Robert Orr–Sysco Food Services, LLC *and* Teamsters Local No. 480, a/w International Brotherhood of Teamsters, Petitioner. Case 26–RC–8160

November 22, 2002

DECISION AND DIRECTION OF THIRD ELECTION

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

The National Labor Relations Board has considered objections to an election held September 6, 2001, and the hearing officer's report (pertinent portions of which are attached as an appendix) recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Second Election issued by the Board on August 7, 2001.[1] The tally of ballots shows 84 for and 80 against the Petitioner, with 3 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, and has decided to adopt the hearing officer's findings and recommendations[2] only to the extent consistent with this Decision and Direction.

In Objection 3, the Employer alleged that employee supporters of Teamsters Local 480 threatened other employees and made attempts to coerce employee sentiment. The hearing officer found that during the 1- to 2-week period immediately preceding the election, threats of physical violence, property damage, and deportation were made to several employees and disseminated among several more.[3] Applying the Board's third-party conduct standard to the evaluation of these threats, the hearing officer concluded that they did not create a general atmosphere of fear and reprisal, and therefore recommended that Objection 3 be overruled. The Employer excepts, inter alia, to the hearing officer's conclusion and recommendation, contending that the employee threats require that the election be set aside. For the reasons set forth below, we find merit in the Employer's exceptions concerning Objection 3. Accordingly, we sustain Objection 3 and set aside the second election, and we will direct a new election.

There are no exceptions to the following factual findings of the hearing officer concerning threats made by prounion employees Henry Watts and Chris Shouse at the Employer's facility.[4]

Watts told employee Carl Becker that (in Becker's words) "if I didn't vote for the Union and I crossed that picket line, . . . he was going to crack my head." Becker recounted this threat to employee William Spencer Jr.

Shouse made a number of threats. During a conversation about strikes, Shouse said to employee Shane Owensby that Owensby was not "crazy enough to cross a picket line." Owensby answered that he had a family to feed and could not afford to walk a picket line. Shouse replied, "You know if you cross it, you know what happens to you. I'm going to make sure I'll take care of your truck." Owensby related Shouse's threat to employees Harvey Carpenter and Jeffrey Suter.

[1] 334 NLRB 977 (2001).

[2] The Employer filed 10 objections. Prior to the hearing, the Acting Regional Director approved the Employer's request to withdraw Objections 7 and 9. The hearing officer recommended that the rest of the Employer's objections all be overruled. Absent exceptions, we adopt pro forma the hearing officer's recommendations concerning Objections 1 and 6. In Objection 1, the Employer sought to reargue the merits of the Board's August 2001 decision setting aside the first election and directing a second election. While Member Cowen joins in adopting pro forma the hearing officer's recommendation concerning Objection 1, he notes that he did not participate in that earlier decision. We also adopt the hearing officer's recommendations concerning Objections 2, 4, 8, and 10. As explained below, we will sustain Objection 3. Accordingly, we find it unnecessary to pass on Objection 5, which alleged electioneering and disruptive conduct in the polling area while voting was in progress.

[3] In fn. 11 of his report, the hearing officer mistakenly included Darrell Rhodes in the list of employees to whom allegedly objectionable statements were made. In fact, there is no evidence that Rhodes was on the receiving end of any such statement.

[4] In addition to these threats, the hearing officer mentioned several other statements allegedly made by Shouse and employee Tommy Thomas. Specifically, the hearing officer noted that (a) employee Euler Reyes testified that Shouse told Reyes he "better vote" for the Union; (b) employee Jeffrey Suter testified that Shouse told employee Harvey Carpenter that something would happen to Carpenter if he crossed a picket line; (c) Rhodes testified that Shouse told employee Chad Munday that if there was a strike and Munday crossed a picket line, something might happen to Munday or his car; and (d) Carpenter testified that Thomas told Carpenter and several others, "You can bet if we go on strike, there ain't going to be no mother fucker coming up in here working if I can't come up in here." There are no exceptions to the hearing officer's failure to find that these additional statements, if made, constituted objectionable threats. Therefore, we do not pass on these statements.

There are also no exceptions to the hearing officer's findings concerning another statement that Thomas made to Carpenter. According to the hearing officer, three witnesses testified as follows concerning this statement. (1) Carpenter testified that Thomas told him: "Anybody who votes for the Company should have their asses kicked." (2) Suter testified that Carpenter told him that Thomas told Carpenter that anyone who voted for the Company deserved to have their butts kicked. (3) Employee Shane Owensby testified that Carpenter told him that Thomas told Carpenter that anybody who crossed the picket line needed their butts whipped. Thus, two witnesses testified to a voting-related statement, and one testified to a "picket line" statement. The hearing officer found that the statement Thomas in fact made was "to the effect that employees who crossed a picket line deserved to have their butts kicked." In so finding, the hearing officer did not explain why he relied on Owensby's hearsay version of what Thomas said over Carpenter's first-hand testimony, corroborated by Suter. The hearing officer also found that Thomas made the statement in question to employee Carl Becker instead of Carpenter. To be clear, there is no evidence that Thomas ever made any allegedly objectionable statement to Becker. In any event, in finding the threats that were made in this case, we have not relied on any version of what Thomas allegedly said to Carpenter because the hearing officer found that the statement was not a threat, and there are no exceptions to that finding.

On another occasion, Shouse threatened Suter as well. After Suter told Shouse that striking employees would not make any money but nonstriking employees would, Shouse replied, "You know what happens when you cross a picket line." Approximately three other employees overheard Shouse' statement.

During a conversation with employee Joseph Hatley, Shouse asked Hatley what he would do if there were a strike. Hatley responded that he would cross the picket line and work. Shouse then asked if Hatley knew what would happen. Hatley replied that he would make a lot of money. Shouse answered, "Well, you better have good insurance." On another occasion, employee Gregory Jaster overheard Shouse telling an employee: "If it were to be yes and they were to go on strike, if people were to—people that work for the company were to cross the picket line, it wouldn't be a pretty thing."

Finally, employee Rashaun Burks overheard Shouse and three other individuals planning to threaten Hispanic employees in relation to their vote in the upcoming election. According to Burks, these four said "that they were going to tell the Mexican guys that if they don't go for the Union, they were going to tell them that they were illegal and didn't have their papers and stuff like that, so they would lose their job." Sometime later, Shouse put this plan into action. Approaching employee Euler Reyes, a native of Mexico, Shouse asked him if he had a green card. Reyes laughed, but Shouse said, "Well, you're illegal here." Shouse then told Reyes, "You'd better vote for the Union, because if you don't, we're going to take your ass back to Mexico." Reyes related this threat to Burks and a supervisor.

Stating that he had taken into account the closeness of the vote, the hearing officer nevertheless concluded that the extent of dissemination of the foregoing threats was insufficient to create a general atmosphere of fear and reprisal rendering a fair election impossible. In so concluding, the hearing officer was influenced by two considerations. First, he observed that third-party threats made by union supporters reasonably cause less concern among employees than threats made by representatives of the union that may become the employees' exclusive representative. Second, relying on *Cal-West Periodicals*, 330 NLRB 599 (2000), he found it likely that threats related to crossing picket lines would have caused employees to vote *against* the Petitioner, not for it, in order to avoid the prospect of strikes and picket lines altogether. For the following reasons, we find the hearing officer's analysis unpersuasive.

