United Food and Commercial Workers, Local 7R (Conagra Foods, Inc., d/b/a Longmont Foods)[1] *and* Rosa Cadena. Case 27–CB–4697

August 25, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 29, 2005, Administrative Law Judge Thomas M. Patton issued the attached decision.[2] Thereafter, both the Employer and the General Counsel filed exceptions and supporting briefs. The Respondent filed a reply brief to the exceptions by the Employer and General Counsel.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified.[3]

The judge recommended dismissal of the allegation that the Respondent Union's organizer, Miguel Reyes, violated Section 8(b)(1)(A) by threatening to assault employee Rosa Cadena if she attended another union meeting.[4] We reverse.

On January 22, 2005, Cadena and Reyes were both present at a union meeting. Cadena expressed vocally, and at length, her dissatisfaction with the Respondent's representation of unit employees. Reyes became irritated and sought to bring Cadena's remarks to a close. Harsh words were exchanged between Cadena and Reyes, and Cadena left the meeting. On January 24, 2005, Reyes told employee Fernando Martinez, among other things, that, if Cadena showed up at a future union meeting, Reyes would "grab her by the hair and take her out." After the incident, Martinez spoke to Cadena. Martinez did not repeat what Reyes had told him, but told Cadena to be careful because Reyes was very upset.

In recommending dismissal of this allegation, the judge, citing *Sheet Metal Workers Locals 102 & 105 (Comfort Conditioning Co.)*, 340 NLRB 1240 (2003), and *Painters Local 466 (Skidmore College)*, 332 NLRB 445 (2000), found that Section 8(b)(1)(A) does not proscribe union conduct which involves a purely intraunion dispute, and does not otherwise interfere with the employee-employer relationship or contravene a policy of the Act. In the judge's view, because the evidence failed to establish either that the threat was in response to any participation by Cadena in the decertification process or that it otherwise impaired statutory policies, the threat was not unlawful. It was in the context of a purely intra-union dispute and was not proscribed under Section 8(b)(1)(A) of the Act.

In *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417, 1418–1419 (2000), the Board set forth certain limiting principles in 8(b)(1)(A) cases involving internal union discipline. However, the instant case involves a threat of physical violence. In *Skidmore College*, supra at 446, the Board observed that *Sandia* also reaffirmed "longstanding precedent holding that Section 8(b)(1)(A) proscribes threats of economic reprisals and physical violence by unions against employees" and found that threats of reprisal made against employees because of their protected intraunion activity were unlawful. Thus, the Board reasoned that such threats go beyond internal union disciplinary action and are unlawful.[5]

Under these principles, Reyes' statement to Martinez that he would "grab her [Cadena] by the hair and take her out" is a threat of physical violence against Cadena. The statement was coercive within the meaning of Section 8(b)(1)(A).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, United Food and Commercial Workers, Local 7R, Denver,

[1] The name of the Respondent appears as amended at the hearing.

[2] On August 14, 2006, the Board issued an Order granting the Employer's motion to sever the instant case from Case 27–RD–1160 and to withdraw its exceptions to judge's recommendation not to set aside the election in that case.

[3] The Employer has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] The judge also found that the Respondent Union violated Sec. 8(b)(1)(A) of the Act by threatening to cause the discharge of employee Fernando Martinez if he disclosed to anyone threats made by Respondent's organizer Miguel Reyes to assault employee Rosa Cadena or if Martinez disclosed to anyone offensive remarks and gestures of a sexual nature that Reyes had directed at Cadena. The Respondent did not except to this finding. Finally, we adopt the judge's recommended dismissal of the allegation that the Respondent violated Sec. 8(b)(1)(A) by restraining and coercing Cadena through the operation of a motor vehicle.

[5] *Comfort Conditioning Co.*, supra, also cited by the judge, is not to the contrary. That case decided only the very narrow issue of whether a specific individual was an employer representative within the meaning of Sec. 8(b)(1)(B). The Board found it unnecessary to decide whether the union had otherwise engaged in conduct proscribed by Sec. 8(b)(1).

Colorado, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a) and reletter subsequent paragraphs.

