

No. 15-60861

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**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**CON-WAY FREIGHT, INC.**

**Petitioner/Cross-Respondent**

v.

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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## **ORAL ARGUMENT STATEMENT**

The Board believes that this case involves the straightforward application of well-settled law to the facts. However, to the extent the Court believes that oral argument would be helpful or grants the Company's request for oral argument, the Board requests the opportunity to participate.

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION  
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**BRIEF FOR  
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**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of Con-way Freight, Inc. (“the Company”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Decision and Order issued against the Company on November 27, 2015, and reported at 363 NLRB No. 53. (ROA 1386-

88.)<sup>1</sup> The Board had jurisdiction over the unfair-labor-practice proceeding under Section 10(a) of the National Labor Relations Act (“the Act”) (29 U.S.C. §§ 151 et seq., 160(a)), which empowers the Board to prevent unfair labor practices. The Board’s Order is final with respect to all parties under Section 10(e) and (f) of the Act. (29 U.S.C. §160(e) and (f)). The Court has jurisdiction under the same section of the Act because the unfair labor practice occurred in Texas within this judicial circuit. The Company’s petition and the Board’s cross-application were timely because the Act places no time limit on such filings.

Because the Board’s Order is based, in part, on findings made in an underlying representation proceeding, the record in that proceeding (Board Case No. 26-RC-008635) is also before the Court under Section 9(d) of the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964); *Terrace Gardens Plaza, Inc. v. NLRB*, 91 F.3d 222, 225 (D.C. Cir. 1996). Section 9(d), does not give the Court general authority over the representation proceeding. Rather, the Court may review the Board’s actions in the representation proceeding for the limited purpose of deciding whether to enforce, modify, or set aside the

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<sup>1</sup> “ROA” refers to the administrative record on appeal filed on February 23, 2016. The ROA, includes the transcript of the representation hearing before the Board’s hearing officer (Record Volume I, ROA 1-828), the exhibits introduced at the hearing (Record Volume II, ROA 829-973), and the pleadings before the Board and the Board decisions under review (Record Volume III, ROA 974-1388). References before a semicolon are to the Board’s findings; those following are to the supporting evidence.

Board's unfair-labor-practice order in whole or part. 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).

### **STATEMENT OF THE ISSUE PRESENTED**

Whether the Board acted within its broad discretion in overruling the Company's election objections and, therefore, properly found that the Company violated Section 8(a) (5) and (1) of the Act by refusing to recognize and bargain with the Union.

### **STATEMENT OF THE CASE**

The Board 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 recognize and bargain with the Union as the certified collective-bargaining representative of a unit of employees at its Laredo, Texas facility. (ROA 1386.) The Company admits (Br. 1) that it refused to bargain. Thus, if the Court upholds the Board's overruling of the Company's election objections, then the Board's Order is entitled to enforcement. The Board's findings in the representation proceeding and the unfair labor practice proceeding are set forth below.

## **I. THE BOARD'S FINDING OF FACT**

### **A. The Underlying Representation Proceeding**

The Company provides freight services across North America. It maintains an office and place of business in Laredo, Texas, where it employs over 100 drivers and dockworkers. (ROA 1062; 1332, 1337.) On August 1, 2014, the Company and the Teamsters Local 657, Affiliated with International Brotherhood of Teamsters (“the Union”) entered into a stipulated election agreement to have a Board-conducted election on September 12, 2014, among a unit of drivers and dockworkers at the Laredo facility in the facility’s training room. (ROA 1058, 1061; 876-77.)

The Union won the election by a vote of 55 to 49, with four challenged ballots, an insufficient number to affect the results. (ROA 1061; 838.) The Company filed objections to the election. A hearing officer issued a report recommending that the election objections be overruled. (ROA 1058-1141, Board Case No. 16-RC-133896.) On July 8, 2015, the Board (Chairman Pearce and Members Johnson and McFerran) issued a Decision and Certification of Representative, adopting the hearing officer’s findings and recommendations. (ROA 1327-29.) Below, the Board sets forth a broad overview of the facts regarding the union campaign and the election. More detailed facts are set forth in the argument section when addressing specific objections.

## **1. The Union's organizing campaign**

In the summer of 2014, company employees began holding meetings to discuss union representation. These meetings led an employee to contact the Union about representation. (ROA 1063; 66-68, 799-802.) Thereafter, Union President/Business Manager Frank Perkins and/or Business Agent Paul Cruz, held general meetings once or twice a week for interested employees. During the meetings, they talked to the employees about the organizing process, and some employees signed authorization cards. They also offered approximately three blank membership cards to any employee who wanted to solicit other employees. (ROA 1063-64; 38, 45, 47-51, 58, 60-62, 73, 178, 197, 799-802.)

Employees, including Antonio Cruz, Francisco Maldonado, Javier Moreno, Juan Narron, Julio Ortega, and Felipe Perez talked with coworkers about the Union. Ortega, Perez, and Moreno, also handed out a few authorization cards. In addition, Moreno and Perez together visited employee Jorge Ordunez at his home, and Cruz and Maldonado together visited employee Hector Menchaca at his home. (ROA 1063-64, 1073, 1078; 40-41, 58-60, 62-63, 68-73, 77-81, 129-30, 143-47, 150-51, 158-63, 177-79, 197-202.) Other employees, including J.J. Martinez, Jose Serna, and Josue Lopez supported the Union, but did not solicit employees, or otherwise help the Union to organize before the election. (ROA 1064-65; 216-21, 234-35, 247-48.)

## **2. The Board agent's handling of the election**

As stipulated in the election agreement, the Board agent held the election on September 12, 2014, from 7:30 a.m. to 10:30 a.m., and from 5:00 p.m. to 8:00 p.m., in the Company's training room. (ROA 1061, 1091, 1096-97; 18-21, 249, 330, 882, 906.) The training room has a solid windowless door that opens to the breakroom, a room approximately twice the size of the training room. (ROA 1091, 1096; 882, 906.) With the door shut, no one could see into the training room from the breakroom. The door remained shut during the election except for when voters entered and exited the training room. (ROA 1092, 1098; 100, 404-05.)

The Board agent used an official Board-provided voting booth. It consisted of a plastic, rectangle-shaped base, along with a three-sided piece of cardboard affixed to the top of the base to form a "U" shape "voting shield" that was placed on top of a table. (ROA 1097, 1100; 20-21, 26-29, 257-58, 334-35, 339-40, 556-58, 858-69.) After voters entered the training room, they went up to the table where the observers for the Union and the Company sat. After the observers checked voter eligibility, the voters received a ballot from the Board agent. (ROA 1097-98, 1100; 21, 258-60, 344-45, 904, 924.) Early in the election, some voters were unsure of where to go after they entered the training room. The Board agent responded by moving some of the extra chairs in the training room to form a path toward the observers. (ROA 1098; 339-41, 501-02.)

Voters stood to mark their ballot at the open side of the U-shaped voting booth, with the ballot sitting on top of the plastic base, within the confines of the three sides of the cardboard shield. The ballot asked “Do you wish to be represented for purposes of collective bargaining by the [Union.]” The ballot had a “yes” box and a “no” box, which were located adjacent to each other. (ROA 1101; 264-65.) After employees voted, they placed the ballot in a ballot box at the end of the same table as the voting booth. (ROA 1098; 260-61, 281-82.)

### **3. Employees’ use of the breakroom during the election**

The Board agent did not designate the breakroom, which was adjacent to the training room, as a no-electioneering area. (ROA 1092, 1096; 816-20.) Many employees passed through the breakroom on the way to vote. Throughout the election, both procompany and prounion employees used the breakroom as they normally did before starting work. They sat at tables, had coffee or food, talked with each other, picked up their papers from the dispatch office, and used the bathroom. (ROA 1093-94; 85-86, 92-103, 110-18, 130-31, 134-40, 181-95, 203-14.)

Prounion employees who spent time in the breakroom included Maldonado, H. Martinez, Cruz, Moreno, Narron, and Ortega. They sat at the table(s) in the corner of the breakroom that was the farthest from the training room. (ROA 1093; 85-86, 92-103, 110-18, 130-31, 134-40, 181-95, 203-14, 884, 886, 888, 890, 892,

910.) Perez and Serna did not spend any time in the breakroom. (ROA 2094; 156, 157, 163-66, 223-27.) Procompany employees including Hector Diaz, Daniel Delgado, Jorge Ordunez, and Toby Cantu also spent time in the breakroom during voting hours. Diaz spent 30 minutes eating at a table that had a view of the training room when the door was open. (ROA 1094; 226, 452-55, 460-61, 469, 481-83, 684, 693-94, 702, 813, 894, 908.)

### **B. The Unfair Labor Practice Proceeding**

After the Board's certification of the Union issued, the Company refused the Union's requests to bargain. (ROA 1386.) Based on a charge filed by the Union, the General Counsel issued a complaint alleging that the Company had unlawfully refused to recognize and bargain with the Union. (ROA 1386; 1330, 1332-36.) Thereafter, the General Counsel filed a Motion for Summary Judgment and Notice to Show Cause why the Board should not grant its motion. (ROA 1386; 1341-50.) In response, the Company admitted that it had refused to bargain with the Union, but claimed that it had no duty to do so because the Board had erred in overruling its election objections and in certifying the Union. (ROA 1386, 1388.)