First, despite his statement to the contrary, the hearing officer did not sufficiently take into consideration the closeness of the election results. Objections must be carefully scrutinized in close elections. *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995); *Colquest Energy, Inc. v. NLRB*, 965 F.2d 116, 122 (6th Cir. 1992). Given the vote spread, a one-vote swing away from the Petitioner would have brought the Petitioner's three challenges into play, potentially changing the outcome of the election—and threats were made to at least five employees and disseminated to at least four more employees. The Board has set aside elections where, as here, threats have been made or disseminated to voters whose ballots might have been determinative. See *Steak House Meat Co.*, 206 NLRB 28 (1973); *Buedel Food Products Co.*, 300 NLRB 638 (1990); *Smithers Tire*, 308 NLRB 72 (1992).

Second, the general proposition that employees reasonably are less concerned about nonagent threats than about threats emanating from the union does not explain why the nonagent threats in this particular case should be found unobjectionable. Rather, it explains, at least in part, why the Board assesses the impact of third-party threats under a more rigorous standard than it applies to threats made by union agents. Threats by union agents warrant the setting aside of an election where they "reasonably tend[ed] to interfere with the employees' free and uncoerced choice in the election." *Baja's Place*, 268 NLRB 868 (1984). Third-party threats, on the other hand, rise to the level of objectionable conduct only where they were "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). We agree with the hearing officer that the *Westwood Horizons* test is applicable here. However, we do not think, as did the hearing officer, that a reason justifying the rigorous third-party standard for evaluating nonagent threats should count again to make that standard even more difficult for the objecting party to meet.

Third, the hearing officer's reliance on *Cal-West Periodicals* for the proposition that "picket line" threats would have caused employees to vote against the Union was misplaced. Before explaining why, however, we first address our dissenting colleague's characterization of the Board's holding in *Cal-West*. According to our colleague, *Cal-West* "held" that except in unusual circumstances, "references to *future* reprisals for crossing a picket line are not sufficiently immediate to create an atmosphere of fear and reprisal." In our view, this statement misconstrues *Cal-West*. No such per se rule is to be found in that decision. Rather, the Board merely found, on the particular facts presented, that the single picket line threat in that case "had no context of immediacy." 330 NLRB at 599.

In *Cal-West Periodicals*, the Board found a single "picket line" threat insufficient to warrant setting aside an election.[5] In so finding, the Board observed that the likely effect of the "picket line" threat would have been to prompt the threatened employee to vote against the union to avoid the prospect of a union picket line. Id. at 600 fn. 6. However, *Cal-West* is distinguishable from the instant case, where union supporters made multiple threats of picket line violence, threatened physical retaliation for voting against the Union, and threatened deportation for voting against the Union. The misconduct in the instant case is accordingly more severe than the misconduct in *Cal-West* with regard to the number of employees making the threats, the number of employees threatened, and the nature and variety of the threats.

Moreover, although a "picket line" threat made during an election campaign might encourage an intimidated employee to vote against the union in the hopes of avoiding a picket line situation, this is not the only or indeed the most pernicious result of such a threat. Where prounion employees are issuing threats of *any* kind against antiunion coworkers, opponents of the union will likely think twice before pinning on a "vote no" button, passing out antiunion literature, or speaking their minds freely. Two consequences may ensue. First, the union may appear to command a degree of support that it does not in fact enjoy, which in turn may influence the votes of undecided employees. Second, the arguments in favor of unionization will tend to predominate among employees during the campaign, possibly swaying some to vote "yes" who might have voted "no" had the voices of all employees been heard.

Our dissenting colleague contends that in setting aside the election, we have relied too heavily on the closeness of the vote and have failed to explain why the threats at issue here were sufficiently aggravated to create a general atmosphere of fear and reprisal. The Board has repeatedly found, however, that voting-related threats of substantial harm directed at a determinative number of voters create an atmosphere of fear and reprisal sufficient to set aside an election. See *Steak House Meat Co.*, 206 NLRB at 29; *Buedel Food Products*, 300 NLRB at 638; *Smithers Tire*, 308 NLRB at 73; accord: *John M. Horn Lumber Co. v. NLRB*, 859 F.2d 1242 (6th Cir. 1988). In this case, aside from the several "picket line" threats, two additional threats remain: Reyes was threatened with deportation, and Becker with physical violence, for voting against the Union. The character of these threats was grave, as they were intended to influence votes and intimated substantial harm; and again, a single changed vote could have altered the outcome of the election. Thus, consistent with the precedent cited above, we disagree with our colleague's view that threats of this character are insufficient to set the election aside.

Our dissenting colleague mistakenly asserts that we have applied the third-party conduct standard to the threats at issue in this case as though it were no different from the test applied to party-agent conduct. In support of her assertion, she relies on *Q. B. Rebuilders, Inc.*, 312 NLRB 1141, 1142 (1993), for the proposition that the Board's more stringent test for third-party threats prevents elections from being overturned "simply because a partisan employee makes overbearing or exuberant remarks to coworkers." In *Q. B. Rebuilders*, however, the Board was dealing with threats that might have been meant as jokes and that were understood as such by some employees. In that case, prounion employee Cortes stated on several occasions that he would report to the INS anyone who voted against the union. However, the first time Cortes made this statement, he and his listeners all laughed. Subsequently, Cortes twice insisted that the remark was just a joke, and some of his coworkers took his remark in that vein. It was in this context that the Board understandably cautioned against applying the third-party conduct standard so as to overturn an election because of "overbearing or exuberant remarks" by employees. Here, however, there is no suggestion that any of the several threats uttered by prounion employees was meant or taken as a joke. Thus, the cautionary language our colleague quotes from *Q. B. Rebuilders* has no application here.

What *does* apply here, however, is the Board's finding in *Q. B. Rebuilders* that a deportation-related threat to call the INS—even one uttered in jest—constitutes a serious threat of economic and emotional harm. Id. at 1142. In an earlier case, the Board explained that threats of deportation are serious because they convey the warning that employees risk not just job loss, "but also the loss of their homes and possibly even separation from their families by failing to support the [u]nion." *Crown Coach Corp.*, 284 NLRB 1010 (1987). Despite these statements, our dissenting colleague, citing *Mike Yurosek & Sons*, 225 NLRB 148, 150 (1976), asserts that Board precedent "holds" that a threat of deportation by fellow employees "does not, by itself, exacerbate illegal aliens' natural fear of deportation so as to render them incapable of exercising a free choice in the election." In other words, according to our colleague the Board has held, as a matter of law, that em-

[5] The statements at issue in *Cal-West* also included a statement that the threatened employee should "wait and see" what would happen if he did not vote for the union. The Board found, however, that this statement was ambiguous and did not necessarily constitute a threat of physical harm. Id.

Member Cowen agrees that, as explained below, the Board's decision in *Cal-West* is distinguishable from the instant matter; thus, he expresses no view on the merits of that decision.

ployee threats of deportation are insufficient to set aside an election. *Crown Coach* contradicts this assertion. There, the Board found third-party deportation threats sufficient in themselves to set an election aside. 284 NLRB at 1011. It is true that in *Mike Yurosek*, the Board stated that it "doubt[ed]" whether the threats and rumors of deportation in that case so exacerbated illegal alien employees' natural fears of deportation as to render them incapable of a free election choice. 225 NLRB at 150. In upholding the election, however, the Board in *Mike Yurosek* placed primary emphasis on the "substantial efforts" that had been made to contradict the threats, lessening their impact. Id. No such effort was made here, so we find *Mike Yurosek* distinguishable.

