

No. 17-10294

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

TRANSIT CONNECTION, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

AMALGAMATED TRANSIT UNION LOCAL 1548

Respondent

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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UNITED STATES COURT OF APPEALS
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)	
Petitioner/Cross-Respondent)	
)	
v.)	
)	No. 17-10294
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	01-CA-183197
)	
AMALGAMATED TRANSIT UNION)	
LOCAL 1548)	
)	
Respondent)	
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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 28-1(b) and 26.1-1, the National Labor Relations Board (“the Board”), by its Deputy Associate General Counsel, hereby certifies that the following persons and entities have an interest in the outcome of this case:

1. Abruzzo, Jennifer, Deputy General Counsel for the Board
2. Amalgamated Transit Union Local 1548, Charging Party
3. Cohen, Ronald S., Regional Attorney, NLRB Region 1 (Boston)
4. Dellinger Vol, Kira, Supervisory Attorney for the Board
5. Dreeben, Linda, Deputy Associate General Counsel for the Board
6. Ferguson, John H., Associate General Counsel for the Board

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7. Foley, Jessica L., Hearing Officer, NLRB Region 1 (Boston)
8. Griffin, Jr., Richard F., Board General Counsel
9. Hirozawa, Kent Y., former Board Member
10. KP Law, PC, Attorneys for Petitioner/Cross-Respondent
11. Jason, Meredith, Managing Supervisor for the Board
12. Kreisberg, Jonathan B., former Regional Director, NLRB Region 1 (Boston)
13. McFerran, Lauren, Board Member
14. Miscimarra, Phillip A., Board Chairman, former Board Member
15. Morris, Darren, General Manager of Petitioner/Cross-Respondent
16. National Labor Relations Board, Respondent/Cross-Petitioner
17. Pearce, Mark G., Board Member, former Board Chairman
18. Pigman, Edward, President & CEO of Petitioner/Cross-Respondent
19. Reich, Mark R., Attorney for Petitioner/Cross-Respondent
20. Ryan, Charles, President of Charging Party
21. Sauter, Gregoire F., Attorney for the Board
22. Switzer, Gene, Hearing Officer, NLRB Region 1 (Boston)
23. Transit Connection, Inc., Petitioner/Cross-Respondent
24. Walsh, Jr., John J., Regional Director, NLRB Region 1 (Boston)
25. Zessin, Timothy D., Attorney for Petitioner/Cross-Respondent

Transit Connection, Inc. v. NLRB, et al.

26. All full-time and regular part-time operators employed by the Employer at its 11 A Street, Edgartown, Massachusetts facility but excluding office clerical employees, managerial employees, dispatchers, mechanics, confidential employees, seasonal employees, guards and supervisors as defined in the Act, and all other employees.

CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 28-1(b) and 26.1-1, the Board certifies that it has no knowledge as to whether there exists any subsidiary, conglomerate, affiliate, or parent corporation of TCI, or any publicly held corporation owning 10% or more of TCI's stock, that has an interest in the outcome of this case.

/s/ Linda Dreeben

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Dated at Washington, DC
this 12th day of July 2017

STATEMENT REGARDING ORAL ARGUMENT

In accordance with 11th Circuit Rule 28-1(c), the Board expresses its belief that oral argument would not be of material assistance to the Court, as this case involves the application of well-settled legal principles to established facts. However, if the Court believes that argument is necessary, the Board requests to participate and submits that 10 minutes per side would be sufficient.

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JURISDICTIONAL STATEMENT

This case is before the Court on the petition for review of Transit Connection, Inc. (“TCI”), and the cross-application for enforcement of the National Labor Relations Board (“the Board”), of a Board Order issued against TCI. The Board’s Decision and Order, reported at 365 NLRB No. 9 (Dec. 28,

2016), is final under Section 10(e) and (f) of the National Labor Relations Act (“the Act”), as amended, 29 U.S.C. § 151, et seq., 160(e) and (f).

The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the Act, which empowers the Board to prevent unfair labor practices. *Id.* § 160(a). TCI’s petition for review and the Board’s cross-application for enforcement are timely, as the Act places no time limitation on such filings. This Court has jurisdiction over these proceedings pursuant to Section 10(e) and (f) of the Act, and venue is proper because TCI transacts business in Florida. *Id.* § 160(e), (f).

The Board’s Decision and Order is based, in part, on findings made in Board Case No. 01-RC-145728, a representation proceeding in which the Board certified Amalgamated Transit Union Local 1548 (“the Union”) as collective bargaining representative for a unit of TCI’s employees in Martha’s Vineyard, Massachusetts. The record in that representation case is also before the Court pursuant to Section 9(d) of the Act, 29 U.S.C. § 159(d). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964); *U.S. Rubber Co. v. NLRB*, 373 F.2d 602, 604 n.3 (11th Cir. 1967).¹ The Court may review the Board’s actions in the representation proceeding for the limited purpose of deciding whether to enforce, modify, or set aside the Board’s

¹ Decisions of the former Fifth Circuit issued prior to October 1, 1981, are binding precedent for this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

unfair-labor-practice order in whole or in part. 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act, *id.* § 159(c), to resume processing the representation case in a manner consistent with the ruling of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

STATEMENT OF ISSUE

The ultimate issue in this case is whether substantial evidence supports the Board's finding that TCI violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by refusing to recognize and bargain with the Union. The underlying issue is whether the Board abused its broad discretion in sustaining the Union's objection to the first election and overruling TCI's objection to the second election.

STATEMENT OF THE CASE

After losing an election to represent a unit of TCI's employees, the Union filed an objection with the Board. The Board, finding merit to the Union's objection, set aside that election and directed a new election. The Union prevailed in the second election but, this time, TCI filed objections. The Board overruled TCI's objections and certified the Union as the unit's exclusive collective-bargaining representative. When TCI refused to recognize and bargain with the Union, the Board issued an Order finding that TCI's refusal violated Section 8(a)(5) and (1) of the Act.

The Board now seeks enforcement of its Order. TCI does not dispute that it is refusing to bargain with the Union but challenges the Union's certification, claiming that the Board abused its discretion in sustaining the Union's objection to the first election and overruling one of TCI's objections to the second. The Board's findings in the representation and unfair-labor-practice proceedings are summarized below.

I. THE BOARD'S REPRESENTATION PROCEEDING

TCI provides public transit services on Martha's Vineyard, an island off the coast of Cape Cod, Massachusetts. (R. 167; R. 29.)² On January 6, 2015, the Union sent a letter notifying TCI that a majority of bus drivers had signed cards authorizing the Union to be their exclusive collective-bargaining representative, and requesting that TCI voluntarily recognize the Union without conducting a Board election. (R. 58.) TCI declined to recognize the Union and, on February 4, the Union filed a petition with the Board's Region 1 ("the Region") to represent a unit of TCI's bus drivers.³ (R. 165; R. 31, 284.)