## **II. THE BOARD'S CONCLUSIONS AND ORDER**

On November 27, 2015, the Board (Chairman Pearce and Members Hirozawa and McFerran) 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. The Board concluded that all the representation issues that the Company raised in the unfair labor practice proceeding were, or could have been, litigated in the underlying representation proceeding. (ROA 1386.)

The Board's Order requires the Company to cease and desist from refusing to recognize and 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). Affirmatively, the Board's Order directs the Company, on request, to bargain with the Union, and to embody any resulting understanding in a signed agreement. The Order also requires the Company to post a remedial notice and, if appropriate, distribute copies of the notice electronically. (ROA 1387.)

### **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 a unit of the Company's employees in Laredo, Texas. A Board-conducted election is presumably fair and regular. Therefore, a party seeking to overturn an election result bears a heavy burden. Here, the Board did not abuse its discretion in finding that the Company failed to carry that burden. Thus, the Board acted within its

broad discretion in finding that neither the Board agent, the employee who served as the Union's election observer, nor other employees engaged in objectionable conduct under the standard applicable for evaluating each type of alleged misconduct.

The Board found that the Board agent did not engage in objectionable conduct because he used a Board approved voting booth and no evidence exists that the Board agent or any observer saw how any employee voted. Similarly, the Board acted well within its discretion in finding that even if the alleged objectionable conduct of the Union's observer occurred, it did not constitute objectionable conduct because the various statements and gestures did not materially affect the election.

With respect to the conduct of prounion employees, the Board reasonably found that some of the alleged objectionable conduct simply did not occur. Regarding the remaining conduct, the Board reasonably found that the prounion employees were not union agents, and that the conduct did not create a general atmosphere of fear among voters, such that a free and fair election was impossible. In sum, because the Board acted within its broad discretion in overruling the Company's election objections, 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 Union.

## ARGUMENT

### **THE BOARD ACTED WITHIN ITS BROAD DISCRETION IN OVERRULING THE COMPANY'S ELECTION OBJECTIONS AND, THEREFORE, PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION**

#### **A. 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 his employees . . . .” The Company concedes (Br. 1) that it has refused to recognize and bargain with the Union in order to contest the Board’s certification of the Union following its election victory. A court’s role in reviewing the Board’s certification of a union is limited to determining whether the Board acted within the “wide degree of discretion” entrusted to it by Congress in resolving questions arising during the course of the representation proceeding. *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); *accord NLRB v. Gulf States Cannery, Inc.*, 634 F.2d 215, 216 (5th Cir. 1981) (holding that Board did not abuse its discretion in overruling employer’s election objections).<sup>2</sup>

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<sup>2</sup> An employer that violates Section 8(a)(5) of the Act also commits a “derivative” violation of Section 8(a)(1) of the Act, which makes it unlawful for an employer “to interfere with, restrain, or coerce employees in the exercise” of their rights under the Act. 29 U.S.C. § 158(a)(1). *See Porta-King Bldg. Sys. v. NLRB*, 14 F.3d 1258, 1261 (8th Cir. 1994); *NLRB v. Centra, Inc.*, 954 F.2d 366, 367 n.1 (6th Cir. 1992).

Because the Board's decision warrants "considerable respect," and representation elections "are not lightly set aside," a "strong presumption" exists that ballots cast under Board procedural safeguards reflect the true desires of the employees. *NLRB v. Hood Furniture, Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991); *see also, NLRB v. Mattison Mach. Works*, 365 U.S. 123, 124 (1961). The objecting party bears the "entire burden" of showing evidence that misconduct warrants overturning the election. *Hood Furniture*, 941 F.2d at 328.

The standard used to determine whether objectionable conduct occurred varies depending upon who is alleged to have committed the misconduct. Where a party alleges Board agent misconduct, it has the burden of showing evidence that "raises a reasonable doubt as to the fairness and validity of the election." *Polymers, Inc.*, 174 NLRB 282, 282 (1969), *enforced*, 414 F.2d 999 (2d Cir. 1969); *see also, NLRB v. Osborn Transp., Inc.*, 589 F.2d 1275, 1280 (5th Cir. 1979). Where the objecting party alleges that the other party to the election, or its agent, committed the objectionable conduct, the objecting party must show not only that the acts occurred, but also that they "interfered with the employees' exercise of free choice to such an extent that they materially affected the results of an election." *Gulf States Cannery*, 634 F.2d at 216. Where third parties allegedly engaged in misconduct—*i.e.*, individuals who are not agents of the union or the employer—the objecting party must show that the third-party misconduct occurred

and that it 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 Hood Furniture*, 941 F.2d at 330.

In sum, the Board does not invalidate elections simply because misconduct occurred. *Gulf State Cannery*, 634 F.2d 216. While “laboratory conditions” represent the ideal, “clinical asepsis is an unattainable goal in the real world of union organizational efforts.” *NLRB v. Sumter Plywood Corp.*, 535 F.2d 917, 920 (5th Cir. 1976). The “critical” determination is whether the employees were permitted to register a free choice. *NLRB v. McCarty Farms, Inc.*, 24 F.3d 725, 728 (5th Cir. 1994).

The Board’s factual findings are “conclusive” if supported by substantial evidence in the record as a whole. Section 10(e) of the Act (29 U.S.C. §160(e)); *Hood Furniture*, 941 F.2d at 328 (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)). Under the substantial evidence standard, a reviewing court may not “displace the Board’s choice between two fairly conflicting views [of the facts], even though the court would justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera*, 340 U.S. at 488. In determining whether the Board’s factual findings are supported by the record, the Court does “not make credibility determinations or reweigh the evidence.” *NLRB v. Allied*

*Aviation Fueling of Dallas LP*, 490 F.3d 374, 378 (5th Cir. 2007). Rather, the Court is bound by the Board’s credibility findings unless they are “inherently unreasonable or self-contradictory.” *Central Freight Lines, Inc. v. NLRB*, 666 F.2d 238, 239 (5th Cir. 1982). Moreover, “[r]ecognizing the Board’s expertise in labor law, [the Court] will defer to plausible inferences it draws from the evidence . . . .” *NLRB v. Thermon Heat Tracing Servs., Inc.*, 143 F.3d 181, 185 (5th Cir. 1998).

**B. The Board Did Not Abuse Its Discretion in Finding that the Board Agent’s Use of a Table-Top Voting Booth (Objection 3(2)), and His Arrangement of the Polling Area (Objection 3(1)), Did Not Compromise the Secrecy of the Voting Process**

The Company claims (Br. 20-24, 26-27) that the election should be set aside because the Board-sanctioned voting booth used by the Board agent did not provide voters with adequate privacy. The Board reasonably rejected this claim. (ROA 1059-60, 1100-1110.) After evaluating the credited evidence under the appropriate standard, the Board found that the Board agent conducted the election fairly and with the appropriate level of privacy because no credible evidence exists that anyone observed how a voter marked his or her ballot. Similarly, the Board (ROA 1059, 1096-1100) reasonably rejected the Company’s claim (Br. 11-12, 20, 23-25) that the Board agent engaged in objectionable conduct in his arrangement of the polling area.

**1. When a Board agent uses a Board-sanctioned voting booth, the Board will not set aside an election absent evidence that someone witnessed how a voter marked a ballot**

The Board has conducted secret ballot elections for over 75 years. For well over 16 years, the Board has used three different types of voting booths to ensure the privacy of each employee's vote. Those types of voting booths include a metal frame booth with a curtain and two types of "lightweight" booths—portable voting booths with plastic panels and cardboard booths set on a table top. See *Voting Booths*, NLRB Operations-Management Memo 00-33 (May 3, 2000); *General Counsel Responses to Questions*, NLRB General Counsel Memo 04-02 p. 2 (April 22, 2004). The Board has described its "table-top" voting booth as follows:

A structure that resembles a lectern desk used by a teacher for classroom instruction. Unlike the Board's standard metal booth, which is a stand-alone cubicle with curtains that shield voters from head to lower torso, the Board's alternative table-top booth shields voters' lower arms and hands as they mark their ballots within the hollow confines of the booth.

*Physicians & Surgeons Ambulance Serv., Inc.*, 356 NLRB 199, 199 (2010), *enforced*, 477 F. App'x 743 (D.C. Cir. 2012). As discussed above (p. 6), the Board agent here used a table-top booth.

In cases where a Board agent uses a Board-sanctioned voting booth, the Board, with court approval, will not set aside an election under its standard for evaluating alleged Board agent misconduct (see above p. 12), "absent evidence that someone witnessed how a voter actually marked [a] ballot." *Physicians &*

*Surgeons*, 356 NLRB at 199, *enforced*, 477 F. App'x at 744. The Board's interpretation of its own precedent is entitled to deference, as the District of Columbia Circuit recognized in endorsing the Board's use of the type of table-top voting booth at issue here. *Physicians & Surgeons*, 477 F. App'x 743, 744.