"(a) Threatening any employee with physical violence because the employee engaged in intraunion activities."

2. Substitute the attached notice for that the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten any employee with physical violence because the employee engaged in intraunion activities.

WE WILL NOT threaten any employee that we will attempt to cause the employee to be discharged if the employee discloses threats that a union agent has made to assault another employee.

WE WILL NOT threaten any employee that we will attempt to cause the employee to be discharged if the employee discloses that a union agent has directed offensive remarks or gestures of a sexual nature to another employee.

WE WILL NOT in any like or related manner restrain or coerce employees we represent at Longmont Foods in the exercise of the rights guaranteed them by Section 7 of the Act.

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 7R

Amadeo Ruibal, Esq., for the General Counsel.
W. V. Bernie Siebert, Esq. (Sherman & Howard, L.L.C.), of Denver, Colorado, for the Employer.
Roger J. Miller, Esq. (McGrath, North, Mullin & Kratz, PC LLO), of Omaha, Nebraska, for the Employer.
John P. Bowen, Esq., of Denver, Colorado, for the Union-Respondent.

DECISION

STATEMENT OF THE CASE

THOMAS M. PATTON, Administrative Law Judge. A hearing was held in these cases at Denver, Colorado, on August 2, 2005.[1]

The charge in the unfair labor practice case was filed by Rosa Cadena, an individual on January 31. The charge was amended on April 28. The complaint issued on April 29, and alleges violations of Section 8(a)(1) of the National Labor Relations Act (the Act) by United Food and Commercial Workers, Local 7R[2] (the Union or Local 7R). The Union denies any violation of the Act.

Employees Ramona Perales and Estela Quezada (the Petitioners) filed the decertification petition on November 12, 2004, and Longmont Workers Committee (the Intervenor) intervened. The petition was filed during the window period prior to the February expiration of a collective-bargaining agreement between Local 7R and ConAgra Foods, Inc., d/b/a Longmont Foods (the Employer or ConAgra). The Board conducted an election on May 19, based upon a Decision and Direction of Election issued on April 20.[3]

The tally of ballots showed that of approximately 510 eligible voters, 254 voted for the Union; 12 voted for the Intervenor, 195 voted for neither labor organization; 7 ballots were challenged; and 1 ballot was void. On May 26, the Employer filed timely objections to conduct affecting the results of the election. The objections relate to asserted conduct by the Union. The Union denies that it has engaged in any conduct that would warrant setting aside the election.

On June 7, the Regional Director for Region 27 directed a hearing on the election objections and consolidated the representation case with the unfair labor practice case for hearing, ruling, and decision by an administrative law judge.

The General Counsel, the Employer, and the Union filed posthearing briefs that have been carefully considered. On the entire record,[4] I make the following[5]

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[1] All dates are 2005, unless otherwise indicated.

[2] The name of the Union-Respondent appears as amended at the hearing.

[3] The unit description is as follows:

Included: All production employees employed at the Employer's plant in Longmont, Colorado. Excluded: All maintenance employees, including supply employees, truck drivers, catchers, and cleanup employees; office clerical employees; sales employees; professional employees; guards; and supervisors as defined in the Act.

[4] The transcript is corrected by replacing the word "gage" with the word "gate" at each of the 13 places where it appears.

[5] My resolutions of conflicting evidence are based on my observation of the demeanor of the witnesses, consideration of the exhibits and assessment of the probabilities. Testimony inconsistent with my findings has not been credited because it is in conflict with more credible evidence or because it is not credible and unworthy of belief. See *NLRB v. Walton Mfg. Co.,* 369 U.S. 404, 408 (1962).