² In this brief, "R" references are to the certified agency record filed on March 22, 2017, and "ERX 1" refers to the CD-ROM filed as a supplemental exhibit on May 18, 2017. Where applicable, references preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." refers to TCI's opening brief.

³ The unit in question consists of "[a]ll full-time and regular part-time operators employed by [TCI] at its 11 A Street, Edgartown, Massachusetts facility but excluding office clerical employees, managerial employees, dispatchers,

A. The First Election and the Union's Objection; the Board's Decision and Direction of a Second Election

Subsequently, TCI and the Union signed a stipulated election agreement to hold a secret-ballot representation election under Board supervision. (R. 165; R. 55-57.) As required by Board law and the parties' election agreement, TCI provided the Union with a list of eligible voters and their addresses, also referred to as an "*Excelsior* list," in preparation for the election.⁴ (R. 168; R. 19.)

The election took place on March 18; the Union lost by a vote of 21 to 18. (R. 165; R. 290.) The Union filed a post-election objection, alleging that the *Excelsior* list did not comply with Board requirements. (R. 166; R. 291.) After an investigation, the Regional Director ordered a hearing on the Union's objection. (R. 166.) The hearing was held on May 7 before Hearing Officer Gene Switzer, who made the following findings of fact.

TCI General Manager Darren Morris personally compiled TCI's *Excelsior* list. (R. 167; R. 34.) TCI does not maintain a dedicated list of its employees' addresses because it communicates with them mostly in person or by telephone. (R. 167; R. 34, 39-40.) Accordingly, to compile the list, Morris reviewed each employee's personnel file to determine the most recent address. (R. 167; R. 39,

mechanics, confidential employees, seasonal employees, guards and supervisors as defined in the Act, and all other employees." (R. 417-18.)

⁴ See *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1239-40 (1966) (establishing requirement that employer provide eligibility list to union ahead of election).

40-41.) He relied primarily on two documents contained in each file: the driver's license and the employment application. (R. 167; R. 34.) Driver's licenses typically display only an employee's residential address, but many employees also provided Post Office Box addresses on their employment applications. (R. 167; R. 34, 37.) Mailing addresses on Martha's Vineyard are generally Post Office Boxes, and 60-70 percent of employee files included such addresses. (R. 167; R. 41-42.) Morris decided to report employee addresses on the *Excelsior* list in a "consistent" manner, including only residential addresses in order to produce a uniform document. (R. 167; R. 34, 40, 42.)

TCI timely delivered the *Excelsior* list to the Union on February 19, 2015. (R. 168 & n.7; R. 45-46.) The list contained the names of 39 employees; for 37, it provided only residential addresses. (R. 168; R. 81-84.) For one employee, it listed a Post Office Box and, for another, it had both residential and Post Office Box addresses. (R. 168; R. 83.)

The *Excelsior* list was received by Charles Ryan, the Union's president and business agent of 23 years. (R. 168; R. 26.) After making sure the list did not include ineligible employees, Ryan entered each name and address into his computer. (R. 168; R. 20, 23.) In so doing, he noticed that six to eight employees were already in his database from a campaign in 2004, so he did not rely on the *Excelsior* list for their addresses. (R. 168; R. 13, 21.) Nor did Ryan compare the

addresses on the *Excelsior* list to those on the authorization cards signed by the employees, as he had submitted those cards to the Region along with the Union's representation petition and did not retain a copy for his records. (R. 168; R. 20.)

On March 10, 2015, the Union sent a campaign mailer to the 39 unit employees. (R. 168; R. 9, 23.) The mailer contained campaign literature intended to respond to similar literature employees had received from TCI, as well as an invitation for employees to attend a union meeting on March 14. (R. 168-69; R. 7-8, 12-13.) Only seven employees attended the meeting. (R. 169; R. 13.) The Union did not attempt to visit employees at home. (R. 169; R. 24.)

After the election, the Postal Service returned as undeliverable 22 of the 39 envelopes the Union had mailed on March 10.⁵ (R. 169; R. 11, 59-80.) Four of the returned envelopes bore addresses that did not exactly match those on the *Excelsior* list, and three were addressed to employees who had attended the March 14 union meeting. (R. 169 & n.11; R. 13, 61, 66, 69, 77.)

On June 3, 2015, Hearing Officer Switzer issued a Report and Recommendation finding that the voter list TCI provided to the Union did not substantially comply with the requirements of *Excelsior* and its progeny because

⁵ In all, 21 envelopes were returned between March 18 and March 23, when the Union filed its objection to the results, and one other after March 23. (R. 169; R. 11, 54, 69.) Return labels were affixed to each envelope: 10 were marked "Not Deliverable as Addressed" (R. 62, 64-66, 68, 70, 72, 77-78, 80), 9 were marked "No Such Street" (R. 59-60, 64, 67, 73-76, 79), and 3 were marked "Unclaimed" (R. 59, 69, 71). All envelopes were also marked "Unable to Forward." (R. 169.)

the list did not contain employee mailing address that TCI had. (R. 166, 169-73.) The Hearing Officer concluded that TCI's actions prevented a substantial number of employees from making a free and reasoned decision as to whether they wished to have the Union for collective-bargaining representative. Accordingly, the Hearing Officer recommended that the election be set aside, and a new election ordered. (R. 173.)

On August 4, 2015, the Board (Chairman Pearce; Members Miscimarra and Hirozawa) adopted Hearing Officer Switzer's Report and Recommendation over TCI's exceptions and issued a Decision and Direction of Second Election. (R. 162-64; R. 311-30.)

B. The Second Election and TCI's Objection; the Board's Decision and Certification of Representative

The Regional Director scheduled the second election for September 10, 2015. (R. 350; R. 334.) This time, the Union prevailed by a vote of 17 to 14, with two challenged ballots that did not affect the result. (R. 350; R. 339.) On September 15, TCI filed an objection alleging that, before the election, employees who supported the Union had threatened a coworker with violence if he did not vote for the Union.⁶ (R. 350; R. 341-42.) After an investigation, the Regional

⁶ TCI also filed an objection based on a Union campaign mailer. (R. 342-43.) The Board overruled that objection (R. 358-60, 377-78), and TCI does not contest that ruling in its opening brief. Accordingly, TCI has waived any further challenge to the Union's certification based on that objection. *See, e.g., Sapuppo v. Allstate*

Director ordered a hearing on TCI's objection. (R. 350.) The hearing was held on October 14, 2015, before Hearing Officer Jessica Foley, who found the following facts.

The day after the Union won the election, Morris discovered video footage of a conversation between three TCI employees while reviewing surveillance videos to determine the source of damage to one of TCI's buses a few weeks earlier. (R. 353; R. 105-06, 122-25.) The conversation took place at the Church Street bus stop in Edgartown, Martha's Vineyard, on August 22, 2015, three weeks before the election. (R. 352; R. 98-99, 105.) Shortly after 10 a.m. on that day, driver Walter Tomkins pulled up to the bus stop, where driver Richard Townes was waiting to relieve him. (R. 352; R. 100-01.) A surveillance camera installed on Tomkins' bus captured footage showing Tomkins sitting in the driver's seat, exchanging pleasantries with Townes as the latter boards the bus. (R. 352; ERX 1, R. 97, 99, 101, 128-29.) Another driver, John "Stevie" Edwards, approaches the open bus door and jokingly teases Tomkins about his driving. After that brief exchange, Tomkins points his finger at Edwards and says to Townes, "Now's your time to tell him that if he doesn't vote for the Union I'm going to kill him."