**2. The Board agent used a Board-sanctioned voting booth, and the Company failed to establish that anyone witnessed how any voter marked a ballot**

The Board reasonably overruled the Company's objection, finding that the Company had failed to carry its burden of showing that the Board agent engaged in objectionable conduct when he used the Board's table-top voting booth with a cardboard shield. (ROA 1106-10.) As an initial matter, the Board reasonably found (ROA 1106) that the Board agent used a Board sanctioned voting booth. The agent used "standard" Board "equipment provided to Board agents for use in conducting representative elections," a cardboard shield with a base that sits on a table top. (ROA 1106.)

The Board further reasonably found (ROA 1106) that the Company failed to "prove that someone actually witnessed how a voter marked his or her ballot." Thus, the Board agent placed the voting booth on a table that sat near the center of the training room. (ROA 1097, 1100-01; 21, 31-32, 257-58, 334, 339-40, 902, 914, 916.) When sitting on the table, the top of the cardboard portion of the voting shield came approximately to voters' chest level, depending on each voter's height.

It shielded all voters' hands and their arms up to at least their elbows. (ROA 1101-03; 263-65, 355-62, 864, 866, 904, 918, 920, 922, 924, 932.)<sup>3</sup> All of the observers, including union observer J.J. Martinez (ROA 1103; 282), and company observers Deltoro (ROA 1103; 400-01, 403, 409-12) and Ramirez (ROA 1103; 606-08, 610-12), acknowledged "that they could not see the ballots as voters marked them." In addition, Deltoro further acknowledged that union observer Martinez could not have seen the ballot as employees voted. (ROA 401.) And the Company's own pictures of the voting booth and observer location at a table along the back wall to the left of the voting booth, "demonstrate that the booth's front and left cardboard side panels blocked . . . [their] view[s] of voters' hands and ballots inside the booth." (ROA 1097, 1100, 1103; 258-60, 344-45, 864, 866, 868, 904, 914, 916, 918, 920, 922, 924, 930, 932.)

The evidence further establishes that the observers "were too far from the voting booth to see over and into it from their seated positions behind the check-in-table." (ROA 1106.) Union observer Martinez sat at a table to the left of the voting booth that was at least six feet away from the voting booth. Company

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<sup>3</sup> The height of the voting booth was 24 inches on all three sides, measured from the surface of the table to the top of the shield, and it was over 17 inches wide. The top of the table measured 29 inches from the floor, so the top of the booth was approximately 53 inches from the floor. (ROA 1101; 262-63, 339, 358-59, 864, 866, 868, 904, 914, 916.)

morning observer Deltoro, and afternoon observer Ramirez, sat next to Martinez, approximately eight to nine feet from the voting booth. (ROA 1097-98; 260-61, 281-82, 330, 346-47, 595, 904, 924.) As the Board explained (ROA 1103), “it does not make sense” that union observer Martinez “would be able to see—from his seated position behind the check-in table several feet away from the booth—over and behind a voting booth shield that rose approximately four-feet-five-inches from the floor and two feet from the table top.” Similarly, the Board agent stood approximately five feet from the voting booth when employees voted. (ROA 1097-98, 1100; 261-62, 281-82, 342-44, 362-63, 904.) The Board reasonably found (ROA 1106) that the Board agent’s position during voting would not have permitted him to see over the voting booth. In sum, given the lack of evidence that anyone saw how any employee voted, the Board reasonably overruled the Company’s election objection.

The Board’s finding, as it explained (ROA 1105), is fully consistent with its earlier court enforced decision in *Physicians & Surgeons*. 356 NLRB 199, *enforced*, 477 F. App’x 743. In that case, the Board rejected the employer’s argument that the Board agent engaged in objectionable conduct by using a table-top voting booth that included a cardboard partition placed on a table that shielded the voter’s hands, lower arms, and torso. The Board found no evidence that the observers—who sat at a table approximately five feet away and who could see the

face and upper arms of voters—actually saw how any voter marked a ballot. *Id.* at 199-200. “Absent evidence that their ballots were seen” the Board found “no basis” to “question the fairness and validity of the election.” *Id.* at 199.

Accordingly, as in *Physicians & Surgeons (id.)*, evidence here that the observers for both the Company and the Union could see voters’ upper arms, shoulders, and head (ROA 1103; 262-66, 268-69, 409, 411, 605-06, 918, 920, 922, 950) does not require a different result.

The Company’s failure to object to the use of the table-top voting booth placed on a table until it knew of the election result (ROA 1104) buttresses the Board’s finding. *See Physicians & Surgeons*, 356 NLRB at 199. Although the Company’s attorney, Richard Browne, an experienced labor law attorney, expressed his belief at the pre-election meeting that the Board was moving away from the use of a cardboard table-top voting booth, “he did not expressly object to [the booth] or request that the Board agent use alternative equipment.” (ROA 1101-02, 18-22, 32-35, 36-37, 54-57.)<sup>4</sup> Thereafter, at no time until after the election result did the Company’s attorney, or any company official, object to the use of the table-top booth, its placement relative to the observers, or make any suggestions about using alternative voting arrangements. (ROA 1097, 1102, 1104;

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<sup>4</sup> The Company has shown no evidence to suggest that the Board has decreased the use of a table-top voting booth, or that it has any intent to reduce such use.

54-57). The Company's silence about these matters does not constitute a binding "waiver," but its failure to object at the time "blunt[s] the force of its argument," pursued after-the-fact, that the Board agent used an inadequate voting booth.

*NLRB v. Bayliss Trucking Corp.*, 432 F.2d 1025, 1028 & n.7 (2d Cir. 1970).

**3. The Company's additional arguments regarding the voting booth are without merit**

The Company argues (Br. 21-22) that the Board's Rules and Regulations and Casehandling Manual require a Board agent to conduct a Board election in a fully enclosed voting booth that contains curtains. That argument fails because the Board has no such requirement.

As the Board explained (ROA 1109), no inconsistency exists between the Board's then-applicable Rules and Regulations, Statements of Procedure (29 C.F.R. § 101.19(a)(2)), that references marking ballots in the secrecy of a "voting" booth, and the "cardboard voting shield" used here, because the shield constitutes "a voting booth that allows for ballots to be marked in secret." (ROA 1109.) The Board's Casehandling Manual establishes that the Board agent conducting an election should ensure that voters mark their ballots in the "privacy" of a "voting booth," but references that a voting booth can be portable and made of cardboard. Casehandling Manual (Part Two), Representation Proceedings § 11304.2 and

11304.3.<sup>5</sup> Moreover, the manual does not require the use of an enclosed voting booth with curtains or any other specific Board-sanctioned voting booth. And, as set forth above, the Board, with court approval, has used table-top voting booths for years that provide voters with a private compartment for marking their ballots.

The Company (Br. 9-11, 21, 23-25) suggests that the voting booth may have been acceptable if the Board agent had put the voting booth on top of aluminum legs placed on the floor rather than on a table. The Company's suggestion contradicts its position at the hearing (ROA 378-80) that using the legs "still wasn't sufficient." Moreover, two factors undermine the Company's contention: the Board's decision in *Physicians & Surgeons* sanctioned the type of voting booth used here; and the Company raised no contemporaneous concerns about placing the voting booth on the table instead of legs. In any event, because it was never shown that anyone saw how any employee voted, the Board reasonably found the additional six inches in the height that would have been gained through the use of the legs was not dispositive. (ROA 11008, 11011; 29-31, 336-37, 376-77, 870, 872, 874, 876, 878, 880, 950-52.) And given the express approval of a table-top voting booth, the Board further reasonably found (ROA 1107) that the legs were a

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<sup>5</sup> The Casehandling Manual does not constitute binding authority, but merely provides guidance. See *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000); *NLRB v. Cedar Tree Press, Inc.*, 169 F.3d 794, 796 (3d Cir. 1999).

“mere support mechanism” and “incidental” to the purpose of having the voting space created by the cardboard shield.

Absent a requirement that the Board agent use a voting booth with a curtain, the Company argues (Br. 26-27), that the Board nevertheless erred by requiring it to prove that someone saw how an employee voted. The Company’s argument ignores that it bears the burden of proof as the party raising the objection. Accordingly, the Company had the burden of proof to meet the standard set forth in *Physicians & Surgeons* that requires an objecting party to establish that someone saw how an employee voted.

Nor can the Company seriously claim (Br. 23) that it met the *Physicians & Surgeons* standard through employees’ “belief” that their ballots were compromised. The Company relies (Br. 23, 25-27) on employees’ impressions about the privacy of the voting booth while voting, their expressions of a preference for more privacy while voting, and their speculation that exposure of their upper arms and face led to the possibility that the observers could have seen how they voted.<sup>6</sup> As the Board found (ROA 1106-08), and as set forth at p. 19.

