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No. 16-

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SUPREME COURT U.S.

IN THE
Supreme Court of the United States

CON-WAY FREIGHT, INC.

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

For more than 50 years, Supreme Court and circuit court authority have recognized that agency principles are to be liberally construed in matters arising under the National Labor Relations Act. Contrary to this well-settled authority, the Fifth Circuit's underlying decision held that agency principles are construed "stringently," and in so doing, disregarded the common law and statutory standards for determining apparent authority.

Further, the Fifth Circuit affirmed an NLRB conducted secret ballot election where the NLRB prejudicially disregarded its own rules and regulations by failing to use an actual voting booth. In its briefing to the Fifth Circuit, the NLRB endorsed the continued use of cardboard voting shields in conducting its elections despite the contrary requirements of the NLRB's own rules and regulations.

This case presents two questions:

1. Do common law and statutory agency principles require that agency law be interpreted "liberally" to include both actual and apparent authority principles?
2. Does the NLRB have the authority in conducting secret ballot elections to use and sanction voting procedures that violate the agency's established rules and regulations?

PARTIES TO THE PROCEEDING

Petitioner Con-way Freight, Inc. was the Petitioner and Cross-Respondent in the Fifth Circuit Court of Appeals. Respondent National Labor Relations Board was the Respondent and Cross-Petitioner in the Fifth Circuit.

CORPORATE DISCLOSURE STATEMENT

Petitioner Con-way Freight Inc. is now known as XPO Logistics Freight, Inc. Con-way Freight Inc. is a wholly owned subsidiary of Con-way, Inc., which is now known as XPO CNW, Inc. The sole shareholder of XPO CNW, Inc. is the publicly-traded corporation XPO Logistics, Inc. No publicly held company owns 10% or more of the stock of XPO Logistics, Inc.

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<i>United States v. Acme Process Equip. Co.</i> , 385 U.S. 138 (1966).	.13

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PETITION FOR A WRIT OF CERTIORARI

This case arises from proceedings before the National Labor Relations Board ("Board" or "NLRB"), but involves broad legal issues of great significance, including the upheaval of common law agency standards and an executive agency's deviation from its rules and regulations. After the NLRB conducted a representation election at Petitioner's Laredo, Texas facility, Con-way Freight, Inc. ("Con-way") filed Objections to Conduct Affecting the Results of the Election ("Objections"). Con-way's Objections alleged that members of the International Brotherhood of Teamsters, Local 657's ("Teamsters" or "Union") in-house organizing committee were agents of the Union cloaked with apparent authority and that their objectionable misconduct before and during the election – including unlawful electioneering, threats, and surveillance of voters – required setting aside the election results. Con-way also objected to the election results because the NLRB Agent supervising the election violated the Board's Rules and Regulations by using a three-sided cardboard shield instead of the required voting booth.

Affirming the erroneous decision of the NLRB, the Fifth Circuit improperly rejected Con-way's argument that the in-house committee members were agents of the Union. The court held that it must apply agency standards "stringent[ly]" and held that because: (i) the Union did not officially designate any committee members with a formal title; and (ii) the Union also was present at Con-way's Laredo facility during the organizing, employees on the in-house committee were not agents of the Union.

The Fifth Circuit's decision contravenes Supreme Court precedent and the law of every other Circuit Court of Appeal. These authorities establish that agency law must be construed "liberally" and includes considerations of actual and apparent authority. Not only do a party's specifically authorized and ratified acts establish an agency relationship, but also under the Restatement (Second) of Agency's settled standard for apparent authority, so does a third party's reasonable belief that the agent speaks for the principal.

The Fifth Circuit's stringent application of agency principles improperly disregarded the correct standard for determining apparent authority. The court discounted the Restatement of Agency and common law agency principles by addressing only principles of actual authority. The Fifth Circuit's reliance only on actual authority and the "specific acts" taken by the Union to support an agency relationship contravened the plain language of the NLRA, which provides that the "specific acts" of the principal "shall not be controlling" in an agency analysis. 29 U.S.C. §152(13).

In addition to this plain error concerning an important principle of federal law, the Fifth Circuit's opinion created a Circuit split concerning the agency test for members of a union's in-house organizing committee. Circuit court authority from the Third and Fourth Circuits adheres to the statutory language, the Restatement, and court authority, and recognizes that the mere presence of union officials at the facility during the organizing campaign and/or the absence of a union's formal delegation of titles to its in-house committee members is not dispositive. Third and Fourth Circuit authority correctly holds that

apparent authority exists when the association between the union and its in-house committee causes employees to reasonably believe that committee members are acting on behalf of the union. This Court's review is necessary to resolve the split in authority created by the Fifth Circuit's erroneous holding and affirm the apparent authority standards in the Restatement correctly espoused by other circuits.

This case also presents an important question of federal law warranting Certiorari; namely the Board's obligation to follow its Rules and Regulations. Rather than using an actual voting booth, as required by the Board's Rules and Regulations, the Board Agent who supervised the secret ballot election used a three-sided cardboard shield in an improvised fashion. The Board's disregard of its own Rules and Regulations that require an actual voting booth was not an anomaly. The Board contends that its use of cardboard voting shields is internally sanctioned and a recurring practice. The Fifth Circuit's opinion does not address or even mention the Board's failure to follow its own Rules and Regulations.

This departure from the Board's Rules and Regulations had a substantial impact on the election. Seven employees – a number that exceeds the Union's margin of victory in the election – testified that they did not believe they had sufficient privacy to vote during the election.

The net result of the Fifth Circuit's decision is a disruption of the common law agency analysis, the plain language of the NLRA, and the authority of this Court. The Fifth Circuit sanctioned the NLRB's unfounded agency test and its decision licenses the Board to continue

ignoring its own Rules and Regulations. The Fifth Circuit's decision, therefore, warrants this Court's review.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 838 F.3d 534. The Fifth Circuit Court of Appeals' denial of Petitioner's Petition for Panel Rehearing is unreported.

The Decision and Order of the National Labor Relations Board is reported at 363 NLRB No. 53.

JURISDICTION

The judgment of the Court of Appeals was entered on September 27, 2016. A Petition for Panel Rehearing was denied on December 12, 2016. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

29 U.S.C. §152(13) provides, in relevant part:

In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

29 U.S.C. §159(c)(1) provides, in relevant part:

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.

STATEMENT OF THE CASE

A. Background

The NLRB held a secret ballot election on September 12, 2014 at Petitioner Con-way's Laredo, Texas Service Center for a unit of drivers and dock workers. The Union prevailed, with 55 votes cast for representation, 49 votes cast against the Union, four challenged ballots and two void ballots.

B. The Union's In-House Organizing Committee

During the Union's organizing campaign at Laredo leading up to the election, a select group of nine Con-way employees handled the on-site organizing activities for the Union. The Union trained these in-house organizing committee members on organizing techniques and the committee worked with the Union's President and Business Manager before the election. Tr. 39-48. The Union President knew the names of all the employees on the in-house organizing committee and acknowledged them as an "in-plant committee," agreeing that the committee was "working for the union." Tr. 39-48, 73, 433, 438.

The Union's in-house organizing committee held weekly meetings at a public park to discuss the campaign with employees. Tr. 45-49, 61, 800. Committee members were the only individuals who gathered signed authorization and membership cards for the Union's organizing campaign at Laredo, and committee members returned those signed cards to the President and Business Manager of the Union. Tr. 39-40, 48. These cards were both dues authorization and membership cards by which employees who signed them joined the Union. *Id.*

As part of their in-house organizing efforts, employees on the Union's committee approached other employees and told them "how the Union worked and how the Union benefits you." Committee members held themselves out as having authority to act on behalf of the Union. Tr. 436. One committee member told employees they "would be able to decide who stayed and who didn't stay at Con-way once they won the election." Tr. 646. Members of the Committee also visited employees' homes prior to the election and, during the hearing on Objections, Laredo employees testified that they believed that the in-house committee members were "from the Union." Tr. 433. The nine committee members were the only union organizing resource in Laredo and the committee was indistinguishable from the Union in the eyes of Laredo employees.

C. The Board Agent Conducting the Election Did Not Use a Voting Booth During the Election

The training room where employees voted in the November 12, 2014 election in Laredo measured 23 feet, 5 inches long and 15 feet, 4 inches wide. Pet. App. 95a. During the voting, the Union's election observer sat at

the observers' table in a chair approximately six feet from voters, while the supervising Board Agent was approximately four feet away from voters. Pet. App. 96a-97a. Employees voting inside the training room could see into the adjacent breakroom – where employees gathered throughout the day – when the door between the training room and breakroom was open. Likewise, employees in the breakroom could see employees inside the training room when the door between the two rooms was open. Pet. App. 98a-99a. During voting there were as many as three employees in the training room at the same time. Pet. App. 98a. Employees waiting to vote stood directly in front of the table, just a few feet from employees who were marking their ballots. The voting room was exposed and crowded, and the Board Agent arranged the voting area so he and the election observers were positioned unreasonably close to voters while they marked their ballots.

Instead of using an actual voting booth during the election, the Board Agent used a "U shape[d]" piece of cardboard to shield employees. Pet. App. 102a. This cardboard shield was just part of the Poll Master II voting kit provided to the Board Agent by the NLRB Regional Office. Pet. App. 5a. The Board Agent did not follow the proper assembly instructions for this voting kit when he failed to install the aluminum legs that are part of the shield. Pet. App. 103a. Instead of properly assembling the cardboard shield so it was free-standing on its aluminum legs, the Board Agent simply put the cardboard shield into its plastic base and put the base and shield on top of one of the tables in the training room where the election was held. Pet. App. 103a.

The Board Agent's improvised voting arrangement and his failure to use an actual voting booth with a curtain had a material effect on the election. Testimony from voters during the Objections hearing established that the heads, upper chests, shoulders, forearms, and almost the entire left arms of voters were visible to the Board Agent and the Union's Observer, who were mere feet away. Pet. App. 105a. Con-way proffered testimony from seven employees who testified that they believed that the location, size, and type of cardboard shield used did not offer sufficient privacy to ensure that their ballots were marked in secret, and/or that others in the room could therefore see or tell how they were voting. Pet. App. 105a-106a. Tr. 471-76, 507, 548-49, 598, 626, 653, 665, 671, 690-92.

D. Proceedings Before the NLRB and Fifth Circuit

On September 19, 2014, Con-way filed timely Objections to the election results alleging both Union and Board Agent misconduct. Specifically, Con-way alleged that Union agents and supporters engaged in unlawful electioneering, unlawfully coerced employees to vote for the Union, and threatened employees who did not support the Union. Con-way argued that employee members of the Union's in-house organizing committee acted as agents of the Union so their conduct is imputed to the Union and must be analyzed under the NLRB's standard for objectionable conduct by a party affecting the results of an election.

Con-way's Objections also alleged Board Agent misconduct because the Board Agent failed to ensure the privacy of the election, created a reasonable doubt as to

the fairness and validity of the election, and violated the Board's Rules and Regulations by failing to use an actual voting booth and arranging the voting room in a manner that did not afford employees a reasonable level of privacy in which to cast their ballots.

A hearing on Con-way's Objections was held on November 18-20 and December 2-3, 2014 before an NLRB Hearing Officer. On February 11, 2015, the Hearing Officer issued a Report recommending that Con-way's Objections be overruled. The Hearing Officer held that the Union's in-house committee members were not agents of the Union. Pet. App. 33a-46a. In so doing, the Hearing Officer erroneously disregarded circuit court authority on the standards for agency and apparent authority, holding that "these cases are not consistent with Board standards for determining agency. As a Board hearing officer, I am bound by Board case law, not conflicting circuit court case law." Pet. App. 41a.

The NLRB Hearing Officer also held that the Board Agent's use of a cardboard voting shield to screen voters instead of an actual voting booth was permissible because the Board's Casehandling Manual authorizes "cardboard" voting shields. Pet. App. 109a. Based on the Hearing Officer's flawed reasoning, simply because the word "cardboard" is used in the Casehandling Manual, *ipso facto*, the cardboard shield used was permissible.

On March 27, 2015, Con-way filed Exceptions to the Hearing Officer's Report with the NLRB. On July 8, 2015, the NLRB issued a Decision and Certification of Representative adopting the Hearing Officer's findings and recommendations. On September 9, 2015, the Union

filed an unfair labor practice charge against Con-way alleging that Con-way refused to bargain with the Union. The NLRB issued its final Decision and Order on November 27, 2015 finding that Con-way had failed to bargain with the Union. Pet. App. 12a-19a.

On December 7, 2015, Con-way petitioned the United States Court of Appeals for the Fifth Circuit for review of the NLRB's Decision and Order. On September 27, 2016, the Fifth Circuit issued its Decision in this case denying Con-way's Petition for Review and granting the NLRB's Cross-Application for Enforcement.

In its decision, the Fifth Circuit affirmed the Board and rejected Con-way's argument that committee members were agents of the Union. The Fifth Circuit's analysis noted only: 1) the Union appointed no employee to serve on the committee; 2) no single employee served as the primary communication conduit between the Union and other Con-way employees; and; 3) the Union dispatched its own representatives who were responsible for organizing in Laredo. Pet. App. 1a-11a. The Fifth Circuit's decision has no additional analysis to support its holding, and it never addressed whether employees reasonably believed that committee members were acting on behalf of the Union under the principles of apparent authority. Pet. App. 1a-11a.

The Fifth Circuit recognized that the Board Agent responsible for the underlying election did not properly assemble the cardboard voting shield used in the election because he did not install the aluminum legs that accompanied the shield. However, in affirming the Board's decision, the Fifth Circuit never addressed or ruled on

Con-way's primary argument that the Board Agent who conducted the election failed to use an actual voting booth as required by the NLRB's Rules and Regulations and Casehandling Manual. Pet. App. 1a-11a.

On November 11, 2016, Con-way filed a Petition for Panel Rehearing with the Fifth Circuit, which was denied on December 12, 2016. Pet. App. 179a.

REASONS FOR GRANTING THE PETITION

Con-way's Petition for Writ of Certiorari should be granted for three reasons.

First, the Fifth Circuit's opinion erroneously adopted a "stringent" agency analysis that is contrary to this Court's precedents, the Restatement, and the plain language of the NLRA.

Second, the Fifth Circuit's opinion created a split in circuit authority regarding the proper legal standards and analysis to determine agency status of members of a union's in-house organizing committee.

Third, the NLRB impermissibly disregarded its own Rules and Regulations by certifying an election in which the required voting booth was not used.

A. The Fifth Circuit's Application of a "Stringent" Agency Analysis Contravenes this Court's Precedent, the Restatement, and the Plain Language of the NLRA

1. The Fifth Circuit's "stringent" application of agency principles is contrary to authority and precedent because it discounts the doctrine of apparent authority

This Court's review is imperative because the Fifth Circuit erroneously held that agency law in NLRB proceedings is stringently construed, contrary to Supreme Court authority and the law of every Circuit, the plain language of the NLRA, and settled common law agency principles. The Fifth Circuit's narrow standard considered only indicia of actual authority in an agency relationship and discounts the doctrine of apparent authority. This Court should affirm the principles of apparent authority and the liberal construction given to agency principles.

Section 2(13) of the NLRA provides that, "[i]n determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." 29 U.S.C. §152(13). The agency standards and analysis applicable in NLRB proceedings should be identical to those applied by federal courts. The NLRB must apply "the common law meaning of the terms 'agency' and 'apparent authority' in determining whether the union will be held responsible for the acts of one of its members." *Overnite Transportation Co. v. NLRB*, 140 F.3d 259, 265 (D.C. Cir. 1989).

This Court has affirmed that agency principles are to be given liberal construction. In a matter concerning the scope of agency in labor law, this Court held that courts should not require a "strict application of the rules of *respondeat superior*." Rather, there is a "clear legislative policy to free the collective bargaining process from all taint of an [party's] compulsion, domination, or influence." *International Ass'n of Machinists v. NLRB*, 311 U.S. 72, 80 (1940). Indeed, in *Local 1814, International Longshoremen's Association v. NLRB*, 735 F.2d 1384, n. 21 (D.C. Cir. 1984), the D.C. Circuit recognized this Court's liberal application of agency principles in NLRB proceedings and that this Court's "liberal development of 'apparent authority' doctrine" applies to other statutes. See *American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982) (Sherman Act); *United States v. Acme Process Equip. Co.*, 385 U.S. 138 (1966) (Anti-Kickback Act provides basis for United States' cancellation of contract).

Until now, every circuit courts of appeal has followed this precedent and endorsed a liberal agency standard:

First Circuit. The 3-E Company, Inc. v. NLRB, 26 F.3d 1, 3 (1st Cir. 1994) ("in this labor context, courts utilize a liberal agency analysis, emphasizing such factors as a supervisor's 'apparent authority'").

Second Circuit. Irving Air Chute Co. v. NLRB, 350 F.2d 176, 179 (2nd Cir. 1965) (agency rules place responsibility on a party when "employees would have just cause to believe that he was acting for and on behalf of the company").

Third Circuit. *NLRB v. L & J Equipment Co., Inc.*, 745 F.2d 224, 232-34, *reh'g denied*, 750 F.2d 25 (3rd Cir. 1984) (relying on apparent authority analysis).

Fourth Circuit. *NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239, 1244 (4th Cir. 1976) (“the common law has been liberalized by § 2(13) of the Act”).

Fifth Circuit. *Cramco, Inc. v. NLRB*, 399 F.2d 1, 3 (5th Cir. 1968) (“Section 2(13) of the Act . . . proscribes any narrow application of agency principles”).

Sixth Circuit. *NLRB v. General Metals Products Company*, 410 F.2d 473, 475-76 (6th Cir. 1969) (Section 2(13) of the NLRA “shall be given a liberal construction”).

Seventh Circuit. *NLRB v. Service American Corp.*, 841 F.2d 191, 196 (7th Cir. 1988) (the “liberal approach” to agency law “seems to command the following of a number of circuits that have considered the issue” and “such an approach finds support in 29 U.S.C. § 152(13).”).

Eighth Circuit. *Colson Corporation v. NLRB*, 347 F.2d 128, 136 (8th Cir. 1965) (“[i]n determining responsibility for union activities, the principles of agency and its establishment are to be construed liberally”).

Ninth Circuit. *NLRB v. Advanced Systems, Inc.*, 681 F.2d 570, 576 (9th Cir. 1982) (“implied or apparent authority is sufficient to establish agency”).

Tenth Circuit. *Furr's Inc. v. NLRB*, 381 F.2d 562, 566 (10th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967) (under

Section 2(13) of the NLRA, “employer responsibility is not to be determined according to the strict rules of agency”).

Eleventh Circuit. *Dowd v. International Longshoremen's Ass'n*, 975 F.2d 779, 785 (11th Cir. 1992) (the Eleventh Circuit has adopted a “liberal application of agency concepts . . . in the labor context”).

D.C. Circuit. *Local 1814, International Longshoremen's Association v. NLRB*, 735 F.2d 1384, n. 21 (D.C. Cir. 1984) (recognizing the “liberal development of [the] ‘apparent authority’ doctrine”).

While the Seventh Circuit in *NLRB v. Service American Corp.* 841 F.2d 191 (7th Cir. 1988) acknowledged that in *Tuf-Flex Glass v. NLRB*, 715 F.2d 291 (7th Cir. 1982), it had previously held that “the test in the union election context is stringent,” it criticized the *Tuf-Flex Glass* decision, holding that the approach in *Tuf-Flex Glass* “cuts against the weight of authority in both this and other circuits.” 841 F.2d 191, n. 6. The Seventh Circuit’s decision in *NLRB v. Service American Corp.* also noted that the liberal approach to agency standards “finds support in 29 U.S.C. §152(13).” 841 F.2d at 196.

Before the instant case, the Fifth Circuit also endorsed a liberal construction of agency principles in NLRB proceedings. In *Cramco, Inc. v. NLRB*, 399 F.2d 1, 3 (1968), the Fifth Circuit held that “Section 2(13) of the Act proscribes any narrow application of agency principles.” Abruptly reversing course, the Fifth Circuit’s holding below erroneously rejected this precedent and held that “the test of agency in the union election context is stringent . . .” The only authority cited by the Fifth Circuit

in support of its holding is *Tuf-Flex Glass v. NLRB*, 715 F.2d 291 (7th Cir. 1983), the very case that the Seventh Circuit criticized, and whose analysis it subsequently abandoned in *NLRB v. Service American Corp.* 841 F.2d 191 (7th Cir. 1988).

A liberal construction of agency means that actual authority principles are “not [solely] determinative of agency.” See *NLRB v. Local Union 1058, United Mine Workers of Am.*, 957 F.2d 149, 152 (4th Cir. 1992) (stating that “section 2(13) of the Act provides that actual authority is not determinative of agency”). Under the NLRA, a party need not have actual authority for an agency relationship to exist. *Id.*¹ A union may create an agency relationship either by directly designating someone to be its agent (i.e. granting “actual authority”) or by taking steps that lead third persons reasonably to believe that the putative agent was authorized to take certain actions (i.e. allowing “apparent authority” to exist). An agency analysis must properly address the existence of both actual and apparent authority.

“Apparent authority” exists where the principal engages in conduct that reasonably causes third persons to believe that the principal consents to have the act done on his behalf by the person purporting to act for him. Restatement (Second) of Agency §27 (1992). Apparent authority is created:

1. Whether a union has “instigated, authorized, solicited, ratified, condoned or adopted” the alleged agents statements through actual authority is not determinative. *NLRB v. Miramar of California*, 601 F.2d 422, 425 (9th Cir. 1979).

By written or spoken words or any other conduct of the principal which, 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. *Id.*

A union cloaks an employee with apparent authority to act for the union when it takes action that creates a perception among the rank-and-file that the employee acts on behalf of the union and that the union did not disavow or repudiate the employee’s statements or actions. *NLRB v. Miramar of California*, 601 F.2d 422, 425 (9th Cir. 1979).²

The Fifth Circuit’s “stringent” application of agency principles in the underlying case erroneously discounted apparent authority principles. The court’s decision applied only the standards for actual authority and, in so doing, disregarded voluminous preceding authority. The Fifth Circuit relied on the Union’s lack of designation, and its involvement in the organizing campaign, and held that those acts undercut the claim that the committee’s members were agents of the Union. While the Fifth Circuit’s decision contains a singular, passing reference to apparent authority as an “indicia” of agency, the court failed to analyze apparent authority as a separate doctrine under which an agency relationship may be formed. Pet. App. 6a. The court did not consider whether the Union’s

2. The appropriate, broad focus of this apparent agency authority inquiry is not on what the union manifested, but instead on what employees could have reasonably believed. An apparent authority analysis requires consideration of “issues related to a person’s state of mind.” *NLRB v. West Coast Liquidators*, 725 F.2d 532, 536 n. 4 (9th Cir. 1984).

conduct, on the whole, reasonably caused employees to believe that an apparent authority relationship existed.

This narrow analysis is contrary to the plain language of 29 U.S.C. §152(13), which provides that the "question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." The Fifth Circuit did exactly what the plain language of the NLRA prohibits – it held that the Union's specific acts do not establish agency under actual authority principles, but the court ignored whether more "liberal" apparent authority principles establish that the Union's conduct, on the whole, created an agency relationship.

Essentially, the Fifth Circuit's "stringent" analysis is an incomplete analysis that analyzes agency under only the most rigid actual authority principles. It discounts apparent authority by design, thereby rejecting the "liberal" apparent authority principles established by common law, the Restatement, and applicable court precedents. The Fifth Circuit's holding erroneously adopts only part of the agency analysis and declares that analysis complete under its new, unfounded, narrow interpretive standard. The holding turns more than 50 years of authority, and the supporting common law, on its head. The Fifth Circuit's holding that agency principles are to be stringently construed is contrary to Supreme Court authority, the authority of every circuit, the common law, and the plain language of the NLRA, all of which recognize apparent authority and the liberal construction of agency principles.

2. The Fifth Circuit's "stringent" agency analysis erroneously mirrored the NLRB's discredited analysis that improperly subrogates or ignores apparent authority principles

The Fifth Circuit's decision effectively adopts a discredited NLRB agency analysis that fixates on the existence of "actual" authority and improperly subrogates or ignores apparent authority principles altogether. In considering the agency status of an in-house organizing committee, the Third Circuit in *L&J Equipment v. NLRB*, 745 F.2d 224, 233 (3rd Cir. 1984) recognized that the "Board has adopted its own standard for determining whether members of an in-house organizing committee who assist a union in organizing activities are agents of the union."³ The Third Circuit noted that the Board has held – like the Fifth Circuit below – that "when union officials take an active part in an organizational drive, the members of an IHOC are not agents of the union."

Citing 29 U.S.C. §152(13) and the Restatement standard for apparent authority, the Third Circuit rejected the Board's analysis, holding that the "Board's standard does not address the "critical questions" of "whether the union placed the IHOC members in a position where employees could reasonably believe that they spoke for the union " *Id.* at 233. Instead, the Board's approach

³ See *United Builders Supply Co., Inc.*, 287 NLRB 1364, 1367 (1988) (employee was not an agent of the union because the union also was present during the election campaign); *S. Lichtenberg & Co.*, 296 NLRB 1302, 1314-15 (1989) (committee members were not agents of the union because committee members were not the union's sole link to employees because the union's professional staff was involved in campaign effort).

"treats the agency status of the IHOC as a function of 'active participation' of professional organizers, in effect making the agency status of IHOC members turn on the presence of other agents (professional organizers), rather than on the authority conveyed on the putative agents or the impression created in the minds of third parties." *Id.* The Board's standard "fails to differentiate between different types of actions taken by IHOC members" and does not require the union to disavow actions "even though those statements may have had an improper influence on employees." *Id.* at 234. The Third Circuit concluded that "the Board's jurisprudence on this subject is inconsistent with both the mainstream of agency and the NLRA's goals of promoting employee free choice in union elections." *Id.*

The Fifth Circuit's analysis in the case at bar follows the Board's erroneous analysis in *L&J Equipment*. Like the Fifth Circuit, the Hearing Officer in the proceeding below found that the Union's President and Business Agent were actively involved in the organizing campaign and that in-house committee members were not agents of the Union. Pet. App. 39a. The Fifth Circuit specifically addressed, relied upon, and affirmed these findings of the Hearing Officer and the Board.

Significantly, however, in reaching these conclusions the Hearing Officer candidly acknowledged that he was disregarding contrary Circuit court authority adopting common law agency principles, and instead was applying the NLRB's discredited standards. The Hearing Officer held in his Report on Con-way's Objections that Circuit court agency "cases are not consistent with Board standards for determining agency and set out a standard for determining agency that is different from

the Board's standard As a Board hearing officer, I am bound by Board case law, not conflicting circuit court case law." Pet. App. 41a.

Unfortunately, the Hearing Officer's erroneous analysis in the underlying case is not unique in NLRB proceedings. In *PPG Industries*, 671 F.2d 817, 820-22 (4th Cir. 1982), the Fourth Circuit recognized that the "Hearing Officer realized the status of [the Fourth Circuit's liberal application of agency principles] as an obstacle to the result he desired to reach [and] expressly refused to apply" that law in an agency determination, claiming that Fourth Circuit authority is "diametrically opposed to the purposes and policies of the National Labor Relations Act" so he did not have to follow it. *Id.* at n. 5. In denying enforcement of the Board's Order in that case, the Fourth Circuit refused to "defer to a legal determination [from the Hearing Officer and Board] which flouts our previous statements on the law governing whether a group of pro-union employees will be considered an agent of the Union." *Id.* at n. 9. The Fourth Circuit noted that agency analysis involves "real world" applications of accountability which is "why the Hearing Officer felt obliged to strain to circumvent it" and held that the "Hearing Officer's feeble attempt to distinguish [Fourth Circuit authority] does not vitiate his obviously improper attitude" and his "incapacity to make objective findings is manifest." *Id.* at 821-22.

The Hearing Officer's non-acquiescence to Circuit court authority establishes that the Board refuses to adhere to the authority of this Court, common law agency principles, and the liberal construction of agency law. The Fifth Circuit erroneously adopted the Board's analysis

and has wrongly eschewed the liberal construction of agency principles.

3. The scope of agency is an important and recurring issue that merits this Court's immediate review

Whether objectionable conduct is attributable to the union or an employer is a crucial factor bearing on the validity of a representation election. *Baja's Place, Inc.*, 268 NLRB 868, 868 (1984). Where misconduct is attributable to third parties, the NLRB will overturn an election if the conduct is "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). The Board, with judicial concurrence, always has accorded less weight to conduct that is attributable to neither the union nor the employer. The agency status of a union or employer representative often is the deciding factor in both unfair labor practice proceedings and the resolution of election objections because it determines whether the alleged conduct must be imputed to a party or considered as the rogue act of a third-party. Thus, use of the proper principles of agency law are of vital importance to a wide range of NLRB cases.

The distinction between an employee-union supporter and an employee-union agent is a "fine one." *NLRB v. Herbert Halperin Distrib. Corp.*, 826 F.2d 287, 290 (4th Cir. 1987). That distinction, however, must be properly drawn in accordance with this Court's precedent, the common law of agency, and the plain language of 29 U.S.C. §152(13). If the Fifth Circuit's decision stands, competing interpretations of the proper application of common law

agency standards between the NLRB and circuit courts will continue, and the Board's application of the standard for objectionable conduct in union elections will remain divergent and unsettled.

The implications of this case are not limited merely to NLRB proceedings or election objections, but more broadly encompass the correct legal standards for apparent authority arising under common law and the Restatement. Absent resolution from this Court, the Board's standard will continue unhindered in cases before that agency. Certiorari is necessary to rectify the Fifth Circuit's and NLRB's erroneous decisions, to affirm the correct agency principles regarding apparent authority, and to stop the NLRB's continued non-acquiescence to circuit court authority on this important legal issue.