Floridian Ins. Co., 739 F.3d 678, 681 (11th Cir. 2014) (“[A]n appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority.” (citations omitted)); *see also* Fed. R. App. P. 28(a)(8)(A) (appellant’s opening brief must contain “appellant’s contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies”).

Townes responds, “That’s right, that’s right, we’re all going to kill him.” (R. 352; ERX 1.) Neither Tomkins nor Townes raises his voice or changes his jocular tone during the exchange. (R. 352-53.) After that exchange, Tomkins, Townes, and Edwards continued to discuss the upcoming election. (R. 352 n.7; R. 125-26.)

Tomkins has known Edwards for over 20 years; they worked together for two other employers before TCI, and Tomkins regularly socializes with Edwards, whom he considers one of his best friends. (R. 354; R. 130.) Townes has known Edwards for about five years and also considers him a good friend. (R. 354; R. 139, 148.)

Morris discovered the alleged threat on his own; it was not reported to him by Edwards or anyone else. (R. 353; R. 96, 110, 124, 128.) On reviewing the footage, Morris believed Tomkins and Townes were threatening violence against Edwards if he voted against the Union, which he found to be “a cause of great concern.” (R. 353; R. 102, 109, 128.) Subsequently, Morris discussed the incident with Edwards and filed objections to the election results. (R. 353; R. 109.) Morris did not speak to either Tomkins or Townes about the exchange, nor did he notify the police of the alleged threat. (R. 353; R. 107-08.)

On November 12, 2015, Hearing Officer Foley issued a Report and Recommendation to overrule TCI’s objection. (R. 349-62.) She found that the statements made by Tomkins and Townes did not meet the standard for

invalidating an election because they were made in jest during a conversation among friends, were not delivered with a threatening tone, occurred during an isolated conversation three weeks before the election, and were not disseminated to anyone beyond Edwards. (R. 355.)

On March 15, 2016, the Board (Chairman Pearce; Members Miscimarra and Hirozawa) adopted the Hearing Officer's Report and Recommendation over TCI's exceptions. (R. 377; R. 363-64.) Based on the election results, the Board certified the Union as the unit's collective-bargaining representative. (R. 378.)

II. THE BOARD'S UNFAIR-LABOR-PRACTICE PROCEEDING

Subsequently, the Union requested to bargain with TCI as the unit's exclusive collective-bargaining representative, but TCI refused in order to test the Union's certification.⁷ (R. 417-18; R. 388.) On August 30, 2016, the Union filed a Board charge over TCI's refusal to recognize and bargain with it. (R. 417.) After investigating that charge, the Board's General Counsel issued an unfair-labor-practice complaint alleging that TCI's actions violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). (R. 417.) The General Counsel then filed a motion for summary judgment and the case was transferred to the Board. (R. 417.)

⁷ See *Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259, 1261 n.1 (11th Cir. 1999) (explaining that the Act's statutory scheme allows employers to seek judicial review of Board certification decisions by refusing to bargain and defending ensuing unfair-labor-practice charge); see generally *Boire*, 376 U.S. at 477.

III. THE BOARD'S CONCLUSIONS AND ORDER

On December 28, 2016, the Board (Chairman Pearce; Members Miscimarra and McFerran) granted the General Counsel's motion for summary judgment and found that TCI violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union. (R. 417-18.) The Board found that all representation issues raised by TCI were or could have been litigated in the representation proceeding and that TCI neither offered to adduce newly discovered or previously unavailable evidence nor alleged any special circumstance that would require the Board to reexamine its Decision. (R. 417.)

The Board's Order requires TCI to cease and desist from the unfair labor practices found and from, 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, 29 U.S.C. § 157. (R. 418.) Affirmatively, the Board's Order requires TCI to bargain in good faith with the Union and, if an understanding is reached, embody the understanding in a signed agreement. (R. 418.) The Board's Order also requires TCI to post a remedial notice. (R. 418-19.)

SUMMARY OF ARGUMENT

TCI admits its refusal to recognize and bargain with the Union. However, TCI challenges the Union's status as exclusive bargaining representative of the unit employees, arguing that the Board abused its discretion in setting aside the first

representation election and validating the results of the second. Because the Board acted well within its discretion in reaching both decisions and certifying the Union, TCI's refusal to bargain violates Section 8(a)(5) and (1) of the Act.

With respect to the first election, the Board reasonably found that the list of eligible voters TCI provided to the Union did not substantially comply with the Board's *Excelsior* rule. A full 46 percent of the addresses on the list were not accurate mailing addresses because they omitted the Post Office Box addresses that employees use to receive mail. Moreover, TCI had mailing addresses on file for 60 to 70 percent of its employees but chose not to include them on the list, even though it admittedly knew that Martha's Vineyard has a quirky mail-delivery system in which mailing addresses are typically Post Office Boxes. As a result, over 38 percent of employees did not receive the Union's campaign mailer or its invitation to a pre-election meeting. TCI's defenses—including that it satisfied its obligations by providing just residential addresses and that the Union should have realized that mailing addresses were missing and requested them—are legally unsupported. Therefore, the Board reasonably found that TCI's withholding of mailing addresses interfered with employees' statutory right to make a fully informed choice in the election, sustained the Union's objection, and set a second election.

With respect to the second election, the Board was amply within its discretion in finding that statements made by employees Tomkins and Townes to their colleague Edwards did not justify overturning the election. Under the established standard, a party seeking to overturn an election based on third-party misconduct must show that the conduct at issue was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible. The Board reasonably found that Tomkins's and Townes's statements did not rise to that level because they were made in the course of good-natured banter among friends, they were directed at Edwards alone and were never disseminated to any other unit employee, and because they occurred only once, three weeks before the election, and were not revived thereafter. TCI's own handling of the incident corroborates the Board's determination that the statements were not aggravated enough to affect employee choice in the election. After Morris discovered the incident and spoke about it with Edwards, TCI took no action to investigate the alleged threat, to refer the matter to the police, or to discipline Tomkins and Townes—even though its employee manual expressly prohibits threats of any kind. Instead, TCI immediately asserted the incident as grounds to overturn the election, thus proving that its actual concern was the prospect of having to negotiate with the Union, not lighthearted teasing among employees. On this evidence, the Board reasonably overruled TCI's objection and certified the results of the election.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT TCI VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION

Section 8(a)(5) of the Act prohibits employers from refusing to bargain in good faith with the representatives of their employees. 29 U.S.C. § 158(a)(5). The Court reviews the Board's finding of a refusal to bargain for substantial evidence, *Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259, 1261 (11th Cir. 1999), but TCI admittedly refused to bargain with the Union in order to challenge the Union's certification by the Board. (Br. 16.) Therefore, the only issue for this Court to decide is whether the Board reasonably exercised its discretion in sustaining the Union's objection to the first election and rejecting TCI's objection to the second. *Associated Rubber Co. v. NLRB*, 296 F.3d 1055, 1060 (11th Cir. 2002).

“Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.” *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); accord *NLRB v. Dynatron/Bondo Corp.*, 992 F.2d 313, 315 (11th Cir. 1993) (“[The Board] enjoys wide discretion to determine whether employee elections have been fairly conducted, and those determinations warrant special respect on review.” (quotation marks and citation omitted)). Therefore, as recognized by this Court, “whether a union representation election was unfairly

conducted and should be set aside is primarily a question for the Board.”

Associated Rubber, 296 F.3d at 1060 (quotation marks, brackets, and citation omitted); *accord NLRB v. Downtown Bid Servs. Corp.*, 682 F.3d 109, 112 (D.C. Cir. 2012) (Board elections rulings subject to “extremely limited” review).

Because the Board acted well within its discretion in sustaining the Union’s objection to the first election and overruling TCI’s objection to the second, TCI’s refusal to bargain with the Union violates Section 8(a)(5) and (1) of the Act.⁸

A. The Board Did Not Abuse Its Wide Discretion in Directing a Second Election Based on TCI’s Failure to Substantially Comply with the *Excelsior* Rule

1. To substantially comply with the *Excelsior* rule, an employer must provide a complete and accurate list of the names and addresses of all eligible voters

As recognized by the Board, “employees have a Section 7 right to make a fully-informed choice in an election.” *Woodman’s Food Mkts., Inc.*, 332 NLRB 503 (2000) (quotation marks and footnote omitted). To protect that right, the Board long ago devised the *Excelsior* rule, which requires employers to provide unions with a list containing the names and addresses of all eligible voters within seven days after the Board has directed that an election take place. *Excelsior*

⁸ A violation of Section 8(a)(5) results in a derivative violation of Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the[ir statutory] rights” See *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Elec. Mach. Co. v. NLRB*, 653 F.2d 958, 960 (5th Cir. Aug. 1981).

Underwear, Inc., 156 NLRB 1236, 1239-40 (1966); accord *NLRB v. Singleton Packing Corp.*, 418 F.2d 275, 278 (5th Cir. 1969). The *Excelsior* rule furthers the goal of “ensur[ing] the fair and free choice of bargaining representative . . . by encouraging an informed employee electorate and by allowing unions the right of access to employees that management already possesses.” *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969) (plurality opinion) (citation omitted). As explained by the Board, the rule’s primary purpose is to “maximize the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation.” *Excelsior*, 156 NLRB at 1241.⁹ Thus, the rule is not intended to “level the playing field” between unions and employers, but to “achieve important statutory goals by ensuring that all employees are fully informed . . . and can freely and fully exercise their Section 7 rights.” *Mod Interiors, Inc.*, 324 NLRB 164, 164 (1997) (citation omitted).

The duty to produce the *Excelsior* list falls on the employer because, “[a]s a practical matter, an employer . . . [has] possession of employee names and home addresses.” *Excelsior*, 156 NLRB at 1240. The Board has made clear that “[i]t is extremely important that the information in the *Excelsior* list be not only timely but *complete and accurate* so that the union may have access to *all* eligible voters.”

⁹ The rule also serves the ancillary purpose of enabling the parties to resolve questions of voter eligibility ahead of the election, thus “further[ing] the public interest in the speedy resolution of questions of representation.” *Excelsior*, 156 NLRB at 1243.

Mod Interiors, 324 NLRB at 164 (emphases added). Accordingly, failure to comply with the *Excelsior* rule may be grounds for setting an election aside. *Excelsior*, 156 NLRB at 1240.

“While the *Excelsior* rule is not to be applied mechanically, it is well established that substantial compliance is required.” *Thrifty Auto Parts, Inc.*, 295 NLRB 1118, 1118 (1989) (footnote omitted). The Board views inaccurate addresses as a less serious flaw than the omission of employee names because the latter not only impedes an informed electorate, but also prevents determination of voter eligibility ahead of the election. See *Women in Crisis Counseling & Assistance*, 312 NLRB 589, 589 (1993). In an inaccurate-address case such as this one, the Board considers the number of inaccuracies as a percentage of the total number of eligible voters. Compare, e.g., *Am. Biomed Ambulette, Inc.*, 325 NLRB 911, 911 (1998) (setting election aside where 56% of employee addresses were inaccurate), *Mod Interiors*, 324 NLRB at 164 (same where 40% of addresses were inaccurate), and *Wasatch Med. Mgmt. Servs., Inc.*, 272 NLRB 1180 (1984) (ordering hearing on election objections where 31-43% of addresses were inaccurate), with *Women in Crisis Counseling*, 312 NLRB at 589 (finding substantial compliance found where 30% of addresses were inaccurate), and *W. Coast Meat Packing Co.*, 195 NLRB 37, 37 (1972) (same where list omitted 4% of employees and 22% of addresses were inaccurate). “[A] union’s ability to

communicate with employees by means other than the eligibility list does not influence the determination of whether the employer has substantially complied with its *Excelsior* duty.” *Mod Interiors*, 324 NLRB at 164 (citation omitted). Finally, finding that an employer failed to comply substantially with the *Excelsior* rule does not require a showing of gross negligence or bad faith; if such a showing is made, however, even an insubstantial failure may justify setting an election aside. *Merchants Transfer Co.*, 330 NLRB 1165, 1165 (2000); *Women in Crisis*, 312 NLRB at 589.

2. TCI failed to substantially comply with the *Excelsior* rule by withholding employee mailing addresses that were readily available in its files

The Board acted within its discretion in sustaining the Union’s objection and ordering a second election because TCI did not substantially comply with the *Excelsior* rule. TCI does not dispute the Board’s finding that 18 of the 39 addresses on the list—over 46 percent—were either inaccurate or incomplete, as evidenced by envelopes the Postal Service returned as undeliverable.¹⁰ (R. 169 & n.11, 170-71 & n.12.) That rate of error is comparable to rates the Board has previously found sufficient to invalidate elections. *See, e.g., Mod Interiors* (40%) and *Wasatch Med. Mgmt.* (31-43%), *supra* p. 18.

¹⁰ When calculating the percentage of inaccurate or incomplete addresses, the Board did not count four returned envelopes whose addresses did not match those on the *Excelsior* list. (R. 171 n.12.)