FINDINGS OF FACT

I. JURISDICTION

The Employer is engaged the business of food processing and distribution at a facility in Longmont, Colorado (the Plant). The Union admits and I find that the Employer meets the Board's standards for asserting jurisdiction based on its operations and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, the Union admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act. There is no contention that the Intervenor is not a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. January 24 Threats to Assault One Employee and to Cause the Discharge of Another Employee

These two alleged violations of Section 8(b)(1)(A) of the Act relate to an incident involving employee Rosa Cadena, employee Fernando Martinez, and Miguel Reyes, a Local 7R, organizer and admitted 2(13) agent. Cadena is a unit employee and a member of Local 7R. Cadena testified that she "participated" in obtaining signatures for the decertification petition. The record does not show the nature of her asserted involvement in the decertification effort or that Local 7R had knowledge of her involvement. On January 22, Cadena and Reyes were both present at a union meeting.[6] There were conflicting accounts about precisely what occurred at the meeting, and neither Cadena nor Reyes testified in an entirely credible manner. The credible portions of the testimony regarding the January 22 meeting and reasonable inferences show that Cadena in voiced assertively and at length her dissatisfaction with Local 7R's representation and interfered with the progress of the meeting. Reyes became irritated and sought to bring Cadena's remarks to a conclusion. Harsh words were exchanged between Cadena and Reyes and Cadena left the meeting. Employee Gabriela Mijares testified in a convincing manner that Cadena "kept talking all the time, interrupting him. They were going to start the meeting and she would interrupt so the meeting didn't start 'til she left."

Martinez related what occurred in a conversation he had with Reyes at an entrance to a parking lot at the plant at 3 p.m. on January 24.[7] No one else was present. Reyes denied that the conversation occurred. Martinez testified that while they were talking they observed Cadena walking from one plant building to another with other employees. Cadena was taking new employees on a tour of the facilities, one of her job duties. Martinez, testifying through a Spanish translator, related that Reyes told him, in reference to Cadena, that "what she needs to be happy is—it's a dick. That's what she needs." According to Martinez, Reyes started touching his "private part" and yelled to Cadena, "Hey, you bitch, this is what you need," and then made motions, inferentially of a sexual nature, with his finger. Cadena testified that she heard Reyes yell "bitch" (in Spanish). Martinez testified that he told Reyes to be quiet, that he represented the Union and should not talk like that. Martinez testified that Reyes mentioned a future union meeting and Martinez asked Reyes "are you going to let her know all those things." Martinez related that Reyes answered, that if she did show up at the meeting Reyes would "grab her by the hair and take her out." According to Martinez, Reyes said he was leaving and that Martinez "didn't hear anything." Martinez related that he asked Reyes, "[W]hat do you mean, I didn't hear anything" to which Reyes replied, "If you say something you can lose your job. I have power." I found Martinez to be a convincing witness regarding this testimony. He impressed me a being a modest person who was genuinely reluctant to repeat what Reyes said, but testified with good recall after the importance of an accurate account was explained to him through the interpreter. Reyes denied the incident in unconvincing fashion. I credit Martinez notwithstanding evidence that he concurred with some of Cadena's criticisms of the Union.

Following the incident at the gate, Martinez spoke with Cadena. He credibly testified that Cadena asked what Reyes was screaming at her, but that he did not want to repeat what Reyes had said and only told her to be careful and not to go out right then because Reyes was very upset. The evidence does not show that Martinez related anything else about Reyes' statements and behavior on January 24 to other persons prior to the election.

The complaint does not allege and the General Counsel has not contended that the coarse remarks and behavior of Reyes directed at Cadena violated the Act.

The General Counsel argues that Union Agent Reyes' statement to Martinez that he would grab Cadena by the hair and drag her out of the room if she attended the next union meeting was a violation of Section 8(b)(1)(A). The General Counsel argues that threats of bodily injury against an employee by a union agent violate Section 8(b)(1)(A), based on the decision in *Oil Workers Local 2-947 (Cotter Corp.),* 270 NLRB 1311 (1984). That proposition is correct only if such threats are related to activity protected by the Act. In *Cotter Corp.,* supra at 1311, the Board concluded:

> Based on the circumstances present here, we find that the logical inference is that Ceremuga's reference to filing a new charge provoked Wilkins into threatening him with physical violence. There is no other reasonable explanation for Wilkins' action. Accordingly, we find that the Respondent violated Section 8(b)(1)(A) of the Act by engaging in such conduct.

