UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

LAWRENCE HOSPITAL CENTER

and **Case No. 2-RC-23130**

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 30, AFL-CIO

John Keil, Esq., Gregory Glickman, Esq.,
(Collazo, Carling and Mish), New York, NY, for the Employer.
Marc Aisen, Organizer, **Richmond Hill, NY, for the Petitioner.**

RECOMMENDED DECISION ON OBJECTIONS

Statement of the Case

STEVEN FISH, **Administrative Law Judge**. Pursuant to a petition filed in case number 2-RC-23130 filed by International Union of Operating Engineers Local 30, AFL-CIO, herein called Petitioner or the Union, the parties entered into a Stipulated Election Agreement on July 26, 2006,[1] providing for an election to be conducted on August 18, in a unit of skilled maintenance employees employed by the Employer at its facility located in Bronxville, New York. The election was conducted as scheduled, and the results were 19 voters, 10 votes for Petitioner, 6 votes against, and one challenged ballot.

On August 25, the Employer filed timely objections to the election. On October 12, the Regional Director issued a Notice of Hearing on Objections, in which she concluded that a Hearing on Objections was warranted, since the investigation raised substantial and material factual issues which may be best resolved on the basis of record testimony. The Director therefore ordered that a hearing be held before an Administrative Law Judge to receive testimony with respect to the issues raised in the Objections and issue a report and recommendations to the Board.

Accordingly, a hearing was held before me on October 25. Briefs have been filed and have been carefully considered. Based upon the entire record, including my observation of the demeanor of the witnesses, I issue the following

Findings of Fact

1. Objections

The Objections filed by the Employer allege the following:

[1] All dates hereafter are in 2006.

Objection No. 1: Through its agents, officials and representatives, Local 30 created an atmosphere of intimidation and coercion, and such atmosphere interfered with the free and uninhibited choice of the employees on the question of Local 30 representation. Shortly before 9:00 a.m. on August 17th, three agents, officials and/or representatives of Local 30 trespassed onto the Hospital's premises (which trespass is the subject of a criminal complaint filed with the local police department); entered a Hospital boardroom in the private executive suite on the 6th floor where a majority of the eligible voters was gathered, waiting for a meeting with the Hospital's president to begin; and threatened, both verbally and with body gestures, a known opponent of Local 30 and such threats were audible and visible to the approximately eleven individuals in the room. By its actions, Local 30 destroyed the "laboratory conditions" to which the voters were entitled.

Objection No. 2: Through its agents, officials and representatives, Local 30 interfered with the free and uninhibited choice of the employees on the question of Local 30 representation by creating the impression that the Hospital was not in control of its own premises and was not able to stand up to the Union. The morning of August 17th, three agents, officials and/or representative of Local 30 trespassed onto the Hospital's premises; entered a Hospital boardroom in the private executive suite on the 6th floor where a majority of the eligible voters was gathered, waiting for a meeting with the Hospital's president to begin; refused to leave the boardroom the first two times that they were asked to leave by a member of Hospital management; and unsuccessfully attempted a second trespass onto the Hospital premises within minutes of having been escorted out of the building by Hospital against agent(s) of Local 30. By its actions, Local 30 destroyed the "laboratory conditions" to which voters were entitled.

2. Facts

The Employer scheduled a meeting of bargaining unit employees to be conducted by CEO Edward Dinan on August 17th, at 9:00 A.M. in the boardroom located on the sixth floor of the Employer's hospital. At approximately 8:45 A.M. there were 10-11 employees in the room, consuming coffee and food which were provided by the Employer. At that time, Mark Aisen, Organizer for the Petitioner entered the boardroom, accompanied by two other individuals.[2] Aisen and the two individuals walked over to employee Nidal Marji. Aisen while standing about two feet away from him asked Marji, "are you Nicky Shoes?"[3] Marji replied "yeah". Aisen responded, "back off, leave my guys alone, let them make their own choice." As he was talking, Aisen motioned with his hands towards the other side of the room, where several bargaining unit employees, including Jeffrey Traviss, and Peter Quinn were sitting.[4] Marji replied "no problem" and the conversation ended.

At that point, Aisen and the other two individuals sat down at the table with union supporters Quinn and Traviss and employee Evens Toussaint. Toussaint then said to all the employees in the room, "if anyone has any questions, now is the time to ask Mark."[5] Aisen introduced one of the individuals with him as a member from another shop represented by the

[2] The two other individuals were member of Petitioner employed by other employers. They were not known to the employees of the Employer.

[3] Nicky Shoes is Marji's nickname.

[4] Traviss and Quinn were known supporters of the Union.

[5] Referring to Business Agent Aisen.

Union, who was there to answer questions about benefits and representation by the Union. Some employees asked about raises and benefits that the Union could obtain for the workers. The Union and Aisen discussed what benefits he believed the Union could get for the employees. Marji asked if the Union could "guarantee" such benefits. Aisen replied that the Union could not guarantee anything and that everything is negotiable.

At that point employee Nicholas Timpone then interjected that he didn't appreciate what Timpone characterized as Aisen's "strong arm tactics, coming in and trying to muscle us around." Aisen then turned to Timpone and asked who he was? Timpone replied that he was a "gentlemen who doesn't care for the Union". Aisen told Timpone to "settle down".

