granted the Employer's request for review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the entire record, we find that the supervisors' prounion behavior was objectionable conduct warranting a second election. See, e.g., *SNE Enterprises*, 348 NLRB 1041 (2006). We therefore set aside the results of the election and order the Regional Director to conduct a second election.[4]

Facts

Overview of the Employer's Civic Center Operations

The Employer is a management company that brings live entertainment to the Civic Center in Hartford, Connecticut. Jeff LaRue is responsible for the Civic Center's overall operations and supervision. Diane Uccello, manager of security and guest relations, reports directly to LaRue. Front House Supervisor Juan Ortiz reports to Uccello. The 12 supervisors[5]—Ron Brown, Mickey Colon, Rosa Dinoto, Diane Dowdell, Robert Glass, Juliet Little, Jim Martinelli, Sharon Shea, Elaine Thibault, Robin Tofil, Al Victor, and Skip Ward—report to Ortiz. Bargaining unit event staff employees, in turn, are subordinate to the supervisors. Event staff employees are responsible for such tasks as collecting patrons' tickets, maintaining clear aisles during events, and helping patrons find their seats. Supervisors oversee the work performed by event staff employees.

Ortiz assigns the supervisors to designated areas in the Civic Center on an event-by-event basis. Prior to the start of an event, supervisors and event staff employees attend a meeting in "section 101" of the arena. At this meeting, Ortiz assigns each event staff employee to work in a particular supervisor's section for the given event.

[1] The procedural history of this case dates back several years. On March 15, 2001, the Board denied the Employer's request for review of the Regional Director's decision finding that 12 individuals whose status was in question were not statutory supervisors but were statutory guards. *Madison Square Garden*, 333 NLRB 643 (2001). Subsequently, following the Regional Director's issuance of a complaint alleging that the Employer refused to bargain with the Petitioner, the Board issued an unpublished order on April 12, 2002, remanding the case to the Regional Director for an examination of supervisory status pursuant to *NLRB v. Kentucky River*, 532 U.S. 706 (2001), and *NLRB v. Quinnipiac College,* 256 F.3d 68 (2d Cir. 2001), and to consider the Employer's objections in light of *ITT Lighting Fixtures v. NLRB*, 658 F.2d 934 (2d Cir. 1981), and *Nathan Katz Realty v. NLRB*, 251 F.3d 981 (D.C. Cir. 2001). In a supplemental decision on Remand, the Regional Director found that the 12 disputed individuals were statutory supervisors based solely on their authority to discipline employees, but concluded that the supervisors did not engage in objectionable prounion conduct. The Employer requested review of the Regional Director's findings. The Board issued an order remanding the matter in light of its decisions in *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004), and *SNE Enterprises,* 344 NLRB 673 (2005). The Regional Director subsequently issued a Second Supplemental Decision on Remand, which is presently before us.

[2] The Employer further contended that the Regional Director erred in failing to find that the supervisors "assign" and "responsibly direct" employees within the meaning of Sec. 2(11). In light of our decision, we find it unnecessary to pass on this issue.

[3] Chairman Battista and Member Schaumber; Member Liebman dissenting.

[4] We find no merit in the Employer's argument that the Board should require a new showing of interest on the part of the Petitioner. The Employer points to no case law in support of its contention that a new showing of interest is justified; rather, the Employer cites *Harborside*, supra, and *Chinese Daily*, supra, cases where the Board directed a second election and did not demand a new showing of interest. See also *River City Elevator Co.,* 339 NLRB 616, 617 (2003) (refusing to require a new showing of interest following a finding of objectionable union conduct).

[5] There is no request for review of the Regional Director's finding that the individuals are statutory supervisors.

