Nor-Cal Ready Mix, Inc., d/b/a Antioch Rock & Ready Mix *and* Machinists District Lodge 190, Local Lodge 1173, International Association of Machinists and Aerospace Workers, AFL–CIO *and* Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL–CIO, Joint-Petitioners. Cases 32–RC–4443, 32–RC–4448

March 30, 1999

DECISION AND DIRECTION

BY MEMBERS FOX, LIEBMAN, AND BRAME

The National Labor Relations Board, by a three-member panel, has considered objections and determinative challenges to ballots cast in an election held June 11, 1998, and the Regional Director's and hearing officer's reports (attached as an appendix) recommending disposition of them.[1] The election was conducted pursuant to a Stipulated Election Aagreement. On June 12, 1998, the Regional Director served on the parties a revised tally of ballots in Cases 32–RC–4443 and 32–RC–4448, which showed 2 for and 1 against the Joint-Petitioners, with 3 challenged ballots, a sufficient number to affect the results, and no void ballots.[2]

The Board has reviewed the Regional Director's report in light of the exceptions and brief and has adopted the Regional Director's findings and recommendations.[3] The Board has also reviewed the attached hearing officer's report in light of the exceptions and briefs, and has decided, contrary to the recommendation of the hearing officer, to overrule the Employer's Objections 1 and 2.[4]

On June 11, 1998,[5] separate elections were held in two units of the Employer's employees: (1) in Cases 32–RC–4443 and 32–RC–4448, Machinists District Lodge 190 and Operating Engineers Local 3, as Joint-Petitioners, sought to represent a unit of mechanics, lubrication employees, parts runners, equipment operators and batch plant operators (the mechanics unit); and (2) in Case 32–RC–4449, Teamsters Local 315 sought to represent a unit of drivers, plant yardmen, and warehousemen (the drivers unit). Employer Objections 1 and 2 assert that the results of both elections must be set aside because of threats of physical and other harm by the Unions, their agents, and supporters.

The hearing officer found that, prior to the election, mixer driver Thomas Pease threatened fellow drivers Gonzalo Ramos, Wanda Covarrubias, and Ron McCoy with various reprisals if they did not vote for the "Union." Following is a summary of the pertinent evidence on these threats, which are described at greater length in the hearing officer's report.

The hearing officer found that, a day or two before the election, Pease, by his words to Ramos, conveyed the message in an angry and threatening manner that Ramos had better vote for the Petitioner or there would be serious consequences. The hearing officer found, however, that Pease's threat to Ramos was not disseminated to any employee in either unit until after the election, when Ramos told McCoy about the incident.

The hearing officer also found that, while at a bar a few weeks before the election, Pease asked Covarrubias four or five times how she was going to vote, and she said she was not going to tell him. Pease told Covarrubias at least four times that he knew people's landlords and could have them removed from their homes and that he was "a person that gets things done," while pointing his finger at Covarrubias. The hearing officer noted that subsequent to the encounter in the bar Covarrubias confronted Pease at a union meeting held on May 21 at the Red Caboose tavern and complained about his threats to her. There were about 20–40 individuals present, including employees of the Employer, employees of other employers, and officials of the Petitioner and Joint-Petitioners. However, there is no evidence that any of the individuals were employees in the mechanics unit. The hearing officer found that Covarrubias had consumed six alcoholic drinks prior to her appearance at the May 21 meeting, that she had two more at the meeting, that she was "completely out of control" there, and that there was no indication that anyone at the meeting gave any credence to her statements or, because of her condition, took her seriously.

[1] This case was originally consolidated with Case 32–RC–4449. In an unpublished Order dated November 30, 1998, the Board severed and remanded that case for the purpose of holding a second election.

[2] The original tally of ballots, served on the parties at the conclusion of the election in Cases 32–RC–4443 and 32–RC–4448, showed 2 for and 1 against the Joint-Petitioners, with 2 challenged ballots, a sufficient number to affect the results, and one void ballot.

[3] The Regional Director recommended that Employer Objection 3 be overruled. That objection asserted that the Board agent who conducted the election interfered with its results by altering the tally of ballots and changing a clearly void ballot to a challenged ballot. We agree with the Regional Director's disposition of Employer Objection 3. Even assuming, arguendo, that the Joint-Petitioners' protest to the Board agent that the ballot was void was procedurally defective, there is no evidence or contention that the Employer was prejudiced thereby. Further, in light of the hearing officer's determination that the disputed ballot was void, the matter is moot.

Contrary to his colleagues, Member Brame would have directed a hearing with respect to Employer Objection 3. The Joint-Petitioners did not challenge the void ballot determination during the count and did not file written objections concerning this matter after the election. In Member Brame's view, there is at least a question whether the Joint-Petitioners' challenge to the void ballot determination was properly before the Board in those circumstances. In light of the subsequent, undisputed, finding by the hearing officer that the ballot is void, however, Member Brame agrees that this procedural issue is effectively moot.

[4] In the absence of exceptions, we adopt pro forma the hearing officer's determination that the challenges to the ballots cast by Sam Cast and Pam Bailey be overruled and that the ballot originally declared void by the Board agent who conducted the election be declared a void ballot.

[5] All dates hereafter are in 1998.

