Oral Argument Not Yet Scheduled

No. 11-1199

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 98

Intervenor

v.

DOWNTOWN BID SERVICES CORPORATION

Respondent

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL LABOR RELATIONS BOARD	)	
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Petitioner	)	No. 11-1199
	)	
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INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 98	)	
	)	Board Case Nos.
Intervenor	)	05-CA-36375
	)	05-RC-16330
v.	)	
	)	
DOWNTOWN BID SERVICES CORPORATION	)	
	)	
Respondent	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board ("the Board") certify the following:

A. Parties and Amici

Downtown Bid Services Corporation was the Respondent before the Board in the above-captioned case and is the Respondent in this court proceeding. The Board's General Counsel was a party before the Board. The International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 98 was the charging party before the Board and is the Intervenor here.

B. Rulings Under Review

The case under review is a Decision and Order of the Board, issued on April 4, 2011 and reported at 356 NLRB No. 130, which relies on the findings of the Board and an administrative law judge in an earlier representation proceeding. The findings of the Board in the representation proceeding (Board Case 5-RC-16330) are contained in an unpublished Decision and Certification of Representative, which issued on December 23, 2010; the findings of the administrative law judge in the same proceeding are contained in an unpublished Administrative Law Judge's Report and Recommendations on Objections, which issued on March 31, 2010.

C. Related Cases

This case has not previously been before this Court. The Board is not aware of any related cases either pending or about to be presented before this or any other court.

/s/ Linda Dreeben
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Dated at Washington, D.C.
this 10th day of November 2011

TABLE OF CONTENTS

Headings **Page(s)**

TABLE OF CONTENTS

Headings – Cont'd **Page(s)**

TABLE OF CONTENTS

Headings – Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases **Page(s)**

[*] Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

[*] Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

[*] Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Statutes: **Page(s)**

National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

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Respondent

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board ("the Board") to enforce a Board Decision and Order issued

against Downtown Bid Services Corporation ("the Company") on April 4, 2011, and reported at 356 NLRB No. 130. (A 187-89.)[1] In its Decision and Order, the Board found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 158(a)(5) and (1)) ("the Act") by failing and refusing to bargain with the International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 98 ("the Union") as the duly certified collective-bargaining representative of the Company's hospitality/safety and maintenance workers. (A 187.) The Union has intervened on the side of the Board in this proceeding.

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction under Section 10(e) of the Act (29 U.S.C. § 160(e)), because the unfair labor practice occurred in the District of Columbia, and because the Board's Order is final with respect to all parties.

As the Board's unfair labor practice Order is based, in part, on findings made in an underlying representation proceeding, the record in that proceeding

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[1] Record references are to the Joint Appendix ("A") filed by the Company, and to the Supplemental Appendix ("SA") filed by the Board. Citations to the original transcript ("Tr.") from the underlying hearing appear in parenthesis following the relevant citation to the Joint Appendix, as multiple transcript pages may be reproduced on a single page of the Joint Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to the Company's opening brief.

(Board Case No. 5-RC-16330) is also before the Court pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Under Section 9(d), the Court has jurisdiction to review the Board's actions in the representation proceeding solely for the purpose of "enforcing, modifying or setting aside in whole or in part the [unfair labor practice] order of the Board." 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the ruling of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

The Board filed its application for enforcement on June 1, 2011. This filing was timely, as the Act places no time limit on the institution of proceedings to enforce Board orders.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board reasonably overruled the Company's election objections and certified the Union, and therefore properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

STATEMENT OF THE CASE

I. THE REPRESENTATION PROCEEDING

A. Factual Background

The Company is a non-profit District of Columbia corporation that provides beautification maintenance, safety, and hospitality services to the public in downtown Washington, D.C. (A 187; A 177 ¶10.) Around March 2009, the Union began a campaign to organize the Company's hospitality/safety and maintenance workers, collectively known as "SAMs." (A 149; A 71 (Tr. 69-70), 124 (Tr. 226).)

Union Business Representative Roosevelt Littlejohn served as the Union's main organizer. (A 149; A 51-52, 122 (Tr. 217).) For the first few months of the campaign, Littlejohn and a few other paid union officials were the only individuals who solicited union authorization cards from employees. (A 125 (Tr. 229-30).) Around June 2009, employee Jennings Brown and several coworkers volunteered to support the Union and joined an in-plant organizing committee. (A 149; A 51-52, 125-27 (Tr. 230-31, 235).)

Over the course of the campaign, Littlejohn held about six informational meetings that were open to all employees. (A 149; A 127 (Tr. 235-36).) At these meetings, Littlejohn sat alone in front of an audience of employees. (A 149; A 131 (Tr. 252).) Brown and other employees asked questions of Littlejohn. (A 149; A 127 (Tr. 237-38).)

Littlejohn made union authorization cards available to employees at the meetings and provided basic information about how to solicit signed cards. (A 149; A 128 (Tr. 240).) A number of employees, including Brown, took the authorization cards and helped to solicit signed cards from fellow employees. (A 149; A 127-28 (Tr. 238-39), 132 (Tr. 255).) Littlejohn periodically collected signed authorization cards from the various employees helping to solicit them. (A 149; A 128 (Tr. 239).) In the event that employees had questions, Littlejohn's name and contact information appeared on the cards themselves. (A 128 (Tr. 240).) The same identifying information appeared on the Union's flyers and other literature, all of which Littlejohn drafted. (A 149; A 128 (Tr. 242), 130 (Tr. 247).)

B. Procedural History

On July 6, 2009, the Union filed a petition with the Board, seeking certification as the representative of a bargaining unit that included all of the Company's full-time and regular part-time hospitality/safety and maintenance workers. (A 148; A 6.) On July 30 and 31, 2009, pursuant to a Stipulated Election Agreement, the Board held a secret-ballot election among the employees in the proposed bargaining unit. (A 148; A 11-12.) The tally of ballots showed 56 votes for the Union, 51 votes against the Union, and 1 challenged ballot, which was insufficient to affect the outcome of the election. (A 148; A 12.)

Subsequently, the Company filed objections to the election alleging, in relevant part, that agents or supporters of the Union engaged in objectionable threats, harassment, and electioneering that interfered with employee free choice in the election. (A 150-56; A 13-15.) Pursuant to an order of the Board's Regional Director for Region 5, a hearing was held on the election objections over two days in March 2010. (A 149; A 26, 53, 115.)

Thereafter, the administrative law judge, sitting as a hearing officer, issued a report recommending that the Board overrule all of the Company's objections and certify the Union. (A 148-56.) The Company timely filed exceptions to portions of the administrative law judge's report and recommendations. (SA 1; A 157-58.) The Board (Chairman Liebman and Members Becker and Pearce) issued a Decision and Certification of Representative on December 23, 2010, adopting the administrative law judge's findings and recommendations, and certifying the Union as the employees' exclusive collective-bargaining representative. (SA 1-4.)