Supervisors have authority to complete "Event Employee Counseling/Disciplinary Notice" forms when event staff employees commit disciplinary infractions. The top of the form contains four boxes indicating the type of discipline involved—verbal reprimand, written reprimand, suspension, or investigative layoff—and supervisors choose the appropriate box based on the infraction. Supervisors need not obtain prior authorization before issuing these forms. After filling out and signing a form, the supervisor gives the form either to Uccello or to Ortiz. Uccello or Ortiz then reviews the form and, if necessary, investigates the incident further. Next, Uccello or Ortiz signs the form and forwards it to the Employer's human resources department for placement in the employee's file. The issuance of a certain number of disciplinary notices within a 6-month period may impact an event staff employee's employment status.

Supervisory Solicitation of Union Authorization Cards

In late March 2000,[6] four supervisors—Colon, Dinoto, Little, and Victor—and seven event staff employees signed a flyer stating that they were committed to forming a union and would be coming around during the following week to discuss the Petitioner. The flyer was addressed to event staff employees, and a union authorization card (with the Petitioner's address and pre-paid postage) was attached to the flyer. The flyer articulated what the signatories hoped to accomplish through unionization, encouraged employees to speak to the signatories if employees needed more information before signing an authorization card, and stated that signed cards could be mailed to the Petitioner or handed to the signatories. On March 23, Brown handed the flyer to event staff employee Carmen Vega.

Additionally, during the course of the Petitioner's organizing campaign, Brown handed out an authorization card to an event staff employee on three other occasions in "section 101" after event staffers complained to Brown about working conditions. Brown told the employees to sign the cards if they wanted to alter the working conditions about which they complained. Also, Dinoto handed a union authorization card to an event staff employee in the presence of another employee during the Petitioner's organizing campaign. Later that same day, Colon asked the employee Dinoto had solicited if that employee had already received an authorization card. The employee replied that he had, and Colon said nothing further.

[6] All dates hereafter refer to 2000, unless otherwise noted.

Supervisory solicitation of authorization cards ended when the petition was filed on April 5, 2000, 8 weeks prior to the election date.[7]

Other Prounion Supervisory Conduct

On more than one occasion during the 2- to 3-week period prior to the election, Brown told event staff employees in the break room that they could obtain better benefits if they joined the Petitioner. On one such instance, Brown informed employees that he had spoken with unionized ticket takers at Madison Square Garden in New York City who told him that they enjoyed a higher rate of pay and were allowed to leave after all event tickets had been collected. Brown stated that if the employees voted for the Petitioner, they too might enjoy similar benefits.

During the same time period, Dinoto, Victor, and Colon also spoke with employees in the employee break room about the benefits of joining a union. In addition, Little spoke with employees throughout the organizing campaign about the better working conditions that she believed would come by way of the Petitioner forcing management to negotiate.

An event staff employee observed Victor, on one occasion during the organizing campaign, tear down a poster that had been put on the wall in the Civic Center by the Employer and that described the Employer's position on the limits of a union's ability to make changes in the workplace. The event staff employee testified that, after ripping the poster off the wall, Victor said, "we don't need . . . piece of shit off this wall." [sic]

Little, along with groups of event staff employees, met with a representative of the Petitioner at a restaurant located in the Civic Center on at least one occasion prior to the election. The Petitioner's representative sometimes bought drinks for the group, and Little and others reciprocated. There is no evidence as to whether Little said anything in any meeting with the Petitioner's representative.

A week prior to the election, the Petitioner held a meeting in a conference room at a hotel across the street from the Civic Center. About 40 to 45 of the Employer's employees, including supervisors Brown, Colon, Dinoto, and Little, attended this meeting; Little had encouraged employees to attend the meeting. Two representatives of the Petitioner sat at a table facing the audience. All four

[7] The Employer maintains that the supervisors solicited cards in the postpetition period. However, there is little evidence regarding postpetition supervisory solicitations. A single employee testified that she saw Brown "with some cards" on an unspecified date "about the same week as the election," but did not state that she saw Brown hand the cards to event staff employees or distribute the cards in any other manner.

supervisors sat with event staff employees in the audience. The meeting focused on the benefits that employees could get from joining the Petitioner.