Accordingly, for all the foregoing reasons, we sustain the Employer's Objection 3 and set aside the election, and we shall direct a third election.

[Direction of Third Election omitted from publication.]

MEMBER LIEBMAN, dissenting.

Contrary to the majority, and consistent with our case law, I would find that the statements relied on by the majority did not create a general atmosphere of fear and reprisal that made a free election impossible. *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). My colleagues acknowledge that the *Westwood* standard is controlling here, but they apply the standard as if it was no different from the less rigorous standard the Board applies to threats made by agents of the employer or the union. See *Cal-West Periodicals*, 330 NLRB 599, 600 (2000). As the Board stated in *Q. B. Rebuilders*, 312 NLRB 1141, 1142 (1993), the higher requirement for third-party threats prevents the Board from overturning elections "simply because a partisan employee makes overbearing or exuberant remarks to coworkers."[1] Thus, contrary to the majority's apparent suggestion, the third-party standard is, appropriately, more difficult for the objecting party to meet.

Under the *Westwood* standard, the Board utilizes the following factors (including the nature of the threat itself) in evaluating the seriousness of a threat:

> [W]hether the threat encompassed the entire bargaining unit; whether reports of the threat were disseminated widely within the unit; whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and whether the threat was "rejuvenated" at or near the time of the election.

Westwood Hotel, supra at 803 (internal citations omitted). The Employer, as the objecting party, must establish the conduct to be objectionable. *Q. B. Rebuilders*, 312 NLRB at 1141–1142. Moreover, 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), citing *NLRB v. Monroe Auto Equipment Co.*, 450 F.2d 1329, 1333 (5th Cir. 1972), cert. denied 412 U.S. 928 (1973). 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, 806 (6th Cir. 1989), quoting *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 120 (6th Cir. 1974).

As an initial matter, the majority errs in its heavy reliance on the closeness of the election in justifying its decision. While the Board will take into account the closeness of an election, a third-party threat still must be proven to be sufficiently aggravated in order to create a general atmosphere of fear and reprisal. As the Board stated long ago: "The question of whether or not such an atmosphere existed does not turn on the election results, but rather upon an analysis of the character and circumstances of the alleged objectionable conduct." *Central Photocolor Co.*, 195 NLRB 839 (1972). The majority here fails to do such an analysis.

As to the specific statements found objectionable, the majority mainly relies on employee comments regarding reprisals for crossing a picket line. Except in unusual circumstances, the Board has held that references to *future* reprisals for crossing a picket line are not sufficiently immediate to create an atmosphere of fear and reprisal in regard to the election at hand. *Cal-West Periodicals*, 330 NLRB at 599. In fact, as noted by the hearing officer here, the Board in that case found that such threats of picket line reprisals would tend to persuade employees to vote against the union in order to avoid the prospect of a strike altogether. Id. at 600 fn. 6.[2] Contrary to the majority's attempt to limit *Cal-West* to the particular circumstances of that case, the Board there clearly provided a broader rationale for why threats of future picket line reprisals lack the requisite "context of immediacy." The Board, in responding to a dissenting member, distinguished the two sets of threats in that case as being qualitatively different: "the first one allegedly concerns the consequences of *not*

[1] The majority asserts that this statement only refers to the "joking" context of the threats to call the INS in *Q. B. Rebuilders*. But the Board's discussion clearly endorses setting aside elections only in cases of the most serious third-party misconduct. Ibid.

[2] The majority seeks to distinguish *Cal-West* on the basis that it involved only one picket line remark. But the Board, in assessing that remark (as well as a threat made in reference to the election), held that the qualitative aspect of the threats did not rise to the third-party standard: "the statements simply lack the same degree of specificity or likely coercive impact." Id. at 599.

selecting the Union; the second one allegedly concerns the consequences of *selecting* the Union, i.e., picket lines and the consequences of crossing them." Id. at 599 (emphasis in original).[3] Clearly, the Board in *Cal-West* discussed specific differences between *categories* of threats and why threats of future picket line violence, in the absence of aggravating circumstances, tend not to carry sufficient immediacy to be objectionable. In any case, the majority here has failed to demonstrate that the remarks created the required atmosphere of fear and coercion.[4]

The majority also relies on statements regarding a plan to threaten Hispanic employees with deportation (which seems to have been followed through on in only one instance). Again, the majority's rationale goes against Board precedent, which holds that a threat by fellow employees to call the immigration authorities during an election campaign does not, by itself, exacerbate illegal aliens' natural fear of deportation so as to render them incapable of exercising a free choice in the election. *Mike Yurosek & Sons*, 225 NLRB 148, 150 (1976), enfd. 597 F.2d 661 (9th Cir. 1979); compare *Q. B. Rebuilders*, 312 NLRB at 1142 (threat to call INS found objectionable because actual INS arrest occurred on the day before the election where work force was found to be 90-percent non–U.S. citizens).[5]

Putting aside these statements, we are left only with employee Watts' threat to "crack" employee Becker's head if he did not vote for the Union and if he crossed the picket line. The Employer did not demonstrate, as required by *Westwood*, that Watts either had any present capability of carrying out the threats or the likelihood that employees acted in fear of any such capability. 270 NLRB at 803. Moreover, the threat was only partly in reference to the election.

While I do not condone any of these statements, I find, as discussed above, that they do not constitute sufficient grounds—even in the context of a close tally—upon which to set aside the election. As one court has stated, "A certain measure of bad feeling and even hostile behavior is probably inevitable in any hotly contested election." *Nabisco, Inc. v. NLRB*, 738 F.2d 955, 957 (8th Cir. 1984). For these reasons, I would deny the Employer's Objection 3 concerning certain employee threats during the election campaign, adopt the hearing officer's report, and certify the election.

APPENDIX

HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION

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Objections 2 and 3

These objections allege in substance that agents, representatives, employees, and/or supporters of the Petitioner coerced employees prior to the election and thereby destroyed the laboratory conditions necessary for a fair and free election.

Denis Huey, the Petitioner's business agent, testified that the Petitioner ran a "low key campaign" that consisted primarily of handbilling early in the morning on two or three Fridays and on the day of the election. The handbilling took place on a public road adjacent to the Employer's facility. Employees participated in distributing the handbills. There was no organizing committee. The Petitioner did not train employees or provide them with any written guidelines or materials as to how they were to conduct themselves during the campaign.

The Employer contends that the Petitioner engaged in objectionable conduct by handing out two of the handbills. One handbill begins with the question, "What will our employer say about a union?" and then purports to answer that question. The other begins with "Management's Big Lie on 401(k)'s" and then purports to provide the truth concerning that subject. The handbills were received in evidence as Employer Exhibits 1 and 2. I refused to receive evidence concerning the truth or falsity of the Petitioner's campaign propaganda.[7] *Midland Life Insurance Co.*, 263 NLRB 127 (1982).

[3] The Board also discussed the particular circumstances of the *Steak House* and *Buedel* cases (also relied on by the majority here), but stressed that the threats in those cases were directed against the employees' vote and much more severe. Id. at 599 (citations omitted). The Board then distinguished a picket line threat found to be objectionable in another case on the basis that it was made by a party to the election (and thus was not a third-party threat) and referenced a particularly severe incident of prior picket line violence. Id. at 599–600. These circumstances distinguish those cases from the situation here.

[4] Instead of pointing to evidence of a general atmosphere of fear and coercion, the majority does nothing more than speculate that such statements by prounion employees "may" reduce the efficacy of the antiunion campaign.