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<sup>6</sup> The Company (Br. 11-13, 24, 26), relies on the testimony of seven witnesses. Six company witnesses, including Hector Diaz (ROA 1103; 471-72, 474-77), Juan Carlos Gutierrez (ROA 1103; 653-56), Jesus Alfredo Garcia (ROA 1103; 670-72, 680), Daniel Delgado (ROA 1103; 691-92), Alejandro Ura (ROA 1103; 626), and Torobio Figueroa (ROA 1104; 506-07, 516-19) acknowledged that the booth covered them up to their chest, but speculated that, at most, an observer could have

such claims do not satisfy its burden. Indeed, as the Board explained in *Physicians & Surgeons* when it rejected a virtually identical argument, “[t]he Board has never set aside an election on [voter’s belief] where, as here, the election was conducted using a Board-sanctioned voting booth. When the Board agent uses such a booth, the Board’s analysis is limited to whether a voter’s ballot marking was observed by others while voting . . . .” 356 NLRB 199, 200. *See also St. Vincent Hosp., LLC*, 344 NLRB 586, 587 (2005) (secrecy of ballot box not compromised where voting booth contained two employees at same time because no evidence existed that “either observed how the other” marked ballot); *Avante at Boca Raton, Inc.*, 323 NLRB 555, 558 n.11 (1997) (secrecy of ballot box not compromised where no evidence that anyone witnessed any employee’s vote, even though employee testified that she was worried that someone could see her vote).

The Company attempts to avoid the *Physicians & Surgeons* standard entirely, by arguing (Br. 27-28) that the Board should have applied its line of precedent that analyzes the adequacy of an improvised voting booth that contains little or no cover, rather than the precedent that accepts the adequacy of a Board-

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determined how they voted based on their arm movements. Similarly, Hector Menchada acknowledged (ROA 548-49, 569-70) that the booth covered him up to his chest, but offered only the vague assertion that people stared at him. Finally, although Gutierrez believed (ROA 1103-04; 653) that the Board agent saw how he voted, the Board reasonably found that the location of the Board agent and voting booth would have prevented the agent from seeing how he voted. (ROA 1103-04, 1106.) And, in any event, the Board reasonably inferred that a trained Board agent would not attempt to discern how an employee voted. (ROA 1106-07.)

sanctioned voting booth. In such cases, the Board has set aside elections based on voters' belief that someone could observe them while voting, even in the absence of evidence that someone actually saw their ballots.<sup>7</sup> The different burdens between the two types of cases sensibly account for the greater secrecy afforded voters when a Board agent uses a sanctioned booth than when the agent uses improvised arrangements. Here, because the Board used a Board-sanctioned voting booth, the Board reasonably found inapplicable the line of cases involving improvised voting arrangements. (ROA 1105-06.) *See Physicians & Surgeons*, 356 NLRB at 199-200. To the extent minor differences exist between this case and the Board's decision in *Physicians & Surgeons* (Br. 23), the "key point" is that here, as in *Physicians and Surgeons*, "there is insufficient evidence to establish that ballot markings were visible to others." (ROA 1109.)

Because cases involving employee belief or perception that someone saw a ballot marked are not applicable when the Board agent uses a Board-provided voting booth, the employees' alleged belief (Br. 11-13, 23-26) is not determinative. In any event, the Board reasonably found (ROA 1108) "not credible" any belief or

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<sup>7</sup> *See, for example, Royal Lumber Co.*, 118 NLRB 1015, 1017 (1957) (Br. 27) (employees who voted with "improvised voting arrangements" consisting of piece of wood propped up on two oil drums voted under "arrangements [that] were entirely too open and too subject to observation") (citation omitted); *Columbine Cable Co.*, 351 NLRB 1087, 1087 (2007) (Br. 27) (employees who voted on a table, without any cover and with their full arms and 80 percent of the ballot exposed "raise[d] doubts concerning the integrity and secrecy of the election").

perception by voters that their arm movements revealed how they voted. The Company has offered no substantive argument to dispute that finding. Thus, as the Board explained (ROA 1108), the fact that hands and lower arms were concealed at least up to their elbows “realistically precludes the possibility that the [Union’s] observer could figure out from arm movements how employees voted.” In addition, because the “yes” and “no” boxes on the ballot were just a few inches apart, and the U-shaped shield for voters contained enough space to place the ballot at various points within the shield, there were simply “too many unknown variables” for the Union’s observer “to know which of the two boxes voters checked” even if he tried to take note of voters’ arm movements. (ROA 1108-09.)

**4. The Company failed to carry its burden of establishing that the Board agent arranged the voting area in a manner that raised a reasonable doubt as to the fairness and validity of the election**

The Company’s related objection (Br. 11-12, 20, 23-25)—that the Board agent committed objectionable conduct in his arrangement of the voting area—merits little discussion. The Board reasonably found (ROA 1100) that “[n]othing about the[] physical arrangements” of the tables and chairs “compromised voter secrecy.” Indeed the Board agent held the election in a room stipulated to by the Company. After voting began, he made a slight modification to the layout of the room to avoid any voter confusion as to where to go after entering the training room. The Company (Br. 23-25) does not explain how the Board agent engaged in

objectionable conduct by, on occasion, allowing more than one voter at a time in the training room. (ROA 1098; 345-46, 499-500.) Nor does the Company (Br. 23) offer any explanation for how the routine election process of having voters check in with observers to ensure voter eligibility before receiving a ballot (ROA 1098) constituted objectionable conduct by the Board agent.

Likewise, to the extent that employees could see into the breakroom when the door to the training room was fully open, that did not compromise voter secrecy. (Br. 24-25.) “The Board agent took steps to segregate the interior of the training room from the breakroom.” (ROA 1100.) Most significantly, the door to the training room remained closed most of the time. Although the door opened for each voter who entered and exited, it opened “only for a brief time” before automatically closing. Moreover, employees had limited views from the breakroom into the training room “due to the line of sight involved and to voter’s bodies passing through the doorway.” (ROA 1099, 1117-18; 106-07, 191-92, 228, 277-78, 363-68, 404-05, 420-21, 884, 886, 888, 890, 892, 894, 906, 908, 910, 914, 928, 930, 932, 934, 936, 938, 940, 942, 944, 946, 948.) Indeed, the Company does not dispute the Board’s finding (ROA 1099) that, from the back of the breakroom where some prounion employees sat for short periods during the election before starting work, voters in the voting booth and employees at the back of the breakroom could not see each other even with the door to the training room wide

open.<sup>8</sup> And before the Court, the Company does not even assert that any improprieties occurred between employees in the breakroom, which was not a no-electioneering area (ROA 1092, 1117), and voters in the training room.

In these circumstances, the Board reasonably overturned the Company's election objection regarding the Board agent's arrangement of the voting area. Moreover, as set forth above at p. 20, the Company's failure to raise complaints about any of these issues prior to the election results, despite the Company (ROA 1092, 1104) having knowledge of the election setup, knowledge that employees typically used the breakroom during the election times, and knowledge of the presence of employees in the breakroom shortly before the election started, buttresses the Board's finding.

Finally, even if the Court viewed a particular type of Board-sanctioned voting booth as preferable, or believed that the Board agent could have arranged the voting room and surrounding area in a different manner, those views would not serve as a basis to deny enforcement of the Board's Order. The Court "is without authority to impose upon the [Board] the kind of election procedures that it may

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<sup>8</sup> Ironically, the evidence demonstrates that procompany employee Hector Diaz sat at the table that provided the best view of the training room when the door was open. (ROA 1094; 452-55, 460-61, 469, 481-83, 813, 908.) No evidence exists that the employee engaged in any electioneering while sitting at the table. (ROA 1117.)

deem most appropriate.” *Antelope Valley Bus Co. v. NLRB*, 275 F.3d 1089, 1095 (D.C. Cir. 2002).

**C. The Board Did Not Abuse Its Discretion in Overruling the Company’s Election Objections that the Union’s Observer J.J. Martinez Engaged in Objectionable Conduct (Objections 4-6)**

In Objections 4-6, the Company alleged that union observer J.J. Martinez engaged in a variety of objectionable conduct while serving as an observer, including making statements and gestures to voters, keeping a list of voters, and handling the ballot box. The Board acknowledged that Martinez was an agent of the Union for the time that he served as an observer. Accordingly, the Board’s rule regarding alleged electioneering in the polling area by a party to the election governs his conduct. Under that rule, as set forth in *Milchem, Inc.*, 170 NLRB 362 (1968), the Board held that “prolonged conversations between representatives of any party to the election and voters waiting to cast ballots . . . .” would constitute grounds for setting aside the election. *Id.* at 172-73; *see Hood Mfg. Co.*, 941 F.2d at 329; *Boston Insulated Wire & Cable Systems, Inc. v. NLRB*, 703 F.2d 876, 881 (5th Cir. 1983). In fashioning *Milchem*, the Board intended to apply the rule with a “sense of realism.” *Milchem*, 170 NLRB at 363. Accordingly, the Board will not set an election aside where a party makes “chance, isolated, innocuous comment[s] or inquir[ies].” *Id.* Applying those principles here, the Board found it unnecessary to resolve credibility conflicts, because even assuming that Martinez’ conduct

occurred as alleged, it did not warrant overturning the election. (ROA 1059, 1121-32.)