The hearing officer additionally found that, in the days after the meeting, employees approached Covarrubias about what she had said, and she then discussed with about seven other named employees the confrontation she had had with Pease. Although the hearing officer made no finding concerning the identity of the persons with whom Covarrubias spoke, in her testimony at the hearing Covarrubias identified those with whom she spoke as individuals named "Whitie," "Tammy," "Dennis," "Lee," "Ringo," "Jimmy," and "Sammy."[6]

The hearing officer also found that, a day or two after the May 21 union meeting, Pease told McCoy that he was going to have his niece "kick Wanda [Covarrubias]'s f—king ass" because of the statements she made about him at the union meeting. In addition, the hearing officer found that 2 or 3 days before the election, Pease told McCoy in a loud and angry voice that he had heard McCoy and some of the other drivers were planning to vote against the union, that he hoped it was not true, that he should let everyone know that it would not be a good idea, that they had better have a life insurance policy, and that the Petitioner in Case 32–RC–4449 had made him a "special rep." When McCoy asked what Pease meant about having a life insurance policy, Pease replied that it should cover accidental death, that the nion knew how to take care of people who were against it, they were not afraid to kill if necessary, and that they had a person on contract. Pease also told McCoy that he had connections with the Board and could find out how McCoy voted, and that he had a family and friends and it would not be worth "fucking around with." The hearing officer found that four or five drivers heard the conversation in which Pease threatened McCoy 2 or 3 days before the election. The hearing officer did not find that Pease's other statements to McCoy were disseminated.

The hearing officer found that Pease was not an agent of the Unions involved in these elections.[7] Applying the third-party misconduct standard, the hearing officer nonetheless found that Pease's threats constituted conduct which was "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel,* 270 NLRB 802, 803 (1984). In this regard, the hearing officer apparently relied upon the serious nature of the threats, the proximity to the election, and the evidence of dissemination, cited above, as well as the vote margin in the two elections.

No party excepted to the hearing officer's conclusion that the election in Case 32–RC–4449 (the drivers unit) should be set aside on the basis of the objectionable conduct set forth above. The Board adopted the hearing officer's recommendation in this regard, in the absence of exceptions, and has remanded that case to the Regional Director for the purpose of holding a second election. With regard to the election in Cases 32–RC–4443 and 32–RC–4448 (the mechanics unit), however, the Joint-Petitioners note that all of the objectionable conduct cited by the Employer involved employees in the drivers unit and that the hearing officer made no finding of dissemination to any eligible voter in the mechanics unit. Accordingly, the Joint-Petitioners assert that Pease's threats provide no basis for setting aside the election in the mechanics unit. We find merit to these exceptions.

"Representation elections are not lightly set aside." *NLRB v. Hood Furniture Mfg. Co.,* 941 F.2d 325, 328 (5th Cir. 1991) (citing *NLRB v. Monroe Auto Equipment Co.,* 470 F.2d 1329, 1333 (5th Cir. 1972), cert. denied 412 U.S. 928 (1973)). Thus, "[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *NLRB v. Hood Furniture Mfg. Co.,* supra, 941 F.2d at 328. Accordingly, "the burden of proof on parties seeking to have a Board-supervised election set aside is a 'heavy one.'" *Kux Mfg. Co. v. NLRB,* 890 F.2d 804, 808 (6 th Cir. 1989) (quoting *Harlan #4 Coal Co. v. NLRB,* 490 F.2d 117, 120 (6th Cir.), cert. denied 416 U.S. 986 (1974). See also *Chicago Metallic Corp.,* 273 NLRB 1677, 1704 fn. 163 (1985), quoting *Valley Rock Products v. NLRB,* 590 F.2d 300, 302 (9th Cir. 1979). The objecting party must show, inter alia, that the conduct in question affected employees in the voting unit. *Avante at Boca Raton, Inc.,* 323 NLRB 555, 560 (1997) (overruling employer's objections where no evidence unit employees knew of alleged coercive incident). And the objecting party must establish dissemination of statements allegedly interfering with preelection conditions; dissemination will not be presumed. *Kokomo Tube Co.,* 280 NLRB 357, 358 including fn. 9 (1986). The Employer here has not established that this election must be set aside.

As noted above, the Board conducted two separate elections at the Employer's premises on June 11 in two entirely separate units. The hearing officer's findings establish that, prior to the election, threats were made to employees in the drivers unit. However, there is no evidence or contention that any threats were made, by Pease or anyone else, to an eligible voter in the **mechanics** unit. As discussed below, there is also no evidence that the threats Pease made to employees in the **drivers** unit were disseminated within the mechanics unit. Accordingly, the hearing officer's finding that the threats affected employee free choice in that unit must be reversed.

There is no evidence or contention that Pease's threats to Ramos or McCoy were ever disseminated to any mechanics unit employee. Likewise, there is no evidence that Pease's threats to Covarrubias were disseminated to any eligible voters in the mechanics unit during the May

[6] Covarrubias testified that both Jimmy and Sammy worked in "dispatch."

[7] There are no exceptions to this finding.

21 union meeting.[8] Accordingly, there is no basis for finding that these threats had any impact on the election in the mechanics unit.

As noted above, the hearing officer found that, after the May 21 union meeting, Covarrubias discussed her confrontation with Pease with the following individuals: Whitie, Tammy, Dennis, Lee, Ringo, Jimmy, and Sammy. There is no record evidence concerning the identity of Tammy, Lee, Ringo, or Jimmy, and no party contends that they are eligible voters in the mechanics unit.[9] However, the Employer asserts that Whitie, Dennis, and Sammy are, respectively, mechanics unit employees Robert McMillan, Dennis Arnold, and Sam Cast, and that this testimony accordingly establishes dissemination of Pease's threats within the mechanics unit. We do not agree.