At some point during the meeting, Colon and Little, who were seated near the front of the audience, stood up and spoke to the employees about the benefits that employees could receive by joining the Petitioner. Colon and Little pointed out particular benefits that the employees were not receiving from the Employer, and stated that such benefits could be gained only through collective-bargaining negotiations between the Petitioner and the Employer. Colon and Little urged employees to vote for the Petitioner as a means of obtaining those benefits. Little specifically emphasized that voting for the Petitioner was the only way the employees could obtain benefits that they did not then enjoy. One employee testified that the meeting was "very heated" and that she felt it was "just like bullying."

The Employer's Response to the Organizing Campaign

The Employer stipulated that it openly opposed the Petitioner's efforts to organize its employees. Specifically, General Manager Brooks met with event staff employees to talk about the Petitioner's campaign "a number" of times before the start of an event in the weeks prior to the election to discuss the Employer's opposition to the Petitioner. Two or three of these meetings occurred in the weeks leading up to the election, and one such meeting took place the night before the election. During each meeting, Brooks told employees that the Employer did not think the employees needed a union, that he was available to talk to them if they had any problems, that he saw many advantages in not having a union, and that in his opinion it was beneficial for the employees to deal directly with the Employer. It is not clear how many event staff employees attended these meetings, or how long the meetings lasted.

On May 10, 3 weeks before the scheduled May 31 election, Brooks held a meeting with the supervisors. Brooks advised the group that the Employer considered them to be statutory supervisors and thereby management representatives, and that the Employer accordingly expected them to support the Employer's opposition to the Petitioner or at least remain neutral. Brooks then stated that supervisors who agreed to support the Employer's position or to remain neutral could leave the meeting. Five supervisors—Brown, Colon, Dinoto, Little, and Victor—did not leave the meeting in response to Brook's invitation. Little told Brooks that she could not support the Employer's position regarding the Petitioner's campaign, and the others nodded their heads in agreement with Little. The meeting then ended.

Sometime prior to the election but after the May 10 meeting, Brown, Colon, Dinoto, Little, and Victor signed and distributed to employees a flyer entitled "Just Ask Us." The flyer was addressed to "All Event Staff" and stated:

> We, the undersigned Event Staff supervisors, take offense at the recent assertions by Mr. Brooks about our thoughts on the subject of unionization. We are all adults, and are fully capable of speaking for ourselves. Regardless of whether we support the Union organizing campaign, we think it is wrong for Mr. Brooks to speak for us. If you want to know what we think, JUST ASK US!

Analysis

Background

It is well settled that "[r]epresentation elections are not lightly set aside." *NLRB v. Hood Furniture Mfg. Co.,* 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted), rehearing denied 946 F.2d 893 (5th Cir. 1991) (table). In assessing whether to set aside an election, the Board looks to all of the facts and circumstances to determine whether the atmosphere was so tainted as to warrant such action. See, e.g., *General Shoe Corp.,* 77 NLRB 124 (1948), enfd. 192 F.2d 504 (6th Cir. 1951), cert. denied 343 U.S. 904 (1952). In making that determination on the basis of a party's conduct, the root question is whether the conduct had a reasonable tendency to interfere with employees' free choice to such an extent that it materially affected the results of the election. See, e.g., *Wright Memorial Hospital v. NLRB*, 771 F.2d 400, 404 (8th Cir. 1985).

When the conduct at issue is partisan supervisory activity during a union organizational effort, the root question remains the same. Id. The Board has long recognized, when a supervisor engages in prounion activity, that the "continuing relationship" between the supervisor and an employee creates a possibility that an employee could be "coerce[d] into supporting the union out of fear of future retaliation by a union-oriented supervisor." *Sheraton Motor Inn,* 194 NLRB 733, 734 (1971).

Historically, the Board has evaluated this possibility by examining the level of the supervisor's authority and the degree of the supervisor's prounion activity, regardless of whether the supervisor overtly indicated that he would use his supervisory authority to punish employees who did not support the union or reward those who did. See id. at 734; *Turner's Express, Inc.,* 189 NLRB 106, 106–107 (1971).