[5] The majority claims that the Board's decisions in *Q. B. Rebuilders*, supra, and *Crown Coach Corp*., 284 NLRB 1010 (1987), support its position on threats of deportation here. In finding such threats objectionable in *Q. B. Rebuilders*, the Board distinguished *Mike Yurosek*, supra, by noting other factors: in the earlier case there were mitigating disavowals of the threats, the large percentage of undocumented workers in the election unit in the *Q. B. Rebuilders* workplace, and most importantly, the rejuvenation of the threat by an INS arrest at the facility the day before the election. 312 NLRB at 1142. Similarly, in *Crown Coach*, supra, the Board found that 65–70 percent of the unit was Hispanic; that the threats sufficiently concerned the unit employees to cause 20–30 of them to question a manager about whether the union would take such an action in the event of its defeat; and that the threat was repeated just before the election. In contrast, here the hearing officer did not make a finding as to how many unit employees were vulnerable to such a threat—or even whether the single employee directly threatened was undocumented.

[7] There is no evidence or contention that the handbills involve forgeries or other deceptive conduct. Nor do the handbills suggest that the Board endorses one party or the other in the election. In its posthearing brief, the Employer contends that "the Union made representations to employees which were not only false, but are impossible to refute"; and that "the Board should consider the fact that the Union

A number of employees testified that other employees made various threats to them in connection with the election. Unless otherwise noted, all of these threats occurred at the Employer's facility and occurred roughly 1 to 2 weeks prior to the election.

Employee Carl Becker testified that he discussed the election on one occasion with employee Henry Watts. Only Becker and Watts were present. Watts noted that the Employer had previously discharged Becker's brother and asked Becker if he was going to vote for the Petitioner. Becker responded that he was not and that he would cross the picket line and work if there was a strike. According to Becker, Watts responded that "if I didn't vote for the Union and I crossed that picket line, that he was going to crack my head."[8] Watts denied that he had any conversations with Becker concerning the Petitioner's organizing campaign or about picket lines or "cracking heads" in particular. I credit Becker. Employee William Spencer Jr. testified that Becker told him about this conversation prior to the election.[9]

Employee Jeffrey Suter testified that he had a conversation in the locker room with employee Chris Shouse. Approximately four other employees, including Shouse and Tommy Thomas, were present. According to Suter, he told Shouse that if the employees went on strike they would not be making any money, but the employees who did not strike would. Shouse responded, "You know what happens when you cross a picket line." The conversation then ended. Shouse denied ever discussing crossing a picket line with Suter. I credit Suter. Suter further testified that employee Shane Owensby told him that Shouse had threatened to bash in the windows and otherwise damage his truck if he crossed a picket line. Finally, Suter testified that employee Harvey Carpenter told him that employee Tommy Thomas told him that anyone who voted for the Company deserved to have their butts kicked; and that Shouse had told Carpenter that something would happen to him if he crossed a picket line.

Owensby testified that he and Shouse had a conversation about the organizing campaign, including going on strike and crossing the picket line. According to Owensby, Shouse said that Owensby was not crazy enough to cross a picket line. Owensby responded that he had a family to feed and a 3-year-old son. He further said that he could not afford to walk the picket line. Shouse responded, "You know if you cross it, you know what happens to you. I'm going to make sure I'll take care of your truck." Owensby testified that no one else was present during this conversation. Shouse denied that he ever threatened anyone concerning crossing a picket line and specifically denied ever making any reference to Owensby's truck. Shouse affirmatively testified that he and Owensby did have a conversation concerning crossing the picket line. According to Shouse, Owensby told him of his intent to cross the picket line. Shouse responded that that was Owensby's business but that Shouse did not believe in doing things like that. Owensby responded that he would be "packing" when he crossed the picket line. I credit Owensby's version of events.

Owensby also testified that Carpenter told him that Thomas told Carpenter that anybody who crossed the picket line needed their butts whipped. Finally, Owensby testified that Suter told him that Shouse told Suter, "If you cross the picket line, you know what can happen to you."

Employee Euler Reyes testified that Shouse asked him if he was going to vote for the Petitioner. Reyes responded that he did not know and that where he came from (Mexico) they did not have this kind of stuff. Shouse told Reyes that he better vote for the Petitioner. Shouse then told a forklift driver who was working nearby that the latter should not talk to Reyes because Reyes was going to vote for the Employer. On another occasion, Shouse asked Reyes if he had a "green card." Reyes "laughed it off" but Shouse then said, "Well, you're illegal here." According to Reyes, Shouse added, "You'd better vote for the Union, because if you don't, we're going to take your ass back to Mexico." Shouse denied that he had any conversation with Reyes in which the latter's immigration status or "green card" came up. According to Shouse, Reyes told him that he was concerned the Employer would fire him if the Petitioner was voted in and that he did not understand the process. Shouse responded that unions provided employees with more job security because there was someone to stand up for them. According to Shouse, Reyes also asked if the Petitioner would attempt to buy his vote. Shouse thought Reyes was joking and did not respond. Reyes then asked whether the Employer would attempt to buy his vote. Shouse responded that that was between the Employer and Reyes. I credit Reyes' version of events. Reyes further testified that he related what Shouse told

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distributed flyers and handouts, which contained obvious falsehoods and which attribute statements and misconduct to the company." Citing *Van Dorn Plastic Machinery Co. v. NLRB*, 736 F.2d 343 (6th Cir. 1984), the Employer contends that "the Board should, in fact, look into the deceptive nature of the representations made by the parties during election campaigns." Even if binding, I would conclude that *Van Dorn* is distinguishable. In that case, the Sixth Circuit stated:

> There may be cases where no forgery can be proved, but where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected. We agree with the Board that it should not aside an election on the basis of the substance of representations alone, but only on the deceptive manner in which representations are made.

Id. at 348. Since the Employer's argument in its posthearing brief relies on "the substance of representations alone" rather than on "the deceptive manner in which representations are made" as the basis for setting aside the election, I conclude that the Petitioner's handbills are not objectionable under *Van Dorn*. Cf. *St. Francis Healthcare Centre*, 336 NLRB 678 (2001) (applying *Van Dorn* as the law of the case and concluding that the union engaged in objectionable conduct where its "gross and material misrepresentations . . . were fraudulently concealed").

[8] In an apparent attempt to demonstrate that Watts' alleged threat was to be taken seriously, the Employer offered evidence that Watts became embroiled in a fight of some kind approximately 13 to 17 years earlier when other employees attempted to pull his pants down and throw him in the freezer. In view of the remoteness in time of this incident and because it occurred as part of a sophomoric initiation rite, I regard this evidence as having no probative value.

[9] I received evidence that employees told other employees about alleged threats, or were told about such threats, for purposes of determining the extent of "discussion, repetition and dissemination among the electorate." *Westside Hospital*, 218 NLRB 96 (1975) (footnote omitted).

him to employee Rashaun Burks and to a supervisor. Burks corroborated this testimony.

Reyes also testified that on the day of the election he was in the breakroom and Tommy Thomas asked him if he had voted yet. Reyes responded negatively. According to Reyes, Thomas then said, "You know what to vote. You vote yes. You know what to vote because you know why they strike. Don't be stupid." Thomas did not specifically deny Reyes' testimony. He did testify that on at least one occasion he told Reyes in substance that he did not think there would be a strike. I credit Reyes' testimony.