There is no record evidence concerning the identity of Whitie and Dennis and, in the absence of such evidence, we cannot accept the Employer's contention that these individuals are the named mechanics unit employees. While Covarrubias did identify Sammy as mechanics unit employee Sam Cast, there is no competent evidence concerning the substance of her conversation with him, and thus, no evidence that Pease's threat was disseminated in the course of this conversation. In this regard, Cast, although called as a witness in this case, was never asked if Covarrubias (or anyone else) had told him about any threats they had received, from Pease or anyone else. Likewise, Covarrubias never testified specifically that she told Cast that Pease had threatened her. Thus, at the hearing, Covarrubias was asked on direct examination if, "at any time following this second [May 21] union meeting and the confrontation at the Red Caboose . . . did you ever discuss those matters with other employees at Antioch Rock." Covarrubias answered that "several employees" approached her. She identified, inter alia, Cast as one of these individuals, but failed to specify the content of her conversations with Cast.[10] Later, on cross-examination, Covarrubias was asked the following question:

> When you were testifying on direct examination about coworkers whom you had discussed these alleged incidents with Tom Peace [sic], involving Tom Pease, you mentioned Whitie, Tammy, Dennis, Lee and dispatch; do you remember that?[11]

There is no basis for inferring that Covarrubias' brief affirmative response to this leading question establishes that she told Cast about the specific threats made by Pease which are at issue in this proceeding.

Under these circumstances, we cannot conclude that any "conversation" between Covarrubias and Cast included dissemination of Pease's alleged implicit threat to have Covarrubias evicted from her home if she did not vote union. Accordingly, we find that Pease's threats were not disseminated to any eligible voter in the mechanics unit and thus have not been shown to have had any impact on the election in the mechanics unit.

For the foregoing reasons, we find that the Employer's Objections 1 and 2 must be overruled. We shall accordingly remand Cases 32–RC–4443 and 32–RC–4448 to the Regional Director for the purpose of opening and counting the challenged ballots cast by employees Sam Cast and Pam Bailey, preparing and serving on the parties a revised tally of ballots, and issuing the appropriate certification.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 32 shall, within 14 days from the date of this Decision, open and count the ballots cast by employees Sam Cast and Pam Bailey. The Regional Director shall then prepare and serve on the parties a revised tally of ballots and issue the appropriate certification.

APPENDIX

HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON DETERMINATIVE CHALLENGED BALLOTS AND EMPLOYER'S OBJECTIONS TO THE ELECTIONS

Pursuant to a Stipulated Election Agreement in Cases 32–RC–4443 and 32–RC–4448[1] approved by the Regional Director for Region 32 on May 14, 1998, an election by secret ballot was conducted on June 11, 1998, among the employees of the Employer in the following appropriate collective-bargaining unit:

> All full-time and regular part-time mechanics, lubrication employees, parts runner, equipment operators, and batch.plant operators employed by the Employer at its Antioch and Byron, California facilities (also included are any Antioch or Byron bargaining unit employees assigned to the Employer's Rio Vista facility); excluding all drivers, sales employees, of-

[8] As noted above, the hearing officer found that Covarrubias complained about Pease's threats at the May 21 union meeting, although she also found that, in light of Covarrubias' admittedly inebriated condition, no one at that meeting "seemed to take Covarrubias' complaints about Pease seriously." In any event, there is no evidence that any mechanics unit employee was in attendance at the meeting, and thus no evidence that Pease's threats were disseminated to any eligible voter in the mechanics unit at that time.

[9] Covarrubias' testimony that Jimmy worked in dispatch is insufficient, without more, to establish that this individual was an eligible voter in the mechanics unit, and we note that the Employer makes no contention to the contrary.

[10] The Employer's attorney asked Covarrubias if she discussed her statements at the union meeting during the course of each of the post-meeting conversations. The hearing officer sustained an objection to the question and suggested that the Employer's attorney ask about each separate conversation in turn. The Employer's attorney started to do so—beginning with conversations with Tammy—but then abandoned that line of questioning.

[11] Covarrubias later identified Cast, who is in a batchman position, as one of the employees in dispatch to whom she was referring.

[1] Joint-Petitioners originally filed petitions for separate units. They later decided to combine those units into a single unit, which they now seek to represent jointly.

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

Upon conclusion of the election, a copy of the official revised tally of ballots reflecting the following results was served on each of the parties in accordance with the Rules and Regulations of the Board:[2]

Approximate number of eligible voters	6
Void ballots	0
Votes cast for Joint-Petitioner	2
Votes cast against participating laborорganization	1
Valid votes counted	3
Challenged ballots	3
Valid votes counted plus challenged ballots	6

The challenged ballots were sufficient in number to affect the results of the election. Pursuant to a Stipulated Election Agreement in Case 32–RC–4449 approved by the Regional Director for Region 32 on May 14, 1998, an election by secret ballot was also conducted on June 11, 1998, among the employees of the Employer in the following appropriate collective-bargaining unit:

> All full-time and regular part-time drivers, including ready mix, aggregate, cement, end dump, transfer, pneumatic, water truck, and flat rack drivers, plant yardmen, and warehousemen employed by the Employer at its Antioch and Byron, California facilities (also included are any Antioch or Byron bargaining unitemployees assigned to the Employer's Rio Vista, California facility); excluding all mechanics and lubrication employees, batchpersons, front-end loader operators, sales employees, office clerical employees, managerial and administrative employees, all other employees, guards, and supervisors as defined in the Act. Upon conclusion of the election, a copy of the official Tally of Ballots reflecting the following results was served on each of the parties in accordance with the Rules and Regulations of the Board:

Approximate number of eligible voters	43
Void ballots	1
Votes cast for Petitioner	20
Votes cast against participating labor organization	16
Valid votes counted	36
Challenged ballots	2
Valid votes counted plus challenged ballots	38

The challenged ballots were not sufficient in number to affect the results of the election.