In this case, moreover, TCI's decision to omit Post Office Box addresses effectively prevented over 38 percent of employees from hearing arguments in favor of representation. (R. 170-71, 173.) TCI does not challenge the Board's conclusion that the Union was unable to communicate with a minimum of 15 of the 39 eligible voters due to the return of campaign mailers addressed according to the *Excelsior* list.¹¹ (R. 171 & n.13.) And because those employees "lack[ed] . . . information with respect to one of the choices available," they were unable to make "a more fully informed and reasonable choice" in the election. *Excelsior*, 156 NLRB at 1240. The Board reasonably found (R. 171) that lack of information significant, especially given the close margin by which the election was decided. *See Mod Interiors*, 324 NLRB at 164 (finding insubstantial compliance where 40% of *Excelsior*-list addresses were inaccurate and election was narrowly decided).

It is baldly disingenuous for TCI to claim that it had "no reason to know that the addresses [in the *Excelsior* list] would not have allowed the Union to deliver campaign material by mail to certain employees." (Br. 36.) Morris all but admitted the opposite when he testified that "mailing addresses are generally P.O. Boxes on Martha's Vineyard, and not a residential street address" (R. 41), and he also admitted that TCI had Post Office Box addresses on file for 60 to 70 percent of its employees (R. 42). Furthermore, TCI operates its business on the

¹¹ The Board did not count three employees who attended the March 14 meeting even though they had not received the Union's mailer. (R. 171 n.13.)

island and is well acquainted with the local mail-delivery system, which it describes alternatively as “particularly complex,” “unreliable and not well understood,” and “unique.” (Br. 12, 17, 27.) TCI even admits that it is “due in part to this complexity” that it does not communicate with employees by mail. (Br. 12.) TCI thus knew, or should have known, that omitting available mailing-address information from the *Excelsior* list would impair the Union’s ability to mail campaign appeals to employees. (R. 173.) Yet, despite all that, Morris made a conscious decision to include only employees’ residential addresses.¹² (R. 34.)

The Board encountered a similar situation in *Rite-Care Poultry Co.*, where it found that an employer did not substantially comply with the *Excelsior* rule because it failed to give the union “information available from its files as to street addresses and/or post office box numbers” of eligible voters. 185 NLRB 41, 41 (1970) (emphasis added). *Rite-Care Poultry* is directly applicable here because, like that employer, TCI failed to provide information that was *readily available in its files*. Contrary to TCI’s suggestions (Br. 26, 34-35), the Board in *Rite-Care Poultry* did not rely on the fact that the employer failed to correct the list after being notified that it was incomplete, or the fact that the employer used the omitted

¹² Morris testified that he omitted Post Office Box addresses because he wanted to produce “a consistent list.” (R. 34.) However, the Board has never mandated consistency or uniformity in eligibility lists; the *Excelsior* rule requires only that employers provide “complete and accurate” information for all eligible voters. *Mod Interiors*, 324 NLRB at 164.

information to mail its own campaign literature to employees. Nor did the Board find that the employer was grossly negligent or acted in bad faith. Instead, the crux of the Board's ruling was that, like TCI here, the employer in *Rite-Care Poultry* failed to provide complete and accurate addresses for its employees, despite having all the information on hand. *See also Dr. David M. Brotman Mem. Hosp.*, 217 NLRB 558 (1975) (holding that employer cannot refuse to produce requested *Excelsior* information in its possession).¹³

TCI contends (Br. 20-21, 24-26) that the Board's ruling alters the contours of the *Excelsior* rule by imposing a "newly-articulated requirement" (Br. 25) to provide residential and mailing addresses, and further objects that there is no precedent for requiring employers to "provide a list of employees' mailing address rather than a residential (street) address" (Br. 24).¹⁴ However, TCI provides no authority for the basic premise underlying those claims, *i.e.*, that under extant Board law, or even in common parlance, the undifferentiated term "address" refers

¹³ TCI's reliance on *Dr. David M. Brotman Memorial Hospital* (Br. 23) is misplaced. In that case, the employer refused a request to provide corrected address information it obtained only *after* furnishing the *Excelsior* list. 217 NLRB at 558. The Board found that although employers have no duty to investigate and secure extra information after providing the list, they must, on request, produce any updated information that subsequently enters their possession. *Id.* at 558-59.

¹⁴ Contrary to TCI's assertion (Br. 24), the Board did not fault it for providing employees' residential addresses *rather than* their mailing addresses. Instead, the Board sanctioned TCI for failing to provide residential *and* mailing addresses despite having both on hand, and despite being fully aware of the significance of Post Office Box addresses in the island's idiosyncratic mail system. (R. 173.)

solely to an individual's place of residence and does not include her mailing address, if the two are different.

As explained above (pp. 16-18), the rule's purpose since its inception has been to ensure "the access of *all* employees to [election-related] communications" in order to "maximize the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation." *Excelsior*, 156 NLRB at 1241. The Board has made clear that, for that objective to be met, "[i]t is extremely important" that employers provide "*complete and accurate*" information to unions. *Mod Interiors*, 324 NLRB at 164 (emphasis added). It should come as no surprise, therefore, that the Board has never explicitly distinguished between residential or mailing addresses, nor has it held that producing the first and omitting the latter satisfies the *Excelsior* rule; indeed, doing so would only defeat the rule's purpose.¹⁵

Unable to muster legal support for its position, TCI instead misrepresents *Rite-Care Poultry*, which it claims "emphasized that the *primary* purpose for requiring accurate addresses" is to allow unions to reach employees at home. (Br. 25 (emphasis added).) But while *Rite-Care Poultry* did state that *Excelsior*

¹⁵ The same rationale explains why the stipulated election agreement did not specify which type of address to provide. (See R. 56 ("[T]he Employer shall provide [a] list containing the full names and addresses of all eligible voters.")) TCI's claim (Br. 25) that the agreement did not "specify that the Employer was to provide anything other than each eligible employee's *home* address" (emphasis added) clearly mischaracterizes the agreement's language.

information should be sufficient to allow for face-to-face campaign appeals, it did not in any way suggest that the omission of mailing addresses would satisfy the rule. 185 NLRB at 42. Indeed, that would be hard to reconcile with the Board's finding, in the same case, that the employer improperly omitted Post Office Boxes from its *Excelsior* list. *Id.* at 41.

TCI also quotes *Trustees of Columbia University in the City of New York*, 350 NLRB 574, 575 (2007), where the Board found that the employer complied with its *Excelsior* obligations by providing the "home addresses" of crew members on a maritime research vessel. (Br. 25.) As TCI fails to mention, however, that case considered whether the employer was required to provide the crew's *email* addresses to the union, given that the ship was at sea during most of the pre-election period. *Id.* at 574. Thus, the Board's use of the term "home addresses" in that decision stemmed from the need to differentiate *ordinary* addresses from email addresses; it does not reflect a distinction between residential and mailing addresses, as TCI misleadingly suggests.