B. The Fifth Circuit's Opinion Created a Circuit Split on the Legal Standards for Agency Analysis of Union In-House Organizing Committee Members

The Fifth Circuit's reliance on the absence of a union's formal delegation or appointment of employees to an in-house committee, and/or the mere presence of union officials at the employer's facility during an organizing drive directly contradicts Third and Fourth Circuit authority. This Court's review is imperative to resolve this split and affirm common law principles adopted by the Third and Fourth Circuits.

Third Circuit. In *NLRB v. L&J Equipment*, 745 F.2d 224 (3rd Cir. 1984), the Third Circuit rejected the NLRB's underlying decision holding that members of the union's in-house organizing committee were not agents

of the union because the union was present at the facility and took an active role in the organizing. Looking to the Restatement (Second) of Agency, the Third Circuit held that apparent authority “turns on the interpretation of the principal’s actions by a third party.” *Id.* at 233. The court held that the critical questions are “whether the union placed the IHOC members in a position where employees could reasonably believe that they spoke for the union.” *Id.*

Further, the Third Circuit established a test for the “proper framework within which to analyze the question of whether a union should be held accountable for the acts of IHOC members.” *Id.* at 234-35.

1. The IHOC as a whole must possess actual or apparent authority to act on behalf of the union in assisting the union in the organizational drive or election campaign.

2. The individual member of the IHOC whose conduct is at issue must be sufficiently active in the IHOC that he or she had actual or apparent authority to act on behalf of the IHOC.

3. The acts of the IHOC member must fall within the scope of his or her role as a member of the IHOC.

4. The union must not have taken adequate steps to repudiate acts which, although unauthorized, fall within the apparent authority of IHOC members.

As noted, the Third Circuit also recognized that the “Board has adopted its own [agency] standard” and has “generally concluded that, when union officials take an

active part in an organizing drive, the members of an IHOC are not agents of the Union.” *Id.* at 233. The Third Circuit rejected the NLRB’s standard outright.

Fourth Circuit. In *Georgetown Dress Corp.*, 537 F.2d 1239, 1243-44 (4th Cir. 1976), the union did not formally appoint a select group of people as a “committee.” The Fourth Circuit found that the “committee had no formal structure, and membership was open to any employee willing to be known as a member of the committee and to work to enlist support for the Union.” *Id.* at 1242. Yet the Fourth Circuit found the committee members to be agents of the Union under principles of apparent authority. The evidence in *Georgetown Dress* established that the committee members were the representatives of the union at the facility in the eyes and ears of the employees, and the union authorized them to occupy that position.

Similarly, in *PPG Industries v. NLRB*, 671 F.2d 817 (4th Cir. 1982), the Fourth Circuit held that a union’s presence during an organizing campaign does not undercut a finding that in-house organizing committee members are agents of the union. A non-employee union representative was present at the facility throughout the organizing campaign, including being present “at the front gate of the plant at least once a week prior to the election and daily during the last ten days of the campaign.” *Id.* at 819-20. Nevertheless, the Fourth Circuit overruled the Board and held that the in-house organizing committee was the alter ego of the union, that the two were “mutually independent allies,” and that the union’s presence at the facility did not undermine a finding that in-house organizing members were agents of the union. *Id.* at 821. The Fourth Circuit also found

the Board's agency analysis to be flawed in that whether the union and in-house organizing committee "did some things without engaging the help of the other" was not dispositive because employees reasonably believed that the in-house organizing committee members were acting as the union. *Id.*

Likewise, in *NLRB v. Kentucky Clay*, 295 F.3d 436 (4th Cir. 2002), the Fourth Circuit reversed the Board's holding that the union's in-house organizing committee members were not agents of the union. The Board had found that the committee members were not agents of the union because they were not formally designated with any title and because the union was simultaneously present at the facility during the organizing. The Fourth Circuit held that "our decisions in *Georgetown Dress* and *PPG Industries* did not rest on the fact that the agents were given any formal label the Union cannot escape responsibility for the improper actions of employees which are otherwise properly charged to it under principles of apparent authority simply by not bestowing a formal title upon them." *Id.* at 443-44. The Fourth Circuit also found that the union's presence at the employer's facility was not dispositive because the union "chose to take a role of minimal involvement while allowing, and at times directing" members of the in-house organizing committee to do the actual organizing. *Id.* at 445. The court also distinguished other cases where non-employee union members present at the facility were "heavily involved in the organizing campaign." *Id.* at 444.

This authority from the Third and Fourth Circuits correctly analyzed common law agency principles of apparent authority by considering whether the union's

conduct, on the whole, caused employees to reasonably believe that the committee members had authority to speak for the union. Looking to the Restatement, these Circuits rejected the Fifth Circuit's analysis that emphasizes official designation, the union's presence during the organizing campaign, or consideration of whether specific acts performed were authorized. The Court should grant Certiorari to resolve this split and affirm common law agency principles of apparent authority.

C. The Fifth Circuit's Holding Cannot Stand Because the NLRB Violated its Rules and Regulations in Conducting the Election

This Court also should grant certiorari to affirm that an NLRB election cannot be properly certified where voters lacked sufficient privacy in which to cast their ballots as a result of the Board's manifest disregard of its own Rules and Regulations. The Fifth Circuit erred in affirming the Board's certification of the election results when those election results were seriously tainted by the Board's deviation from its own Rules and Regulations.

This Court has held that the rules and regulations of an administrative agency are binding. *Service v. Dulles*, 354 U.S. 363, 372 (1956); *United States v. Nixon*, 418 U.S. 683, 694-696 (1974). The Board must follow its own rules, and its deviation from the same is contrary to well-settled law. *Electronic Components Corp. v. NLRB*, 546 F.2d 1088, 1090-94 (4th Cir. 1976). Absent a formally promulgated and published change, an executive agency is bound to consistent interpretation of its own promulgated regulations and procedures. *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579, 586

(D.C. Cir. 1997). Being such an agency, the Board is bound by its own regulations, with the force and effect of law, and the agency's failure to follow its regulations renders its accompanying decision invalid. See *Cunningham v. United States*, 423 F.2d 1379, 191 Ct.Cl. 471 (1970) (Air Force); *Piccone v. United States*, 407 F.2d 866, 186 Ct.Cl. 752 (1969) (Navy Dept.); *Watson v. United States*, 162 F. Supp. 755, 142 Ct.Cl. 749 (1958) (War Dept.); and *Hanifan v. United States*, 354 F.2d 358, 173 Ct.Cl. 1053 (1965) (Civil Service Commission).

Courts have not hesitated to strike down NLRB decisions that failed to conform to the agency's Rules and Regulations. In *Gulf States Mfgs. Inc. v. NLRB*, 579 F.2d 1298, 1308 (5th Cir. 1978), the Board failed to follow its own Rules and Regulations regarding the statute of limitations applicable to unfair labor practice charges after the employer withdrew an unfair labor practice charge and later re-filed. The NLRB's Rules and Regulations required that it re-file or re-open the withdrawn unfair labor practice charges as new charges and handle and consider them as new charges, without tolling the statute of limitations from the withdrawn charge. The NLRB failed to consider the re-filed charge as a new charge and the Fifth Circuit held that the Board violated its own internal procedures in its Rules and Regulations. The Fifth Circuit noted that the "violation adversely affected the rights of the Company by depriving it of the defense of limitations afforded by Section 10(b), and was error." *Id.* at 1309. The Fifth Circuit affirmed that "the failure of an agency to follow its regulations renders its decisions invalid." *Id.* at 1308.

The NLRB rule that ballots be marked in an actual "voting booth" is a binding Rule and Regulation published in the federal register. 29 C.F.R. §101.19(a)(2):

As to the mechanics of the election, a ballot is given to each eligible voter by the Board's agents. The ballots are marked in the secrecy of a voting booth."

NLRB Rules & Regulations Section 101.19(a)(2).

Beyond the clear language of this Rule requiring an actual voting booth, the NLRB's Casehandling Manual adds additional insight as to how the required voting booth is to be used:

The voter proceeds from the checking table to a *voting booth*. The Board agent should *police the booth* to see that there are no cross-conversations between *occupants* and that there is *no more than one occupant per booth*. The Board agent should also occasionally inspect *the interior of the booth*.

What is required is a *compartment or cubicle* that not only *provides privacy* but that *also demonstrates the appearance of providing privacy*, while maintaining a level of dignity appropriate to the election process.

The voter is then given a ballot and instructed to *enter the booth*, mark the ballot, fold it so as to keep the mark secret and return to the voting table. The Board agent and the observers

should make sure that when the challenged voter *comes out of the booth*, he/she goes to the voting table and does not drop the ballot in the box before placing it in the envelope.

NLRB Casehandling Manual §11304 (emphasis added).

The Casehandling Manual's use of the terms "occupant" and "interior" requires that the voting booth be a personal space that a voter can "enter." The terms "police" and "inspect" demonstrate that the Board agent must take affirmative steps to monitor the voting booth, as the "interior" of the booth should not be in the Board Agent's plain sight or open to the observers.

The Board Agent who conducted the election in Laredo failed to follow the NLRB's Rules and Regulations when he provided no actual voting booth in which employees could mark their ballots in privacy. Instead, the three-sided cardboard shield used by the Board Agent falls far short of the Board's required voting booth, as it was not a "compartment or cubicle," but rather a "U shape[d]" "piece of cardboard" loosely placed on a table just feet away from the Observers. Pet. App. 102a. There was no "booth" and no area for employees to "enter" to vote in private.

The Board's use of a non-compliant cardboard shield undermines the secret ballot election process because it does not afford voters the level of privacy required. The Board regularly upholds election objections when voting arrangements failed to afford employees the requisite level of privacy. In *Imperial Reed & Rattan*, 118 NLRB 911 (1957), the Board agent oversaw the creation of an improvised voting booth that included stacking chairs and

cushions to obscure observers' view of voters' actions. "The union observer stated that he could see some of the ballots as the employees placed them on the voting table although he could not see how they were marked." *Id.* at 912-13. Under those circumstances – even where the testimony was that the observer could not see how the ballots were marked – the Board still found that "in the interest of preserving the integrity of our election processes, we shall set aside the election and direct that a new election be held." *Id.* at 913; *see also Columbine Cable Co.*, 351 NLRB 1087, 1087 (2007) (the Board "has consistently set aside elections where voting arrangements could have led employees to believe they were being observed as they voted."); *Royal Lumber Co.*, 118 NLRB 1015, 1017 (1957) (setting aside an election where employees voted under circumstances where, nonvoter "could have seen" how some employees voted and that the employees "could have believed" that their votes had been observed).

The Board Agent's failure to use an actual voting booth and his improper use of a cardboard shield significantly affected the election and raised "a reasonable doubt as to the fairness and validity of the election." *Durham School Services*, 360 NLRB No. 108, slip op. at 11 (2014). The Board Agent's failure to use an actual voting booth was the key contributing factor to employees' reasonable belief that the secrecy of their votes was compromised. Employee testimony on the issue was consistent:

Q: Did you feel you had enough privacy while you were voting to cast your vote with the requisite secrecy?

A: No, I didn't feel privacy because – because, at the moment of casting my vote, there was a piece of cardboard that didn't cover up all of me. So the two or three people that were there could see what I was doing, just from the way that I moved my arm Tr. 626.

Q: Any why did you think there was not enough privacy?

A: In my case, the cover, the shield went up to at least my chest to the way where anybody could see in that room. Since it was actually next to where Isabel and J.J. was, I didn't feel it was enough privacy for me to vote, so when I voted, I kind of tried to throw them off with my arm movement. I was leading vote yes and it goes this way and now, I kind of extended by pen to vote to throw them off because J.J. was looking at me. Tr. 690-92.

The Board's failure to use an actual voting booth required by its own Rules and Regulations was significant because of the way the Board Agent set up the voting room, which afforded only minimal privacy, and because the Union's election observer engaged in inappropriate conduct during the election. During the Objections hearing, Employer Observer Isabel DelToro testified that Union Observer J.J. Martinez made several comments to voters during the election while voting was taking place, engaged in conversations with employees who were voting, and campaigned for the Union in the polling place. Tr. 381-83, 548-49. Martinez himself admitted that he intentionally stared directly at employees as they were

marking their ballots, in a manner that employees testified made them uncomfortable and concerned. Tr. 267, 548-49. Martinez also picked up the ballot box during the morning voting period and shook it. Tr. 385-86. Further, during the election the observers were mere feet away from where employees marked their ballots and there were as many as three employees in the 15-foot wide training room at the same time either voting or waiting to vote. Tr. 346. The Board Agent regularly stood next to the cardboard shield while employees were marking their ballots, causing several employees to believe that the Board Agent was monitoring them and/or could see how they were voting in the election. Tr. 346. In sum, the Board Agent's failure to use an actual voting booth as required by the Board's Rules and Regulations was not simply harmless error, but rather it exacerbated a voting environment that already lacked any "appearance of" privacy and a "level of dignity appropriate to the election process." Casehandling Manual, Part Two §11304.3.

The Fifth Circuit's erroneous decision implicates significant administrative due process deficiencies that strike at the heart of federal labor policy and the Board's central mission to conduct free and fair elections. As the Ninth Circuit pointed out in *NLRB v. Welcome-American Fertilizer Co.*, 443 F.2d 19, 20 (9th Cir. 1971), "failure to follow such guidelines tends to cause unjust discrimination and deny adequate notice contrary to fundamental concepts of fair play and due process."

Further, the Board Agent's use of a cardboard shield instead of the required voting booth was not an isolated incident. The Board argued before the Fifth Circuit that use of the voting shield was permissible

because the Board used it in past elections and because the Casehandling Manual refers to "cardboard" voting booths. The agency further contended that use of these shields was both prevalent and officially "sanctioned" by the agency. The Board's refusal to adhere to its own Rules and Regulations requiring an actual voting booth in elections is acknowledged within the agency and this improper practice will continue to be a recurring issue unless addressed by this Court.

The NLRB's failure to follow its own Rules and Regulations requiring it to use an actual voting booth for elections involves the NLRB's most important administrative function – conducting secret ballot elections. This Court should require the NLRB to follow the requirements of its own Rules and Regulations.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,
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APPENDIX

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APPENDIX A — OPINION OF THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH
CIRCUIT, FILED SEPTEMBER 27, 2016

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-60861

CON-WAY FREIGHT, INCORPORATED,

Petitioner Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent Cross-Petitioner

Filed
September 27, 2016

On Petition for Review and Cross-Application
for Enforcement of an Order of the
National Labor Relations Board

Before STEWART, Chief Judge, and CLEMENT and
HAYNES, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge:

Con-way Freight, LLC (“Con-way”) petitions for
review of a union election at its Laredo, Texas facility, and
for review of a National Labor Relations Board (“Board”)

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Appendix A

Decision and Order finding that Con-way engaged in unfair labor practices. The Board cross-applies for enforcement of its Order. Con-way's petition is DENIED; the Board's cross-application is GRANTED.

I

Con-way provides freight services across North America and employs over 100 drivers and dockworkers at its Laredo, Texas facility. In 2014, a group of Con-way employees in Laredo contacted the International Brotherhood of Teamsters, Local 657 ("Union") regarding possible unionization. Two representatives of the Union met with a group of Con-way employees and explained that, once a sufficient number of employees signed representation cards, the Union could petition the Board to conduct an election for purposes of collective bargaining representation. The Union representatives visited with Con-way employees multiple times, collecting signatures. Several employees also volunteered to provide additional signature and membership cards to coworkers and to campaign in support of the Union.

Once enough signatures were collected, the Union petitioned the Board for an election. An election was scheduled for the following month. Leading up to the election, a small number of employees reported feeling harassed and intimidated by pro-Union coworkers, with some employees testifying that they were threatened with termination if they did not support unionization. In addition, several anti-Union employees' vehicles were vandalized in the weeks prior to the election, though no culprits were ever identified.

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Before the election, the Board agent held a pre-election conference with the parties. Con-way was represented by an experienced labor attorney, its own assistant general counsel, and its selected observer. The Union was represented by one of the representatives who had previously met with Con-way employees and its selected observer. The Board agent arranged to hold the election in the training room at the Con-way facility. Neither Con-way nor the Union objected to the Board agent's arrangement of the voting area at the pre-election conference.

After the pre-election conference concluded, the voting began. Employees entered the training room one at a time and filled out their ballots behind a shielded voting lectern. The Board agent and each party's observer were present in the polling place. The election was close, but the Union won: 55 yeas against 49 nays, with an additional four challenged ballots that went uncounted.

Following the election, Con-way filed a number of objections and the Board ordered a hearing. The hearing officer recommended overruling all of Con-way's objections. The Board adopted the officer's recommendation, and certified the Union as the employees' collective bargaining representative. Con-way refused to negotiate with the Union following the election, leading the Union to file an unfair labor practice charge with the Board. The Board eventually issued a final Decision and Order, finding that Con-way engaged in an unfair labor practice when it failed to bargain with the Union. Con-way petitioned this court for review of the election and

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the Board's subsequent Order. The Board cross-applied for enforcement.

II

"Congress has given the Board wide discretion in the conduct and supervision of representation elections, and the Board's decision warrants considerable respect from reviewing courts." *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991). "Our review is limited to determining whether the Board has reasonably exercised its discretion, and if the Board's decision is reasonable and based upon substantial evidence in the record considered as a whole," the Board's decision will be upheld. *Id.* "There is a strong presumption that ballots cast under specific [Board] procedural safeguards reflect the true desires of the employees." *Id.* "A party seeking to overturn a Board-supervised election bears a heavy burden. Its allegations of misconduct must be supported by specific evidence of specific events from or about specific people. Further, an election may be set aside only if the objectionable activity, when considered as a whole influence[d] the outcome of the election." *Boston Insulated Wire & Cable Sys. v. NLRB*, 703 F.2d 876, 880 (5th Cir. 1983) (internal quotations and citations omitted).

III

Con-way raises five separate arguments for setting aside the results of the election: (1) the Board agent failed to ensure the secrecy and privacy of the election; (2) the Board erroneously held that a group of pro-Union

Appendix A

employees were not agents of the Union; (3) Union agents engaged in objectionable electioneering; (4) the election was held in an atmosphere of fear and intimidation sufficient to taint the results; and (5) we should invalidate the election results because the closeness of the election, combined with the evidence supporting the four other grounds, is sufficient to taint the results. We address each of these in turn.

A.

Con-way argues that the Board agent compromised the integrity of the election by failing to use a proper voting booth, failing to correctly assemble the cardboard shield used in place of a voting booth, and by not securing the secrecy of the polling area. Ballots were cast in a three-sided cubicle-shaped device specifically designed for elections, called the "Poll Master II." The training room that was used as the polling place shared a door with the breakroom, where voters entered and exited. Persons in the breakroom could see the front of the booth when the door opened, but they could not see what a voter was doing inside the booth. The Poll Master II consists of a three-sided cardboard shield for privacy, a plastic base into which the cardboard shield is inserted, and aluminum height-adjustable legs onto which the shield and base may be placed. The Board agent inserted the shield into the base, and then placed the shield and base on top of a table in the polling place rather than on the aluminum legs. Con-way maintains that because the table was slightly lower than the legs would have been, observers were able to see more of the voters' upper torso and arms while

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voting. Con-way argues that this increased exposure to prying eyes may have intimidated voters and caused them to change their vote. We disagree. Observers were simply not able to see how voters filled out their ballots.¹

B.

Con-way contends that a group of pro-Union employees who campaigned for unionization constituted an in-house "Union Committee," and were therefore the Union's agents. We apply common law agency principles in the labor law context. See *Poly-Am., Inc. v. NLRB*, 260 F.3d 465, 480 (5th Cir. 2001). "One of the primary indicia of agency is the apparent authority of the employee to act on behalf of the principal." *Id.* "The test of agency in the union election context is stringent, involving a demonstration that the union placed the employee in a position where he appears to act as its representative." *Tuf-Flex Glass v. NLRB*, 715 F.2d 291, 296 (7th Cir. 1983) (emphasis in original). An employee who engages in "vocal and active" support does not become an agent on that basis alone. *United Builders Supply Co.*, 287 N.L.R.B. 1364, 1364 (1988) (holding that an employee's status as a leading union supporter was insufficient to establish general union agency).

Here, the Union never appointed any employee to serve on any type of committee on its behalf. No employee

1. At oral argument, counsel for Con-way suggested that, by seeing the upper arm and shoulder, an observer might be able to read a voter's body language and determine which side of the yes/no ballot was being marked. We find that argument unavailing.

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served as the primary communication conduit between the Union and other Con-way employees. The Union dispatched its own representatives who visited the facility on multiple occasions, meeting with employees to explain the election process and garner support. There were, to be sure, employees who distributed membership cards to their coworkers and advocated for unionization, but, as the hearing officer noted, "[t]hese interested employees were equals, just employees working concertedly as a group in their common interest." In any union election, it is very likely that pro-union employees will make concerted efforts to persuade their colleagues. Such attempts at persuasion do not make employees agents of a union.

C.

J. J. Martinez ("Martinez") was the Union observer during the election. Con-way argues that, while observing the proceedings, Martinez engaged in improper electioneering, surveillance, and list-keeping. Martinez made some ambiguous remarks to a few voters when they entered the polling place, such as "here we are," "this is how we do it," and "you know what you have to do." It is true that "sustained conversation" between parties to the election and employees preparing to vote "constitutes conduct which," "regardless of the remarks exchanged," "necessitates a second election." *Milchem, Inc.*, 170 N.L.R.B. 362, 362 (1968). "[A]pplication of this rule," however, is "informed by a sense of realism." *Id.* At 363. Martinez's brief, isolated remarks do not violate the *Milchem* rule. See *Hood Furniture*, 941 F.2d at 329 (noting that "prolonged conversations" are required to violate

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the *Milchem* rule). Martinez also apparently flashed a thumbs-up signal to some voters, but there is no evidence that these signals were “clearly linked to any instructions to vote for the Union.” *U-Haul Co. of Nevada, Inc.*, 341 N.L.R.B. 195, 196 (2004).

In his role as observer, Martinez checked off the names of eligible voters as they entered the room to receive their ballots. It is “well-established” that an election may be set aside “if employee voters know, or reasonably can infer, that their names are being recorded on unauthorized lists.” *Days Inn Mgmt. Co. v. N.L.R.B.*, 930 F.2d 211, 215 (2d Cir. 1991) (internal quotation omitted). There is no evidence here that Martinez created or maintained a separate list of voters in violation of Board rules.

Although we do not condone Martinez’s sometimes unprofessional behavior, the Board reasonably exercised its discretion in concluding that none of his actions were sufficient to “destroy the atmosphere necessary for a free choice in the election and thus to warrant setting the election aside.” *Hood Furniture*, 941 F.2d at 329.

D.

Con-way further argues that the election is invalid because it was conducted in an atmosphere of fear and intimidation. Specifically, Con-way alleges that Union agents and third parties threatened job loss for employees who did not vote for the Union, that the Union created a secret “hit list” to threaten anti-Union employees, and that a small number of anti-Union employees’ vehicles were vandalized around the time of the election.

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The evidence indicates that rumors of termination for those who voted against the Union were unsourced, unconfirmed, and reached only a small number of employees. Such isolated rumors of job loss are not enough to create an atmosphere of fear and intimidation sufficient to undermine the results of an election.²

Con-way failed to present any solid evidence proving that any alleged “hit-list” existed. Only one employee claimed to have heard rumors of such a list. The evidence suggests that there were instead typical and permissible campaign lists, used to gauge and track employee support for the Union prior to the election. Such lists do not impact the integrity of an election.

Four employees testified that, around the time of the election, their vehicles were vandalized. All four employees had been opponents of the Union. There is no evidence in the record identifying the vandals, however, and so the evidence of damage has limited probative value. See *NLRB v. White Knight Mfg. Co.*, 474 F.2d 1064, 1067 n.3 (5th Cir. 1973) (“The rule is well established that where the challenged conduct is not attributable to either of the parties it can be given less weight than if the conduct

2. It is debatable whether such threats would make an employee more or less likely to vote for a union in the first place. After all, “alleged misrepresentation of mandatory union membership” might well “inure[] to the benefit of the Company rather than the Union.” *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 31 (5th Cir. 1969). An undecided employee might find such strong-arm tactics unseemly or unsettling, for example, and might be inclined to vote against unionization for that reason.

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were attributable to the parties themselves.”). There is also no evidence indicating that employees’ votes were impacted by the vandalism. We acknowledge that vehicular vandalism is serious. Nonetheless, given the small number of incidents and the lack of evidence linking the vandalism to Union supporters, we conclude that the Board reasonably exercised its discretion in finding that the vandalism did not create an atmosphere of fear and intimidation such that employees were unable to freely cast their votes.

E.

Con-way lastly argues that the close vote, combined with all other evidence, mandates setting aside the election. “The closeness of the election is obviously relevant.” *NLRB v. Gooch Packing Co.*, 457 F.2d 361, 362 (5th Cir. 1972). But “[t]he cumulative impact of a number of insubstantial objections does not amount to a serious challenge meriting a new election.” *Lamar Co., LLC v. NLRB*, 127 F. App’x 144, 151 (5th Cir. 2005). The bulk of Con-way’s objections are based on “isolated events involving unknown persons or other rank and file employees rather than Union representatives.” *Hood Furniture*, 941 F.2d at 330. These objections, and the evidence Con-way offers in support, are insufficient to “make a prima facie showing that the atmosphere of free choice [was] destroyed by the alleged conduct.” *Id.*

* * *

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There is no doubt that this election was imperfect. In particular, Martinez, the Union observer, acted unprofessionally inside the polling place. We do not condone this behavior. We do not, however, “sit to determine whether optimum practices were followed.” *Avondale Indus., Inc. v. NLRB*, 180 F.3d 633, 637 (5th Cir. 1999) (internal quotation omitted). Rather, we determine “whether on all the facts the manner in which the election was held raises a reasonable doubt as to its validity.” *Id.* (internal quotation omitted). Taken as a whole, the facts here do not raise “a reasonable doubt” as to the validity of this election.

IV

Con-way Freight’s petition is DENIED. The Board’s cross-application for enforcement is GRANTED.

**APPENDIX B — DECISION AND ORDER OF THE
NATIONAL LABOR RELATIONS BOARD, DATED
NOVEMBER 27, 2015**

NATIONAL LABOR RELATIONS BOARD

Case 16–CA–159605

CON-WAY FREIGHT INC. AND TEAMSTERS
LOCAL 657, AFFILIATED WITH
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS.

November 27, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS
HIROZAWA AND McFERRAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on September 9, 2015, by Teamsters Local 657, affiliated with International Brotherhood of Teamsters (the Union), the General Counsel issued the complaint on September 10, 2015, alleging that Con-way Freight Inc. (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain following the Union's certification in Case 16–RC–133896. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g). *Frontier Hotel*, 265 NLRB 343 (1982).) The

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Respondent filed an answer, admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On September 25, 2015, the General Counsel filed a Motion for Summary Judgment. On October 1, 2015, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response. The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Union's certification based on its objections to conduct alleged to have affected the results of the election in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.¹

1. In its answer to the complaint, the Respondent admits the filing of the charge, but denies service of the charge. We note,

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On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a Delaware corporation with an office and place of business in Laredo, Texas (the facility), and has been engaged in the business of providing freight services across North America.

In conducting its operations during the 12-month period ending August 31, 2015, the Respondent derived gross revenues in excess of \$50,000 for the transportation of freight from the State of Texas directly to points outside the State of Texas.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

however, that the complaint was timely served within the Sec. 10(b) period on the Respondent's counsel, and that the Respondent filed a timely answer to the complaint. Thus, even assuming that the Respondent was not properly served with a copy of the charge, we find that the Respondent's denial of service does not create a genuine issue of material fact warranting a hearing or constitute grounds for dismissal of the complaint. See *Buckeye Plastic Molding*, 299 NLRB 1053, 1053 (1990) (the failure to make timely service of a charge on a respondent will be cured by timely service within the 10(b) period of a complaint on the respondent, absent a showing that the respondent is prejudiced by such circumstances). Here, there has been no assertion, much less a showing, of prejudice to the Respondent.

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We further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on September 12, 2014, the Union was certified on July 8, 2015, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

Included: All full-time and regular part-time line haul and p&d drivers, and dock workers (including those who load, unload, those who handle over, short & damaged goods, and those who handle weights & inspection) employed by the Respondent at its facility located at 1472 Mines Road, Laredo, Texas.

Excluded: Office clerical employees, employees not on Con-way's payroll, managers, guards and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

About July 17, 2015, the Union requested that the Respondent recognize and bargain with it as the exclusive

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collective-bargaining representative of the unit. Since about July 17, 2015, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since July 17, 2015, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry*

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Co., 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Con-way Freight Inc., Laredo, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Teamsters, Local 657, affiliated with International Brotherhood of Teamsters as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

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Included: All full-time and regular part-time line haul and p&d drivers, and dock workers (including those who load, unload, those who handle over, short & damaged goods, and those who handle weights & inspection) employed by the Respondent at its facility located at 1472 Mines Road, Laredo, Texas.

Excluded: Office clerical employees, employees not on Con-way's payroll, managers, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Laredo, Texas, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced,

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 17, 2015.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 16 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., November 27, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

[APPENDIX INTENTIONALLY OMITTED]

APPENDIX C — DECISION AND CERTIFICATION
OF REPRESENTATIVE OF THE NATIONAL
LABOR RELATIONS BOARD, DATED JULY 8, 2015

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR
RELATIONS BOARD

Case 16-RC-133896

CON-WAY FREIGHT

Employer

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 657

Petitioner

DECISION AND CERTIFICATION OF
REPRESENTATIVE

The National Labor Relations Board, by a three-member panel, has considered objections to an election held September 12, 2014, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 55 for and 49 against the Petitioner, with 4 challenged ballots, an insufficient number to affect the results.

