UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

MEMBERS BUILDING MAINTENANCE, LTD.,

Employer

and **Case No. 16-RC-10879**

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 100,

Petitioner

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

Pursuant to a petition filed on March 2, 2009,[1] by Service Employees International Union, Local 100 (Petitioner) and a Stipulated Election Agreement which was signed by the parties on March 19, 2009, an election was conducted on April 13, 2009, among certain employees of Members Building Maintenance, Ltd. (Employer).[2] The results of the election are set forth in the Tally of Ballots, which issued on April 13, 2009.[3]

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[1] Unless otherwise indicated, all dates are 2009.

[2] The collective bargaining unit contained in the stipulated election agreement is as follows:

> Included: All full-time and regular part-time Custodian/ Janitor employees of Members Building Maintenance, Ltd. working at Terminal D of the DFW Airport;
>
> Excluded: All other Members Building Maintenance, Ltd. employees working at Terminal D of the DFW Airport including office clerical employees, professional employees, guards and supervisors as defined in the Act.

[3]

Approximate number of eligible voters	71
Void ballots	0
Votes cast for Petitioner	38
Votes cast against participating labor organization	31
Number of valid votes counted	69
Number of challenged ballots	0

On April 20, 2009, the Employer timely filed Objections to conduct affecting the results of the election, and copies were duly served on the Petitioner. Thereafter, on May 7, 2009, the Regional Director for Region 16 issued a Report on Objections, Order Directing Hearing and Notice of Hearing, and ordered that a hearing be conducted for the purpose of receiving evidence to resolve the issues raised by the Objections to the election. In her May 7, 2009 Order, the Regional Director directed the hearing officer to prepare and serve upon the parties, a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of said Objections.

Accordingly, on May 19, 2009, a hearing was held in Fort Worth, Texas, before the undersigned hearing officer. The Employer was represented by counsel and the Petitioner was present at the hearing and both had full opportunity to call, examine, and cross-examine witnesses, and to introduce evidence pertinent to the issues.

Upon the entire record in this case,[4] and from my careful observation of the demeanor of the witnesses while testifying under oath, I find as follows.[5]

[4] Permission was granted by the undersigned for the filing of a four-page legal memorandum. The Employer and Petitioner subsequently filed a memorandum which I have duly considered in formulating my recommendations.

[5] In the resolution of all issues raised by the Objections where credibility of oral testimony became a factor, I have carefully considered the demeanor and conduct of the witnesses, as well as their candor, objectivity, bias or lack thereof, and I have weighed the witnesses' understanding of the matter to which they testified, the plausibility, consistency and probability of their testimony, as well as whether portions of their testimony should be accepted when other portions are rejected. While I have addressed the credibility of specific witnesses with regard to certain matters more fully herein, the absence of a statement of resolution of a conflict in specific testimony, or the absence of an analysis of such testimony, does not mean that such did not occur. See, ***ABC Specialty Foods, Inc.***, 234 NLRB 475 (1978) citing as authority ***U.S. v Pierce Auto Lines***, 327 U.S. 515 (1946). The Board has long held that the failure of the trier of fact to detail completely all conflicts in the evidence does not mean that this conflicting evidence was not considered. See, ***Borman, Inc.***, 273 NLRB 312 (1984).

OBJECTIONS

The Employer filed ten Objections to conduct affecting the results of the election, none of which were withdrawn prior to the hearing and are as follows:

1. Petitioner, through its agent(s), officials(s), or supporter(s), through coercion and intimidation at the worksite and in communications to employees created an atmosphere of fear, threats, reprisal and the potential for violence and rendered the holding of a free and fair election impossible.

2. Petitioner, though its agent(s), officials(s), or supporter(s), created an atmosphere of fear, threats, reprisal and the potential for violence by telling employees that Petitioner knew where they lived and would make trouble for them at home if they did not vote for Petitioner and other threatening statements, which rendered the holding of a free and fair election impossible.

3. Petitioner, through its agent(s), officials(s), or supporter(s), created an atmosphere of fear, threats, reprisal and the potential for violence within the 24 hour period before the election by telling employees that Petitioner knew where they lived and would make trouble for them at home if they did not vote for Petitioner and other threatening statements, which rendered the holding of a free and fair election impossible.

4. Petitioner, through its agent(s), officials(s), or supporter(s), particularly one of its observers, created an atmosphere of fear, threats, reprisal and the potential for violence within the 24 hour period before the election by telling an employee(s) that Petitioner's observer would be watching when they voted, would know how they voted, knew where they lived and would make trouble for them at home if they did not vote for Petitioner and other threatening statements, which rendered the holding of a free and fair election impossible.

5. Petitioner, through its agent(s), officials(s), or supporter(s), offered inducements to employees in exchange for their support of Petitioner which substantially interfered with the employees' freedom of choice in the election and rendered the holding of a free and fair election impossible.

6. Petitioner, through its agent(s), officials(s), or supporter(s), specifically one of its observers, engaged in improper electioneering during the release of voters immediately prior to and after the opening of the polls and encouraged prospective voters to vote for the Petitioner as they left their work stations to vote, which substantially interfered with the employees' freedom of choice in the election and rendered the holding of a free and fair election impossible.

7. Petitioner, through its agent(s), officials(s), or supporter(s), specifically one of its observers, failed to abide by its agreement regarding voter release which substantially interfered with the employees' freedom of choice in the election and rendered the holding of a free and fair election impossible.

8. Employees were harassed, coerced, restrained, and intimidated if they did not join, support, or otherwise select Petitioner as their bargaining representative.

9. By these and other acts and conduct, the employees were misled, interfered with, intimidated, restrained, confused and coerced, thus rendering their free choice of a bargaining agent in the election impossible.

10. By the actions described in each paragraph above, independently and in combination, the laboratory conditions necessary to the holding of a free and fair election were destroyed.

RECOMMENDATION

I conclude Objections 1, 2, 3, 4, 6, 7, 8, 9, and 10 should be overruled and that the Petitioner's conduct did not have a reasonable tendency to interfere with the employees' free choice in the election that was held on April 13, 2009. Therefore, I recommend that the election results be upheld.