II. THE UNFAIR LABOR PRACTICE PROCEEDING

On January 4, 2011, the Union requested, by letter, that the Company recognize and bargain with the Union as the exclusive collective-bargaining representative of the Company's hospitality/safety and maintenance workers. (A 187; A 176 ¶6.) The Company refused. (A 187; A 167.) Thereafter, acting on an unfair labor practice charge filed by the Union (A 166), the Regional Director

issued a complaint alleging that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (A 187; A 168-71.)

The General Counsel subsequently filed a motion for summary judgment, and the Board issued a notice to show cause. (A 187; A 175-81, 183.) In response, the Company did not deny that it refused to bargain with the Union, but claimed that it had no duty to do so because the Board had erred in overruling the Company's election objections and certifying the Union. (A 187; A 184-85.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On April 4, 2011, the Board (Chairman Liebman and Members Becker and Pearce) issued its Decision and Order, granting the General Counsel's Motion for Summary Judgment and finding that the Company's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (A 187-88.) The Board concluded that all representation issues raised by the Company in the unfair labor practice proceeding were, or could have been, litigated in the underlying representation proceeding, and that the Company neither offered any newly discovered or previously unavailable evidence, nor alleged the existence of any special circumstances, that would require the Board to reexamine its decision to certify the Union. (A 187.)

The Board's Order requires the Company to cease and desist from refusing to bargain with the Union, and in any like or related manner interfering with,

restraining, or coercing employees in the exercise of their Section 7 rights (29 U.S.C. § 157). (*Id*.) Affirmatively, the Board's Order directs the Company, on request, to bargain with the Union, to embody any resulting understanding in a signed agreement, and to post a remedial notice. (*Id*.)

SUMMARY OF ARGUMENT

The Board reasonably found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the Union, which the Board had certified as the collective-bargaining representative of the Company's SAMs in the underlying representation proceeding. Before this Court, the Company challenges the Board's findings in the representation proceeding, and renews its objections that union agents and supporters engaged in objectionable conduct that warranted setting aside the Union's election victory. The Board, however, properly overruled the Company's objections and certified the Union. Accordingly, the Company violated the Act by refusing to bargain with the Union.

Specifically, the Board reasonably overruled (SA 1-3, A 150-54) the Company's Objections 1 and 2, which alleged that employee Brown and other union supporters, acting as agents of the Union, engaged in threats and harassment that impaired employee free choice in the election. Preliminarily, the Board found (SA 1-2, A 153 & n.5) that the employees were neither general nor special agents

of the Union. Accordingly, the Board considered (SA 3) the employees' conduct under the legal standard governing the actions of third parties. Applying that standard, the Board reasonably found (*id*.) that the Company failed to meet its burden of showing that the isolated incidents in evidence—many of which occurred long before the election—created a general atmosphere of fear and reprisal that rendered a fair election impossible. In the alternative, the Board appropriately concluded (SA 3 n.2) that the same result would obtain even if those incidents were considered under the standard governing conduct by parties to an election.

The Board also reasonably overruled (A 154-55) the Company's Objections 3 and 4, which alleged that employee Brown engaged in objectionable conduct while serving as the Union's election observer. The evidence shows only that during a break in the voting, Brown received a cell phone call and mentioned the name of the Company's election observer to the unidentified caller. As no employees were in the area at the time, and the election observer's identity was hardly a secret, the Board found (A 154) that Brown's cell phone conversation could not have impaired employee free choice in the election. Similarly, the Board reasonably found (A 155) that Brown's occasional gestures and movements in the polling area—which he discontinued at the Board agent's direction—did not materially affect the results of the election.

With regard to Objection 5, which concerns the Union's choice of Brown to serve as its election observer, the judge reasonably found (A 156) that the Company waived that objection by failing to lodge it in a timely manner at the preelection conference. In its opening brief, the Company presents no argument contesting this finding, which provided a complete basis for overruling Objection 5. Accordingly, the Company has waived any right to contest the decision to overrule Objection 5.

As all of the Company's objections are, thus, either without merit or not preserved for appellate review, the Board's certification of the Union must stand, and the Board is entitled to enforcement of its Order requiring the Company to bargain with the Union.

ARGUMENT

THE BOARD REASONABLY OVERRULED THE COMPANY'S ELECTION OBJECTIONS AND CERTIFIED THE UNION, AND THEREFORE PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION

A. Introduction, Applicable Principles, and Standard of Review

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of [its] employees . . . ." Here, the Company (Br. 4) has admittedly refused to bargain with the Union in order to challenge the Board's certification of the Union

following its election victory. There is no dispute that if the Board properly certified the Union as the employees' collective-bargaining representative, the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. 158(a)(5) and (1)) by refusing to bargain with the Union,[2] and the Board is entitled to enforcement of its Order. *See C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 881-82 (D.C. Cir. 1988). Accordingly, the issue before the Court is whether the Board abused its broad discretion in overruling the Company's election objections and certifying the Union. *See NLRB v. A.J. Tower Co.*, 329 U.S. 324, 329-30, 335 (1946); *accord Amalgamated Clothing Workers v. NLRB*, 424 F.2d 818, 827 (D.C. Cir. 1970).

"Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *A.J. Tower Co.*, 329 U.S. at 330; *accord C.J. Krehbiel Co.*, 844 F.2d at 882. There is a "strong presumption" that an election conducted in accordance with those safeguards "reflect[s] the true desires of the employees." *Deffenbaugh Indus., Inc. v. NLRB*, 122 F.3d 582, 586 (8th Cir. 1997); *accord NLRB v. Coca-Cola Bottling Co. Consol.*, 132 F.3d 1001, 1003 (4th Cir. 1997) ("the outcome of a Board-certified election [is] presumptively

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[2] An employer's failure to meet its Section 8(a)(5) bargaining obligation constitutes a derivative violation of Section 8(a)(1) (29 U.S.C. § 158(a)(1)), which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the[ir statutory] rights . . . ." *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

valid"); *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (same); *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989) (same). Therefore, the results of such an election "'should not be lightly set aside.'" *NLRB v. Mar Salle, Inc.*, 425 F.2d 566, 570 (D.C. Cir. 1970) (citations omitted).