Employee Rashaun Burks testified that on one occasion he overheard Shouse, employee Charles McDaniels, Thomas and another individual who he knew only by the nickname "Bart Simpson" talking. Burks testified that he could not tell which person made the comment but that "I heard them saying that they were going to tell the Mexican guys that if they don't go for the Union, they were going to tell them that they were illegal and didn't have their papers and stuff like that, so they would lose their job or whatever." Neither Shouse nor Thomas specifically testified concerning this conversation. Neither McDaniels nor "Bart Simpson" testified at all. I credit Burks.

Employee Harvey Carpenter testified that he and other employees, including Reyes, Burks, and "quite a few" others were on break discussing what would happen in the event of a strike. At one point Carpenter said that if there was a strike the Company would bring in replacements, train them, and keep shipping out groceries. Tommy Thomas, who was not a part of the conversation, leaned his head back and said, "Well, you can bet if we go on strike, there ain't going to be no mother fucker coming up in here working if I can't come up in here." On another occasion, Thomas told Carpenter in the presence of other employees that "[a]nybody who votes for the Company should have their asses kicked." Finally, Carpenter testified that Owensby told him that Shouse had threatened to damage his truck.[10]

Thomas testified that he was terminated from his employment on September 9; that he had a conversation with Carpenter approximately 10 minutes before he was fired; that Carpenter said that he realized the Petitioner had been voted in but that he was not going to strike and he would cross the picket line if there was a strike; that Thomas told Carpenter that people are serious about strikes and it would be dangerous for Carpenter to come to work; and that Carpenter responded that he was not worried because he had something to protect himself. Another employee then told Thomas to "cut that out" and, according to Thomas, he took that advice. Thomas denied that he had otherwise threatened employees except that he did say that it would be "foolish" or "stupid" to vote for the Company.

I credit Thomas' version based on my observation of him while testifying and based on his recitation of the details of the conversation and the circumstances surrounding it. Thus, I conclude that even if Thomas threatened Carpenter with adverse consequences if he exercised his right to refuse to engage in a strike, this threat occurred after the election.

Employee Darrell Rhodes testified that employee Chad Munday told him that Shouse threatened him that if there was a strike and he crossed a picket line something might happen to him or his car. Munday did not testify. I credit Rhodes that Munday made the statement attributed to him.

Employee Joseph Hatley testified that Shouse asked him what he would do if there were a strike; that Hatley responded that he would cross the picket line and work; that Shouse asked if Hatley knew what would happen; that Hatley responded he would make a lot of money; and that Shouse then said, "Well, you better have good insurance." Shouse did not specifically deny this testimony but as noted previously did deny making any threats to employees concerning crossing a picket line. I credit Hatley.

Employee Jimmy Faulk Jr. testified without contradiction that he attended a Halloween party in late October 2000 (after the first election but prior to the second election); that a number of prounion employees also attended the party; and that the girlfriend of one of those employees told his girlfriend that several people there did not like him, he did not need to be there and he should watch his back.

Employee Billy Spencer described the atmosphere at the Employer's facility during the preelection period as being "intense." He offered little by way of concrete, specific testimony as to the basis for this description.

Employee Gregory Jaster testified that 2 days prior to the second election he overheard Shouse tell employee Charles McDaniel that "if it were to be yes and they were to go on strike, if people were to—people that work for the company were to cross the picket line, it wouldn't be a pretty thing." I credit Jaster over Shouse's general denial.

Dorothy Merkle, the Employer's vice president of human resources, was also called as a witness by the Employer. She testified without elaboration that five Hispanic employees were eligible to vote in the election.

The credited evidence establishes that during the 1- to 2-week period prior to the election, Watts threatened Becker with physical violence if he did not vote for the Petitioner and crossed a picket line; that Shouse expressly or impliedly threatened Suter, Owensby, Reyes, Hatley, and Jaster with property damage, deportation, or other untoward consequences in connection with how they voted and whether they crossed a picket line; and that Shouse, McDaniel, Thomas, or "Bart Simpson" threatened "the Mexican guys" with loss of their jobs if they did not vote for the Petitioner. The credited record evidence also establishes that Thomas made a comment to at least Carpenter to the effect that employees who crossed a picket line deserved to have their butts kicked; and that Thomas told employee Reyes to "vote yes because you know why they strike. Don't be stupid." The credited record evidence also establishes

[10] Carpenter also testified on cross-examination by the Petitioner's counsel that he heard Shouse make comments to Euler Reyes concerning his country of origin and immigration status. At one point Carpenter testified that Shouse told Reyes that he had "heard Mexico was responsible for the World Trade Center bombings." I take judicial notice that the World Trade Center incident occurred on September 11. The record fails to affirmatively establish that any of these comments occurred prior to the election on September 6.

that the nine named employees[11] to whom the statements recounted above were originally directed told each other about many if not all of these statements. In addition, Suter and Carpenter testified that other employees (some of whom were among the nine named employees) were present when certain of these comments were made. However, the record does not establish that the statements were otherwise widely disseminated throughout the voting unit. Although I have no reason to disbelieve Faulk's testimony, I note that the alleged threat at the Halloween party is remote in time (almost a year prior to the rerun election) and consists of multiple layers of hearsay. Accordingly, I conclude that this testimony has little if any probative value in resolving the Employer's objections. Finally, I give no weight to Billy Spencer's testimony concerning his subjective reaction to unidentified events during the preelection period. *Culinary Foods, Inc.*, 325 NLRB 664, 665 (1998).

Employers and unions are generally not held responsible for the acts of rank-and-file employees. Whether the conduct of rank-and-file employees is attributable to a party is determined in accordance with common law agency principles. *Allegheny Aggregates*, 311 NLRB 1165 (1993). There is no record evidence indicating that the conduct of the prounion employees identified above was instigated, authorized, solicited, ratified, condoned, or adopted by the Petitioner. Prounion status alone is insufficient to establish agency. *United Builders Supply Co.*, 287 NLRB 1364, 1365 (1988). Accordingly, the conduct of the prounion employees identified above is evaluated under the third-party standard. *Cal-West Periodicals*, 330 NLRB 599, 600 (2000). The Employer, as the objecting party, has the burden of establishing that "the third-party conduct during the election was so aggravated as to create a general atmosphere of fear and reprisal rendering a fair election impossible." Id.

I conclude that the comment Thomas made to Becker to the effect that employees who crossed a picket line deserve to have their butts kicked constitutes Thomas' opinion concerning the appropriate fate for employees who crossed a picket line and not a threat as to what he or other employees would or might do to employees who crossed a picket line. Accordingly, I conclude that this comment, and dissemination of this comment, does not support the conclusion that there existed a general atmosphere of fear and reprisal during the preelection period. I also conclude that Thomas' comment to Reyes to "vote yes because you know why they strike. Don't be stupid" is too ambiguous to support the conclusion that such an atmosphere existed. Cf. *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984).