Thus, contrary to the Company's contention (Br. 40-43), the Board reasonably found that statements to several voters, such as "here we are," and "this is how we do it," even if made by Martinez, were not objectionable. The statements the Board explained were not "[o]n their face" electioneering, as they did not "solicit or urge any voter to favor the [Union]." (ROA 1127.) In addition, they were "not prolonged or sustained conversations[,]" but rather "short and direct declarations." (ROA 1127.) Moreover, the Company does not dispute that the only voter identified as the recipient of Martinez' comment was one of the first voters to vote, a time when some confusion existed among voters over where to go after entering the room. (ROA 1098, 1122, 1127-28, 1131; 340-42, 770-72.) Accordingly, the Board reasonably found in context that "the evidence does not establish that any such statements were more than isolated, innocuous comments made in the course of moving voters through the voting process." (ROA 1122, 1128.)

Likewise, even assuming that Martinez told employee Menchaca at the check-in table "you know what you have to do," the statement did not constitute improper electioneering because it is "ambiguous on its face." (ROA 1128.) It was particularly ambiguous when placed in context with Martinez having not

engaged in any prounion activity, or having previously spoken to Menchaca about the Union. Moreover, the Board reasonably inferred that any such statement may have simply referenced the training provided by the employer to employees regarding the voting process. (ROA 1128; 776.) *See Environmental Maint. Solutions*, 355 NLRB 334, 342 (2010) (statement by observer that “you guys know what you have to do already” not objectionable).

The Board also reasonably found other alleged comments unobjectionable even if they occurred. Thus, Martinez telling voters “to get more voters” did not urge any voter to vote in a particular way, or seek voters who would vote in a particular way. Moreover, no evidence exists that he made the comment to a voter waiting in line to vote, as opposed to a voter leaving the room after voting, or that any employees were waiting in line to vote when he made the alleged statement. (ROA 1129.) Similarly, Martinez’ greeting employee Luis Rosales with a hug and a comment that they were waiting for him, was not objectionable because it “did not involve electioneering or prolonged conversation.” Likewise, Martinez’ shaking Francisco Alvarez’ hand was a simple greeting that did not involve electioneering or a prolonged conversation. (ROA 1129.) In addition, to the extent that Martinez spoke to Alvarez about traffic, the evidence establishes that the Board agent stopped the conversation before it became prolonged. (ROA 1124-25, 1129-30.) Accordingly, the Board’s findings that Martinez’ brief

comments did not violate *Milchem* are fully supported by case law. *See, e.g., NLRB v. Vista Hill Foundation*, 639 F.2d 479, 481 & n.3, 482-85 (9th Cir. 1980) (observer told several voters that he was glad to see them voting and discussed weather); *NLRB v. Osterlen Serv. For Youth, Inc.*, 649 F.2d 399, 400-01 (6th Cir. 1981) (observer talked to almost every voter, and brief discussions involved work issues, voter turnout, and upcoming union meeting).

The Company's argument regarding other alleged conduct fare no better. The Company (Br. 43-44) has not shown a basis to reverse the Board's finding that no evidence exists that Martinez kept a separate list of voters or surveilled them. Rather, he simply examined the official eligibility list to determine how many eligible voters had yet to vote, and observed voters as the Union's observer. (ROA 1131-32; 274-75, 717.) With respect to Martinez picking up the ballot box, the Board recognized the fundamental need to maintain the integrity of the ballots and that any "unnecessary" contact with the ballot box is not "desirable." (ROA 1131.) The evidence indicated, however, that, at most, Martinez picked up the box for a few seconds. Moreover, neither the Board agent nor company observer Deltoro lost sight of the box, and Deltoro conceded that Martinez did not tamper with the box or the ballots. (ROA 1123, 1131; 386-88, 405.) In these circumstances, the Board reasonably concluded (ROA 1131) that, even if Martinez picked up the ballot box as alleged, his conduct did not constitute objectionable conduct that

required a new election. Rather, as in *Sawyer Lumber Co.*, 326 NLRB 1331, 1332 (1998), *affirmed*, 225 F.3d 659 (5th Cir. 2000), without evidence that anyone tampered with the ballot box, the Company's objection constitutes "little more than speculation about the possibility of irregularity," and does not support overturning the election.

Finally, the Board did not err by failing to aggregate Martinez' alleged conduct (Br. 41-43). The cases the Company relies on involve extreme conduct not present here. In *NLRB v. Carroll Contracting & Ready-Mix, Inc.*, 636 F.2d 111, 111-13 (5th Cir. 1974), two former employees engaged in extensive electioneering. They wore prounion clothing and positioned themselves in a parking lot where as many as 45 employees lined up to vote. Throughout the election they urged employees to vote for the union and pointed to the "yes" box on an oversized reproduction of the ballot. In *Bio-Medical of Puerto Rico.*, 269 NLRB 827, 829-30 (1984), a union agent other than the observer positioned himself at a no-electioneering area immediately adjacent to the polls for almost the entire election, disregarding the Board agent's instructions. The Board found that, under the particular circumstances, the agent engaged in "persistent and deliberate" misconduct that arguably implied he had "some connection with, if not control over, the election." Nothing of the sort occurred here.

**D. The Board Did Not Abuse Its Discretion in Overruling the Company’s Election Objections Regarding Electioneering, Surveillance, Threats of Job Loss, and a Hit List (Objections 1, 2, 8, 11)**

In objections 1, 2, 8, and 11, the Company asserts that employees who supported the Union engaged in improper electioneering and surveillance, threatened employees who did not support the Union with job loss, and kept a hit list of employees who did not support the Union. The Board found that some of the conduct alleged by the Company in these objections did not occur. To the extent that the conduct did occur, the Board found that the union supporters who engaged in the conduct were not union agents. Accordingly, the Board applied the third-party standard in finding that the union supporters did not engage in conduct that made a free and fair election impossible. Below, the Board first addresses the finding that the union supporters were not union agents. The Board then addresses the specific alleged objectionable conduct, some of which the Company has waived before the Court by failing to raise in its opening brief.

**1. The Board reasonably found that employee supporters of the Union, except for J.J. Martinez, in his role as the Union’s observer, were not union agents**

**a. Applicable principles**

The Board, with Court approval, has long held that prounion employees do not constitute union agents merely because of their “vocal and active union support[.]” *United Builders Supply Co.*, 287 NLRB 1364, 1364 (1988); *accord*

*Tuf-Flex Glass v. NLRB*, 715 F.2d 291, 296 (7th Cir. 1983). “[I]t is not enough that the employee unilaterally claims representation status.” *Id.* Rather, the conduct of prounion employees is only attributed to a union where the union has “instigated, authorized, solicited, ratified, condoned, or adopted” the conduct at issue. *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808-09 (6th Cir. 1989); *Pan-Oston Co.*, 336 NLRB 305, 306 (2001). Common law principles apply in determining agency status. *Poly-America, Inc. v. NLRB*, 260 F.3d 465, 480 (5th Cir. 2001). The party asserting an agency relationship has the burden of proving that relationship. *Id.* at 480 (quoting *Restatement 2d Agency* § 27 (1992)).

“‘Apparent authority’ exists where the principal engages in conduct that ‘reasonably interpreted’ causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.” *Poly-America*, 260 F.3d at 480 (quoting *Restatement 2d Agency* § 27 (1992)); accord *Lamar Co., LLC v. NLRB*, 127 F. App’x 144, 148 (5th Cir. 2000). Accordingly, “[t]o create apparent authority, the principal must either intend to cause the third party to believe that the agent is authorized to act for it, or should realize that its conduct is likely to create such a belief.” See *Millard Processing Servs., Inc. v. NLRB*, 2 F.3d 258, 262 (8th Cir. 1993); *Restatement 2d Agency* § 27 & cmt. a. Conduct that the Board finds relevant in determining agency includes the alleged agent’s involvement in official union functions during the campaign,

the union's direction of the alleged agent during the campaign, whether the union holds out the alleged agent as its representative, and whether the alleged agent serves as the union's sole link to employees. *United Builders Supply Co.*, 287 NLRB 1364, 1365 (1988).

**b. The Company failed to meet its burden of proving agency status**

Applying the above principles, the record amply supports the Board's finding (ROA 1059, 1066) that the Company failed to carry its burden of proving that employees who supported the Union and engaged in alleged objectionable conduct, were union agents, except for J.J. Martinez when he acted as the union observer during the election. As the Board found (ROA 1066), "[t]he evidence does not show that any of them had actual or apparent authority to speak or act on the [Union's] behalf."

Thus, the evidence establishes that the main organizing occurred during frequent meetings conducted by Union President /Business Manager Perkins and/or Business Agent Cruz. The alleged union agents were simply employees who supported the Union by attending union meetings and talking to other employees about the Union. A few also solicited two or three coworkers to sign cards for the Union. As the Board explained (ROA 1066), and as shown above, under settled law, employees do not become union agents by engaging in prounion activity. Moreover, because union officials "were actively involved in the

campaign” through the holding of regular meetings, “anyone paying attention would have understood that [union] officials—not the employee supporters of the [Union]—were the ones who spoke and acted on behalf of the [Union].” (ROA 1066.)

Likewise, the Company has not established that the Union created actual or apparent authority for those union supporters with respect to any of the alleged objectionable conduct attributed to them. (ROA 1066.) Indeed, the record discloses no union conduct that could have given employees a reason to believe that union supporters acted on behalf of the Union with respect to the alleged objectionable conduct. *See Tuf-Flex Glass*, 715 F.2d at 296. In these circumstances, the Board reasonably concluded (ROA 1069) that the union supporters, except for J.J. Martinez in his role as the union’s observer, were not union agents and applied the third-party standard to the alleged objectionable conduct.