The Board's Harborside Decision

In *Harborside,* the Board reaffirmed this longstanding precedent holding that, in order to set aside an election on the basis of objectionable prounion supervisory conduct, it is not necessary to find that a supervisor made explicit threats or promises. In doing so, the Board disavowed language used in some relatively recent Board cases that suggested that an explicit threat or promise was required to establish objectionable prounion supervisory conduct; language which resulted in the case's remand to the Board from the Sixth Circuit. See *Harborside Healthcare, Inc. v. NLRB*, 230 F.3d 206, 214 (6th Cir. 2000). The Board also pointed out, however, that it was "by no means suggesting that supervisory prounion speech, without more, is objectionable." See *Harborside,* 343 NLRB at 911.

The *Harborside* Board took the opportunity of the remand to rearticulate Board law and formulated a two step inquiry to apply in cases involving objections to an election based on prounion supervisory conduct:

> 1) Whether the supervisor's prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election.
>
> This inquiry includes: a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct and b) an examination of the nature, extent, and context of the conduct in question.
>
> 2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct

Id. at 909.

While largely reaffirming established Board precedent, in examining the nature, extent, and context of the supervisors' conduct under the first prong of the *Harborside* standard, the Board held with respect to the supervisory solicitation of authorization cards that "absent mitigating circumstances" such solicitations have "an inherent tendency to interfere with the employee's freedom to choose to sign a card or not" and thus "may be objectionable." Id. at 911. In so holding, the Board reversed its prior law concerning supervisory solicitations of authorization cards.[8]

The Board reasoned that a supervisory solicitation of an authorization card may be objectionable because it gives the supervisor the opportunity to determine those employees who support the union and, "by the process of eliminating nonsigners, who likely [do] not." Id.[9] The Board continued, "[w]hen a supervisor asks that a card be signed, the employee will reasonably be concerned that the 'right' response will be viewed with favor, and a 'wrong' response with disfavor." Id. The Board analogized the prounion supervisory solicitation of authorization cards to a supervisor's solicitation of a signature on an antiunion petition, conduct which also may be objectionable. Id.[10] The Board pointed to the similar false portrait of union support that supervisor-obtained cards may provide and the potential for employees to reasonably sense an obligation to support the union after signing a card. Id. at 912; see also *Chinese Daily News,* 344 NLRB 1071, 1072 (applying *Harborside* to find a supervisor's solicitation of authorization cards inherently coercive where the supervisor distributed cards to eight subordinates and personally watched while seven of the subordinates signed the cards).

Consistent with its longstanding exception to the *Ideal Electric* rule,[11] the Board concluded that the effects of the coercion from the solicitation may linger during the critical period between the filing of the petition and the election, even if the solicitation occurred prior to the commencement of the critical period. *Harborside*, supra at 912 (citations omitted).

In *SNE Enterprises*, 348 NLRB 1041,[12] the Board, applying *Harborside*, addressed whether certain mitigating circumstances were sufficient to negate the inherently

[8] *Millsboro Nursing & Rehabilitation Center*, 327 NLRB 879, 880 (1999) (the Board held that "solicitation of authorization cards by supervisors is not objectionable where 'nothing in the words, deeds, or atmosphere of a supervisor's request for authorization cards contains the seeds of potential reprisal, punishment or intimidation'")(citation omitted).

[9] As its post-*Harborside* precedent has shown, the Board has found various supervisory prounion speech—short of solicitations—to be unobjectionable. See, e.g., *SNE Enterprises,* 348 NLRB 1041, 1041–1042 (2006) (finding leads' prounion comments to be unobjectionable and setting aside election solely on the basis of leads' solicitations); *Northeast Iowa Telephone Co.*, 346 NLRB 465, 466–467 (2006) (finding that managers' prounion conduct, coupled with their limited supervisory authority, did not interfere with employee free choice).

