Harborside Healthcare, Inc. *and* Service Employees International Union, Local 47, AFL–CIO, CLC.
Case 8–CA–30592

December 8, 2004

SUPPLEMENTAL DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN, SCHAUMBER, WALSH, AND MEISBURG

This case is before the Board on remand from the United States Court of Appeals for the Sixth Circuit. *Harborside Healthcare, Inc. v. NLRB*, 230 F.3d 206 (2000). The principal issue for decision is under what circumstances the prounion activity of a supervisor will be held to constitute objectionable conduct, such that a new election is warranted. The court remanded the case because it determined that the Board applied the wrong legal standard and improperly adopted the hearing officer's report, which contained erroneous credibility resolutions.[1] As to the legal standard, the court pointed out that the hearing officer relied on relatively recent Board decisions that departed from established Board precedent by purporting to require an explicit threat or promise in order to establish objectionable prounion supervisory conduct. Specifically, the court stated:

> The hearing officer's legal conclusions were based upon Board authority (*Pacific Physicians Services*, 313 NLRB 1176 (1994); *Sutter Roseville Medical Center*, 324 NLRB 218 (1997); *Pacific Micronesia Corp.,* 326 NLRB [458] (1998)) that emphasized requirements of coercion and threats in conjunction with other prounion supervisory conduct.

Harborside, 230 F.3d at 213. Quoting its decision in *Evergreen Healthcare, Inc. v. NLRB*, 104 F.3d 867, 874 (1997), the court held that the proper inquiry was whether the supervisor's conduct "'reasonably tended to have a coercive effect' and 'was likely to impair [the employees'] freedom of choice,' not whether [the supervisor] promised benefits or made threats." *Harborside*, 230 F.3d at 214. The court remanded the case to the Board in light of the court's factual findings and "for appropriate determination under the proper Sixth Circuit standard," a standard which was consistent with earlier extant Board law. Id. at 214.

We acknowledge that the Board decisions identified by the court and relied on by the hearing officer contain language that may reasonably be construed as requiring an explicit promise of benefits or threat of reprisal in order to find objectionable conduct. As discussed below, we agree with the court that such a requirement is inconsistent with long-held Board precedent. We therefore disavow such language in our decision today.

Because the language in those decisions has engendered confusion and was in error, we take this opportunity to restate the Board's legal standard for determining when supervisory prounion activity is objectionable, warranting a new election. We also reverse prior Board law with respect to the solicitation of union authorization cards by supervisors. We hold today that such solicitations are inherently coercive absent mitigating circumstances.

Applying our restated standard, we conclude that the supervisory prounion conduct at issue here was objectionable in that it interfered with the employees' freedom of choice so as to materially affect the election outcome. We therefore set aside the election and direct a second election in the stipulated bargaining unit.

A. Introduction

Although this case arises in the context of prounion supervisory conduct, it is important to observe, at the outset, that the issue of whether to set aside an election based on the acts or statements of supervisors is one that may arise whether the conduct is prounion or antiunion. Election campaign statements by supervisors which reasonably cause prounion employees to fear reprisal or to expect reward if they exercise their Section 7 rights will ordinarily be attributed to the employer and found objectionable.[2] That principle of Board law is in recognition of the authority supervisors may exercise over employees, including the power to promote, reward, discipline, assign or direct, and the potential for abuse of that authority. See Section 2(11).

Objectionable *prounion* supervisory conduct, while perhaps less frequent, has a similar potential to interfere with employee free choice. In our view, irrespective of

[1] An election was conducted on October 1, 1998 in Case 8–RC–15788 pursuant to a Stipulated Election Agreement. There were 49 votes for the Union, 36 against the Union, and 2 challenged ballots, an insufficient number to affect the results. On February 17, 1999, the Board overruled the Respondent's objections to the election, holding that the supervisor's conduct was not objectionable, and certified the Union as the employees' exclusive bargaining representative.

Thereafter, the Respondent refused the Union's request to bargain. The General Counsel issued an 8(a)(5) refusal-to-bargain complaint, and the Respondent filed an answer, admitting in part and denying in part the complaint allegations, and asserting affirmative defenses. The General Counsel moved for summary judgment, arguing that all issues raised were previously litigated in the underlying representation case. On July 8, 1999, the Board granted the Motion For Summary Judgment. *Harborside Healthcare, Inc.*, 328 NLRB No. 128 (1999) (not reported in Board volumes). The Respondent petitioned for review in the Sixth Circuit, and the Board cross-applied for enforcement. On October 18, 2000, the court remanded the case to the Board for further consideration in light of its opinion.

[2] See, e.g., *Hendrix Mfg. Co. v. NLRB*, 321 F.2d 100, 104 (5th Cir. 1963), enfg. 139 NLRB 397 (1962).

whether the supervisor improperly importunes subordinates to vote for the union or against it, the vice is the same, viz employees may be induced to support/oppose the union because they fear future retaliation, or hope for preferential treatment, by the supervisor. See generally *Wright Memorial Hospital v. NLRB*, 771 F.2d 400, 404 (8th Cir. 1985), enfg. 271 NLRB No. 21 (1984) (not reported in Board volumes). A supervisor is typically an employee's principal contact with management. Whenever a supervisor engages in prounion or antiunion activities directed at employees he or she supervises, the potential exists for these activities to put pressure on employees, who are unlikely to forget the power the supervisor has over their work life. This is true whether or not the statements or actions of the supervisor are consistent with the views of the employer.[3] In the interest of conducting free and fair elections, it is therefore incumbent on the Board to ensure that employees are protected from conduct by supervisors, be it prounion or antiunion, which interferes with the employees' freedom of choice.

B. Factual Background Including the Appellate Court's Factual Findings

The Respondent operates a nursing home in Beachwood, Ohio. The Union petitioned to represent a unit of 102 service and maintenance employees at the Beachwood home. During the course of the election campaign, charge nurse Robin Thomas, a licensed practical nurse (LPN)[4] at the nursing home, spoke with employees in support of the Union and engaged in other prounion activity. Conflicting testimony was offered at the hearing concerning precisely what Thomas said to eligible voters. The hearing officer resolved the conflict by largely discrediting the testimony of three employees, nursing assistants Lynne Pavelchak, Monica Thyme, and Frankie Jackson. Based on his credibility resolutions, the hearing officer found that Thomas told Pavelchak to "vote for the Union, you're going to get terminated anyway," and told Thyme that "the Union would . . . help guarantee job security." The hearing officer also found that Thomas "merely told [Jackson] about the benefits of unionization and encouraged his support" for the Union, but "never threatened his employment or even mentioned the possibility of job loss to him." Assuming without deciding that Thomas was a statutory supervisor, the hearing officer concluded that none of Thomas' statements to unit employees in support of the Union were objectionable. As stated above, the Board adopted the recommendation of the hearing officer and certified the Union as the employees' bargaining representative.

The court of appeals refused to affirm the Board's decision, in part because it found that "important factual findings are not supported by substantial evidence in the record as a whole." *Harborside*, 230 F.3d at 214. In so doing, the court "noted some limited but important exceptions to the hearing officer's purported credibility findings." Id., 230 F.3d at 214. In reviewing the testimony of the three nursing assistants who described Thomas' statements and conduct during the critical period, the court criticized the hearing officer's credibility findings as "unfair" and "unpersuasive." Id. at 213.