Indeed, in *Lamar Co., LLC v. NLRB*, 127 F. App’x 144 (5th Cir. 2005), the Court rejected an argument similar to the Company’s argument here. In that case, an employee distributed union literature and “was entrusted with the task of inviting other employees to [u]nion meetings” held at his home. 127 F. App’x at 148. The Court held that the employee was not a union agent because the employer failed to establish any evidence that the union held out the employee as

its representative particularly where no organizing committee existed, and because union officials had an active role. *Id.* at 148-49. Here, as in *Lamar*, no evidence exists that the Union held out the employees as its representative, or had organizing committee, and the Union officials had an active role in the union campaign.

The Company's claim (Br. 30-32, 36-37) that the alleged agents were part of an "organizing committee" has no merit regardless of how many times the Company repeats the claim. The credited evidence establishes that no formal or informal committee existed. Thus, except for telling employees not to talk with coworkers during work time or threaten them, the union officials did not provide employees with specific instructions or training. Nor did they tell any employees that prounion employees who spoke with them were representatives of the Union. (ROA 1063, 1064; 44-48, 52-53, 61-62, 73-76, 178-79, 197.) Moreover, the Company does not dispute the Board's finding (ROA 1064) that the term came from the Company's attorney, who used it in filings before the Board and at the hearing. As Union President Perkins stated, he did not know anything about a committee until the Company used the term in its election objections. (ROA 47-48.)<sup>9</sup>

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<sup>9</sup> Similarly, the Company's attorney used the term "working for the [u]nion" as part of a question at the hearing. (Br. 5, 31; ROA 38-39.) In proper context, the

The Company also claims (Br. 31) that employees “reasonably believed” that the alleged union agents spoke for the Union. The apparent authority argument fails, however, absent manifestation by the Union that would cause others to believe that it had given authority to the alleged union agents. Because no evidence exists to support the Company’s contention that an in-house committee existed, or (Br. 30) that such a committee “served as the primary conduits for communication between employees and the union,” the Board (ROA 1066-67) appropriately distinguished the cases cited by the Company (Br. 30-32, 37). *See, e.g., Bristol Textile Co.*, 277 NLRB 1637 (1986) (agency found where one employee served as union’s only link with other employees and where union relied on employee extensively as its contact with employees); *Pastoor Bros. Co.*, 223 NLRB 451 (1976) (agency found where employees recognized formal in-house committee as “in-plant” representative and union formally established committee as its “liaison” with employees).<sup>10</sup>

Nor, as the Company suggests (Br. 34-36), did the Board err (ROA 1067) by declining to be bound by two Fourth Circuit cases where the court found agency

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testimony of Union President Perkins (ROA 44-46, 52-53) makes clear that the Company inaccurately characterizes the testimony.

<sup>10</sup> As this Court has recognized, even where employees hold union meetings without the presence of union officials, serve on an in-plant organizing committee, and distribute information and solicit authorization cards, they are not necessarily union agents. *Lamar Co.*, 127 F. App’x at 148.

status: *NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239 (4th Cir. 1976), and *PPG Industries, Inc. v. NLRB*, 671 F.2d 817 (4th Cir. 1982), because the Board is not bound by any particular circuit’s decisions. See *Network Capital Funding Corp.*, 363 NLRB No. 106 (2016), slip op. at 11, 2016 WL 7683218; *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616-17 (1963). In any event, contrary to the Company’s contention (Br. 30, 32, 34, 35, 36), the Board (ROA 1068-69) reasonably found those cases distinguishable based on factors that do not exist here. Indeed, two of the three factors cited by the Company as present in *Georgetown Dress* (and by the Fourth Circuit in distinguishing it in *NLRB v. Herbert Halperin Distributing Corp.*, 826 F.2d 287, 291 (4th Cir. 1987))—the existence of an inplant committee with well-defined membership and the absence of contact between rank-and-file employees and the union’s professional staff—are missing here. *Halperin* also distinguished *PPG* because the organizing committee in *PPG* consisted only of those employees who signed up for membership on it; the union submitted the committee members’ names to the employer and referred to them in handbills as “our employee committee.” *PPG*, 671 F.2d at 819. Thus, in *PPG*, the court found that the organizing committee members were union agents largely because the union publicly proclaimed them as agents. No comparable evidence exists here.<sup>11</sup>

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<sup>11</sup> The Board has declined to follow the specific four-part test set forth by the Third

**2. The Company failed to establish that the conduct alleged in Objections 1, 2, 8, 11 made a free and fair election impossible**

**a. Electioneering (Objection 1)**

In objection 1, the Company asserts that union supporters in the area adjacent to the polling area engaged in electioneering. (ROA 1110-15.) Before the Court, the Company has waived any challenge to the alleged electioneering by employees Narron, A. Cruz, and H. Martinez (Br. 14-15, 44-47), by failing to address substantively the Board's specific findings and reasoning (ROA 1113) that the alleged conduct did not occur. Rather, the Company offers a vague and conclusory assertion (Br. 38) that the Board erred in its findings, and then references portions of the alleged objectionable conduct as though it had occurred (Br. 44-46), completely ignoring the Board's contrary finding. By failing to adequately brief the issue, the Company has waived it before the Court. *See U.S. v. Scroggins*, 599 F.3d 433, 447 (5th Cir. 2010); *U.S. Pineda-Campos*, 622 F. App'x 445, 446 (5th Cir. 2015); Fed. R. App. P. 28(a)(8)(A) (argument in brief before court must contain party's contention with citations to authorities and record). To the extent that the Company references any of this alleged

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Circuit in *NLRB v. L&J Equipment Co.*, 745 F.2d 224 (3d Cir. 1984). *See Advanced Products Corp.*, 304 NLRB 436, 436 n.2 (1991). In any event, the Board here (ROA 1068-69), contrary to the Company's contention (Br. 30, 34, 35), reasonably distinguished that case as it involved a designated in-house committee that had more authority and responsibilities than the employees had here.

objectionable conduct in the facts section of its brief, such a reference that is devoid of any developed argument does not constitute a properly-raised challenge. *See Justiss Oil Co. v. Kerr-McGee Refining Corp.*, 75 F.3d 1057, 1067 (5th Cir. 1996) (party waives by abandonment issue raised to court on appeal, but not argued in body of brief).<sup>12</sup>

The Board based its findings on a variety of factors, not disputed here, including that the allegations lacked corroboration, were not credible, constituted hearsay, and came in response to leading questions from the Company's attorney. (ROA 1011-14.) Moreover, the Company does not dispute the Board's finding (ROA 1112) that the Company has never even alleged that H. Martinez was a

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<sup>12</sup> Before the Board, the Company's Objection 8 contained numerous claims of asserted objectionable conduct that the Board overruled. The Company's argument section of its brief does not dispute many of the Board's findings. Those Board findings involve alleged objectionable conduct by employee Edgar Mitsi toward employee Jorge Ordunez (ROA 1072-73, 1078; 294-97, 317-18); Moreno and Perez toward Ordunez (ROA 1073, 1079; 297-301); Maldonado toward Ordunez (ROA 1073, 1079, 302-05); Mitsi, Serna, and A. Cruz toward employee Alejandro Ura (ROA 1073-74, 1079; 619-25, 629-32, 637-38); Jose Serna toward employee Julio Cruz (ROA 1074, 1079; 221-23, 230, 328); and Maldonado, A. Cruz, and Narron toward employee Menchaca (ROA 1074-75, 1079; 179-80, 522-29, 563-64, 524-35, 550-52, 571-73). As noted above, to the extent that the Company references any of the above-alleged objectionable conduct in the fact section of its brief (Br. 6-8), such references, devoid of any developed argument that addresses the Board's findings, does not constitute a properly raised challenge to the Board's findings. In any event, the Board reasonably found none of the above conduct objectionable. The Board relied primarily on its determination that the alleged conduct was not threatening in nature and was not disseminated. The Board also reasonably discounted employees' subjective belief. (ROA 1075-81.)

union agent, and that no evidence exists to establish that he was an agent. The Company's failure to challenge the Board's specific findings leaves without evidentiary foundation the Company's claim that they engaged in conduct that destroyed the conditions necessary for a free and fair election. Accordingly, the Board is entitled to affirmance of its finding that they did not engage in objectionable electioneering.

In any event, the Board reasonably found (ROA 1114) that even if it "credit[ed]" the testimony of all of the [Company's] witnesses on this objection about electioneering," the conduct of Narron, Martinez, and Cruz "was not improper." The Company asserted before the Board (ROA 111-12) that Narron told employees in the breakroom to vote for the Union, and that he told an employee outside the facility to vote for the Union; that Cruz', while assisting an employee on crutches in the office area, made a reference to supporting the Union; and that J.J. Martinez, while in the breakroom, told an employee, as translated from Spanish, "do what you have to do." Under settled case law, however, the "[t]he Board has repeatedly declined to impose a zero-tolerance rule on voting-day electioneering." *Family Service Agency San Francisco v. NLRB*, 163 F.3d 1369, 1381 (D.C. Cir. 1999), and cases cited. As the Board has recognized, "[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 in the vicinity of the polls.” *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118, 1118 (1982), *enforced*, 703 F.2d 876 (5th Cir. 1983).