Threats of physical violence, property damage, deportation, loss of employment, or other untoward consequences are probative in determining the existence of a general atmosphere of fear and reprisal and, in appropriate circumstances, would warrant setting aside an election. See, e.g., *Q. B. Rebuilders, Inc.*, 312 NLRB 1141 (1993); *Westwood Horizons Hotel*, above. I conclude that those circumstances are not present here. The tally of ballots discloses that there were approximately 173 eligible voters in this case. The record evidence establishes that the threats made principally by Shouse but also by several other prounion employees were made to or disseminated among nine named employees and at least some additional employees. However, I further conclude that the Employer has failed to satisfy its burden of establishing that this "relatively limited dissemination" of threatening statements was sufficient to "create a general atmosphere of fear and reprisal rendering a fair election impossible." *Culinary Foods, Inc.*, 325 NLRB at 664. In reaching this conclusion, I have taken into account the fact that the outcome of the election was close.[12] *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995). However, I also recognize that the Board and the courts are reluctant to overturn an election based on statements that are not attributable to a party because those statements are evaluated under a different (i.e., third-party) standard, and because "employees reasonably have a greater concern about threats emanating from the union that may become their exclusive representative than they would have from threats uttered by a single non-agent individual." *Cal-West Periodicals*, 330 NLRB at 600. In addition, it is highly unlikely that any of the "picket line" threats would have had the effect of coercing employees into voting for the Petitioner. To the contrary, their likely effect would be to cause employees to vote against representation in order to avoid the prospect of a union picket line or having to cross it. Id. at 600 fn. 7. Accordingly, and for all the reasons above, I conclude that Objections 2 and 3 lack merit.

. . . .

Objections 4, 5, and 8

These objections allege in substance that agents, representatives, and employee supporters of the Petitioner engaged in prolonged conversations with voters waiting in line to cast ballots, and engaged in campaigning or other disruptive conduct in the polling area; and that the Board agent who conducted the second election failed to take appropriate steps to afford voters a quiet period and an opportunity for reflection prior to casting their ballots.

The scheduled times for the second election were 8 to 10:30 a.m. and 4:30 to 7 p.m. Preelection conferences were held at 7:30 a.m. and 4 p.m. Both parties had two observers at the morning and afternoon sessions. The observers for the morning and afternoon sessions were different. One Board agent was assigned to conduct the election. At the preelection conferences, the Board agent explained the ground rules for the election and gave the observers written instructions (Form NLRB-722) concerning their duties. The observers were instructed not to engage in conversation other than social pleasantries with the voters and to refer all questions concerning the election to the Board agent. The parties agreed that the Employer's receptionist would make an announcement over the Employer's public address system at 8 a.m. and 4:30 p.m. to advise employees that the polls were open and that employees who wished to do so could go vote.

[11] Becker, Suter, Owensby, Carpenter, Reyes, Burks, Rhodes, Hatley, and Jaster.

[12] I reject the Employer's contention that I "presume" all three voters who were challenged by the Petitioner voted against representation and that therefore the margin of victory was one vote rather than four votes.

The official notice of election provided that the second election would take place in the "Operations breakroom at the Employer's main facility." The Employer curtained off part of the breakroom for use as the polling area. One of the Petitioner's representatives taped the curtain panels together prior to the beginning of the election. The curtains were sufficiently transparent that it was possible for those within the polling area to see the silhouettes of individuals who were outside the polling area but inside the breakroom. The preelection conference took place in the polling area. There are three televisions in the breakroom.

The original election in this case also took place in the breakroom. The Employer instructed employees to not use the breakroom during the polling periods for the original election but apparently did not give similar instructions for the re-run election. The breakroom was not formally designated as a "no-electioneering" zone.

The Employer contends that the curtained area was "poorly designed" with "no visible means of entrance and exit"; that the curtains did little to shield voters from the activities in the breakroom; and that voters were at times confused as to how to enter the polling area. I reject the Employer's contention that the physical construct of the polling area warrants setting aside the election. See generally *Sawyer Lumber Co.*, 326 NLRB 1331 (1998) ("When the integrity of the election process is challenged, the Board must decide whether the facts raise a reasonable doubt as to the fairness and validity of the election."). (Internal quotations and citations omitted.)

Employee Perry Manson testified in substance that he was the first employee to vote in the second election; that he entered the curtained area where the voting was taking place after the Board agent announced the polls were open; that in addition to the Board agent and the observers, Petitioner representative Huey was present in the polling area; that neither an additional union representative nor any company representatives were present; and that Huey was gone when he finished voting.

Employee Thomas Stout testified that he entered the breakroom at "approximately 8 [a.m]"; that he observed two individuals wearing shirts that had a Teamsters Local 480 insignia on them; that he did not see anyone wearing a suit; and that he then joined four other employees who were already in line to vote. At the hearing, Stout identified Petitioner representative Huey as one of the individuals who was wearing a Teamsters shirt. Other undisputed evidence establishes that the second Petitioner representative was an unpaid organizer named Larry Askew.

Employer observer Chris Dalton testified that two union representatives and two company attorneys were in the polling area prior to the beginning of the voting; and that at least one of the company representatives was wearing a suit. Dalton initially testified that the union and company representatives all left the voting area together prior to the announcement that the polls were open. Later, he testified that the company representatives left first and the union representatives stayed behind for approximately 3 to 5 minutes to tape the curtains closed. Dalton further testified that the union representatives left the polling area "maybe ten minutes" prior to the opening of the polls; that the Board agent then instructed the observers how to handle the voting eligibility list; that they then "waited just a short time"; and that the Board agent then announced that the polls were open. Finally, Dalton testified that he did not recall Petitioner representative Huey being in the polling area when the polling started. The Employer's second observer, Harold Laster, testified that the Petitioner's representatives were "on the way out" at the time the Board agent announced that the polls were open.

Petitioner representative Askew testified that he attended the preelection conference; that after the conference he borrowed some tape from the Board agent and taped gaps in the curtains shut; that he, Huey, and the company attorneys all left the polling area at the same time; that they arrived in the reception area at 3 minutes before 8 a.m.; that they waited 3 minutes before the Employer's receptionist read the announcement opening the polls; and that the Petitioner representatives and company attorneys then left the premises. Similarly, Petitioner representative Huey testified that he, Askew, and the two company attorneys all left the preelection conference together; that they then went to the reception area; that they waited a minute or two before the announcement was made that the polls were open; and that the union and company representatives talked for a minute or two and then left the building through the front door. Terry Woodard, one of the Petitioner's observers for the morning voting session, testified that the two union representatives and the two company attorneys left the polling area together "about five minutes before" 8 a.m.; and that the Board agent announced that the polls were open after they had left.

Sherry Sills, the Employer's receptionist, testified that she opens the switchboard at 8 a.m. and did so on the day of the election; that the first thing she did after opening the switchboard that day was read a notice over the Employer's public address system announcing that the polls were open; and that the union representatives were both present at 8 a.m. when she did so. Similarly, Dorothy Merkle, the Employer's vice president of human resources, testified that the Petitioner's representatives were present in the lobby "prior to 8 [a.m] because at 8 [a.m] on the nose we read the announcement in the lobby"; and that the union representatives had been there "probably ten to fifteen minutes prior to 8 [a.m]."

Employee Manson's testimony would place at least one of the Petitioner's two representatives within the curtained area at 8 a.m. when the polls opened. Employee Stout's testimony would place both union representatives within the breakroom but outside the curtained area at "approximately 8 [a.m]." The testimony of the Employer's observers, Dalton and Laster, respectively, would place the union representatives as either having just left, or as just leaving, the breakroom when the polls opened. Petitioner observer Woodard testified to similar effect. The testimony of Petitioner representatives Askew and Huey and Employer witnesses Sills and Merkle place the union representatives in the reception area by at least a couple of minutes prior to 8 a.m. I credit Askew, Huey, Sills, and Merkle on this point. Although the Employer introduced evidence that it would have been theoretically possible for Askew and/or Huey to have returned to the breakroom after the public address announcement, I credit their testimony that they did not do so

and instead left the premises with the company attorneys.[13] Accordingly, I conclude that the Petitioner's representatives were not in the breakroom at the time the polls opened at 8 a.m. or shortly thereafter. Finally, even if Manson's testimony were fully credited, I would nonetheless conclude that the brief presence of one of Petitioner's representatives in the polling area would not warrant setting aside the election. *Roney Plaza Management Corp.*, 310 NLRB 441, 448 (1993).