The Challenged Ballots in Cases 32–RC–4443 and 32–RC–4448

The ballot of *Pam Bailey* was challenged by the Employer on the ground that she is an office clerical employee. The ballot of *Sam Cast* was challenged by Joint-Petitioners on the ground that he is a statutory supervisor. The Joint-Petitioners challenged a ballot which the Board agent conducting the election had orginally determined to be void.

[2] The Board agent who conducted the election originally determined that one ballot was void, and on June 11, 1998, served on the parties a tally of ballots. On June 12, 1998, she served on the parties a revised tally of ballots reflecting Joint-Petitioner's challenge to that ballot.

The Objections

The Employer filed the following objections to both elections:

> 1. The Unions, by their agents and supporters, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions by intimidating employees with bodily and other severe harm, including loss of homes, if they did not commit to voting for the Union, or did not vote for the Union, or in the event the Union lost the election.
>
> 2. The Unions, by their agents and supporters, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions by threatening to physically beat employees who spoke out against the Union.

In addition to the above two objections, the Employer filed the following objection to the election conducted in Cases 32–RC–4443 and 32–RC–4448:

> 3. The National Labor Relations Board, by it[s] agents and employees, interfered with the fair operation of the election process, otherwise interfered with the results of the election, and destroyed the necessary laboratory conditions by altering the tally of ballots and changing a clearly void ballot to a challenged ballot.

Acting pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the Regional Director conducted an administrative investigation of the determinative challenges and Employer's objections. On July 8, 1998, the Regional Director issued a Report and Recommendations on Challenged Ballots and Objections and Notice of Hearing. In the Report, the Regional Director recommended to the Board that Employer's Objection 3 be overruled, finding that since the alleged objectionable conduct occurred after the polls had closed, it could have had no impact on how any employee voted in the election. The Regional Director also concluded in the report that the Employer's and Joint-Petitioners challenges, as well as Objections 1 and 2, in Cases 32–RC–4443 and 32–RC–4448 raised material issues of fact and law which could best be resolved by a hearing.

On July 21, 22, and 29, 1998, a hearing was held before Hearing Officer Marilyn O'Rourke for the sole purpose of resolving the challenges and Objections 1 and 2. The hearing was conducted in accordance with the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended. All parties present at the hearing were afforded a full opportunity to be heard, to present and examine witnesses, to introduce relevant evidence, and to present oral arguments during the course of the hearing. Upon the entire record of the proceedings, I make the following findings of fact, conclusions of law, and recommendations.

The Challenged Ballots

Pam Bailey. The Employer challenged the ballot of Pam Bailey on the ground that she is an office clerical employee.[3] Joint-Petitioners contend that she is a plant clerical employee entitled to inclusion in the unit.

[3] The Employer had included Bailey on the list of eligible voters it submitted to the Regional Office.

Bailey and her supervisor, Operations Manager John Malnar, credibly testified regarding Bailey's duties and working conditions. Bailey testified that no one in management had ever told her what her job title was. Although Malnar testified that she is "basically a filing clerk" in the shop to maintain records and order parts, he stated that he was not sure she was ever given a title.

Malnar testified that he is responsible for scheduling and maintenance and repairs on plants and equipment. In addition to Bailey, Malnar supervises the mechanics. He does not supervise anyone who works outside the shop. Both Bailey and Malnar testified that Bailey works in an office in a corner of the shop where the mechanics work; no other employees work in the shop. The shop is in a separate building from the main office. Bailey testified that she spends about 45 minutes to an hour in the shop itself during her approximately 4-hour shift. Bailey and the other employees who work in the shop punch the same timeclock, which is located in her office.

Bailey testified that one of her duties at the time of the election was to maintain records on the computer. She maintains all repair orders on each of the Employer's trucks, prices and inventory stock of parts, and records on vendors.[4] She also maintains hard copy or paper files for each truck, including records required by the California Highway Patrol and U.S. Department of Transportation. Drivers submit pretrip reports to Bailey where they note any problems with the truck to which they have been assigned. The pretrip reports are given to the mechanics. Mechanics fill out repair orders, and, after the repairs are completed, submit them to Bailey for filing. When the mechanics need parts for repairs, they go to Bailey and tell her what to purchase. She then contacts vendors and orders the parts, which are usually delivered by the vendors. Bailey receives the parts and places them in the stockroom. She also checks the stockroom to see whether any of the Employer's regular stock needs replenishing.[5] Bailey delivers the original invoice and a copy of the purchase order to the accounting department in the main office building. That is the only occasion where she goes to the other building. She also keeps copies of the purchase orders and invoices in her office. Bailey maintains records on warranty repairs as well. Mechanics have access to all these records.

Malnar's testimony on Bailey's duties was in accordance with Bailey's testimony. Malnar testified that the only correspondence Bailey types is that related to the shop or to maintenance in the shop. He also testified that Bailey checks with the lead mechanic regarding any unclear maintenance records. Malnar testified that prior to hiring Bailey, he performed her duties for about 2 months.[6] Prior to that, the mechanics had done the work she now does. Malnar also testified that when Bailey, who is part time, is not present, the mechanics order parts from vendors.

The distinction between office and plant clericals is rooted in community-of-interest concepts. *Cook Composites & Polymers Co.,* 313 NLRB 1105, 1108 (1994); *Minneapolis-Moline Co.,* 85 NLRB 597, 598 (1949). Employees who perform clerical duties in close association with the production process and with production or maintenance employees are considered plant clericals and are included in the same unit as production employees. *Brown & Root. Inc.,* 314 NLRB 19, 23 (1994*); Goodman Mfg. Co.,* 58 NLRB 531, 533 (1944).