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The Board has reviewed the record in light of the exceptions¹ and briefs,² has adopted the hearing officer's findings³ and recommendations,⁴ and finds that a certification of representative should be issued.

1. Although the Employer excepts to the hearing officer's finding that Antonio Cruz's testimony should not be discredited due to his alleged violation of the sequestration order, this exception is bare and unsupported by argument. Accordingly, pursuant to Sec. 102.46(b)(2) of the Board's Rules and Regulations, we find that this exception should be disregarded. See *2 Sisters Food Group*, 357 NLRB No. 168, slip op. at 3 fn. 11 (2011).

2. Member Johnson notes that the Employer's citations of *Electrical Workers Local 357 (Newtron Heat Trace, Inc.)*, 343 NLRB 1486, 1498 (2004), *Bloomfield Health Care Center*, 352 NLRB 252, 256 (2008), and *NLRB v. L & J Equipment Co.*, 745 F.2d 224, 233 (3rd Cir. 1984) within Sec. IV.B. of its supporting brief either do not fully support the positions they are cited for or contain inaccurate quotations. Sec. 102.46(c)(3) of the Board's Rules and Regulations requires that parties "clearly" present the facts and law relied on in support of their argument; he cautions that such citations fail to meet this standard.

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

4. In adopting the hearing officer's recommendation to overrule the Employer's Objection 10, we do not rely on the hearing officer's finding that "there is a reasonable possibility that some or all of this [vehicle] damage may have been tied, in some undefined way, to the election campaign, or at least that employees reasonably could reach

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IT IS CERTIFIED that a majority of the valid ballots have been cast for International Brotherhood of Teamsters, Local 657, and that it is the exclusive

that conclusion." By merely establishing that the vehicles of four pro-Employer employees sustained damage prior to the election, the Employer failed to show that the vehicle damage was linked to the election campaign, the Union, or even Union supporters. See, e.g., *ATR Wire & Cable Co.*, 267 NLRB 204, 209-210 (1983), *enfd.* 752 F.2d 201 (6th Cir. 1985); *Beaird-Poulan Division*, 247 NLRB 1365, 1379-1381 (1980), *enfd.* 649 F.2d 589 (8th Cir. 1981); see also *NLRB v. Bostik Division*, 517 F.2d 971, 974 (6th Cir. 1975), *enfg.* 209 NLRB 956 (1974). Further, we do not rely on any evidence of the employees' subjective reactions to the vehicle damage because "[i]t is well established that 'the subjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct.'" *Corner Furniture Discount Center, Inc.*, 339 NLRB 1122, 1123 (2003) (quoting *Picoma Industries*, 296 NLRB 498, 499 (1989)).

Member Johnson agrees that Employer's Objection 10 should be overruled because the Employer failed to establish that the damage done to specific employees' vehicles created a *general* atmosphere of fear and reprisal. Specifically, he notes that there was no direct evidence connecting either the Petitioner or any pro-Petitioner employees to the damage, nor was there evidence of widespread dissemination of any broad-based pattern of vehicle damage (as opposed to limited dissemination of single incidents of damage) amongst the employees in the unit. He notes, however, that there may be instances where it would be reasonable to attribute vehicle damage to a certain party to an election, even in the absence of express threats of vehicle damage or specific evidence of responsibility. For example, where there was little or no prior occurrence of vehicle damage, and subsequently only the vehicles of employees who did not support the union were damaged, and a significant amount of this kind of damage occurred and became clear to employee-voters before the election, he would find objectionable conduct. However, the Employer failed to show such a scenario here.

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collective-bargaining representative of the employees in the following appropriate unit:

Including: All full-time and regular part-time line haul and p&d drivers, and dock workers (including those who load, unload, those who handle over, short, & damaged goods, and those who handle weights & inspection) employed by the Employer at its facility located at 1472 Mines Road, Laredo, Texas.

Excluding: Office clerical employees, employees not on Conway's payroll, managers, guards and supervisors as defined in the Act.

Dated, Washington, D.C., July 8, 2015.

Mark Gaston Pearce, Chairman

Harry I. Johnson, III, Member

Lauren McFerran, Member

NATIONAL LABOR RELATIONS
BOARD

APPENDIX D — NATIONAL LABOR RELATIONS BOARD REGION 16 HEARING OFFICER'S REPORT ON EMPLOYER'S OBJECTIONS, DATED FEBRUARY 11, 2015

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

Case No. 16-RC-133896

CON-WAY FREIGHT

Employer

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 657

Petitioner

HEARING OFFICER'S REPORT ON EMPLOYER'S OBJECTIONS

On September 12, 2014, an agent of Region 16 conducted an election among certain employees of the Employer, pursuant to a stipulated election agreement between the Employer and the Petitioner and approved by the Regional Director. A majority of employees casting ballots in the election voted for representation by the Petitioner. However, the Employer contests the results of the election.

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The Employer claims that employee supporters of the Petitioner (including Drivers Antonio Cruz, Josue Lopez, Francisco Maldonado, J. J. Martinez, Javier Moreno, Juan Narron, Julio Ortega, Felipe Perez, and Jose Serna) were agents of the Petitioner and that they engaged in misconduct warranting a new election. Specifically, the Employer contends that these employee supporters of the Petitioner threatened employees with retaliation and/or retribution for not supporting the Petitioner, told employees that the Petitioner would know how they voted, damaged employees' vehicles because they did not support the Petitioner, congregated in the vicinity of the polls, engaged in surveillance or created the impression of surveillance in the vicinity of the polls, and engaged in improper electioneering near the polling area.

Additionally, the Employer contends that during the election Petitioner Observer J. J. Martinez made improper statements and gestures to voters, picked up and shook the ballot box, openly reviewed and counted names of voters on the eligibility list who had and had not voted, actually kept track of and/or made a record of which employees had or had not voted and how they voted, and/or created the impression that he was keeping track of voters.

Further, the Employer claims that the Board agent conducting the election compromised the integrity of the election. Specifically, the Employer contends that the Board agent failed to maintain voter privacy due to his arrangement of the polling area, by using a cardboard voting shield instead of a fully enclosed voting booth, by allowing the Petitioner's observer to engage in the alleged

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misconduct described above, and by failing to prevent or stop electioneering in the vicinity of the polling area.

Based on these contentions, the Employer asks that the election be set aside and that a new election be held.

After conducting the hearing and carefully reviewing the evidence as well as arguments made by the parties, I recommend that the Employer's objections be overruled.

With regard to the objections concerning conduct by employee supporters of the Petitioner, I conclude that the Employer has failed to prove that the individuals involved in the alleged objectionable conduct were agents of the Petitioner. Therefore, their conduct cannot be attributed to the Petitioner. I further conclude that the conduct engaged in by these individuals was not so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible. More specifically, the evidence is insufficient to establish that employee supporters of the Petitioner threatened employees with retaliation and/or retribution for not supporting the Petitioner, told employees that the Petitioner would know how they voted, damaged employees' vehicles because they did not support the Petitioner, improperly congregated in the vicinity of the polls, engaged in surveillance or created the impression of surveillance in the vicinity of the polls, and/or engaged in improper electioneering near the polling area.

Regarding the Petitioner observer's alleged misconduct, I conclude that the observer was an agent of

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the Petitioner during the election and that his conduct in that capacity can be attributed to the Petitioner. However, I further conclude that the objections concerning his conduct at the election should be overruled because the evidence is insufficient to show that the observer engaged in objectionable conduct that warrants setting aside the election. More specifically, even assuming that the observer engaged in the conduct attributed to him, the evidence does not establish that his conduct amounted to misconduct that materially affected the results of the election and warrants overturning the election.

As for the objections about the Board agent, I recommend that the Employer's objections be overruled because the evidence is insufficient to show that the Board agent's conduct raises a reasonable doubt as to the fairness and validity of the election. More specifically, the evidence is insufficient to establish that the Board agent failed to maintain voter privacy due to his arrangement of the polling area, improperly used a cardboard voting shield instead of an enclosed voting booth, allowed the Petitioner's observer to engage in objectionable misconduct, and/or failed to prevent or stop improper electioneering in the vicinity of the polling area.

In its objections (specifically, Objection 7), the Employer alleged that during the critical period the Petitioner promised employees monetary rewards and/or other benefits in exchange for supporting it in the election. During the hearing, the Employer did not submit any evidence in support of this objection, and it formally requested to withdraw it. In light of the Employer's

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withdrawal of Objection 7, the Petitioner did not submit any evidence to respond to it.

I recognize that the election result was fairly close (55 votes for the Petitioner and 49 votes against, with 4 non-determinative challenged ballots). However, my view is that, even taking into account the closeness of the election result, the alleged objectionable conduct does not warrant overturning that result.

After recounting the procedural history, I discuss the Board standard for setting aside elections, including the standards applicable to alleged misconduct by individuals who are not party agents, to a party's alleged objectionable conduct, and to Board agent misconduct. Then I discuss the parties' burdens and the Board's standards with regard to establishing an agency relationship. Next, I discuss the agency status of the individuals who engaged in the alleged misconduct. These findings on agency status will determine which standard applies to the particular conduct involved, in terms of deciding whether such conduct warrants setting aside the election. Following these matters, I discuss each objection. I do not address each objection in the numerical order set forth in the Employer's objections document. Instead, I discuss the objections in an order that I conclude allows for a relatively clear presentation of the various issues presented by the objections, taking into account that there is an interrelationship among several objections. I arrange the discussion of the various objections roughly in the chronological order in which the alleged misconduct took place, and I group together some objections that raise related issues.

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Finally, I address issues about violations of the sequestration order that I entered at the beginning of the hearing. The Employer contends that one of the witnesses, Antonio Cruz, violated my order. Additionally, there is an issue that I raise on my own about whether testimony by the Employer's Assistant General Counsel, Daniel Egeler, violated my order. I conclude that Cruz did not violate my order but that Egeler's testimony was in violation. However, I do not recommend imposing any sanction, such as discrediting Egeler's testimony.

PROCEDURAL HISTORY

The Petitioner filed the petition in this matter on August 1, 2014. The parties agreed to the terms of an election and the Region approved their agreement on August 11, 2014. The election was held on September 12, 2014. There were two voting sessions on that day. The first session was from 7:00 a.m. to 10:30 a.m. and the second session was from 5:00 p.m. to 8:00 p.m. The employees in the following unit voted on whether they wished to be represented by the Petitioner:

All full-time and regular part-time line haul and p&d drivers, and dock workers (including those who load, unload, those who handle over, short & damaged goods, and those who handle weights & inspection) employed by the Employer at its facility located at 1472 Mines Road, Laredo, Texas.

The ballots were counted and a tally of ballots was provided to the parties. The tally of ballots shows that

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55 ballots were cast for the Petitioner, and that 49 ballots were cast against representation. There were four non-determinative challenged ballots. Thus, a majority of the valid ballots were cast in favor of representation by the Petitioner.

Objections were timely filed. The Regional Director for Region 16 (Fort Worth, Texas) ordered that a hearing be conducted to give the parties an opportunity to present evidence regarding the objections. Due to the objections involving alleged misconduct by the Region 16 Board agent who ran the election, the Regional Director sought a hearing officer from outside Region 16. I am a field attorney working out of Region 27 (Denver, Colorado). As the hearing officer designated to conduct the hearing and to recommend to the Board whether the Employer's objections are warranted, I heard testimony and received into evidence relevant documents on November 18 through 20 and December 2 through 3, 2014. The parties were permitted to file briefs, and both the Employer and the Petitioner did so in a timely manner. Briefs have been fully considered.

THE BURDEN OF PROOF AND THE BOARD'S STANDARD FOR SETTING ASIDE ELECTIONS

It is well settled that "[r]epresentation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Lockheed Martin Corp.*, 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir.

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1991) (internal citation omitted). Therefore, "the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one." *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005), citing *Kuw Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989).

In determining whether to set aside an election based on party misconduct, the Board applies an objective test. The test is whether the conduct of a party has "the tendency to interfere with employees' freedom of choice." *Cambridge Tool & Mfg. Co., Inc.*, 316 NLRB 716, 716 (1995). Thus, under the Board's test the issue is not whether a party's conduct in fact coerced employees, but whether the party's misconduct reasonably tended to interfere with the employees' free and uncoerced choice in the election. See *Baja's Place*, 268 NLRB 868 (1984).

In contrast, when there is no evidence that a party is involved in alleged misconduct the test to be applied is whether the misconduct by third parties is so aggravated as to create a general atmosphere of fear and reprisal rendering a fair election impossible. See *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). The Board requires this more rigorous showing for third-party conduct because the conduct of third parties tends to have less effect upon voters than similar conduct attributable to the employer who has control, or the union which seeks control, over the employees' working conditions. See *Cal-West Periodicals*, 330 NLRB 599, 600 (2000); *Orleans Manufacturing Co.*, 120 NLRB 630, 633 (1958). Furthermore, the employer and the union are deterred from election misconduct by the Act's unfair labor practice

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provisions and the trouble and expense of going through a rerun election, whereas third parties do not face those deterrents. *Id.* Were the Board to give the same weight to conduct by third persons as to conduct attributable to the parties, the possibility of obtaining quick and conclusive election results would be substantially diminished. *Id.*

To set aside an election based on Board agent misconduct, the objecting party must show that there is evidence that “raises a reasonable doubt as to the fairness and validity of the election.” *Durham School Services, LP*, 360 NLRB No. 108, slip op. at 4 (2014), *citing Polymers, Inc.*, 174 NLRB 282, 282 (1969), *enforced* 414 F.2d 999 (2d Cir. 1969), *cert. denied* 396 U.S. 1010 (1970).

Although the narrowness of the vote in an election is a relevant consideration, it is not dispositive. Even in a close election, the Board fully analyzes the evidence to determine if the applicable standard is met. *See Accubuilt, Inc.*, 340 NLRB 1337, 1337 (2003).

THE EMPLOYER'S OPERATION

The Employer is a Michigan corporation that is engaged in the business of providing freight services across North America. It has an office and place of business in Laredo, Texas, which is where the representation dispute in this case originated. At its Laredo facility, the Employer employs over a hundred drivers and dockworkers.

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**THE BURDEN OF PROOF AND THE BOARD'S
STANDARD FOR ESTABLISHING AGENCY
STATUS; WHETHER THE EMPLOYEES WHO
SUPPORTED THE PETITIONER WERE ITS
AGENTS**

Record Evidence

As stated above, the Employer contends that certain employee supporters of the Petitioner - including Drivers Antonio Cruz, Josue Lopez, Francisco Maldonado, J. J. Martinez, Javier Moreno, Juan Narron, Julio Ortega, Felipe Perez, and Jose Serna - engaged in conduct that interfered with the election. In assessing the validity of these contentions, it is necessary to determine whether or not any of these employees were agents of the Petitioner.

The evidence shows that in approximately Summer 2014 several of the Employer's drivers - Antonio Cruz, Francisco Maldonado, Javier Moreno, Juan Narron, Julio Ortega, and Felipe Perez - began meeting at a Laredo public park on Saturdays to discuss getting a union to represent them due to concerns that the Employer was not treating employees well. Eventually, these employees' discussion led to someone contacting the Petitioner about representation.

Thereafter, the Petitioner - through its President/ Business Manager Frank Perkins and Business Agent Paul Cruz - worked with interested employees to obtain enough employee signatures to support a representation petition. Once the Petitioner filed a petition, it continued

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to work with interested employees to obtain enough employee votes in its favor to win an NLRB-conducted election.

Throughout the organizing, the Petitioner's President/Business Manager Perkins and Business Agent Cruz visited Laredo in order to hold general meetings with the employees who chose to attend. Cruz' responsibility in connection with organizing the Employer's Laredo employees was to meet and talk to potential members there. Many of the Employer's employees in Laredo speak Spanish. Cruz is bilingual. Cruz visited Laredo approximately once or twice per week to work on the organizing effort. Sometimes Cruz met with the employees by himself and other times President/Business Manager Frank Perkins went with him.

At these meetings, Cruz and Perkins talked to the employee-attendees about the organizing process. These Petitioner officials explained the organizing process to them, including that to be able to file a representation petition the Petitioner needed to have enough employees sign papers reflecting that they wanted the Petitioner to represent them for purposes of collective bargaining. Some employees who attended the meetings signed membership forms at that time. Additionally, at these meetings the Petitioner officials provided approximately three blank membership cards to any employee who wanted them. The Petitioner officials informed these employees that they would need to talk to their coworkers about signing. The Petitioner did not provide employees with specific instructions or training, either in writing or verbally,

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about how to go about dealing with their coworkers in the organizing process. Perkins and Cruz did tell them not to talk to their coworkers about signing during working time and not to make threats. Perkins and Cruz also explained to them that they needed to turn in to them any signed membership cards that they obtained.

Several employees who supported the Petitioner - including Antonio Cruz, Francisco Maldonado, Javier Moreno, Juan Narron, Julio Ortega, and Felipe Perez - volunteered to provide assistance to the Petitioner during the organizing process, including through the critical period following the filing of the representation petition up to the election. In general, this group of employees supported the Petitioner, provided membership cards to their coworkers, talked to their coworkers about signing with the Petitioner, and/or generally campaigned in favor of the Petitioner. Narron received cards from the Petitioner, but he did not give them out to others. It appears that there were efforts to continue to obtain employee signatures even after the Petitioner filed the petition, right up to the election.

The evidence shows that the Petitioner did not designate this group of pro-Petitioner employees to be a formal or informal committee. There was no criteria for selection to a committee, or any selection of officers of a committee. The Petitioner did not designate any of these employees on any internal Petitioner documents to be members of a committee, and it did not send any letter to the Employer to indicate that these individuals were working on its behalf. Nor did the Petitioner ever

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communicate to other employees that the group of supporters constituted a Petitioner committee or that any of the employees who supported it was some sort of petitioner representative. The employees who were interested in having representation merely supported the Petitioner. These interested employees were equals, just employees working concertedly as a group in their common interest in improving working conditions. The record, and the Employer's brief, contains references to a "committee" or an "in-house committee," but references like this came only from the Employer's attorneys, who used terms like this to characterize the employees' concerted efforts to support the Petitioner. In fact, there was no "committee."

There were some drivers - such as J. J. Martinez, Jose Serna, and Josue Lopez - who supported the Petitioner but who did not participate significantly in getting others to sign with the Petitioner or in any other substantial organizing activity. Martinez personally went to Petitioner meetings and he signed a membership card while there. However, Martinez did not try to get others to sign or otherwise help the Petitioner to organize before the election. Serna previously had worked for a different employer whose employees the Petitioner represented. When employees found out about this, they asked Serna questions about that experience. Serna also spoke out in favor of the Petitioner at a meeting. Otherwise, he was not involved. Josue Lopez attended a meeting that Petitioner held, but he did not urge his coworkers to support the Petitioner. None of the Employer's alleged objectionable conduct involved Josue Lopez.

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Although J. J. Martinez was not actively involved in urging support for the Petitioner, he did serve as the Petitioner's election observer, after a coworker asked him just a couple of days before the election to do so.

The Board's Legal Standard for Agency Status

The burden of proving an agency relationship rests with the party asserting its existence, both as to the existence of the relationship and as to the nature and extent of the agent's authority. See *Millard Processing Services*, 304 NLRB 770, 771 (1991); *Sunset Line & Twine Co.*, 79 NLRB 1487, 1508 (1948).

"[T]he Board 'will not lightly find an employee 'in-plant organizer' to be a general agent of the union.'" *Mastec Direct TV*, 356 NLRB No. 110, slip op. at 1 (March 11, 2011), quoting *S. Lichtenberg & Co.*, 296 NLRB 1302, 1314 (1989). "[E]mployee members of an in-plant organizing committee are not, simply by virtue of such membership, agents of the union." *Mastec Direct TV*, 356 NLRB No. 110, slip op. at 1, quoting *Cornell Forge Co.*, 339 NLRB 733, 733 (2003). In-plant organizers generally are found to be agents of the union only when they serve as the primary conduits for communication between the union and other employees or are substantially involved in the election campaign in the absence of union representatives. See *Cornell Forge Co.*, 339 NLRB at 733.

Agency is not established merely on the basis that employees are engaged in "vocal and active union support." *United Builders Supply Co.*, 287 NLRB 1364,

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1365 (1988); *see also Tuf-Flex Glass v. NLRB*, 715 F.2d 291, 296 (7th Cir. 1983).

Attending organizing meetings or soliciting cards on behalf of a union do not, standing alone, render employees agents of a union. *See Health Care and Retirement Corporation of America v. NLRB*, 255 F.3d 276 (6th Cir. 2000).

Moreover, the agency relationship must be established with regard to the specific conduct that is alleged to be unlawful. *See Pan-Oston Co.*, 336 NLRB 305, 306 (2001); *Cornell Forge Co.*, 339 NLRB at 733.

A party's observer at an NLRB-conducted election is only an agent of that party for the purposes of conduct at the time they act as observers. *See Brinks Inc.*, 331 NLRB 46,46 (2000); *Dubovsky & Sons, Inc.*, 324 NLRB 1068, 1068 (1997). An observer is not the party's agent for any acts outside the observer's role in the election. *See Divi Carina Bay Resort*, 356 NLRB No. 60, slip op. at 10-11 (December 29, 2010).

Application of Board Law to Record Evidence

The Employer has failed to meet its burden of proving that these individual employees were agents of the Petitioner. The evidence does not show that any of them had actual or apparent authority to speak or act on the Petitioner's behalf. Moreover, their vocal and active support for the Petitioner, their attendance at Petitioner's organizing meetings, or their involvement

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in soliciting cards from fellow coworkers did not make them agents. Also, the Petitioner's officials - President/Business Manager Frank Perkins and Business Agent Paul Cruz - were actively involved in the campaign and anyone paying attention would have understood that these Petitioner officials - not the employee supporters of the Petitioner - were the ones who spoke and acted on behalf of the Petitioner.

Moreover, the Employer has not demonstrated that the Petitioner created actual authority or apparent authority for these employee supporters with regard to any of the alleged objectionable conduct attributed to them (threatening employees with retaliation and/or retribution; telling employees that the Petitioner would know how they voted; damaging employees' vehicles; congregating in the vicinity of the polls; engaging in surveillance or creating the impression of surveillance in the vicinity of the polls; and/or engaging in improper electioneering near the polling area).

The Employer relies on the Board's decision in *Pastoor Bros. Co.*, 223 NLRB 451 (1976), to support its agency contention, but that case is readily distinguishable. There, employees formed a formal employee committee by a show-of-hands vote, which the union subsequently used as its own in-plant organizing committee. Testimony established that employees looked upon the committee as the "in-plant representative" of the union, and the union used the formally-established committee as its "liaison" with employees. Also, employee committee members drafted and signed an employee handout that was

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reviewed by the union's attorney and then distributed by the union's business agent. Here there was no committee. Employees merely acted concertedly to support the Petitioner, without ever forming a committee or being used as such by the Petitioner. In *Cornell Forge Co.*, 339 NLRB 733, 734 n.6 (2003), the Board distinguished *Pastoor Bros. Co.* on these grounds, concluding that the case "involve[d] employees with far more substantial indicia of union authority."

Additionally, the Employer relies on *Bristol Textile Co.*, 277 NLRB 1637 (1986), but that case is distinguishable as well. There, the Board deemed an employee to be the union's agent because the employee was the union's *only* link with other employees and the union relied extensively on this employee to be its contact with employees, relaying information back and forth. In these circumstances, employees recognized this particular employee to be the representative of the union at the plant. In short, he was the union's "conduit" between the union and the employees. The present case simply does not involve such facts. The Petitioner's bilingual business agent, Paul Cruz, visited Laredo once or twice per week to meet with employees, and President/Business Manager Perkins often went with him. There is no evidence demonstrating that any of the employees alleged to be agents served exclusively or even extensively as a conduit "go between" who funneled information or other communications between the Petitioner and other employees. In *Cornell Forge Co.*, 339 NLRB 733, 734 n.6 (2003), the Board distinguished *Bristol Textile Co.*, as it did *Pastoor Bros. Co.*, on these grounds. See also *United Builders Supply Co.*, 287 NLRB

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1364, 1364 (1988) (also distinguishing *Bristol Textile Co.* on these grounds).

The Employer also relies on court of appeals cases, from the Third and Fourth Circuits, to support its contention that the employees who supported the Petitioner were its agents. See *NLRB v. L & J Equipment Co., Inc.*, 745 F.2d 224 (3d Cir. 1984); *NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239 (4th Cir. 1976); *PPG Industries, Inc.*, 671 F.2d 817 (4th Cir. 1982). In my view, and as described further below, these cases are not consistent with the above-discussed Board standards for determining agency and, in any event, they do not support the Employer's agency contention.

Preliminarily, it must be stated that, because these circuit court cases set out a standard for determining agency that is different from the Board's standard, as a Board hearing officer I do not have the authority to apply them instead of Board law. As a Board hearing officer, I am bound by Board case law, not conflicting circuit court case law. A hearing officer's role in representation proceedings is similar to that of administrative law judges in unfair labor practice cases. Administrative law judges clearly are bound to follow Board precedent (not precedent of the circuit courts of appeal) unless and until it is reversed by the Board or the Supreme Court. See *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616-617 (1963). Similarly, hearing officers must follow Board precedent.

In that regard, it appears that the Board has not accepted the court's approach to agency set forth in *NLRB*

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v. L & J Equipment Co., Inc., 745 F.2d 224 (3d Cir. 1984). In that case, the union and the employees set up an in-house organizing committee that the union's organizers used to further its organizing goal. Employees informally selected the members of the committee, and they elected a chairman. The committee members received specific instructions from the union, and the members served as a liaison between the union and the other employees. The Board initially determined that the employee-members of this committee were not the union's agents. The court of appeals, however, rejected the Board's test for determining agency status of employees who assist a union by serving on an in-house organizing committee, and the court created its own four-part test. The four factors under the court's test are the following: (1) the organizing committee as a whole must possess actual or apparent authority to act on behalf of the union; (2) the individual member of the committee whose conduct is at issue must be sufficiently active in the committee that he or she had actual or apparent authority to act on behalf of the committee (the court noted that it was not adopting a *per se* rule that all members of in-house organizing committees are agents of the union even if the committee itself has actual or apparent authority); (3) the acts of the committee member must fall within the scope of his or her role as a member of the committee; and (4) the union must not have taken steps to repudiate acts which, although unauthorized, fall within the apparent authority of committee members. The court remanded the case to the Board for it to consider the agency issue under this four-part test. The Board accepted the remand and treated the court's opinion as the "law of the case."

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However, after that case the Board has declined to rely on the court's test. See *Advanced Products Corp.*, 304 NLRB 436, 436 n.2 (1991). See also *BJ's Wholesale Club*, 319 NLRB 483, 506 n.54 (1995) (administrative law judge stated that the Board's decision on remand rested on the court's decision as the law of the case); *Hotel & Restaurant Employees Local 226 (Santa Fe Hotel)*, 318 NLRB 829, 838 (1995) (same).

Additionally, it is not clear on this record that Third and/or Fourth Circuit precedent even would be binding precedent in a later review and/or enforcement proceeding if there were to be one. Section 10(e) of the Act allows for judicial review of Board decisions in circuits where an employer transacts business. The representation proceeding here involved employees in Laredo, Texas, which is in the Fifth Circuit. The stipulated election agreement does show that the Employer is a Michigan corporation and that it provides freight services across North America. Michigan is in the Sixth Circuit. Although the Employer likely does business in the Third and/or Fourth Circuit, the stipulation in the election agreement is too broad to establish that it actually does so. Further, it cannot be assumed that even if the Employer were to petition a court for review it would file such a petition in the Third or Fourth Circuit, given that the events took place in the Fifth Circuit.

In any event, I find that each of these court of appeals cases is distinguishable.

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Even if the Third Circuit's four-part test set forth in *NLRB v. L & J Equipment Co., Inc.*, 745 F.2d 224 (3d Cir. 1984), were to apply here, the evidence does not satisfy that standard. First, the Petitioner did not form any in-house organizing committee. Employees who supported the Petitioner merely took an active role in furthering their own interests by helping the Petitioner to win the election. Moreover, even assuming that this group of employee-supporters constituted a "committee," the Employer has not demonstrated that the Petitioner imbued it with actual or apparent authority (through communications to other employees or to the Employer) to act on its behalf; that any individual employee was sufficiently active in the committee's activities that he had authority to act for it; or that any employee's acts alleged to be objectionable fell within his role as a member of the committee.

In *NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239 (4th Cir. 1976), in finding that employees were union agents, the court relied on several facts that are not present here. In that case, the employees were members of an "In-Plant Organizing Committee" and other employees in the plant knew these employees to be committee members. Further, written notices of union meetings identified the committee and the union as being one and the same. Also, "[t]he committee members in the eyes of other employees were the representatives of the union on the scene and the union authorized them to occupy that position." Here, however, neither the Petitioner nor the employees themselves ever established or held themselves out, verbally or in writing, as a committee, and certainly not a Petitioner committee. Also, the evidence does not establish that employees

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generally viewed their pro-Petitioner coworkers as the representatives of the Petitioner. As stated above, the Petitioner's Business Agent, Paul Cruz, visited Laredo once or twice per week to meet with employees, and President/Business Manager Perkins often went with him. Thus, *Georgetown Dress Corp.* does not compel a finding of agency status. See, e.g., *S. Lichtenberg & Co.*, 296 NLRB 1302, 1315 (1989) (distinguishing *Georgetown Dress Corp.* on the grounds that union organizers were actively involved in the campaign); *Cambridge Wire Cloth Co.*, 256 NLRB 1135, 1139 n.18 (1981) (same). See also *Pierce Corp.*, 288 NLRB 97, 100 n.51 (1988) (also distinguishing *Georgetown Dress Corp.*); *ATR Wire & Cable Co.*, 267 NLRB 204, 209 (1983) (same).