After some further discussion, Al Ghiotti, the Employer's Manager of Engineering entered the boardroom. Ghiotti asked Aisen and the other two individuals with him who they were? Aisen replied that they were representatives from the Union and that they were there for the meeting to answer any questions from employees. Ghiotti replied that this was a private meeting, that the Union did not belong there, and if they wanted to have a meeting with employees, they should have their own meeting. Aisen agreed to leave and he and the two other individuals with him left the room with Ghiotti who escorted them to the lobby. Ghiotti asked them to wait until Bob Greco, Vice President of Resources officials arrived, wherein Greco was instructed to escort them out of the Hospital

Ghiotti then notified James Keough Assistant Vice President in charge of security, that the representatives from the Union had appeared in the boardroom prior to CEO Dinan's meeting, that he (Ghiotti) had asked them to leave, and Greco had escorted them out. Keough suggested that they make sure that the Union representatives had left. Ghiotti accompanied by the Employer's attorney, checked the entrances and exits to the hospital, to see if the Union representatives were still around. They then proceeded to the boiler room, where they instructed boiler room supervisor McFadden that there were representatives of the Union on site, and that he was not to allow any Union representatives into the boiler room, if they attempted to enter. McFadden was also instructed to call Ghiotti or Security, if Union representatives attempted to enter the boiler room.

A few minutes later, Aisen went to the boiler room and attempted to speak with McFadden. Aisen complained to McFadden about the fact that McFadden had allegedly "burned" one of the union's members, by making this member look bad. Aisen did not explain precisely what he meant by McFadden making the member look bad, nor what McFadden had allegedly done to this member. McFadden replied to Aisen that he did not know what Aisen was talking about, and added that "everybody is lying about me."[6]

Aisen then left the boiler room and left the hospital . Aisen did not make any attempt to enter the boiler room. McFadden then called Ghiotti, and informed him that three union guys had come to the boiler room and said that he (McFadden) had instructed the Union representatives to leave. McFadden did not tell Ghiotti what the union representatives had wanted, what they spoke to McFadden about, or whether or not the Union representatives had

[6] While McFadden is an admitted 2(11) supervisor, Aisen testified that ordinarily his position(Chief Engineer) is ordinarily included in the unit. However, in this case the parties agreed that McFadden is a 2(11) supervisor and was not included in the unit. Aisen's testimony suggests that McFadden had at least at one time been a member of the Union, and that he (Aisen) had a long history with McFadden.

attempted to enter the boiler room.[7]

The Hospital filed a police report relating to the events of that day, apparently accusing the Union of trespass. The charges were eventually dropped.

Shortly after the Union representatives left the boardroom, CEO Dinan arrived and the meeting was conducted. The record is not clear as to what was actually discussed at the meeting, but it does not appear that the Union election the next day was brought up. Dinan did tell the employees that he was "disappointed" with them, but the record does not disclose the substance of Dinan's complaints.

The prior "confrontation" between Aisen and Marji was not mentioned at the meeting either. However, during the course of the meeting, Marji looked at employee Ray Algarin and said "I can make phone calls too."[8] Algarin replied "Why are you looking at me?" Marji responded "If you don't like it, we can go across the street."

Subsequent to this meeting on August 21, Algarin filed a police report, accusing Marji of threatening him during the meeting of August, 17. In this report, Algarin alleges that during the meeting, Marji allegedly stated to Algarin, "I will take you outside and kick your fucking ass." The report further reflects that the "underlying problem could be the result of arguments between Union and non-union employees of the Hospital". Algarin further stated that Marji "Mistakenly thought that Algarin called for the meeting with Lawrence Hospital Management." The report goes on to state that "Algarin does not wish to pursue the matter criminally, but wishes to document the incident in the event of future occurrences."

Algarin also complained personally to CEO Dinan as well as to Human Resources Director Pat Orsala about Marji's alleged threat to him. Dinan told Algarin that Marji was probably mad, because Aisen had threatened him earlier in the meeting. Algarin told Orsala that the dispute between he and Marji was about how the Union had come into the meeting uninvited. Algarin also told Dinan during his meeting with him, that he (Algarin) did not agree with what the Union had done, and he did not like the way the Union had entered the meeting. Algarin was not present when Aisen and Marji had their confrontation, so he made no comments to Dinan about that incident.

However, the next day, at the morning lineup, the employees began to discuss the events of the day before. Marji began the discussion by asking if Timpone could believe what happened the day before at the meeting, when they (the Union) came in and "threatened" him. Several employees including Timpone, Doug Rose, Gustavo Franco, Dennis Bradley and Evens Toussaint expressed similar sentiments, that they were upset with the Union coming into the meeting, and threatening Marji not to say anything about whether you are for or against the Union. Timpone testified that he believed that Aisen's conduct was a threat because, "he came in with two other guys, they stood right to him, stood right behind him, and told him to stop talking to the other guys."

[7] There were no bargaining unit employees in the boiler room at the time of Aisen's discussion with McFadden. The record contains no evidence that any bargaining unit employees ever became aware of the incident involving McFadden and Aisen.

[8] Apparently, some of the non-union employees, including Marji, believed that Algarin had used his cell phone to call Aisen to tell him about the meeting.

Aisen testified that he had been told by an employee prior to the meeting, that the employees had been told to attend a meeting with the CEO that morning. The Employer had previously conducted meetings with employees, during which the Union and the election were discussed. Thus Aisen wanted to attend the meeting, in order to be able to discuss with employees the Union's views with regard to the election and to answer any questions the employees may have. Aisen testified further that the reason that he confronted Marji prior to the meeting, was because Aisen had previously been informed by some employees that Marji had previously made threats to them of bodily harm for attending union meetings, or engaging in other union activity, and that Marji had also threatened employees with loss of overtime or discharge, if they engaged in union activities. Therefore, according to Aisen, he felt "that the Union should make an appearance and show, we're for the men, so that's what I said." Aisen added that he wanted to "show that the Union was defending the people who are to do the right thing. I didn't say which way to vote, just that they be allowed to vote and there was no threats of violence." Therefore, when Aisen told Marji to "back off", he contends what he meant was "everyone should have a fair chance to vote", and he did not want Marji to threaten the employees, concerning the Union or the election.[9]

With respect to Aisen's testimony about alleged previous threats by Marji, the record does reveal that the Union has filed charges alleging such conduct, but these charges are still pending. In this regard however, Algarin testified that at some point, on several occasion prior to the filing of the petition, Mari had told him, that "if the Union don't get in, there's going to be a lot of overtime for us, and if the Union does come in, they're going to stop the overtime meaning towards projects that the hospital wanted up to do. Algarin also testified that employee Toussaint told him (Algarin) that Marji had threatened Toussaint with bodily harm not to vote for the Union.[10]

Algarin also testified that he had several other arguments and disputes with Marji over the years, including disputes over work related matters, and that he had made several complaints to management about Marji allegedly taunting him, threatening him, and allegedly "spitting" on his tools.