The testimony summarized above shows that Bailey is a plant clerical who should be included in the unit. Bailey and all other shop employees are supervised by Malnar, who does not supervise any office clerical employees. *Sears. Roebuck & Co.,* 222 NLRB 476, 477 (1976) (common supervision). Bailey punches the same timeclock as the other shop employees. Her work location in the shop is in a building separate from that in which office clericals work. See *ITT Lighting Fixtures,* 249 NLRB 441, 442 (1980) (plant clerical worked in office separate from office clericals), enf. denied on other grounds 658 F.2d 934 (2d Cir. 1981), cert. denied 466 U.S. 978 (1983). Bailey performs work which pertains solely to the maintenance and repair of trucks and other equipment. See *Raytee Co.,* 228 NLRB 646, 647 (1977) (employee whose responsibilities were directly concerned with unit work held to be plant clerical). Her work was previously performed by the mechanics, and some of it is currently performed by mechanics when she is not present. See *Regal Thread & Notion Co.,* 221 NLRB 610, 611 (1975). Bailey's contact with those working in the building where the main office is located is minimal; it consists only of delivering copies of invoices and purchase orders to the accounting department. See *ITT Lichting Fixtures,* supra, 249 NLRB at 442. In short, the testimony clearly shows that Bailey's community of interest is with the other employees in the shop and not with office clerical employees. Bailey's position should be included in the unit. I therefore recommend that the challenge to her ballot be overruled.[7]

Sam Cast. Joint-Petitioner challenged the ballot of Sam Cast on the basis that he is a supervisor. In support of this position, the only witness Joint-Petitioner presented was Bailey. Bailey testified that Cast works in the dispatch office, but had no knowledge of his job duties.

Cast testified for the Employer. He stated that prior to about July 1998, and since about April 1998, his job has been batchman.[8] Cast receives invoices from the dispatcher which contain the formula and amount for batched products. He enters that into a computer, operates the batch machine, and places the batched products into the trucks. Cast stated that he does not hire employees, discipline or fire employees, supervise or direct

[4] Malnar testified that the Employer has 62 mixer trucks, 11 sets of bottom dumps, 2 transfers, and 2 pneumatic trailers, plus the power units to pull them.

[5] Malnar testified that it is the lead mechanic's responsibility to see that inventory of commonly used parts is maintained.

[6] Malnar testified that just prior to Bailey's hire, a young man was employed in her job for about 1-1/2 months, but he did not work out.

[7] Bailey referred to herself as a parts runner and testified that she sometimes picks up parts from vendors. Malnar testified that he was aware that she had picked up parts, but that it was not part of her duties and there is no such position as parts runner. Parts runner was listed in the Stipulated Election Agreement as one of the positions included in the unit, however. Bailey's and Malnar's testimony was in disagreement as to how frequently Bailey picked up parts. Since the only positions other than parts runner listed for inclusion in the unit are mechanics, lubrication employees, equipment operators, and batch plant operators—which Bailey obviously is not—parts runner presumably was included to cover Bailey, who, as noted above, was included in the eligibility list submitted by the Employer. In any event, in view of the overwhelming evidence supporting a plant clerical finding, it is unnecessary to resolve any issues regarding the frequency of Bailey's picking up parts or whether such a task is within her job duties.

[8] Cast testified that in about January 1998, he was promoted to a position called plant supervisor, but he later decided to return to his batchman position.

the activities of employees, and does not have the authority to do those things. Section 2(11) of the Act defines a supervisor as,

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

There is no evidence in the record that Cast has any supervisory authority within the meaning of Section 2(11) of the Act. Thus, Cast's position should be included in the unit. I recommend that the challenge to his ballot be overruled.

The challenged ballot which was originally determined to be void. The ballot which was originally determined to be void by the Board agent was challenged by the Joint-Petitioner. The ballot attached as Appendix A shows that the voter placed diagonal marks in both the "yes" and "no" boxes, with the mark in the yes box extending further beyond the boundaries of the box than does the mark in the no box. This slight distinction does not indicate the voter's intention. I therefore conclude that the ballot is void.

The Obiections

Objections 1 and 2 contain general allegations of threats of physical harm to employees by union agents and supporters, with Objection 1 also including a threat of loss of homes, if employees did not support the Unions. Hearing testimony shows that these objections are based on allegations of threats made by mixer driver Thomas Pease, which the Employer contends affected the results of both elections. Because of the similarity between and the general nature of the two objections, they will be treated together.

The alleged threat to Gonzalo Ramos. Cement truckdriver Gonzalo Ramos testified that about a day or two before the election, Pease came walking toward him angrily pointing his finger in his face and told him that he "should think about what [he] was going to do" and that "the Union said that the Delta wasn't only full of fish." Ramos testified that Pease also told him that he knew how he was going to vote because they had somebody in Labor and would find out and that he'd "better do it if [he] didn't want to have problems with him and you know, family problems." Ramos stated that Pease called him a "fool . . . . asshole, tucking Mexican" and "consuelo." Ramos testified that there were no witnesses to this incident, that the only employee he reported the incident to was driver Ron McCoy, but that he did not tell McCoy until after the election.[9]

Pease testified that during this conversation, he told Ramos that he was sure he understood, that he knew what to do, and that it would be best for his family if he went ahead with the Union with all the benefits. Pease denied making the other statements that Ramos testified he had made.

I credit the testimony of Ramos over that of Pease regarding this conversation.[10] Although Ramos may not have understood everything Pease said to him because of his limited English skills, the testimony of both Ramos and Pease shows that they always converse with each other in English, which they would not do if Ramos' skills were too limited. Thus, while recognizing that Ramos may not have understood everything that Pease said to him during the conversation in question, I find that Pease did convey the message in an angry and threatening manner that Ramos had better vote for the Petitioner or there would be serious consequences.

