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Mastec North America, Inc., d/b/a Mastec Direct TV and Communications Workers of America, Local 3871. Case 10–RC–15707

March 11, 2011

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND HAYES

The National Labor Relations Board, by a three-member panel, has considered objections to an election held August 22, 2008, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows 14 for and 12 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has decided to adopt the hearing officer's findings and recommendations as further explained below, and finds that a certification of representative should be issued.¹

I. OBJECTION 4: CONDUCT OF ALLEGED UNION AGENTS

We agree with the hearing officer's recommendation to overrule the Employer's Objection 4, which alleges that agents of the Union threatened and intimidated eligible voters during the campaign. Based on testimony regarding their membership in an in-plant "organizing committee," the Employer argues that employees Anthony Hodges and Scott Winter were union agents and that their conduct is therefore attributable to the Union. We find, in agreement with the hearing officer, that the evidence fails to establish agency.

At the hearing, union organizer Eddie Hicks testified about a document, not offered into evidence, that named Hodges and Winter as two of the four members of an "organizing committee."² Hicks identified the document

¹ For the reasons stated in the hearing officer's report, we adopt her recommendations to overrule Objections 1, 2, 3, and 6.

The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

² According to the Employer's counsel, Matt Abel and Lou Mays were the other two employees identified on the document as members of the organizing committee. Neither Abel nor Mays was alleged to have committed any objectionable conduct.

as the union secretary's notes from a meeting Hicks did not attend. Regarding the role of the four individuals, Hicks testified that it was not a formal committee. Rather, he testified as follows: "What that's for, if we had to notify somebody, that was the four people we were going to get in touch with." He further stated: "If anybody had a question, I would answer back to these four people, not everybody in that group. I couldn't answer to everybody so these four people would get—the question would come to them, they would bring it to me, through my secretary, and I would put the information back to them." The four employees received no special training and attended no meetings other than those open to all employees.

The Employer argues that Hicks' testimony establishes that the four individuals were members of an organizing committee and that the organizing committee had both actual and apparent authority to speak for the Union. We disagree. "[E]mployee members of an in-plant organizing committee are not, simply by virtue of such membership, agents of the union." *Cornell Forge Co.*, 339 NLRB 733, 733 (2003); accord: *Advance Products Corp.*, 304 NLRB 436, 436 (1991). Moreover, the Board "will not lightly find an employee 'in-plant organizer' to be a general agent of the union." *S. Lichtenberg & Co.*, 296 NLRB 1302, 1314 (1989). The burden of proving agency is on the party asserting it. *Cornell Forge Co.*, supra at 733. The Employer has failed to meet that burden here in relation to either Hodges or Winter.³

First, the evidence fails to show that Hodges and Winter had actual authority to speak for the Union. Although Hicks testified that he would relay messages to the unit through the four employees, that establishes actual authority only to relay those specific messages, not to speak for the Union generally. See *United Builders Supply Co.*, 287 NLRB 1364, 1365 (1988) (employee had limited authority to collect cards and inform employees of meetings, but was not a general agent). There is no evidence that Hicks authorized the employees to make the alleged threats or was aware that they had done so.

Second, the evidence does not show apparent authority. Apparent authority "results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe the principal has authorized

³ The Employer argues that another employee, Chris Verbal, was also a union agent because he testified that he belonged to the organizing committee. Verbal, however, was not identified by Hicks as one of the committee's four members. Furthermore, evidence of Verbal's organizing activities is limited to Hicks' testimony that Verbal "talked to us about a meeting and we set the meeting up. He brought everybody." That evidence is insufficient to establish agency under the principles discussed below.

the alleged agent to perform the acts in question.” *Corner Furniture Discount Center, Inc.*, 339 NLRB 1122, 1122 (2003). “Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that his conduct is likely to create such a belief.” *Id.* Here, we find no such manifestation by Hicks to the unit employees.