Similarly, *PPG Industries, Inc. v. NLRB*, 671 F.2d 817 (4th Cir. 1982), presented a scenario different than the one involved here. As in *Georgetown Dress Corp.*, the employees who were alleged to be union agents were members of an "In-Plant Organizing Committee" and the union's written literature referred to the committee as "our" committee. Additionally, the employee-members of the committee consented to the union providing their names to the employer. Taking these facts (and others) into account, the court concluded that the union and the committee were not "two mutually independent allies supporting a common cause, the [u]nion on the one hand, the [committee] members on the other, but rather one group acting as an alter ego for the other." *Id.* at 821. Such facts are absent here. The evidence does not establish that the Petitioner and its employee-supporters were bound together as an alter ego. See also *ATR Wire & Cable Co.*,

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267 NLRB at 209 (distinguishing the court's decision in *PPG Industries, Inc.*).

Conclusion

Because none of the employees identified above were agents of the Petitioner (except, as concluded immediately below, for J. J. Martinez while he served as the Petitioner's election observer), in considering the objections about alleged misconduct by these individuals, I will apply the third-party standard described above.

I further conclude that the evidence establishes that the Petitioner's election observer, J. J. Martinez, was an agent of the Petitioner, but only for purposes of his observer role.

**THE EMPLOYER'S OBJECTIONS AND MY
RECOMMENDATIONS**

The order directing hearing in this matter instructs me to resolve the credibility of witnesses testifying at the hearing and to make findings of fact and recommendations to the Board as to the disposition of the objections.

Below, I summarize the relevant testimony and documentary evidence on each objection and, where I make a credibility resolution, I set forth my reasons within the context of the objection related to the witnesses' testimony.

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The election here was a fairly close one, with strong feelings both in favor of the Petitioner and against it. Employees on both sides of that divide testified. Given those strong feelings on both sides of the representation issue, I have been conscious that all of the employees who testified had a stake in the outcome of this proceeding. Those employees who voted for the Petitioner presumably want the objections to be overruled, and those employees who voted against the Petitioner presumably want the objections to be sustained. In that sense, no witness was neutral.

For that reason, I rely primarily on inherent probabilities and common sense in deciding what happened in particular situations.

In many instances identified below, I conclude that legal precedent does not support the objection even if the Employer's witnesses' testimony is credited. In those instances, I assume for purposes of making my recommendations to the Board about those objections that the Employer's witnesses are credible, but without specifically deciding that to be the case.

Although I observed the witnesses carefully at the hearing, I did not find that my observations of their demeanor were particularly helpful in resolving credibility. Therefore, I did not rely significantly on witness demeanor to decide credibility.

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Objection 8

The Union intimidated, threatened, and coerced employees with retaliation and/or retribution - such as threats of job loss, physical harm, and other reprisals - if they did not support the Union.

Record Evidence

Alleged "Hit List"

The record includes vague references about pro-Petitioner employees maintaining a "hit list" of employees who were against the Petitioner. The evidence, however, does not substantiate that supporters of the Petitioner ever maintained or used any such list. Several employees who assisted the Petitioner - including Antonio Cruz, Felipe Perez, and Javier Moreno - testified that there was no such hit list. The evidence shows that the only lists that the pro-Petitioner employees maintained were lists to keep track of who had and had not signed cards so that they knew who they still needed to talk to.

At the hearing, the Employer asked its witness Hector Diaz, who is a driver/driver instructor for the Employer, if he ever heard about an alleged "hit list" identifying employees who were against the Petitioner. In response, Diaz explained that he had heard that pro-Petitioner employees had identified some other employees who they wanted to talk to about getting a union in. Diaz did not confirm that he had heard about pro-Petitioner employees using a list of employees who were against the Petitioner for the purpose of targeting them for retaliation.

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Alejandro Ura, a driver who declined to support the Petitioner through signing a card, testified that a few weeks before the election he had stated to coworkers in the breakroom that the Employer could end up closing if the Union came in. Later, pro-Petitioner Driver Felipe Perez called him on the telephone about this statement.

According to Ura, Perez told him in their phone conversation that he should be careful about making statements about the Employer shutting down if the Union came in and that he could end up having some unspecified problems in the future. Ura testified that, during that conversation, Perez also said something about a list being made and that Ura's name was on it. Ura concluded that he was on a list that would result in him getting into trouble with pro-Petitioner employees.

Felipe Perez testified that he was friends with Ura and that when he heard that Ura was saying that the Employer could shut down if the Union came in he decided to call his friend about it. Perez states that he told Ura that what he was saying was not correct, that this was all rumor which Ura did not know to be true, and that Ura should not be making statements like this. Perez acknowledged that, during this phone conversation with Ura, he mentioned a list of employees who were in favor of the Petitioner. Perez testified that his mention of a list came up in the context of explaining to Ura that there already were many employees who were in favor of the Petitioner. Perez denied that that he told Ura that he was on a list that would lead to him having problems with those who supported the Petitioner.

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There is no evidence that Ura told other employees about anything that Perez said in connection with a list.

Alleged Rumors That Anti-Union Employees Would Lose Their Jobs

Driver/Driver Instructor Hector Diaz testified that some employees, including Carlos Lopez and Marcos Contreras, talked to him about how they had heard from some unnamed and unidentified employee supporters of the Petitioner that those who voted against the Petitioner would be dismissed. Diaz, who was a leadman, explained to them that this was impossible, pointing out that the vote would be by secret ballot.

Driver/Driver Instructor Toribio Figueroa testified that employees, including Jose Munoz, told him that if they did not go to the Union side things could happen such as being fired. The record does not include any evidence about who was the source of such concerns.

Driver Juan Carlos Gutierrez testified that he heard rumors that if the Union came in it would decide which employees would stay and which would be fired. Gutierrez testified that he understood that if the Union came in then those employees who did not support it would not be working there. Gutierrez also did not identify the source of such rumors.

There is no evidence demonstrating that pro-Petitioner employees told other employees that anyone who voted against the Petitioner would lose their jobs if the Union came in.

*Appendix D**Alleged Threats Toward Jorge Ordunez*

Driver Jorge Ordunez testified that, approximately 15 days to 1 month before the election, he and Edgar Mitsui (who was a hostler who was eligible to vote in the election) had a conversation in the yard, in which Mitsui asked why Ordunez did not want to join the Union. Ordunez states that he told Mitsui that he was not interested and asked him what could happen if he did not join. According to Ordunez, Mitsui answered that if Ordunez ever had a problem and Mitsui were the Union representative or steward that Ordunez was going to have to resolve things the best he could and that he was going to be screwed.

The Employer does not claim that Mitsui was an agent of the Petitioner, and there is no evidence to show that he had such status. Nor does the evidence establish that there was any reasonable basis for Ordunez to believe that Mitsui was speaking on behalf of the Petitioner or that there was any reasonable prospect that Mitsui ever would be a Union representative or steward.

Ordunez told only one or two other employees about Mitsui's statement.

Approximately two weeks before the election, Javier Moreno and Felipe Perez visited Ordunez at his home to talk to him about why he did not want to join with them and the Union. The Petitioner did not have Moreno and Perez conduct this home visit, or any other home visit, as the Petitioner does not use home visits as part of its organizing efforts. These two supporters of the Petitioner, in what

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Ordunez described as a "normal" tone, tried to convince Ordunez that he should be on their side because with the Union things would be better. To end the conversation, Ordunez told them that he had to leave to get to work, which resulted in Moreno and Perez becoming rushed in what they were trying to say to him. Ordunez got in his truck and drove away, with Moreno and Perez still at his house.

Thereafter, Javier Moreno and Francisco Maldonado continued to talk to Ordunez about supporting the Petitioner. At times, they called Ordunez on the telephone when he was out driving. Moreno told Ordunez that the supporters were upset with him because they thought he was going to be with them.

Approximately two days before the election, Ordunez and Francisco Maldonado had a conversation in the work parking lot. From his rolled-down car window, Maldonado asked Ordunez if he was going to vote for the Union. Ordunez told Maldonado that he most likely would not do so. Maldonado responded by telling Ordunez "fuck you."

There is no evidence that Ordunez told coworkers about Moreno's and Perez' visit to his home, Moreno's statement that supporters of the Petitioner were upset with him, or Maldonado's "fuck you" remark.

Alleged Inquiries About Alejandro Ura's Wife

Driver Alejandro Ura testified about repetitive efforts by Petitioner supporters to find out if his wife knew

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anything about what was going on with management and the Petitioner. Ura's wife worked in the main office as an assistant to the sales agents, which is in the same area where the Employer's managers worked. Evidently employee supporters of the Petitioner thought that Ura's wife may be privy to information about the Employer's reaction to the organizing campaign. Initially, about a week before the election Hostler Edgar Mitsui approached Ura, asked him why he was not getting on board with the Union, and also asked him if his wife knew what was happening. Soon after, pro-Petitioner employee Antonio Cruz asked Ura the same questions. Then, Jose Serna also asked him about what his wife knew. None of the Petitioner supporters made any threats about Ura's wife. However, each of these conversations upset Ura because he felt that they should not be trying to get inside information from his wife.

There is no evidence to show that Ura told any employee about these inquiries about what his wife knew.

Alleged Fraudulent Conduct Toward Julio Cruz

Driver Julio Cruz testified that, approximately two weeks before the election, Jose Serna informed him that he (Serna) had signed an authorization card on Cruz' behalf. Cruz asked Serna why he did that and Serna explained that he thought that Cruz was going to sign. According to Cruz, he had to leave at that time so he told Serna that he would talk to him later.

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The next day, Cruz asked Serna again why he signed a card with his name. At that time, Serna denied that he had signed Cruz' name to a card and that he had told Cruz the previous day that he had done so. Serna said that Cruz should not be making such accusations.

Cruz went to the Employer's HR department to make sure that they knew he did not sign a card. Cruz only informed HR about this incident, and he did not talk to his coworkers about it.

Serna testified that he did not tell Julio Cruz that he had filled out a card for him. Serna testified, however, that Cruz did accuse him of doing so and that Cruz appeared very upset about it, to the point that Serna thought that Cruz was going to hit him. According to Serna, he explained to Cruz that this was a serious accusation and that he did not do what Cruz thought he did.

The record does not include any card bearing Cruz' signature, and there is no independent evidence demonstrating that there was a card with his forged signature.

Alleged Harassment of Hector Menchaca

Driver Hector Menchaca testified that some of his coworkers talked to him about the Petitioner and to get him to sign an authorization card. Javier Moreno invited him to attend a Petitioner meeting, which Menchaca never did. One day, Francisco Maldonado talked to Menchaca in the parking lot at the end of a work day about signing

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a card. Menchaca declined, stating that he did not understand what signing signified. Maldonado invited Menchaca to a meeting. When Menchaca drove out of the parking lot, Maldonado and Antonio Cruz followed him to his home. When they all arrived at Menchaca's house, Maldonado and Cruz talked to him more about signing the card. Menchaca said that he still had to read everything and do research on the internet to understand things better. Maldonado and Cruz left. Menchaca states that he felt "harassed" because they wanted him to sign without understanding what signing meant.

The next day, Service Center Manager Ted Garcia held a meeting with all the employees. At that meeting, Garcia stated to everyone that someone had complained about being bothered to sign in favor of the Union. Evidently, Garcia's statement led Maldonado and Cruz to conclude that Menchaca was the person who had complained to Garcia. In fact, Menchaca had not complained to Garcia about being bothered to sign for the Petitioner.

After that meeting, Maldonado told Menchaca that they would not bother him anymore. Apparently trying to correct the misperception that he had complained to Garcia, Menchaca said that if he had reported Moreno and Cruz they already would have been taken into the office. Moreno responded that he did not care because they could not do anything to him. At some point, Antonio Cruz joined the conversation. Menchaca told the two of them that he did not want to hear any more about the Union.

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Thereafter, Moreno stopping talking to Menchaca, but Cruz continued for a while to talk to him about the Union. Eventually, after Menchaca continued to tell Cruz that he did not want to hear anymore about it, Cruz largely stopped talking to him about that subject.

Even though Moreno and Cruz stopped talking to Menchaca about the Union, Menchaca's coworker Anthony Viejo (who was against the Petitioner) told Menchaca that he heard Juan Narron say that they (the pro-Petitioner employees) were going to try to "fuck him over."

Later, Menchaca's coworker Joe Diaz - who was known to be against the Petitioner - told him that Petitioner supporters were speaking badly of him on a Teamsters-sponsored website called ChangeConway2Win. Menchaca went to the website and saw that there was an accusation that he was informing. The website referred to Menchaca in a derogatory fashion, changing his last name from Menchaca to "Mencaca," with the "caca" portion meaning "shit."

There is no evidence that Menchaca told his coworkers about these exchanges between him and supporters of the Petitioner.

Board Law

In cases involving third-party threats, the Board evaluates the nature of the threat, whether the threat encompassed the entire bargaining unit, whether reports of the threat were widely disseminated within the unit,

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whether the person making the threat was capable of carrying it out, whether the employees likely acted in fear of any capability of carrying out the threat, and whether the threat was rejuvenated at or near the time of the election. *See Q.B. Rebuilders, Inc.*, 312 NLRB 1141, 1142 (1993); *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). Additionally, the Board considers the closeness of the vote. *See, e.g., Robert Orr-Sysco Food Services*, 338 NLRB 614, 615 (2002). Employees' subjective reactions to threats are irrelevant to the question whether there was objectionable conduct that warrants setting aside an election; the Board focuses on the reasonableness of employee fears based on objective facts. *See Picoma Industries*, 296 NLRB 498, 499 (1989). Dissemination among employees will not be presumed and the objecting party must present specific evidence of dissemination. *See Crown Bolt, Inc.*, 343 NLRB 776 (2004).

Application of Board Law to Record Evidence

Below, I separately discuss and analyze each of the above-described categories of alleged misconduct to determine if any of them warrant overturning the election. Then I consider whether, taken collectively, these incidents require a new election. I conclude that, taken individually and/or collectively, these situations do not meet the applicable standard.

Alleged "Hit List"

I conclude that the Employer's objection about an alleged "hit list" to target anti-Petitioner employees for retaliation does not warrant setting aside the election.

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The evidence does not substantiate that supporters of the Petitioner ever maintained or used any such list for such nefarious purposes, and I find that there was no such "hit list."

To be sure, the evidence reflects that pro-Petitioner employees kept track of who had and had not supported the Petitioner, including by writing names on a list or lists. Such lists obviously allowed the Petitioner and its supporters to gauge the level of support among the unit employees and to identify which employees to focus on in terms of lobbying for votes. There is nothing impermissible or objectionable about keeping track of employee support in this way for such purposes, and such lists are not the same as "hit lists."

As described above, Alejandro Ura testified that Felipe Perez referred to him as being on a list of non-supporters who were to be targeted for retaliation. I discredit Ura's testimony on this issue. In the absence of evidence showing that there actually was a "hit list," I find that it is more likely that any reference that Perez made to a list was in the context of Perez trying to persuade Ura to support the Petitioner along with others, and that Perez referred to the list showing that there were a number of other employees who supported the Petitioner. The evidence does not establish that Ura had a reasonable basis for concluding or inferring that Perez was trying to warn him, as a friend, that he was on a list of targets. It seems that Perez' purpose in initiating the conversation was, as a friend, to persuade Ura to stop spreading a malicious rumor - that the Employer could close if the

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Union came in - that could have a strongly adverse effect on employees' willingness to consider voting in favor of the Petitioner. Given the powerful impact that such comments could have had on the election outcome, there was nothing improper about Perez trying to quash such talk and then, in addition, trying to convert his friend to the pro-Petitioner side.

In sum, I conclude that there were no threats about a hit list at any time before the election, that possibly only Ura thought that there might be one (though he did not have a reasonable basis for reaching that conclusion), and that the possibility of a hit list did not have an effect on employees' votes in the election.

*Alleged Rumors That Anti-Union Employees Would
Lose Their Jobs*

As described above, a few witnesses testified that there was talk among employees before the election about how those who did not support the Petitioner would lose their jobs if they voted against the Petitioner.

From the evidence submitted, I am not able to determine the source of such comments. There is no evidence to show that the Petitioner or any of the most involved pro-Petitioner employees were responsible for generating such talk.

Nor can I conclude that this talk was widespread or that it so adversely affected the election environment that it made a fair election impossible.

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Also, 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 Petitioner. The Employer is the party who has the control over firing. Employees had no basis for believing, even if the Petitioner were to win the election, that it would be able to direct the Employer to discharge employees who had not supported the Petitioner. There is no reason for any employee to think that the Employer - which ran a campaign urging employees to vote no - would get rid of any employee on the grounds that s/he did not support the Petitioner. Since the Petitioner did not have means to carry out the discharge of those who opposed it, such comments reasonably would not have led any employee to vote other than how s/he wanted. *See, e.g., Duralam, Inc.*, 284 NLRB 1419, 1419 n. 2 (1987) (threats of job loss if the union did not prevail in election not objectionable, as "such statements can be readily evaluated by employees as being beyond the control of the union").

Thus, the evidence on this objection does not establish that any rumors about job loss warrant overturning the election.

Alleged Threats Toward Jorge Ordunez

With regard to Jorge Ordunez' testimony about Hostler Edgar Mitsui's statement (that if Mitsui were the Union representative or steward and Ordunez ever had a problem he would have to resolve things himself), I conclude that this statement was not threatening. First, the evidence does not show that Mitsui was so connected to

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the Petitioner that it appeared that he actually ever would be Union representative or steward. Mitsui's relationship to the Petitioner was such that the Employer has not even alleged him to be one of its agents (and I find that Mitsui was not an agent). Additionally, it seems most likely that Mitsui's remark merely was hypothetical and rhetorical in nature, made in a discussion between two coworkers about the pros and cons of supporting the Petitioner. The Employer alleges that Mitsui's statements were threatening in nature, but it seems more likely to me that Mitsui merely was communicating his personal feeling that if he ever were in a position of responsibility within the Union (a highly speculative scenario) if it became the collective-bargaining representative, then he would not look kindly on having to represent employees who did not want the Union but then relied on it when they were in trouble. There was no reasonable basis for Ordunez to believe that what Mitsui said somehow demonstrated that the Petitioner, if it won the election, would fail to represent any employees who did not support it in the election. In these circumstances, and also considering that dissemination of the statement was limited to only a couple employees, Mitsui's remark to Ordunez does not provide any basis for overturning the election.

Nor does Ordunez' testimony about Javier Moreno's and Felipe Perez' visit to his home establish the existence of improper conduct. The evidence shows that, approximately two weeks before the election, Moreno and Perez visited Ordunez at his home to talk to him about why he did not want to join with them. I find that the conversation merely involved legitimate efforts to try to convince Ordunez to lend his support to the Petitioner.

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Ordunez also testified that Moreno told him later that the supporters of the Petitioner were upset with him because they thought he was going to be in with them. Assuming that Moreno did make this statement to Ordunez, merely telling Ordunez that others were upset with him simply was part of non-threatening discourse to convince him that he was taking the wrong position. That statement did not include a threat, either explicitly or implicitly.

Likewise, if Francisco Maldonado told Ordunez "fuck you" because he would not support the Petitioner, that statement was not threatening. It merely conveyed Maldonado's strongly negative, even contemptuous, feelings about Ordunez' decision.

Additionally, evidence of dissemination about any of the conduct directed to Ordunez is lacking. Although Mitsui's statement happened approximately two weeks to a month before the election, Ordunez told only one or two other employees about it. The evidence does not show that discussion about it circulated more widely, or that anyone was particularly concerned about it. There is no evidence that anyone else knew about the other conduct.

Alleged Inquiries About Alejandro Ura's Wife

Alejandro Ura's testimony about repetitive efforts by Petitioner supporters to find out if his wife knew anything about the organizing from her vantage point inside the office did not involve threatening conduct. As Ordunez admitted, he was upset with these inquiries

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because they were repetitive and they involved his wife, which he thought crossed the line. It appears to me that Ordunez, quite naturally, was being protective of his wife and he had reasonable grounds for not appreciating these inquiries from pro-Petitioner employees. However, the inquiries themselves were not threatening, and they did not constitute conduct that calls for rejecting the presumed validity of the election result.

Alleged Fraudulent Conduct Toward Julio Cruz

I conclude that Jose Serna did not engage in objectionable conduct toward Julio Cruz. The evidence does establish that Cruz confronted Serna because Cruz believed, based on a previous conversation between the two of them, that Serna had forged his name on a membership card. However, the evidence is not sufficient to prove that Serna actually signed Cruz' name to a card. The Employer established at the hearing that the Petitioner retained copies of the card signatures that it submitted to the Regional Office as its showing of interest, but the Employer did not seek to obtain those copies and it did not submit into evidence any card bearing Cruz' signature. Consequently, it cannot be determined if anyone signed his name for Cruz. Cruz claims that Serna told him that he had signed Cruz' name, but Serna denies that he ever told Cruz that he did that. Cruz testified that, when he confronted Serna, Serna denied doing it and stated that Cruz was making a false accusation. I find only that Cruz sincerely believed that Serna signed a card for him against his wishes, but not that Serna actually did this. Given that (as described above) Serna was not involved in gathering

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signatures on authorization cards, I do not see any reason why he would go to the extreme length of forging Cruz' name on a card. It seems most likely that Cruz simply misunderstood something else that Serna had said to him.

In any event, the evidence does not demonstrate that this act, even if it happened as Cruz believes, reasonably would have caused Cruz to feel compelled to vote for the Petitioner in the election. If anything, it seems that Cruz' reaction to it would have led him to vote against the Petitioner.

Also, there is no evidence to show that Cruz told other employees about what he believed Serna did.

In its brief, the Employer cites *Shaw's Supermarkets*, 343 NLRB 963 (2004), for the proposition that Serna's objectionable conduct requires that the election be set aside, because it constituted an "egregious form of coercion and intimidation." However, *Shaw's Supermarkets* deals with a different issue (whether an employer can obtain an election even though it agreed to a contractual "after-acquired store" provision) and it does not hold that an election must be aside in circumstances like those alleged here.

Alleged Harassment of Hector Menchaca

I conclude that the conduct of pro-Petitioner employees Javier Moreno and Francisco Maldonado toward Hector Menchaca did not involve objectionable conduct that warrants a new election.

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Moreno's and Maldonado's efforts to get Menchaca to sign in favor of the Petitioner, including visiting him at his home, were permissible and did not involve any threats or coercion. Eventually, once it appeared to Moreno and Maldonado that Menchaca had complained to management about their conduct, they backed off and did not even talk to him.

It was only Menchaca's coworker - Anthony Viejo, who was against the Petitioner - who stoked the issue by telling Menchaca that he had heard Juan Narron say that the pro-Petitioner employees were going to try to "fuck him over." Viejo did not testify; so it is not even clear that Narron actually made such a statement.

Eventually, Menchaca saw on a Teamster-supported website that he was being portrayed as an informer for the Employer and that he was being referred to as "caca." Though Menchaca may have just cause for being bothered by and upset about these statements, the statements were not directly threatening and do not provide a basis for overturning the election result. *See, e.g., Teamsters Local 299 (Overnite Transportation Co.)*, 328 NLRB 1231, 1231 n.2 (1999) ("mere name-calling does not generally warrant setting aside an election"); *Stonewall Cotton Mills*, 75 NLRB 762, 768 (1948) (overruling objection that petitioning unions used loudspeakers to direct "derogatory epithets" against several employees, as the loudspeaker utterances were in the nature of pre-election propaganda and the verbal attacks did not constitute intimidation or coercion of prospective voters). *See generally Linn v. Plant Guards Local 114*, 383 U.S.

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53 (1966) (acknowledging that the Board has concluded that epithets such as "scab" and "liar" are commonplace in labor struggles and not so indefensible as to lose the protections of Section 7 of the Act). Additionally, there is no evidence to show that this website directed such statements to any other potential voters, that the content of this website posting was common knowledge among employees, or that employees had substantial concerns about it.

*Overall Assessment of Allegations of Intimidation,
Threats, and Coercion*

The collective evidence submitted regarding intimidation, threats, and coercion does not establish that the election must or should be set aside.

First, the alleged misconduct either was not substantiated or was not threatening in nature. As described above, there is no credible evidence of the existence of a hit list. Although there was some testimony about rumors that employees who were against the Petitioner would lose their jobs, employees did not have a reasonable basis for believing that this outcome realistically could happen. Ordunez' testimony about statements that Mitsui, Moreno, Perez, and Maldonado made to him does not establish that they threatened him; rather, they merely stated their opinions to him, without making threats. Ura's testimony about the inquiries about what his wife knew were not threatening at all. Similarly, there was nothing threatening about the incident involving Serna's alleged forgery of Cruz' signature. Nor did the Petitioner supporters direct any threats to Menchaca.

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Additionally, these incidents did not involve a large portion of the voting unit. The employees who testified about it comprised only a portion of the approximately 115 eligible voters.

Moreover, evidence of dissemination of these incidents is lacking. The evidence does not establish that a significant number of employees knew anything about an alleged hit list or rumors that employees who did not support the Petitioner would lose their jobs. Ordunez told only a couple of employees about what Mitsui said, and it appears that he did not tell any others about the other incidents. There is no evidence that Ura told employees about the inquiries about his wife, that Cruz told anyone other than HR about what he concluded Serna had done, or that Menchaca told his coworkers about his experiences.

To a large degree, the alleged intimidation, threats, and coercion rest on these few employees' subjective reactions to statements and situations. These subjective reactions, however, were not reasonable and, in the end, are irrelevant to the question whether there was objectionable conduct that warrants setting aside an election.

Recommendation

I recommend that Objection 8 be overruled.

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Objection 9

The Union intimidated, threatened, and coerced employees by telling them that the Union would know how they voted in the election.

Record Evidence

The only evidence that relates to this objection is the evidence described above, involving rumors that if the Petitioner came in then employees who were against it would lose their jobs.

There is no evidence that the Petitioner told any employees that it would know how they voted in the election, which as an NLRB-conducted election would be by secret ballot.

Nor is there is any evidence that any pro-Petitioner employees said anything to create the belief that Petitioner would know how they voted in the election.

To the extent that employees were saying that anti-Petitioner employees would lose their jobs, the record does not establish the basis for such belief. It is possible that any such statements were just talk among employees, not stemming from any particular source.

Analysis

I decline to find that this election result should be overturned on the basis that a small number of employees

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discussed that the Petitioner would know how they voted, which realistically had no possibility of happening.

Recommendation

I recommend that Objection 9 be overruled.

Objection 10

The Union intimidated threatened and coerced employees by vandalizing and damaging the cars of several employees who were openly supporting the Employer during the campaign.

Record Evidence

Damage to Vehicles of Employees Who Were Against the Petitioner

Around the time of the election, four employees had damage to their personal vehicles and one of the same employees also had damage to a work vehicle on two separate occasions. These employees all were eligible voters and all had revealed before their vehicles were damaged that they were against the Petitioner.

Approximately two to three weeks before the election, when Driver/Driver Instructor Hector Diaz went to his vehicle in the Employer's parking lot, he discovered a scratch on the passenger side of his car, from the front wheel well to the rear door. Diaz was against the Petitioner, and he spoke out against it at a meeting. He noticed the scratch a few days after he spoke out.

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An unspecified number of weeks before the election, Driver Sergio Villareal's vehicle was vandalized. The passenger side door was scratched and antifreeze was thrown on it, causing a stain in the paint. The record does not reveal where Villareal was when he discovered the damage. Villareal opposed the Petitioner, but he was not especially outspoken about it. He did tell one coworker, Raul Gonzales, about his opposition two to three weeks before the election and he believes that Gonzales passed that information to others.

Driver Mario Ramirez had two vehicles damaged before the election. Approximately two weeks before the election, he found three nails in a tire on his 2000 Silverado truck. Approximately one week before the election, on a different vehicle - his 2011 Silverado - he had a nail in the rear tire and a slow leak in the front tire. The record does not disclose where Ramirez was when he discovered the damage. Ramirez had been open with his coworkers that he opposed the Petitioner.

Either about a day before the election or possibly on the day of the election, Driver Hector Menchaca discovered two dents in his new personal truck, a 2014 Chevy Silverado, after he got out of work. He saw foot prints in the mud by his truck in the parking lot, causing him to conclude that someone kicked the truck. As described above, Menchaca had resisted the efforts of pro-Petitioner employees to recruit him to their side and he was criticized on-line.

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Menchaca also had damage to a work truck, approximately two to three weeks before the election. On two occasions, someone removed a piece from the air braking system on his tractor-trailer. Based on Menchaca's testimony, it is not likely that this piece could come off without someone purposely removing it. Without this piece, the brakes were subject to failure. Both times, Menchaca discovered the problem during his pre-trip inspection. He was being extremely careful in his inspections in the weeks leading to the election, because he and other anti-Petitioner employees had discussed among themselves that they needed to be extra careful in case someone did something to their vehicles.

As set forth in more detail below, there was testimony that some employees heard at times before and after the election that employees Toby Cantu, Toribio Figueroa, Brian Nino, Raymundo Perez, Paco Salazar, and an unidentified woman also had damage to their vehicles. This testimony is hearsay regarding whether or not these employees actually had damage to their vehicles. I allowed this testimony into the record because dissemination among employees of information about alleged objectionable conduct is relevant in assessing whether the conduct constitutes a valid basis for overturning an election. There is no record evidence affirmatively showing that any of these employees actually suffered any damage. Neither Cantu, Nino, Perez, Salazar, or the unidentified woman testified at the hearing, and no other witnesses testified about any direct, first-hand knowledge that they had about any actual damage to these employees' vehicles. The Employer certainly had the ability to subpoena these

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employees to testify (as it did with many other employees). Toribio Figueroa did testify at the hearing, and he made clear that he did not have any damage to any vehicle. Consequently, I find that the evidence is not sufficient to establish that any of these employees did have their vehicles damaged.