As we accept the court's remand, we must accept its findings of fact. Consistent with the court's decision, we therefore credit in its entirety the testimony of the three nursing assistants regarding Thomas' preelection conduct. Accordingly, we find that the credited evidence establishes that Thomas:

- approached Pavelchak near the beginning of August 1998,[5] asked her to sign a union card, and told her that she "needed to come to a union meeting";
- told Pavelchak on September 13, two and a half weeks before the election, that if she did not vote for the Union, she (Pavelchak) would lose her job because she had signed an authorization card and her "name was on the list, that [Harborside] would fire [her] anyway, so [she] had better vote for the Union and pray they got in";
- told Pavelchak that she "had to attend all of the Union meetings" and harassed her repeatedly about not attending;
- approached Pavelchak on September 29, two days before the election, stating that "your days here are numbered if this union doesn't get in, tell your coworkers they need to vote for the union!"[6]

[3] See, e.g., *Turner's Express, Inc. v. NLRB*, 456 F.2d 289 (4th Cir. 1972) ("[A]n employee is more concerned about the attitude of his immediate supervisor than he is with the feelings of the company president. This is similar to the Army where a private is more concerned with the attitude of his corporal or sergeant than he is with the colonel or general, since the corporal and sergeant control his day to day life.").

[4] Prior to the election, the Respondent and the Union stipulated that LPNs were not part of the unit. See fn. 7, below.

[5] The petition was filed on August 5, 1998. All subsequent dates are in 1998, unless otherwise indicated.

[6] The hearing officer noted that Pavelchak did not testify regarding the specifics of the September 29 incident and for this reason did not ascribe any weight to this incident. However, the incident is fully described in Pavelchak's September 30 written grievance that was introduced into evidence and Pavelchak explicitly testified on direct examination that the written grievance accurately described the incident; the Union did not cross-examine Pavelchak regarding the incident. In these circumstances, we credit the information set forth in the written grievance as adopted by Pavelchak in her testimony at the hearing.

- repeatedly approached and badgered Pavelchak during the two weeks before the election, telling Pavelchak that she had to vote for the Union and warning her that she would lose her job if the Union did not win the election, notwithstanding that Pavelchak had asked Thomas to stop badgering her;
- initiated a "loud" and "intimidating" confrontation with Thyme about the Union seven to nine days prior to the election, during which Thomas constantly mentioned job security and told Thyme to "remember that there is no job security here. [Harborside] could fire you at will"; and
- initiated prounion discussions with Lolisia Starr and a "numerous amount" of other employees that were similar to Thomas' confrontation with Thyme, including repeated references to job security;
- told Jackson that he could lose his job if he did not vote for the Union;
- asked Jackson to sign a Union card, pressured Jackson to wear a Union pin "on a daily basis for about a couple of weeks," repeatedly attempted to get Jackson to vote for the Union, and asked Jackson to sign a Union petition;
- posted prounion signs at Harborside and wore a prounion pin;
- solicited authorization cards from unit employees and returned them to the Union organizer; and
- engaged in other prounion conduct addressed to employees, including encouraging employees who worked on Thomas' floor to vote for the Union, badgering a housekeeping employee on Thomas' floor about voting for the Union on September 13, frequently talking about the Union in the employees' break room and in the smoking area, and asking at least three or four employees to sign a prounion petition.

Id. at 212–213.

The court also found a number of facts with regard to Thomas' supervisory status that we adopt.[7] Specifically, the court found that Thomas, as the immediate supervisor of the nursing assistants, "had the authority to initiate disciplinary action[,] . . . direct nurses, assign nurses' schedules, make independent judgments, interview and recommend prospective employees, give the principal input on nursing assistants' evaluations (which affect retention and pay raises), immediately suspend and send home employees, request employees to stay over, and recommend suspension and termination of employees." Id. at 211. Given those findings, we conclude that Thomas was a supervisor within the meaning of Section 2(11) of the Act.

C. The Circuit Court Holding that Prounion Supervisory Conduct can be Objectionable, Even Absent an Explicit Threat or Promise

In its decision, the court underscored the legal standard to be applied when analyzing whether supervisory prounion conduct interfered with an election:

> An election will be invalidated when the petitioner demonstrates that "the supervisor's conduct reasonably tended to have such a coercive effect on the employees that it was likely to impair their freedoms of choice in the election." The party challenging the election need not introduce proof of actual coercion.
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> To determine whether a supervisor's conduct reasonably tended to have such a coercive effect on the employees that it was likely to impair their freedoms of choice in the election, the Board and the circuit courts have considered the following two factors: (1) the degree of supervisory authority possessed by those who engaged in the pro-union activity; and (2) the extent, nature and openness of the pro-union activity.

Id. at 210 (emphasis omitted), quoting *Evergreen Healthcare*, 104 F.3d at 874.

As noted above, the court's decision criticized the Board's hearing officer for straying from this legal standard by seeming to require that the Respondent prove an explicit threat or promise by a prounion supervisor to a unit employee in order to establish election misconduct. *Harborside*, 230 F.3d at 210, 213.[8] The court stated that the hearing officer's legal conclusions were based on three relatively recent Board cases appearing to require

[7] The court stated that the parties stipulated that Thomas, as an LPN, was a supervisor. *Harborside*, 230 F.3d at 211. In fact, the record reflects that the parties merely stipulated that LPNs were not included in the unit. The parties entered into this stipulation because Harborside's position was that LPNs, as charge nurses, possessed 2(11) supervisory authority, while the Union wanted to avoid litigating the issue.

[8] The court acknowledged, however, that neither the hearing officer nor the Board in this case explicitly required the showing of an actual threat as a necessary element of this objection as a matter of law. *Harborside*, 230 F.3d at 210. Rather, the difficulty rested with "[t]he hearing officer's legal conclusion [which] was based upon at least a perception that the Board required 'some hint of retaliation [or reward].'" Id. at 214.

express threats or promises in order to find supervisory prounion conduct objectionable.

The cases relied on by the hearing officer can indeed be construed as requiring evidence of express threats or promises to establish supervisory prounion misconduct. In *Pacific Physician Services*, 313 NLRB 1176 (1994), the Board found a supervisor's prounion statements were not grounds to set aside the election because they were expressed "without any hint of retaliation or reward." Similarly, in *Sutter Roseville Medical Center*, 324 NLRB 218 (1997), the Board stated that supervisory prounion statements "are not inherently coercive and are not objectionable when made without threats of retaliation or [promises of] reward." Id. at 219. In *Pacific Micronesia Corp.,* 326 NLRB 458 (1998), the Board adopted the Regional Director's decision overruling an objection alleging objectionable supervisory prounion conduct. The Regional Director, citing *Sutter Roseville*, above, found that the declarations submitted in support of the objection "do not even point to any evidence of coercion because of the supervisor's alleged behavior." *Sutter Roseville*, supra at 460.

We have reexamined these decisions in light of prior Board precedent and the court's criticism of them. To the extent that they require an express threat or promise, they represent a departure from established precedent. Prior Board cases did not require a showing of an express threat or promise by a prounion supervisor to a unit employee in order to find objectionable conduct. Rather, as the Ninth Circuit explained in enforcing the Board's decision in *NLRB v. Hawaiian Flour Mill*, 792 F.2d 1459, 1462 (1986), the proper inquiry in this kind of case is whether supervisory prounion conduct "'reasonably tend[s]' to have a coercive effect on or [is] 'likely to impair' an employee's choice." (Citations omitted.) Some cases may indeed involve explicit coercion, such as "an express threat or promise of reward." *NLRB v. Regional Home Care Services*, 237 F.3d 62, 69 (1st Cir. 2001). Others, however, involve "the more subtle question of whether the conduct and speech of the supervisor amounted to implicit threats or coercion." Id. As the Ninth Circuit stated in *Hawaiian Flour Mill*, "Evidence of actual threats are not required; implied threats of retaliation are sufficient." 792 F.2d at 1462.[9] Accordingly, we disavow the language in question in *Pacific Physician Services*, *Sutter Roseville*, *Pacific Micronesia Corp.*, and similar cases,[10] and hold that an express promise or threat is not a requirement for finding prounion supervisory conduct objectionable.