As stated above, Hicks testified that he “would answer back” to one of the four employees “if anybody had a question.” The record, however, does not disclose how often that actually occurred or what type of information, other than meeting times, was communicated through the four employees. Evidence of the four employees’ specific activities is limited to general testimony from other witnesses that employee Hodges attended meetings, made people aware of the election date, and made some phone calls to employees. There is no evidence specifically addressing Winter’s campaign activities.

There is also no evidence that the Union or the four employees ever told any employee that any of the four employees were acting as the Union’s representatives, were members of any type of organizing committee, or were in any way associated with the Union beyond being union supporters. Furthermore, the evidence does not establish that the Union’s admitted agents lacked a substantial role in the campaign—an important factor in analyzing the apparent authority of in-plant organizing committee members.⁴ Hicks did not attend the first two campaign meetings, but representatives of the national union with which the petitioning Union was affiliated did. Hicks apparently attended later campaign meetings, because he testified: “I didn’t even take notes on the last two or three meetings. I’d just sit there and I’d talk with the men.” Hicks also testified that the Union’s secretary communicated with employees on their cell phones. Thus, it would have been plain to employees that the Union had its own spokespersons separate and apart from the four employees. See *Corner Furniture*, supra at 1123; *Advance Products Corp.*, supra at 436; *United Builders Supply*, supra at 1365.⁵ For all of the foregoing reasons, we overrule the Employer’s Objection 4.

⁴ See, e.g., *Corner Furniture*, supra at 1123; *Cornell Forge*, supra at 733; *S. Lichtenberg & Co.*, supra at 1302 fn. 4.

⁵ The cases in which the Board has found employees to be union agents are distinguishable. In *Bristol Textile Co.*, 277 NLRB 1637 (1986), the Board found that, aside from a few meetings, the employee at issue was the union’s only link to employees and had been identified by the union’s vice president as the “spokesman” for employees. At the vice president’s request, the employee made weekly reports to him. The employee testified that employees came to him to find out “what . . . was going on” and that employees recognized that he “represented the [u]nion” at the plant. *Id.* at 1637. Here, there is no evidence that the employees perceived the four employees as the Union’s representa-

II. OBJECTION 5: THIRD-PARTY CONDUCT

We also agree with the hearing officer’s recommendation to overrule Objection 5, which alleges that the conduct of certain prounion employees requires that the election be set aside, even if the employees were not acting as union agents. Specifically, the objections cite a statement by prounion employee Anthony Hodges to employee Matthew Abel that Hodges could “whip [employee Dennis Sheil’s] ass” or sabotage his work;⁶ an anonymous telephone threat to employee Lou Mays that the caller would “get even” with him if he “backstab[bed] us”; and statements by prounion employee Chris Verbal to a group of three or four employees that Verbal would “bitch slap” two other employees (who were not present at the time) or “whip their f—in’ ass” if they “cost us the election,” and that he would “whip [supervisor] Eddie’s ass” if the Union lost. There is no evidence that any of the above statements were further disseminated.

A. The Third-Party Conduct Standard

It is settled that the Board will not set aside an election based on third-party threats unless the objecting party proves that the conduct was “so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.” *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); see also *Lamar Advertising of Janesville*, 340 NLRB 979, 980 (2003); *Cal-West Periodicals*, 330 NLRB 599, 600 (2000). In assessing the seriousness of an alleged threat, the Board considers the following factors: (1) the nature of the threat itself; (2) whether it encompassed the entire unit; (3) the extent of dissemination; (4) whether the person making the threat was capable of carrying it out, and whether it is likely that employees acted in fear of that capability; and (5) whether the threat was made or revived at or near the time of the election. *Westwood*, supra at 803. For the reasons stated by the hearing officer, the Employer failed to satisfy the *Westwood* standard here.

The Employer concedes that proof of a general atmosphere of fear and reprisal is required in order to overturn the election. Nevertheless, our dissenting colleague contends that that standard should be modified to lower the burden imposed on a party seeking to overturn the results

tives or relied on them to find out what was going on, and those employees were not the Union’s “only link” to the unit. In *Bio-Medical Applications of Puerto Rico*, 269 NLRB 827, 827–828 (1984), the employees introduced themselves as representatives of the union, spoke at meetings, made special appearances with union officials at campaign functions, and were taken by the union to campaign at a facility other than where they worked. None of those facts is present here.