Ghiotti testified that he recalled several complaints made to him by both Algarin and Marji about each other. Ghiotti remembered Algarin complaining to him that Marji was making fun and laughing at Algarin, and that Marji left his tools around and failed to clean up after himself. Algarin also complained to Ghiotti that he was verbally abused by Marji, and Marji "likes to be the boss, tells Algarin what to do." Ghiotti also received complaints from Marji about Algarin's work habits. Ghiotti brought the two employees into his office, told them that this pettiness and childishness has to stop, and that their main job was to work together. On another occasion, Ghiotti recalled an argument between Algarin and Marji about some work related and personality issue at the morning lineup. Ghiotti told them to stop that argument, and brought each of them individually into the office, and informed them that his kind of conduct

[9] Aisen emphasizes that the Union believes that Marji was a supervisor under section 2(11) of the Act and in fact, as noted Marji's vote was challenged by the Union on that basis. In that regard, the record revels that Marji had recently been promoted to a position of "Team Leader", which appears to have some quasi supervisory responsibilities. The record also reveals that this promotion caused some resentment by Marji towards Algarin, who did not like to take any orders from Marji, and was the source of some of the previous problems and arguments between Algarin and Marji.

[10] Algarin did not testify as to when Toussaint had allegedly informed him of the alleged threat made to Toussaint by Marji, or when the alleged threat had been made.

must stop.

My findings set forth above with respect to the events of August 17th are based on a compilation of the credited portions of the testimony of several witnesses who testified concerning the events on that day, including Marji, Algarin, Aisen, Ghiotti, Timpone, Bradley, Traviss and Quinn. I have in addition to comparative demeanor considerations, relied on my assessment of the probabilities of the events, insofar as the testimony of the witnesses conflicts, as well as considering the fact that several of the witnesses called appeared to demonstrate a bias towards tailoring their testimony towards the party that called them as a witness. In many respects, the essential facts are not in a substantial dispute, although the witnesses' testimony varied somewhat in some minor areas. The most significant areas in dispute, are Marji's testimony that Aisen told them "this is a warning", during their confrontation, and that Aisen allegedly pointed his finger, at Marji, 12-16 inches from Marji's face, while talking to Marji on that day. I do not credit Marji's testimony with respect to either of these assertions. I note that his testimony was not corroborated by any of the witnesses called by either side, including employee witnesses called by the Employer. In that regard Bradley testified that he observed that Aisen held up his two hands in front of him together, in front of his chest, while talking to Marji. Timpone testified that Aisen was standing with his hands crossed while he spoke to Marji. I do not credit either of these versions, since no other witness so testified. I did credit Timpone's testimony however, as related above, that Aisen did motion with his hands towards the Union supporters Traviss and Quinn sitting on the other side of the room, while demanding that Marji stop talking to these individuals. I have noted Aisen's propensity to talk with his hands while testifying in this proceeding, and find it likely that he would have motioned towards the other side of the room towards the Union's supporters with his hands.

The only other area in significant dispute, is Ghiotti's testimony that Aisen initially refused Ghiotti's instructions to leave the boardroom, and that Ghiotti had to tell Aisen to leave three times, before Aisen agreed to do so. I do not credit Ghiotti's testimony in this regard, particularly since it was not corroborated by any other witnesses, including Timpone, Bradley and Marji, witnesses called by the Employer, who all essentially corroborated the credited testimony of Aisen and the Union's witnesses that Aisen did not object to or refuse to leave when asked to do so by Ghiotti, and immediately complied with Ghiotti's request in that regard.

3. Analysis

In evaluating party conduct during the critical period, the Board applies an objective standard, wherein it finds conduct to be objectionable if it has "the tendency to interfere with the employees freedom of choice." *Ceder-Sinai Medical Center,* 342 NLRB 596, 597 (2004); *Cambridge Tool & Mfg. Co.,* 316 NLRB 716 (1996). In deciding whether the employees could freely and fairly exercise their choice in the election, the Board evaluates the following factors:

(1) the number of the incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party in canceling out the effect of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct an be attributed to the union. *Cedars-Sinai Medical, supra; Avis-Rent-A-Car System,* 280 NLRB 580, 587 (1980).

In applying these principles to the instant case, the Employer relies on Aisen's alleged misconduct on August 17th at the meeting about to be conducted in the Employer's boardroom. It relies on *Phillips Chrysler Plymouth Inc.,* 304 NLRB 16 (1991), where the Board in evaluating the above nine factors, set aside an election, based upon the conduct of two non-employee Union organizers, who repeatedly and belligerently refused to heed requests of the Employer's president to leave a meeting at which the Union agents had no legal right to be present. The Board concluded that "this direct challenge to the Employer's assertion of its property rights could not have been lost on the employees as they began to vote (75) seventy five minutes later." The Board further observed that "that after the police were summoned, the organizers failed to stop their unwarranted trespass. The message undoubtedly conveyed to employees by the union agents' conduct was that the Employer was powerless to protect its own legal rights in a confrontation with the Union." *Id.* at 16. The Board in view of the closeness of the election, and no evidence of misconduct by the employer, found that the misconduct of the Union agents reasonably tended to interfere with the employees' free and uncoerced choice, and set aside the election.