The Board finds that the scope of Section 8(b)(1)(A) in intra-union disputes is to proscribe union conduct against union members that impacts on the employment relationship, impairs access to the Board's processes, pertains to unac-

[6] Testimony regarding the meeting was received only as background evidence, over the objection of the Union. No unfair labor practice is alleged to have occurred at the meeting.

[7] Martinez' testimony was offered through a translator. The translation was sometimes related as a third person account of what the witness said. The translation was adequate to establish this account of his testimony.

ceptable methods of union coercion . . . or otherwise impairs policies imbedded in the Act. Section 8(b)(1)(A) does not proscribe intra-union conduct which involves a purely intraunion dispute, and does not interfere with the employee-employer relationship, or contravene a policy of the National Labor Relations Act. *Sheet Metal Workers Locals 102 & 105 (Comfort Conditioning Co*), 340 NLRB 1240 (2003); *Painters Local 466 (Skidmore College),* 332 NLRB 445 (2000). As stated by the administrative law judge in *Precoat Metals*, 341 NLRB 1137, 1187 (2004):

> The Act does not broadly deputize the Board as some sort of police court empowered to adjudicate internal disputes between labor organizations' officers and members. Only recently the Board held that it could not become involved in internal affairs of labor organizations, so long as whatever happened had no affect on employment relationships, access to the Board or some other public policy interest encompassed by the Act.

The threat by Reyes to grab Cadena by the hair and drag her out of the room if she attended the next union meeting was made in reference to Cadena's assertions, made as a Local 7R member at a union meeting, that the union leadership was deficient. The evidence does not establish that the threat was in response to any participation by Reyes in the decertification process or that it otherwise impaired policies imbedded in the Act. It was not shown to be more than an internal dispute. Accordingly, I conclude that the General Counsel has not proven that the threat to assault Cadena violated Section 8(b)(1)(A) of the Act.

The vulgar statements and behavior of Reyes directed at Cadena occurred at an employee entrance to the workplace and would be offensive to many employees. That conduct occurred at a time when Cadena was at work and in the presence of other employees. Accordingly, Reyes conduct affected employee working conditions and were matters of employee concern. Martinez had a Section 7 right to discuss Reyes' behavior with other employees and to concertedly address the issue with the union leadership and with management. Threats of job loss for engaging in protected activities violate Section 8(b)(1)(A). *Paperworkers Local 710 (Stone Container)*, 308 NLRB 95 (1992). Accordingly, the Union violated Section 8(b)(1)(A) of the Act by Reyes' threat that Martinez would lose his job if he repeated what he had heard and seen.

B. January 24 Restraint and Coercion of an Employee by the Operation and Parking of a Motor Vehicle

Cadena, Reyes, Union Organizer Jose Moreno, and employee Reina Gutierrez testified regarding what occurred in the late afternoon of January 24. According to Cadena it was quitting time, about 5 p.m. and she was walking alone to her car. She crossed a road that ran between the main building of the Plant and a secondary building with an adjacent parking lot where she parked. The spot where she crossed the road was within sight of a plant gate some distance down the road where Reyes was picketing. Cadena related that when she looked in Reyes' direction he looked at her and began dancing "real dirty." Reyes denied seeing Cadena leaving the plant that day.

Cadena testified that it was very cold, so she got in her car and started it to warm it up. She related that at that point she saw her friend Reina Gutierrez, an inventory clerk and not a member of the unit represented by Local 7R. It was also quitting time for Gutierrez. Cadena got out of her car and walked across the street and engaged Gutierrez in conversation on the other side of the road. Cadena explained that she tried to get Rena's attention and talked to her because she was frightened of Reyes, but she did not mention her fear to Gutierrez. While Cadena and Gutierrez were talking near to but not in the road, they both described a car driving by at a higher than usual rate of speed and close to them. Neither testified that the car drove off the road near them and Gutierrez recalled remarking that the driver was crazy. Gutierrez was unable to identify the driver or the car. Cadena had her back to the road. The women concluded their conversation, with Cadena returning to her car and Gutierrez walking to a door into the main plant building where she got her personal belongings and left work through a door on the other side of the plant.