⁶ Sheil did not support the Union.

of an election based on third-party conduct.⁷ For the reasons stated below, we decline to follow our colleague's suggestion that we recast long-settled law.

To begin, we agree with our colleague that it is appropriate to apply the five-factor *Westwood* test in assessing the seriousness of alleged threats, and we consider those factors below. The fundamental question that consideration of the five factors is intended to illuminate, however, is whether the conduct created a general atmosphere of fear and reprisal rendering a free election impossible. *Westwood*, 270 NLRB at 803. That standard is grounded on principles of common sense, fairness, and efficiency and directly advances the goals of the Act. The courts have repeatedly endorsed it.⁸

We share the goal that animates the dissent: to insure that the election's results reflect the true and uncoerced choice of a majority of those voting. Since the Act's adoption, however, the Board has consistently concluded that that statutory goal is better served by requiring a more compelling showing to set aside an election when the source of the alleged coercion is the conduct of third parties rather than the conduct of the employer or union. For the reasons we now explain, we continue to believe our longstanding jurisprudence strikes the best balance between the competing objectives of preventing improper influence and respecting election results. The dissent's position, in our view, tips that balance too far in one direction by permitting a few employees (or even outside third parties), through the use of rough language, through overexuberance (which is most likely in a close election), or even through a deliberate effort to sabotage the election process, to frustrate what may have been the uncoerced choice of the majority.

⁷ The Board has consistently held that the third-party standard applies even where, as here, there was a narrow electoral margin. *Lamar*, supra at 980; *Cal-West*, supra at 600. Our colleague cites *Steak House Meat Co.*, 206 NLRB 28, 29 (1973), for the proposition that third-party threats directed at only one employee have required setting an election aside in certain circumstances. We find the serious physical threats in *Steak House*—in which two male employees repeatedly threatened to kill a 16-year-old coworker, and one such threat was made while the speaker was holding a knife—easily distinguishable from the conduct here.

We also observe that the facts of *Westwood* itself, in which the Board ultimately set aside the election, are also far more extreme than those presented here. The third-party conduct at issue in *Westwood* included an employee's use of actual physical force to bring another employee to the voting line, conduct that was witnessed by 15 other employees.

⁸ See, e.g., *Precision Indoor Comfort, Inc. v. NLRB*, 456 F.3d 636, 639 (6th Cir. 2006); *Clothing & Textile Workers v. NLRB*, 736 F.2d 1559, 1568 (D.C. Cir. 1984); *Tuf-Lex Glass v. NLRB*, 715 F.2d 291, 296 (7th Cir. 1983); *Beaird-Poulan Division v. NLRB*, 649 F.2d 589, 594 (9th Cir. 1981).

First, we emphasize the extraordinary potential for disruption of the election process and frustration of employee choice that would result if third-party conduct were not subject to a heightened standard. “[W]ere the Board to give the same weight to conduct by third persons as to conduct attributable to the parties, the possibility of obtaining quick and conclusive election results would be substantially diminished.” *Orleans Mfg. Co.*, 120 NLRB 630, 633–634 (1958); accord: *NLRB v. Griffith Oldsmobile*, 455 F.2d 867, 870 (8th Cir. 1972); *Owens-Corning Fiberglass Corp.*, 179 NLRB 219, 223 (1969). As the Board explained in *Orleans*:

The employer and the union are deterred from election misconduct by the unfair labor practice provisions of the Act and by the trouble and expense which repeated elections impose upon them. The absence of similar deterrents against third persons who wish to forestall a conclusive election may make them more prone to engage in conduct calculated to prevent such a result.