The alleged threats to Wanda Covarrubias. Mixer truckdriver Wanda Covarrubias testified that a couple days before the May 21, 1998 union meeting, she was sitting at the bar in the Antioch Saloon when Pease came in. Covarrubias stated that she offered Pease a beer, which he accepted. She testified that Pease asked her how she was going to vote, and that she responded that she would vote what was best for her family. According to Covarrubias, Pease then, with his finger pointing in her face, told her, "if this didn't go union he was going to—he knew things about a lot of people and he would fuck them all up[;] he was going to fuck everybody[; a]nd that he knew how to get things done from the people's landlords and he could have people thrown out of their homes." She states that Pease said this several times and then left. Covarrubias testified that Pease was "projecting anger and, I would say, hatred" toward her, that that surprised her because they had always gotten along and "always drank together." She stated that she had been behind in her rent and that Pease had been friends with her landlord for many years. Covarrubias also stated, however, that her landlord was a "kind man," that she knew he would not evict her if she came up with her rent, and that she knew she would catch up with the rent. Covarrubias further testified that she and Pease had always gotten along, often drank together, and had been friendly prior to this incident.

Rodrick Murie, who is part owner of the Antioch Saloon and Covarrubias' fiancee, testified that he was bartending at the time the above incident took place and heard part of the conversation, beginning with Pease's question about how Covarrubias would vote. Murie testified that Pease did not have any drinks while at the Antioch Saloon that day. Murie stated that he heard Pease ask Covarrubias four or five times how she was going to vote, and that she responded that she was not going to tell him. Pease then asked Murie how he thought Covarrubias would vote, and Murie responded that he did not know. Murie testified that Pease said at least four times that he knew people's landlords and could have people removed from their homes, and that he was "a person that gets things done." Murie stated that Pease pointed his finger at Covarrubias. Murie testified that he did not hear Pease say that he was "going to fuck up" people or words to that effect.

Pease testified that he told Covarrubias that he knew she was the person going in the office and reporting that he was trying to organize the union and was trying to get Michael Thornquist, who works in the office, fired.[11] He stated that he also told her that "they've already threatened us here about if they hear any talk about the Union that we will be punished if not terminated" and that he was scared for his job just as much as anybody else and did not need that kind of pressure. Pease further testified

[9] Ramos testified at the hearing through an interpreter. He testified that he and Pease spoke to each other in English, but that he does not comprehend much English.

[10] With the exception of Rodrick Murie, I do not have complete confidence in the testimony of any of the witnesses who testified on the objections. The credibility resolutions are based on my observations of the proceeding, the demeanor of the witnesses, the internal and external consistencies in the testimony, and the inherent probability of events.

[11] Covarrubias stated that she did not recall Pease making that statement.

that after mentioning the benefits of having a union, he told Covarrubias not to go back down and tell the office that he was organizing and trying to get Thornquist fired, and that if he kept hearing his name mentioned there, he would go down to her landlord and tell him what was going on with her, that she had collected unemployment while she was working and had just gotten a loan or gift from the county to catch up on her bills. Pease testified that he also asked Covarrubias how it would look when she went to pay her rent next winter and whether she would leave her landlord hanging and told her he had known her landlord all his life and was not going to let that happen. He denied pointing his finger at Covarrubias.

Covarrubias further testified that in the Employer's yard a couple days later, Pease yelled to her from inside his truck that she did not have to rat on him. She stated that she responded that she did not rat on him and told him not to bother her any more. According to Covarrubias, Pease then said he would tell the Employer that she knew who cut the conveyor belt.[12] Pease's testimony on this incident was that, while a conversation between he and Covarrubias did take place at that time and place, he only told her to calm down. He states that she told him that she did talk to somebody, and that she did not want to talk to him and to get away from her.

Covarrubias reported these alleged threats at the May 21, 1998 union meeting at the Red Caboose. Testimony was in general agreement as to what occurred at that meeting. Covarrubias testified that she went into the meeting after drinking four beers and two mudslides, that she had a beer in her hand when she walked in the meeting area, which she drank, and that she had another beer at the meeting.

According to the testimony of Covarrubias, Pease, and then-president of the Petitioner, Dale Robbins, there were 20–40 people at the meeting. Attending were employees of the Employer and of other employers, as well as officials from the Petitioner and Joint-Petitioners. Covarrubias testified that at the beginning of the meeting, she started "screaming and ranting and raving" about Pease's alleged statements to her, saying that Pease was their representative, that she wanted something done about what he had said to her, that he was "muscling women and children," that they were condoning it, and that somebody should take baseball bats to Pease's head. Covarrubias also testified that she "made a complete ass" of herself and was "completely out of control" at the meeting. All three witnesses testified that Pease said he did not have to listen to Covarrubias and then attempted to leave the meeting, but was told to stay and did stay. Robbins and Pease testified that employees kept telling Covarrubias to shut up. Covarrubias acknowledged that employees may have told her that, but that she was screaming too loud to hear them. Covarrubias testified that several employees approached her in the days after this meeting and that she had many conversations with about seven other named employees about the confrontation she had had with Pease. The latter testimony was unrefuted.[13]

With regard to the different accounts by the three witnesses as to what Pease said to Covarrubias in the Antioch Saloon, I find the testimony of Murie to be the most credible and credit his version over those of Covarrubias and Pease.[14] Murie testified that Pease told Covarrubias that he knew people's landlords and could have them removed from their homes. As to the incident in the yard a couple days afterwards, the only statement Covarrubias claims Pease made which could be considered threatening—that he would tell the Employer she knew who cut the conveyor belt—was not linked to the election.