The party seeking to set aside an election bears a "heavy burden" of showing that the election results are invalid. *Kwik Care Ltd. v. NLRB*, 82 F.3d 1122, 1126 (D.C. Cir. 1996); *Amalgamated Clothing Workers*, 424 F.2d at 827; *see also NLRB v. Mattison Mach. Works*, 365 U.S. 123, 123-24 (1961) (per curiam). To meet that burden, the objecting party must demonstrate, not only that improprieties occurred, but that they "interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election." *Amalgamated Clothing Workers*, 424 F.2d at 827 (citation omitted). With respect to objectionable conduct by third parties, the objecting party must show that it was "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 264-65 (D.C. Cir. 1998). The determination whether the objecting party has carried its burden is "fact-intensive" and thus "especially suited for Board review." *Family Serv. Agency San Francisco v. NLRB*, 163 F.3d 1369, 1377 (D.C. Cir. 1999).

On appeal, the Board's rulings on election objections are entitled to deference. *Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d

1559, 1562 (D.C. Cir. 1984); *Amalgamated Clothing Workers*, 424 F.2d at 827; *accord Timsco Inc. v. NLRB*, 819 F.2d 1173, 1176 (D.C. Cir. 1987). "It is for the Board in the first instance to make the delicate policy judgments involved in determining when laboratory conditions have sufficiently deteriorated to require a rerun election." *Amalgamated Clothing & Textile Workers Union*, 736 F.2d at 1562. Accordingly, the scope of appellate review is "extremely limited," and the Board's decision is entitled to affirmance if it is reasonable and supported by substantial evidence on the record as a whole. *Id.* at 1562, 1564; *accord C.J. Krehbiel Co.*, 844 F.2d at 882.

In the instant case, the Board reasonably determined (SA 3, A 156) that the Company failed to establish conduct sufficiently egregious to warrant setting aside the election. Specifically, as explained below, the Company failed to carry its heavy burden of establishing, as it alleged in Objections 1 and 2, that pro-union employees materially affected the results of the election by threatening and harassing fellow employees in the months before the election. The Company likewise filed to show, as it alleged in Objections 3 and 4, that the Union's designated observer at the election, pro-union employee Brown, materially affected the results of the election by his movements and gestures in the polling area and his conversation on a cellular phone during a break in the voting. With regard to Objection 5, which concerns the Union's selection of Brown as its election

observer, the judge reasonably found that the Company waived that objection by failing to lodge it in a timely manner at the preelection conference. In its opening brief, the Company fails to present any argument contesting this finding, which provided a complete basis for overruling Objection 5. Accordingly, the Company has waived any right to contest the decision to overrule Objection 5.

B. The Board Reasonably Overruled the Company's Objections 1 and 2, which Alleged that Pro-Union Employees Interfered with Employee Free Choice by Threatening and Harassing Fellow Employees Before the Election

The Company contests (Br. 30-52) the Board's decision to overrule Objections 1 and 2, which alleged that pro-union employees, some of whom were purportedly agents of the Union, threatened and harassed fellow employees about signing union authorization cards, attending union meetings, and voting for the Union. Preliminarily, as the Board found (A 153, 164-65), the pro-union employees at issue were not agents of the Union in regard to the alleged threats and harassment. The Board therefore considered (SA 3) the evidence of the pro-union employees' conduct under the legal standard applicable to third parties—that is, parties other than the employer and the petitioning union. Applying this third-party standard, the Board properly found (SA 3, A 152-54) that the inter-employee threats and harassment shown by the Company were not so extreme as to create a "general atmosphere of fear and reprisal" warranting a rerun election. The Board

further found (SA 3 n.2) that the same result would obtain even if the alleged threats were considered, as urged by the Company, under the legal standard appropriate for parties to an election.

As we now show, the Board's findings with respect to Objections 1 and 2 are amply supported by the record and consistent with settled law. They are accordingly deserving of affirmance, notwithstanding the Company's arguments to the contrary.

1. Facts relevant to the Company's Objections 1 and 2

a. Employee statements regarding job loss

During the organizing campaign—which culminated in a Board-conducted representation election on July 30 and 31, 2009—a few pro-union employees told coworkers that they would lose their jobs if they did not support the Union. (A 150-51; A 57 (Tr. 14), 58 (Tr. 18-19), 59 (Tr. 24), 66 (Tr. 52), 69-70 (Tr. 63-65), 73-74 (Tr. 79-81), 78 (Tr. 98), 90-91 (Tr. 147-49), 92 (Tr. 153), 93 (Tr. 157).) Specifically, sometime in May or June 2009, Brown told employee Ethel Frye that if she "wouldn't sign up for the Union . . . the Union would come in and fire [her]." (A 150; A 57 (Tr. 14), 66 (Tr. 52).) In May or early June 2009, employee Fenton Chester told Frye, in the presence of three other employees, that she could lose her job if she did not support the Union. (A 150; A 58 (Tr. 18-19).) Following these statements, Frye went to three different company officials to ask if

her job was, in fact, in jeopardy, and if the Union could fire her. (A 151; A 59 (Tr. 24), 67 (Tr. 53), 80-81 (Tr. 106-09).) All three officials told Frye, before the election, that she would not be fired and the Union could not fire her. (*Id*.)

About one month before the election, employee Brown told coworker Raymond Dantzler that if he did not join the Union, he "could lose [his] job, the [C]ompany would find a way to fire [him]." (A 73-74 (Tr. 79, 81).) A few days before the election, Dantzler asked the Company's Administrative Specialist and Payroll Administrator Jalal Chaoui whether Brown's statement was true. (A 73 (Tr. 79-80).) Chaoui assured Dantzler that his job was not in danger, that he "was fine, nothing to worry about . . . ." (A 73 (Tr. 80).)

Sometime in July 2009, employee Earl Garnett told fellow employee Jose Canales that "if [he] didn't support the Union, [he] will have to find another job." (A 78 (Tr. 98).) At the time, Garnett repeated the statement about five times, apparently "because he thought [Canales] wasn't understanding him." (A 78 (Tr. 99).) Similarly, a few days before the July election, employee Goberto Arcia told fellow employees Norma Canales and Maria Paz Caravate that if they did not vote for the Union, they would be fired. (A 151; A 69-70 (Tr. 63-65), 90-91 (Tr. 147-49).)

On an unspecified date before the election, as employee Vivian Morgan was walking to the metro with some coworkers, employee Chester worried aloud that

"if he didn't get the Union in, he was going to lose his job." (A 92-93 (Tr. 153, 157)). When Morgan said that she would not vote for the Union, Chester replied: "I'm going to keep my job and they're going to fire you" (A 93 (Tr. 157)). Morgan worried about this comment "until [she] got more information about what was going on." (A 93 (Tr. 157).)

b. Name-calling incidents

In July 2009, employee Brown pressed employee Dantzler for an answer as to whether he would support the Union. (A 73 (Tr. 77-78).) When Dantzler did not respond, Brown "start[ed] calling [Dantzler] a lot of names and stuff." (A 73 (Tr. 78).) Among other things, Brown called Dantzler a "punk." (A 73 (Tr. 79).)