[10] Such solicitations require an employee to make an observable choice, demonstrating support for or rejection of the union. In this regard, they are akin to a supervisor soliciting an individual employee to wear antiunion paraphernalia, which the Board has found to be objectionable. See, e.g., *Circuit City Stores, Inc.*, 324 NLRB 147 (1997); *Barton Nelson, Inc.*, 318 NLRB 712 (1995). Similarly, a supervisor unlawfully interrogating employees about their support for the union—which also demands such an observable choice—has been held to warrant a second election. *See, e.g., Pacific Beach Hotel*, 342 NLRB 372, 373 (2004).

[11] 134 NLRB 1275 (1961).

[12] Chairman Battista and Member Schaumber; Member Liebman dissenting.

coercive effect of supervisory card solicitations on an election that the union won by a very narrow margin. In *SNE*, first-line supervisory leads solicited authorization cards from subordinates whom they assigned work and responsibly directed on a daily basis. The Board majority found the mitigating circumstances were insufficient. While it recognized that the supervisors may not have had the authority to hire, fire, transfer, or promote, they were first-line supervisors with the authority to assign and direct work as well as to issue written warnings, authority the Board considered to have a broad impact on the employees' daily work lives. The Board discounted the fact that the supervisory solicitations ceased when the election petition was filed, noting that solicitations outside the critical period may still impact an election. Likewise, the Board disagreed that the coerciveness of the solicitations was mitigated because the supervisors did not explicitly or implicitly threaten reprisal or promise benefits, and they were allegedly "collegial" in their solicitations.[13] Id., slip op. at 4. It pointed out that "[a] supervisor's statements may be coercive regardless of his friendship with an employee and regardless of whether the remark was well intended." *SNE*, supra, slip op. at 4, quoting *Washington Fruit & Produce Co.,* 343 NLRB 1215, 1216 fn. 9 (2004). The Board further determined that although the employer distributed antiunion campaign literature advising employees that they were not obligated to vote for the union, such literature neither amounted to a "disavowal" of the supervisors' conduct nor "lessened in any significant way the continuing pressure an employee would reasonably feel to vote consistent with an earlier stated intention." Id., slip op. at 3–4.

The Decision of the Regional Director

In the case at bar, the Regional Director found that the only potentially objectionable conduct engaged in by the supervisors was their solicitations of employees. Viewing the totality of the supervisors' partisan activity, the Regional Director determined that "[n]one of the prounion conduct engaged in by the five supervisors . . . even remotely rises to the level engaged in by the supervisor in *Harborside,*" outside the solicitations, the supervisors "did nothing more than actively urge employees to support the [Petitioner]." The Regional Director further found that mitigating circumstances rendered the card solicitations unobjectionable because: the supervisors' 2(11) authority was limited in nature and extent; the distribution and solicitation of authorization cards ceased 8 weeks prior to the election; and none of the prounion supervisory conduct was "harassing," "pressuring," or "badgering" as was the behavior the Board found objectionable in *Harborside*.

Application of the Law to the Facts of this Case

For the reasons more fully set forth below and considering, as we must, all the facts and circumstances present, we find that the election must be set aside. Examining the first prong of the *Harborside* test, we hold that the supervisors' prounion conduct reasonably tended to coerce and interfere with employee free choice.