This Report is organized into three sections. Specifically, in the first section, I give a general overview of the legal standard to be applied in Objections cases. Next, each Objection is presented, including my recommendation. Where appropriate, I combine Objections. I then summarize the specific evidence presented by the parties and, where appropriate, make credibility resolutions, identify and apply the appropriate legal standard to the Objection(s) and make my recommendation. Finally in the recommendation section, I make my overall recommendation to the Board.

LEGAL ANALYSIS TO BE APPLIED IN OBJECTION CASES

"Representation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." ***Lockheed Martin Skunk Works***, 331 NLRB 852, 854 (2000) quoting ***NLRB v. Hood Furniture Mfg. Co.***, 941 F.2d 325, 328 (5th Cir. 1991). Additionally, the burden is on the

objecting party to establish evidence in support of its objection. ***Waste Management of Northwest Louisiana, Inc.,*** 326 NLRB 1389 (1998).

The Board's objective standard for evaluating objectionable conduct is whether such conduct reasonably tends to interfere with the employees' exercise of their free choice. ***Cambridge Tool & Manufacturing Co.,*** 316 NLRB 716 (1995). Several factors are relevant when determining whether a party's conduct had the tendency to interfere with employees' free choice: (1) the number and severity of violations; (2) the extent of dissemination; (3) the size of the unit; (4) the proximity of the misconduct to the election; (5) the closeness of the election; and (6) the number of unit employees affected. ***Bon Appetit Mgmt. Co.,*** 334 NLRB 1042, 1044 (2001).

OBJECTIONS 1, 2, 8, and 9

These objections allege that the Union and its supporters, (Objection 1) created an atmosphere of fear, threats, reprisal and the potential for violence which rendered the holding of a free and fair election impossible; and (Objection 2) by telling employees that Petitioner knew where they lived and would make trouble for them at home if they did not vote for Petitioner and other threatening statements. Further, the objections allege that (Objection 8) employees were harassed, coerced, restrained, and intimidated if they did not join, support, or otherwise select Petitioner as their bargaining representative and (Objection 9) employees were misled, interfered with, intimidated, restrained, confused and coerced, thus rendering their free choice of a bargaining agent in the election impossible.

Based on the reasons herein, I recommend the Board overrule these Objections.

Objection 1: Fear, Threats, Reprisal and the Potential for Violence

Cleaning employee Roxana Gavidia testified that about three weeks prior to the election, Petitioner supporter Gregorio Lacayo told her and several other employees while they were

eating lunch that she should not support the Union because the "cars were not going to be able to be witnesses to whatever happened to the people that supported the Union." She then testified that Lacayo would be blamed for it if something happened to their cars because of what he said, perhaps as a joke. Later on cross examination she testified that Lacayo said "anyone who betrayed the union, that the cars were not going to be able to be witnesses of what happened in the parking lot." She further stated that she did not know what he meant by the statement and that Lacayo did not work for the Employer at the time of the election. Gavidia testified that *after* the election she found a wire (a type that employees use at work) in her flattened car tire, and a month prior to the election two of her front car tires were flat which she believed was an accident prior to the election and she did not know if the Union flattened her tires. Sylvia Mejia testified that she was with Gavidia when they found the flat tire after the election. Mejia testified that she was afraid and feared that next time someone might tamper with someone's brake lines but she did not know who she was afraid of. Mejia testified that before the election she heard about death threats directed at others but she did not have any specific knowledge of the threats. When pressed on cross-examination she referred to the car tires that were flattened and punctured.

Gavidia further testified that about a month before the election, her coworker Lupe told her that her car had been scratched by an unknown person. She testified that she was not afraid of the Petitioner's supporters.

Sylvia Mejia testified that she feared the Petitioner's supporters because her car was scratched *after* the election.

Mejia further testified that the employees have discussed the death threats, the Petitioner representative banging on her door (noted below in Objection 8), her car being scratched and that all of these together created a fear in the workplace of the Petitioner.

Gavidia also testified that a Petitioner supporter (who she could not recall) told her that once the union came in the people who had not supported the union could possibly get fired. She later testified further that the statement caused fear because it was said that "whoever the bad guys were, whoever had not voted, you know, something would happen." There was no further testimony on this alleged threat of job loss. However, Mejia testified that Petitioner supporter Juan Cruz told her *after* the election that all of the supervisors would be fired if the Union came in.

Cleaning employee Rosa Elena Hernandez testified that Petitioner supporter Oscar Eduardo watched and followed her into work and Petitioner representative Kenneth Stretcher visited her home about a week and a half prior to the election. She further testified that no one suggested to her that there might be violence toward her if she did not support the Union or that anyone harassed her specifically about how she was going to vote.

Cleaning employee Maria Calderon testified that Petitioner's observer Cristobal Vigil called her Judas for betraying the Union and looked at her with a mean face *after* the election. She testified that two other Petitioner supporters also looked at her with a mean face *after* the election.

The Petitioner presented Jose Saravia and Cristobal Vigil in support. Saravia testified that he did not intimidate, threaten, or threaten violence to anyone about the union.

Vigil testified that he never made an ugly face at anybody about the union and that he never heard any threats about killing anyone. Vigil also denied threatening anyone, giving anyone a flat tire, or creating an atmosphere of fear in the workplace about the union.

I find that the following incidents occurred prior to the election: a month before the election Gavidia had two flat tires and Lupe's car was scratched, about three weeks before the election Lacayo made a statement to Gavidia that if she betrayed the Union, the cars in the

parking lot would not be witnesses to what happened, Gavidia was told that once the union came in the people who had not supported the union could be fired, and about a week and a half before the election Hernandez was watched and followed by a presumed Petitioner supporter.