In addition, on unspecified dates before the election, pro-union employees Jerome Coleman and Earl Garnett, both of whom are African American, called fellow African American employee Ronald Calhoun "stupid" for not supporting the Union. (A 152; A 75 (Tr. 86-87).) Coleman also called Calhoun a "stupid nigger" for not supporting the Union. (*Id.*)

Finally, about a week before the election, Company Director of Operations Everett Scruggs saw an anonymous, handwritten message on one of the Company's campaign posters in an employee locker-room area. (A 152-53; A 98 (Tr. 180).) The anonymous message read: "Fuck you BID, you all going down,

hopefully to hell, with your cocksucking niggers, spics, and white trash." (A 152-53; A 99 (Tr. 183).)

2. The Company failed to prove that the pro-union employees at issue were agents of the Union

The question whether an employee is an agent of a labor organization is controlled by common-law principles of agency. *Mar-Jam Supply Co.*, 337 NLRB 337, 337 (2001); *accord Overnite Transp. Co.*, 140 F.3d at 265-66. Under those principles, an agency relationship exists where the employee has either actual or apparent authority to act on behalf of the labor organization. *Cornell Forge Co.*, 339 NLRB 733, 733 (2003). Moreover, "[t]he agency relationship must be established with regard to the specific conduct that is alleged to be unlawful." *Cornell Forge*, 339 NLRB at 733. The employer, as the party asserting the agency relationship, has the burden of making this showing. *See Associated Rubber Co. v. NLRB*, 296 F.3d 1055, 1060 (11th Cir. 2002); *Millard Processing Servs., Inc. v. NLRB*, 2 F.3d 258, 262 (8th Cir. 1993); *Cornell Forge*, 339 NLRB at 733.

a. Pro-union employee Brown was not a general agent of the Union

The Company argues (Br. 36-38) that pro-union employee Brown was an agent of the Union based on his "pivotal role in every stage of the organizing

campaign . . . ."[3] It is nevertheless undisputed that the Union never gave Brown actual authority to generally act on its behalf during the organizing campaign. Indeed, paid union organizer Littlejohn, who ran the campaign, specifically denied that any employee was ever designated to serve in an official capacity for the Union or identified as a member of a union-sponsored "organizing committee."[4] (A 124 (Tr. 224), 133 (Tr. 259-60).) Instead, "there were people that volunteered to support the Union," and Brown was not even chief among the volunteers. (A 124 (Tr. 223-24), 129 (Tr. 243-44), 132 (Tr. 256-57).) Brown's lack of actual authority to act for the Union, and his status as merely a voluntary supporter of the Union, is reflected by his own testimony about his periodic communications with Littlejohn: According to Brown, he and Littlejohn never discussed strategy because, as far as he knew, "there wasn't really no strategy," and he was simply "trying to get people's support." (A 136 (Tr. 274).)

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[3] Although the Company refers (Br. 29-30) to three other employees (Fenton Chester, Earl Garnett, and Jerome Coleman) as "agents of the Union," the Company does not argue that those employees played a pivotal role in the organizing campaign or served as agents of the Union, except for the limited purpose of soliciting signed authorization cards (Br. 30-36). *See* below, pp. 23-26.

[4] Although Littlejohn advised the Company during the campaign that employees were "acting as an in-plant organizing committee," he did not identify anyone by name. (A 51-52.) In any event, this Court has long recognized that "mere membership in an in-plant organizing committee is not sufficient, by itself, to make the actions of an individual attributable to the union." *Overnite Transp.*, 140 F.3d at 266 (citing *Amalgamated Clothing & Textile Workers*, 736 F.2d at 1565).

Implicitly recognizing that Brown lacked actual authority to act as the Union's general agent, the Company dwells (Br. 36-38) on what it views as evidence of Brown's apparent authority. The Board, however, reasonably rejected (A 153 n.5) the Company's claim. "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 the alleged agent to perform the acts in question.'" *Mastec North Am.*, 356 NLRB No. 110, 2011 WL 828384, at *2 (2011) (quoting *Corner Furniture Discount Ctr., Inc.*, 339 NLRB 1122, 1122 (2003)); *accord Overnite Transp.*, 140 F.3d at 266. In this case, there is simply no evidence that Littlejohn, the Union principal, did anything to create a basis for employees to believe that Brown was the Union's agent. Although some of the affected employees testified to their belief that Brown was "organizing the Union," they were unable to connect their belief to anything Littlejohn or the Union had done. (A 57 (Tr. 13).) *See Overnite Transp.*, 140 F.3d at 266 (finding that "while it may be the case that several employees did in fact believe that [pro-union employee] McConley acted on behalf of the union, the union cannot be held responsible for [his] conduct because it did nothing to confer apparent authority on him"). Accordingly, the Board reasonably found (A 153 n.5) that their testimony failed to establish that the Union imbued Brown with apparent authority to act as its agent. (A 57 (Tr. 13), 65 (Tr. 47), 78 (Tr. 99-100), 95 (Tr. 169), 97 (Tr. 174).)

The Company likewise errs in suggesting (Br. 37-38) that Littlejohn was largely absent from the campaign and left Brown to answer employee questions, thereby prompting employees to infer that Brown was the Union's agent. The record does not support the Company's theory that Littlejohn was absent and that Brown served as his proxy. Contrary to the Company's theory, Littlejohn and other paid union organizers were physically present outside the Company's facility, distributing leaflets and authorization cards to employees, during the first three months of the organizing campaign. (A 124-25 (Tr. 226-30).) During this time, they were the only individuals who solicited employees to sign authorization cards. (A 125 (Tr. 229-30).)

Additional evidence supports the Board's finding that the Company failed to meet its burden of establishing that Brown had apparent authority to act as a union agent. Thus, it was Littlejohn, not Brown, who arranged informational meetings for employees over the course of the organizing campaign. Littlejohn was present at all of those meetings, seated alone in front of an audience of employees. By contrast, Brown only attended "some" of the meetings, and at the few he did attend, he did not introduce Littlejohn or serve as a speaker. (A 127 (Tr. 235-38), 131 (Tr. 252).) Rather, he simply asked questions of Littlejohn and expressed his opinions, just like the other employees in attendance. (A 127 (Tr. 237-38).) In addition, Littlejohn prepared all of the literature to be distributed to employees.

Littlejohn's name and telephone number appeared on that literature and on the authorization cards distributed to employees, as the sole contact person for the Union. (A 128 (Tr. 240, 242), 130 (Tr. 247).) Given this evidence of Littlejohn's hands-on involvement with the organizing campaign, as well as Brown's specific denial that he ever represented to employees that he was the lead organizer for the Union, the Board reasonably rejected (A 153 n.5) the Company's theory that Brown was the Union's agent under principles of apparent authority.