120 NLRB at 633–634. This disruptive potential would be even greater if anonymous threats, such as the telephone call to employee Mays, were given significant weight. As stated by the District of Columbia Circuit, a union “may well have had no way to prevent such incidents from occurring; a rerun election would merely risk futility, because such incidents could easily recur despite the best efforts of the union and its supporters.” *Clothing & Textile Workers v. NLRB*, 736 F.2d 1559, 1568 (D.C. Cir. 1984). The prospect of a rerun election might even encourage parties or individuals to manufacture anonymous threats and then attempt to use them to set aside the election. *Id.*

Second, because unions and employers cannot control nonagents, “there are equities that militate against taking away an election victory because of conduct by a nonagent.” *Cal-West*, supra at 600; accord: *Lamar*, supra at 980. Simply put, it is unfair to saddle parties with the consequences of conduct over which they have no control. As the court stated in *NLRB v. Staub Cleaners, Inc.*, 418 F.2d 1086, 1088 (2d Cir. 1969): “[W]here one of the parties is directly at fault, the most effective deterrent to future misconduct is to deny that party what it sought to gain improperly. But, when . . . third parties are responsible for the improper comments, they have little concern with the expense and annoyance incurred by repeating the election, and the NLRB order in such a case carries with it no deterrent effect.”

Third, the Board and the courts recognize that conduct by third parties is less likely to affect the outcome of the election than employer or union conduct. *Lamar*, supra at 980; *Cal-West*, supra at 600; *NLRB v. Eskimo Radiator*

Mfg. Co., 688 F.2d 1315, 1319 (9th Cir. 1982). “Employees reasonably have a greater concern about threats emanating from the union that may become their exclusive representative than they would have from threats uttered by a single nonagent individual.” *Cal-West*, supra at 600 (overruling objection based on employees’ statements that another employee should “wait and see” what happened to him if he did not vote yes and that they would “beat him up” if he crossed a picket line); *Orleans Mfg. Co.*, 120 NLRB 630, 633 (1958) (“[T]he conduct of third persons tends to have less effect upon the voters than similar conduct attributable to the employer who has, or the union which seeks, control over the employees’ working conditions.”). Employees will ordinarily reasonably discount the bravado of coworkers even when, as the dissent points out, the individual employees theoretically have the capacity to carry out the threat. See, e.g., *NLRB v. Bostik Division*, 517 F.2d 971, 975 (6th Cir. 1975); *Lamar*, supra at 981.

Our colleague contends that an employee has the same ability as an employer or union to effectuate a physical threat. Indeed, he would presume “that third parties making physical threats are capable of following through on them.” As explained above, however, employee perception of the relative capability of a third party to effectuate a threat is only one of the reasons for the stricter third-party standard. The third-party conduct standard has routinely been applied to cases involving threats of physical harm or other repercussions that could, in theory, be carried out by an employee.⁹

Our colleague also condemns the Board’s application of *Westwood* as “reflexively dismissing almost any threat uttered by a pro-union employee as mere bravado, a colloquialism, or typical of language used in the workplace.” His concerns are misplaced for at least three reasons. First, we reject any implication that the *Westwood* standard governs only prounion conduct. The standard applies to all third-party threats, whether the individuals making them are prounion or antiunion. Second, our colleague denounces the *Westwood* “atmosphere of fear and reprisal” standard, yet he offers no reliable means of distinguishing bravado from objectionable threats. In the present case, as explained below, we rely on record evidence that similar statements were common in this workplace and among these employees. Third, and more generally, in declining to find that all language suggesting a

physical threat must be deemed to have serious intent, we draw on our experience enforcing the Act. Loose talk is common, but acts of violence or other forms of retaliation perpetrated by employees rarely occur. Workplace violence may be on the rise, as our colleague asserts, but we see no evidence that talk of the kind involved here is leading to action prior to or after union representation elections.¹⁰

In short, in our view, requiring a general atmosphere of fear and reprisal in order to set aside an election based on third-party conduct appropriately balances the need to deter coercive conduct and preserve free choice against the interest in resolving representation issues promptly and with due regard for the expressed will of the majority. We therefore decline to abandon or recast the Board’s longstanding test.

B. Application of the Standard

Applying the *Westwood* standard here, we find that the Employer has failed to show that the employees’ conduct created a general atmosphere of fear and reprisal rendering a free election impossible. With regard to the physical threats in particular, the *Westwood* factors weigh against finding them sufficiently serious to be objectionable. The threats did not encompass the entire unit, nor were they disseminated beyond the employees present. In the context of this employer’s workplace, the threats were comparable to everyday back and forth among employees and would not tend to suppress employee free choice. *Lamar*, supra at 981.