TCI also claims that its eligibility list satisfied *Excelsior* requirements because the Union could have used the list to visit employees in their homes. (Br. 27-28.) The Board expressly declined (R. 331 n.2) to rely on the Hearing Officer's factual rejection of that argument (R. 171), and for good reason: it is legally immaterial. "The issue of a union's access to employees is irrelevant to the

application of the *Excelsior* rule.” *Mod Interiors*, 324 NLRB at 164. That is because the *Excelsior* analysis considers only whether the employer substantially complied with the rule in providing the eligibility list to the union. *Id.* (citing *Thrifty Auto Parts*, 295 NLRB at 1118). For purposes of that determination, it is irrelevant whether the Union actually contacted employees after receiving the list, or whether it could have communicated with them by other means.¹⁶ *See id.* (Board does not “look beyond the issue of substantial compliance” because doing so would “spawn an administrative monstrosity” (quotation marks and citation omitted)). Therefore, whether the list would have allowed the Union to visit each employee’s residence is immaterial to the Board’s finding that, by omitting available mailing-address information, TCI failed to satisfy the *Excelsior* rule.

The Board reasonably rejected TCI’s claim that the Union “knew or reasonably should have known” that the list contained only residential addresses (Br. 29), and that the Union thus waived its objection by failing to notify the Board or TCI of the problem (Br. 31-32, 34). The Board has never placed the onus on unions to ensure that employers comply with the *Excelsior* rule, as TCI itself admits.¹⁷ (Br. 31.) And it would make little sense to do so here, where TCI knew

¹⁶ For the same reason, TCI’s professed disbelief that the Union waited 20 days to mail its campaign appeals (Br. 27, 28) is irrelevant to its argument.

¹⁷ *See K.T.I., Inc.*, 330 NLRB 1293, 1293 n.1 (2000) (declining to decide whether an *Excelsior*-list deficiency must be asserted in advance of an election in order to

when it provided the list that it had omitted mailing addresses in its possession. In any event, the Board credited Union President Ryan's testimony that the Union did not use the *Excelsior* list to mail campaign appeals until March 10, and only became aware of the problem *after* the election, when the undelivered envelopes started arriving by return mail. (R. 172.) The credited evidence also refutes TCI's claim (Br. 29) that the Union could have verified the accuracy of the *Excelsior* list by comparing it to the authorization cards, which the Union obtained from employees prior to filing its representation petition. Ryan testified without contradiction that he had already submitted those cards to the Board's Regional Office, as required by Board rules, before receiving the *Excelsior* list, and had not retained copies for his records.¹⁸ (R. 20.) Moreover, the Board reasonably found (R. 172) that, even if the Union had kept copies of the cards, it would have been justified in relying solely on the list prepared by TCI because employers are "the

preserve an objection). Nor can such a rule be derived from the cases on which TCI relies (Br. 31-32), because they pertain only to the *employer's* duty to correct the eligibility list when given notice of any deficiency.

¹⁸ A union petitioning to represent a unit of employees must provide evidence that those employees wish to be represented. 29 C.F.R. § 102.61(a)(7). That evidence, which may take the form of a list of signatures or, in this case, union authorization cards signed by employees, must be submitted to the Region in its original form. *Id.* § 102.61(f).

most reliable source” for accurate, up-to-date information about employee names and addresses.¹⁹ *Murphy Bonded Warehouse, Inc.*, 180 NLRB 463, 464 (1969).

Finally, there is no merit to TCI’s insinuation that Ryan lied about not retaining copies of authorization cards. (Br. 29-30.) As an initial matter, whether the Hearing Officer specifically credited Ryan’s testimony on that point is irrelevant.²⁰ (Br. 29) “It is well established that explicit credibility findings are unnecessary when a judge has ‘implicitly resolved conflicts in the testimony by accepting and relying on the testimony of [one party’s] witnesses.’” *Am. Coal Co.*, 337 NLRB 1044, 1044 n.2 (2002) (quoting *Electri-Flex Co. v. NLRB*, 570 F.2d 1327, 1330 (7th Cir. 1978)).²¹ In any event, the Hearing Officer explicitly stated

¹⁹ It is also pure speculation to assume, as TCI does (Br. 29-30), that if the Union had retained copies of the cards, it would have noticed a difference between the addresses on the cards and those on the list. The record shows only that the Union received cards from “more than 50%” of unit employees (R. 58), and there is no evidence as to whether those cards listed residential or mailing addresses, or whether any of them were submitted by employees whose envelopes were returned as undeliverable. *See Murphy Bonded*, 180 NLRB at 464 (“[E]xamination into the number or identity of employees who have signed authorization cards [is] a subject intimately related to the [union]’s showing of interest, which is an administrative matter not subject to litigation.” (citation omitted)).

²⁰ TCI’s argument that no weight should be given to Ryan’s testimony absent “a specific credibility determination” (Br. 39, 30) is especially baffling because the Hearing Officer made no such determination regarding any aspect of Morris’s testimony either.

²¹ *See also NLRB v. Beverly Enters.-Mass., Inc.*, 174 F.3d 13, 26 (1st Cir. 1999) (Board judge not required to “make explicit credibility findings as to each bit of conflicting testimony, so long as his factual findings as a whole show that he implicitly resolve[d] such conflicts.” (alteration in original) (quotation marks and

that his findings of fact were “based upon a synthesis of the *credited* aspects of the entire record,” and that he detailed his credibility determinations *only* “[t]o the extent that material facts [were] in serious dispute.” (R. 167 n.5 (emphases added).) Thus, the inclusion of Ryan’s testimony on authorization cards reflects the Hearing Officer’s determination that not only was Ryan a credible witness, but also there was no evidence to contradict his testimony on that point.

This Court accepts the Board’s credibility determinations unless they are “inherently unreasonable or self-contradictory,” *Associated Rubber*, 296 F.3d at 1060 (quotation marks and citation omitted), and accords “extreme deference” to credibility determinations made by hearing officers and adopted by the Board. *NLRB v. Dixie Lime & Stone Co.*, 737 F.2d 1556, 1560 (11th Cir. 1984); *accord Parkview Cmty. Hosp. Med. Ctr. v. NLRB*, 664 F. App’x 1, 3 (D.C. Cir. 2016) (“Credibility determinations made by hearing officers and adopted by the Board ‘may not be overturned absent the most extraordinary circumstances such as utter disregard for sworn testimony or the acceptance of testimony which is on its fac[e] incredible.’” (alteration in original) (quoting *E.N. Bisso & Son, Inc. v. NLRB*, 84 F.3d 1443, 1445 (D.C. Cir. 1996))). TCI’s speculation about what “a reasonable person with Mr. Ryan’s experience and sophistication” might have done (Br. 30) falls well short of the threshold to overturn the Board’s findings.

citation omitted)); *NLRB v. Katz’s Delicatessen of Houston St., Inc.*, 80 F.3d 755, 766 (2d Cir. 1996) (same) (citing cases).