Respondent also cites *North of Market Senior Services v. NLRB,* 204 F. 3rd 1163 (D.C. Cir. 2000), where the Circuit Court refused to enforce a bargaining order because the Board refused to grant the employer a hearing based upon allegations similar to the facts in *Phillips Chrysler, supra.* In *North of Market Senior Services,* on the morning of the election, at a pre-election conference, Union organizers told management that supervisors had told employees incorrectly that they could only vote during their lunch hour, from 12:00–1:00 PM. This instruction was wrong, since the polls were opened between 11:00 AM and 1:00 PM. In fact, according to the Employer, the employees had been told only that they had to vote during their lunch hour, but that they could take their lunch hour at any time between 11:00 AM -1 PM. In order to correct this apparent confusion on the part of employees, as to when they could vote, the Board Agent sent the Union agents through the Employer's facility, accompanied by a management representative, to notify the employees that they could vote between 11:00 AM and 1:00 PM. The Union agents wearing their Union insignia, spoke to employees, and told them that they had been sent by the NLRB to say that employees could vote any time between 11 and 1. The Union agents added that the employees did not need to take their lunch break to vote. This was contrary to the Employer's view, whose representative would tell employees that they could take their lunch break at any time between 11 and 1, but they did have to take their lunch to vote. The affidavit submitted by the Employer's representative asserted that the Union agents frustrated her efforts to get that message across, stating "Whenever I would make that statement, the Union agents would contradict my instruction, telling employees that they had been sent by the Board Agent to tell them that they could vote whenever they wanted and it did not have to be on their lunch hour." Furthermore, during this time the Union's Agents walked into patient examining rooms, "without permission" from the Employer, where some elderly patients were being treated and were in various states of undress. According to the affidavit of the Employer's representative she "was powerless to stop this rampage though our facility or to counter what the Union agents were doing and saying, particularly in light of their repeated statement to employees that they had been sent by the NLRB."

The Union won the election by a vote of 15-11. The Director dismissed the Employer's Objections filed based on the facts described above without a hearing. The Board, with member Hurtgen[11] dissenting adopted the Director's findings.

[11] Member Hurtgen believed that the above conduct warranted a hearing. *North Market Services,* Case No. 20-RC-17350 (Sept. 28, 1998)

After the Employer refused to bargain with the Union, 8(a)(5) charges and a complaint were issued, resulting in a Board Decision Ordering the Employer to bargain with the Union, based on a Summary Judgment motion.[12]

The D.C. Circuit, in an opinion by Judge Edwards, denied enforcement of the Board's order and remanded to the Board ordering it to conduct a hearing based on the Employer's objections. The Court ordered the remand based on two grounds. First, it determined that the laboratory conditions of the election were violated, and the integrity of the election impugned, by the Board Agent delegating the Board's authority to a party to notify the employees about the election times. The Court observed that the Union agents announced that they had been sent by the NLRB, told employees when they could vote, added "insult to injury", by openly refuting a management official's instructions regarding employees' lunch breaks. The opinion further held that "it was strange at best for the Union officials to be wondering through the Employer's work areas, with no assent from the employer and on the proclaimed authority of the NLRB. This certainly may have given the impression that the Board had ceded significant authority to the Union over the conduct of the election." 204 F.3d at 1169. Thus the Court concluded that the Board erred in denying the Employer a hearing on that objection.

Additionally, the Court relied on *Phillips Chrysler, supra,* to order a hearing on the Employer's somewhat related objection, that the Union agents' tour through the facilities and open disagreements with management necessitated invalidating the election. After discussing *Phillips Chrysler,* and its rationale that the Union's challenge to the Employer's property rights sent a message to employees, that it was powerless to protect its own legal rights in a confrontation with the Union, warranted a new election, the Court found as follows:

> Similarly, in this case, *North of Market* has raised significant issues regarding the Union's improper invasion of its property and the resulting impression that the employer was helpless to control the situation. First, not only did the Union agents walk around the employer's facility without the employer's permission, but they walked into private examination rooms where patients were in a state of undress. The Union agents' unhindered access to the facilities and the examining rooms surely could have been seen as a challenge to *North of Market's* property rights. Second, the Union agents repeatedly disagreed with Ms. Valoris: She told employees that they had to vote on their lunch break, but the Union agents told employees that they did not have to vote during their lunch hour. This disagreement could well have given employees the impression that *North of Market* was unable to protect its rights in a dispute without the Union. This is especially true given that the Union agents purported to be speaking for the Board when they disagreed with the employer.

The Court therefore also ordered the Board to conduct a hearing an address the application of *Phillips Chrysler* to the case at hand.

Respondent argues that the above precedent, warrants a finding that the Union engaged in objectionable conduct, particularly where the conduct occurred on the day before the election, and the election results were very close.

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[12] 327 NLRB 1018 (1999). While Member Hurtgen dissented from the failure to provide a hearing on the Employer's Objections, he agreed that Respondent raised no issues in the 8(a)(5) proceeding, and for institutional reasons, agreed that Summary Judgment was appropriate.

I do not agree. The basis for finding objectionable conduct in *Phillips Chrysler* and *North of Market*, *supra,* was the Union agents "repeated and belligerent refusals" to heed requests of the Employer's representatives to leave the premises, conveyed to the "employees the message that the employer was powerless to protect its own legal rights in a confrontation with the Union", 304, NLRB at 16. Those facts are simply not present here. I have found that Aisen immediately complied with Ghiotti's request that he leave the meeting, and that Aisen and the other individuals with him did so without any confrontation or any challenge to the Employer's authority. While the Employer did find it necessary to call the police and did file trespass charges against Aisen, these charges were eventually withdrawn, and were totally unnecessary, since Aisen had agreed to and did leave the premises, before the police arrived. Thus under no circumstances here, can it be reasonably assumed that the Union's conduct conveyed the message to employees that the employer was powerless to protect its property rights in a confrontation with the Union. *Chrill Care Inc.,* 340 NLRB 1016, 1017-1018 (2003). (Union supporters left when asked to do so by owner); *Champaign Residential Services,* 325 NLRB 687, 688 (1998), (Two incidents involved. At first Union representative attempted to enter management office, was stopped and asked "a couple of times" to leave. Union left, reentered building, but left when escorted out of building by escort. Second incident involved two Union representatives who initially refused to leave office when asked to do so by management, remained there for 8 minutes, and did not leave until 2 or 3 requests and interventions of police. Board concludes that due to the lack of flat refusal to leave premises, or any significant resistance by the Union's representatives and relatively short intervals between the Employer's demands and the Union's departure, that the conduct was insufficient to warrant setting the election aside.); *Station Operators, Inc.* 307 NLRB 263 (992) (Petitioner's representatives left the premises when told to do so by the Employer's officials after being on the scene for approximately 5 minutes in each of three instances.); *Genesis Health Ventures d/b/a Amsted Center,* 326 NLRB 1208, 1213-1214 (1998) (Union representative initially refused to leave the meeting when ordered to do so by Employer. Employer cancelled meeting and the Union representative left facility. Board finds that since Union representative was ordered to leave and did so almost immediately, it did not expose the Employer as powerless to defend its property rights.)