D. Restatement of the Board's Legal Standard

In view of those recent decisions that strayed from extant Board law, we take this opportunity to restate the legal standard to be applied in cases involving objections to an election based on supervisory prounion conduct.

When asking whether supervisory prounion conduct upsets the requisite laboratory conditions for a fair election, the Board looks to two factors.

> (1) Whether the supervisor's prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election.
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> This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct; and (b) an examination of the nature, extent, and context of the conduct in question.
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> (2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.

We believe that this restatement is largely consistent with Board law prior to *Pacific Physician Services* and its progeny, and is responsive to the court's remand. The first prong of our test ("whether the supervisor's prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election") mirrors the Sixth Circuit's standard ("whether a supervisor's conduct reasonably tended to have such a coercive effect on the employees that it was likely to impair their

[9] Other courts of appeals, enforcing Board decisions, have similarly not limited the inquiry to explicit coercion. See *NLRB v. Indiana Home Sanitation*, 803 F.2d 345, 348–349 (7th Cir. 1986) (inquiry is whether "employees may be coerced into supporting the union out of fear of future retaliation by the prounion supervisor"); *Wright Memorial Hospital v. NLRB*, 771 F.2d 400, 406 (8th Cir. 1985) (upholding election where evidence showed employees "were neither coerced into voting in favor of the union because they feared future retaliation nor had reason to believe that any adverse action would be taken against them if they did not support the union"); *Fall River Savings Bank v. NLRB*, 649 F.2d 50, 56 (1st Cir. 1981) (concern is that employees might support union "out of fear of retaliation" by prounion supervisor); *NLRB v. Manufacturer's Packaging Co*., 645 F.2d 223, 226 (4th Cir. 1981) (inquiry is whether the supervisors' prounion conduct "contain[s] the seeds of potential reprisal, punishment, or intimidation"); and *NLRB v. San Antonio Portland Cement Co*., 611 F.2d 1148, 1151 (5th Cir. 1980), cert. denied 449 U.S. 844 (1980) (supervisor's attendance at union meeting and wearing of union button does not contain "seeds of potential reprisal, punishment, or intimidation").

[10] See, e.g., *Millsboro Nursing & Rehabilitation Center*, 327 NLRB 879 (1999), in which the Board stated that the relevant inquiry was whether "threats or promises of benefits were made." Id. at 879.

freedoms of choice in the election"). *Harborside*, 230 F.3d at 210.[11] The second prong of the Board's test ("whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election") also mirrors the Sixth Circuit's standard ("did the conduct in question interfere with freedom of choice so that it materially affected the result of the election"). *Harborside*, 230 F.3d at 214.[12] The second prong is also consistent with both Board and appellate court decisions requiring a detailed inquiry into the supervisor's authority and the nature and extent of the supervisor's prounion conduct. Id. See also *NLRB v. Cal-Western Transport*, 870 F.2d 1481 (9th Cir. 1989) ("In determining whether [supervisor] Kuyper's conduct could reasonably tend to coerce employees, the Board thoroughly examined the degree of his supervisory authority, including his ability both to reward and retaliate, and the extent of prounion conduct."), enfg. 283 NLRB 453 (1987). See generally *Wright Memorial Hospital v. NLRB*, 771 F.2d 400, 404 (8th Cir. 1985) (burden is on the moving party to establish, not just that objectionable acts occurred, "but also that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election"), enfg. 271 NLRB No. 21 (1984) (not reported in Board volumes).

E. Application of the Restated Legal Standard to the Facts of this Case

1. Whether Thomas' conduct reasonably tended to coerce or interfere with employee free choice

a. The nature and degree of Thomas' supervisory authority

As stated above, the court found that Thomas was the immediate supervisor of the nursing assistants in the unit. *Harborside*, 230 F.3d at 211. Specifically, the court found that, using independent judgment, Thomas "had the authority to initiate disciplinary action[,] . . . direct nurses, assign nurses' schedules, . . . give the principal input on nursing assistants' evaluations (which affect retention and pay raises), immediately suspend and send home employees, . . . and recommend suspension and termination of employees."

In addition, as noted by the court, nursing assistants Pavelchak, Thyme, and Jackson all reasonably perceived Thomas to be a supervisor with substantial authority. Pavelchak testified that Thomas had the ability to tell her what to do, write her up, send her home, and ultimately have her terminated. Thyme testified that Thomas directed her and had the authority to discipline her. Jackson testified that Thomas could "write you up and make you lose your job."

Based on the foregoing, we conclude that Thomas had significant supervisory authority over unit employees, including the ability to both reward and retaliate against them. Therefore, the factor of the nature and degree of supervisory authority supports a finding that Thomas' prounion conduct (set forth below) reasonably tended to coerce or interfere with employees' exercise of free choice in the election.[13]

b. The nature, exten,t and context of Thomas' conduct

(1) In general

We next address the nature and extent of Thomas' conduct. We emphasize that, during the period preceding the October 1 election, she repeatedly threatened several employees that they could lose their jobs if the Union lost the election. Thus, Thomas told Pavelchak on September 13 that if Pavelchak did not vote for the Union, Pavelchak would lose her job because she had signed an authorization card and "her name was on the list, that [Harborside] would fire [her] anyway, so [she] had better vote for the Union and pray they got in." Approximately 2 weeks later, Thomas again told Pavelchak that if the Union lost the election, her "days here [were] numbered." Similarly, Thomas told Jackson that if he did not vote for the Union, he could lose his job. In addition, Thomas initiated a "loud" and "intimidating" "confrontation" with Thyme about the Union, during which Thomas told Thyme to "remember" that she had "no job security here" and could be fired "at will." Thomas' ability to both reward and retaliate against employees, together with her repeated and confrontational references

[11] We believe that the phrase "interfere with" is not synonymous with "coercion." As in Sec. 8(a)(1), the terms are distinct, and they represent different ways of undermining Sec. 7 rights. Similarly, they represent different ways of undermining employees' free exercise of their Sec. 7 right to make an electoral choice in an untainted atmosphere. For example, a noncoercive speech in the 24-hour period before an election (*Peerless Plywood*, 107 NLRB 427 (1953)), or the use of a racial appeal (*Sewell Mfg*., 138 NLRB 66 (1962)), may not "coerce" an employee, but they do interfere with the election process.

[12] In assessing the effect of the conduct on the election, the Board may take into account the antiunion statements of higher company officials, and the extent to which they may disavow coercive prounion conduct of supervisors.

[13] We note that during the preelection period, Thomas was Pavelchak's charge nurse for only 1 day and was not Thyme's or Jackson's charge nurse at any time. This fact, however, is counterbalanced by other facts. In particular, charge nurse assignments were neither exclusive nor permanent; employees sometimes worked double shifts or were reassigned to other floors. Therefore, those three employees could reasonably fear that Thomas would eventually exercise charge nurse authority over them. Furthermore, as noted above, Thomas engaged in prounion conduct directed at other employees who were at the time assigned to her floor and who therefore may have been subject to her charge nurse authority, including a housekeeping employee whom Thomas badgered about voting for the Union.

to job loss, could reasonably lead these three employees to believe that she was not merely expressing her personal opinion, but predicting a real prospect that they could lose their jobs. Given Thomas' status, the employees could reasonably conclude that Thomas had the ability to affect their job tenure if the Union lost the election.