Evidence About Who Caused the Damage

None of the four employees who testified that their vehicles received damage knows who was responsible for causing it. There is no evidence showing who was responsible for such damage, and certainly no evidence that any of the pro-Petitioner employees whom the Employer alleges to be the Petitioner's agents damaged these vehicles.

It is possible that at least some of the damage was not due in any way to the election campaign. For example, paint scratches and dents are not uncommon, and nails in tires are not unheard of. Also, anti-Petitioner employees were being especially careful in their inspections, and that extra attention may have led them to discover some damage, such as scratches, that could have been there earlier but had gone unnoticed.

I do conclude, however, that there is a reasonable possibility that some or all of this damage may have been tied, in some undefined way, to the election campaign, or at least that employees reasonably could reach that conclusion. Several employees suffered damage to their vehicles in a short time frame just before the election. The

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evidence shows that damage like this had not ever occurred before. Also, it is hard to attribute anti-freeze being placed on paint to an accident, and it seems that the two instances of damage to the brake system on Menchaca's work truck were purposeful. Additionally, someone posted on-line comments about Menchaca being an informer. There likely was a connection between such postings and the damage to his vehicles. Given that a number of instances of vehicle damage occurred contemporaneously with the lead-up to the election, I infer that the election may have had something to do with it.

Nevertheless, although I conclude that at least some of the vehicle damage may have related to the election, I am not willing to attribute its cause to the Petitioner or to any particular employees or groups of employees who supported the Petitioner. There is no evidence to show that President/Business Manager Frank Perkins or Business Agent Paul Cruz had any role any it. Indeed, Perkins credibly testified that the first time he even heard about any such damage was after the election, as a result of the Employer filing objections. Certainly it is possible that some pro-Petitioner employees damaged these employees' vehicles to retaliate against them for not supporting the Petitioner, but the evidence does not affirmatively show that was the case. There certainly is no evidence to show that the employees who were most active in helping to establish support for the Petitioner damaged anyone's vehicle. Alternatively, it also is possible that anti-Petitioner employees damaged the vehicles of others who opposed the Petitioner in the hope that this damage would discredit the Petitioner in the eyes of voters

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and intensify negative views about it (or even provide a basis for challenging a Petitioner victory if the Petitioner won the election, which now has come to pass). Without getting too much into speculation about who may have been responsible, the bottom line is that no one knows who was responsible for the damage to these vehicles.

*Dissemination Among Employees of Information
About Damage to Vehicles*

The employees who suffered damage to their vehicles disclosed that information to others to varying extents, as described below.

Hector Diaz told his supervisor, Jose Sanchez, about the scratch on his vehicle. Additionally, he talked about it in a single conversation with coworker Brian Nino and an unidentified dockworker. Separately, Diaz told Sergio Villareal, Mario Ramirez, and Joe Diaz about it. Diaz also talked about it with pro-Petitioner employees Edgar Mitsui and Genaro Flores, because Diaz thought that those two may have been the ones responsible for the scratch. When Diaz told Mitsui and Flores about the scratch and accused them of doing it, they denied that they did any such things and they stated that they did not even believe that Diaz' vehicle actually had been scratched.

Sergio Villareal reported the damage to his vehicle to his supervisor, Steve Solis. Solis informed Villareal that he was not the only one who had his vehicle damaged. The evidence does not show that Villareal told anyone else about the damage to his vehicle.

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Mario Ramirez testified that he told his supervisor and coworkers Sergio Villareal, Raul Gonzales, and Joe Diaz about the damage to his vehicle.

Hector Menchaca told a supervisor (J. J. Salazar) and two of his coworkers (Antonio Viejo and Mauricio Rodriguez) about the damage to his personal truck. He testified that he did not want to make a big deal about it. Also, Menchaca was not sure if he told these individuals about the damage before or after the election.

Regarding the damage to the braking system on his work truck, Menchaca told supervision and only one coworker who was a very good friend, Anthony Viejo. Menchaca testified that he believed that Viejo kept that information to himself and did not divulge it to other employees, since he did not hear any employees talking about the damage to his brakes before the election.

Customer Service Representative (and Employer Election Observer) Isabel Deltoro testified that before the election she heard about damage to the vehicles of Paco Salazar (a punctured tire) and Raymundo Perez (some sort of liquid on the truck). Deltoro also testified that after the election she heard about tire punctures to the vehicles of Toby Cantu and Toribio Figueroa. As set forth above, there is no affirmative evidence showing that Paco Salazar, Raymundo Perez, or Toby Cantu suffered any damage to their vehicles and it is clear that Figueroa did not have any vehicle damage at all. Deltoro did not testify that she heard anything about damage to the vehicles of Hector Diaz, Sergio Villareal, Mario Ramirez, or Hector Menchaca.

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Hector Diaz testified that, before the election, he heard that Brian Nino, Mario Ramirez, and a woman who was against the Petitioner had their vehicles damaged. Diaz did not explain what he heard about the specific damage to their vehicles. Diaz did not testify that he heard before the election about damage to the vehicles of Sergio Villareal or Hector Menchaca.

Toribio Figueroa testified that a few weeks before the election he heard that Mario Ramirez, Sergio Villareal, and Toby Cantu had damage to their cars and that he did not hear about any other damage. According to Figueroa, Ramirez had a nail in his tire, Villareal had antifreeze or some other liquid poured on the paint, and Cantu also had flat tires. Figueroa did not testify that he heard before the election about damage to the vehicles of Hector Diaz or Hector Menchaca.

Juan Carlos Gutierrez testified that before the election he heard that there had been vandalism to the vehicles of Hector Diaz, Sergio Villareal, Brian Nino, and Raymundo Perez. He testified that he heard that Diaz and Nino each had a scratch on his truck, and that Villareal and Perez each had liquid thrown on their vehicles. Gutierrez did not testify that he heard before the election about damage to the vehicles of Mario Ramirez or Hector Menchaca.

Former Dockworker (now Freight Management Trainer) Daniel Delgado testified that before the election he heard that a cleaning lady for the Employer who was the wife of a dock worker had a vehicle damaged. He did not testify about what allegedly happened to her vehicle.

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Delgado did not testify that he heard before the election about damage to the vehicles of Hector Diaz, Sergio Villareal, Mario Ramirez, or Hector Menchaca.

Other employees testified in favor of the Employer on other issues, but did not testify that they heard about vandalism to any vehicles.

Clearly, if employees' testified accurately about what they heard about employee vehicle damage, there is a significant discrepancy between the hearing evidence demonstrating who actually suffered damage to their vehicles and the evidence about what other employees heard about who suffered damage.

Board Law

Damage to vehicles of anti-union employees does not automatically warrant setting aside a union election victory. *See, e.g., NLRB v. Bostik Division, USM Corp.*, 517 F.2d 971, 974 (6th Cir. 1975) (affirming Board's decision that damage to anti-union employees' personal automobiles did not warrant overturning the election result); *ATR Wire & Cable Co.*, 267 NLRB 204, 210 (1983), *enforced ATR Wire & Cable Co. v. NLRB*, 752 F.2d 201, 202 (6th Cir. 1985).

In situations where the evidence does not establish who was responsible, the Board applies the standard for assessing third-party misconduct. Under the applicable test, it must be determined whether the misconduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a fair election impossible.

*Appendix D***Application of Board Law to Record Evidence**

If the damage to the anti-Petitioner employees' vehicles indeed was related in some way to the election, it was uncalled for and unjustified (whatever the source). However, I cannot recommend that this damage requires a new election. The damage to employees' vehicles was not so aggravated as to create a general atmosphere of fear and reprisal rendering a fair election impossible. The evidence does not reasonably establish that this damage affected the votes of either those employees who actually suffered the damage or any employees who heard about it.

First, the damage to personal vehicles was not widespread. Out of a unit of approximately 115 eligible voters, the evidence establishes that only that 4 of them (Hector Diaz, Sergio Villareal, Mario Ramirez, and Hector Menchaca) actually experienced vehicle damage. This is not the sort of situation that reasonably can be characterized as one that involved a general atmosphere of fear and reprisal.

Additionally, without minimizing the significance to these individuals of the damage to their personal property (along with possible repair costs, which the record does not reveal), the damage was not of an extreme nature. Diaz had a scratch on the side of his car. Villareal had a scratch on a door and a stain in the paint. Ramirez had damage to possibly three tires (one of them involving only a slow leak). Menchaca had two dents in his personal truck.

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Further, most of the personal vehicle damage (all of it except for the damage to Menchaca's personal truck) happened weeks before the election. The gap in time between the damage and the election likely gave the vehicle owners enough of an opportunity to make their election choices based on their considered assessments of their long-term interests instead of on any undue pressure they felt arising from the damage. The dents in Menchaca's truck happened close to the election, either the day before the election or possibly on the day of the election, but I conclude that the timing of this damage did not affect Menchaca's vote. Menchaca's testimony makes clear that at no time did he ever desire to have the Petitioner represent him and that when he cast his ballot he voted how he wanted.

Certainly the anti-Petitioner employees who suffered this damage would have viewed these events as cause for concern. However, I am not convinced that these events reasonably would have caused any of them to vote for the Petitioner when they really did not want to do so. It seems more likely that this sort of conduct would have tended to sway them even more strongly against the Petitioner, not to cause them to vote for it. *See, e.g., NLRB v. Bostik Division, USM Corp.*, 517 F.2d 971, 974 (6th Cir. 1975) (incident of damage to anti-union employees' personal automobiles tended to confirm employees' opinion that they did not want the union to win the election).

Moreover, the evidence shows that reports of this damage to employees' personal vehicles circulated only to a limited extent to other employees before the election.

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Diaz told several coworkers about the scratch on his car, and Ramirez also told a few coworkers about the nails in his tires. However, Villareal did not tell any of his coworkers about the scratch and other paint damage on his vehicle, and Menchaca may not have told any coworkers until after the election about the dents in his personal truck. If Menchaca did tell coworkers about it before the election, he told only a couple of them. Reports about this limited damage to a handful of employees does not establish the existence of a general atmosphere of fear and reprisal.

Further establishing the absence of a general atmosphere of fear and reprisal, there is no evidence describing how these employees who heard reports about damage reacted to that news. The record does not reveal that they had any concerns that they also could be victims of such conduct. Nor does the evidence establish that these reports led to widespread conversation among eligible voters.

Also, I conclude that the evidence does not affirmatively establish that reports of damage to Diaz', Villareal's, Ramirez', and/or Menchaca's vehicles would have caused employees who were against the Petitioner to switch their allegiance to it when they cast their secret ballots. The evidence does not establish that employees who heard about the damage to others' vehicles were so affected that it can be concluded that this damage caused them to change their votes in favor of the Petitioner when they otherwise would have voted against it. Indeed, there is even less reason to suppose that this damage so effected

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employees who merely heard about it - as compared to the actual victims of the damage - that they voted other than their true wishes. Although these instances of damage potentially could have caused anti-Petitioner employees to keep their feelings and views to themselves during the election campaign (to avoid any chance that their stated views might result in their own vehicles being damaged), I conclude - in light of the anonymity that comes with a secret-ballot election - that it is unlikely that reports of damage would have caused others to make a choice in the voting booth that reflected something other than their true desires.

In my view, the most serious damage was that done twice to the brakes on Menchaca's work truck. Had Menchaca not discovered the damage in his pre-trip inspections, it is possible that he could have been involved in a serious or possibly even deadly accident. However, I conclude that even this more serious damage, did not adversely affect the election.

First, the damage to Menchaca's work truck did not compel Menchaca to vote against his wishes. As stated above, Menchaca voted how he wanted.

Next, this type of more extreme vehicle damage was isolated only to the two situations involving Menchaca. No one else had such damage to any of their vehicles, either personal or work.

Further, Menchaca told only one coworker (another anti-Petitioner employees) about the damage to the

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braking system on his work truck, and that employee evidently did not tell other employees about it. No witness testified that s/he heard about damage to Menchaca's work truck. Given that only Menchaca and one other employee knew about this damage, it cannot be concluded that it contributed to a general atmosphere of fear and coercion that could call the actual election result into serious doubt.

As set forth above, there was testimony that employees heard before the election about damage to the vehicles of Toby Cantu, Brian Nino, Raymundo Perez, Paco Salazar, and an unidentified woman, but there was no evidentiary proof that these particular employees actually suffered such damage. This discrepancy between the proof of who actually suffered damage and the witness testimony about what they heard about who suffered damage reflects negatively on the Employer's case. I have strong doubts as to whether or not reports actually were circulating about damage to Cantu's, Nino's, Perez', Salazar's, and the unidentified woman's vehicles, when there is no affirmative nonhearsay evidence to establish that any of these employees actually did suffer such damage.

It is possible, though, that employees who heard reports about vehicle damage merely got the names of the actual victims wrong. In that regard, I observe that Isabel Deltoro testified that she heard that Raymundo Perez had some liquid thrown on his vehicle. Although there is no evidence to substantiate that this happened to Raymundo Perez' vehicle, the evidence shows that it did happen to Sergio Villareal. Thus, it appears possible that Deltoro may have confused Villareal with Perez.

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Also, as mentioned, Deltoro thought that Toribio Figueroa had damage to his vehicle, but he clearly did not. If the reports that circulated simply were inaccurate about the identity of whose vehicles received damage (so that reports about damage to the vehicles of Cantu, Nino, Perez, Salazar, and the unidentified woman in reality were about situations involving Hector Diaz, Sergio Villareal, Mario Ramirez, and Hector Menchaca), then the same analysis set forth above would apply - that is, the evidence does not establish that employees who heard about the damage to these employees' vehicles were so affected that it can be concluded that it caused them to change their votes in favor of the Petitioner when they otherwise would have voted against it.

Further, the witnesses who testified that they heard about damage to the vehicles of Toby Cantu, Brian Nino, Raymundo Perez, Paco Salazar, and an unidentified woman apparently were not aware that Hector Diaz, Sergio Villareal, Mario Ramirez, and Hector Menchaca all had damage. Isabel Deltoro testified that before the election she heard about damage to the vehicles of Paco Salazar and Raymundo Perez. Evidently, she did not know anything before the election about damage to the vehicles of Hector Diaz, Sergio Villareal, Mario Ramirez, or Hector Menchaca, given that she did not testify that she heard about damage to the vehicles of those specific employees. Similarly, Hector Diaz evidently did not know before the election about the damage to Villareal's and Menchaca's vehicles, Toribio Figueroa did not know about damage to Hector Diaz's and Hector Menchaca's vehicles, Juan Carlos Gutierrez did not know about damage to the

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vehicles of Mario Ramirez and Hector Menchaca, and Daniel Delgado did not know about damage to the vehicles of Hector Diaz, Sergio Villareal, Mario Ramirez, or Hector Menchaca. Thus, what these witnesses knew before the election about damage to vehicles did not indicate that such damage was widespread. As in the discussion above, the damage that these witnesses testified they heard about before the election was not so extensive as to create a general atmosphere of fair and reprisal.

Further, what these witnesses claim to have heard about damage to the vehicles of Cantu, Nino, Perez, Salazar, and the unidentified woman shows that they would have understood that this damage was not especially serious. Deltoro's testimony shows that she had heard about some punctured tires and some sort of liquid on a truck. Figueroa and Juan Carlos Gutierrez each testified that he also heard about flat tires and some liquid. The other witnesses who testified about alleged damage to these other employees' vehicles did not explain what they heard about the specific nature of the damage. The evidence that the damage they heard about was not extreme also shows that there was not any general atmosphere of fear and reprisal.

Under these circumstances, I conclude that the evidence about damage to employees' vehicles is insufficient to meet the Employer's burden of proving that this misconduct requires a new election.

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Recommendation

I recommend that Objection 10 be overruled.

Objection 11

The Union intimidated, threatened, and coerced employees by congregating immediately adjacent to or in close proximity to the polling area so that they would be seen by employees who were proceeding to the polling area to vote and employees had to pass by them to get to the polling area.

Record Evidence

Pursuant to the stipulated election agreement, the Board agent conducted the election in the Employer's training room. The training room is 23 feet 5 inches long and 15 feet 4 inches wide.

Just outside the training room, there is a large breakroom. The record does not include specific evidence about the length of the breakroom. However, the record includes Employer's exhibits that depict the break room and the training room. From these exhibits, it appears that the breakroom is approximately twice the length and somewhat wider than the training room, or approximately 47 feet long and 25 feet wide.

The training room has a solid, windowless door that opens into the breakroom. When that door is shut, the interior of the training room is cut off from the breakroom.

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There are eight tables spread around the breakroom, four chairs around each table, a refrigerator, vending machines, an ice machine, and a coffee maker. Employees regularly use the break room before they start their work shifts, and they also use it to take breaks and have lunch.

A drivers room is just to the side of the breakroom. The drivers room connects to the dispatch office, where drivers get their papers for the day. Additionally, the bathrooms are just off the breakroom, next to the drivers room and dispatch office.

There are two doors leading into and out of the breakroom, and from there to the training room, the drivers room, the dispatch office, and the bathrooms. One of those doors is at the back of the breakroom furthest from the training room, leading from the dock to the breakroom. This is where employees typically enter and exit the breakroom. The other door is only several feet from the training room door. This other door connects the breakroom and the main office area. On election day, most employees used the dock door to enter the breakroom on their way to vote.

The stipulated election agreement did not include any provision barring employees from using the breakroom during the election. Also, there is no evidence to show that, in connection with the parties' agreement to hold the election in the Employer's training room, there was any side agreement or understanding that employees would not be allowed to use the breakroom during the election hours.

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Just before the first voting session, the Board agent held a preelection conference inside the training room. The Employer's main representative at that conference was Richard Brown, who was the attorney who represented the Employer in the election proceeding at that time. Brown is an experienced labor attorney, having been a long-time partner in a law firm in Birmingham, Alabama, and a specialist in labor and employment law since 1979. Also present for the Employer were its Assistant General Counsel Daniel Egeler and its observer, Isabel Deltoro. The Petitioner's representative at the preelection conference was President/Business Manager Frank Perkins. The Petitioner's observer, J. J. Martinez, also attended.

As the party representatives left the training room after the preelection conference and before voting started at 7:00 a.m., a few employees already were gathering in the breakroom. No party representatives raised any issues with the Board agent about employees being in the breakroom during the election, and no one made any effort either through the Board agent or independently to make sure that employees would stay out of the breakroom during voting hours.

Throughout the election, employees used the breakroom as they normally did on regular work days. The Employer uses a system of staggered shifts, with various starting times for the employees. Consequently, employees came into and left the breakroom at various times during the election. When they arrived in the breakroom before their scheduled work times, they dropped off their

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backpacks, sat at tables and had coffee and/or food, and talked with each other. While there, they also picked up papers at the dispatch office and used the bathroom.

As described more below, pro-Petitioner and anti-Petitioner employees were in the breakroom during at least the morning voting hours, apparently in connection with starting work and voting before they went out with their trucks.

Petitioner supporter Francisco Maldonado was scheduled to start work at 8:30 a.m. Maldonado arrived at the facility between approximately 7:30 and 7:40 a.m. He voted within minutes of his arrival. After Maldonado voted, he sat in the breakroom at a table as far away as possible from the training room, in the back corner near the vending machines. Heriberto Martinez sat at the same table with Maldonado. Maldonado sat there until it was time for him to check in for work, somewhere between 8:23 and 8:30 a.m.

Antonio Cruz arrived at approximately 8:00 to 8:30 a.m. - which is close to his normal arrival time for his shift start time at 9:00 a.m. - so that he could vote before going out on his run. Cruz voted within minutes after arriving, then stayed in the drivers room and the back of the breakroom, near the door by the dock, where he had coffee and food and waited for his shift to start. While he was in the drivers room and the back of the breakroom that morning, Cruz moved around and talked to coworkers.

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Javier Moreno's start time on the day of the election was 9:00 a.m. Moreno arrived at the facility at approximately 8:00 a.m. He usually arrives significantly early because he lives far from the facility and leaves home early enough to make sure that he is not late for work. Moreno voted right away, then he sat in the breakroom at one of the two tables furthest from the training room. He plugged in his cell phone and looked at it and also listened to music with earphones.

Juan Narron's start time that day also was 9:00 a.m. Narron arrived between 8:20 and 8:30 a.m. As he usually does, he entered the breakroom, put his things down, and got a cup of coffee. He put his things on a table near the back of the breakroom, on the side opposite from the training room. At that point, Narron knocked on the training room door and then went inside the training room to vote. After voting, Narron went back to his cup of coffee and went into the dispatch office to see if his route was ready. He remained at the back of the breakroom until he started his shift.

Julio Ortega's start time on election day was 9:00 a.m. Ortega arrived at approximately 8:15 or 8:20 a.m. He went to the breakroom, as he always does. He put his things down in the breakroom, near the vending machines that are away from the training room. He said good morning to some others in the breakroom, then he went to vote in the training room. After voting, Ortega went back to a table near the vending machines, where he sat and ate. Eventually, he went into the dispatch office to get his route, and then clocked in at approximately 8:53 a.m.

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Felipe Perez arrived at the facility at approximately 9:05 or 9:10 a.m. His start time was 9:30 a.m. Perez entered the breakroom as usual, and went to vote right away. After voting, Perez went to the dispatch office and picked up his papers. From there, he went on his route, without stopping in the breakroom or talking with anyone there.

On election day, Jose Serna was scheduled to start work at 6:30 a.m. He arrived at the facility at approximately 6:25 a.m., before the polls opened at 7:00 a.m. Serna clocked in and worked on the dock. One of his supervisors released him to go vote at between 7:30 and 8:00 a.m. He walked through the breakroom to get to and from the training room. After voting, Serna went right back to work. Other than walking through the breakroom to get to and from the training room to vote, he was not in the breakroom that morning.

The record establishes that employees who were known to be against the Petitioner also were in the breakroom during voting hours. For example, Hector Diaz testified that he supported the Employer in the campaign and that everyone knew how he felt. He described how on election day he took a lunch break in the breakroom for about a half hour starting at approximately 8:15 or 8:20 a.m. Diaz sat at the table at which he usually sat, which was only a few feet away from the training room door. Moreover, from where Diaz was sitting, he was facing the training room door, with the best possible view into the training room from the breakroom. Diaz testified that others in the breakroom - like him- were sitting there, eating, having coffee, and getting ready to go to work.

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Dockworker Daniel Delgado and Drivers Jorge Ordunez and Toby Cantu also were in the breakroom for a while during the morning voting session. Testimony establishes that each of those three employees opposed the Petitioner.

Employees who wanted to enter the training room to vote had to go through the breakroom, either through the back door from the dock that they usually used or through the door that connected the breakroom and the main office. During the election, most voters got to the polling area by entering the breakroom through the back door. Those who entered through this back door had to walk the full length of the breakroom to get to the training room to vote.

Some employees who did not support the Petitioner, including Hector Menchaca, testified that it was uncomfortable and intimidating to walk past Petitioner supporters in the breakroom just before going into the training room to vote. Menchaca, in particular, testified that as he went through the breakroom to go vote, he saw the pro-Petitioner employees sitting at a table with intimidating looks on their faces.

During the election, it was apparent from inside the training room that employees were using the breakroom. When the training room door was open wide enough, those inside the training room could see that people were in the breakroom. Also, those inside the training room could hear that there was talking in the breakroom, though the talking was not loud enough so that those inside the room could make out what was being said. The Board agent never went into the breakroom to tell employees that they had to vacate the breakroom while voting was underway.

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At no time did a line of voters extend from the training room out into the breakroom. Apparently voters waited in the breakroom until they could go straight into the training room to vote, or they arrived to vote at times that allowed them to cast their ballots right away without waiting.

Petitioner President/Business Manager Frank Perkins was not at the facility during voting hours. Business Agent Paul Cruz was hundreds of miles away.

Board Law

The Board does not permit parties and their agents to be stationed near the polling area. See *Electric Hose and Rubber Co.*, 262 NLRB 186, 216 (1982); *Performance Measurements, Inc.*, 148 NLRB 1657, 1659 (1964). The Board's prohibition prevents parties from surveying the union activities of employees or creating the impression that they are doing so. *Id.*

Consistent with such case law, Section 11326 of the Board's Casehandling Manual on Representation Proceedings provides that representatives of the parties are not allowed in the vicinity of the polls and that agents of the parties are not allowed in the polling area during election hours.

Although the Board limits the ability of representatives and agents of the parties to be present at or near the polls, it does not require that employees stay away from the polls. Thus, the Casehandling Manual does not include

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any provision banning employees from being near the polls during election hours.

Application of Board Law to Record Evidence

The evidence does not establish that the pro-Petitioner employees' presence in the breakroom during voting hours constituted objectionable conduct that warrants setting aside the election. As concluded above, the pro-Petitioner employees were not representatives or agents of the Petitioner. Thus, Board policy did not prohibit them from being in the breakroom outside the training room. Further, these employees had as much right to be in the breakroom during voting hours as did anti-Petitioner employees who were in the breakroom during those times (about which the Employer has not complained).

The Employer's main contention seems to be that these employees in fact were agents of the Petitioner, and therefore that their presence at the polls was improper. As discussed above, I conclude that these employees were not Petitioner agents.

At the hearing, the Employer's attorney suggested that the presence of these pro-Petitioner employees in the area outside the polls amounted to a "gauntlet" that others who were opposed to the Petitioner had to withstand to reach the polls. In its brief, the Employer does not advance this particular argument. In the event that the Employer still maintains that the presence of the pro-Petitioner employees in the breakroom was a gauntlet, I reject that characterization. The pro-Petitioner employees

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did not engage in any activity in the breakroom that even remotely resembled a "gauntlet."

Finally, although employees who were against the Petitioner may not have liked seeing the pro-Petitioner employees in the breakroom as they went to vote, their discomfort does not provide grounds for overturning the election. Elections can be hard-fought affairs, with employees' emotions running strong on both sides of the issue. Nonetheless, employees with opposing views routinely see each other at and near the polls - for example, when a line of voters forms at the polls. That employees on both sides of the issue end up seeing each other in the moments just before they vote does not invalidate an election.

Recommendation

I recommend that Objection 11 be overruled.

Objection 3(1)

The Board agent improperly arranged the polling area in a way that compromised the secrecy of the voting process.

Record Evidence

As stated above, pursuant to the terms of the stipulated election agreement, the Board agent conducted the election in the training room, which is separated from the breakroom by the training room door. The training

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room was large enough - 23 feet 5 inches long and 15 feet 4 inches wide - to accommodate the number of voters in this election, and this is the polling location that the parties accepted through the stipulated election agreement.

Before the Board agent arrived at the polling area on the morning of the election, the Employer's representatives had set up some tables and chairs in the training room in a manner that they anticipated would be acceptable to the Board agent, although they did not have a specific place reserved for the voting booth and the ballot box. It appears that when the Board agent arrived he kept the same table and chair placement that the Employer's representatives had set.

Throughout the election, the Board agent personally used a table and chair along the back wall opposite from the doorway entrance into the training room and to the left of the room (when viewed from the perspective of voters entering the training room). The parties' observers shared a different table, which was situated along the back wall and to the right of the room (again, from the perspective of entering voters). There was a gap between the Board agent's table and the observers' table of approximately a few feet.

There was a third table situated parallel to the Board agent's and the observers' tables, approximately halfway between the entrance to the training room and the back wall and in the left side of the room (once again, from the perspective of entering voters). This third table was placed so that it was closer to the Board agent table than

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it was to the observers' table. The Board agent placed the voting booth on the top of the third table at the end furthest from the observers. He placed the booth so that voters would stand against the edge of that end of the table and place their blank ballots inside the booth for marking. The sides of the booth were between each voter and the observers and the Board agent himself. (Below, I further discuss the details of the voting booth, in addressing the Employer's objection that the Board agent compromised voter privacy by using a cardboard voting shield instead of an enclosed voting booth.) The Board agent placed the ballot box at the other end of that table, opposite the voting booth. While the Employer's representatives were with the Board agent inside the training room during the preelection conference, they did not make any request that he place the booth in any particular place in the room.

Throughout the voting, the observers sat in their chairs behind the observer table. As the voters cast their ballots in the voting booth, the observers were to the voters' front left at an angle of approximately 45 degrees (possibly somewhat less) as measured from the voters' line of sight straight ahead of them while in the voting booth. Employer Observers Deltoro and Ramirez used the seat furthest from the voting booth, as each of them sat to the left of Petitioner Observer Martinez during the session for which each served as observer. The distance from the booth to Petitioner Observer Martinez was approximately at least six feet, and the distance from the booth to the Employer observer was approximately eight to nine feet.

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When voters were in the room, the Board agent stood up to provide them with ballots and to monitor the process. Most of the time, the Board agent stood in the gap between his table and the observers' table, but sometimes he stood just in front of his table between it and the voting booth. These locations were immediately to the left of the voting booth. The distance from the booth to where the Board agent stood in the gap between tables was approximately five feet, and the distance from the booth to where he stood in front of his table was approximately four feet.

The distance from the ballot box to the observers was approximately 6 feet, and approximately 2-1/2 to 3 feet to the Board agent.

Early in the election, it was apparent that some voters were not sure where to go when they first entered the training room. After the first several voters, the Board agent placed four chairs, in a two-by-two pattern, against the end of the table where he placed the ballot box to help establish a walkway or path to guide the voters straight to the observers as they entered the training room to vote.