I find that in the above cited cases are clearly more dispositive than *Phillips Chrysler* and *North Market*[13] in evaluating the Union's conduct here. Therefore since it cannot be found that the Union's conduct can be construed as a challenge to the Employer's property rights,[14] its conduct did not reasonably tend to interfere with the employees free and uncoerced choice in

[13] I note that *North of Market* is a Circuit Court decision, which disagreed with the Board's view, that the conduct of the Employer therein did not constitute objectionable conduct. Since I am however bound by the Board's assessment of the Employer's conduct, *North Market* cannot be considered as binding precedent in my evaluation of the instant matter. However, since the facts therein are clearly significantly different than the facts here, *North Market* does not warrant a finding of objectionable conduct in this case. Notably, in *North Market,* unlike here, the Union's "challenge" to the Employer's property rights was accompanied by the Union, having been improperly authorized by the NLRB to transmit instructions to employees about voting time, and the Union disagreeing with management representatives in front of employees about whether they needed to take their lunch hour in order to vote.

[14] The Employer also argues that the Union continued to challenge its property rights, by Aisen's conduct in attempting to enter the boiler room, after being told to leave the premises by the Employer's representative. However inasmuch as no unit employees were present in the boiler room at the time of the incident, and no unit employees became aware of it, it cannot have had any influence on the election results.

the election. Thus the objection of the Employer based Aisen's conduct in entering the meeting, although uninvited, has no merit, and I recommend that it be dismissed.

The Employer also argues that Aisen's comments to Marji that he "back off" from in effect discussing the Union and the election with other employees, constitutes a threat of bodily harm and objectionable conduct sufficient to set aside the election. *Cedars-Sinai Med. Ctr.,* 342 NLRB No. 58 at 5 (2004) (ordering second election where presumed Union agents placed anonymous phone calls to anti-union employees and told them, *inter alia,* to "stop fucking with the union"); *Robert-Orr Sysco Food Svcs., L.L.C.,* 338 NLRB 614 (2002) (setting aside election; where pro-union employees threatened co-workers with physical violence prior to the election); *RJR Archer, inc.,* 274 NLRB 335, 336 n. 8 (1986) (statement to an eligible voter that "things can happen to a vehicle or even a wife and kids" constituted a threat of bodily harm that "the Board does not consider lightly… even when addressed to one employee"); *Baja's Place,* 268 NLRB 868, 869 (1984) (setting aside election where union representative threatened "to get" an employee and his job).

The Employer further argues that the Board has consistently held that comments similar to "back off", even when made in a casual tone, are sufficiently threatening to require a representation election to be set aside. See, e.g. *Taylor Wharton Division Harsco Corp.,* 336 NLRB, 157, 158 (2001) (setting aside the election where supervisor told a pro-union employee he was "digging himself a hole" by parking his truck covered in pro-union stickers outside management's office); *Jordan Marsh Stores Corp.,* 317 NLRB 460, 463 (1995) (supervisor's comments to employee to "watch your back" considered a threat even though made in a casual tone); *Q.B. Rebuilders, Inc.,* 312 NLRB 1141, 1142 (1993) (setting aside election where pro-union employee threatened to call the INS to report any employee who voted against the union even though the statement may have been made in jest, and the threatened employees perceived the threat as a "bad Joke"); *Trover Clinic,* 280 NLRB 6, (1986) (supervisor telling Union supporter to "keep a low profile" and "be quiet with it" deemed coercive despite friendly relationship between individuals); *Union National Bank,* 276 NLRB 84, 88 (1985) ("well, you'd better watch yourself" deemed a threat); *Stride Rite Corp.,* 228 NLRB 224, 230 (1977) (supervisor's comment to employee to "watch your step" deemed an 8(a)(1) violation even where the supervisor had good intentions for making the comment and also wished the employee success in the Union campaign).

Respondent also argues that several of the factors considered by the Board in *Avis-Rent-A-Car,* and its progeny in assessing whether objectionable conduct has occurred, are present here. They include the number of employees subjected to the misconduct, (here 11 out of 19 unit employees were present). *Robert Orr-Sysco, supra; Cedar-Sinai Medical, supra;* the threats occurred one day before the election, *Avis Rent-A-Car, supra; Cedar-Sinai, supra; Hopkins Nursing Care Center,* 309 NLRB 958, 959 (1992); and the fact that the election results were very close (four vote margin). *Chinese Daily News,* 344 NLRB No. 132 at 9; *North of Market Senior Svcs., supra; R.J.R. Archer,* 274 NLRB at 336 n 12.

Petitioner argues that his comments to Marji to "back off" were meant only as an admonishment by him to Marji, whom he believed to a supervisor, to cease making unlawful threats of retaliation or violence to Union supporters during the campaign. Aisen further contends that the statement did not contain any threat by the Union take any action against Marji, and should not be so construed. Finally, it asserts that even if the statement were to be considered a threat, he could not have affected the election, since Marji is a supervisor his vote was challenged and is ineligible to vote.