The Company attempts (Br. 38) to liken Brown to the employees who were found to be union agents in *NLRB v. Kentucky Tennessee Clay Co.*, 295 F.3d 436, 442-446 (4th Cir. 2002), but the facts of this case will not permit any such analogy. In *Kentucky Tennessee Clay*, the Fourth Circuit found that two employee union supporters were agents of the union, where the union's paid organizer "never traveled to the [company's] facility or to any other place within [the area] to meet with or attempt to organize the facility employees," and instead relied "near[ly] exclusive[ly]" on the two employees at issue. 295 F.3d at 443. By contrast, here, paid union organizer Littlejohn was present at the Company's facility on numerous occasions, and active on several fronts in the campaign; and there is no evidence that he relied nearly exclusively on Brown to run the organizing campaign. *Kentucky Tennessee Clay*, accordingly, provides no authority for a finding that Brown was the Union's general agent in the organizing campaign. *See NLRB v.*

Herbert Halperin Distrib. Corp., 826 F.2d 287, 290-91 (4th Cir. 1987) (upholding Board's determination that employees were not agents of the union where the union's professional staff was heavily involved in the campaign and where union did not rely primarily on employees to organize the other workers), *cited in Overnite Transp.*, 140 F.3d at 266.

b. Pro-union employees were not "special agents" of the Union in regard to the remarks at issue

The Company insists (Br. 31-36) that, even if Brown was not a general agent of the Union, he and other union supporters were "special agents" empowered to solicit signed union authorization cards under *Davlan Eng'g*, 283 NLRB 803, 804 (1987), which holds that employees who solicit authorization cards may be "special agents of the union for the limited purpose of assessing the impact of statements about union fee waivers or other purported union policies that they make in the course of soliciting." On this basis, the Company seeks to hold the Union responsible for the statements of Brown and other prounion employees. The Board, however, reasonably rejected the Company's argument because the statements at issue could not reasonably be viewed as involving union "policies." (SA 2.) In addition, regarding Objection 1, the record failed to show that the prounion employees made the alleged threats of job loss while they were soliciting authorization cards. Accordingly, the Board properly rejected the Company's

reliance on a "special agency" theory in its failed attempt to attribute the prounion employees' statements to the Union. (SA 2-3.)

As the Board recognized (SA 2), any special agency created for the purpose of card solicitation is limited. Specifically, it is settled that when a union makes authorization cards available to employees, and "permits or acquiesces in employees' soliciting such cards without indicating to third parties that statements made by the card solicitors are not to be taken as the policies of the Union," this only vests employee solicitors with "actual authority to obtain signed cards" and "apparent authority to make statements *related to the subject matter of the cards*." *University Towers, Inc.*, 285 NLRB 199, 199 (1987) (emphasis added) (citing *Davlan Eng'g*, 283 NLRB 803 (1987)). The Board accordingly considers "employees who solicit authorization cards [to be] special agents of the union for the limited purpose of assessing the impact of statements *about union fee waivers or other purported union policies* that they make in the course of soliciting." *Davlan Eng'g*, 283 NLRB at 804 (emphasis added); *accord Cornell Forge*, 339 NLRB at 734.

The problem for the Company is that there is no evidence establishing that the purportedly threatening and harassing statements made by Brown and others were "related to the subject matter of the [union authorization] cards" or "other purported union policies." *University Towers*, 285 NLRB at 199; *Davlan Eng'g*,

283 NLRB at 804. The Company, thus, does not even attempt to connect the name-calling and "pressing" of employees about whether they would support the Union with statements about the content of the authorization cards or related union policies.

With regard to the statements regarding job-loss, the testimony of the employees to whom the statements were directed fails, in the first place, to connect any such statements with a request to sign a union authorization card.[5] (SA 2.) Moreover, as the Board found (*id*.), even if the statements had been made in the course of card solicitation as the Company claims, those statements—that employees would be fired if they did not sign union authorization cards—"cannot be construed by any reasonable person as representing 'purported union policies.'" *See Davlan Eng'g*, 283 NLRB at 804.

The Company challenges this finding, arguing (Br. 35-36) that because "[m]any employees are not schooled in union matters," they could believe that a union has "a policy of exclusion as concerns non-adherants to the union's cause." But the Company cites no authority for the proposition that reasonable employees

[5] The Company seeks to overcome this difficulty by asserting (Br. 36) that the statements were "part and parcel of the combined effort . . . to solicit cards and drum up support for the [U]nion" (Br. 36), effectively suggesting that the category of card solicitation may be enlarged to include all conduct supportive of the Union. The Company cites no precedent, however, for viewing card solicitation, and the limited agency that attaches to it, in this all-encompassing way.

would view possible termination of their employment—a step that would require action by their *employer*—as a *union* policy.[6]

In these circumstances, the Board reasonably found (SA 2) that the statements by Brown and others were outside the scope of the special agency conferred on them for the limited purpose of soliciting coworkers to sign authorization cards, and therefore not attributable to the Union under *Davlan* and similar cases. The Board accordingly considered (SA 2) the statements under the standard applicable to third parties in a representation election. As shown below, the Board reasonably rejected the Company's claim that the employees' conduct was objectionable under a third party standard.

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[6] *Service Employees Int'l Union, AFL-CIO*, 322 NLRB 402, 402 nn.1 & 2 (1996), on which the Company relies (Br. 31-32), is an administrative law judge's decision that was only reviewed by the Board for purposes of adjusting the judge's findings of fact and recommended remedy. Accordingly, the judge's unreviewed findings as to the "special agent" status of a supervisory employee, and as to the union's responsibility for job-loss threats made by that employee while soliciting authorization cards, are not precedential. *See Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 345 (D.C. Cir. 2003) (judge's findings, to which no exceptions were filed with the Board, "are not . . . considered precedent for any other case"(internal quotation marks and citation omitted)). In any event, as the Board observed below (A 153 n.6), the finding in *Service Employees*, that a union may be responsible for job-loss threats *made by a supervisor and agent of the employer* in the course of card solicitation, is of no import here. In this case, the Company alleges job-loss threats by rank-and-file employees who, unlike the supervisor in *Service Employees*, could not reasonably have been viewed by their peers as speaking from knowledge of an employer-endorsed union policy of having employees fired for not signing authorization cards.