B. The Board Did Not Abuse its Wide Discretion in Finding that Tomkins's and Townes's Statements Did Not Constitute Objectable Third-Party Misconduct

TCI's objection alleged that, in the run-up to the election, employees Tomkins and Townes threatened a colleague with physical violence if he did not vote for the Union, and that their statements unlawfully affected the election results. (Br. 37-47.) Acting within its broad discretion, the Board overruled that objection. (R. 377.) In doing so, the Board rejected TCI's claim that Tomkins and Townes were acting as agents of the Union when they made the statements at issue, and found instead that they were merely acting as third parties. (R. 354.) Before the Court, TCI does not contest (Br. 38-39) either that finding or the Board's consequent application of the more stringent third-party standard for evaluating alleged pre-election misconduct. *See Associated Rubber*, 296 F.3d at 1060-61 (comparing standards for party and third-party misconduct); *Mastec N. Am., Inc.*, 356 NLRB 809, 811 (2011) (explaining that third-party-misconduct cases require "[a] more compelling showing" to overturn election results).

1. A party seeking to overturn an election based on third-party statements must show that those statements were so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible

The Board will not overturn an election based on third-party misconduct unless the objecting party can show not only that the misconduct occurred, but also that it was "so aggravated as to create a general atmosphere of fear and reprisal

rendering a free election impossible.” *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); accord, e.g., *Pac Tell Grp., Inc. v. NLRB*, 817 F.3d 85, 95 (4th Cir. 2015); *NLRB v. Le Fort Enters., Inc.*, 791 F.3d 207, 212 (1st Cir. 2015); *Downtown Bid Servs.*, 682 F.3d at 116. To determine whether a threatening statement is objectionable under that standard, the Board considers five factors: (1) the nature of the threat; (2) whether it encompassed the entire bargaining unit; (3) whether reports of the threat were disseminated widely within the unit; (4) whether the person making the threat was capable of carrying it out, and whether it is likely that employees acted in fear of that capability; and (5) whether the threat was made or revived at or near the time of the election. *Mastec*, 356 NLRB at 810 (citing *Westwood Horizons*, 270 NLRB at 803).²² The third-party-conduct standard applies even where the election is decided by a narrow margin. *Lamar Co., LLC*, 340 NLRB 979, 980 (2003).

²² This Court has articulated the third-party-misconduct standard using fewer factors. Specifically, it examines: “(1) whether the evidence establishes fear in the minds of the voters; (2) whether that fear affected their votes; and (3) whether, had it not been for the fear, the results of the election might have been different.” *Certainfeed Corp. v. NLRB*, 714 F.2d 1042, 1060 (11th Cir. 1983) (citing *Daylight Grocery Co. v. NLRB*, 678 F.2d 905, 909 (11th Cir. 1982); *NLRB v. Tampa Crown Distribs., Inc.*, 272 F.2d 470, 473 (5th Cir. 1959)). But whether you apply the Board’s test or this Court’s, the bottom line is the same: “[C]onduct not attributable to the opposing party cannot be relied upon to set aside an election [unless such conduct] is so aggravated that a free expression of choice of representation is impossible.” *NLRB v. IDAB, Inc.*, 770 F.2d 991, 998 (11th Cir. 1985) (quotation marks and citation omitted).

2. Tomkins’s and Townes’s statements were not objectionable third-party threats justifying setting aside the election

The Board acted within its broad discretion in affirming the Hearing Officer’s finding that Tomkins’s and Townes’s statements were not so aggravated as to create an atmosphere of fear and reprisal rendering a free election impossible. With regard to the first *Westwood* factor, substantial evidence supports the Board’s finding that their comments were not “malicious or threatening” in nature or tone. (R. 355.) To the contrary, upon review of the video footage, the entire conversation smacks of good-natured banter among friends who know each other so well they are not afraid to joke about matters over which they disagree. The facetious nature of the exchange is apparent from the get-go, with Edwards teasing Tomkins about his driving. Tomkins does not display any visible anger or displeasure in response to that teasing. Instead, he comments to Townes, “Now’s your time to tell [Edwards] that if he doesn’t vote for the Union I’m going to kill him,” to which Townes responds, “*That’s right, that’s right, we’re all going to kill him.*” (ERX 1 (emphasis added).) Even on the written page, the sarcastic nature of Townes’s response is clearly conveyed in his tongue-in-cheek hyperbole. Edwards’s response—“Oh yeah!”—indicates that he is also in on the joke. (*Id.*)

Significantly, the video makes clear that neither Tomkins nor Townes raised his voice during the exchange, or altered his tone of voice or body language to convey aggression or menace, contrary to what one would expect had they meant

for Edwards to interpret their statements literally. Nor did Edwards appear fazed in any way, as would befit someone whose life had just been threatened. In fact, immediately after the allegedly threatening exchange, the three men continued to converse about the upcoming election, in what Morris testified he perceived to be an entirely nonthreatening manner. (R. 125-26.) That seamless transition back to undisputably innocuous banter provides further evidence of the three men's friendship and camaraderie. Moreover, both Tomkins and Townes testified that they had no malicious intent and were simply ribbing their friend Edwards. (R. 131, 135-36, 146, 148.) And Edwards, for his part, never reported the incident to TCI, nor did any other employee. (R. 110, 124, 128.) The evidence thus amply supports the Board's finding that the statements were "made in jest" and were not threatening in nature. (R. 355.)

The other *Westwood* factors bolster the Board's finding that Tomkins's and Townes's statements to Edwards did not rise to the level of objectionable third-party misconduct, even in light of the closeness of the election results.²³ (R. 355.)

²³ TCI's emphasis on the closeness of the vote (Br. 45-47) is nothing more than a vain attempt to make up for its failure to carry its burden of proof. It is well established that, "although the closeness of the election is an important consideration, that factor does not alter the objecting party's burden to prove that there has been misconduct to warrant setting aside the election in the first instance." *Cargill, Inc.*, No. 21-RC-136849, 2015 WL 5734973, at *1 n.2 (NLRB Sept. 30, 2015) (citation omitted), *adopted*, 363 NLRB No. 110, 2016 WL 453590 (Feb. 4, 2016), *enforced*, 851 F.3d 841 (8th Cir. 2017); *see also Central Photocolor Co.*, 195 NLRB 839, 839 (1971) ("The question of whether . . . an

Specifically, the video uncontrovertibly shows that Tomkins and Townes addressed their comments to Edwards alone, and that they did not mention any other employee, let alone the entire unit. And as TCI concedes (Br. 42), there is no direct evidence that their statements were disseminated to any other unit employee.²⁴ Finally, the statements occurred on a single occasion, three weeks before the election, and there is no evidence that they were repeated thereafter or that they were amplified by any other pre-election misconduct. (R. 355.) Based on the non-threatening, isolated nature of the statements, and their relative temporal distance from the election, the Board reasonably concluded that they did not create “a general atmosphere of fear and reprisal rendering a free election impossible.” *Westwood Horizons*, 270 NLRB at 803.

atmosphere [of fear and reprisal] existed does not turn on the election results, but rather upon an analysis of the character and circumstances of the alleged objectionable conduct.”). Here, the overtly lighthearted nature of the exchange, coupled with the utter lack of evidence relative to the other *Westwood* factors, substantially supports the Board’s finding that no misconduct occurred. This key finding—that no misconduct actually occurred—also distinguishes this case from those on which TCI relies (Br. 46).