In addition to Thomas' threats of job loss directed to Pavelchak, Thyme, and Jackson, the record reveals that Thomas spoke to Lolisia Starr and a "numerous amount" of other, unidentified employees about the Union, while on the job, in the smoking area and in the parking lot, during which she made numerous repeated reference to "job security" and her need to be able to "count on" these employees to vote for the Union. Given the outspoken and aggressive nature of Thomas' discussions with Pavelchak, Thyme, and Jackson, it is not unreasonable to infer that when Thomas spoke to Starr and these other employees, she did not limit her remarks to permissible expressions of opinion about the Union.[14]

In addition, Thomas went beyond merely inviting Pavelchak to union meetings. Thomas told Pavelchak that she "had to" attend all the union meetings, and repeatedly asked why Pavelchak was not attending. In essence, Thomas was telling Pavelchak that attendance at the union meetings was being required by the person who had supervisory authority over her. Particularly in the context of Thomas' repeated ominous warnings about job loss, Pavelchak could reasonably have believed that noncompliance with this directive would result in consequences that would be adverse to her. Indeed, the pervasiveness and intensity of Thomas' interactions with Pavelchak about the Union caused Pavelchak to file a grievance against Thomas. In the grievance, Pavelchak alleged that Thomas "continuously harassed" her about supporting the Union.

Thomas also solicited union cards from a dozen employees, repeatedly pressured at least one employee to wear a union pin, badgered a housekeeping employee about voting for the Union, and solicited signatures on a union petition from at least three or four employees. Contrary to our dissenting colleagues, we believe that the evidence permits a reasonable inference that Thomas solicited signatures on cards and the prounion petition from at least some of the employees she supervised. After all, Thomas supervised an entire wing, and she solicited signatures from about 15 employees. When viewed in context we find that Thomas' conduct reasonably tended to coerce or interfere with employees' free choice.[15]

(2) Supervisory solicitation of union authorization cards

In *Millsboro Nursing*, 327 NLRB 879, 880 (1999), the Board held that the solicitation of authorization cards by supervisors is not objectionable where "nothing in the words, deeds, or atmosphere of a supervisor's request for authorization cards contains the seeds of potential reprisal, punishment or intimidation." In our view, however, absent mitigating circumstances, supervisory solicitation of an authorization card has an inherent tendency to interfere with the employee's freedom to choose to sign a card or not. By definition, a supervisor has the power to affect—for good or for ill—the working life of the employee. The solicitation of cards gives the supervisor the opportunity to obtain a graphic illustration of who is prounion and, by the process of eliminating nonsigners, who likely is not. When a supervisor asks that a card be signed, the employee will reasonably be concerned that the "right" response will be viewed with favor, and a "wrong" response with disfavor. By overruling *Millsboro Nursing* on this point and finding such conduct objectionable, we are by no means suggesting that supervisory prounion speech, without more, is objectionable. For example, just as an employer, through its supervisors, can speak against representation (see Sec. 8(c)), a supervisor can also speak in favor of the union. On the other hand, when a supervisor solicits a signature on a union card or on a prounion petition, that conduct may be objectionable. Similarly, where a supervisor solicits a signature on an antiunion petition, that conduct may also be objectionable.

Our dissenting colleagues complain that persons who solicit in the belief that they are employees may ultimately be held to be supervisors, and their conduct will thus be objectionable. Although there are no such facts in this case, our colleagues are correct. However, the law is evenhanded in this respect. For example, if an individual whom an employer believes is not a supervisor tells an employee that unionization will lead to plant closure, and the Board later determines that the individual is a supervisor, the employer may be held liable for the conduct. The essential point, in both cases, is that employees should be free from coercive or interfering tactics by individuals who are supervisors, even if the employer or union believes that the individual is not a supervisor.

[14] We note that employee Thyme testified that the remarks that Thomas made to her were repeated by Thomas to other employees.

[15] Member Meisburg agrees with the test set forth in this opinion, but he would not infer from this record that Thomas solicited authorization card signatures from employees whom she supervised. Nonetheless, Member Meisburg is satisfied that that the election must be set aside based on the totality of Thomas' statements and conduct.

Our dissenting colleagues also complain that, under our decision today, a union will not choose, as solicitors, persons who are on the borderline between supervisory status and employee status. In order to avoid supervisory coercion, however, that choice is thrust upon unions, just as a similar choice is thrust upon employers. Even if, as our colleagues say, unions will be deprived of solicitors who might be "natural leaders," our concern is that, if these people are supervisors, the interference with employee free choice emanates from their supervisory authority, not their leadership qualities. That being the case, both employers and unions must use care to avoid tactics that interfere with employee free choice.

We recognize that the solicitation of cards in this case occurred largely, if not wholly, prior to the filing of the petition, i.e., outside the critical period. However, in our view, this does not necessarily mean that the conduct is not cognizable as an objection because the impact of the supervisor's solicitation would ordinarily continue to be felt during the critical period. This is so because of the power of the supervisor over an employee. We think that the solicited employee would be very reluctant to ask a supervisor for the return of a signed card, should the employee change his mind about the wisdom of having signed it. The result, as the Supreme Court has explained in analogous circumstances, is two-fold: first employees "would feel obliged to carry through on their stated intention [i.e., the card] to support the union,"[16] and second the Union cards can "paint a false portrait of employee support during its election campaign."[17]

Our dissenting colleagues disagree with our view that prepetition solicitation by a supervisor can be objectionable. They say that our view "guts" the *Ideal Electric* rule.[18] We do not "gut" *Ideal Electric*. To the contrary, we reaffirm that doctrine, and simply apply a previously-developed narrow exception to that doctrine.

In *Lyon's Restaurant*, 234 NLRB 178 (1978), the Board overruled a hearing officer who, relying on *Ideal Electric*, supra, found nonobjectionable a union's prepetition statement to employees that their employment could be affected if they opposed the union. The *Lyons* Board relied on the exception to the *Ideal Electric* rule articulated by the Board in *Gibson's Discount Center*, 214 NLRB 221 (1974).

In *Gibson's* the Board was faced with an employer's objection to a union's prepetition offers to waive initiation fees in contravention of the Supreme Court's decision in *NLRB v. Savair Mfg. Co*., 414 U.S. 270 (1973).[19] The Board held that because most card solicitations occur prepetition, if the Court's *Savair* rationale "was to have any practical effect," it would have to apply to both prepetition and postpetition statements which involve the solicitation of authorization cards. The *Lyons* Board found the situation it was dealing with was "sufficiently similar" to require application of the exception to the *Ideal Electric* rule. The Board explained that the union's statement was a "catalyst which propelled the two employees to sign authorization cards. . . and [that the resultant] apparent support of Petitioner may well have given an impression of support to other employees during the election campaign." 234 NLRB at 179.[20]

The Board continued: "[A]s in *Gibson's Discount Center*, the Petitioner has solicited its authorization cards on the basis of a proscribed statement which . . . the employees may well have believed Petitioner could have carried out." *Lyons Restaurants*, 234 NLRB at 179. A fortiori, that is true of a supervisor who has power over the working life of the employee, whether the supervisor is acting consistent or inconsistent with the employer's wishes. Accordingly, when that supervisor solicits the employee outside the critical period, the effects of the coercion may continue to be felt during that period.[21]

We do not agree that the underlying rationale of *Savair* is as limited as our colleagues suggest. To be sure, *Savair* itself involved a promise of benefits. However, it is clear that coercion and interference can emanate from a fear of detriment just as they can emanate from a promise of reward. Sticks as well as carrots can be used in coercive and interfering ways. Thus, we would not limit *Savair* solely to the latter.