Applying that principle here, the Board reasonably found that the comments, if made, were “non-coercive” and did not taint the election because, at most, they simply urged a pronoun position. (ROA 1114-15.) Moreover, the Company does not dispute that the remarks—said in the breakroom, the main office, and outside the facility—were not made “within a designated ‘no electioneering’ area,” or contrary to any instructions from the Board agent, thereby minimizing the impact of any such conduct.” (ROA 1011, 1115.)<sup>13</sup> In addition, although many voters passed through the breakroom on the way to vote, the Company’s suggestion (Br. 46) that the comments occurred in the “line of march” to vote is specious. There is no evidence that any voter inside the training room would have seen or heard the comments while inside the training room.

In these circumstances (ROA 1114-15), the Board acted well within its discretion in finding, in the alternative, that the Company failed to show that the three employees engaged in any impermissible electioneering. Indeed, the Board, with Court approval has found such comments unobjectionable. *See Hood Mfg.*,

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<sup>13</sup> Before the Court, the Company does not dispute that the Board (ROA 1116-18) properly overruled its objection that the Board agent erred by failing to make the breakroom a no-electioneering area. (Objection 3(6).) Accordingly, as shown above, the Company has waived any challenge to that finding.

941 F.2d at 329 (admonition by union supporters to voters near polling place to “stick together,” and “you know damn well the way you’re supposed to vote” not objectionable); *Family Service Agency San Francisco*, 163 F.3d at 1376, 1381-82 (not objectionable conduct where several employees in hallway outside voting area urged numerous employees to support union); *Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 269-70 (D.C. Cir. 1998) (union supporters who surveilled employees entering polling place and held “raucous” rally near polling place not engaged in objectionable conduct); *NLRB v. Duriron Co.*, 978 F.2d 254, 258 (6th Cir. 1992) (electioneering by union supporters located near doors to polling place not objectionable where conversations were not prolonged).

Even where union representatives have engaged in electioneering immediately outside the voting area, the Court has recognized that the conduct was not objectionable where it did not occur in a no-electioneering area, was not contrary to any instructions from the Board agent, and where the employer made no complaint to the Board agent who might have been able to stop the conduct. *See Boston Insulated Wire*, 703 F.2d at 881. The Court further recognized in that case that the fact “that the doors [to the voting area] were open for a few seconds at a time throughout the day does not significantly undermine the Board’s conclusion that the doors were usually closed, or that they formed a physical barrier between the voters and the union representatives.” *Id.* at 881 n.6; *see also NLRB v. Klinger*

*Elec. Corp.*, 656 F.2d 76, 87 (5th Cir. 1981) (recognizing that Board dispensed with employer’s objection on ground that employee was not acting as agent of union, but noting that “comments were not ‘prolonged,’ or even a ‘conversation,’” that would violate *Milchem* rule.)

**b. Surveillance (Objections 2, 11)**

In objections 2 and 11, the Company asserts that employees who supported the Union engaged in surveillance in and near the polling area. (ROA 1091-95, 1118-21.) Although a heading in the argument section of the Company’s brief (Br. 44) references surveillance, the argument contains no reference to alleged surveillance by employees Moreno and Maldonado (Objection 2) by videotaping or photographing employees outside the voting area, or to the Board’s specific finding that the alleged conduct did not occur. (ROA 1118-19.) To the extent that the Company asserts facts related to this objection in the fact section of its brief, that reference fails to preserve the issue before the Court because the Company had the obligation, as set forth above pp. 39-40, to address the merits of the Board’s findings in the argument section of its brief. Accordingly, as set forth above p. 41, the Board is entitled to affirmance of its finding that Moreno and Maldonado did not engage in objectionable surveillance.

In any event, the Board (ROA 1120-21) reasonably found “the evidence insufficient to establish” that Moreno and Maldonado took photos or videos of

employees on election day. As the Board explained (ROA 1120-21), the employee who made the assertion was admittedly unsure that such conduct occurred, was not credible, and his testimony was uncorroborated. (ROA 1120-21.) *See Baker Concrete Constr., Inc. v. NLRB*, 73 F. App'x 12, 14-15 (5th Cir. 2003) (hearing officer's credibility determinations adopted by Board based, in part, on lack of corroboration, was not "unreasonable, unjustified, or contradicted by other findings of fact").

With respect to the general presence of prounion employees in the breakroom (Br. 46), the Board reasonably found (ROA 1120) that their mere presence did not constitute surveillance. As the Board explained (ROA 1120), and the Company does not dispute, such presence in the breakroom before their shifts started "was not unusual activity." Indeed, the Company does not dispute that on the day of the election both prounion and procompany employees in the breakroom were engaged in the routine task of eating and drinking coffee before starting work. (ROA 1120.) Although some employees may have arrived a little earlier than normal, and may have stayed in the breakroom for longer than usual, the Board (ROA 1120) reasonably declined to infer that they spent the extra time for "purposes of surveillance, given that they reasonably needed to give themselves some extra time to so that they could vote before starting work." (ROA 1120.)

The cases cited by the Company (Br. 45-46) do not stand for the proposition that, even if the employees were union agents, their mere presence “requires” a finding that they engaged in objectionable conduct. Unlike the cited cases (Br. 45), the employees here did not engage in out-of-the-ordinary conduct by spending time in the breakroom, engage in activity in a no-electioneering area, or act contrary to any other instructions from the Board agent. *See Nathan Katz Reality LLC. v. NLRB*, 251 F.3d 981, 991-93 (D.C. Cir. 2001) (union agents in no-electioneering area acted contrary to Board agent’s instructions and employer objected to activity at the time); *Electric Hose & Rubber Co.*, 262 NLRB 186, 216 (1982) (Board inferred that only purpose of supervisor’s unexplained presence outside polling area was “to convey to [the voting] employees the impression that they were being watched”); *Star Expansion Ind. Corp.*, 170 NLRB 364, 365 (1970) (union agent engaged in electioneering in a no-electioneering area “during a substantial part of the voting period,” notwithstanding Board agent’s instructions, on three separate occasions, that he leave the area and that he not electioneer within 50 feet of polls).

**c. Threat of job loss (Objection 8)**

In objection 8, the Company alleged that employees who supported the Union threatened those who did not support the Union with job loss. (ROA 1072.) The Board recognized there was some discussion about employees losing their jobs

if they did not support the Union. (ROA 1077.) But the Board reasonably found that the Company failed to show that any such talk was objectionable under the third-party standard ( see above at p. 13). In determining whether an alleged threat made a free and fair election impossible, the Board considers: (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 from an objective standpoint, 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; *see generally, Lamar Co.*, 127 F. App'x at 149.

Here, the Board reasonably found that, as to the nature of the alleged threat, the “source of such comments” was unknown. (ROA 1077.) Specifically, employee Diaz asserted that two employees had talked to him about “unnamed and unidentified employees” who had told them that those who voted against the Union would be dismissed. (ROA 1072; 433-34.) Similarly, employee Toribio Figueroa asserted that employees, including Jose Munoz, told him that he could be fired for not supporting the Union (ROA 1072; 487-90), but “[t]he record does not include any evidence about who was the source of such concerns.” Likewise, employee Juan Carlos Gutierrez testified about “rumors” that the Union would decide which employees stayed. (ROA 1072; ROA 640-47, 659-61.) Although the Company

asserts (Br. 6) that Gutierrez attributed a comment to alleged union agent Felipe Perez, Gutierrez actually named a different employee who worked at a different facility, and for whom the Company does not even allege agency status. (ROA 643-46, 659-61.)

In addition, the Board reasonably found, and the Company does not seriously dispute, that the rumors were not widespread. (ROA 1077.) And, as the Board found, “it was not reasonable for anyone who heard any such comments to believe that they would lose their jobs if they did not support the [Union].” (ROA 1077.) The Company controls hiring and firing, and employees would not have reason to believe that, after urging employees to vote against the Union, the Company would thereafter fire employees for not supporting the Union. Indeed, although the Company (Br. 31-32) references procompany employee Diaz as “reasonably believing” the alleged threat of job loss for not supporting the Union, his testimony establishes that he knew it was impossible for employees to lose their job for supporting the Company because voting takes place by secret ballot, and that he expressed that view to any concerned employees. (ROA 1072; 433-34, 438-41). Accordingly, the Board reasonably found (ROA 1077) that this portion of the Company’s election objection did not identify conduct that warranted overturning the election. *See NLRB v. LeFort Enterprises, Inc.*, 791 F.3d 207, 213 (1st Cir. 2015) (unobjectionable where prounion employees told five employees

that union would have them fired if they did not vote for union); *Downtown Bid Servs. Corp.*, 682 F.3d 109, 113-14 (D. C. Cir. 2012) (unobjectionable where several prounion supporters told co-workers that they would be fired unless they supported union) and cases cited.