Under the first prong, we first consider the nature and degree of supervisory authority possessed by the supervisors who engaged in the prounion conduct. Contrary to the Regional Director's conclusion, the supervisors hold meaningful authority over event staff employees. The supervisors are the event staff employees' first line of supervision. As discussed in *Harborside*, a first-line supervisor has the most day-to-day contact with the employees and can broadly impact employees' daily working lives.[14] *Harborside*, supra, slip op. at 5. The supervisors have the authority to discipline, without obtaining prior authorization. If they observe an employee commit a disciplinary infraction, they may issue them an Event Employee Counseling/Disciplinary Notice, which becomes part of the employees' personnel files and can affect employees' job status. As such, the supervisors have substantial authority over an event staff employee's job status. See *Wilshire at Lakewood*, 345 NLRB 1050 (2005), reversed and remanded sub.nom. *Jochims v. NLRB*, 480 F.3d 1161 (D.C. Cir. 2007). (finding Sec. 2(11) supervisory authority where the individual in question had discretionary ability to write up employee infractions and place such writeups in the employee's disciplinary file, and the writeups constituted the first step in the employer's disciplinary process). Event staff employees could reasonably fear that responding negatively to the supervisors' prounion conduct, including the solicitations, would make them more vulnerable to a disciplinary write-up. See *Harborside*, supra at 911 (when a supervisor asks an employee to sign an authorization card, the employee may reasonably be concerned that a "right" response will be viewed with favor and a "wrong" response will be viewed with disfavor).

Our dissenting colleague seeks to minimize the authority of the supervisors. However, the authority to discipline is a powerful one. While the supervisors' superi-

[13] The former is not the standard to be applied; the latter is vague and can be given a variety of meanings that do not necessarily lessen the coercive impact of the solicitations.

[14] In its decision remanding *Harborside* to the Board the Sixth Circuit emphasized this point. It referred to its decision in *Grancare Inc. v. NLRB,* 137 F.3d 372 (1998), and its observation that "while charge nurses may be low level, they are the 'ranking authority' present for much of the time." *Harborside Healthcare v. NLRB*, 230 F.3d 206, 211.

ors can review the supervisor's action, the ability to initiate the disciplinary process and ultimately impact an employee's job status remains a significant one. Here, the supervisors clearly possessed, at a minimum, supervisory authority to effectively recommend discipline. An employee would reasonably be reluctant to act contrary to the wishes of a supervisor who wielded that authority.

We next consider the nature, extent, and context of the supervisors' prounion conduct, which necessarily includes consideration of the manner in which the supervisors engaged in partisan activity.

Beginning with the solicitations themselves, it is undisputed that supervisors solicited union authorization cards from their direct subordinates, conduct deemed inherently coercive absent mitigating circumstances. *Chinese Daily News*, supra, slip op. at 2. While the evidence does not establish that the supervisors actually collected the signed authorization cards from the employees, as was the case in *Chinese Daily News*, the initial campaign flyer provided that signed cards could be handed to one of the flyer's signatories, four of whom were supervisors. Furthermore, it is not unreasonable to infer, given the extent and intensity of the supervisors' prounion conduct, which is discussed below, that Brown would have had access to the cards and would have known which employees signed authorization cards and which did not. At a minimum, employees had reason to believe that whether they signed a card would become known to their supervisor.

That the card solicitations, which began in March, ceased at the time the petition was filed on April 5, does not lessen the effect of the solicitations. As the Board majority noted in *SNE Enterprises,* because the solicitation primarily occurs before a petition is filed, it is typical for solicitations to end a month or more prior to an election. *SNE Enterprises*, supra, slip op. at 3, citing *Harborside,* 343 NLRB at 912 (supervisory solicitation of authorization cards is inherently coercive, even if it occurs outside the critical period). Notwithstanding our dissenting colleague's contentions, Board law is clear that the passage of a mere 2 months between supervisory card solicitations and an election does not render coerced employees suddenly noncoerced. *SNE Enterprises,* supra, slip op. at 3 (the lapse of 3 months between the card solicitations and the election did not mitigate the inherent coercion).

Moreover, the supervisory card solicitations were followed by the supervisors' continued campaigning for the Petitioner right up until the May 31 election, thereby ensuring that event staff employees were aware of the continued partisan interest of their supervisors throughout the course of the organizing campaign.

Finally, appeals that acknowledge and respect employees' Section 7 rights are far less likely to have a tendency to coerce or interfere with employee free choice than insistent conduct engaged in with displays of hostility toward a contrary message. The latter fairly describes the supervisory conduct in the instant case.