3. The Company failed to show that the pro-union employees' conduct was objectionable under the standard governing third parties

It is settled that the Board will not set aside an election based on third-party misconduct unless the objecting party proves that the misconduct was "'so aggravated as to create a general atmosphere of fear or reprisal rendering a free election impossible.'" *Mastec North Am.*, 356 NLRB No. 110, 2011 WL 828384, at *3 (quoting *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984)); *accord Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 265 (D.C. Cir. 1998). To determine whether threats, in particular, are objectionable under this standard, the Board considers five factors: (1) the nature of the threat; (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 Horizons Hotel*, 270 NLRB 802, 803 (1984), and cases cited at nn.8-12; *accord Mastec North Am.*, 356 NLRB No. 110, 2011 WL 828384, at *3.

a. Statements regarding job loss

The evidence in this case does not support the Company's contention (Br. 50) that "employees were subjected to pervasive threats of direct union retaliation . . . if they did not sign a union card or vote for the union." Only a handful of the

117 employees who were eligible to vote testified that statements regarding job loss were made to them prior to the election on July 30 and 31, 2009, and their testimony describes nothing more than a few isolated incidents, some of which long preceded the election.

Applying the Board's five-factor test for evaluating third-party statements, it is clear that the job-loss statements here did not encompass the entire bargaining unit of 117 employees. The evidence reveals that a handful of pro-union employees made job-loss statements to six fellow employees in a total of six incidents, three of which occurred at least one month before the election.

In one of the earliest incidents—in late May or early June 2009—employee Chester made a job-loss statement to fellow employee Frye in the presence of three other named employees. (A 58 (Tr. 18-19).) However, this is the only instance in which a job-loss statement was disseminated to other employees. Although Morgan testified generally that she was with other employees when Chester suggested that his own job and hers would be in jeopardy depending on the results of the election, Morgan did not specify the identity or number of employees present for Chester's statements, making it impossible to evaluate the extent of dissemination of Chester's statements to Morgan. (A 92 (Tr. 153), 93 (Tr. 157-58).)

Moreover, there is no evidence that the pro-union employees who made the job-loss statements were "capable of carrying [them] out," or otherwise had any special knowledge of or role in the process of terminating fellow employees. *See Mastec North Am.*, 2011 WL 828384, at *3. Indeed, because the statements were made by rank-and-file employees, who had no actual knowledge of what they spoke, the statements themselves were opaque and inconsistent. Brown told Frye that the Union would fire her; but he told Dantzler that it was the Company that would fire him. Chester, Garnett, and Arcia did not even specify, in their respective statements, the actor who would fire employees in the event that the Union won the election.

Regardless, the statements generated enough confusion among the six employees at whom they were directed that several of those employees sought clarification from Company officials. When they did so, Company officials told them, in no uncertain terms, that no one would be fired based on the results of the representation election. (A 59 (Tr. 24), 67 (Tr. 53), 73 (Tr. 79-80), 80-81 (Tr. 106-09).) Thus, by the date of the election, several of the employees lacked a reasonable basis to believe that they would be fired for either supporting or not supporting the Union, making it unlikely that they acted in fear of being fired when they cast their votes at the election.

b. The alleged harassment

The evidence similarly fails to show harassment "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Mastec North Am.*, 356 NLRB No. 110, 2011 WL 828384, at *3 (quoting *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984)); *accord Overnite Transp.*, 140 F.3d at 265. In the month before the election, pro-union employee Brown pressed fellow employee Dantzler about whether he would support the Union and "start[ed] calling [Dantzler] a lot of names and stuff." (A 73 (Tr. 77-78).) According to Dantzler, Brown specifically called him "a punk." (A 73 (Tr. 79).) In addition, on unspecified dates before the election, pro-union employees Coleman and Garnett, both of whom are African American, called fellow African American employee Calhoun "stupid" for not supporting the Union, and Coleman further called Calhoun a "stupid nigger" for not supporting the Union. (A 153; A 75 (Tr. 86-88).) Calhoun admitted, however, that rough talk of this kind—including use of the word "nigger"—is not uncommon among the Company's African American employees. (A 153-54; A 76-77 (Tr. 92-93), 82 (Tr. 116).)

The Board reasonably found (SA 2, A 153) that these isolated name-calling incidents were not so aggravated as to warrant a rerun election. *See*, *e.g.*, *El Fenix Corp.*, 234 NLRB 1212, 1213-14 (1978) (employee's ethnic slur did not warrant setting aside election). Indeed, "[a] certain measure of bad feeling and even hostile

behavior is probably inevitable in any hotly contested election," and the incidents in evidence here are by no means beyond the pale. *Nabisco, Inc. v. NLRB*, 738 F.2d 955, 957 (8th Cir. 1984).

The Company argues (Br. 50) that there were additional incidents, to which employee Frye testified, that should be taken into consideration here. The Company specifically points to Frye's testimony, in an investigative affidavit given to the Board, that she witnessed Brown telling another employee to sign an authorization card, and telling him "you're scared" when he refused to do so. (A 35.) However, Frye's affidavit—which is one of three inconsistent statements (A 33, 40, 42) that Frye signed prior to the hearing—is of questionable value in the absence of corroborating testimony from Head, the employee who was purportedly harassed by Brown. The Company further argues (Br. 50) that Frye's testimony shows she was "isolated from her team, apparently because she was not an open supporter of [the Union]." In so arguing, the Company obscures the fact that Frye's testimony relating to her purported isolation from her team was inconclusive: although she initially testified that Brown excluded her from a team meeting (A 58 (Tr. 18-19)), she later denied that she was ever excluded from team meetings (Tr. 50). Thus, Frye's testimony does not help the Company to carry its burden of establishing that Brown created a "general atmosphere of fear or reprisal rendering a free election impossible." *Mastec North Am.*, 356 NLRB No. 110,

2011 WL 828384, at *3 (internal quotation marks omitted); *accord Overnite Transp. Co.*, 140 F.3d at 265.

4. In any event, the pro-union employees' conduct would not be objectionable even under the legal standard governing parties to an election

As the Board reasonably found (SA 3 n.2), the pro-union employees' conduct would not be objectionable even if it were evaluated under the standard appropriate for parties to a representation election.[7] Indeed, the Board has found job-loss statements similar to those here unobjectionable even when made by agents of a union, particularly where, as here, there is no evidence that the Company favored the Union or was disposed to discharge employees at the Union's request. *See Underwriters Laboratories, Inc.*, 323 NLRB 300, 301-02 (1997) (finding unobjectionable threat by union representative that employees would lose their jobs if they voted against union representation), *enforced*, 147 F.3d 1048 (9th Cir. 1998); *Janler Plastic Mold Corp.*, 186 NLRB 540, 540 (1970)

[7] In addition to the factors noted in connection with the third-party standard, the party standard calls for consideration of: the number of incidents of misconduct; the number of employees subjected to the conduct; the degree of persistence of the misconduct in the minds of the bargaining unit employees; the effect, if any, of misconduct by the opposing party to cancel out the effect of the original misconduct; the closeness of the final vote; and the degree to which the misconduct can be attributed to the party. *Cedars Sinai Med. Ctr.*, 342 NLRB 596, 597 (2004).