As shown above, at the May 21, 1998 union meeting, Covarrubias complained about Pease's alleged conduct. She testified that she had had eight alcoholic drinks, some of them at the meeting, and that she was completely out of control. Employees told Covarrubias to "shut up," apparently until she did. At the meeting, there was no indication that anyone conducted themselves in a manner which would show that any credence was given to her statements. However, according to Covarrubias' unrefuted testimony, after the meeting, employees approached her about what she had said, and she then discussed with them the confrontation she had had with Pease.

The alleged threats to Ron McCoy. Mixer truckdriver Ron McCoy testified that a day or two after the union meeting at the Red Caboose, he saw Pease and Pease's niece in the parking lot of the Red Caboose, that Pease told him that he was going to have his niece "kick Wanda's fucking ass because of the embarrassment and the ratting that she did at the union meeting and that he was going to have her tits cut off." McCoy also testified that Pease said the niece was capable of doing it. However, McCoy later admitted that Pease never said anything about his niece's capabilities and admitted that his own testimony that Pease had done so was not true. McCoy also testified that he did not remember if anything else was said. Pease denied ever having a conversation with McCoy at which his niece was present and denied ever making any of the statements McCoy stated that he had made during that alleged incident.

McCoy also testified that about a week before the election, Pease told him in the Employer's yard that "the Union needed to get voted into the yard and God help the drivers and God help all the yard itself." McCoy stated that he asked Pease if that was a threat and that Pease replied that he could "take it any fucking way [he] wanted to." McCoy stated that there were no witnesses to the conversation. Pease did not testify regarding this alleged conversation.

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[12] Covarrubias testified that the conveyor belt had been cut shortly after the organizing began.

[13] Covarrubias additionally testified that Pease had said the following to her on other occasions: at her house in about the beginning of May, Pease allegedly made a reference to shooting the cows of a neighbor who he said had shot his dog; Pease allegedly told her in the Employer's yard some time before the election that he was going to report driver Earl to another employer Earl works for and have him fired from that employer for working nonunion for the Employer; Pease allegedly told her that sometime in 1997, he had threatened to shoot the dog of an employee; and Pease allegedly told her that he had put a dead animal in the truck of another person. Covarrubias also testified that at the Antioch Saloon prior to the election, Pease's niece told her that she had been talking too much and that if she did not stop, she would "kick ther] ass." Such alleged statements, even if made, were not linked to the elections at issue and consequently would not constitute objectionable conduct.

[14] It is recognized, in making this credibility finding, that Murie did not hear the entire conversation of Covarrubias and Pease. It should be noted that Covarrubias undercut the reliability of her own testimony by, among other things, stating that she had a poor memory and was a "basket case" when the events to which she testified took place, when she gave her sworn statement to the Employer, and when she testified at the hearing. She also acknowledged on cross-examination that she had previously knowingly filed a false claim for unemployment benefits and was in danger of discharge at the time of the hearing because charges of driving under the influence of alcohol were then pending against her.

McCoy testified that on a second occasion about 2 or 3 days prior to the election, again in the yard, Pease told him in a loud and angry voice that he had heard that McCoy and some of the other drivers were planning on voting against the Union, that he hoped it was not true, that he should let everyone know that it would not be a good idea, that they had better have a life insurance policy, and that Petitioner had made him a "special rep." McCoy testified that he asked Pease what he meant by having a life insurance policy, and Pease replied that it should cover accidental death, that the Union knew how to take care of people who were against it, they were not afraid to kill if necessary, and that they had a person on contract. McCoy stated that he again asked Pease if he was threatening him, but said he did not remember what Pease' reply was. McCoy further stated that Pease said he had connections at the Labor Board and could find out how people voted, and that he told McCoy he had a family and friends and it would not be worth "tucking around with."

McCoy named four or five drivers who he said were 3 to 5 feet away in a position where they could hear this conversation. None of those drivers testified regarding the alleged incident. While McCoy testified on direct examination that he told about five or six employees about these statements, on cross-examination, he said he could not remember whether or not he told any other employees.

Pease testified that he did have a conversation with McCoy 2 or 3 days before the election, but denied making the statements that McCoy testified he had made. His version of the conversation was completely different. Pease testified that McCoy said he wanted to vote "yes" and asked if Petitioner could make any promises. According to Pease, he replied that all the Petitioner could do was negotiate and apply pressure in negotiations and that it would win without a strike. I find it highly unlikely that McCoy, the Employer's election observer and an outspoken opponent of the Petitioner prior to the election, would have had such a discussion with Pease, particularly that he would have told Pease that he wanted to vote yes.

With regard to the incident which McCoy testified took place about a week before the election, I find that the reported statements are too vague to constitute a threat. As for the other two incidents, although McCoy may have embellished upon his testimony, I find that Pease did threaten McCoy and that four or five other drivers heard the conversation which took place 2 or 3 days before the election.

The alleged agency status of employee Thomas Pease. The Employer maintains that Pease is an agent of both the Petitioner and Joint-Petitioners. The Employer's and the Petitioner's witnesses testified that Pease spoke to drivers about supporting the Petitioner, solicited employees to sign authorization cards, helped set up union meetings, and served as the election observer for the Petitioner. The Board has held that such activities on the part of an employee are insufficient to make the employee an agent of the union. See, for example*, Advance Products Corp.,* 304 NLRB 436, 436 (1991) (employee who was member of in-house organizing committee, solicited support for union, distributed union literature, buttons, hats, and shirts, kept union informed of events occurring in plant, and served as election observer for the union, not agent of the union); *United Builders Supply Co.,* 287 NLRB 1364, 1365 (1988) (employee who solicited and obtained signatures on authorization cards, set up union meetings and informed employees of meetings, and served as election observer for union, not agent of the union); *Mike Yurosek & Sons,* 225 NLRB 148, 149–150 (1976) (fact that employees served on in-plant organizing committee or as election observers did not make them agents of the union), enfd. 597 F.2d 661 (9th Cir. 1979), cert. denied 444 U.S. 839 (1979). I therefore find that Pease was not an agent of the Petitioner or Joint-Petitioners.