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[16] *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 278 (1973).

[17] Id. at 277.

[18] In *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961), the Board held that, in representation cases where a preelection hearing was conducted, it would generally not set aside the election based on conduct occurring before filing of the petition. The rule was later extended to all election cases. See *Goodyear Tire & Rubber Co.*, 138 NLRB 453 (1962).

[19] In *NLRB v. Savair*, supra, the election was set aside because of prepetition conduct.

[20] See also *Royal Packaging Co.,* 284 NLRB 317 (1987), for another case applying the *Ideal Electric* exception when the solicitation of authorization cards is involved.

[21] *Ideal Electric* notwithstanding, the Board will consider prepetition conduct that is sufficiently serious to have affected the results of the election. See, e.g., *Servomation of Columbus*, 219 NLRB 504, 506 (1975) ("Of course, if threats or violence generates an atmosphere of fear and coercion which persists to the date of the election and taints the conditions under which it is conducted, the election will be set aside regardless of the time when the misconduct occurred, the end to which it was directed, or the persons responsible for its perpetration."). See also *Royal Packaging,* supra; *Gibson's Discount Center*, supra; and *NLRB v. Savair*, supra. In addition, the Board will consider evidence of prepetition conduct that adds "meaning and dimension" to related postpetition conduct. See, e.g., *Fruehauf Corp.*, 274 NLRB 403, 408 (1985).

In the instant case, considering the nature and extent of Thomas' conduct as a whole, together with her significant supervisory authority, there can be no doubt that her campaign activities would reasonably tend to coerce or interfere with the employees' exercise of free choice in the election. Although, as discussed above, evidence of express threats is not required, here the record shows that Thomas repeatedly threatened employees with the prospect of job loss if the Union lost the election. In addition, Thomas' continuous, pervasive, and aggressive campaigning on behalf of the Union, which included soliciting employees' signatures on authorization cards and a prounion petition, requiring an employee to attend union meetings, requiring another employee to wear a union pin, repeatedly asking employees if she could "count on" them—much of this conducted in a harassing, pressuring, and badgering manner—would reasonably tend to chill the employees she supervised from expressing opposition to the Union.

2. Whether Thomas' conduct materially affected the election outcome

Having found that Thomas' prounion conduct reasonably tended to interfere with the employees' exercise of free choice in the election, we must next decide whether that conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election. As stated above, in analyzing this factor, we will consider: (1) the margin of the election; (ii) whether the conduct at issue was widespread or isolated; (iii) the timing of the conduct; (iv) the extent to which the conduct became known; and (v) the lingering effect of the conduct. Relying specifically on the factors of the margin of the election, the timing of the conduct, and the lingering effect of the conduct, we find that Thomas' conduct materially affected the outcome of the election.[22]

a. The margin of the election

The tally of ballots in the election shows 49 for and 36 against the Union, and there were 2 challenged ballots. Viewing the facts in the light most favorable to the objecting party—in this case, the Respondent—we assume that the two challenged ballots were cast against the Union, thus bringing the Union's margin of victory to 11.[23] Therefore, a shift in as few as six votes would have changed the election result, a relatively small margin of victory in a unit of approximately 102 eligible voters.

Here, Thomas' coercive prounion conduct directly affected at least four employees identified by name—Pavelchak, Thyme, Jackson, and Lolisia Starr. It also directly affected employees not identified by name—the 15 employees whom Thomas asked to sign union cards, the three or four employees whom Thomas asked to sign a union petition, the employees to whom Thomas made prounion statements similar to those she made during her confrontation with Thyme, and the unidentified housekeeping employee whom Thomas badgered on September 13. Even assuming that these groups are not mutually exclusive (for example, that some of the employees in the Union card group were also in the union petition group), Thomas' prounion conduct undoubtedly affected a critical number of employees relative to the Union's margin of victory.

b. Timing of the conduct

Approximately 2 weeks before the election, Thomas threatened Pavelchak with the possibility that she could lose her job if the Union did not prevail in the election. At roughly the same time, Thomas badgered a housekeeping employee under her supervision about voting for the Union. Approximately 1 week prior to the election, Thomas threatened Thyme with the prospect of job loss in the event the Union lost the election. And again, just 2 days before the election, Thomas threatened Pavelchak, telling her that her days at Harborside were numbered if the Union did not prevail in the election. Thus, the proximity of the misconduct to the election date supports a finding that it materially affected the election outcome.

c. Lingering effect of the conduct

Threats of job loss are highly coercive and one of the most serious forms of election misconduct. *Waste Management, Inc.*, 330 NLRB 634, 634 fn. 22 (2000); *Lakehaven Nursing Home*, 325 NLRB 250, 251 (1997).[24]

[22] The test does not require that all the factors be satisfied.

[23] In assessing the size of the margin of victory, the Board will assume the unopened, uncounted challenged ballots were cast in favor of the objecting party. See, e.g., *Acme Bus Corp.,* 316 NLRB 274, 274 (1995).

[24] Consistent with this opinion, we overrule *B. J. Titan*, 296 NLRB 668 (1989), to the extent that it holds that a prounion supervisor's linking of job security to support of the union is never objectionable. Whether such statements are coercive and objectionable will depend on the circumstances.

In *B. J. Titan* the Board found nonobjectionable a prounion supervisor's statements linking the employer's threats of retaliation if the employees selected union representation with the protection the union could provide if it was selected. Here, in contrast, the "threat" initiated with Thomas, a prounion supervisor; it is not attributable to the employer. The Board in *B. J. Titan* expressed the proposition, mentioned above, that statements that stress the benefits of union representation in terms of job security constitute "permissible partisan appeal[s] for union support." 296 NLRB at 668 fn. 2, citing *NLRB v. Superior Coatings*, 839 F.2d 1178, 1181 (6th Cir. 1988); see *Smith Co*., 192 NLRB 1098, 1101 (1971). We disagree with the breadth of that statement. Statements mentioning job security as a benefit of unionization are permissible provided they cannot reasonably be construed as a threat of

Here, in addition to the threats directed at employees Pavelchak and Thyme, Thomas separately threatened a third employee, Jackson, with the prospect of job loss if the Union lost the election. As mentioned above, Thomas also actively solicited employee signatures on authorization cards and on a prounion petition. Further, it is not unreasonable to infer, given the direct evidence of Thomas' repeated resort to prounion coercive tactics, that she went beyond the permissible expression of personal opinion with the "numerous" other employees she spoke with about the Union. In sum, Thomas' campaign activity was not only extensive and persistent, but her tactics were badgering, harassing, and intimidating in nature. Thomas remained a supervisor and her prounion campaigning continued into the critical period, up to the election. For these reasons as well, we find that the effect of her misconduct would not dissipate, but would tend to linger.