With this arrangement of the room, voters went through a circuit leading them into the room, through the voting process, and out of the room in a natural, intuitive way with little to no confusion or disruption. Voters entered the training room through the entry door, then walked straight ahead to the observers. Once the observers checked voter eligibility, the voters moved to their left to the Board agent. The Board agent handed each of them a ballot, and each voter moved to his/her

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left and into the voting booth. Each voter placed a blank ballot inside the voting booth. They marked their ballots in this space. After marking their ballots, they deposited them in the ballot box at the other end of the same table. At that point, they exited the room.

The training room door usually was kept shut during the voting hours, although the door necessarily had to open and close when voters entered and exited. The door had an automatic closer, so once someone opened the door the closer brought the door back into the shut position. The door was open only for the amount of time it took for voters to go in and out and for the automatic closer to shut the door again.

The tally of ballots shows that 110 employees voted, and witness testimony indicates that no more than approximately 3 voters were in the polling area at the same time. Given the large number of voters and even accounting for multiple voters entering and exiting simultaneously, the door must have opened and closed numerous times throughout the two multi-hour voting sessions.

While the door was open, the bodies of the voters who were entering and/or exiting were in the doorway for part of the time before the door closed automatically, thereby limiting views between the training room and the breakroom.

When the training room door was open far enough (such as when it was open all the way so that it was

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perpendicular to the entryway itself), it was possible for employees in the breakroom to see part of the training room if they looked in that direction. However, if the door was open only approximately halfway or less, it appears that employees would not be able to see into the training room from any of the tables in the breakroom.

As described above, when pro-Petitioner employees were in the breakroom during voting hours, they located themselves in the back corner near the vending machines, about as far as possible from the training room door while still being able to use the breakroom. From documentary evidence that the Employer submitted into evidence (consisting of blueprints and photographs of the breakroom and training room areas), it is apparent that, with the training room door wide open, it of course was possible to see between those two rooms. However, this documentary evidence shows that at the moment when voters cast their ballots, even when the training room door was wide open, voters behind the voting booth and employees at the back of the breakroom could not see each other. A photo taken from the perspective of a voter behind the voting booth with the door wide open (Employer Exhibit 8(i)) shows that the voter potentially could see, through a narrow gap between the door edge and the door jamb, toward a small section of what appears to be a table at approximately the middle of the breakroom, but not the back portion of the breakroom where the pro-Petitioner employees situated themselves. Another photo (Employer Exhibit 8(o)) - taken from the table that was, at the very back corner of the breakroom next to the vending machines and looking into the training room with the door wide open - shows that it

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was not possible from that location to see either the voting booth or the voter behind it. It appears that from that back table the line of sight was approximately to where the Board agent stood. The photos show that as one got closer to the training room - approximately between the second and third tables from the vending machines - with the door wide open it was possible to see the front of the voting booth, but not the voter behind it.

Board Law

As explained above, to set aside an election based on Board agent misconduct the objecting party must show that there is evidence that raises a reasonable doubt as to the fairness and validity of the election.

Application of Board Law to Record Evidence

The Board agent's arrangement of the polling area adequately protected employees' right to a secret ballot election and did not call into question the fairness and validity of the election. The Board agent accepted the Employer's arrangement of the tables and chairs within the training room, which were set up in a logical way that allowed for a smooth voting process and that provided for adequate distance between voters and others. Evidently the Employer did not have any problem with the placement of the tables and chairs because before the start of the election its own representatives initially placed them there, subject to the Board agent's approval. Using the table near the middle of the room for the voting booth and the ballot box, the Board agent placed the booth at the

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table end opposite from the observers and the box at the other end of the table, several feet from the observers. Nothing about these physical arrangements compromised voter secrecy and/or voter freedom of choice.

Although employees were in the breakroom during the election, their presence there does not mean that the Board agent's arrangement of the polls was improper. The Board agent took steps to segregate the interior of the training room from the breakroom. The training room door was closed most of the time, preventing anyone in the breakroom from seeing inside when it was shut. Although the door opened many times during the election, each time the door was open it was for only a brief time and views from the breakroom into the training room were limited due to the lines of sight involved and to voters' bodies passing through the doorway. In any event, if employees in the breakroom may have had some opportunities to see inside the training room does not constitute objectionable conduct. Employees frequently see each other during voting - for example, when they are inside the polling area waiting to vote or are in line waiting to vote. A fair election does not require that voters be totally concealed from view by other voters or potential voters.

Recommendation

I recommend that Objection 3(1) be overruled.

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Objection 3(2)

The Board agent compromised voter privacy by using a cardboard voting shield instead of an enclosed voting booth.

Record Evidence

Throughout the election, the Board Agent used an official NLRB-provided voting booth consisting 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. The open side of the U shape is where voters stood to mark their ballots, with the ballots sitting on top of the plastic base - which provided a writing shelf - within the confines of the three sides of the cardboard shield.

The question on the ballot was "Do you wish to be represented for purposes of collective bargaining by International Brotherhood of Teamsters Local 657?" The ballot had a "yes" square-shaped box and a "no" square-shaped box, which were located adjacent to each other, with the yes box to the left side of the ballot and the no box to the right. The two boxes were approximately two-and-a-half inches away from each other.

The Board agent placed the booth on the top of the table, described above, that sat near the center of the training room. 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. The left and right panel sides of the shield each was 17-1/4 inches wide, and the

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front panel was 17-1/2 inches wide. The plastic base itself, viewed from the perspective of a voter facing down at the base, was 22-1/2 inches wide and 18-3/8 inches long from front to back. It appears that the plastic base was approximately three inches thick, so the cardboard shield rose approximately 21 inches over the writing shelf. The top of the table measured 29 inches from the floor, so the top of the booth was approximately 53 inches (4 feet 5 inches) from the floor. When sitting on the table, the top of the cardboard portion of the voting shield came approximately to voters' chest level, depending of course on each voter's particular height.

This type of voting booth comes with aluminum legs that can be used to support the plastic base and the cardboard shield. However, the Board agent did not use these aluminum legs during the election. Had the Board Agent used the aluminum legs instead of the table to support the booth, the height of the entire voting booth would have been approximately six inches higher than it was throughout the election. The record does not disclose the reason why the Board agent did not use the aluminum legs.

The Employer's lead attorney during the election, Richard Brown, attended the preelection conference, along with the Employer's Assistant General Counsel Daniel Egeler. According to Brown, when he saw that the Board agent was using a cardboard voting booth, he asked the Board agent if that is what the Regional Office used in all elections. The Board agent answered "yes." Brown testified that he told the Board agent that he was

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surprised that the Regional Office used that equipment, because other Regional Offices were moving away from using them due to the filing of objections. (It is not at all clear that Brown's perception on this point is accurate, and there is no proof that Regional Offices have been moving away from using this type of voting booth. In Region 27, these voting booths are NLRB standard-issue voting equipment that field employees currently use to run elections.) According to Brown, as the Board agent set up the cardboard voting booth, the agent commented that it did not give much privacy.

The evidence shows that, although Brown questioned the Board agent about use of that voting booth, he did not expressly object to it or request that the Board agent use alternative equipment. Brown explained that he did not press the issue because it would have been futile. It appears in fact that it would have been futile, as there is no indication that the Board agent had any alternative voting booth with him. It seems that if Brown had pressed the issue further it would not have been possible for the Board agent to obtain an alternative NLRB-provided voting booth and still run the election as scheduled, given that Laredo is far from the nearest NLRB office in San Antonio.

However, it is not at all apparent that it would have been futile for Brown to raise an issue with the Board agent about the aluminum legs. Brown's testimony shows that, at the morning preelection conference, he saw that the Board agent set the booth on top of the table. If the Employer felt that use of the aluminum legs instead

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of the table top was important to a fair election, that issue certainly was one that the Board agent could have considered and possibly accommodated.

Even with the voting booth sitting on the table instead of on the aluminum legs, the booth shielded all voters' hands and their arms up to least their elbows. The voters' upper arms, shoulders, and heads, especially the taller ones, were visible above the top of the shield.

Several witnesses testified that they felt that this voting booth did not provide adequate privacy because it did not completely shield their entire bodies from view from others in the room, especially from the view of the Petitioner's election observer, J. J. Martinez, who some witnesses state was looking or staring at them as they voted. These witnesses testified that they felt intimidated and/or uncomfortable while voting due to the Petitioner observer's ability to see their upper arms, shoulders, and faces above the top of the voting shield. Also, when some voters cast their ballots, there were up to two employee-voters in the room at the same time. Such witnesses who testified about feeling uncomfortable while voting stated that they felt that, to ensure their privacy, they needed a voting booth that completely concealed them from view while voting, such as fully-enclosed booths with curtains that sometimes are used during political elections (and which Board agents sometimes use to run elections).

Even though some voters felt uncomfortable that Petitioner Observer Martinez was looking or staring at them when they voted, the evidence shows that Observer

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Martinez did not engage in any misconduct by observing voters as they cast their ballots. Martinez was there as an observer of the election. Observers' duties include assisting the Board agent to make sure that only one voter occupies the booth at a time, that each voter deposits the ballot in the ballot box, and that each voter leaves the voting area immediately after depositing the ballot. Also, observers are to report to the Board agent about any unusual activity. To fulfill these duties, observers obviously need to look at voters, even at the moment they are casting their ballots. That is all that Martinez did. Some voters may have felt Martinez was staring at them, but this merely is a characterization. An alternative characterization may be that Martinez was observing intently. I am not able to determine that any alleged staring by Martinez was improper, as it is not possible to draw a line separating legitimate observation from staring.

Although witnesses testified to feeling intimidated and/or uncomfortable behind the voting booth, there is no persuasive evidence that anyone witnessed how any voter actually marked his/her ballot on the writing shelf behind the cardboard shield. All of the observers testified that they could not see the ballots as voters marked them. Even those witnesses who testified that they felt that the voting booth did not afford them enough privacy acknowledged that they did not think that anyone - including Petitioner Observer Martinez - could see how they actually marked their ballots. It seems that this had to have been the case, because it does not make any sense that Petitioner Observer Martinez would be able to see - from his seated position behind the check-in table several feet away from

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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. In that regard, the Employer submitted into evidence photographs of its reproduction of the training room as it was set up during the election. Employer Exhibits 8(b) and (d) are photographs taken from the Petitioner observer's perspective, looking toward the booth. Those exhibits demonstrate that the booth's front and left cardboard side panels blocked his view of voters' hands and ballots inside the booth.

Still, several voters testified that they thought that, even though no one could see how they actually marked their ballots inside the voting booth, Petitioner Observer Martinez could see enough of their arm and shoulder movements to figure out which box they checked on the ballot. Former Dockworker Daniel Delgado testified that, because of this concern, he consciously extended his pencil on the writing shelf inside the cardboard portion of the booth to make it more difficult for anyone to tell which box he marked.

Two witnesses testified that they had concerns about the Board agent being too close to the voting booth while they voted. Juan Carlos Gutierrez testified that when he voted there was a person there whom he did not recognize. This person obviously was the Board agent, but Gutierrez apparently did not understand that he was a representative of the NLRB. Gutierrez testified that this person was about four feet away from him when he cast his ballot, and that this person made him feel uncomfortable. Gutierrez believed that this person could see how he marked his ballot. Jesus Alfredo Garcia similarly testified that he felt

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that the Board agent was too close to him when he voted. Garcia estimated that the Board agent was seven feet away. They felt that the Board agent might have been able to see the marking of their ballots over the voting shield.

Employer Exhibit 8(f) is a photograph showing the view that the Board agent would have had during times when he stood in front of the table that he had for his own use (which is the closest the Board agent stood to the booth while employees were using it to vote). That exhibit demonstrates that the left side panel of the cardboard portion of the voting booth blocked his view of voters' hands and ballots.

Toribio Figueroa testified that the Petitioner, through its observer J. J. Martinez, challenged his ballot. After he marked the ballot he handed it, possibly unfolded, to the Board agent. Figueroa thought that he did not fold the ballot himself, and that the Board agent folded it for him before placing it inside a challenge envelope. Figueroa testified that he was not sure if he handed the ballot to the Board agent face-up or face-down, and that he did not know whether or not the Board agent saw how he marked his ballot. Figueroa was fairly certain that neither observer saw his marked ballot, because when he handed it to the Board agent the agent's body blocked the observers' view.

No party, election observer, or voter complained to the Board agent during the election about concerns over lack of privacy in the voting booth. Employees began talking among themselves about this privacy issue only after the

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conclusion of the election, once the election result was known.

Board Law

Under Section 11304.3 of the Board's Casehandling Manual for Representation Proceedings, "[a] voting booth may be either metal or cardboard and will normally be supplied by the Regional Office." Section 11304.2 provides that Board Regional Offices are expected to maintain a supply of "portable voting booths (metal or cardboard)." "What is required is a compartment or cubicle that not only provides privacy but that also demonstrates the appearance of providing privacy while maintaining a level of dignity appropriate to the election process." Section 11304.3.

In *Pacific Coast M.S. Industries*, 355 NLRB 1422, 1440 (2010), an administrative law judge addressed an employer objection about a Board agent's use of "[t]wo NLRB blue corrugated cardboard voting partitions or booths" that were "set atop [a] small table about a foot apart." The AU J administratively determined that "this official agency equipment" was about 16 inches high, 24 inches wide, and 19 inches deep, plus an additional two-inch "brace flap" across the top. The AU J concluded that the evidence did not establish that the use of these cardboard partitions or booths compromised voter secrecy.

In *Physicians & Surgeons Ambulance Service*, 356 NLRB No. 42 (November 30, 2010), the Board addressed whether the use of a type of voting booth that was similar

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to the one used in this election compromised the secrecy of the voting process. The Board described the voting booth set up in that case as its “table-top’ model, a structure that resembles a lectern desk used by a teacher for classroom instruction.” Slip op. at 1. Further, the Board stated the following: “[u]nlike 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.” *Id.* The Board determined that the use of this table-top booth did not raise a reasonable doubt as to the fairness and validity of the election. *Id.* The Board stated that it “has never set aside an election on this basis where, as here, the election was conducted using a Board-sanctioned voting booth.” *Id.* at 2. The Board explained that where the alleged election misconduct is the Board agent’s failure to ensure the secrecy of voter balloting, the Board will not set aside the election absent evidence that someone witnessed how a voter marked his or her ballot. *Id.* at 1-2. Since there was no such evidence in that case, the Board concluded that there was no basis for overturning the election. *Id.*

Additionally, in that case the employer argued that the table-top voting booth failed to provide adequate privacy and secrecy because it “allowed the observers to see the faces and arm movements of voters as they marked their ballots.” *Id.* at 1. The Board rejected this argument, concluding that employees’ affidavit evidence did not constitute adequate grounds for overturning the election where the affidavits reflected only that employees

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believed that the table-top voting booth failed to provide them a sufficiently private voting environment. *Id.*

Further, the Board acknowledged that it had set aside elections based on voters’ beliefs that they could be observed while voting, but it explained that it had done so only in cases where employees voted without a voting booth or a completely private room. *Id.* at 1-22. The Board stated, at n. 3, that *Imperial Reed & Rattan Furniture Co.*, 118 NLRB 911 (1967), did not require setting aside the election based on employees’ belief that the table-top voting booth was inadequate, as in that earlier case it set aside the election where “employees marked their ballots on an improvised table, not a Board-sanctioned booth.” In that case, the improvised “booth” consisted of chairs stacked with cushions. The Board, at n.4, deemed *Crown Cork & Seal Co. v. NLRB*, 659 F.2d 127, 131 (10th Cir. 1981), not to invalidate the table-top voting booth, as the issue in the case was not whether the election should have been set aside on the basis that employees could have believed that they were observed while voting; rather, the issue was whether the ballot markings actually could be seen by the employer’s observer. The Board, with a court’s approval, overruled the objection because there was no evidence that the observer witnessed any voter’s election choice. The Board also distinguished *Columbine Cable Co.*, 351 NLRB 1087, 1088 (2007), because in that case the employees voted without a voting booth or a completely private room and there was some evidence that a ballot was 80 percent exposed; the employees did not use any Board-sanctioned booth, including the table-top model. In *Columbine Cable Co.*, late-arriving voters

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voted without any booth, merely standing in a room with the parties' observers present. Thus, it is clear that the Board concluded that these cases apply only in situations where employees voted with an improvised voting booth instead of, as here, with a Board-sanctioned voting booth.

Application of Board to Record Evidence

The evidence does not establish that the Board agent's use of this type of NLRB-provided voting booth with a plastic base/writing shelf and cardboard shield was objectionable misconduct.

The voting booth that the Board agent used here was standard Agency equipment provided to Board agents for use in conducting representation elections. Also, it was the same type of NLRB-sanctioned booth used in the election at issue in *Physicians & Surgeons Ambulance Service*, and apparently was more substantial than the blue corrugated cardboard partitions used in the election in *Pacific Coast M.S. Industries*.

Because the voting booth was NLRB-sanctioned equipment, in order to overturn the election result based on this objection the evidence must prove that someone actually witnessed how a voter marked his or her ballot. The evidence here does not meet that standard.

There is no persuasive evidence that anyone - including the Petitioner's observer or the Employer's observer, the Board agent, or others waiting in the training room to cast ballots - saw how any voter marked his or her ballot.

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The observers were too far from the voting booth to see over and into it from their seated positions behind the check-in table. Although the Board agent stood closer to the booth, I find that he still was not able to see how anyone marked his or her ballot. After all, the testimony shows that the Board agent was no closer to the booth than four feet away and possibly approximately seven feet away. From that distance, he could not have seen over the booth. Also, I conclude that the Board agent would not have been looking at how voters marked their ballots because, due to their training and experience, Board agents understand that how voters mark ballots is supposed to be secret and they do not personally seek to discern how individual voters mark their ballots. Absent direct evidence to the contrary, I am not willing to find that the Board agent was looking at any voter's ballot mark. Toribio Figueroa testified that the Board agent might have seen his marked ballot because Figueroa did not fold it before having it placed in a challenge envelope, but Figueroa could not say that the Board agent actually did see it (if the Board agent did see it, it was an isolated, inadvertent disclosure due to Figueroa not folding his ballot before handing it to the Board agent for placement in a challenged-ballot envelope).

In the absence of evidence showing that anyone witnessed how any voters marked their ballots, there is no basis for overturning the election because the Board agent used this particular type of voting booth.

The Employer objects that the Board agent did not place the voting booth on the aluminum legs that were part

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of the voting kit and, therefore, that he did not use the NLRB-provided equipment as it was intended to be used and in an authorized way. It suggests that, because the booth without the aluminum legs was akin to improvised equipment, the applicable test is not whether anyone actually witnessed how voters marked their ballots but is whether employees could have believed that they were observed while voting.

To the extent that the Employer contends that supporting the booth with the table top instead of the aluminum legs is per se improper, I reject that contention. In *Physicians & Surgeons Ambulance Service* the Board approved use of a table-top model voting booth, so it is clear that there is nothing inherently wrong with placing a booth on top of a table.

Also, the cardboard shield and enclosed writing shelf are the important parts of the booth, as those parts are what create private voting space. The supplied aluminum legs are incidental to this purpose. The aluminum legs are a mere support mechanism for the key parts of the booth. A table of adequate height, like the one used here, serves the same support purpose just as effectively as aluminum legs would have. There is no comparison between not using the aluminum legs on a voting booth and the improvised "booths" which the Board found objectionable in cases like those discussed above (such as chairs stacked with cushions, or a completely open room with no booth and the parties' observers present).

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Consequently, I decline to find that the Board agent's use of the table as a substitute for the aluminum legs means that the test for improvised equipment is applicable here. The test applicable to assessing the validity of the particular booth used in this election is the one that I applied above - that is, whether anyone saw how ballots actually were marked.

It does appear to be the case that use of the aluminum legs would have resulted in the booth being elevated approximately six more inches from the floor from where it rested on the table top. However, my view is that the absence of those few extra inches of voting-booth height did not render the actual booth insufficiently private. Even with the use of the table top for support, the booth adequately shielded voters' hands and lower arms so that no one could see how they marked their ballots. That reality is dispositive of this issue.

The Employer contends that the evidence establishes that the Petitioner's observer could tell from voters' arm movements how they voted but, for the reasons explained below, I am not at all persuaded that this claim is valid, either legally or factually.

The first response to this Employer contention is that, as explained above, this employee belief or perception that their arm movements revealed their actual vote is not relevant to the inquiry when NLRB-provided voting is used.

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Second, these claims simply are not credible, as explained below.

Thus, when voters had their ballots sitting on top of the writing shelf for marking, the cardboard shield still extended approximately 21 inches over and around the shelf, so that voters' hands and lower arms were concealed at least up to their elbows. This factor alone realistically precludes the possibility that the Petitioner's observer could figure out from arm movements how employees voted.

Additionally, the "yes" and "no" boxes on the ballots were immediately adjacent to each other on the ballots, being just a couple of inches apart. These boxes were too close to each other for the Petitioner observer to tell - from a seated position approximately at least six to eight feet away from the booth and on the other side of the cardboard shield - which of those boxes any voter marked.

Further, there is enough space inside the U-shaped shield for voters to place their ballots (which were much smaller than the interior of the booth) at various points within it, so that a particular ballot could have been directly in the center of the available space on the writing shelf, more to the left or right, or more to the top or bottom. Likewise, voters could have placed their ballots behind the shield so that they were tilted to the left or the right to a greater or lesser degree. For example, Juan Carlos Gutierrez testified that he placed his ballot so that the "no" box was at the top when he marked it, instead of to the right of the "yes" box. Since the observers could not

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see exactly where and how each voter placed the ballot inside the voting booth, even close observation of voters' arm movements realistically could not reveal which box each voter marked. For example, if it appeared from a voter's arm movements that s/he placed a mark at the left of center of the plastic base, it could not be concluded that this was a yes vote, since which box was marked would depend on where inside the booth the voter placed the ballot and the ballot's angle in relation to the voter's arm and hand. Even if the observer took note of voters' arm movements, there were too many other unknown variables for him to know which of the two boxes voters checked. Observation of voters' arm movements realistically would not have enabled any observer to do better at determining a voter's choice than the 50-50 guess that comes with a choice between "yes" and "no."

The Employer also contends that *Physicians & Surgeons Ambulance Service* is inapplicable to this case, apparently on the grounds that in that case the employer merely presented two affidavits and neither affidavit alleged that ballot markings were visible to others. It is true that the evidence in that case was in affidavit form, while here there is a full record following a multi-day hearing. The key point, however, is that the evidence here does not demonstrate that voters' ballot markings were visible to others. In that regard, this case is indistinguishable. Here, as in *Physicians & Surgeons Ambulance Service*, there is insufficient evidence to establish that ballot markings were visible to others. Thus, that case is dispositive of that Employer objection.

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The Employer also asserts that *Physicians & Surgeons Ambulance Service* is wrongly decided, as that decision cannot be reconciled with the Board's Statements of Procedure (specifically, Section 101.19(a)(2)) indicating that ballots are to be marked in the secrecy of a "voting booth." In my view, there is no inconsistency between that case and the Board's statements of procedure, as the cardboard voting shield used here is a voting booth that allows for ballots to be marked in secret. In any event, as a hearing officer I do not have the authority to disregard applicable Board precedent.

Similarly, the Employer contends that the Board agent's use of the cardboard voting booth is inconsistent with the Casehandling Manual for Representation Proceedings, which refers in various sections to voters entering the "booth" and to Board agents policing it. The Employer claims that these references require a more substantial booth than the cardboard/plastic booth used here. The Casehandling Manual, however, does not state that this type of booth is unacceptable. Indeed, it states the opposite. As discussed above, Section 11304.3 of the Casehandling Manual provides that "[a] voting booth may be either metal or cardboard and will normally be supplied by the Regional Office." Board Regional Offices are expected to maintain a supply of "portable voting booths (metal or cardboard)." Since the Casehandling Manual specifically authorizes portable cardboard voting booths, the other references to the voting booth in other parts of that manual must be read to allow cardboard voting booths like the one used in this election.

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The Employer also relies on *Royal Lumber Co.*, 118 NLRB 1015 (1957); *Imperial Reed & Rattan Furniture Co.*, 118 NLRB 911 (1967); *Crown Cork & Seal Co. v. NLRB*, 659 F.2d 127, 131 (10th Cir. 1981); and *Columbine Cable Co.*, 351 NLRB 1087 (2007), for the proposition that an election should be set aside where voting arrangements could have led employees to believe they were being observed as they voted. As explained above, the Board addressed most of these same cases in its decision in *Physicians & Surgeons Ambulance Service* and decided that none of them invalidated the use of a Board-sanctioned cardboard table-top voting booth. Consequently, the Employer's reliance on these cases is misplaced.

In *Physicians & Surgeons Ambulance Service* the Board did not address *Royal Lumber Co.*, 118 NLRB 1015 1017 (1957), but it did address that case in *Columbine Cable Co.* There, the Board explained that the problem in *Royal Lumber Co.* was that "employees voted in a small lean-to shed on a board placed on top of two oil drums" and a nonvoter stood in the open doorway for part of the election. Thus, under the Board's analysis set forth in *Physicians & Surgeons Ambulance Service*, it is clear that *Royal Lumber Co.* is not applicable to a case like the present one, where the Board agent conducted the election using Board-sanctioned equipment.

Finally, in its brief the Employer refers to this booth as a "joke hardly befitting the solemnity of a Board conducted secret ballot election" and as "the type of voting arrangement one might expect to find used by some third-world dictator trying to justify 'their' democratic election,

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certainly not in America in a secret ballot election that has been called the 'Crown Jewel' of the National Labor Relations Board." While the Employer certainly has the right to hold that view, it is not and has not been the Board's view. As discussed above, the evidence shows that the voting booth allowed for sufficient voter privacy and secrecy. Moreover, the goal of the Board and its agents is to run a fair election so that employees themselves have the opportunity to express their own wishes about representation. Thus, the Employer's equating the Board's election equipment with what dictators use to run sham elections is not a valid comparison.

Recommendation

I recommend that Objection 3(2) be overruled.

Objection 1

The Petitioner's supporters engaged in electioneering on the day of the election immediately adjacent or in close proximity to the polling area that was directed toward employees who were proceeding to the polling area to vote.

Record Evidence

The No-Electioneering Area

At the preelection conference, the Board agent posted an official NLRB notice on the outside of the training room door, which faced the breakroom when the door was closed.

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The notice stated "polling place" and "no electioneering or loitering." That notice stayed posted throughout the election.

The Board agent did not declare the breakroom itself to be a no-electioneering area. At the preelection conference, the Board agent stated that he could not control the breakroom from inside the training room. For that stated reason, the Board agent did not post any other no-electioneering signs at any location other than the training room door.

The evidence shows that no party representative or employee-voter ever requested the Board agent to post additional no-electioneering signs.

Alleged Electioneering Misconduct by Juan Narron

Former Dockworker Daniel Delgado testified that he was in the breakroom at approximately 8:00 a.m. on election day, after he had voted earlier that morning. According to Delgado, pro-Petitioner Driver Juan Narron pointed to the "yes" option on a sample ballot that was posted in the breakroom and said, in a loud voice, "this is what you have to vote for" or "this is where you have to vote."

Narron denied that he made such a statement.

Driver Jesus Alfredo Garcia testified that at approximately 8:45 a.m. on election day he was in his truck, leaving the facility to start his route. As we he was

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driving away, he saw Juan Narron stop Cesar Ortiz (who was a new driver) outside the breakroom, talk to Ortiz, and follow Ortiz to the entrance to the breakroom. Garcia was too far away to hear what Narron and Ortiz said. Later that day, Garcia asked Ortiz if Narron was asking him who he voted for. Garcia testified that he did not remember what Ortiz told him about what Narron had said other than that they had already been bothering him, but that Ortiz did not tell him that Narron was talking about the Union. Then, the Employer's attorney asked Garcia the following question: "[d]id Mr. Ortiz tell you that Mr. Narron was telling him how to vote in the election?" Garcia responded "yes," without further elaboration.

Narron denies talking to Ortiz that day.

Ortiz did not testify at the hearing.

Alleged Electioneering Misconduct by Heriberto Martinez

Jorge Ordunez testified that he arrived at the facility at approximately 9:00 a.m. on election day. Ordunez went through the breakroom before voting, to take care of his paperwork in the dispatch office and to use the bathroom. He noticed that there were several pro-Petitioner employees in the breakroom, including Driver Heriberto Martinez. Ordunez testified that Martinez said to him in Spanish "ahi te encargo," which was translated in the record both as "do you what you have to do" or "you know what you have to do," which Ordunez understood to mean that he needed to vote in favor of the Petitioner.

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Heriberto Martinez testified that, after he voted in the morning session at approximately 7:45 a.m., he sat in the breakroom, as he usually did before going out on his route. Martinez testified that he did not see Ordunez in the breakroom that morning and that he did not have any conversations with Ordunez at all on the day of the election.

The Employer has not alleged that Heriberto Martinez was a Petitioner agent, and there is no evidence to show that he was one.

Alleged Electioneering Misconduct By Antonio Cruz

At approximately 9:00 a.m., Francisco Lopez arrived at the facility. Lopez had injured his foot and was using crutches to walk from the yard into the building.

While Lopez still was in the yard, Antonio Cruz approached Lopez and assisted him inside the building. Cruz held the entry door to the main office so that Lopez could get through it more easily, then walked at Lopez' side as they went through the main office. Cruz also opened the door from the main office to the training room and breakroom area.

According to Toribio Figueroa, who works in the office, Antonio Cruz entered the office area from the breakroom and then went to the front door to assist Lopez. Figueroa testified that, once Cruz and Lopez were in the office, Cruz said to Lopez "let's go, I'm helping you so that you can go vote."

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Former Dockworker Daniel Delgado, who was working at a desk in the office during the morning election, testified that he saw Cruz through the office window outside in the parking lot doing a pre-shift inspection on his truck. According to Delgado, Cruz stopped working on his truck, went over to Lopez, and walked with Lopez up to and inside the office. Delgado states that, once they were inside the office, Cruz said to Lopez "let's vote, the more of us there are the better" and "let's vote for the Union."