(finding unobjectionable threat by union that employees would lose their jobs if they did not vote for the union).[8]

Similarly, with regard to the allegedly harassing conduct of Brown and other union supporters, the additional scrutiny that the party standard carries with it does not change the fact that the acts of harassment at issue were relatively minor. They consisted mainly of persistent, "pressing" (A 73 (Tr. 79-80)) solicitations for employee support, and a few incidents of name-calling that are not out of the ordinary for this workplace.

In these circumstances, even under the party standard, none of the conduct at issue provides a basis for overturning the election.

5. Anonymous conduct

In connection with Objection 2, the Company also argues (Br. 51) that the Board should have overturned the election results because one of the Company's

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[8] *Lyon's Restaurants*, 234 NLRB 178, 179 (1978), a case relied upon by the Company (Br. 42, 44), involved threats of job loss that employees could reasonably have believed the union capable of carrying out, given the peculiar bargaining history between the employer and a sister local of the union in that case. The union in *Lyon's Restaurants* sent dues delinquency notices to employees during the organizing campaign, stating that employees were "subject to removal" if they did not pay dues, and a union agent similarly told employees that if they did not join the union, "they would not work." *Id*. at 178-79. The Board found that "[g]iven the prior bargaining history between the [e]mployer and [the union's] sister local," the union's threats of job loss for those who did not join the union "carried a sufficient ring of plausibility to have interfered with the election." *Id*. at 179. There is no similar bargaining history in this case that would make *Lyons* persuasive here.

campaign posters was found in an employee locker-room area, "defaced with bigoted and threatening language." However, it is exceedingly rare for the Board to overturn an election based on such anonymous misconduct, and the Board reasonably declined (A 153) to do so here.

Misconduct by anonymous third parties to an election are given even less weight than misconduct by known third parties, because "ordering a rerun election based on anonymous incidents could be both futile and 'devastatingly unfair' to the majority" of employees who voted in the election. *Mastec North Am.*, 356 NLRB No. 110, 2011 WL 828384, at *7 (quoting *Amalgamated Clothing & Textile Workers Union*, 736 F.2d at 1568). Here, the Board reasonably found (A 152-53) that the anonymous comments on the poster, consisting mostly of profane epithets, were not so impairing of free choice as to warrant a rerun election. This is particularly appropriate given the lack of evidence as to whether or how many employees saw the poster in its defaced form. *Cf. Cedars Sinai Med. Ctr.*, 342 NLRB 596, 598 (2004) (evidence showed that objectionable anonymous threats of physical harm to the loved ones of two specific employees were disseminated to "at least 34 unit employees").

C. The Board Reasonably Overruled the Company's Objections 3 and 4, which Alleged that Brown, the Union's Observer at the Election, Engaged in Objectionable Conduct in the Polling Area

The Company argues (Br. 52-54) that the Board erred in overruling its Objections 3 and 4, which alleged that Brown, who served as the Union's observer, engaged in objectionable conduct by conversing on a cell phone in the polling area during a break in the voting, and by addressing and gesturing to voters. Contrary to the Company, the Board properly overruled these objections.

1. Facts relevant to the Company's Objections 3 and 4

At the preelection conference, the Union selected employee Brown to serve as its observer, and no party objected to his designation. (A 150, 156; A 130 (Tr. 248).) Accordingly, Brown served as the union observer during all sessions of the representation election held on July 30 and 31, 2009. (A 150; A 55 (Tr. 5), 130 (Tr. 248).) As the Union's observer, he sat in the polling area alongside the Company's observer, Michael Marshall, and the Board agent. (A 154; A 84-85 (Tr. 124-25).) During a break in the election proceedings, when the polling area was closed to voters, the Board agent granted Brown's request for permission to make a telephone call on his cell phone in the polling area. (A 154; A 84-85 (Tr. 124-28).) After Brown completed this call, he received a call from an unidentified individual. (A 154; A 84-85 (Tr. 124-25).) In the presence of the Board agent and Marshall, Brown told the caller that the Company's election observer was

"Michael Marshall from hospitality." (*Id*.) No voters were present when Brown made this comment. (*Id*.)

While the voting was underway, Brown laughed and smiled with employees who came into the polling area to vote. (A 154-55; A 87 (Tr.135).) At one point, Brown tried to stand up and hug a voter who was coming upstairs into the polling area. (A 155; A 86-87 (Tr. 132-35).) Brown stopped short of embracing the employee as soon as the Board agent told him to stop. (A 155; A 87 (Tr. 133-36), 89 (Tr. 143-44).) Thereafter, Brown remained in his seat as instructed and ceased making facial expressions and other gestures in the presence of the voters. (A 87 (Tr. 136), 89 (Tr. 143-44).)

2. The Company failed to show that Brown's conduct constituted objectionable electioneering

To the extent that the Company is arguing (Br. 4, 52-54) that Brown engaged in objectionable electioneering, its claim must be rejected. As this Court has recognized, "[t]he Board has repeatedly declined to impose a zero-tolerance rule on voting-day electioneering." *Family Serv. Agency San Francisco v. NLRB*, 163 F.3d 1369, 1381 (D.C. Cir. 1999). This is so because "[a] representation election is often the climax of an emotional, hard-fought campaign and it is unrealistic to expect parties or employees to refrain totally from any and all types of electioneering." *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118, 1118

(1982), *enforced*, 703 F.2d 876 (5th Cir. 1983). *Accord Overnite Transp. Co.*, 140 F.3d at 269.

In addressing electioneering objections, the Board accordingly "makes a judgment, based on all the facts and circumstances, whether the electioneering substantially impaired the exercise of free choice so as to require the holding of a new election." *Boston Insulated Wire & Cable Sys., Inc. v. NLRB*, 703 F.2d 876, 881 (5th Cir. 1983). The Board's totality-of-the-circumstances analysis considers the following factors: whether the alleged electioneering occurred within or near the polling place; the extent and nature of it; whether it was conducted by a party to the election or by employees; whether it occurred within a designated no-electioneering area; and whether it was contrary to the specific instructions of a Board agent. *Boston Insulated Wire*, 259 NLRB at 119. *Accord Overnite Transp. Co.*, 140 F.3d at 270.