When in *Harborside*, supra at 914, the Board said that "an employer's antiunion campaign may mitigate the coercive effect of impermissible prounion supervisory authority," the Board was referring to situations where "higher management . . . takes timely and effective steps to disavow [the conduct]" such as to alleviate its coercive impact. Here—as in *SNE Enterprises*—no such action took place.

Brooks' statements at the pre-event meetings on the reasons why the Employer did not think a union was necessary were unlikely to "lessen . . . the continuing pressure an employee would reasonably feel to vote consistent with their earlier stated intention." *SNE Enterprises*, supra, slip op. at 3–4. Indeed, the supervisors made it clear in the "Just Ask Us" flyer that they disagreed with management and intended to present their prounion views to employees. In any event, it is unclear how many event staff members attended the pre-event meetings in question; whatever mitigating effect Brooks' statements may have had is reduced by the distinct possibility that some employees may not have been present for any of the meetings where Brooks discussed the organizing campaign. Testimony indicating that the Employer hung on a wall of the Civic Center a poster articulating the Employer's views on the limitations of unionization is similarly insufficient in establishing the requisite mitigation, as the content of the poster is unclear and the record does not demonstrate how many employees may have seen the poster.

Our dissenting colleague says that employees "likely knew" that the Employer objected to the prounion conduct of some supervisors. We disagree. The employees knew that the Employer disagreed with the prounion views expressed by these supervisors. This is a far cry from disavowing the supervisors' prounion conduct, including the card solicitations, so as to assure employees that they would be protected by the Employer if they exercised their Section 7 right to resist or act inconsistently with the supervisors' prounion appeals.

Having determined that the supervisors' prounion conduct was coercive under the first prong of the *Harborside* test, we now examine the second prong of the analysis and find that the prounion supervisory activities involved here materially impacted the election's outcome. The parties agree that the conduct at issue had the potential to affect a critical number of employees, given that the Peti-

tioner prevailed by only 5 votes, 27 to 22. There is no dispute that at least five employees were solicited by supervisors to sign authorization cards. Although the card solicitation occurred 8 weeks prior to the election, as noted above, supervisory prounion conduct continued to take place right up to the election date in the form of the "Just Ask Us" flyer," supervisor participation at the Petitioner's meeting, conversations with employees, and Victor tearing down the Employer's antiunion poster. The lingering effect of the solicitations therefore continued up to the election date. Because the supervisory card solicitations alone were inherently coercive, contrary to our dissenting colleague's assertions there need not be evidence of threats or promises in order to establish that the effect of the conduct tended to linger.

Conclusion

We find that the supervisors' solicitation of union authorization cards constituted objectionable coercive conduct and materially affected the outcome of the election. Accordingly, we reverse the Regional Director's decision to overrule the Employer's objections, and we direct a second election.

[Direction of Second Election omitted from publication.]

MEMBER LIEBMAN, dissenting.

In this case, the majority again shows that it will apply its new rule on supervisory solicitation of union authorization cards as a per se rule. I dissent here essentially for the same reasons that I dissented in a similar, recent case involving supervisors' solicitation of union-authorization cards, unaccompanied by threats or promises of any kind. *SNE Enterprises,* 348 NLRB 1041, 1045 (2006) (dissent). First, *Harborside Healthcare*, 343 NLRB 906 (2004), which held that such card solicitations were inherently coercive absent mitigating circumstances, was wrongly decided. Second, *Harborside* should not be applied retroactively to conduct that which was lawful at the time it occurred. Finally, even applying the *Harborside* standard, the card solicitations involved in this case are not objectionable, because mitigating circumstances tempered any possible impact of the solicitations. I limit my observations here to the issue of mitigating circumstances.

I.