Neither Figueroa nor Delgado saw or heard what happened after Cruz and Lopez walked through the door leading into the breakroom and training rooms.

Cruz testified that he assisted Lopez because, given that Lopez was on crutches due to his injured foot, he needed help to open doors. Cruz testified that, while assisting Lopez, he asked Lopez how he was feeling. Cruz denied making any statement to Lopez about voting. Cruz testified that Lopez went into the training room to vote, and that he did not go into the training room with Lopez.

Francisco Lopez did not testify.

Board Law

The Board does not absolutely prohibit electioneering in the vicinity of election polls. It has recognized that "[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*

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Insulated Wire, 259 NLRB 1118, 1118 (1982). "While the Board seeks to establish election conditions as ideal as possible, 'elections must be appraised realistically and practically, and should not be judged against theoretically ideal, but nevertheless artificial standards.' *Id.* Thus, the presence of electioneering near a polling area does not rule out the existence of "laboratory conditions."

Where a party objects that the election was disrupted by electioneering which did not take place in the polling area itself and was not directed to voters waiting in line to vote, the Board determines whether the electioneering "substantially impaired the exercise of free choice." *Glacier Packing Co., Inc.*, 210 NLRB 571, 573 n.5 (1974). *Accord Boston Insulated Wire*, 259 NLRB at 1119. The Board considers the nature and extent of the electioneering, whether it occurred within a designated "no electioneering" area, whether it occurred contrary to the instructions of the Board agent, whether a party to the election objected to it, and whether a party or a nonparty to the election engaged in it. *See, e.g., Del Rey Tortilleria, Inc.*, 272 NLRB 1106, 1107-1108 (1984); *Boston Insulated Wire*, 259 NLRB at 1119.

Application of Board Law to Record Evidence

I find that the evidence does not establish that pro-Petitioner Drivers Juan Narron, Heriberto Martinez, or Antonio Cruz engaged in electioneering as alleged. Additionally, I conclude that even if they did engage in this conduct, it does not warrant a new election.

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With regard to Former Dockworker Daniel Delgado's claim that Narron urged employees in the breakroom to vote in favor of the Petitioner, there was no other evidence to corroborate Delgado's claim. The evidence shows that there were other employees in the breakroom at the time when Narron allegedly made these statements. The absence of testimony from any of these other employees to confirm Delgado's claim leads me to conclude that the Employer did not meet its burden of proving that Narron actually made the statements attributed to him.

Similarly, no one corroborated Jorge Ordunez' testimony that Heriberto Martinez said to him in the breakroom, in Spanish, "ahi te encargo." Absent confirmation, I conclude that the Employer did not meet its burden of proving that Martinez made the alleged statement.

Also, I have serious doubts about the credibility of Jesus Alfredo Garcia's testimony about Juan Narron's interaction with Cesar Ortiz. Garcia was not in a position to hear Narron's and Ortiz' verbal exchange, and his testimony regarding what Ortiz may have told him about it later is hearsay. Additionally, in my view Garcia's uncertain testimony was adversely affected by clearly leading questions from the Employer's counsel.

Additionally, I have doubts about the credibility of Figueroa's and Delgado's testimony about Antonio Cruz' comments to Francisco Lopez while Cruz helped Lopez into the facility. Figueroa's and Delgado's accounts differ significantly. Figueroa testified that Cruz came from the

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breakroom area and saw Lopez outside the facility. In contrast, Delgado's testimony is that Cruz was outside by his truck just before he approached Lopez and walked with him into the facility. Also, Figueroa's testimony is that Cruz announced that he was helping Lopez so that he could go vote, while Delgado's testimony is that Cruz told Lopez "let's vote, the more of us there are the better" and "let's vote for the Union." These significant discrepancies call the credibility of their accounts into question. Also, it is not likely that the discrepancies about what Cruz said could be explained by the possibility that they heard different parts of the same verbal exchange, because the main office was small and both of them presumably heard the entirety of the same exchange involving Cruz and Lopez.

However, even if I were to credit the testimony of all of the Employer's witnesses on this objection about electioneering, the evidence still would not establish that these pro-Petitioner employees engaged in misconduct that warrants setting aside the election. Even if events happened as the Employer's witnesses described, the electioneering conduct attributed to Juan Narron, Heriberto Martinez, and Antonio Cruz was not improper.

First, the electioneering described above involved noncoercive conversations with potential voters at most merely urging a pro-Petitioner stance, and some of the comments possibly did not even go as far as urging support. According to Delgado, Narron urged employees to vote yes. Jesus Alfredo Garcia testified that Narron may have told Cesar Ortiz about how to vote in the election.

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Ordunez testified that Heriberto Martinez told him either "do you what you have to do" or "you know what you have to do." Toribio Figueroa and Daniel Delgado testified that Antonio Cruz, while assisting Francisco Lopez toward the training room, said something to Lopez either about helping him to go vote or about voting for the Petitioner. This sort of campaign activity generally is permissible.

Also, if the Employer is claiming that Cruz did something improper by assisting Lopez - who was on crutches due to a foot injury - to get to the polling area, there would be no merit to such a claim, as even a party can actually furnish or pay for transportation to get employees to the polls. *See, e.g., Fed. Silk Mills*, 107 NLRB 876, 877-878 (1954) (not objectionable for union to reimburse employee car-pool drivers for gas and oil expenses that drivers incurred in transporting employees to polls); *Kay Mfg. Corp.*, 121 NLRB 1077, 1079 (1958) (not objectionable for union to pay for a taxi to transport employee to the polls). Given that a party can deliver voters to the polls, including by paying money to reimburse expenses, there certainly is nothing wrong with one employee opening and holding doors for an injured coworker on crutches to help him get to the polls.

Additionally, this activity did not take place within a designated "no electioneering" area, thereby minimizing the impact of any such conduct. Delgado's and Ordunez' complaints about electioneering by Narron and Heriberto Martinez involved alleged statements that they made in the breakroom. Garcia's testimony about Narron's statements to Cesar Ortiz involved conduct that took place

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outside the facility. Antonio Cruz' alleged electioneering of Francisco Lopez took place in the main office. None of these places was a no-electioneering area.

Also, the alleged electioneering took place at locations that voters inside the training room most likely did not see or hear or physically could not have seen or heard. With the training room door shut most of the time, voters' chance of being exposed to it from the breakroom were limited. *See, e.g., Boston Insulated Wire*, 259 NLRB 1118, 1119 (1982) (fact that closed doors separated voters from electioneering undermines claim that electioneering was objectionable). They could not have seen or heard any electioneering that took place in the main office or outside the entire facility.

Further, this alleged electioneering in the breakroom, outside, and in the main office did not take place contrary to the instructions of the Board agent. In addition to the Board agent not designating the breakroom, outside areas, or the main office to be no-electioneering areas, he did not tell employees on an ad hoc basis that they could not engage in electioneering there.

Moreover, no party objected to the Board agent not instructing employees that they could not engage in electioneering in those places outside the training room.

Finally, the Petitioner did not engage in this electioneering. As I determined above, the employees who supported the Petitioner and engaged in activity in support of it were not its agents.

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Recommendation

I recommend that Objection 1 be overruled.

Objection 3(6)

The Board agent failed to ensure that there was no electioneering or campaigning taking place in the area immediately adjacent to the polling area.

Record Evidence

The evidence relevant to this objection is set forth above in the section dealing with Objection 1, regarding alleged electioneering.

Board Law

The Board has not adopted a per se rule governing the distance from the polling booth within which electioneering is restricted. See *Season-All Industries*, 276 NLRB 1247, 1256 n. 33 (1985). "Board agents conducting elections may delineate an area within which electioneering is prohibited; they must exercise their judgment as to what constitutes electioneering activity; and they are required to take reasonable measures to restrict electioneering activity which comes to their attention, consistent with their other obligations." *Glacier Packing Co., Inc.*, 210 NLRB 571, 573 (1974). "[T]he establishment of an area in which electioneering is not permitted must in the first instance be left to the informed judgment of the Regional Director and his agents conducting the election" because

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"they are on the scene and familiar with the physical circumstances surrounding the location of the polls." *Marvil International Security Service*, 173, NLRB 1260, 1260 (1968).

Application of Board Law to Record Evidence

I conclude that the Board agent exercised appropriate judgment in not making the breakroom a no-electioneering area.

First, no party requested that the Board agent do so. If there was a pressing need for this area to be designated a no-electioneering area, one would expect that a party would have raised the issue with the Board agent so that he could consider whether such designation was necessary and/or appropriate. The Employer certainly was aware that employees' normal practice was to use the breakroom at times when the election was being held in the training room. Its representatives even saw employees gathering in the breakroom just before the election was to start. It was reasonably foreseeable that employees who gathered in the breakroom potentially could make statements there urging others to vote a particular way. Yet, the Employer did not seek to prevent such conduct by making a timely request that the Board agent post signs prohibiting electioneering throughout the breakroom.

Second, based on the evidence that the Board agent stated that he could not control the breakroom from inside the training room, I infer that the Board agent made a judgment call that it would be difficult for him to

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police the breakroom in the event he were to designate it as a no-electioneering area. Indeed, it would have been difficult for him to do so, and I conclude that he made a reasonable judgment in that regard. During the election, the Board agent stationed himself well inside the training room, near the exterior wall. Also, the training room door was kept shut during most of the time during election hours, which helped give voters privacy in the immediate polling area. This frequently-closed door prevented the Board agent from readily seeing into the breakroom. The training room is over 23 feet long and, as found above, the breakroom is approximately 47 feet long. Had the Board agent made the entire breakroom a no-electioneering area, he would have been responsible for policing conduct outside the immediate area of the training room and over approximately 60 feet from where he stood to hand out ballots to voters. Had the Board agent designated the entire breakroom to be a no-electioneering area, his duties inside the training room could have been compromised. Policing the breakroom could have resulted in him needing to leave the training room itself, creating difficulties in monitoring, for example, the ballot box and blank ballots inside the training room or the conduct of the observers. The Board agent dealt with the issue of potential electioneering invading the hearing room simply by keeping the training room door shut as much as possible, thereby avoiding other potential issues.

Third, the Board agent did post a no-electioneering sign on the breakroom side of the training room door, and the pro-Petitioner employees who were present in the breakroom during voting hours stayed away from the

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area near the entrance to the training room, stationing themselves at the opposite side of the breakroom near the vending machines. The only employee who sat near the entrance to the training room was an employee, Hector Diaz, who had been open about his opposition to the Petitioner. The evidence does not show that this anti-Petitioner employee engaged in any electioneering while seated there. Accordingly, by posting this sign where he did, the Board agent took adequate action to ensure that voters would not be subject to electioneering immediately outside of or at the polls.

Fourth, the door to the training room door frequently was shut during voting, opening only for brief moments when voters entered and exited the training room, and the evidence does not establish that any line of voters extended outside the training room into the breakroom. Also, during those times when voters opened the door to enter and exit the training room, their bodies passing through the doorway would have limited views between the training room and the breakroom. Given that the interior of the training room largely was segregated from the breakroom, voters in the final moments before they voted and at the moment of voting were insulated from any electioneering taking place in the breakroom.

Fifth, the testimony establishes that voices from the breakroom could not be heard very well from inside the training room. Although it was possible to hear from inside the training room that there was talking in the breakroom, the training room was sufficiently insulated from the breakroom so that the detailed content of

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conversations taking place in the breakroom could not be discerned inside the training room. That factor further demonstrates that electioneering in the breakroom would not invade the polling area itself.

Sixth, there was a limited line of vision between the training room and the breakroom. It appears from documentary evidence that the Employer submitted into evidence (consisting of blueprints and photographs of the training room and breakroom areas) that from the back of the breakroom (which is where the pro-Petitioner employees were during voting hours) employees could not see voters while they were behind the voting shield as they actually marked their ballots. It appears that from that tables at the back corner of the breakroom the line of sight would have allowed them only to see the area where the Board agent stationed himself near his table, but not the voting booth itself of any voter standing behind it.

For these reasons, my conclusion is that the Board agent did not abuse his discretion in not making the breakroom a no-electioneering area.

Recommendation

I recommend that Objection 3(6) be overruled.

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Objection 2

The Petitioner's supporters engaged in surveillance of the voting process and/or created the impression of surveillance in and near the polling area.

Record Evidence

The Employer contends that the evidence described above concerning the presence of pro-Petitioner employees in the breakroom establishes that these employees were surveilling the voting process or, at least, that they created the impression of surveillance. Also, the Employer relies on evidence showing that, while pro-Petitioner employees were in the breakroom during the election, some of them had with them their cell phones which were equipped with cameras that could take photographs and video.

Additionally, Driver/Driver Instructor Hector Diaz testified that, while he was sitting immediately outside the training room during the first voting session, he saw pro-Petitioner employees Javier Moreno and Francisco Maldonado standing near the training room door for up to approximately 30 minutes. Anyone standing in that location could see the entire breakroom. While the training room door was closed, anyone in that location obviously could not see into the training room because the door blocked the view inside. Even when the training room door was open, either partially or completely, anyone standing in that location could not see into the training room, because the door obstructed the line of vision into the training room.

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Diaz also testified that Moreno had his cell phone in his front left shirt pocket while he was standing near the training room door. Diaz testified that his impression was that Moreno was taking photos or video with his cell phone camera because he was moving back and forth with his body, in a stiff movement that suggested that he was panning the breakroom with the phone camera in his pocket. Diaz acknowledged, however, that he could not tell if Moreno's phone camera was turned on or if Moreno actually was using it to take photos or videos.

Diaz testified that he did not tell anyone else during the election about what he noticed about Moreno possibly taking photos or video. Diaz did not hear any other employees in the breakroom talking about what Moreno was doing.

Diaz did not ask Moreno and/or Maldonado about what they were doing, or whether they were taking photos or video.

No other employees testified that Moreno and/or Maldonado were taking photos or video near the polls.

Javier Moreno denied that he stationed himself near the training room door. He testified that he sat at a table at the back of the breakroom. Also, although he admitted that he had his cell phone with him in the breakroom, he denied that he had it in his front pocket to take photos or video. According to Moreno, he had his cell phone plugged into a wall outlet at the table while he was in the breakroom and he sat there listening to music on headphones.

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Francisco Maldonado admitted that he had his cell phone with him in the breakroom on the morning of the election and that his phone is equipped with a camera that is able to take photos and video. However, Maldonado denied that he used his camera that morning to take photos or video in the breakroom. He also denied that he stood near the training room door during the election.

Board Law

As explained above in the discussion relating to the objection about employees congregating near the polls, to prevent surveillance or the impression of surveillance the Board does not allow parties and their agents to be stationed near the polling area.

Additionally, in *Randell Warehouse of Arizona*, 347 NLRB 591 (2006), the Board determined that a union engages in objectionable conduct by photographing employees engaged in Section 7 activity, absent a valid explanation conveyed to the employees in a timely fashion. This holding applies only to union actions, not to the actions of union supporters. See *Enterprise Leasing Co.- Southeast, LLC*, 357 NLRB No. 159, slip op. at 2 (December 29, 2011).

Application of Board Law to Record Evidence

The Employer's argument that the presence of pro-Petitioner employees in the breakroom amounted to objectionable surveillance or the impression of surveillance rests on its contention that these employees were

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Petitioner agents. I have found that these employees were not agents of the Petitioner. Absent an agency connection to the Petitioner, the employees' mere presence in the breakroom cannot be deemed to have been surveillance or the impression of surveillance.

Additionally, the evidence does not establish that the several pro-Petitioner employees gathered in the breakroom actually engaged in surveillance or that their presence there reasonably could have been perceived as surveillance. The employees' presence in the breakroom at the times of day involved was not unusual activity, as their presence coincided with the start of their shifts. As described above, it was common for employees to wait in the breakroom before their shifts started, where they had food and drinks and talked to each other. Although some of the employees arrived somewhat earlier than they usually did and may have been in the breakroom for longer than usual, it cannot reasonably be inferred that any extra time they spent there during voting hours was for purposes of surveillance, given that they reasonably needed to give themselves some extra time so that they could vote before starting work. Moreover, employees who were known to be against the Petitioner also were in the breakroom during voting hours. The fact that some of them had with them cell telephones equipped with cameras does not bolster the Employer's claim of surveillance. Cell phone cameras are ubiquitous these days, and their mere presence does not signify surveillance. Also, given that truck drivers are on the road away from home, having cell phones to check-in with family and friends is entirely common.

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Regarding Hector Diaz' contention that Javier Moreno and Francisco Maldonado took photos or video of employees outside the polling area, I find that the evidence is insufficient to establish that they did so. Diaz is the only person who testified that Moreno and Maldonado engaged in this behavior. No other witness corroborated Diaz' claim. Further, even Diaz was not sure that Moreno and Maldonado were taking photos or video, and Diaz did not take even minimal steps to find out what they were doing, such as simply and directly asking them what they were doing. Additionally, Diaz's description of Moreno's conduct - with Moreno possibly taking photos or video from his camera inside his front shirt pocket by turning his body from side to side to pan around the breakroom - strikes me as not credible. Diaz' description of the whole scenario seems too strange or contrived to be believed. Also, I fail to see any reason why Moreno or Maldonado would take photos or video of employees inside the breakroom - most of whom may have been pro-Petitioner anyway.

Moreover, it appears that only Hector Diaz had concerns that Moreno and Maldonado might be taking photos or video. Diaz acknowledged that during the election he did not let other employees know about his concerns. Absent evidence that other employees were aware that Moreno and/or Maldonado might be taking photos or video, any such conduct by them could not have affected enough voters to have made a difference in the election outcome.

Finally, as determined above, neither Moreno nor Maldonado were agents of the Petitioner, so *Randell*

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Warehouse of Arizona, 347 NLRB 591 (2006), is inapplicable even if the evidence were to establish that they engaged in the alleged misconduct.

Recommendation

I recommend that Objection 2 be overruled.

Objections 4, 5, and 6

The Petitioner's observer made improper statements and gestures to voters before and after they voted; handled the ballot box; openly reviewed and counted the employee names on the voter eligibility list to determine who had or had not voted; and kept track of and/or made a record of which employees had or had not voted and how they voted, or created the impression that he was doing so.

Record Evidence

The Petitioner's election observer during both voting sessions was J. J. Martinez, who is a driver included in the bargaining unit. The Employer's election observer during the first of the two voting sessions was Isabel Deltoro, and its observer during the second session was Mario Ramirez. Deltoro works in the Employer's customer service department. Like Martinez, Ramirez is a driver.

Deltoro and Ramirez, along with Driver Hector Menchaca, testified that Petitioner observer Martinez engaged in improper conduct inside the polling area

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during the election hours, as described in more detail below.

Deltoro testified that, in the first voting session, Martinez said to approximately three or four voters, including Driver Martin Leija, "here we are" and "this is how we do it."

Martinez testified that he barely talked to voters, and that he kept his comments largely to "hello" or "good morning." Martinez explained that the Board agent had provided him and the other observers with instructions not to talk to voters.

Martin Leija testified that he was one of the first voters. He testified that when he voted Observer Martinez did not say anything to him, other than discussion about his name.

Deltoro also testified that, when the voting started, several voters did not know which way to go when they entered the training room to vote. To deal with that issue, the Board agent placed four chairs, in a two-by-two pattern, against the end of the table near the ballot box to help establish a walkway or path to guide the voters straight to the observers as they entered the training room to vote. Deltoro's testimony does not make clear whether or not Martinez' alleged statements "here we are" and "this is how we do it" were made due to voter confusion about where to go and what to do upon entering the polling area, but I conclude that this likely was the scenario.

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Hector Menchaca testified that when he approached the observer table to check in, Petitioner Observer Martinez said to him, in a low voice, "you know what you have to do." Menchaca testified that he felt that this meant that he had to support the Union. Undoubtedly, Menchaca's previous experiences with Petitioner supporters lobbying him to support the Petitioner influenced his interpretation about what Martinez' statement meant. According to Menchaca, the Board agent was right there when Martinez said this and he thinks that the Board agent heard it. The Board agent did not say anything to Martinez about his statement to Menchaca.

Petitioner Observer Martinez denied that he said to any voter "you know what you need to mark" or "you know what you need to vote."

Deltoro also testified that Martinez told three employees, apparently in separate situations, to call those who were outside the training room to "come in and vote" to "get this over with." She testified that one of those employees was Driver Juan Salinas, that another possibly was Julio Ortega, and that she did not recall the name of the other employee. Deltoro's testimony on this point does not establish whether Salinas was waiting to vote when Martinez told him to have other employees come into vote or whether Salinas was leaving the training room after having voted. Regarding the two-others, the evidence does not establish whether those employees were waiting to vote when Martinez made the statement or they were leaving the room after voting. The initial question put to Deltoro on this issue was the following: "during the

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morning session, did the Union observer, Mr. Martinez, make any verbal comments or statements to voters as they were coming in to vote or as they were leaving from voting?" She answered "yes," without clarifying if they were coming in to vote or were leaving after having voted. Also, Deltoro's testimony does not establish that, in each of these three situations, any other voters were inside the training room waiting to vote. Her testimony did not indicate that Martinez called on others to get any particular voters.

Martinez testified that he did not tell any voter to get other employees to vote. He testified that, when the polls opened, employee did not show up right away to vote. When they finally started coming, he said "we were waiting."

Juan Salinas testified that Observer Martinez did not tell him to get other people to come and vote.

The Employer called Julio Ortega to testify before it called Deltoro as a witness. The Employer did not ask Ortega whether or not Martinez told him to call other employees into the training room to vote.

According to Deltoro, Martinez also made a "thumbs up" gesture to several voters. She estimated that Martinez did this to over three or four voters but not more than six, and that Martin Leija was one of those three or four. She stated that Leija and possibly a couple of others returned the thumbs up gesture to Martinez. Although Deltoro's testimony is unclear on this point, it appears that her testimony is that Leija may have given a thumbs-up to Martinez after he said "here we are, this is how we do it."

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Martinez testified that he did not give any voters a thumbs-up and that no voters gave such a gesture to him.

In his testimony, Leija was not asked specifically about any gestures by him or Martinez. However, Leija explained what happened from the time he entered the training room to the time he left and he did not mention any exchange of gestures. Leija described the voting process as being expeditious: he checked in, got a ballot, marked it, dropped it in the box, and left.

Additionally, Deltoro testified that, approximately an hour into the first voting session after approximately 20 voters had cast their ballots, Martinez picked up the ballot box and shook it up and down for a few seconds, evidently to see how full it was. She acknowledged that she and the Board agent were present and that they did not lose sight of the box at any time. Also, there were no voters present at the time. Further, Deltoro made clear that Martinez did not put anything into the box or remove anything from it or actually tamper with the box or its contents.

Martinez testified that he did not pick up or otherwise handle the ballot box. He said that the only time he personally came into direct contact with the box was when the Board agent taped it up between voting sessions.

Further, Employer Observer Deltoro testified that Petitioner Observer Martinez repeatedly used the voter eligibility list (which they jointly used at the election) to count how many employees had and had not voted. Deltoro did not complain to the Board agent that Martinez was keeping track of votes.

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Petitioner Observer Martinez testified that there was a lot of "down time" during the election, with no voters coming in. He testified that, while no employee was voting and in the presence of the Employer's observer, he sometimes looked at the official eligibility list to see who had and had not voted. In doing so, he ran his finger down the list and counted to see how many employees were left to vote. He testified that he did not count to himself how many had voted for and against the Petitioner. Martinez denied that he kept a separate list or otherwise recorded who voted.

Employer Observer Ramirez testified that, in the second voting session, Martinez asked him twice while they were at the observer table waiting for voters and when no voters were in the room, what time Driver Luis Rosales comes in. Ramirez testified that when Rosales came into the training room to vote Martinez shook Rosales' hand, gave him a hug, and said "we were waiting for you." There is no evidence to show that anyone else was present at this time.

Martinez testified that he did not remember asking Ramirez where Luis Rosales was or telling Rosales that they had been waiting for him. Martinez denied that he brought Rosales into the voting room, that he hugged Rosales inside the polling area, and that he told Rosales that they had been waiting for him. Martinez testified that he probably said "how you doing" to Rosales and probably shook his hand.

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Luis Rosales testified that on the day of the election he was on the road making deliveries and that he did not have any conversation at all with Martinez before he saw him at the polls. Rosales states that he voted at the evening session toward the end. Rosales testified that Petitioner Observer Martinez was not involved in getting him to the polls that day, and that Martinez did not say anything to him, did not give him a hug, and did not shake his hand.

Additionally, Employer Observer Mario Ramirez testified that, while in the polling area, Petitioner Observer Martinez shook Francisco Alvarez' hand and the two of them discussed "traffic outside and stuff like that." Ramirez' testimony does not establish how much time Martinez and Alvarez talked. Ramirez did testify that "he" - apparently meaning Alvarez - "was there for a couple of minutes." His testimony does not clarify out of the couple of minutes that Alvarez was there, how much of that two minutes was spent discussing traffic. According to Ramirez, the Board agent stopped the discussion by telling Alvarez to vote and leave the room and by telling Martinez not to talk to voters.

Martinez did not testify about what happened when Francisco Alvarez voted.

Francisco Alvarez did not testify.

*Appendix D***Board Law***Party Conversations With Voters In the Polling Area*

In *Milchem, Inc.*, 170 NLRB 362 (1968), the Board established that it normally will set aside an election if there are prolonged or sustained conversations between representatives of any party to the election and prospective voters waiting to cast ballots, without regard to or inquiry into the content of the remarks exchanged or the nature of the conversation. In *Milchem*, the "prolonged" or "sustained" requirement was met based on conversation lasting five minutes between a union official and voters in line. The Board determined that this rule was salutary in that it avoided distraction, lastminute electioneering or pressure, and unfair advantage from prolonged conversations between representatives of any party and voters waiting to cast ballots. The Board explained, however, that it intended that application of this rule would be "informed by a sense of realism." *Id.* at 363. Thus, "any chance, isolated, innocuous comment or inquiry by an employer or union official to a voter will [not] necessarily void the election[,] since "the law does not concern itself with trifles." *Id.*

The *Milchem* prohibition applies to the conduct of election observers at the polls. See *General Dynamics Corp.*, 181 NLRB 874, 875 (1970).

Conversations of up to two to three minutes have been deemed not to violate *Milchem*, since conversations of that length are not prolonged or sustained and are innocuous.

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See, e.g., *NLRB v. Bostik Division, USM Corp.*, 517 F.2d 971, 976 (6th Cir. 1975); *NLRB v. Vista Hill Foundation*, 639 F.2d 479, 484-485 (9th Cir. 1980); *Bonanza Aluminum Corp.*, 300 NLRB 584, 584 (1990) (concluding that the objecting party did not meet its burden of proving that a conversation was prolonged where the testimony was that it last for more than two but less than five minutes).

Milchem does not prohibit observer conversations with voters that do not go beyond those which might normally be engaged in by an observer in fulfilling the observer function. See *General Dynamics Corp.*, 181 NLRB at 875.

Observers Telling Voters to Get Other Voters to the Polls

The Board, with a court of appeals' approval, decided not to overturn an election on the grounds that a union observer, inside the polling area, told a voter to go get a particular employee to vote. See *NLRB v. WMFT*, 997 F.2d 269, 274-275 (7th Cir. 1993). In that case, the employer contended that this conduct amounted to "last-minute electioneering" inside the polling area in violation of the *Milchem* rule. As the court of appeals explained in *WMFT*, the Board concluded that the observer's statement to go get another voter did not violate the *Milchem* rule because the employee to whom the statement was made was not waiting to cast a ballot and no other eligible voters were present in the polling area when the observer made the statement.

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Observer Gestures to Voters in the Polling Area

In *Brinks Inc.*, 331 NLRB 46, 46-47 (2000), the Board concluded that a union's election observer engaged in objectionable electioneering that warranted setting aside the election when, at the observer table in the polling area, he told several voters to vote for the union, one of those voters told other voters who were waiting to vote what the observer had said, and the observer gave a thumbs-up signal to other employees as they approached the check-in table. The Board agent admonished the observer for this conduct, which was contrary to the agent's earlier instructions.

In *U-Haul Co. of Nevada, Inc.*, 341 NLRB 195, 196 (2004), a union observer gave a thumbs-up sign to and smiled at several voters, without engaging in other objectionable conduct. The Board determined that the thumbs-up gestures were not objectionable. The Board observed that it does not prohibit, although it discourages, election observers from wearing campaign insignia that urge voters to vote in a particular way, and it treated gestures such as thumbs-up gestures as being comparable. *Id.* The Board stated that "[w]hether or not giving a 'thumbs up' and smiling at voters is wise or desirable conduct on the part of an observer, it does not itself constitute objectionable conduct." *Id.* The Board distinguished *Brinks* on the grounds that the observer's conduct was "not clearly linked to any instructions to vote for the [u]nion", and "the gesture was unaccompanied by any verbal exchange and could not reasonably be understood to convey any particular meaning." *Id.* at 196.

*Appendix D**Integrity of Ballot Box and Ballots*

In order to maintain the integrity of the election, the Board requires that no one involved in the election process actually tamper with the ballot box and ballots, and that the box and ballots not lose sight of the Board agent and/or observers. *See, e.g., Sawyer Lumber Co.*, 326 NLRB 1331, 1332 (1998).

Keeping Lists of Voters

Board policy prohibits anyone, including election observers, from keeping a list of persons who have voted, aside from the official eligibility list used to check off voters as they receive their ballots. *See Cerock Wire & Cable Group*, 273 NLRB 1041, 1041 (1984). The keeping of any other list of individuals who have voted is prohibited and is grounds in itself for setting aside the election when it can be shown or inferred from the circumstances that the employees knew that their names were being recorded. *See Days Inn Management Co.*, 299 NLRB 735, 736-737 (1992). Keeping a list of voters is not objectionable unless more than a de minimis number of voters know of the maintenance of a separate list. *See C & G Heating and Air Conditioning, Inc.*, 356 NLRB No. 133, slip op. at 2 n.4 (April 6, 2011).