Starting with Petitioner's contentions, I reject its assertion that Marji intended to only admonish Marji not to threaten the Employer's employees. Whatever Marji may have intended is not relevant, as the issue to be decided is whether the remark in question can reasonably be interpreted by an employee as a threat. Thus the intent of the speaker or the actual effect on the listener is inconsequential. *Battle Creek Health Systems,* 341 NLRB 882, 894 (2004); *Smithers Tire,* 308 NLRB 72 (1992). The fact is that whatever Aisen meant by or what motivated his comments, he did not tell Marji not to threaten any employees, but instead made a more generalized statement, which can and was reasonably construed as telling Marji not to talk to employees about the election or the Union. Petitioner's further contention that Aisen's comments cannot be construed as objectionable, since Marji is a supervisor and ineligible to vote, is equally without merit. Initially, I would note that there has been no finding that Marji is or is not a supervisor under section 2 (11) of the Act, and the fact that Petitioner has challenged his vote on that basis, is not determinative. Thus for the purposes of analyzing Aisen's conduct, Marji must be considered an employee. Moreover, even it Marji were considered a supervisor under section 2 (11) of the Act, the Union's conduct could still be deemed coercive and objectionable, since such conduct in the presence of employees is considered to be coercive to the employees, who could reasonably fear that they would be subjected to similar threats or similar conduct, if they did not support the Union. *Local 1109, SEIU (Staten Island Hospital),* 339 NLRB 1059, 1060-1062 (2003); *Union Nacional De Trabajadores (Carborundum Comp. of Puerto Rico),* 219 NLRB 862, 863, 869 (1975).

However, I find Petitioner's further contention to be meritorious, and to be a crucial and determinative weakness in the Employer's assertion that objectionable conduct has been established. I agree with Petitioner that Aisen's statement to Marji to "back off", cannot be reasonably construed as threatening physical harm or any other reprisals. Aisen did not say, nor did the circumstances otherwise imply, that Aisen or the Union would take action against Marji, or that he would suffer any adverse consequences, if he did not comply with Aisen's request or demand that Marji cease talking to the employees about the election or the Union.

This crucial fact is contrary to all the cases cited by the Employer in support of its contention that Aisen's statements constituted a coercive threat. Many of the cases cited by the Employer such as *Taylor Wharton, supra; Jordan Marsh, supra; Trover Clinic, supra; Union National Bank, supra,* and *Stride Rite, supra* involve statements deemed to implied threats, such as "watch your back", "keep a low profile", "you'd better watch yourself", and "watch your step", which were made by supervisors to employees. The rationale for finding these remarks to be coercive threats, is the recognition that employees reasonably perceive that supervisors, with the power to carry out changes in terms and conditions of employment of employees, might retaliate in some manner against said employee, in that connection, if they do not comply with the supervisors' implicit request or demand to cease or reduce their union activities. Therefore these cases do not support the Employer's assertion that allegedly similar comments by Aisen, as a Union representative can be construed as similarly coercive. Since the Union has no power to directly affect terms and conditions of employment of employees, the kinds of statements made be the supervisors' in the cases cited by the Employer, cannot reasonably be construed as coercive, when made by a Union representative.

In this regard, Respondent cites, *Randell Warehouse of Arizona,* 347 NLRB #46 (2006), for the proposition that the Board must use a uniform standard in evaluating objectionable conduct, and does not draw a distinction in evaluating the conduct of Employers and Unions. Slip op. at p. 5. However, I do not agree with the Employer that *Randell* can be so broadly construed. While it is true that in *Randell*, the Board, contrary to prior law, decided to apply similar standards to conduct of both Unions and Employers in photographing employees. But *Randell* did not change prior law, and in effect expressly recognized, that there are numerous

areas of law, where the Board does apply different standards to conduct of Unions and Employers *vis-à-vis* the reasonable perception of employees concerning the statements, and their perception of the power and abilities of the respective parties to carry out the alleged threat or promises made. See for example *Underwriters Jobs Labs,* 323 NLRB 200, 302 (1997) (Threat by Union that employees would lose jobs if they voted against the Union, not objectionable); *Hollingsworth Management,* 342 NLRB #50 (2004) (Threat by Union representative to employee that he would lose his job if Union did not get in, not objectionable.) *J.T.J. Trucking,* 313 NLRB 1240 (1994) (Threat by Union of less health benefits not objectionable). *C.f.., Local 399 SEIU (City of Hope Medical Center),* 333 NLRB 1399, 1401 (2001) (Threat by Union to cause jobs to be outsourced coercive, in retaliation for protected concerted activities of employees). Indeed, *Randell* itself recognized and discussed several areas, where the Board permits Unions to engage in conduct, which if performed by Employers would be deemed coercive and unlawful. *NLRB v Media General Operations,* 360 F. 3d 434, 441, 174 LRRM 2486 (4th Cir. 2004) (Union's directly soliciting employees to sign "vote yes" petition not objectionable conduct); *Springfield Hospital,* 281 NLRB 643, 692, 693 (1986), *enfd.* 899 F2d 1305 (2d Cir. 1990) (Union asked employee whether they were for or against Union and recorded response); *Plant City Welding & Tank Co.,* 119 NLRB 131 (1957) and Canton *Carp's Inc.,*127 NLRB 513 fn. 3 (1960). (Permitting Union home visits), and *Peoria Plastic Co.,*117 NLRB 545 (1951) (Finding similar home visits by Employer's coercive, and objectionable conduct); compare also *Office Electronics, Inc.,* 127 NLRB 991 (1960), (Prohibiting employer's pre-election poll), and *J.C. Penny Food Dept.,*195 NLRB 921 (1972) *enfd.* 82 LRRM 2173 (7th Cir. 1972); (Union poll of employees as to how they would vote, not objectionable); *Mercy Memorial Hospital,* 279 NLRB 360 (1986) *enfd. sub nom.* 830 F.2d 1022 (6th Cir. 1988) (Union asking its members to report co-workers pro-management activities held not objectionable. Board in responding to dissent, reaffirms well settled principles that "an employer occupies a far different position with regard to the coercive impact of its action upon employees than does a Union. The Board in recognizing this difference, has frequently applied different standards to the actions of the employer than it has to the similar actions of unions.") *Id. at 360* citing *Louis-Allis v. NLRB,* 463 F. 2d 512, 517 (7th Cir. 1972).