In his post-hearing brief, the Employer cites several cases including ***United Steelworkers of America, AFL-CIO v. NLRB***, 496 F.2d 1342 (5th Cir. 1974) (holding if the margin of victory is narrow, minor union violations should be more closely scrutinized); ***Westwood Horizons Hotel***, 270 NLRB 802 (1984) (overturning election based on threats of violence by union supporter against employees if they voted against union); ***NLRB v. Janler Plastic Mold Corp***., 82 LRRM 2174 (7th Cir. 1972) (In an identical case, an election was set aside because the totality of threats of loss of jobs and inappropriate election observation by an alleged union adherent); ***NLRB v. Griffith Oldsmobile***, 455 F.26 867 (8th Cir. 1972) (overturning election based on threats of violence by union supporter against employees if they voted against union); ***Long Airdox Co***., 275 NLRB 652 (1985) (setting aside election when after union agent commented "you have … nice tires … you wouldn't want them cut, would you?"); ***Steak House Meat Co***., 206 NLRB 28 (1973) (setting aside election when two pro-union employees threatened a single employee to vote for the union in close vote); and ***NLRB v. Union Nacional de Trabajadores***, 540 F.2d 1 (1st Cir. 1976) (a reasonable employee may regard threats directed at another employee as a "reliable indicator of what would befall him if he were to refrain from [supporting] the Union.") in support of its argument.

Contrary to the Employer's post hearing brief, the election in ***NLRB v. Janler Plastic Mold Corp.*** was never overturned, but rather the Circuit remanded the case to the Board for a hearing on the issues. The Board found in ***Janler Plastic Mold Corporation***, 208 NLRB 167 (1974), the case following the Circuit's remand, that the election results were upheld because the threat of job loss made by a rank and file employee was not considered a threat or

misrepresentation but acceptable election propaganda and that the employee who observed the voters entering and leaving the polls and maintained a tally of how he thought each employee voted was not severe enough to overturn the election and did not affect the election results.

Similarly, in ***NLRB v. Griffith Oldsmobile***, contrary to the Employer's post-hearing brief, it was found that an unidentified man's threat to two employees that it would not be healthy for him or he would not be able to work in the automobile business if he did not sign a union card within a few weeks before the election was not enough to establish an atmosphere of fear affecting the election (the result of which was a margin of 2 votes) and the results were upheld.

In ***United Steel Workers of America v. NLRB***, the Fifth Circuit enforced the Board's order requiring the employer to bargain with the newly certified union. While the Employer cited this case for its finding that when there is a narrow margin of victory in an election, misconduct should be more closely scrutinized, this case is also relevant for its finding that specific evidence is needed to show that the misconduct actually interfered with employee free choice and materially affected the results of the election. The Circuit found that the specific evidence necessary to warrant setting aside the election was not present even though a union supporter made threats to four or five employees and there had been damage inflicted on vending machines in the employee break room before the election (the Board found the damage to be unrelated to the election and occurred two months prior). The Circuit found that the union won the election by a much larger margin than the four or five employees threatened.

The Employer also cited ***NLRB v. Union Nacional de Trabajadores*** for its finding that a reasonable employee may see threats to other employees as what may happen to them. While that particular finding is consistent with Board decisions that consider the dissemination of threats (discussed in more detail below), the facts of the case are distinguishable from the instant

case in that the unfair labor practice charge occurred in a strike context and involves a union agent's conduct. A union agent attacked an employer supervisor in front of employees and threatened to destroy employer property. The First Circuit found the union agent's attack and threats, which were not disavowed by the union, were made for the purpose of instilling a fear of job loss and violence in employees if they opposed the union. In the instant case, a union agent did not make the threats, the threats occurred in an organizing context rather than a strike, and there was no evidence that any physical assaults occurred.

In ***Long Airdox***, cited by the Employer, the Board set aside an election because of the cumulative affect of employee threats to other employees regarding their union support in the election. The Board found that the threats created a general atmosphere of fear and reprisal which deprived employees of their free choice in the election. The Employer pointed out in his post-hearing brief that one of the threats made was "you have … nice tires … you wouldn't want them cut, would you?" That particular threat is similar in nature to the threat Gavidia testified that Lacayo made to her that "anyone who betrayed the union, that the cars were not going to be able to be witnesses of what happened in the parking lot." However, in ***Long Airdox***, this was not an isolated threat, there were several other more serious threats made within the two to three weeks prior to the election including threats to bomb employees' houses, burn employee vehicles, pay a visit to employee houses if they wore a vote no shirt, hurt anyone who crosses a picket line and go to their homes, stomp employees who did not vote for the union. I find the threats in ***Long Airdox*** to be more in number and of a more serious nature than the threats and conduct involved in the instant case.

Lastly, the Employer cited ***Steak House Meat Company***, because the election was overturned as a result of a threat to one employee. However, in that case one employee threatened to kill another employee if he did not vote for the union and brandished a knife at

him. As a result of the threat, the employee did not vote and the vote margin was one vote. The Board found that the threat created an atmosphere of fear affecting the results of the election because the one employee who did not vote as a result of the threat could have changed the outcome of the election if he had voted. The instant case is distinguishable, because there was no evidence that weapons were used to threaten employees or that anyone specifically threatened to kill them if they did not vote for the union, the Petitioner won by 7 votes (a four vote swing to the Employer would have changed the results) and the evidence did not establish that at least 4 employees either failed to vote or changed their vote as a result of threats made prior to the election.

The standard required for setting aside an election based on misconduct depends on whether the actor is a party (or agent) or a third party. When the actor is a third party, the objecting party (in this case the Employer) has a heavier burden of proof because the conduct of third parties is less likely to affect the outcome of the election and the (Petitioner) lacks control over non-agents. Therefore, the Board will only set aside an election based on third party threats if the conduct is "so aggravated that it creates a general atmosphere of fear and reprisal rendering a free election impossible." ***Lamar Advertising of Janesville***, 340 NLRB No. 114 (2003) citing ***Westwood Horizons Hotel***, 270 NLRB 802 (1984).

In the instant case, the only people specifically identified for allegedly threatening or harassing employees are former cleaning employee Gregorio Lacayo and cleaning employee Oscar Eduardo. The testimony regarding their support of the Petitioner showed that they attended union meetings or spoke about the union meetings with coworkers.

The Board in ***Lamar Advertising*** did not find an employee to be a union agent based on his distribution of union literature, informing employees about union meetings and hosting union meetings at his house. The Board has also found that an agency relationship exists where there is

actual or apparent authority; however pro-union employees are not agents solely on the basis of the vocal or active union support. ***Cornell Forge Co***., 339 NLRB No. 85 (2003). More specifically in ***Cornell***, agency was not established where the employee was among 11 employees on an organizing committee, wore union insignia, spoke in favor of the union to coworkers and there was no evidence that the union was aware of the employee conduct. In ***United Builders Supply Co***., 287 NLRB No. 150 (1988), the Board held that an employee was not a union agent even when he solicited authorization cards, asked to set up union meetings and informed other employees of the meetings, and acted as an election observer, because the union did not have knowledge of the employee's acts and it was clear to employees that the union had its own spokesperson.