Cadena testified that she talked to Gutierrez for about 15 minutes and in her testimony stated that Gutierrez left after the car drove past them. According to Cadena, Reyes made a U-turn and parked in front of her car and she sat in her car for about 20 minutes.

Cadena's testimony about the car incident was markedly different from the affidavit she gave during the administrative investigation. In that affidavit she stated:

> Then Reyes made a U-Turn on Emery Street a little—a little past where we were standing, and then he pulled into the parking lot where my car was parked. The other Union rep was in the car with Reyes when they drove past me. They stayed in the car for 15 minutes. I continued to try to act natural and talk to Rena. I was afraid that I was trying to act like I wasn't. I didn't look at Reyes to see if he or the other Union rep were looking at me. I got in my car and sat there for 15 minutes.

Gutierrez' testimony was credibly offered and is credited. In contrast, I was not impressed with Cadena's testimony about the car incident, which was denied by Reyes and organizer Jose Moreno.

The discrepancy between Cadena's affidavit and her testimony appears to be an attempt by her to make her original story related during the investigation conform to the credible testimony of Gutierrez. If the "crazy" driver had made a U-turn and parked in front of Reyes' car while the women continued to talk, as described in Cadena's affidavit, it is unlikely that it would have gone unnoticed by Gutierrez.

Cadena's testimony about the car incident was not credibly offered. I credit Reyes' denial and Moreno's credibly offered testimony on this issue. Cadena's discredited testimony regarding what occurred while she spoke with Gutierrez is reason to doubt her account of the "dirty dancing" and her account of that matter was not credibly offered. In summary, I do not credit Cadena's version of any of the events on January 24, to the extent they are inconsistent with the testimony of Reyes, Moreno, and Gutierrez. The General

Counsel has not established the violation alleged regarding this incident.

IV. THE OBJECTIONS

The Employer's four objections are as follows:

(1) On or about May 18, 2005, the day before the election in the above-captioned case, United Food and Commercial Workers Union Local 7R (the Union) caused to be distributed to employees of the Employer at its Longmont facility, the document attached hereto as exhibit "A." In that document the Union promised employees a substantially increased amount of strike pay as an inducement for the employees to vote for the Union. The promise was of the type that the Union could effectuate. The unlawful promise interfered with the election process and clearly affected the results of the election.

(2) Sarah Bailly, an agent of the Union, told employees that they would receive $350 for strike pay if they voted for the Union and there was a strike. Such a promise interfered with the election and affected the results of the election.

(3) The document attached as exhibit "A" also contained the threat that if the employees did not vote for the Union, "You workers get *screwed* and all the management get bigger bonuses!" Such threat had the tendency to interfere with the election and had a coercive effect thereby affecting the results of the election.

(4) In the months preceding the election, the Union by and through its agents threatened, restrained, and coerced employees in the exercise of their Section 7 rights. See generally the complaint and notice of hearing in Case 27–CA–4697–1.

A. Objection 1

The central contention of the Employer in Objection 1 is that the strike pay promised in the handbill was objectionable conduct because it was a promise of an increased benefit strikers would receive from the Union, conditioned on the Union being selected by the employees and upon employees becoming members of the Union so as to qualify for strike pay.

The Union distributed the handbill referred to in Objections 1 and 3 to all the unit employees the day before the election. It was printed on both sides. Some of the unit employees speak and read only Spanish. One side of the handbill was in English and the other in Spanish, but they were otherwise identical. The wording and layout of the handbill is as follows:

> LOCAL 7 MEMBERS
>
> ConAgra is now telling you to give them one year but what they do not tell you is, if you vote out Local 7, you are then an *at will employee*! Which means the Company can cut your wages *at will*, cut your benefits *at will*, fire you *at will*. You workers get *screwed* and all the management get bigger bonuses! Now the Company is trying to scare you with strikes. If the Company, ConAgra, does not address the wages and benefits you deserve, and forces you to strike, Local 7's executive board voted yesterday, May 17, 2005, to give each of you $350.00 per week of strike benefits!
>
> WORKERS, REMEMBER IT IS YOUR CHOICE, YOUR VOICE, YOUR VOTE!
>
> ONE day *longer*, one day *stronger*
>
> UNITED FOOD & COMMERCIAL WORKERS, LOCAL 7
>
> X