The record contains no evidence that Hodges and Verbal, the employees making the alleged threats, were capable of carrying them out. Nor is there evidence that Hodges or Verbal had a history of fighting or other violent behavior. Furthermore, it does not appear from the record evidence that the alleged threats—to “bitch slap” and “whip [another employee’s] ass”—would have been taken seriously. Employee Matthew Abel, who heard Verbal’s statements, described them as “just, you know, blowin’ off steam,” and testified that “a lot of technicians have probably said that once or twice, maybe not in regards to the Union.” He further testified that he had probably said that he would “whip somebody’s ass . . . more than once.” Abel’s testimony in this regard is consistent with the Board’s general recognition that the threat

⁹ See *Lamar*, supra at 980 (threat to “kick ass”); *Accubuilt, Inc.*, 340 NLRB 1337, 1338 (2003) (threat to damage employee’s car or to “get him back” if he voted no); *Duralam, Inc.*, 284 NLRB 1419 (1987) (threat that an employee would be “dead meat” if the union lost by one vote and that an employee’s bones would be broken if he crossed a picket line).

¹⁰ Our colleague draws an analogy to picket-line misconduct cases, in which physical threats may be deemed unprotected even if they are not accompanied by physical action. As our colleague concedes, the analogy is flawed. In picket-line misconduct cases, only the individual committing the misconduct loses the protection of the Act. See, e.g., *Clear Pine Moldings*, 268 NLRB 1044, 1045–1046 (1984). Here, the Employer seeks to overturn the expressed will of the majority of employees based on the alleged threats of a few.

to “kick [someone’s] ass’ . . . standing alone does not convey a threat of actual physical harm.” *Leasco, Inc.*, 289 NLRB 549, 549 fn. 1 (1988). Because the language alleged as threatening here was not uncommon in the Employer’s workplace and was unlikely to have led other employees to fear actual physical harm, it is unlikely that it would have affected the outcome of the election.¹¹

The other evidence on which our colleague relies consists of a statement by employee Anthony Hodges, made about a week before the election, that he could sabotage employee Dennis Sheil’s work, and an anonymous telephone threat received by employee Lou Mays 2 nights before the election, that some unknown persons would “get even” with Mays if he “backstab[bed]” them. Although both threats were close in time to the election, and Hodges (who had experience in quality control) may have had the ability to carry out the threat of work sabotage, the other *Westwood* factors weigh against sustaining the objection. Neither threat encompassed the entire unit. The threat of sabotage was not made to Sheil, but to Abel, who did not repeat it to Sheil or to anyone else. The telephone threat was anonymous and vague and was not disseminated to anyone.¹² As explained above, we agree with the District of Columbia Circuit that ordering a rerun election based on anonymous incidents could be both futile and “devastatingly unfair” to the majority. *Textile Workers*, supra, 736 F.2d at 1568.

We do not condone the sorts of statements made by the employees here. Nevertheless, the burden of proof on a party seeking to have a Board-supervised, secret-ballot election set aside is a heavy one. *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 806 (6th Cir. 1989) (citing *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 120 (6th Cir. 1974), cert. denied 416 U.S. 986 (1974)). As explained above, the Employer has failed to satisfy the standard for overturning an election based on third-party conduct, and, contrary to our colleague, we do not believe it would further the purposes of the Act to abandon that well-established,

¹¹ See *Bostik Division*, supra, 517 F.2d at 973 (holding that statement that an antiunion employee would “get [his] ass kicked” was “not the type that would be expected to have a coercive impact,” because “[s]uch irresponsible threats are almost inevitable in the course of a heated election campaign and most employees doubtless expect such exchanges”); cf. *Ontario Knife Co. v. NLRB*, 637 F.2d 840, 846 (2d Cir. 1980) (Friendly, J.) (“[T]he Board and the courts have recognized that the speech of the workplace is not that of the parlor”).