²⁴ TCI cannot compensate for its failure to offer any evidence of dissemination to eligible voters by speculating that the statements were “likely overheard by members of the public” or that lower voter turnout in the second election could have been caused by hypothetical dissemination. (Br. 42.) As TCI itself concedes (Br. 38), it must provide “specific evidence” to support setting the election aside, *Associated Rubber*, 296 F.3d at 1061, and “[s]uspicion, conjecture, and theoretical speculation register no weight on the substantial evidence scale.” *TRW, Inc. v. NLRB*, 654 F.2d 307, 312 (5th Cir. Aug. 24, 1981) (citation omitted).

TCI disputes the Board's finding that the statements were not menacing, arguing that, "in today's political and social climate . . . , a threat to kill another person must be taken seriously and literally." (Br. 43.) But Morris's handling of the incident shows that TCI itself did not take Tomkins's and Townes's statements literally or consider them objectively threatening. Morris testified that he "view[ed] this [exchange] as a threat" and that "any type of threat [to kill someone] needs to be a cause of great concern." (R. 102, 109, 128.) However, Morris admitted that he did not report the alleged threat to the police, as one would expect of someone harboring such "great concern." (R. 102, 107.) Nor did he launch disciplinary proceedings against Tomkins and Townes, even though TCI's workplace policy expressly prohibits threats or harassment of any kind.²⁵ (R. 107-08, 119, 139.) Indeed, Morris admitted he never even discussed the matter with either of them. (R. 108.)

The sum total of Morris's response was to first discuss the incident with Edwards, and then to call TCI's attorney to see whether TCI could leverage the incident to get the election results overturned. (R. 180-82; R. 109, 127.) Given Morris's failure to even raise the issue with Tomkins or Towns, much less discipline or report them to the police, it is truly ironic for TCI now to claim that

²⁵ TCI's Policies and Procedures Manual includes a section titled "Work Place Violence," which states in relevant part: "TCI does not tolerate violence in any form. Threats, intimidation, physical contact or sexual harassment [are] prohibited at all times" (R. 217.)

the Board's ruling is "highly irresponsible" and "serves to condone such behavior." (Br. 43.) To the contrary, TCI's contemporaneous response—or lack thereof—only adds to the already substantial evidence supporting the Board's determination that the statements in question were not objectively threatening in context.

Despite what TCI claims (Br. 41-43), this Court's *Associated Rubber* decision has absolutely no bearing on this case. In *Associated Rubber*, two weeks before an election, an employee (Brown) told another (Spears) that he "had better" accept some union literature; Spears declined, and Brown said he would "pay" for his refusal. 296 F.3d at 1058. Then, three days before the election, Brown accelerated the operation of a production-line mixer where Spears was working, making his job "extremely rough." *Id.* at 1058, 1064. The union prevailed in the election by three votes. *Id.* at 1059. The Court held that "the fact that Spears was threatened and then retaliated against in a way that placed him in personal danger would reasonably create fear in the minds of employees who were voting in the certification election." *Id.* at 1064. Specifically, the Court found that Brown effectively carried out his earlier threat by creating a dangerous situation for Spears, which would have been apparent to other employees. *Id.* at 1062-63. The Court also emphasized that the mixer incident occurred only three days before the election and that it was disseminated to five or six other employees, who connected it to Brown's earlier threat. *Id.* at 1063-64.

The differences with *Associated Rubber* could not be more stark: not only were the statements in this case objectively lighthearted when made, but they were never concretized through conduct as the threat was in *Associated Rubber*. Nor were they ever disseminated to any other employee, or revived at all, much less close to the election. For those reasons, this Court's conclusion in *Associated Rubber*, and criticism of the Board's analysis in that case, are inapposite here.

Finally, TCI's adverse-inference argument (Br. 43-45) is but a sleight-of-hand attempt to pin TCI's own burden of proof upon the Union.²⁶ Specifically, TCI contends that the Union's "primary defense" was that Edwards perceived Tomkins's and Townes's statements as a joke, a position that TCI asserts only Edwards's testimony could establish. (Br. 44.) But that argument obscures the fact that it was *TCI's* burden to prove misconduct so aggravated as to impair employee free choice. *NLRB v. IDAB, Inc.*, 770 F.2d 991, 998 (11th Cir. 1985). Because TCI utterly failed to carry that initial burden, the Union had no reason to present Edwards's testimony to defend against TCI's unsupported assertion that Tomkins's and Townes's statements were objectionable.

To the contrary, in light of the video evidence of a lighthearted exchange, Tomkins's and Townes's testimony that they spoke in jest, and Morris's testimony

²⁶ Given that TCI never requested the Hearing Officer to draw an adverse inference from Edwards's absence, either at the hearing or in its post-hearing brief (R. 267-77), one wonders how the Hearing Officer's failure to draw such an inference could qualify as arbitrary and capricious, as TCI claims (Br. 43).

that Edwards never reported a threat, there is no reason to think the statements were objectively threatening or that Edwards perceived them as such. TCI is the party that stood the most to gain from the testimony of Edwards, who not only opposed the Union but was also the target of Tomkins's and Townes's "threats." If anything, therefore, Edwards's absence would support an adverse inference against TCI. *See KBMS, Inc.*, 278 NLRB 826, 849 (1986) ("[I]t is generally recognized that the inference is drawn against the party with the burden of persuasion on an issue or against the party who is relying on the statements of the uncalled witness." (quoting *NLRB v. Cornell of Cal., Inc.*, 577 F.2d 513, 517 (9th Cir. 1978) (citation omitted))). This is particularly true given that Morris made a point of discussing the incident with Edwards but, when the Union's counsel asked Morris what Edwards said, TCI objected on hearsay grounds. (R. 127.) In any event, the point is of little import, since Edwards's perception of Tomkins's and Townes's statements, were it in the record, would not be determinative. Under well-established Board law, third-party statements are reviewed under an objective standard, which considers whether "a reasonable employee in [the listener's] position would have been put in fear by the threat." *Lamar*, 340 NLRB at 981. Applying that standard, the Board reasonably found, and substantial evidence supports, that Tomkins's and Townes's statements were not objectionable third-party threats that justified setting aside the election.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying TCI's petition for review and enforcing the Board's Order in full.

Respectfully submitted,

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July 2017

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TRANSIT CONNECTION, INC.)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	
)	No. 17-10294
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	01-CA-183197
)	
AMALGAMATED TRANSIT UNION)	
LOCAL 1548)	
)	
Respondent)	
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(B) and 32(g)(1), the Board certifies that its brief contains 9,668 words of proportionally spaced, 14-point type, and the word-processing software used was Microsoft Word 2010. The Board further certifies that the electronic version of the Board's brief filed with the Court in PDF form is identical to the hard copy of the brief that has been filed with the Court, and that the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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Dated at Washington, DC
this 12th day of July 2017

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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2017, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

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Dated at Washington, DC
this 12th day of July 2017