At issue is the union authorization card solicitation by the Employer's supervisors, whom the Regional Director found to meet the Act's supervisory definition based solely on their authority to discipline event staff employees. No supervisor ever explicitly or implicitly threatened or made promises to employees in relation to the card solicitations or other prounion conduct, and supervisors neither collected the cards nor specifically requested the return of signed cards. Supervisory card solicitations ceased on April 5, 2000, about 2 months before the election.

The Employer openly opposed the Petitioner's organizing campaign. General Manager Martin Brooks conducted meetings with event staff employees on "a number" of occasions in the weeks leading up to the election. He repeatedly expressed the Employer's opposition to event staff employee unionization, advised employees that he did not feel there was a need for a union, stated that there were advantages to not having a union, and affirmed that employees were free to speak with him if they had any problems.

Employees also likely knew that the Employer objected to the prounion conduct of certain supervisors. Following a meeting between Brooks and the supervisors where Brooks mandated that the supervisors either oppose the Petitioner's campaign or remain neutral, several supervisors signed a flyer addressed to employees and entitled "Just Ask Us." In this flyer, the supervisors stated that they "[took] offense at the recent assertions by Mr. Brooks about [their] thoughts on the subject of unionization." The same individuals who signed the "Just Ask Us" flyer had previously signed a prounion flyer to which an authorization card was attached.

II.

Even assuming—consistent with *Harborside*'s overruling of well-established precedent—that supervisory card solicitation is inherently coercive even where the Employer openly opposes unionization, the evidence of mitigating factors nevertheless merits upholding the election in this case.

The first mitigating factor here is the limited authority that the supervisors exert over event staff employees. While supervisors can issue "Event Employee Counseling/Discipline" notices, either Manager of Security and Guest Relations Diane Uccello or Front House Supervisor Juan Ortiz reviews any such notice and can investigate the relevant incident. Moreover, there is only scant evidence about the impact of these notices on an employee's job status. Uccello testified vaguely that the issuance of an unspecified number of notices within a 6-month period affects event staff employees' jobs, but provided no further information about this alleged progressive discipline system.

A second mitigating factor is the time lapse of about 8 weeks between the card solicitations and the election. This approximately 2-month timespan afforded an ample cooling-off period. The supervisory prounion conduct that occurred once the solicitations had ceased consisted

mostly of conversations and meetings with employees and was notably noncoercive.

A third mitigating factor is the general lack of harassing incidents, as compared with the facts of *Harborside*. The *Harborside* Board characterized the supervisory conduct there as "badgering" and "harassing," pointing out that such behavior ultimately became the basis of an employee grievance. 343 NLRB at 913. The record here reveals no "badgering" or "harassing" conduct on the part of the supervisors. Indeed, the fact that the supervisors did not even collect signed cards or request their return underscores the mild character of the solicitations.

Fourth, the Employer's professed antiunion stance also serves as a mitigating factor. On several occasions, Brooks explicitly informed employees that the Employer opposed the organizing campaign and that employees should approach him if they had any problems. Given that the pre-event meetings took place on a number of different dates, and included the event staff employees who were scheduled to work the given day's event, it is probable that a large percentage of employees attended at least one of these meetings. The majority asserts that Brooks' assertions at the pre-event meetings were "unlikely" to lessen pressure on employees to support the union, but offers no rationale to explain why the statements of an upper-level management representative would have no meaningful effect on employee sentiments. Employees were also made aware that the Employer objected to prounion supervisory conduct, by way of the "Just Ask Us" flyer, described earlier. That incident surely demonstrates that the Employer and the prounion supervisors were at odds over the issue of unionization.

Finally, there is no sound basis for the majority's insistence that the card solicitations had a lingering effect on employees. The initial solicitations were not accompanied by threats or promises, and prounion supervisors engaged in no subsequent objectionable conduct, whether predicated on the card signing or not.

III.

As this case illustrates, the *Harborside* decision—particularly in its rigid application by the majority—continues to have harmful effects, resulting in the setting aside of elections where there is little evidence that employees' freedom of choice was genuinely impaired. Accordingly, I dissent.