The Board has found that employee union supporters can become agents through certain conduct. An employee was found to be a union agent because he travelled with union officials to other plants and was introduced as a union representative, spoke to coworkers about dues and fees, asked questions on behalf of employees at an employer meeting, accompanied union officials to a Board proceeding, attended the pre-election conference with union officials remained in a designated no-electioneering area during the election pursuant to a union official's instruction, and attended the post election ballot count with union officials. ***Bio-Medical Applications of Puerto Rico, Inc.,*** 269 NLRB 827 (1984). Another employee was found to be a union agent because he acted as a conduit of information between employees and the union. The employee was the only union presence in the plant and the only link between the employees and the union, made weekly reports to the union about the campaign and relayed employee questions to the union. ***Bristol Textile, Co***., 277 NLRB No. 182 (1986).

When compared with the cases cited above, there was no evidence presented to support a finding that either Lacayo or Eduardo was an agent of the Petitioner based on their attendance at union meetings or discussions about the meetings.

Once it is established that an employee is not a Petitioner agent, the Board applies a five factor test to assess the seriousness of a third-party threat. ***Westwood Horizons Hotel***, 270 NLRB 802 (1984) (two weeks prior to the election, pro union employee threatened to beat up three named non supporters and anyone else who did not vote for the union, then physically forced two employees to vote while several pro union employees chanted "vote yes" as they stood in line to vote). The five factors are (1) the nature of the threat; (2) whether the threat encompassed the entire bargaining unit; (3) whether reports of the threat were disseminated widely within the unit; (4) whether the person making the threat was capable of carrying it out and whether it is likely that employees acted in fear of the capability to carry out the threat; and (5) whether the threat was rejuvenated at or near the time of the election.

Applying the ***Westwood*** five factor test to the instant case, (1) the threats testified to concerned property damage to vehicles/death threats and job loss; (2) the threats were directed at anyone in the bargaining unit who did not vote for the union; (3) only one employee (Gavidia) testified that she directly heard the threat to their vehicles and the same employee (Gavidia) testified about the threat of job loss; (4) Gavidia testified that other employees were around when the threat to their vehicles was made but only named one and Mejia testified that she spoke to employees about the scratch on her car (which occurred after the election) and the (vague) death threats but the number of those employees was not given; (5) there was no testimony that the threats were rejuvenated at or near the time of the election.

The Board ordered the rerun of an election based on third party conduct including many threats made to employees during the election that created an atmosphere of fear in the

workplace sufficient to have the tendency to affect the results of the election. ***Diamond State Poultry Co., Inc***, 107 NLRB 3 (1953). In that case strangers (one of whom was wielding a knife) circulated through the plant threatening employees just before the election that they should vote the right way or it would not be good for them, they should vote the right way if you know what is good for you, if you don't you'll be in trouble up to your neck, and there had better be a good election or something would happen to them. The Board found that the election was held in a general atmosphere of confusion and fear of reprisal which made a rational uncoerced selection of a representative impossible and directed a new election.

The Board set aside an election in ***Robert Orr-Sysco Food Services, LLC***, 338 NLRB No. 74 (2002), based on voting related threats of physical violence, property damage, and deportation directed at a determinative number of voters. The Board considered the closeness of the vote, the number of employees making threats, the number of employees threatened, and the nature and variety of the threats. The union won by four votes with three challenged ballots. The Board relied on evidence that the threats were made to five employees and disseminated to four others (a number that could have affected the results of the election). The Board noted that threats of deportation are especially serious threats of economic and emotional harm and set aside the election.

However, in ***Shawnee Manor***, 321 NLRB No. 171 (1996), while the Board was considering a different issue, they did not set aside an election where a pro union employee told another employee that if she did not sign a union authorization card, the union would come and get her children and slash her car tires.

In considering the factors set forth in ***Robert Orr-Sysco Food Services***, I find that although threats of possible job loss and property damage are serious, they are not as serious as the threats contained in the cases cited above involving weapons, deportation, and bodily harm.

Secondly, although the threats were directed at anyone in the unit who did not vote for the union, only one employee testified to hearing the threats directly and the number of employees the threats were disseminated to was not established. Only three employees were specifically identified as hearing the threats, but at least 4 votes would have to change to alter the results of the election. Lastly, the threats were not rejuvenated at the time of the election.

In addition to the threats, the Employer presented other evidence to establish an atmosphere of fear in the workplace, specifically Hernandez's testimony that Eduardo was watching and following her in the weeks prior to the election, Gavidia's flat tires and Lupe's car being scratched. However, Gavidia testified that she did not know who flattened her tires, that she initially thought it was an accident, and she was not afraid of the union supporters. Further, Hernandez testified that she did not associate Eduardo's behavior with the election until after the election when he stopped watching and following her.

I do not find that based on the testimony presented that these incidents affected or had the tendency to affect the results of the election or created an atmosphere of fear in the workplace that warrants setting aside the election. Based on the reasons herein, I recommend the Board overrule Objection 1.

Objection 2: Threatening Statements

I find that there is no record evidence to support the portion of Objection 2 alleging that Petitioner or its supporters told any employees that they knew where they lived and would make trouble for them at home if they did not vote for the Petitioner. The remaining portion of Objection 2, "other threatening statements" is sufficiently contained within Objection 1 alleging the Petitioner or its supporters created an atmosphere of fear, threats, reprisal and potential for violence. Therefore, based on the fact that no evidence was presented in support of a portion of

this objection and the reasoning used in the discussion on Objection 1, I recommend the Board overrule Objection 2.

Objection 8: Harassment and Intimidation

Rosa Elena Hernandez testified that about a week and a half prior to the election, Petitioner supporter Oscar Eduardo, watched her and followed her from the parking lot to the work place. She testified that she did not know why he was watching her until *after* the election when he stopped watching her that she believed he was trying to pressure her about the election.

Hernandez testified that the second day *after* the election, Petitioner supporter Miriam (last name unknown), pushed her at the time clock. She further testified that no one told her that there might be violence toward her if she did not support the Union.