The Employer contends that the promise in the handbill to pay strike pay to Local 7R members in the event of a possible future strike is a ground for setting the election aside. In *Savair Mfg. Co*., 414 U.S. 270 (1973), the Supreme Court addressed the standards for assessing election objections based on union promises of benefits before representation elections. The promise in *Savair* was that union initiation fees would be waived. The court concluded that the initiation fee waiver was objectionable on the facts of that case because the offer is not across the board to all unit employees. Rather, the waiver had been expressly limited to those who joined prior to the election. The court emphasized that the evidence demonstrated that a substantial number of employees had joined the union before the election, but there was no indication of any employees joining the union after the election, which the court concluded would be the obviously rational decision once the Union had won the election. In reaching its conclusion that the initiation fee waiver was objectionable, the court reasoned:

> Whatever his true intentions, an employee who signs a recognition slip prior to an election is indicating to other workers that he supports the union. His outward manifestation of support must often serve as a useful campaign tool in the union's hands to convince other employees to vote for the union, if only because many employees respect their coworkers' views on the unionization issue. By permitting the union to offer to waive an initiation fee for those employees signing a recognition slip prior to the election, the Board allows the union to buy endorsements and paint a false portrait of employee support during its election campaign.

Savair Mfg. Co., 414 U.S. at 277.

Following the decision in *Savair*, the Board addressed the issue of whether a union's preelection promise of strike pay was a ground for setting aside an election. In *Dart Container*, 277 NLRB 1369 (1985), a union had distributed to employees a leaflet that stated, in part, "We guarantee: that once we win the election you will be eligible for all Teamsters Local 848 benefits, including Local 848's 3/4 of a million dollars strike fund." The Board concluded that unlike the situation in *Savair*, the evidence did not establish that any employee need have demonstrated preelection support for the union to take advantage of the promised strike pay. Accordingly, the Board found the promise of strike pay was not objectionable. The Board attached no significance to the absence of specifics regarding the amount of strike pay that would be paid or the amount in the strike fund.

The challenged handbill in the present case limits the promised strike pay to Local 7R members, but like the situa-

tion in *Dart Container,* there is no probative evidence that the promised strike pay would be available only to employees who joined Local 7R before the election. Indeed, the challenged handbill was not distributed until the day before the election, which afforded little time to "paint a false portrait of employee support" by employees joining the union, which concerned the court in *Savair*.

Union membership is a common, if not universal, requirement to receive strike pay. A union's right to financially support its striking members is a fundamental right. Employees, acting through their unions, accordingly have a protected right to tell employees being organized that strike pay will be available to members who choose to join a future economic strike. As the Board observed in *Dart Container*:

> The extent to which a union may be able to withstand strikes is a natural employee concern, and we have long held that promising strike benefits—even generous benefits—does not impair free choice. See *Lloyd A. Fry Roofing Co*., 119 NLRB 661, 662 (1957) (union promised $30-per-day strike benefit, a "munificent" sum). We therefore do not find that the first leaflet interfered with the election.

Dart Container, supra at 1369, footnotes moved to text.

The promised $30-per-day strike benefit referred to in *Dart Container* was a promise that the petitioning union would supply waterfront work at $30 per day for those union members who needed it. *Lloyd A. Fry Roofing Co*., 119 NLRB 661, 661–662 (1957). The promise was not extended to nonmembers. The Local 7R handbill was similarly not objectionable on the ground that the promised strike pay would only be only available to members.

After concluding in *Dart Container* that the promise of strike pay to union members was not objectionable, the Board then addressed a second campaign leaflet the union had distributed to employees regarding a benefit of union membership. The leaflet, in a question and answer format, included the following:

> Question
>
> I heard when the union wins the election, we would have free legal help from the teamsters attorneys, is this true?
>
> Answer
>
> Yes!! Local 848 has this as a benefit to all members, could it be the company doesn't want you to have access to free legal help from the teamsters attorneys????