Findings on Objections 1 and 2. Conduct not attributable to either party may be grounds for setting an election aside. However, the Board "accords less weight to such conduct than to conduct of the parties." *Orleans Mfg. Co.,* 120 NLRB 630, 633 (1958). Third-party conduct will be grounds for setting an election aside when "the conduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel,* 270 NLRB 802, 803 (1984). Accord: *Picoma Industries,* 296 NLRB 498, 498 (1989). In assessing alleged threats under the third-party conduct standard, the Board examines (1) the cumulative effect of the threats; (2) whether the threats were directed at all employees in the bargaining unit; (3) whether the persons making the threats are capable of carrying out the threats; (4) the degree to which the threats were disseminated; and (5) whether the threats were made in close proximity to the date of the election. See *Picoma Industries, Inc.,* 296 NLRB 498, 498–499 (1989); *Hamilton Label Service*, 243 NLRB 598, 598–599 (1979); *Westside Hospital,* 218 NLRB 96, 96 (1975).

It is well established that "the subjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct." *Emerson Electric Co.,* 247 NLRB 1365, 1370 (1980), enfd. 649 F.2d 589 (8th Cir. 1981). Thus, the Board determines "whether it is likely that the employees acted in fear of [a third party's] capability of carrying out the threat." *Westwood Horizons Hotel,* 270 NLRB 802, 803 (1984).

Credited testimony discussed above shows that Pease threatened some fellow employees with physical harm shortly before the election. Threats were made to Ramos and McCoy just 1 to 3 days prior to the election. The threats of physical harm to McCoy which took place 2 or 3 days before the election were heard by four or five other employees. See *Picoma Industries,* supra*,* 296 NLRB at 499 (while threats were not disseminated by the employee to whom they were made, they were made in presence of other employees). While no one seemed to take Covarrubias' complaints about Pease seriously at the union meeting because of the condition she was in, employees approached her later about what she said and she then had discussions with about seven other employees.

I find that threats made to other employees by Pease, some of which took place shortly before the election, one of which was witnessed by other employees, and some of which were disseminated to other employees, created a general atmosphere of fear and reprisal necessitating a second election in both Cases 32–RC–4443 and 32–RC–4448 and Case 32–RC–4449. See *Smithers Tire & Automotive Testing of Texas,* 308 NLRB 72, 72–73 (1992); *Buedel Food Products Co.,* 300 NLRB 638, 638 (1990); *Sequatchie Valley Coal Corp.,* 281 NLRB 726, 726 (1986). Of particular concern is the number of employees who learned of the threats and the vote margins in the two elections. See *Picoma Industries*, supra, 296 NLRB at 500*; RJR Archer, Inc.,* 274 NLRB 335, 336 (1985).

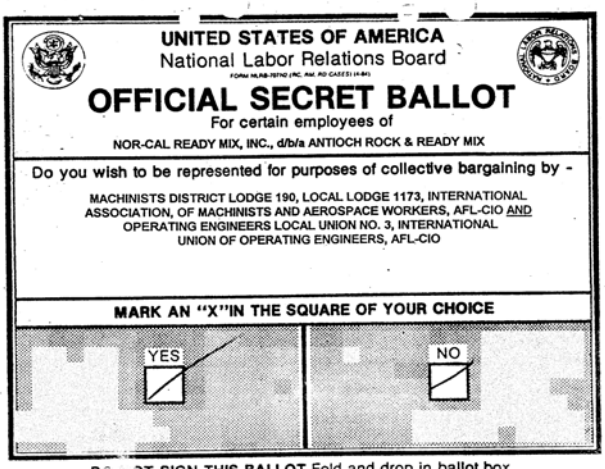
RECOMMENDATION

For the reasons stated above, I recommend that the challenges filed in Cases 32–RC–4443 and 32–RC–4448 to the

ballots of Bailey and Cast be overruled, and that should a rerun election be ordered by the Board, those employees be found eligible to vote in the rerun election.

I recommend that Objections 1 and 2 be sustained, that the elections conducted on June 11, 1998, be set aside, and that new elections be directed.[15]

[15] Within 14 days from issuance of this report, any party may file with the Board in Washington, D.C. exceptions to the report with supporting brief, if desired. Immediately upon the filing of such exceptions, the filing party shall serve a copy thereof, together with a copy of any brief filed, on the other parties. A statement of service to the Board shall be made to the Board simultaneously with the filing of exceptions. If no exceptions are filed to this Report, the Board may decide the matter forthwith upon the record or make other disposition of the case.



UNITED STATES OF AMERICA
National Labor Relations Board

OFFICIAL SECRET BALLOT
For certain employees of
NOR-CAL READY MIX, INC., d/b/a ANTIOCH ROCK & READY MIX

Do you wish to be represented for purposes of collective bargaining by -

MACHINISTS DISTRICT LODGE 190, LOCAL LODGE 1173, INTERNATIONAL ASSOCIATION, OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO AND OPERATING ENGINEERS LOCAL UNION NO. 3, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

MARK AN "X" IN THE SQUARE OF YOUR CHOICE

YES NO

DO NOT SIGN THIS BALLOT Fold and drop in ballot box.
If you spoil this ballot return it to the Board Agent for a new one.

Appendix A