Hernandez also testified that about a week or a few days prior to the election she was visited by Petitioner representative Kenneth Stretcher at her home. She testified that he was taken aback by her request for paperwork but he was more or less polite to her.

Sylvia Mejia testified that Petitioner representative Kenneth Stretcher banged on her door at home loudly about two weeks prior to the election. She answered the door nervously, they spoke about the Union, he was polite and nice and did not threaten her and when he asked if he could come back she said yes.

The Employer also presented manager Robert Chung for this objection; however, he provided no relevant testimony to this objection.

The Petitioner presented Jose Saravia in support, even though there were no specific allegations against him. Saravia testified that he did not intimidate anyone about the union.

As previously noted, the standard for setting aside an election based on third party conduct is that the conduct must be so aggravated that it creates a general atmosphere of fear and

reprisal making a free election impossible. ***Lamar Advertising of Janesville***, 340 NLRB No. 114 (2003).

I find that Hernandez did not associate Oscar Eduard's watching and following her with the election until after the election (as discussed in the Objection 1 section) and the incident with Miriam occurred after the election; therefore neither could have affected the results of the election or created fear prior to the election that would make a fair election impossible. Additionally, there was no evidence that the Petitioner harassed Hernandez or Mejia when Stretcher came to their homes to talk about the Union before the election. Although Mejia testified she was apprehensive when she opened the door to Stretcher, by the time Stretcher left she told him he could come back and she also testified that he was nice and polite. Hernandez testified that Stretcher was more or less polite when he visited her home and did not express any fear of him in her testimony. There was no evidence presented that demonstrates that his visits created a fear in the workplace rendering a free election impossible. Therefore, I recommend the Board overrule Objection 8.

Objection 9: Misled and Confused Employees

Roxana Gavidia testified that a Petitioner supporter (Gregorio Lacayo) told her and several other employees while they were eating that she should not support the Union because the "cars were not going to be able to be witnesses to whatever happened to the people that supported the Union." She then testified that he would be blamed for it if something happened to their cars because of what he said, perhaps as a joke. However, on cross examination she testified that he said "that anyone who betrayed the union, that the cars were not going to be able to be witnesses of what happened in the parking lot."

I find that Gavidia's testimony is contradictory on this point, however, it is more plausible that the later testimony is more accurate because she believed that Petitioner supporter

Lacayo would be blamed for anything that happened to their cars in the parking lot, so it does not make sense that Lacayo would have said that something could happen to supporters of the Union in the parking lot and be blamed for it. Therefore, I find that Lacayo did not mislead employees about the Employer doing something in the parking lot, but rather Gavidia's testimony was unclear.

The Employer also presented cleaning employee Jakang Shin for this objection. She testified that when she arrived in the voting area to vote in the election, Petitioner's observer Cristobal Vigil told her that she could not vote because she was a supervisor. Shin further testified that she did vote in the election. The Petitioner presented Cristobal Vigil, who testified that he did not object to anyone voting at the election.

The Employer also presented cleaning employee Sylvia Mejia and managers Robert Chung and Guy Tolliver for this objection; however they provided no testimony relevant to this objection other than testifying that the Employer did not intimidate, harass, induce or otherwise influence employees to oppose the Union.

The Board applies a four part test to evaluate questionable or misleading campaign communications including "(1) whether there has been a misrepresentation of a material fact; (2) whether the misrepresentation came from a party who was in an authoritative position to know the truth or who had special knowledge of the fact; (3) whether the other party had adequate opportunity to reply and to correct the misrepresentation; and (4) whether the employees had independent knowledge of the misrepresented facts, so that they could effectively evaluate the propaganda." ***United Steel Workers of America, AFL-CIO***, 496 F.2d 1342 (5th Cir. 1974) citing ***NLRB v. Carlton McLendon Furniture Co., Inc***., 488 F.2d at 62 (5th Cir. 1973), ***Hollywood Ceramics Co., Inc.,*** 140 NLRB 221 (1962).

I find that the portion of Objection 9 that alleges employees were interfered with, intimidated, restrained, has been sufficiently covered in Objection 8 above. Additionally, as discussed above, I find that the credited facts do not support that Petitioner or its supporters misled or confused employees about the Employer through Lacayo's statement. Therefore, I do not find that there was a misrepresentation of material fact. Finally, with regard to the election day statement to Shin, I find that the Petitioner's observer was attempting to challenge Shin, although improperly directing his statement to Shin rather than the Board Agent, Shin was still able to vote. The evidence fails to show that his statement affected Shin's ability to vote or the outcome of the election. Therefore, I recommend the Board overrule Objection 9.

OBJECTIONS 3 and 4

These Objections both allege conduct occurring in the 24 hours preceding the election. Objection 3 alleges that the Union acting through their agents, officials, supporters, created an atmosphere of fear, threats, reprisal and the potential for violence within the 24 hour period before the election by telling employees that Petitioner knew where they lived and would make trouble for them at home if they did not vote for Petitioner and other threatening statements, which rendered the holding of a free and fair election impossible. Objection 4 alleges that the Union acting through their agents, officials, supporters and specifically its observer, created an atmosphere of fear, threats, reprisal and the potential for violence within the 24 hour period before the election by telling an employee(s) that Petitioner's observer would be watching when they voted, would know how they voted, knew where they lived and would make trouble for them at home if they did not vote for Petitioner and other threatening statements, which rendered the holding of a free and fair election impossible. The record evidence in support of these Objections is insufficient and, therefore, I recommend that they be overruled.

The Employer presented cleaning employees Roxana Gavidia, Rosa Elena Hernandez, and Sylvia Mejia in support of Objections 3 and 4. Gavidia, Hernandez, and Mejia did not testify about any threatening statements made within the 24 hour period prior to the election. There was no testimony presented regarding the specific allegations that in the 24 hours prior to the election the Petitioner or its supporters told employees that Petitioner's observer would be watching when they voted, would know how they voted, that Petitioner knew where they lived and would make trouble for them at home.

I find that the only testimony that covered a statement made within the 24 hours prior to the election was Jakang Shin's testimony that Petitioner observer Cristobal Vigil told her that she could not vote because she was a supervisor when she arrived to vote. She voted and there were no outstanding challenged ballots when the certification issued.