The Board, concluded that the promise of free legal help in the second leaflet was not objectionable, reasoning:

> The Petitioner's second leaflet advised employees that the Petitioner provided free legal help to all its members and promised to continue to do so after the election. The Employer contends that the Petitioner's promise is similar to the union's promise in *Crestwood Manor*[8] to hold a $100 raffle for the entire unit in the event the union won the election. The Board found that the promise in *Crestwood Manor* interfered with employees' free choice. Here, by contrast, the Petitioner promised to provide free legal help only as an existing incident of union membership.
>
> We do not believe that a union interferes with an election when it promises to extend an existing incident of union membership to new members. Unlike promising a newly created benefit to all employees as the union did in *Crestwood Manor*, promising to extend an existing benefit to new union members does not suggest to employees that their votes are being purchased. Just as an employer can call attention to benefits that its employees in the proposed unit currently enjoy, so, too, can a union point out the benefits its members currently enjoy.[9]

Dart Container, 277 NLRB at 1369–1370.

On brief ConAgra quotes only the second of the paragraphs set forth above and argues that the Local 7R handbill was objectionable because the amount of the promised strike pay was not an "existing benefit."[10] ConAgra misreads the holding in *Dart Container*. It is clear that the Board was addressing only free legal help and not strike pay in the discussion of existing benefits in the second-quoted paragraph. ConAgra's position is completely at odds with the Board's long-held position that a promise of generous strike benefits does not impair free choice. Accordingly, the Employer's contention that the amount of the promised strike pay was objectionable because it was not an "existing benefit" has no merit.[11]

The Employer argues that taken to its extreme, a holding that the union may say whatever it wants about strike benefits would authorize unions, on the day before an election, to offer employees $10,000; $20,000; and $100,000. Assuming, without deciding, that strike pay might in some other case be so high as to be objectionable, there is no evidence that $350 per week strike pay was disproportionate to what the unit employees would earn if they did not join a strike. The Employer did not offer to introduce evidence that would support such an argument.

In view of all the foregoing, I conclude that the Employer has not proven Objection 1.[12]

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[8] 234 NLRB 1097 (1978).

[9] *Dart Container*, 277 NLRB at 1369–1370, footnotes omitted.

[10] The Union's attorney acknowledged at the hearing that the amounts of strike pay the Union paid to strikers in different strike situations, including the strike pay described in the handbill, were ad hoc decisions that varied with the particular circumstances. Thus, the Union acknowledges that the amount of strike pay referred to in the handbill was established to serve the Union's purposes if there was a strike in the future at the ConAgra Longmont facility, without regard to the amount of strike pay in other situations.

[11] The Board's approval in *Dart Container* of the promise of free legal help for members also supports my conclusion that Local 7R's promise of strike pay only to members did not render the handbill objectionable. Although it is not necessary to resolve the question, the Local 7 strike pay is arguably an "existing benefit," with variable terms for each represented unit.

[12] The revocation of an Employer subpoena, which was received as an exhibit, was addressed again on brief. The Employer speculates that documents requested might show, inter alia, that the promised strike benefits were increased over what had been paid in a past strike against the Employer; that the Union's executive board may

B. Objection 2

The allegation that Sarah Bailly,[13] an agent of the Union, told employees that they would receive $350 for strike pay if they voted for the Union and there was a strike is not supported by substantial and probative evidence. Accordingly, I conclude that Objection 2 is not proven.

C. Objection 3

This objection is that the statement in the handbill distributed the day before the election stated, "You workers get *screwed* and all the management get bigger bonuses!" I am aware of no persuasive authority for setting aside an election based upon such a statement. The import of the statement is no more than a prediction, in coarse terms, that if the Union was voted out, management would benefit at the expense of the unit employees, who would receive less favorable treatment. The statement, view both in isolation and in the context of the other statements in the handbill, did not exceed the bounds of permissible campaign propaganda. *Cambridge Tool & Mfg. Co.,* 316 NLRB 716 (1995). I conclude that Objection 3 is not proven.

D. Objection 4

This objection is that at the election the Union threatened, restrained, and coerced employees in the exercise of their Section 7 rights prior to the election by engaging in the unfair labor practices alleged in Case 27–CB–4697–1.