Therefore, I conclude that *Randell* does not change these well established principles, but merely concluded that in evaluating photographing of employees, that Unions have sufficient power to coerce employees, so that employees may reasonably fear Union retaliation when their Section 7 activity is subject to unexplained photographing, 347 NLRB at 7.

Further, I note that a statement made by an Employer representative to an employee to "back off" from efficient Union organizing is not only not coercive or unlawful, but not even reflective of union animus. *Medical Transport,* 324 NLRB 553, 555 (1997). Thus since Aisen's comment to Marji even if made by supervisor would not be unlawful, or coercive, the fact that it was made by a Union representative to an employee, makes the statement even less likely to be deemed coercive or objectionable.

While I agree with the Employer's assertion, that a Union is capable of carrying out physical harm to employees, and is so perceived by employees, I do not agree with the Employer's further contention that Aisen's comment to "back off", can reasonably construed as a threat by the Union to physically harm Marji, should he not comply with the Union's request to (in effect) stop talking to employees about the election. I again emphasize, as correctly pointed out by Petitioner, that Aisen made no statement implicitly or explicitly, threatening any type of retaliation against Marji, should he failed to comply with Aisen's request, much less a threat of physical harm. The numerous cases cited by Respondent all contain statements explicitly or implicitly implying some sort of retaliatory actions, that would or might be taken by the Union, should the employees fail to comply with the Union's entreaties. While in *Cedars-Sinai, supra,*

employees were warned to "back off" their opposition to Petitioner, these statements were accompanied by warning the employee to "be careful" about opposing Petitioner, and another call wherein the Union told the employee that she needed to think about her family and her young daughters and to "back off". The Board relied on these statements in evaluating subsequent statements made to another employee as objectionable,[15] but is clear that the Board relied on the aspect of the Union's statements that implied threats of bodily harm to the employee and her two young daughters, and not merely to the Union's admonition to "back off". *Id.* at 547-578. Indeed the threats made by the Union to the employee within the critical period found objectionable by the Board, where also based on specific threats of reprisal by the Union. Thus, while as pointed out by the Employer, the Union told the employee therein to "stop fucking with the Union", the key objectionable portion of the comments made was the additional statement by the Union that "little kittens look good in frying pans", and that the Union would "stab his dogs", and "wouldn't it be terrible if his Corgi were run over". Thus, the basis for finding the Union's statements coercive or objectionable, was not that the Union told the employee to "stop fucking with the Union", but that the Union added a specific and serious thereat to harm the employee's dogs if he did not do so. In these circumstances the Board concluded that the statements to the employee would reasonably tend to cause employees who heard about them to reasonably assume that Petitioner was willing to physically harm an employee who was opposed or voted against it in the election. *Id.* at 598. A similar conclusion cannot be drawn from Aisen's mere request to Marji to "back off", unaccompanied by any implicit threat to harm Marji, or any other employee who might oppose or vote against the Union. *Baja's Place, supra,* also cited by the Employer is similarly not dispositive, since there, the Board viewed the statement by a Union to "get" the employee as an implied threat of physical harm. While some people might construe the statement of "get" as ambiguous, the Board viewed it as threatening physical harm. But the statement by the Union that it would "get" the employee found to be related to the election campaign, is clearly a threat to take some action against the employee and the Board concluded that it could reasonably be construed as a threat of physical harm or other unspecified reprisals. Here Aisen made no threat to "get" Marji, or to take any action against him, should he fail to comply with Aisen's admonition to cease his discussions about the Union.

The Employer relies heavily on the testimony of Timpone and other witnesses, to the effect that Timpone as well as other employees felt that Aisen had threatened Marji at the meeting. More specifically, Timpone testified that he believed that Aisen's conduct was a threat, because he came in with two other guys, they stood right next to him, stood right behind him, and told him to stop talking to the other guys. Further, Timpone told Aisen that he did not appreciate Aisen's "strong arm tactics", and other employees expressed among themselves similar sentiments the next day, i.e. that they believed that Aisen had threatened Marji during the meeting the prior day. However, it is well established by both Board and Court law, that it is inappropriate and error to rely on the subjective reactions of the employees allegedly threatened. *Local 299, IBT (Overnite Transportation Co.),* 328 NLRB 1231 fn. 2 (1999); *Culinary Foods Inc.,* 328 NLRB 664 (1991); *K-Mart Corp.,* 322 NLRB 1014, 1015 (1997); *Hopkins Nursing Center,* 309 NLRB 958 fn. 4 (1992); *AOtop v. NLRB,* 331 F.3d 100, 104 (D.C. Cir. 2003); *NLRB v. Media General, supra,* 174 LRRM at 2485. The test is an objective one; i.e. whether conduct has a reasonable tendency to interfere with the employees' free choice.

Therefore, the subjective reactions of Timpone and the employees that they felt that

[15] These statements had been made prior to the critical period. But the Board considered them in evaluating similar statements to another employee within the critical period to determine whether objectionable conduct occurred.