Application of Board Law to Record Evidence*Martinez' Statements to Voters*

Clearly, there is a credibility conflict between Deltoro's, Menchaca's, and Ramirez' accounts on the one

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hand and Martinez' account on the other hand. The Board agent did not testify at the hearing, so there is no other account of events to help resolve what actually happened.

I conclude that it is not necessary to resolve these credibility disputes to decide this objection. As explained below, even were I to credit Deltoro's, Menchaca's and Ramirez' testimony relating to these objections, the Petitioner observer's conduct does not warrant setting aside the election.

Even assuming that Petitioner Observer Martinez said to several voters "here we are" and this is how we do it," I conclude that such statements did not constitute improper electioneering nor did they constitute conversation that violated the *Milchem* rule. On their face, these statements did not constitute electioneering, as they did solicit or urge any voter to favor the Petitioner. Additionally, they were not prolonged or sustained conversation, as both statements merely were short and direct declarations. Further, Employer Observer Deltoro did not testify about the particular context in which Martinez allegedly made such statements, but it seems likely that that any such comments were made in connection with legitimate observer functions. Deltoro's testimony certainly does not exclude this possibility. Significantly, Deltoro was able to identify only Martin Leija as one of the few voters to whom Martinez said "here we are" and "this is how we do it." Leija's testimony established that he was one of the first voters. As Deltoro explained, there had been an issue when the voting started with several voters not knowing which way to go when they entered the training room to

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vote so the Board agent placed chairs by the ballot box to help guide voters to the check-in table. Deltoro's testimony does not make clear whether or not Martinez' statements "here we are" and "this is how we do it" were made due to some initial voter confusion about where to go and what to do upon entering the polling area. I find, however, that it is likely that any statements to the effect of "here we are" and "this is how we do it" were made in connection with helping to direct voters to the observers' check-in table. Telling confused incoming voters "here we are" is fully consistent with the need for incoming voters to approach the observers at the check-in table to determine if they are eligible voters. Any statements to the effect of "this is how we do it" also seem likely to relate to orienting voters to the mechanics of the voting process. I find 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.

Nor does Menchaca's testimony - that Martinez said to him at the check-in table "you know what you have to do" - establish that Martinez engaged in improper electioneering. The statement, assuming that Martinez said it, is ambiguous on its face. Moreover, Martinez had not been actively involved in the Petitioner's preelection organizing campaign. Menchaca's testimony does not even suggest that Martinez had approached him before the election to try to convince him to support the Petitioner. Menchaca testified that he felt that Martinez' statement meant that he had to vote for the Petitioner, but that interpretation likely stemmed from Menchaca's subjective reaction to what he felt had been pressure from other pro-

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Petitioner employees to get him to support the Petitioner (although, as discussed above, the pro-Petitioner employees' conduct in this regard was not objectionable). Martinez' statement to Menchaca at the check-in table merely may have been Martinez indicating that Menchaca likely already knew what to do as the next step in the voting process after checking in with the observers - that is, get a ballot, mark it, and put it in the ballot box. By the time of the election, voting unit employees already had received information about what the voting process would be. Thus, employees had been provided at least with the NLRB notice of election that informed employees that they were eligible to mark a ballot and place it in a ballot box. Also, Martin Leija testified that the Employer had met with employees before the election and explained that at the election there would be a representative from the government, one for the Employer, and one for the Petitioner. Given that the Employer provided such information to employees about what they could expect at the polls, it is likely that the Employer also provided them with information about how they would need to get a ballot and mark in the box of their choice. Further, Menchaca testified that the Board agent was standing right next to them and probably heard what Martinez said, but the Board agent did not admonish Martinez. If Martinez in fact had made a statement that sounded like electioneering, the Board agent likely would have intervened. Menchaca's testimony that the Board agent did not admonish Martinez indicates that Martinez' statement to Menchaca did not involve electioneering. Consequently, I conclude that, even if Martinez said to Menchaca "you know what you have to do," any such statement did not amount to electioneering

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and that it was another innocuous statement, similar to those discussed above, relating to the mechanics of voting. See, e.g., *Environmental Maintenance Solutions*, 355 NLRB 344, 342 (2010) (statement that “you guys know what to have to do already” deemed not objectionable, where meaning was ambiguous and could have referred to the fact that voters already knew how and where to mark their ballots and where to return them).

Additionally, assuming without specifically deciding that Martinez told voters to get more voters, I conclude that any such statements by Martinez do not require a new election. Here, even if Martinez told a few employees to go get voters, such statements did not indicate a preference for voters to mark their ballots in any particular way and they did not involve prolonged conversation. Also, such a statement did not amount to a request to get voters who favored the Petitioner; as described, the statement was to get more voters without any reference to which way they might vote. Further, the evidence fails to establish that the employees to whom the statements allegedly were made actually were waiting to vote (which is one of the necessary conditions for *Milchem* to apply) as opposed to leaving the room after having voted. Similarly, there is no evidence to show that any other voters were in the room waiting to vote at the time Martinez made any such statements.

With regard to Observer Martinez greeting Luis Rosales with a hug and commenting that they were waiting for him, assuming without deciding that this happened, any such conduct did not involve electioneering or prolonged conversation. It merely was a greeting, albeit

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an exuberant one. The Board does not prohibit observers from extending greetings to voters. See *Modern Hard Chrome Service Co.*, 187 NLRB 82, 83 (1970). Further, a hug does not violate *Milchem*, as that case only prohibits conversation of a prolonged or sustained nature; a hug does not involve any verbal discourse at all.

Similarly, if Martinez shook Francisco Alvarez’ hand when Alvarez showed up to vote, that conduct too was a simple greeting. It did not involve electioneering on its face, nor prolonged conversation. Also, since the hand shake did not involve verbal discourse, *Milchem* is inapplicable.

With regard to Martinez and Alvarez talking about traffic, the evidence shows that the Board agent cut off this conversation by telling Alvarez to leave the room once he voted. It is true that *Milchem* does not allow for inquiry into the content of conversation between a party representative and a voter waiting to vote, so the fact that the conversation was about traffic does not preclude the *Milchem* rule from applying. The record, however, does not establish that this conversation between Martinez and Alvarez lasted long enough before the Board agent stopped it for it to be considered prolonged conversation that was not innocuous. That discussion lasted less than two minutes, an amount of time that does not run afoul of *Milchem*.

The Employer also contends that the above-described individual instances involving conversation between Petitioner Observer Martinez and voters should be

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aggregated so that, taking their cumulative effect together, they constitute a *Milchem* violation. Aggregating in that manner, however, would not be appropriate. As explained above, some of the alleged statements appear to have been related to legitimate observer duties. In other situations, it is not clear that any statements were made while employees were waiting to vote. Other conduct alleged to have violated *Milchem*, such as the alleged hugs and handshake, did not involve conversation at all.

In the case on which the Employer relies to support aggregation, *Bio-Medical of Puerto Rico*, 269 NLRB 827, 829-830 (1984), the Board did aggregate four conversations in concluding that, cumulatively, they violated *Milchem*. That case, however, involved particular circumstances not present here. In that case, a union agent other than its election observer stationed himself in a no-electioneering area immediately adjacent to the polls, contrary to the Board agent's instructions, for almost the entire election. In that location, he spoke to four voters as they approached the polls, telling two of them that they could not be present there before voting and that they had to go to their working areas. The hearing officer had concluded that each of the conversations with the four voters did not violate *Milchem* because each conversation was isolated and not prolonged. The Board reversed the hearing officer, concluding that in the particular circumstances - which involved the union agent deliberately violating the Board agent's instruction not to station himself there - this union agent engaged in "persistent and deliberate" misconduct that went so far as possibly conveying to voters that he had "some connection with, if not control over, the election."

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This conclusion does not apply here, as Martinez did not engage in deliberate and persistent conduct contrary to the Board agent's instructions which was so aggravated as to indicate that he controlled the election.

Gestures Between Observer Martinez and Voters

Even if Observer Martinez and some voters exchanged thumbs-up gestures, any such conduct would not invalidate this election. As explained above, the Board does not consider such gestures, without accompanying electioneering, to constitute sufficient grounds for requiring a new election. Such gestures, when unaccompanied by any verbal exchange, do not reasonably convey any particular meaning. Above, I determined that Martinez did not engage in any objectionable electioneering while serving as observer, and there is no evidence that any instance of giving a thumbs-up also involved simultaneous statements of electioneering. Thus, as in *U-Haul Co. of Nevada, Inc.*, 341 NLRB 195, 196 (2004), any thumbs-up gestures here would not invalidate the election.

Also, as discussed above in the section addressing the Employer's agency contentions, Martinez had not been actively involved in the Petitioner's organizing efforts before the election, so as to give any context or particular meaning to such gestures. That fact bolsters my conclusion that any thumbs-up gestures did not constitute objectionable conduct warranting overturning this election.

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Further, with regard at least to the thumbs-up that Deltoro testified Martin Leija gave to Petitioner Observer Martinez, it appears that Leija may have given that gesture after Martinez said to him "here we are, this is how we do it." If, as discussed above, such a statement from Martinez involved directing voters to the check-in table, then Leija's thumbs-up to Martinez likely only signified communication of a message such as "thanks" or "I understand now." Such an exchange is not objectionable.

Martinez Picking Up Ballot Box

Regarding the allegation that Martinez picked up the ballot box during the first voting session, any unnecessary observer contact with the ballot box certainly is not desirable in an election. Maintaining the integrity of the ballots, of course, is fundamental. Here, however, the evidence does not establish that this alleged improper conduct undermined the integrity of the box or the ballots. Deltoro's testimony shows that, if Martinez indeed did pick up the box, he had the box in his hands only for a few seconds. Also, Deltoro's testimony makes clear that neither she nor the Board agent lost sight of the box while Martinez had it in his hands. Further, Deltoro admitted that Martinez did not do anything to tamper with the box itself or with the ballots contained in it. Under these circumstances, even if Martinez picked up the box as Deltoro described, that conduct did not amount to objectionable conduct that requires a new election. *See, e.g., Sawyer Lumber Co.*, 326 NLRB 1331, 1332 (1998) (rejecting objection about tampering of ballot box during separate Board agent and observer breaks, where the box never left the view of either the agent or the observers).

*Appendix D**Martinez Keeping List of Voters*

The evidence does not establish that Martinez kept any separate list of voters or that any employees reasonably believed that he was doing so. The record shows only that Martinez examined the official eligibility list to determine at various points during the election how many eligible voters were left to vote. Additionally, the evidence does not demonstrate that Martinez examined the official list in this way in the presence of any employees. Martinez' testimony was that he looked over the list during times when they were waiting for voters to arrive. In any event, even if Martinez went over the list in the manner he described while voters were present, it is not reasonable to suppose that the voters would have concluded that he was keeping a separate list. Voters most likely would have understood that he was performing duties in connection with the official list, which is not objectionable conduct.

In its brief, the Employer also seems to rely on evidence that Martinez told a voter, Luis Rosales, that they had been waiting for him. I conclude that such a statement did show that Martinez was keeping a separate list of voters, or that he created the impression that he was doing so. Rosales likely would have understood this statement only to reflect the reality that he had not shown up earlier to vote. He reasonably would not have understood this to mean that anyone was keeping a list or that Martinez' statement showed surveillance.

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Recommendation

I recommend that Objections 4, 5, and 6 be overruled.

Objections 3(3), 3(4), 3(5)

The Board agent allowed the Petitioner's observer to make improper statements and gestures to voters, to handle the ballot box, and to openly review and count the employee names on the voter eligibility list who had or had not voted.

Record Evidence

In the discussion above about Objections 4, 5, and 6, the record evidence is set forth relating to the Employer's objections about the Petitioner observer's statements and gestures to voters, handling of the ballot box, and reviewing and counting names on the voter eligibility list.

Regarding the evidence about the Board agent's response to such conduct, the evidence indicates that the Board agent did not take any action to stop Observer Martinez from making statements and/or gestures to voters, except that he promptly stopped Martinez and Francisco Alvarez from talking. The evidence shows that the Employer's observers did not complain to the Board agent about any such conduct by Martinez.

With regard to handling the ballot box, Employer Observer Isabel Deltoro testified that the Board agent told the Petitioner's observer that from the way that

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Deltoro was looking at him he should not pick up the box. Petitioner Observer Martinez testified that because he did not ever pick up the ballot box the Board agent did not say anything to him about such conduct.

As for the evidence about the Board agent's response to the Petitioner's observer viewing and counting names on the list, the evidence shows that the Board agent did not take any action to stop the observer from doing this. Neither Employer Observer Deltoro nor Ramirez raised any issue with the Board agent during the election about Petitioner Observer Martinez counting names on the list.

Board Law

To set aside an election based on Board agent misconduct the objecting party must show that there is evidence that raises a reasonable doubt as to the fairness and validity of the election.

Application of Board to Record Evidence

I conclude that, by not admonishing the Petitioner observer for making statements to voters and/or giving a thumbs up sign to voters, the Board agent did not engage in objectionable misconduct that warrants setting aside the election. Nothing that the Board agent did, or failed to do, raised a reasonable doubt about the fairness of the election.

As explained above, the evidence does not establish that any statements or gestures that Observer Martinez

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made to voters involved electioneering or the sort of conversation that *Milchem* prohibits. The record does not establish that any statements were more than isolated, innocuous ones. Any thumbs-up gestures were ambiguous in meaning. Given that the underlying conduct itself was not objectionable and does not itself provide a basis for invalidating the election, there also is no basis for setting aside the election because the Board agent did not admonish the observer for such conduct. Also, Employer Observer Deltoro admits that she did not complain to the Board agent about these statements or gestures. Thus, the evidence does not establish that the Board agent even was aware that it was happening, if it did happen.

Nor did the Board agent engage in misconduct in connection with the Petitioner observer picking up the box. The Board gives its agents who are in charge of elections "the important responsibility to safeguard the ballot box and ballots against tampering and to maintain the integrity of the election process." *Sawyer Lumber Co.*, 326 NLRB 1331, 1332 (1998). Even assuming (without specifically deciding) that Observer Martinez did pick up the box, the evidence does not establish that the Board agent would have known that he was going to do that before it happened, so it is extremely doubtful that the agent had an opportunity to preempt it. Once it did happen, the Board agent told Martinez not to do it. Thereafter, by Deltoro's own admission, it did not happen again, indicating that the Board agent handled it in a sufficiently effective manner. Although the Employer observer's testimony suggests that she thought the Board agent should have directed a more strongly worded admonition to Observer Martinez,

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the Board agent said enough to alert him that he needed to refrain from handling the box again.

Here, the Petitioner observer did not engage in any misconduct by reviewing the official eligibility list and counting the number of voters left. Consequently, there was no need for the Board agent to take any action to stop the observer. Also, neither of the two Employer observers even bothered to raise the issue with the Board agent, so the Board agent did not have an opportunity to determine during the election whether what Petitioner Observer Martinez was doing crossed any lines. Accordingly, there is no basis for attributing error or misconduct to the Board agent.

Recommendation

I recommend that Objections 3(3), 3(4), and 3(5) be overruled.

Objections 12, 13, 14, and 15

The Petitioner created an atmosphere of fear, intimidation, threats, and coercion that destroyed the laboratory conditions; the Petitioner's conduct caused employees to be so fearful of voting their consciences that they switched their votes to the Petitioner and/or intentionally voided their ballots; the Petitioner's objectionable conduct, either individually or cumulatively, destroyed the minimum laboratory conditions necessary for a fair election; the Petitioner and/or the NLRB engaged in additional improper or objectionable conduct that interfered with the election.

*Appendix D***Record Evidence**

For the most part, these objections do not raise any additional specific evidence or factual issues not already considered above in the discussion of the Employer's more specific objections.

With regard to the contention that employees switched their votes to the Petitioner out of fear, there is no evidence to establish, either actually or inferentially, that anyone switched their votes in this way, or that there were employees who voted against their true desires.

Regarding the contention that voters intentionally voided their ballots, the tally of ballots shows that there were two void ballots. There is little evidence about how or why these ballots became void. The only record evidence relating at all to the reasons for void ballots was Antonio Cruz' testimony that one of the voters was a Jehovah's Witness who was going to mark his ballot in both the "yes" and "no" box because his religion did not allow him vote. There is no evidence tying the void ballots to any conduct by the Petitioner or its supporters.

Analysis

The above discussion of each objection sets forth my views about each individual objection. As explained, I conclude that none of the individual objections provides a basis for requiring a new election.

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Considering all the objections collectively, I also conclude that the evidence does not demonstrate any of the following: that there was an atmosphere of fear, intimidation, threats, and coercion that destroyed the conditions required for a fair election; that employees were so fearful of voting their consciences that they switched their votes to the Petitioner and/or intentionally voided their ballots; that the Petitioner's objectionable conduct, either individually or cumulatively, destroyed the minimum laboratory conditions necessary for a fair election; and/or that the Union and/or the NLRB engaged in additional improper or objectionable conduct that interfered with the election.

Additionally, with regard to the Employer's reference to employees voiding their ballots, the tally shows that there were only two void ballots. The evidence does not prove that these two employees voided their ballots because the pro-Petitioner employees caused them to fear to vote their consciences.

Granted, the election outcome here was fairly close, and the Employer raised numerous objections to the election. However, in my judgment the narrowness of the outcome and the number of objections do not combine to warrant overturning the election. The fundamental purpose in having an election is to ascertain what the majority of the employees want. Consequently, absent proper cause, what the majority decides through the voting process is entitled to respect, even if it is just barely a majority. The tally of ballots reflects that there was a relatively even split within this group of employees on whether they wanted

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the Petitioner to represent them. The majority decision, however, was made in a presumptively-valid NLRB-conducted secret-ballot election, and that decision must be upheld absent sufficient proof of misconduct under the standards described above. *See Consumers Energy Co.*, 337 NLRB 752, 752 and n.2 (2002) (the closeness of an election does not alter an objecting party's burden to prove that there has been misconduct that warrants setting aside the election). The mere fact that the Employer advanced numerous objections – which individually I rejected - is not an adequate basis for running another election to see if the close split between the pro-Petitioner and anti-Petitioner employees might break the other way.

Recommendation

I recommend that Objections 12, 13, 14, and 15 be overruled.

Objection 7

The Petitioner promised employees monetary rewards and/or other benefits in exchange for supporting it in the election.

As described above, during the hearing the Employer requested to withdraw this objection and it did not present any evidence in connection with this objection. Consequently, I recommend that the Employer's withdrawal of this objection be approved.

*Appendix D***SEQUESTRATION ORDER**

At the hearing, based on both parties' request, I entered the standard sequestration order and read its terms into the record. The order provided the following:

[A]ll persons who are going to testify in this proceeding, with specific exceptions, may only be present in the hearing room when they are giving testimony. Each party may select one person to remain in the room and assist it in the preparation of its case. They may remain in the hearing room even if they are going to testify or have testified. The order also means that from this point on until the hearing is finally closed, no witness may discuss with other potential witnesses either the testimony that they have given or that they intend to give.

Under the rule, as applied by the Board, with one exception, counsel for a party may not, in any manner, including by showing of transcripts of testimony, inform a witness about the content of testimony given by a preceding witness without express permission of the hearing officer; however counsel for a party may inform counsel's own witness of the content of testimony and may show to a witness, transcripts, the testimony given by a witness for the opposing side, in order to prepare for rebuttal of such testimony.

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At the hearing and in its brief, the Employer contended that one of the witnesses, Antonio Cruz, violated this order twice, by speaking to other witnesses about testimony. The Employer requests that I discredit Cruz' testimony.

— Additionally, based on my review of the record, there is an issue which I raise, *sua sponte*, about whether testimony by the Employer's Assistant General Counsel, Daniel Egeler, violated the sequestration order.

Violation of a sequestration order may result in the tainted testimony being stricken from the record if a party can show that it was prejudiced by the violation, or in a stricter scrutiny of the tainted testimony. *See Medite of New Mexico, Inc.*, 314 NLRB, 1145, 1148-1149 (1994).

I address these issues below.

Antonio Cruz

On the first day of the hearing, the Employer's counsel called Cruz to the stand. Among other things, Employer counsel asked Cruz about whether the Petitioner had given employees instructions about what to say to get other employees to support the Petitioner (which inquiry related to the Employer's agency allegation). In answering, Cruz testified that the employees had done their own investigation into what their rights were and that one of the employees shared with the others an NLRB paper that explained those rights, in Spanish. Employer counsel asked some questions about that paper, including about it being in Spanish. Cruz offered that he thought he

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had it in his truck and he could bring it into the hearing room. Employer counsel stated "we may want that, yeah." Subsequently, nothing more was said to Cruz about bringing in that paper and the matter dropped.

Additionally, during Cruz' testimony on that first day of the hearing, the Employer's counsel asked him about the events, described above, that took place when he helped Francisco Lopez to the polling area.

When Cruz finished his testimony, I instructed him not to talk to anyone else about his testimony.

On the second day of the hearing, the Employer called J. J. Martinez to the stand. When Martinez entered the hearing room, he had a document in his back pocket. The Employer's counsel asked him what it was. Martinez testified that it was the "employee rights" and that, just before Martinez entered the hearing room, Cruz told him that he had been asked about this paper and Martinez should bring a copy into the hearing room as "they" - apparently the Employer's attorneys - did not know they were in Spanish. Martinez took a copy and brought it into the hearing room so that "they can see them inside."

I allowed the Employer to recall Cruz to the stand to testify about possible violation of the sequestration order. Cruz testified that he gave this document to Martinez just before Martinez was called in to the hearing room because he had mentioned it in his testimony and had said that he had it if they wanted to see it in Spanish. Cruz testified that he felt that the lawyers did not believe him when he

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said it was in Spanish, so he provided a copy to Martinez who brought it into the hearing room.

Subsequently, Cruz did not testify again.

On the fourth day of the hearing, Daniel Delgado testified that on the second day of the hearing he had waited in a restaurant near the hearing site in the event he were called to testify that day (which he was not). Delgado testified that Cruz was there too and that Cruz said to him that he was the one who had said that Cruz had opened the door for Francisco Lopez. Delgado said he was not going to argue and that they would see when everything was over (apparently meaning the hearing process). Cruz responded by saying they would see if money is stronger than truth. Delgado had not testified by that time, and Cruz apparently inferred - from the questions that he had been asked on the first day of hearing and from his recollection of who had been in the main office when Cruz assisted Lopez - that Delgado was one who had informed the Employer or its counsel about that situation.

The Employer contends that, in these statements to Martinez and Delgado, Cruz violated the sequestration order. At the hearing, the Employer did not request any specific sanction, but in its brief it requests that I discredit Cruz' testimony based on his alleged violation of the sequestration order.

As stated above, my order precluded witnesses from discussing with other potential witnesses either the testimony that they have given or that they intend to

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give. I find that Cruz did not discuss with either Martinez or Delgado the testimony that he had given or intended to give. With Martinez, Cruz only informed him that the lawyers had asked about the Spanish version of the employee rights paper, and then Martinez took a copy of it from Cruz into the hearing room to provide to the hearing participants, as he had offered to the previous day on the record. With Delgado, Cruz merely accused Delgado of raising this issue with the Employer. Cruz did not say anything to Delgado about testimony that Cruz had given or would give.

Additionally, these incidents could not have affected Cruz' substantive testimony, as he gave his testimony before talking to Martinez or Delgado.

Even if Cruz technically did violate the order, I conclude that it was insubstantial and did not have material effect on any hearing testimony. Since Cruz' testimony could not have been affected by what he said to Martinez and Delgado, any impact had to be on what Martinez and Delgado stated in their testimony. However, the existence of the employee rights paper was a side issue in the hearing. It did not significantly relate to any of the Employer's objections, and it did not come up in Martinez' testimony except to the extent that the Employer's attorneys asked him about it in attempting to prove that Cruz violated the sequestration order. Although the Francisco Lopez situation which Cruz raised with Delgado did relate to the Employer's electioneering objection, Cruz did not reveal anything substantive about his testimony on that issue. Also, since Delgado was

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waiting to give his testimony when Cruz directed this accusation to Delgado, by that time Delgado certainly already understood that he would be called to the stand to testify about what he heard Cruz say to Lopez. Cruz' statement to Delgado merely would have confirmed that this was an issue, without revealing to Delgado how Cruz had testified on that issue.

In any event, in my analysis of the case, I did not credit Cruz' testimony over the testimony of Delgado or any the Employer's other witnesses.

For these reasons, there is no need for me to discredit Cruz' testimony because of what he said to Martinez or Delgado.

Daniel Egeler

In examining the record regarding my sequestration order, I realized that there was a previously-unrecognized violation of my order through Assistant General Counsel Daniel Egeler's testimony.

At the start of the hearing, Assistant General Counsel Egeler entered an appearance along with the three other attorneys who represented the Employer at the hearing. He was not the "one person" allowed to remain in the room to assist in the preparation of the case. That person was the Employer's Service Center Manager, Ted Garcia.

In his capacity as one of the Employer's attorneys, Egeler sat through the entire hearing and observed the

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testimony of all of the witnesses. Service Center Manager Garcia also sat through the entire hearing.

On the last day of hearing, as part of the Employer's rebuttal, Employer counsel called Egeler to the stand. Egeler testified briefly about the no-electioneering sign that the Board agent posted on the training room door. Egeler was the very last witness to testify, and he had observed every other witness testify.

Egeler's testimony created a situation that violated my order prohibiting all persons who are going to testify from being present in the hearing room except while giving testimony. Egeler testified, even though he had sat through the entire hearing and had heard the testimony of all the other witnesses.

It is true that Egeler testified on rebuttal, and my sequestration order provided some leeway regarding letting rebuttal witnesses know about the content of testimony given by a witness for the opposing side. Thus, the order allowed counsel for the Employer to inform their own witnesses of the content of testimony given by a witness for the Petitioner, including by showing the rebuttal witnesses transcripts of the opposing side's witnesses. However, this exception to the sequestration rule did not allow a rebuttal witness like Egeler actually to sit in the hearing room during testimony by all of the Petitioner's witnesses.

I conclude, however, that this violation of my sequestration order was inadvertent. The Employer called

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Egeler to testify as part of its brief rebuttal case, and he testified only about the no-electioneering sign that the Board agent posted on the training room door. I believe that the Employer did not anticipate until very late in the hearing that Egeler would testify, after issues arose about the location of the no-electioneering area. Specifically, Petitioner President/Business Manager Frank Perkins testified late on the second-to-last day of the hearing and there were questions about the location of any no-electioneering signs. Perkins testified that there may have been a notice on the training room door, but he was not sure. My conclusion is that these questions on this issue, and Perkins' uncertainty, is what prompted the Employer to call Egeler to the stand to clarify this issue. It appears that none of the participants in the hearing - certainly not me and apparently not the Petitioner's counsel or the Employer's counsel - made the connection that Egeler's testifying was contrary to the terms of the sequestration order. No one objected to him testifying, and I did not seek to prevent him from giving testimony, given that I did not realize at the time that it was contrary to the sequestration order.

Even after the hearing, no one raised an issue with me about the propriety of Egeler taking the stand as a witness. The Petitioner's counsel has not complained about it, and he has not requested any sanction for this violation of my order.

Further, I am not persuaded that Egeler's testimony was influenced by previous testimony by other witnesses.

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Also, there is no real dispute about the accuracy of Egeler's limited testimony. Petitioner President/Business Manager Frank Perkins testified that he thought there was a no-electioneering sign on the training room door, but he was not sure. Egeler's testimony merely confirmed what Perkins thought may have been the case.

Under these circumstances, I decline to discredit Egeler's testimony or strike it due to his having sat through the entire hearing and then providing testimony, contrary to the sequestration order.

CONCLUSION

Based on the foregoing and on the record as a whole, I recommend that the Employer's objections be overruled in their entirety. The Employer has not established that its objections, either individually or cumulatively, to the election held on September 12, 2014, warrant overturning the election. The Employer did not establish that the Petitioner engaged in misconduct that reasonably tended to interfere with employee free choice, that any of pro-Petitioner employees engaged in conduct that was so aggravated as to create a general atmosphere or fear making a fair election impossible, or that the Board agent conducting the election engaged in conduct that raises a reasonable doubt as to the fairness and validity of the election. Therefore, I recommend that the appropriate certification issue.

*Appendix D***EXCEPTIONS****Right to File Exceptions**

Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001.

Procedures for Filing Exceptions

Pursuant to the Board's Rules and Regulations, Sections 102.111 — 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on February 25, 2015, at 5 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically.** If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file. A request for extension of time, which may also be filed electronically, should be submitted to the Regional Director and a copy of such request for extension of

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time should be provided to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on each of the other parties in the proceeding in the same manner or a faster manner as that utilized in filing the request with the Regional Director.

A copy of the exceptions must be served on each of the other parties to the proceeding, as well as on the Regional Director, in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated at Denver, Colorado this 11th day of February, 2015.

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/s/

Daniel J. Michalski, Hearing Officer
National Labor Relations Board
Region 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, Colorado 80294
(303) 844-3551

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**APPENDIX E — ORDER DENYING PETITION
FOR REHEARING OF THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT,
FILED DECEMBER 12, 2016**

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

No. 15-60861

CON-WAY FREIGHT, INCORPORATED,

Petitioner Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent Cross-Petitioner

Petition for Review of an Order of the
National Labor Relations Board

ON PETITION FOR REHEARING

Before STEWART, Chief Judge, and CLEMENT, and
HAYNES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/

UNITED STATES CIRCUIT JUDGE