The Petitioner presented Cristobal Vigil regarding these Objections. Vigil testified that he did not object to anyone voting at the election.

I credit Shin's account of this incident based on the fact that she was detailed in her testimony and her account of other election conduct was corroborated by other witnesses.

I find that the Petitioner's observer was attempting to challenge Shin's ballot when he told her at the voting location, as an observer, that she could not vote because she was a supervisor. While he should have directed his comment to the Board Agent rather than to Shin, Shin was allowed to vote and the evidence fails to show that her vote was affected by his statement.

Based on the reasons herein, I recommend the Board overrule Objections 3 and 4.

OBJECTION 5

Objection 5 alleges that the Petitioner, through its agent(s), officials(s), or supporter(s), offered inducements to employees in exchange for their support of Petitioner which substantially

interfered with the employees' freedom of choice in the election and rendered the holding of a free and fair election impossible. During the hearing, Employer withdrew Objection 5. I recommend that the Board approve Employer's request to withdraw Objection 5.

OBJECTION 6

This Objection alleges that the Petitioner acting through their agents, officials, supporters and specifically its observer, engaged in improper electioneering during the release of voters immediately prior to and after the opening of the polls and encouraged prospective voters to vote for the Petitioner as they left their work stations to vote. The record evidence in support of this Objection is insufficient and, therefore, I recommend that it be overruled.

The Employer presented cleaning employees Sue Dooley, Jakeng Shin, Sylvia Mejia, manager Robert Chung, and manager Guy Tolliver in support of this Objection.

Sue Dooley testified that the parties had a pre-election agreement that Dooley as the Employer's observer and the Petitioner's observer Jose Saravia would stay with the male Board Agent to release the voters, while the other Employer observer and Petitioner observer would remain in the voting area with the female Board Agent. She testified that Saravia left the room, went down the stairs and returned about 40 to 45 minutes later when a manager brought him back. She testified that she remained with the male Board Agent and they walked around together looking for Saravia. Sylvia Mejia was an Employer observer and corroborated that there was a pre-election agreement wherein she was assigned to remain with the female Board Agent along with the Petitioner's observer Cristobal (Vigil corroborated this agreement). Mejia also witnessed Saravia leaving the room alone.

Dooley testified that she did not see Petitioner observer Jose Saravia talking to any employees during the approximately 45 minutes he was away from the voting area and the Board Agents. This testimony was corroborated by Chung, who saw Saravia walking around the work

place (Terminal D) alone two different times in the same area where he observed one other employee. Guy Tolliver testified that approximately 22 employees were scheduled to work in Terminal D where Saravia was seen when he was not with the Board Agent; although he testified that he did not see Saravia speak to any other employees during that time which was approximately 15 or 20 minutes prior to the start of the election until about 15 to 20 minutes after the election started.

Chung also testified that his supervisor Guy Tolliver called him twice to tell Saravia to return to the south ticket hall. Tolliver corroborated Chung's testimony on that point.

Shin testified that she saw Saravia talking on the telephone during the election when he was standing in front of the video store and told Dooley. Dooley corroborated that Shin told her.

The Petitioner presented Jose Saravia and Cristobal Vigil regarding this Objection. Vigil testified that he remained with Mejia and the female Board Agent and did not use his cell phone during the election because of the pre-election agreement.

Saravia testified that prior to the election, Manager Robert Chung told the employees they had to vote per a schedule and later it was determined that the employees could vote when they wanted to and there was no schedule. Saravia denied being away from the Employer's observer (Dooley) at any time during the election. He testified that he left the voting area with the male Board Agent and the Employer's observer to tell the employees' there was no schedule to vote, and then once he left with the Employer observer to use the restroom. Saravia initially denied using his cell phone during the election, but then admitted to calling Robert Chung although he stated that he was with the Employer's observer when he made the call to tell Chung that there was no voting schedule. He denied visiting all of the gates and campaigning for the union during the election. He testified that he is a union supporter but did not do any campaigning for the union.

In sum, I find that the evidence does not support a finding that the Petitioner's observer, Jose Saravia, engaged in electioneering during the time immediately preceding the election or during the election.

In his post-hearing brief, the Employer cited several cases including ***Overnite Transportation Company v. NLRB***, 140 F. 3d 259 (D.C. Cir. 1998)(holding that the Board must also overturn an election in these situation where union agents/supporters upset the "ideal atmosphere in which a free choice may be made by employees, protected from interference by employer, union, Board agent, or other parties); ***Kitchen Fresh, Inc. v. NLRB***, 716 F.2d 351 (6th Cir. 1983) (if union representatives engaged in "any conversation with employees who were waiting to vote," a new election would be required); ***Nathan Katz Realty, LLC v. NLRB***, 251 F.3d 981 (D.D.C. 2001) (overturning election where union agents were among employees about to vote, even where there was no evidence that they spoke); ***Performance Measurements Co., Inc***., 148 NLRB 1657 (1964) (presence of company president among the voting employees constituted "improper conduct" that "interfered with employees' free will); ***Electric Hose & Rubber Co***., 262 NLRB 186 (1982) (the "unexplained presence" of two supervisors among the voting employees alone was "coercive evidence" that "destroyed the laboratory conditions necessary for the conduct of a free and fair election"); ***Pepsi-Cola Bottling Co.,*** 289 NLRB 736 (1988) and ***Mike Yurosek & Son, Inc.***, 292 NLRB 1074 (1989) (where the Board overturned elections when union could provide no legitimate excuse for its agents' misconduct); ***Home Town Foods, Inc. v. NLRB***, 416 F.2d 392 (5th Cir. 1969)("We are not impressed with the argument that all coercive acts must be shown to be attributable to the union itself, rather than to the rank and file of its supporters… The important fact is that such conditions existed and that free election is thereby rendered impossible."); ***Milchem, Inc.,*** 170 NLRB 362 (1968); ***Bio-Medical Applications of Puerto Rico, Inc.***, 269 NLRB 827 (1984) (where union representative,

in violation of Board agent's instructions, remained for almost the entire election period in a waiting room adjacent to the polling area, the ***Milchem*** rule was violated and the election was set aside); ***Carroll Contracting & Ready-Mix***, 636 F.2d 111 (5th Cir. 1981) (geographical protection from coercion much broader than just the polling place) in support of its position.