¹² See *Accubuilt, Inc.*, supra (finding that coworkers’ threat to “get [an employee] back” for voting no was not objectionable); *Nabisco, Inc. v. NLRB*, 738 F.2d 955, 957 (8th Cir. 1984) (finding that two anonymous phone calls and rocks hurled at an employee’s home, affecting a determinative number of voters, did not “add up to a pattern of improper conduct requiring an evidentiary hearing”; “A certain measure of bad feeling and even hostile behavior is probably inevitable in any hotly contested election.”).

judicially-approved standard. Accordingly, we adopt the hearing officer’s recommendation to overrule Objection 5.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Communication Workers of America, Local 3871, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time technicians, lead technicians and apprentice technicians employed by the Employer at its Kingsport, Tennessee facility, but excluding all other employees, technical employees, temporary employees, confidential employees, professional employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C. March 11, 2011

Wilma B. Liebman, Chairman

Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

I would sustain the Employer’s Objection 5 and set aside the election based on third-party threats made during the critical preelection period. I readily accept the proposition that the Board must apply a more stringent standard for setting aside an election based on the conduct of persons who are not subject to an employer or union’s direct control. Notwithstanding this necessary distinction between party and nonparty conduct, there are few phrases in the Board’s lexicon that are more misleading than the statement in *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984), that the test for objections to third party threats in an election campaign is “whether the misconduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.” The phrase, or at least the word “general,” should be abandoned. It suggests a requirement of widespread and aggravated misconduct, and indeed it was born in cases concerning such conditions,¹ but the scope of objectionable threats is not so limited. Indeed, third

¹ See *Diamond State Poultry Co.*, 107 NLRB 3, 6 (1953).

party threats directed at only one employee have required setting aside an election in certain circumstances.²

The *real* test of the objectionable nature of third-party threats is the multifactor standard set forth in *Westwood Horizons Hotel*:

[W]hether a threat is serious and likely to intimidate prospective voters to cast their ballots in a particular manner depends on the threat's character and circumstances and not merely on the number of employees threatened. In determining the seriousness of a threat, the Board evaluates not only the nature of the threat itself, but also whether the threat encompassed the entire bargaining unit; whether reports of the threat were disseminated widely within the unit; whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and whether the threat was "rejuvenated" at or near the time of the election.

Unlike my colleagues, I find that the election here must be set aside under this third party test.³

The relevant facts are undisputed. One to two weeks before the election, eligible voter Matt Abel heard pro-union employee Chris Verbal tell a group of three or four unit employees that he would "bitch slap" someone or "whip their f—in' ass" if they "cost us the election." Abel testified that Verbal was referring to employees Dennis Sheil and Shawn Whippo. Then, about a week before the election, prounion employee Anthony Hodges told Abel that he heard Sheil and Abel had changed their minds about supporting the Union. Hodges then told Abel that Hodges "could . . . whip [Sheil's] ass" and "find out jobs that [Sheil] had done [and] f— them up to where they wouldn't pass the [quality control test]."⁴

Two days before the election, employee Louis Mays told Hodges and employee Mark Hopkins that he thought the election should be postponed for 6 months to give the Employer a chance to address employees' concerns.

² See *Steak House Meat Co.*, 206 NLRB 28, 29 (1973), cited with approval in *Westwood Horizons*, 270 NLRB at 803 fn. 8.

³ As stated above, I would abandon or revise the rote summary statement of the *Westwood* test, but not the multifactor test itself, which does not require that third party physical threats be pervasive in order to be objectionable. Although the third-party conduct at issue here is prounion, the test is, of course, applicable to antiunion conduct as well.

I join my colleagues in adopting the hearing officer's recommendation to overrule the Employer's Objections 1, 2, and 3. Inasmuch as I would find the Employer's Objection 5 sufficient to warrant setting aside the election, I find it unnecessary to pass on the Employer's Objections 4 and 6.

⁴ Hodges had experience in quality control and likely would have been viewed as capable of carrying out such a threat.