Aisen had threatened Marji are neither relevant nor conclusive to a determination of whether a reasonable employee would believe Aisen had threatened Marji with physical harm and whether such employees would consequently fear similar treatment from the Union, if they failed to support the Union, if they did not stop talking against the Union with their fellow employees. While it is somewhat troubling, that Aisen made his comments to Marji, accompanied by two other individuals, I do not believe that this fact is sufficient to transform otherwise lawful conduct, i.e. the statement by Aisen to "back off", to a coercive threat of bodily harm. I do not believe that it is reasonable for employees to have concluded, that the more presence of two other individuals with Aisen when he told Marji to "back off", implicitly threatened Marji with physical harm, if he did not comply with Aisen's request.

I would also note in this regard, that the record here tends to show that neither Timpone nor the other employees felt intimidated or threatened by Aisen's remarks. Although Timpone claimed that he was upset about the Union's conduct, and felt that the Union engaged in "strong arm tactics", and had threatened Marji, he nonetheless felt free to speak up at the very same meeting. In the presence of Aisen and the other two individuals, who Timpone believed engaged in the threatening conduct towards Marji, Timpone told Aisen that he didn't appreciate Aisen's "strong arm tactics", and told Aisen that he (Timpone) was a "gentleman who doesn't care for the Union". Similarly, the other employees who allegedly felt that Aisen had threatened Marji, felt free to express their disapproval of the Union's conduct at the meeting, during a discussion among themselves the next day. Therefore, based on these facts, it is not likely that employees felt constrained by Aisen's comments to freely express their views, or that such comments would be likely to affect their vote in the election the next day. I note the Board supported the Courts have long held that "Representation elections are not lightly set aside", *Delta Brands 344 NLRB # 1 at 2 (2005); NLRB v. Hood Furniture Mfg. Co.,* 941 F.2d 325, 328, 5th Cir. 1991). There is a "strong presumption that ballots cast under specific NLRB procedural safe guards reflect the true decision of employees". *Delta Brands, supra,* citing *NLRB v. Hood, supra*. Further it is recognized that "election campaigns are by their nature rough and tumble affairs, and typically involve some elements of pressure and inducement. But a certain amount of hyperbole and appeals to emotion are to be expected". *NLRB v. Media General, supra,* 174 LRRM at 2486. The issue here is whether the alleged misconduct is of the type that would likely cause interference with the free choice of a reasonable employee. *K-Mart, supra, AOtop v. NLRB, supra.*

I cannot find that the Employer has adduced sufficient evidence to conclude that the free choice of a reasonable employee would have been interfered with by Aisen's conduct towards Marji. See *AOtop v. NLRB, supra.* (Conduct of an agent of the Union, who told employees that they "had to" vote for the Union, asked employees how they were going to vote, and followed an employee while she worked, held to be "innocuous conduct" and not objectionable).

Indeed, an examination of Board precedent reveals that far more threatening statements by Union agents have been held to be too ambiguous to support a finding of objectionable or coercive conduct. *Cal-West Periodicals,* 330 NLRB 599 (2000) (Statement made by Union supporter to "Wait and see" what happens to him unless he voted "Yes", found to be ambiguous, and not objectionable. Board notes that "a certain amount of bad feeling and even hostile behavior is probably inevitable in any hotly contested election" *Id.* at 599, citing *Nabisco v. NLRB,* 738 F.2d 955, 957, (8th Cir. 1984), and *NLRB v. Hood, supra,* finding no objectionable conduct where employee was called an obscene name, told that he better vote "yes" and had his car swatted by pro-Union leafletter); *Briar Crest Nursing Home,* 333 NLRB 935, 938 (2001) (Statements made by striking employee to non striker, that if she went to work striker would get another striker "on her tail", and the striker would make sure that the non striker "don't come to work during the strike". Board concludes that while these remarks were no doubt attempts to

dissuade employees from continuing to work during the strike, neither statement, "was objectively speaking an unambiguous threat to cause bodily harm"); *Wayne Stead Cadillac,* 303 NLRB 432, 436 (1991) (Statement made by striker to wife of potential strike breaker, that her husband "could get hurt" if he went back to work, held to be ambiguous and not threatening); *National Duct Co.,* 265 NLRB 413 (1982) (Statement by Union Agent (Peters) to employee that if he did not "play the game" Peters' way, he would not "play at all", followed by a statement that employee should go ahead and vote "no", because his vote was not needed. Board finds nothing coercive in remarks, and does not find implicit threat of bodily harm). *Loose Leaf Hardware, Inc.,* 246 NLRB 350 (1979) (Statement by Union agent that people who crossed the picket line had accidents attributed to "acts of God", held to be ambiguous and not warranting setting aside the election).

Here, in my view the statement made by Aisen that Marji should "back off", from discussing the election, is little different than other types of campaigning that the Board has considered to be permissible, and non objectionable such as visiting homes of employees, and polling employees about their preferences. Elections cannot be set aside, based on the vivid imaginations of employees. The fact that Timpone, or other employees may have believed that Aisen was threatening Marji, is not determinative, as it was not reasonably based. Indeed, some employees might feel intimidated or even threatened when they are solicited to sign a Union card or to vote for the Union, where such solicitation or request was made by a Union representative, accompanied by other individuals. But that does not mean that such a fear is reasonable or that it warrants setting aside an election. As the 8th Circuit Court of Appeals aptly observed:

> The statute does not require the Board to treat employees as if they were bacteria on a petri dish that must be free of contamination. Employees' apprehension is not itself sufficient to spoil the vote". 904 F.2d 307, 397, 402 (7th Cir. 1990).

Accordingly, based on the above analysis and authorities, I conclude that the Employer has not established that Aisen's conduct in his confrontation with Marji, can be reasonably construed as threatening Marji with physical harm or any other reprisals and that therefore this conduct did not have the tendency to interfere with the employees freedom of choice.

I shall recommend that the Employer's objections be dismissed and that the appropriate certification be issued.[16]

Dated, Washington, D.C., December 29, 2006

STEVEN FISH
Administrative Law Judge

[16] Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, within 14 days from the date of issuance of this Recommended Decision, either party may file with the Board in Washington, D.C. an original and eight copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof upon the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may adopt this Recommended Decision.