The Employer's Antiunion Stance

Finally, we turn to the factor of the Employer's antiunion stance. As stated above, footnote 12, we view the employer's antiunion stance as relevant to the second prong of the test—that is, whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election. In this regard, the record shows that while Thomas was engaging in substantial prounion activity during the critical period, the Respondent was conducting an antiunion campaign. Although an employer's antiunion campaign may mitigate the coercive effect of impermissible prounion supervisory authority, we find here that the Respondent's public stance did not mitigate the effects of Thomas' conduct. First, although the Respondent told Thomas to stop her prounion activities, there is nothing to show that the instruction was communicated to unit employees, and Thomas in fact continued her prounion activities. Second, in light of the nature and degree of Thomas' day-to-day authority over employees' working conditions—including Thomas' perceived authority, in the words of employee Jackson, to "make [employees] lose [their] jobs"—employees would reasonably view her, rather than higher management, as the one to whom they should be responsive.

Our colleagues contend that the supervisor's coercive or interfering prounion conduct can be mitigated by higher management's antiunion stance. We do not disagree with the principle. However, whether it is applicable will depend upon the specific facts and circumstances of each case, such as the size of the employer, the levels of supervisory authority, and the extent of the particular supervisor's authority over the solicited employee. Generally, the supervisor, not higher management, has immediate and day-to-day control over the working life of the employee. Conceivably, if higher management learns of the supervisory conduct, and takes timely and effective steps to disavow it as to all of the employees, the supervisor's conduct may be mitigated. However, there is no evidence of such mitigation here.

The relatively close margin of victory, the timing of the threats relatively close to the election, and the lingering effect of Thomas' conduct, taken together, warrant the conclusion that her conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election.

Conclusion

For the foregoing reasons, we find that Supervisor Thomas' prounion conduct was objectionable and warrants setting the election aside. Accordingly, we shall dismiss the complaint in Case 8–CA–30592, reopen Case 8–RC–15788, set aside the election held October 1, 1998, vacate the certification of representative, and direct a second election.

ORDER

It is ordered that the complaint in Case 8–CA–30592 is dismissed.

IT IS FURTHER ORDERED that Case 8–RC–15788 is reopened, that the election held on October 1, 1998, is set aside, and that the certification of representative issued on February 17, 1999, is vacated.

IT IS FURTHER ORDERED that Case 8–RC–15788 is remanded to the Regional Director for Region 8 for the purpose of conducting a second election pursuant to the direction set forth below.

[Direction of Second Election omitted from publication.]

MEMBERS LIEBMAN and WALSH, dissenting.

Statutory supervisors who support a union act at their peril. Not only are they fair game for employers who oppose unionization, but their participation in the union's organizing campaign also may prevent the union from being certified after winning an election. This is true even when their supervisory status was uncertain at the time, and even though their actions were no more than an antiunion supervisor would be permitted to do, with the blessing of the employer and the Board. That seems to be the lesson of the Board's decision here.

Ostensibly in response to a remand by the United States Court of Appeals for the Sixth Circuit, the majority offers a "restatement" of the law governing the prounion conduct of supervisors in the context of representa-

loss of continued employment if the employee does not vote for the union.

tion elections. Instead of simply clarifying the issue raised by the Sixth Circuit—whether an actual threat or promise of benefit by the supervisor is required to find objectionable conduct (it is not, and never has been)—the majority adopts a new legal test, without the benefit of briefing. That test minimizes the importance of a key factor: the employer's *antiunion* stance, which the Board has long recognized as limiting the impact of a *prounion* supervisor's conduct. As part of its effort, the majority expressly overrules prior Board decisions, including decisions holding that mere supervisory solicitation of a union authorization card is not objectionable conduct. That ruling alone jeopardizes the outcome of many elections, where cards will be solicited by persons who are unaware that, under the law's definition, they will turn out to be supervisors.

In its disregard for prior decisions, its use of broad new language, and its neglect of workplace realities, the majority's new test signals a radical break with the Board's established approach. It will result in unwarranted obstacles to union representation. The majority is headed down a slippery slope**.**

After describing the current state of Board law and explaining the flaws in the majority's new test, we address its application to this case. In directing a new election, the majority relies on conduct that would not reasonably tend to coerce employees, even if it had been backed by the full weight of the employer's authority. In any event, it is impossible to conclude that any arguably coercive conduct could have materially affected the outcome of the election here.

I. THE BOARD'S HISTORIC APPROACH TO PROUNION SUPERVISORY CONDUCT

The majority shows little real interest in how the Board traditionally has analyzed prounion supervisory conduct. The Board's basic approach has been established since 1969.[1] If an employer has communicated its opposition to union representation (a key factor), the prounion conduct of a supervisor is objectionable (and thus may warrant setting aside the election, depending upon its possible effect on the outcome) only where it reasonably tends to coerce employees into voting for the union, based on the fear of retaliation or the hope of reward.[2] The Board takes into account the "nature and degree of authority possessed by those engaged in the prounion activity, and their concomitant ability to reward or punish unit employees." *Sutter Roseville Medical Center*, 324 NLRB 218, 219 (1997).[3] The extent of the supervisor's prounion conduct is also considered.[4]

Neither an explicit threat or promise,[5] nor proof of actual (as opposed to possible) coercion,[6] is required to find conduct objectionable. On the other hand, "[m]ere supervisory participation in a union's organizing campaign does not, without a showing of possible objectionable effects, warrant setting aside an election." *Gary Aircraft Corp.*, 220 NLRB 187, 187 (1975). A prounion supervisor is free to express his personal opinion, endorsing the union and pointing out the benefits of union representation.[7] In addition, a prounion supervisor may ask employees to sign union authorization cards.[8]

II. THE SIXTH CIRCUIT'S REMAND

The Sixth Circuit remanded this case because it concluded that the Board had applied an incorrect legal standard, i.e., a standard contrary to the court's own standard.[9] The court apparently read certain Board decisions

[1] See *Stevenson Equipment Co.*, 174 NLRB 865, 866 (1969).

[2] See, e.g., *Sil-Base Co.*, 290 NLRB 1179 (1988).

[3] E.g., *Cal-Western Transport*, 283 NLRB 453, 453–455 (1987), enfd. 870 F.2d 1481 (9th Cir. 1989).

[4] Id. at 453.

[5] See, e.g., *FPA Medical Management*, 331 NLRB 936, 938 (2000) (assumed supervisors' statements not objectionable where no "threats or promises of benefits—explicit or implicit").

[6] As the Board has observed, the issue is whether there is a "*possibility* that a supervisor's prounion conduct could coerce employees into supporting the union." *Cal-Western Transport*, supra, 283 NLRB at 453 (emphasis added).

[7] See, e.g., *Millsboro Nursing & Rehabilitation Center*, 327 NLRB 879, 880 (1999); *Sutter Roseville Medical Center*, supra, 324 NLRB at 219.

[8] See *Millsboro Nursing*, supra, 327 NLRB at 880 (collecting cases); *Sutter Roseville*, supra, 324 NLRB at 219 fn. 5; *Cal-Western Transport*, supra, 283 NLRB at 455–456. The Board's established rule on this point, which the majority overturns today, has been enforced by the courts. See *NLRB v. Cal-Western Transport*, 870 F.2d 1481, 1486 (9th Cir. 1989); *NLRB v. Hawaiian Flour Mill, Inc.*, 792 F.2d 1459, 1463–1464 (9th Cir. 1986); *Wright Memorial Hospital v. NLRB*, 771 F.2d 400, 405 (8th Cir. 1985). See also *NLRB v. Manufacturer's Packaging Co.*, 645 F.2d 223 (4th Cir. 1981) (prounion supervisory conduct, including solicitation of cards, did not require setting aside of election).