Subsequently, employee Scott Winter called Mays a "traitor," "backstabber," and a "f—ing snitch." Later that night, Mays received an anonymous phone call at his house. Repeating Winter's "backstabber" accusation from earlier that day, the caller told Mays "don't be a f—ing backstabber, if you backstab us, we will f—ing . . . get even with you."

There is no indication that reports of the threats by Verbal and Hodges, Winter's diatribe, or the subsequent anonymous phone threat to Mays⁵ were disseminated to employees other than those who first heard them. Still, at least 5 to 6 employees were exposed to threats of physical reprisal for opposing the Petitioner, repeated a final time only 2 days before an election which the Petitioner won by a slim 14 to 12 vote margin, meaning a change in even one vote could have resulted in a different outcome (in a tie vote, the petitioner loses).⁶

One of the principal reasons for finding many third party threats unobjectionable is that the protagonists are not in a position to make good on the threat. That rationale is applicable to many types of threats to affect an employee's job or working conditions, but it hardly holds true for threats of a physical nature. Unless the Board is going to impose on an objecting party the burden to prove that an employee making a threat has greater pugilistic skills or physical prowess than the threatened employee, and it has not heretofore imposed such a burden, then it seems an acceptable general proposition that third parties making physical threats are capable of following through on them.

There remains the question whether the threats at issue may be objectively viewed as uttered with serious intent. I would so find. In this respect, the majority's contrary view is representative of an analytical approach reflexively dismissing almost any threat uttered by an employee as mere bravado, a colloquialism, or typical of language used in the workplace. This approach is unfortunately reminiscent of the Board's quondam attitude towards physical threats by strikers and picketers, holding that such misconduct did not deprive them of statu-

⁵ My colleagues place particular emphasis on the unreasonableness of setting aside an election based on anonymous threats. I do not find that the anonymous call to Mays, standing alone, would be objectionable under the *Westwood* test. It does, however, warrant consideration in conjunction with the proven threats by identified prounion employees, including Winters' tirade against Mays earlier that same day using language very similar to that used by the anonymous phone caller.

⁶ The closeness of the election results is a consideration, albeit not determinative, in analyzing whether third party threats are objectionable. See *Robert Orr-Sysco Food Services*, 338 NLRB 614, 615 (2002) ("The Board has set aside elections where, as here, threats have been made or disseminated to voters whose ballots might have been determinative."), and cases cited there. In this case, threats were made to a determinative number of voters.

tory protection unless accompanied by physical actions. That policy met its deserved demise⁷ after the Supreme Court granted review of a case in which the Board originally held that verbal threats by drunken strikers to a non-striker at his home and in the presence of his pregnant wife and young daughter did not remove the strikers' statutory protection.⁸

Clearly, the issue of whether to set aside an election based on third party threats involves consideration of *some* factors that are not at issue in striker misconduct cases. However, particularly at a time when workplace violence is on the rise nationally and employer efforts to restrain it trend towards zero tolerance, there should be a common concern as to whether the Board's assessment of preelection physical threats in the workplace furthers

employee free choice and labor relations stability. In my view, the multifactor *Westwood Horizons* test for third party conduct, if correctly applied, requires finding that the objective collective impact of the threats in this case was serious and likely to intimidate prospective voters to cast their ballots in a particular manner.⁹ I would therefore set aside the election results and direct a new election.

Dated, Washington, D.C., March 11, 2011

Brian E. Hayes,

Member

NATIONAL LABOR RELATIONS BOARD

⁷ See *Clear Pine Moldings, Inc.*, 268 NLRB 1044 (1984).

⁸ *Georgia Kraft Co.*, 258 NLRB 908, 912-913 (1981), *enfd.* 696 F.2d 931 (11th Cir. 1983), *cert. granted* 464 U.S. 981 (1983), judgment vacated in part 466 U.S. 901 (1984), reversed in relevant part on remand 275 NLRB 63 (1985).

⁹ My colleagues mischaracterize my position as conflating the party and third-party standards with respect to physical threats. I agree that a higher standard must be met before setting aside an election based on third-party conduct, but I would find that standard was met here.