The limited nature of the threat here distinguishes this case from those relied on by the Company (Br. 50, 52) where the threats were more expansive and found objectionable. In *Robert Orr-Sysco Food Serv.*, 338 NLRB 614, 614-15 (2002) for example, the Board specifically cited a pattern of threats made by prounion employees to multiple individuals who opposed the union, and the severity and “nature and variety of the threats” that included threats to report immigration status, and threats of physical harm. Finally, because any such statements here are not attributable to the Union, the Company does not advance its position (Br. 51-52) by relying on cases where a union made such threats. *See, e.g., United Broad. Co. of New York, Inc.*, 248 NLRB 403, 403-04 (1980) (shop steward threatened to place employee on blacklist if he voted against union); *Mike Yurosek & Son, Inc.*, 292 NLRB 1074, 1074 (1989) (union official threatened job loss in context of surveilling and photographing on daily basis employees engaged in anti-union activity).

**d. “Hit list” (Objection 8)**

In objection 8 the Company also asserts that the Union maintained a “hit list” to target employees who did not support the Union. (ROA 1071-72.) Substantial evidence supports the Board’s finding that “there was no such hit list.” (ROA 1076-77.) The Board (ROA 1071, 1076; 71-72, 160-61, 752-53) relied on the testimony of several prounion employees including A. Cruz, Perez, and Moreno that they did not keep a “hit list.” Rather, they merely maintained a list of employees who had and had not signed cards so that “they knew who they still had to talk to.” The Board found, and the Company does not dispute that such conduct, absent more, was neither “impermissible [n]or objectionable,” or that such a list is not the same as a “hit list.” (ROA 1076.)

The Company’s reliance (Br. 53) on the testimony of employee Diaz to claim the existence of an actual “hit list” lacks merit. Diaz explained that he had heard that prounion employees had identified some other employees who they wanted to talk to about the Union, but he did not confirm that he had heard of a list designed to target those who did not support the Union. (ROA 1071; 427-31.) Nor has the Company (Br. 53-54) shown any basis to overturn the Board’s credibility determinations and inferences drawn from the testimony of Alejandro Ura and Perez. The Board discredited Ura’s testimony about a “hit list.” The Board, instead, reasonably inferred from Perez’ testimony that, during Perez’ conversation

with Ura, in which Perez told Ura that he should stop spreading a rumor that the Company would close if the Union won the election, Perez simply referenced a list showing that a lot of employees were supporting the Union. (ROA 1071-72, 1076-77; 159-61, 749-51.) Absent an evidentiary foundation, the Board reasonably overruled the Company's objection.<sup>14</sup>

**E. The Company Failed to Carry Its Burden to Show that Anonymous Vandalism to Vehicles Prior to the Election Warranted Overturning the Election (Objection 10)**

The evidence establishes that, prior to the election, four employees who did not support the Union had vehicles vandalized. Sometime before the election, Sergio Villareal had a scratch on the passenger side of his vehicle and anti-freeze was thrown on it causing a stain in the paint. (ROA 1083; 585-89.)

Approximately two to three weeks before the election, Diaz saw a scratch on the passenger side of his car. (ROA 1083; 444-47, 478-80.) Approximately two weeks before the election, Mario Raimerez found three nails in a tire of his vehicle. About one week before the election, he found a nail in a tire on a different vehicle, and a leak in a front tire. (ROA 1083; 593-94.) Approximately one day before the election, Menchaca found two dents in his truck. (ROA 1083; 538-42.) Twice

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<sup>14</sup> *Carpenters (Society Hill Towers Owners' Ass'n)*, 335 NLRB 814, 814 (2001), relied on by the Company (Br. 54), has no relevance here because there a union violated the Act by videotaping and photographing employees in a manner that would cause them to fear retribution for crossing its picket line.

before the election, while performing a pre-trip inspection on his work truck, he found a piece of the air breaking system removed from the truck. (ROA 1084; 536-38, 554-60.)

On these facts, and with the Company adducing no evidence to support its speculation (Br. 55) that the vandalism was attributable to the Union or its agents, the Board reasonably overruled the objection based on the third-party standard that the vandalism did not make a free and fair election impossible. (ROA 1087, 1088, 1328 n.4.) Indeed, the Board, with court approval, has regularly found that such anonymous vandalism to cars and property of employee who do not support a union does not warrant a new election. *See Overnite Transportation Co. v. NLRB*, 105 F.3d 1241, 1247 (8th Cir. 1997) (damage to cars of three employees); *Stripco Sales, Inc. v. NLRB*, 934 F.2d 123, 127 (7th Cir. 1991) (damage to cars of one employee and supervisor who told other employees that union was responsible); *NLRB v. Hydrotherm. Inc.*, 824 F.2d 332, 336-37 (4th Cir. 1987) (damage to employee's car, and to employee's workstation which included reference to employee as a rat for supporting employer); *ATR Wire & Cable Co. v. NLRB*, 752 F.2d 201, 201-02 (6th Cir. 1985) (damage to cars of employees including scratches, lose battery and spark plug cables, and hole in radiator); *NLRB v. Bostik Division, USM Corp.*, 517 F.2d 971, 974 (6th Cir. 1975) (damage to cars including cut tires, damaged radiator, and dented hood).

Moreover, there is no evidence that the damage done to specific employees' vehicles created a general atmosphere of fear and reprisal. As the Board noted, the evidence fails to establish "widespread dissemination of any broad-based pattern of vehicle damage (as opposed to limited dissemination of single incidents of damage) amongst employees in the unit." (ROA 1328 n.4.) For example, Menchaca told only a few people about damage to his car, and he did not know whether he told them before or after the election. (ROA 1086, 1088; 541-42.) Similarly, he told only one employee and a supervisor about the issues with his truck, and he has no knowledge of any dissemination of those incidents to other employees. (ROA 1086, 1089-90; 541-542.) The Company has offered no contrary evidence. And there is no evidence that Villarreal told other employees about the scratch and paint damage to his car. (ROA 1086, 1088.)

The type of anonymous damage here differs significantly from the conduct in the cases relied on by the Company (Br. 57). In *Cedar-Sinai Medical Ctr.*, 342 NLRB 596, 596-98 (2004), applying the third-party standard, the Board set aside the election because there were threats of violence toward two employees who opposed the union, including threats of harm to family members and pets, unless they stopped their opposition. And in *Teamsters Local 812*, 304 NLRB 111, 115 (1991) picketers engaged in a wide range of violent conduct including throwing rocks, displaying a gun, blocking ingress and egress, physically threatening and

spitting at employees, recording license numbers and photographing employees, placing nails in front of vehicles, and damaging employees' vehicles.

**F. Neither the Cumulative Effect of the Objections, Nor the Closeness of the Election, Warrant Overturning the Election**

Finally, having failed to show any independent instances of objectionable conduct, the Company asserts (Br. 58-59) that the cumulative impact of the various incidents warrants setting aside the election, especially in light of the closeness of the election results. The Board reasonably rejected the Company's claim. (ROA 1135, 1160.) Indeed, under settled case law a party cannot use a cumulative impact argument to turn a number of insubstantial objections into a serious challenge. *See Lamar Co.*, 127 Fed App'x at 151 (“[t]he cumulative impact of a number of insubstantial objections does not amount to a serious challenge meriting a new election”); *NLRB v. White Knight Mfg.*, 474 F.2d 1064, 1067-68 (5th Cir. 1973) (totality of inadequate election objections cannot require new election); *accord NLRB v. Browning-Ferris Indus.*, 803 F.2d 345, 349 (7th Cir. 1986); *Amalgamated Clothing & Textile Workers v. NLRB*, 736 F.2d 1559, 1569 (D.C. Cir. 1984).

Similarly, the courts have repeatedly refused to give weight to unmeritorious objections—no matter how numerous—just because of a close vote. *See, e.g., CSC Oil Co. v. NLRB*, 549 F.2d 399, 400 (6th Cir. 1977) (upholding election that union won by single vote, even though employer raised numerous unmeritorious

objections); *Bostik Division*, 517 F.2d at 975 n.5 (upholding election that union won by four-vote margin, where conduct alleged by employer did not warrant setting aside election); accord *Deffenbaugh Indus., Inc. v. NLRB*, 122 F.3d 582, 586 (8th Cir. 1997) (citing cases in which courts have upheld election results in spite of narrow victory margin); *NLRB v. Southern Health Corp.*, 514 F.2d 1121, 1125 (7th Cir. 1975) (“the mere fact that a vote is close will not compel the conclusion that [the allegedly objectionable conduct] had an impact on the election results”). The Company cannot be heard to argue otherwise, where the only cases it relies on (Br. 58) involve conduct that had already been found objectionable.

**CONCLUSION**

The Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

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National Labor Relations Board

April 2016

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**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

CON-WAY FREIGHT, INC.	*
	*
Petitioner/Cross-Respondent	* No. 15-60861
	*
v.	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 16-CA-159605
	*
Respondent/Cross-Petitioner	*
	*

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,558 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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Dated at Washington, DC  
this 25th day of April, 2016

**UNITED STATES COURT OF APPEALS  
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**CERTIFICATE OF SERVICE**

I hereby certify that on April 25, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC  
this 25th day of April, 2016