In this case, it is undisputed that Brown's conduct occurred within the polling area, while he was serving as the Union's election observer. However, as shown below, an examination of the nature and extent of his conduct reveals that it could not have substantially impaired employee free choice in the election, and the Board properly so found (A 154-55).

a. Brown's telephone conversations

The Board reasonably overruled the Company's Objection 3, which alleged that Brown's telephone conversations impaired employee free choice. As the Board found (A 154), the Board agent at the election permitted Brown to make a telephone call "during a break in the election proceedings, when no employees were in the voting area." (A 84-85 (Tr. 124-27).) After completing this telephone call, Brown received another call from an unknown individual. Brown told that individual that "Michael Marshall from hospitality" was serving as the Company's observer. (A 154; A 84-85 (Tr. 124-27).) As the Board noted, there were no employees in the area when Brown made this statement, and in any event Brown's identification of the Company's election observer could have had "no impact" on the election, as that information was not a secret. (A 154.) In these circumstances, the Board reasonably overruled (A 154) the Company's Objection 3, relating to Brown's telephone conversations.

b. Brown's gestures and movements in the polling area

The Board also reasonably overruled the Company's Objection 4, which alleged that Brown's conduct in the polling area required the election to be set aside. The evidence presented by the Company showed only that Brown made unspecified gestures and "was laughing and smiling with the people that were there to vote." (A 87 (Tr. 135).) Although he also "tried to stand up and hug [a voter

who] was coming upstairs" into the polling area, he promptly aborted his effort at the Board agent's request. (A 86-87 (Tr. 132-35).) Thereafter, Brown did not attempt to get up or hug any voter, and he kept his facial expressions and gestures in check. (A 87 (Tr. 136).)

The Company makes much (Br. 22) of testimony that one employee froze when he saw Brown and left the polling area without explanation. However, the evidence does not connect this employee's choice to leave with any gesture or movement on Brown's part. (A 88-89 (Tr. 139-41).) Indeed, there is no evidence that Brown's gestures and movements impaired any employee's free choice in the election. Thus, although employee Morgan testified that Brown gave her a "severe look" when she entered the polling area, she confirmed that his look did not sway her vote. (A 93 (Tr. 159).)

The Company errs in contending (Br. 53) that Brown's facial expressions and gestures were akin to the objectionable conduct of the election-observer in *Brinks, Inc.*, 331 NLRB 46 (2000). In *Brinks*, unlike the instant case, the election observer did not limit himself to making gestures (giving voters a "thumbs up" signal); he also made patently objectionable *statements* to them (telling them how to vote) that were contrary to the Board agent's instructions. Brown, of course, made no such gestures or statements, and he obeyed the Board agent's directions. Accordingly, the Board properly rejected (A 155) the Company's argument based

on *Brinks*, and overruled the objection relating to Brown's gestures and movements in the polling area. *See U-Haul Co. of Nevada v. NLRB*, 490 F.3d 957, 965 (D.C. Cir. 2007) (distinguishing *Brinks* and upholding Board finding that union observer did not engage in objectionable electioneering by smiling at voters and giving them the "thumbs up" sign as they approached to vote).

D. Objection 5, which Alleged that the Election Results Should Have Been Set Aside Because the Union Designated Brown as Its Election Observer, Is Not Properly Before the Court

At the preelection conference, the Union selected prounion employee Brown to serve as its observer, and there is no evidence that any party objected to the Union's designation. (A 156.) It was not until after the election that the Company objected to the Union's choice, alleging in Objection 5 that the Union "interfered with the laboratory conditions" by designating Brown as its observer. As the administrative law judge correctly noted, however, "objections to particular persons acting as observers must be made at the preelection conference or they are waived." (A 156.) *See Detroit East, Inc.*, 349 NLRB 935, 936 (2007); *Liquid Transporters, Inc.*, 336 NLRB 420 (2001). Based on the Company's failure to lodge such an objection at the preelection conference, the judge properly overruled Objection 5. (A 156.) This ruling—that the Company waived any objection to Brown's selection by failing to speak up at the preelection conference—provided a complete basis for overruling Objection 5.

In its opening brief, the Company fails to present any argument contesting the judge's decision to overrule Objection 5 based on the Company's failure to lodge a timely objection about the Union's choice of Brown as its observer. By failing to challenge this ruling in its opening brief, the Company has waived any right to contest the decision to overrule Objection 5. *NetworkIP, LLC v. FCC*, 548 F.3d 116, 128 n.10 (D.C. Cir. 2008); *accord Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990).

In any event, at bottom the Company bases its objection to Brown's designation as the union observer on the erroneous view that he engaged in objectionable threats and harassment. As shown above pp. 27-33, his statements and conduct were not objectionable. Accordingly, even if the Company had lodged a timely pre-election objection to Brown serving as an observer, and had preserved the issue for appellate review, such an objection would not have provided a basis for setting aside the election results.[9]

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[9] Nor does the Company preserve the issue for review by noting in its Statement of Facts (Br. 22-23) the testimony of employee Morgan that when she appeared at the polls, she was upset by Brown's "severe" look but cast her vote anyhow. (A 92 (Tr 154).) As the judge noted, Morgan never officially objected to Brown serving as an observer; to the contrary, upon learning that each party to an election is entitled to an observer, she stated that she did not find his presence inappropriate. (A 156; A 93 (Tr. 158-59).) The judge reasonably relied on Morgan's testimony as support for his waiver finding, which (as noted above) the Company does not contest in the argument section of its brief.

CONCLUSION

The Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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November 2011

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STATUTORY ADDENDUM

**Relevant provisions of the National Labor Relations Act,
29 U.S.C. §§ 151-69 (2000):**

Sec. 7. [§ 157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];
>
> ***
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

Sec. 9 [§ 159.]

***

(c) [Hearings on questions affecting commerce; rules and regulations]

> (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> > (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the

representative defined in section 9(a) [subsection (a) of this section], or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsection (a) of this section]; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsection (a) of this section]; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) [section 160(c) of this title].

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act [subchapter] in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) [of this section] the extent to which the employees have organized shall not be controlling.

(d) [Petition for enforcement or review; transcript] Whenever an order of the Board made pursuant to section 10(c) [section 160(c) of this title] is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f) [subsection (e) or (f) of section 160 of this title], and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Sec. 10. [§ 160.] (a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

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(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section

2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner	)	No. 11-1199
	)	
and	)	
	)	
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 98	)	
	)	Board Case Nos.
Intervenor	)	05-CA-36375
	)	05-RC-16330
v.	)	
	)	
DOWNTOWN BID SERVICES CORPORATION	)	
	)	
Respondent	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 9,920 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, D.C.
this 10th day of November 2011

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	)	
Respondent	)	

CERTIFICATE OF SERVICE

I certify that on November 10, 2011 I electronically filed the Board's brief in this case with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that I served the Board's brief on the following counsel through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the appropriate address listed below:

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Dated at Washington, D.C.
this 10th day of November 2011