Employees Paul Putnam and Diane Murray testified in substance that they voted in the morning session of the election; that the Board agent informed them that their ballots were being challenged and explained the challenge procedure but did not tell them why or by whom they were being challenged; and that several other voters were in line waiting to vote at the time. One of the Employer's observers corroborated the gist of this testimony. As is usual in these cases, the Board agent did not testify. See Representation Casehandling Manual (Part Two), Section 11429.1.

In its posthearing brief, the Employer contends that the Board agent's alleged failure to more fully detail the reasons for the challenges to the ballots of Putnam and Murray "served to taint the election by creating the impression that the Board was not a neutral arbiter, but rather an active party to the election." Initially, I note that Section 11338.2(b) of the Representation Casehandling Manual provides in relevant part that "[t]he reason for the challenge should be stated at the time the challenge is made." However, and even assuming that the Board agent failed to comply with the Casehandling Manual in this regard, "the failure to achieve absolute compliance with [all of the rules, regulations and guidelines for conducting an election] does not necessarily require that a new election be ordered." *Polymers, Inc.*, 174 NLRB 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969). The Employer cites no case authority, and I have found none, holding that a Board agent's failure to state the reason for a challenge at the time the challenge is made raises a "reasonable doubt as to the fairness and validity of the election." Id. Accordingly, I reject the Employer's contention that alleged deficiencies in the challenged ballot procedure in this case warrant setting aside the election.

Petitioner's observer, William Norwood, testified that he arrived for the second session of the election by about 4 p.m.; that the Board agent was already there; and that the two Petitioner's representatives arrived at about 4:05 or 4:10 p.m. Norwood further testified that after the union and company representatives left, the Board agent looked at her watch and said, "[W]e'll give it a few more minutes" because it was not quite 4:30 p.m.; and that the Board agent looked at her watch at 4:30 p.m. and announced the polls were open. Petitioner observer Paul Ridley similarly testified that the Board agent said that "we still have a few more minutes" after the company and union representatives left and that "we had a few minutes to do whatever we needed to do" before the polls opened.

Sherry Sills testified that the union representatives had not yet arrived when it was time to read the announcement at 4:30 p.m.; that she read the notice "[p]robably two or three minutes after 4:30 p.m. because I kept looking at my watch"; and that she then immediately went upstairs to punch out because she was late for a part-time job. Sills' timecard indicates that she punched out at 4:35 p.m. Similarly, Dorothy Merkle testified that Huey arrived in the lobby area for the afternoon voting session "a couple of minutes past 4:30"; that he was present "by 4:32"; and that the announcement opening the polls was read immediately after Huey arrived. Both Huey and Askew testified in substance that Sills read the announcement at 4:30 p.m.

Petitioner observer Woodard testified that "[e]very clock in the building's got something different on it"; and that "there's one clock, if you clock out for your break on it, and come back on the other one, you'll gain two or three minutes." Another Petitioner observer, Lamont Ridley, testified that the timeclocks are sometimes 3 to 4 minutes apart. Merkle testified that she has been alerted to problems with the timeclocks but that the differences in time have been "shy of a minute."

Keith McIntyre, the Employer's manager of safety, training, and security, was called as a witness by the Employer. McIntyre testified that his duties on the day of the election included escorting the Petitioner's representatives on and off the property; that because of a mixup, he did not do so after the morning preelection conference; and that visitors are required to sign in and out at a card shack. Visitors typically check their own watches to indicate their times in and out. The sign-in form for the day of the second election discloses that the Union representatives entered their arrival times as 4:22 and 4:24 p.m. and their departure time as 4:38 p.m.

In its posthearing brief, the Employer contends that "[a]ll the evidence points to the conclusion that the polls did not open at 4:30 p.m. as posted, but rather they opened several minutes after that." I reject this contention based on the testimony of Petitioner observers Woodard and Ridley, which I credit, that the Board agent waited until 4:30 p.m. and then opened the polls. I further credit their testimony concerning the disparities in timeclocks at different locations in the Employer's facility. Given these disparities, I conclude that it is impossible to determine whether Sills read the announcement indicating that the polls were open at 4:30 p.m., as Askew and Huey testified, or within several minutes after that, as Sills and Merkle testified. I further conclude that it is unnecessary to definitively resolve this dispute for the simple reason that all of this evidence relates to the time *the announcement was read* and not to the time that *the polls opened*. Accordingly, I reject the Employer's contention that the record establishes that the Board agent opened the polls late for the afternoon session. For this reason, I further conclude that it is unnecessary to determine "whether the number of employees possibly disenfranchised [by the late opening of the polls] is sufficient to affect the election outcome." *Pea Ridge Iron Ore Co.*, 335 NLRB 161 (2001).[14]

[13] In view of my credibility resolutions I find it unnecessary to consider whether an adverse inference would be warranted based on the failure of the Employer to call its attorneys to testify on this limited point.

[14] In its posthearing brief, the Employer contends that the alleged error in opening the polls late was compounded by the fact that the Employer posted signs on the televisions requesting that they remain off "during voting hours: 4:30 to 7:30 p.m. Thank you." The agreed-upon

Considerable and conflicting evidence was elicited at the hearing as to whether the three televisions were on or off in the breakroom during the morning session of the election and, if they were on, how loud they were.[15] I find it unnecessary to detail the evidence, or to resolve the conflicts in the evidence, since I conclude that loud television noise in the polling area would not in any event constitute objectionable conduct. *Prestolite Wire Division*, 225 NLRB 1 (1976) (noting that in underlying representation case the Board rejected the contention that the election should be set aside because the Board agent who conducted the election purportedly allowed "employees who were union organizers to make excessive noise in the line near the voting booth"; and stating that "while [the Board] did not condone the noisy and somewhat disruptive atmosphere in which the election was conducted," the "laboratory conditions [for conducting the election] were not impaired by the amount and volume of conversation in the voting line"), enfd. denied 592 F.2d 302 (6th Cir. 1979) (concluding that employer was entitled to hearing on objections). For the same reason, and relying on the same authority, I conclude that it is unnecessary to detail and resolve the considerable evidence elicited at the hearing concerning loud and at times profane conversations among employees who were using the breakroom during at least part of the afternoon polling times.[16]

Employer observer Chris Dalton testified that at one point during the morning session the Board agent asked that the televisions be "cut off"; that Petitioner observer James Taylor exited the curtained area in order to do so; that employee Mark Tidwell was in the breakroom at the time; that Taylor asked Tidwell if he had voted yet; and that Tidwell responded negatively and indicated that he would vote later. Dalton further testified that Taylor's question to Tidwell disturbed him because it was contrary to the Board agent's instructions; that he mentioned the incident to the Board agent; but that the Board agent indicated she had not heard Taylor's question. I credit Dalton's testimony.