In ***Kitchen Fresh, Inc***., the Sixth Circuit remanded the case for a hearing, the Circuit did not direct a new election. The portion cited by the Employer in his post-hearing brief is the ***Milchem*** rule. ***Kitchen Fresh*** is distinguishable from the instant case in that it involved electioneering directly outside the voting area and union representatives standing in an area that employees were required to pass on their way to vote. In the instant case, there was no evidence presented of electioneering or any conversations with Union representatives occurring at or near the voting location, nor was there evidence presented that Union representatives were located where employees had to pass them in order to vote.

Nathan Katz Realty, ***Performance Measurements***, and ***Electric Hose & Rubber Co***. cited by the Employer in his post-hearing brief involve representatives of parties to the election being present near the polling place. As discussed more fully below, these cases are not applicable to the instant case because Saravia was not an agent of the Petitioner.

Further, ***Pepsi-Cola*** and ***Mike Yurosek & Son*** are not applicable to the instant case because the misconduct involved in those cases involved photographing employees and surveillance.

The Board established a rule in ***Milchem, Inc***. prohibiting prolonged conversations between representatives of a party to the election and voters waiting in line regardless of the topic of conversation. The Employer cited ***Bio-Medical Applications of Puerto Rico*** in his post-hearing brief which involved a violation of the ***Milchem*** rule where an employee who was determined to be an agent of the union remained in the room next to the polling place and spoke

to voters who were on their way to vote. The Employer also cited ***NLRB v. Carroll Contracting & Ready-Mix*** in its post-hearing brief for the decision that protection from interference (electioneering) extended beyond the polling place. In that case, the Fifth Circuit disagreed with the Board and found that two former employees standing in the parking lot wearing shirts urging employees to vote for the union interfered with employee free choice in the election. However, the Circuit found that the conduct was interference because the line of voters extended out to the parking lot and therefore they were in the voting area and were protected by the ***Milchem*** rule. All three cases are distinguishable from the instant case for reasons discussed below.

The Board considers several factors to determine whether electioneering is sufficient to justify overturning an election. ***Overnite Transportation Company v. NLRB***, 140 F.3d 259 (D.C. Cir. 1998) First it determines whether the ***Milchem*** rule was violated, if the electioneering is not encompassed within the ***Milchem*** rule, the Board will only overturn an election if the activity substantially impaired the exercise of free choice by considering the nature and extent of the activity, whether the activity occurred within a designated "no electioneering" area, whether it was contrary to the instructions of the Board's election agent, whether a party to the election objected to it, and whether a party to the election engaged in it.

I find that the Board's electioneering policy in ***Milchem*** is not applicable here because there was no evidence of any actual electioneering at or near the voting room nor in the line of employees waiting to vote, or in any place the employees would be required to pass in order to enter the voting location. Further, because Saravia was not an agent of the Petitioner solely based on a photo the Petitioner posted on its website after the election and being selected as their observer during the election as the Employer contends in its post-hearing brief (***United Builders Supply Co***., 287 NLRB No. 150 (1988) (election observer who solicited authorization cards, supported the union, and informed employees of union meetings that he set up was not a general

agent of the union)), the test to apply is whether his conduct was so disruptive as to require setting aside the election and substantially impaired employees free choice. ***Boston Insulated Wire Co.,*** 259 NLRB 1118 (1982); ***Overnite*** (1998). Additionally, as cited by the Employer in his post-hearing brief, the Fifth Circuit in ***Home Town Foods***, 416 F.2d 392 noted that employee free choice must be protected from interference by the employer, union, Board agent, or other parties. Therefore, even though Saravia was not an agent of the Petitioner, his misconduct could be grounds for setting aside the election.

The conduct objected to (Saravia leaving his post as election observer for about 45 minutes in violation of the parties' pre-election agreement) lasted for approximately 45 minutes, which is a substantial amount of time; however the nature of the conduct was minimal as no evidence was presented that Saravia interacted with employees waiting to vote. No evidence was presented that there was a designated no electioneering area, however the conduct was contrary to the instructions of the Board's election agent and the Employer objected to the conduct by instructing Saravia to return and then later by escorting him back.

Even though Saravia was out of the presence of the Board Agent for a substantial period of time, contrary to the Board Agent's instructions, and under the Employer's objection, the evidence does not show that he was electioneering in the voting area or an area employees had to pass to vote. Therefore, I cannot find that Saravia's disappearance was so disruptive that it would require setting aside the election as the evidence does not show that he spoke to or interacted with any employees eligible to vote during that time.

Based on the reasons stated herein, I recommend the Board overrule Objection 6.

OBJECTION 7

This Objection alleges that the Petitioner through its agent(s), officials(s), or supporter(s), specifically one of its observers, failed to abide by its agreement regarding voter release which

substantially interfered with the employees' freedom of choice in the election and rendered the holding of a free and fair election impossible. Based on the reasons stated herein, I recommend the Board overrule this Objection.

The Employer presented Sue Dooley, Jakeng Shin, Sylvia Mejia, Robert Chung, and Guy Tolliver in support of this Objection and the Petitioner presented Jose Saravia and Cristobal Vigil.

As previously noted in the section on Objection 6, Sue Dooley testified that the parties had a pre-election agreement that Dooley as the Employer's observer and Petitioner observer Jose Saravia would stay with the male Board Agent to release the voters, while the other Employer observer and Petitioner observer would remain in the voting area with the female Board Agent. She testified that Saravia left the room, went down the stairs and returned about 40 to 45 minutes later when a manager brought him in. She testified that she remained with the male Board Agent and they walked around together looking for Saravia. Sylvia Mejia was an Employer observer and corroborated that there was a pre-election agreement wherein she was assigned to remain with the female Board Agent along with the Petitioner's observer Cristobal (Vigil corroborated this agreement). Mejia also witnessed Saravia leaving the room alone.

Manager Robert Chung testified that he saw Saravia walking around the work place (Terminal D) alone two different times in the same area where he observed one other employee. Chung also testified that his supervisor Guy Tolliver called him twice to tell Saravia to return to the south ticket hall.