[9] We put aside the question of whether the court was warranted in rejecting what it understood to be the Board's approach, apparently based on its own view of the proper test. Compare *NLRB v. Browning-Ferris Industries of Louisville, Inc.*, 803 F.2d 345, 347 (7th Cir. 1986) (characterizing review of Board's decision as "extremely limited" and noting deference to "Board's selection or rules and policies to govern a particular election"). See also *Napoli Shores Condominium Homeowners' Assn. v. NLRB*, 939 F.2d 717, 718–719 (9th Cir. 1991).

The Act itself does not specifically address the issue posed here. As a result, establishing a standard for assessing the effect of prounion supervisory conduct on employee free choice is surely a matter committed to the Board's expertise and discretion, not the courts'. See *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990) ("We will uphold a Board rule as long as it is rational and consistent with the Act . . . even if we would have formulated a different rule had we sat on the Board"). See also *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330 (1946) ("Congress has entrusted the Board with a wide range of discretion in establishing the procedure and safeguards necessary to

as requiring, or at least strongly implying, that an explicit threat or promise was required. *Harborside Health Care, Inc. v. NLRB*, 230 F.3d 206, 211–213 (6th Cir. 2000). In fact, none of the cases cited by the court applied such a requirement, nor has the Board ever done so. Nevertheless, the language used by the Board in some decisions is open to misinterpretation**.** While the majority is wrong in implying that the decisions actually "strayed from extant Board law**,**" it is right to disavow any inadvertent suggestion in the language of the decisions that prounion supervisory conduct is objectionable only when an explicit threat or promise is made.

That is all the Board needed to do here. Instead, the majority**,** abandoning judicial restraint, goes farther. On its face, the Board's new test[10] may not seem an abrupt departure. But, as we will explain, the new test is applied here in a way that belies appearances. In the case of card solicitations by prounion supervisors, for example, the new test serves as an excuse to overrule precedent.

III. THE MAJORITY'S NEW TEST AND ITS FLAWS

Today's decision suggests that prounion supervisory conduct may be objectionable based solely on the extent of the supervisor's participation in the union's campaign, on the theory that the supervisor's involvement (at least beyond some unspecified level) necessarily destroys the laboratory conditions required for an election. That principle is at odds with current Board law, which focuses on the potential for coercion in supervisory conduct—and it could never be applied to a supervisor's involvement in an employer's *antiunion* campaign without a dramatic reversal of current Board law. Apart from its dubious approach to determining what conduct is objectionable, the majority also fails to fully explain when and why objectionable conduct will be sufficient to set aside an election.

Depending on its application, the effect of the Board's test could be to frequently overturn elections where statutory supervisors actively supported the union. The notion of a prounion supervisor is not as strange as it may seem.[11] The Act's definition of a supervisor sweeps in many workers whose authority is quite limited and whose legal status is highly debatable.[12] Before their status is determined, these borderline supervisors may seek union representation for themselves and their coworkers, unaware that they are ineligible and, indeed, that their participation in the campaign may result in the union's victory being set aside. To the extent that it inhibits workers who fall near, but not over, the supervisory line, the majority's approach threatens to deprive unions of their natural leaders in the workplace.

A. The Shift from Coercion as the Focus of the Inquiry

The Board's prior decisions on prounion supervisory conduct, in the context of employer opposition, have centered on the possibility of employee coercion: the fear of retaliation or the hope of reward. The majority today phrases the inquiry as "[w]hether the supervisor's prounion conduct reasonably tended to coerce *or interfere with* the employees' exercise of free choice in the election." Presumably, then, the majority envisions**,** by its use of the words "interfere with," that even where an employer's antiunion position has been communicated to employees, and even where employees cannot reasonably fear retaliation or hope for a reward based on the supervisor's conduct, an election might still be set aside. But the majority never explains what sort of conduct might fall in this category or why it would be objectionable.

If the majority is implying that the degree of the supervisor's authority, plus the extent of his participation in the union's campaign, can make noncoercive conduct objectionable, then its position is inconsistent with the Board's prior decisions.[13] On that view, indeed, *antiunion* supervisory conduct that is now routinely tolerated would be found objectionable. At the direction of their employer, supervisors—up to the highest company official—may urge their subordinates to vote against unioni-

insure the fair and free choice of bargaining representatives by employees").

[10] The majority states:

> When asking whether supervisory prounion conduct upsets the requisite laboratory conditions for a fair election, the Board looks to two factors.
>
> (1) Whether the supervisor's prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election.
>
> This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct; and (b) an examination of the nature, extent, and context of the conduct in question.
>
> (2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.*/
>
> */ In assessing the effect of the conduct on the election, the Board may take into account the antiunion statements of higher company officials, and the extent to which they may disavow coercive prounion conduct of supervisors.

[11] See *NLRB v. Regional Home Care Services*, 237 F.3d 62, 68 (1st Cir. 2001).

[12] See generally *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001) (addressing supervisory status of nurses under Sec. 2(11) of Act).

[13] See, e.g., *Admiral Petroleum Corp.*, 240 NLRB 894, 896–897 (1979).

zation. Indeed, employers are free to compel employees to listen to their antiunion message, in captive audience meetings, one-on-one encounters, and other settings, while excluding union representatives.[14] The Board rightly has held that there is "no reason to view a supervisor's *prounion* statements with more suspicion than a supervisor's *antiunion* statements." *U.S. Family Care San Bernadino*, 313 NLRB 1176, 1176 (1994) (emphasis added). So long as a supervisor is engaged in persuasion, as opposed to coercion, his conduct remains proper.[15]

Whatever the majority's new test means, it may not be applied to treat prounion supervisory conduct *less* tolerantly than antunion conduct. Indeed, there are powerful reasons to treat prounion supervisory conduct as less likely to coerce employees. Where employers oppose union representation (as they typically do, often with vigor), the prounion conduct of a supervisor will tend to coerce employees into supporting the union far less often than comparable conduct by an antiunion supervisor acting on behalf of an antiunion employer. The Board long has recognized that a supervisor's ability to harm or help employees is derived from the employer's ultimate authority and that an antiunion employer is unlikely to tolerate coercion by a prounion supervisor.[16]

Nor does it have to. Because supervisors are not protected by the Act, an antiunion employer is free to discipline them for their prounion views or actions.[17] For this reason, notably, the courts have refused to permit employers who knowingly tolerated prounion supervisory conduct to pursue related election objections.[18]

Given the risks of supporting a union for a supervisor who is not protected by the Act, it is not surprising that prounion supervisors often are workers with such limited authority that they and their coworkers fail to recognize that they *are* statutory supervisors, as opposed to ordinary employees, and that they cannot be represented by the union if it wins the election. This consideration, too, diminishes the potential coercive effect of prounion supervisory conduct, as the Board has observed for many years.[19]

The majority's opinion, in a footnote, observes that

> [i]n assessing the effect of the conduct on the election, the Board may take into account the antiunion statements of higher company officials, and the extent to which they may disavow coercive prounion conduct of supervisors.