Conduct that is found to be an unfair labor practice may also be the basis for invalidating an election. The only unfair labor practice that occurred prior to the election was Reyes threat on January 24 that Reyes would cause Martinez to lose his job if Martinez spoke to anyone about Reyes' offensive remarks and behavior that day.

The Board does not apply a per se approach in deciding whether restraining and coercing employees in the exercise of their Section rights in violation of the Act is sufficient to set aside the election. *Caron International*, 246 NLRB 1120 (1979). Rather, the Board examines the unfair labor practice conduct to determine whether it was extensive enough to interfere with the election. The Board considers: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; and (9) the degree to which the misconduct can be attributed to the party. *Harsco Corp.*, 336 NLRB 157 (2001).

The *Harsco* factors that support the objection are that the threat to Martinez must be attributed to the Union and the Union did nothing to cancel out the effect of the threat. The other factors mitigate the effect of the threat on the outcome of the election. Thus, a single employee was shown to have been subjected to the unlawful threat to Martinez, the threat was almost 4 months before the election and the misconduct was not shown to have been disseminated to any other bargaining unit employee. Regarding the severity of the incident and whether it was likely to cause fear among the employees in the bargaining unit, Reyes statement was threat to a single employee that would not reasonably cause fear among the other employees. Further, it was a threat of employer action that an employee in the circumstances of this case would reasonably evaluate as not being one the Union could likely carry out. There is no objective evidence that the threat persisted at the time of the election and the tally of ballots does not support a conclusion that the threat made to a single employee affected the election.

Based on all the foregoing, I conclude that Objection 4 does not afford a basis for setting the election aside.

CONCLUSIONS OF LAW

1. The Employer is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(b)(1)(A) of the Act by threatening an employee that the Union would attempt to cause his discharge if the employee disclosed to anyone threats an agent of the Respondent Union had made to assault another unit employee or disclosed to anyone offensive remarks and gestures of a sexual nature that the agent had directed at another unit employee.
4. The Respondent has not otherwise violated the Act.

Rulings and Conclusions on the Election Objections

1. Objections 1, 2, and 3—These objections have not been proven.
2. Objection 4—The only unfair labor practice I have found is a single threat made by a union agent to an employee. That threat is an insufficient basis for setting aside the election.

Accordingly, I dismiss the objections to the election and recommend the Board certify the Union.

THE REMEDY

Having found that the Respondent Union has engaged in unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

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not have had the authority to authorize strike pay; that the executive board may not have taken the action described in the handbill; that the strike pay described in the handbill may not have been available to employees in other units represented by the Union; and that some employees, including nonmembers, might not be eligible to receive strike pay. The information requested by the subpoena addressed, in part, matters outside the election objections and none of the information sought was reasonably relevant to the question of whether the challenged handbill objectively had "the tendency to interfere with the employees' freedom of choice." *Cambridge Tool Mfg.,* 316 NLRB 716 (1995). Moreover, exploration of irrelevant fact issues would have unduly extended the hearing. See also *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), regarding misstatements of fact as election objections.

[13] The name is spelled in the transcript as "Sara Bailey."

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended Order[14]

ORDER

The Respondent, United Food and Commercial Workers, Local 7R, Denver, Colorado, its officers, agents, and representatives shall

1. Cease and desist from

(a) Threatening any employee that the Union will attempt to cause the employee to be discharged if the employee discloses threats that an agent of the Respondent Union had made to assault another employee.

(b) Threatening any employee that the Union will attempt to cause the employee to be discharged if the employee discloses offensive remarks or gestures of a sexual nature that an agent of the Respondent Union has directed at another employee.

(c) Restraining or coercing employees in any like or related manner in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its business office and meeting places copies of the attached notice marked "Appendix."[15] Because a substantial number of employees in the collective-bargaining unit read only the Spanish language, the Region will translate the required notice into Spanish and the notice will be signed and posted in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and return to the Regional Director sufficient copies of the notice for posting by the Employer, if willing, at all places where notices to employees are customarily posted in its facility in Longmont, Colorado.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."