Manager Guy Tolliver testified that Dooley and the male Board Agent told him that Saravia was missing and asked where he was. Tolliver looked in the break room where he found the remaining two observers and the female Board Agent. Tolliver called Robert Chung twice to find Saravia.

Dooley testified that she did not see Saravia using the phone but Ms. Shin told her that Saravia was using the telephone during the time Dooley and the male Board Agent were looking for him. Shin testified that she saw Saravia using the telephone during the election and told Dooley about it.

Saravia testified that he was never away from the Employer's observer (Dooley) during the election. He testified that he left the voting area with the male Board Agent and the Employer's observer to tell the employees' there was no schedule to vote and he left once with the Employer observer to use the restroom. Saravia initially denied using his cell phone during the election, but admitted to calling Robert Chung although he stated that he was with the Employer's observer when he made the call to tell Chung that there was no voting schedule.

I credit the testimony of Dooley, Shin, Chung, Tolliver, and Mejia. I do not credit the testimony of Jose Saravia based on his demeanor when answering questions on direct and cross examination and based on the contradictory testimony of the other witnesses. Therefore, based on the credited testimony, I find that Saravia left the voting area without the male Board Agent and used his phone during the election in violation of the pre-election agreement.

The Employer, in its post-hearing brief, cited the same authority as noted in Objection 6 in support of its argument for this Objection.

The Board overruled an employer's objections to observer conduct because there was no evidence of any improper communications between the observer and potential voters. ***St. Vincent Hospital, LLC***, 344 NLRB No. 71 (2005). The union's observer was given permission to use the restroom. He was gone from the voting room for fifteen to twenty minutes and the employer's observer saw him talking to other employees while he was gone. The objection to the observer's conduct was overruled based on a lack of evidence of improper communication with potential voters.

Further, it has been found that a union observer leaving the polling area unescorted is a breach of Board procedure, but is not enough to overturn election results. ***NLRB v. WFMT***, 997 F.2d 269 (7th Cir. 1993). A union observer was given permission to leave the polling area unescorted to return an urgent phone call. The observer did not return to the polling area. The election was not set aside based on evidence that the observer's statements outside the polling area did not influence any voters.

Similarly, in the instant case, Saravia left the polling area unescorted for about 45 minutes. However, there was no evidence presented that he spoke to any employees while he was outside the polling area or that he influenced any voters during that time. Additionally, the testimony established that Saravia also used his cell phone during the election in violation of the parties' pre-election agreement. His testimony, which is not contradicted by another witness, was that he was speaking with his supervisor, not a potential voter.

Therefore, I conclude that the evidence did not support that the outcome of the election was affected by the fact that the Petitioner's observer failed to abide by the pre-election agreement to remain with the Board Agent and to refrain from using his cell phone. For these reasons, I recommend this Objection be overruled.

OBJECTION 10

Objection 10 alleges that by the actions contained in each of the objections, independently and in combination, the laboratory conditions necessary to the holding of a free and fair election were destroyed.

As referenced in the previous sections of this report detailing each objection, I have found that the following conduct occurred prior to and during the election: Gavidia and Lupe's cars were damaged, Lacayo made a threat to non-supporter's vehicles, a threat of job loss was made to non-supporters if the union came in, Eduardo followed and watched Hernandez,

Stretcher visited several employees' homes, Vigil told Shin that she could not vote because she is a supervisor when she arrived at the polling place to vote, and Saravia left the polling area during the election.

Several factors are relevant when determining whether a party's conduct had the tendency to interfere with employees' free choice: (1) the number and severity of violations; (2) the extent of dissemination; (3) the size of the unit; (4) the proximity of the misconduct to the election; (5) the closeness of the election; and (6) the number of unit employees affected. ***Bon Appetit Mgmt. Co.,*** 334 NLRB 1042, 1044 (2001).

In the instant case, I find that (1) approximately 7 alleged incidents of misconduct occurred ranging in severity; (2) the evidence presented did not determine the extent of dissemination of the threats or harassment; (3) the unit includes about 71 employees; (4) the conduct occurred within the month prior to the election; (5) the election results were such that 4 votes could have changed the outcome; (6) the evidence shows that 3 employees were affected by the threats. The threats were made to one employee and disseminated to two other employees, two employees' cars were damaged (but there was no evidence presented that the Petitioner or its supporters were responsible for the damage), one employee was watched and followed (but did not attribute the conduct with the Petitioner or the election until after the election), Petitioner representative Stretcher visited the homes of two employees (but there was no evidence that either employee has any reason to be afraid of him), and one employee was told by an observer that she could not vote (but she did vote and her vote counted because there were no challenged ballots according to the election results).

My findings and conclusions are made with careful consideration of the totality of the circumstances and considering the closeness of the election results. However, I find that the

cumulative conduct occurring prior to the election was not severe enough to influence or have the tendency to influence employees' free choice in the election and are not objectionable.

RECOMMENDATION

In accordance with the foregoing facts, after carefully considering all of the evidence in the record, and based on a fair assessment of the credibility of each witness who testified, as set forth above, I conclude Objections 1, 2, 3, 4, 6, 7, 8, 9, and 10 should be overruled. I further conclude that the Petitioner's conduct did not have a reasonable tendency to interfere with the employees' free choice in the election that was held on April 13, 2009. Therefore, I recommend that the election results be upheld. Finally, I recommend that the Employer's request to withdraw Objection 5 be approved [6].

Signed at Fort Worth, Texas, this 4th day of June 2009.

Darci Slager
Hearing Officer
National Labor Relations Board
Region Sixteen
819 Taylor Street, Room 8A24
Fort Worth, Texas 76102

[6] As provided in Section 102.69 of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, within 14 days from the date of issuance of this report, any party may file with the Board in Washington, DC an original and seven copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director and a Statement of Service shall be made to the Board simultaneously therewith. If no exceptions are filed, the Board may then adopt the recommendations herein. The National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, DC. If a party wishes to file one of these documents electronically, please refer to "E-Gov" on the National Labor Relations Board web site: www.nlrb.gov.

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of June 2009, a copy of the Hearing Officer's Report on Objections to Election regarding Case No. 16-RC-10879 was served by regular mail on the following parties:

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HAND DELIVERED TO:
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