Employee Joseph Hatley, one of the Employer's observers for the second shift of the election, testified that he heard employees in the breakroom say such things to voters as they walked toward the polling area as "Go get 'em. Go show 'em the power"; that the curtain was somewhat transparent; and that he "could see employee Chris Shouse sitting up there putting his arm up like that, 'Go get 'em, Dog. Go show Steve,' which is now a warehouse manager." Hatley further testified that he heard the employees tell an employee named James Haddocks, who had been on vacation, "Well, we're glad you could make it. You're going to show 'em, ain't you Dog." Haddocks responded, "Yeah, I've got something to show them." Shouse denied all the foregoing testimony. I have previously discredited Shouse's testimony and do so again here.

Employee Shane Owensby testified concerning an incident that occurred when he was standing in line outside the curtain waiting to vote. Tommy Thomas was sitting at a table with a group of five or six people. According to Owensby, he heard Thomas ask on five or six occasions as voters emerged from the curtained area, "Are you sure you voted the right way?" Thomas denied this testimony and testified that "I've never even had a five second conversation with him before ever—working at the company." I credit Owensby.

Employee Gregory Jaster testified that Tommy Thomas and other employees were sitting at a table in the breakroom when Jaster came in to vote; and that he overheard Thomas say to the others, "It'd be in the people's best interest to vote yes." Thomas did not specifically deny this testimony. I credit Jaster.

The credited evidence establishes that on one occasion during the morning session the Petitioner's observer briefly left the curtained area and asked an employee if the employee had voted yet. I conclude that such conduct is not objectionable.

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polling time was instead from 4:30 to 7 p.m. I note that there is no evidence that the Employer secured the agreement of the Petitioner or the Board agent prior to posting these signs. I reject the Employer's attempt to advance its own unilateral and erroneous conduct as the basis for sustaining its objections to the conduct of the election.

[15] For example, one Employer witness—Perry Manson—testified that the televisions were not on at the beginning of the election. Other Employer witnesses—Thomas Stout and Harold Laster—testified that they were. Employer witness Diane Murray testified that during the morning session "[f]or the most part [the noise level] was pretty good. I mean, there was a little mumbling, but nothing drastic." One of the Employer's observers—Chris Dalton—testified that the televisions were off and on, and the noise level up and down, at various times during the morning session; that "it got extremely noisy with the people coming in and out, and the TVs were on"; and that at one point the Board agent asked that the televisions be "cut off." Laster generally corroborated this testimony. Terry Woodard, one of the Petitioner's observers in the morning session, testified that "[the televisions] were off [during the morning voting session] because it was so quiet in there." Joe Robbins, a maintenance technician, testified without contradiction that at Dorothy Merkle's request he posted a sign on the televisions prior to the afternoon session of the election requesting that the televisions remain off during the voting.

[16] Jimmy Faulk, a witness called by the Employer, testified that "[i]t was pretty loud in there. It was typical—typical noise level of a day coming in before the shift starts." Joseph Hatley, one of the Employer observers, testified that it was "quite loud" during the afternoon shift changes; that he "could hear everybody talking, yelling"; that the Board agent twice commented on how loud it was; and that there was considerable profanity. Faulk and Hatley further testified that the voting area was "intimidating" and "strange," respectively. However, their subjective reactions are irrelevant in determining whether objectionable conduct occurred. *Culinary Foods*, 325 NLRB at 664–665. Another employee—Gregory Jaster—testified that when he went to vote between 4:30 and 5 p.m., "You could hear people talking, but there wasn't, you know, nobody being loud really or nothing." Former employee Tommy Thomas testified that he was in the breakroom at about 4:45 p.m.; that he recalled employees discussing the "Michael Jordan comeback"; that some of the employees, including himself, used loud and profane language; and that someone told them to quiet down. Petitioner observer Lamont Ridley testified that employees in the break room "got loud once"; and that he told a voter "to tell them those guys—this was after he voted—tell those guys to watch their language. There's a lady in there." Employee Chris Shouse testified that he was in the breakroom from 4:35 to 4:55 p.m.; that Thomas was also in the breakroom during that time; that employees were discussing sports, including the Tennessee Titans but not including Michael Jordan; and that no one told them to hold down the noise. I regard the inconsistencies between Shouse and other witnesses concerning what occurred in the breakroom in the half-hour after the polls opened in the afternoon as further reasons for generally discrediting Shouse's testimony.

At the outset, I reject the Employer's contention that the entire breakroom constituted the voting area. Rather, I conclude that the curtained area within which the balloting actually took place was the voting area. *Westwood Horizons Hotel*, 270 NLRB at 803 fn. 14.[17] Although the Board's decision in *Milchem, Inc.*, 170 NLRB 362 (1968), which prohibits conversations between parties to an election and voters, extends to observers, *Modern Hard Chrome Service Co.*, 187 NLRB 82 (1970), it does not extend to such a "chance, isolated innocuous comment or inquiry" as was involved in the brief interchange between Taylor and Tidwell. *Milchem, Inc.*, 170 NLRB at 363 ("We will be guided by the maxim that 'the law does not concern itself with trifles.'"). See also *Sir Francis Drake Hotel*, 330 NLRB 638 (2000) (union observer's remarks to voters not objectionable since brief and innocuous).

The credited evidence further establishes that prounion employees Shouse and Thomas exhorted prospective voters on several occasions during the afternoon voting session to vote for the Petitioner. I conclude that such conduct is not objectionable. Initially I note that the conduct involved conversations between employees and did not involve a party to the election. *Rheem Mfg. Co.*, 309 NLRB 459 (1992). The proper test to apply in these circumstances is whether the third-party conduct is so disruptive of employee freedom of choice that the election must be set aside. *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118, 1119 fn. 6 (1982). In concluding that this test has not been met, I note that Shouse and Thomas were only in the breakroom for approximately 20 to 30 minutes prior to the beginning of their 5 p.m. shifts, and that there is no evidence that such exhortations occurred during the morning shift or the balance of the afternoon shift. *Crestwood Convalescent Hospital*, 316 NLRB 1057 (1995). I also note that only one of the employees (Owensby) was actually in the polling area or standing in line waiting to vote when a comment was made. *Golden Years Rest Home*, 289 NLRB 1106 (1988); *Mead Corp.*, 189 NLRB 190 (1971).[18] Finally, I note that a number of the comments attributed to Thomas were made to employees who had already voted. Accordingly, and for all of the reasons set forth above, I conclude that the Employer's Objections 4, 5, and 8 lack merit.

Objection 10

I have considered and rejected all of the Employer's contentions, including its contention concerning the alleged late opening of the polls, in connection with specific objections above. Accordingly, I conclude that its "catch-all" objection also lacks merit.

[17] *Pepsi-Cola Bottling Co.*, 291 NLRB 578 (1988), relied on by the Employer, is not to the contrary. In that case, the Board concluded that the no-electioneering area extended to lines that formed outside the room where the polling took place. Although there is record evidence indicating that such lines existed during the morning voting session, there is no similar evidence regarding the afternoon voting session. Rather, the only record evidence concerning lines during the afternoon sessions is that on one occasion one employee—Shane Owensby—briefly waited just outside the curtained area before entering to vote.

[18] The Employer's reliance on *Brinks Inc.*, 331 NLRB 46 (2000), is misplaced since there, unlike here, the electioneering took place in the voting area and involved an observer. *Pepsi-Cola Bottling Co.*, supra, is also distinguishable since there, unlike here, voters were forced to make their way through a "gauntlet" of cheering and chanting union supporters who were waiting in line to vote.