In our view, the employer's public stance bears on whether prounion supervisory conduct is objectionable at all, and not simply on whether the conduct affected the election. Prior decisions—which reflect the Board's considered expert judgment about workplace realities over more than thirty 30 years—make clear that an employer's antiunion position is critical. In that context, a prounion supervisor acts against his employer's expressed interests, sometimes contrary to the employer's direct orders, and always at the risk of lawful discharge. In most workplaces, employees have little to fear from such a supervisor: they need simply bring his actions to the attention of another manager.[20]

[14] See, e.g., *Frito Lay, Inc.*, 341 NLRB 515 (2004) (supervisors sent on 10–12 hour "ride-alongs" with individual employee drivers); *Andel Jewelry Corp.*, 326 NLRB 507 (1998) (employer's chief financial officer conducted daily meetings with employees in each department for last 2-1/2 weeks before election); *Flex Products*, 280 NLRB 1117 (1986) (employer's president called 120 of 164 unit employees into plant manager's office for individual meetings); *Electro-Wire Products*, 242 NLRB 960 (1979) (employer's president spoke to at least half of eligible employees individually at work stations on election day); *Associated Milk Producers*, 237 NLRB 879 (1978) (plant manager spoke individually to nearly every eligible employee, at work stations, on morning of election); *NVF Co.*, 210 NLRB 663 (1974) (general manager called 95 percent of eligible voters into office in groups of five or six to express opposition to union and solicit votes); *Livingston Shirt Corp*., 107 NLRB 400 (1953) (captive audience meeting).

The statement of the employer in *Flex Products*, supra, is emblematic: "I'm allowed to talk to anybody I want. This is my company." 280 NLRB at 1117. We do not necessarily endorse these decisions, but we do recognize them as controlling law. See *Andel Jewelry*, supra, 326 NLRB at 507 fn. 4 (personal statement of Member Liebman).

[15] Employers' antiunion campaigns routinely use company officials, from front-line supervisors to senior managers, to persuade employees to vote against unionization. As a practical matter, even lawful conduct of this sort influences employee free choice on a regular basis—just as it is designed to do. That an opinion may derive its persuasive force in part, or even primarily, from the speaker's position of authority does not make it objectionable. In the early days of the Act, the Board, sensitive to the powerful influence of employers over their employees, required employers to remain strictly impartial. That requirement did not survive First Amendment scrutiny by the Supreme Court and the enactment of Sec. 8(c) as part of the Taft-Hartley Act. See 1 American Bar Association, Section of Labor & Employment Law, *The Developing Labor Law* 87–88 (4th ed. 2001) (Patrick Hardin & John E. Higgins, Jr., eds.) (collecting cases and discussing history of doctrine).

[16] See, e.g., *Stevenson Equipment Co*., supra, 174 NLRB at 866.

[17] See, e.g., *Medcare Associates, Inc*., 330 NLRB 935, 935–939 (2000).

[18] See, e.g., *NLRB v. Columbia Cable TV Co.*, 856 F.2d 636, 639 (4th Cir. 1988) ("[A]n employer might well contest a representation petition on the merits and then seek a second bite of the apple by objecting to the result based on the 'fifth column' activity of its own supervisors"); *NLRB v. Manufacturer's Packaging Co.*, 645 F.2d 223, 226 (4th Cir. 1981).

[19] See *William B. Patton Towing Co.*, 180 NLRB 64, 65 (1969). See also *Millsboro Nursing*, supra, 327 NLRB at 880 fn. 7. The Board's observation has been endorsed by the courts. See *Regional Home Care Services*, supra, 237 F.3d at 70; *NLRB v. Lake Holiday Associates, Inc.*, 930 F.2d 1231, 1235 (7th Cir. 1991); *Wright Memorial Hospital v. NLRB*, supra, 771 F.2d at 406.

[20] See *Turner's Express, Inc.*, 189 NLRB 106, 107 (1971), enf. denied 456 F.2d. 289 (4th Cir. 1972).

B. Assessing the Effect of Objectionable Conduct

Apart from deciding what conduct is objectionable, the Board must also decide whether objectionable conduct is sufficient to set aside a particular election. The majority identifies the factors to consider in determining whether that conduct "interfered with freedom of choice to the extent that it materially affected the outcome of the election." But it never explains why a special test for assessing the impact of prounion supervisory conduct, as opposed to other types of objectionable conduct, is necessary.

In cases involving the misconduct of a party, the Board has such a test, which overlaps with the majority's test, but which is not identical.[21] The majority's test omits two factors that, it seems to us, may well bear on cases like this one: the degree to which the conduct can be attributed to a party and the mitigating effect of misconduct by the other party. To which party (union or employer) should the conduct of a prounion supervisor be attributed, when the employer is opposed to unionization? To what extent is the employer responsible for the supervisor's conduct in such circumstances and thus should be estopped from objecting to it? Why should the supervisor's conduct effectively be attributed to the union, if it has no control over him?

Admittedly, these are difficult issues, but the Board should grapple with them. It may well be that (absent unlikely evidence that the supervisor was acting as the union's agent) the Board should apply the *third-party* standard in these cases and should set aside an election only where prounion supervisory conduct renders a free election impossible, by creating a general atmosphere of confusion or fear of reprisal.[22]

IV. APPLICATION OF THE MAJORITY'S NEW TEST

Even if we applied the majority's new test to the facts of this case, we would find no basis to set aside the election. Here, the Union's margin of victory was 11 votes. To find a material effect on the outcome of the election, then, the conduct of prounion supervisor Robin Thomas must have potentially affected at least *six* employee-voters.[23] At most, however, only *four* voters were affected (employees Lynne Pavelchak, Monica Thyme, Frankie Jackson, and an unidentified housekeeping employee), and we dispute even that figure. There is no evidence, meanwhile, that Thomas' conversations with Pavelchak, Thyme, or Jackson were overheard by other employees or otherwise disseminated, or that the conversation with the housekeeping employee was overheard by anyone in the bargaining unit other than Pavelchak.[24]

To reach beyond those four voters and achieve the desired outcome, then, the majority wrongly:

> (1) relies on a supervisor's solicitation of union authorization cards and signatures on a prounion petition, although such conduct has not been objectionable under established law, which the majority today overrules;
>
> (2) infers that objectionable threats were made to some employees simply because supposed threats were made to *other* employees, although even the original statements were not objectionable under established law; and
>
> (3) relies on the supervisor's explanation to employees of the benefits of unionization, conduct which is clearly proper and which would never support the result here if *antiunion* statements were at issue.

Even considering the four employees most directly involved, the majority errs in finding the supervisor's conduct potentially coercive. The majority relies on statements that were not objectionable under established law, creating an arbitrary double standard. It also fails to give proper weight to both the employer's antiunion stance and the supervisor's minimal authority over these employees. Four votes, in any case, can make no difference here.

A. Conduct Involving More than the Four Employees

We turn first to the majority's attempt to find more than four voters potentially affected by objectionable conduct.

[21] See, e.g., *Taylor Wharton Division*, 336 NLRB 157 (2001). There, the Board stated:

> In determining whether a party's misconduct has the tendency to interfere with employees' freedom of choice the Board considers: (1) the number of incidents; (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 conduct to the election; (5) the degree to which the misconduct persists 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 to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party.

Id. at 158, citing *Avis Rent-a-Car*, 280 NLRB 580 (1986).

[22] See generally *Cal-West Periodicals*, 330 NLRB 599 (2000).

[23] E.g., *Coca-Cola Bottling Co.*, 232 NLRB 717, 718 (1977) (unlawful interrogations of two employees in a unit of 106 represented "isolated incidents" insufficient to affect the results of the election in which union lost by eight-vote margin).

[24] See *Caron International*, 246 NLRB 1120 (1979) (general foreman's threat to union activist employee did not warrant setting aside election, because threat was isolated incident and no evidence that it was overheard by or disseminated to other employees). Compare *Lancaster Care Center, L.L.C.*, 338 NLRB 671 (2002) (nursing supervisor's threat to union supporter warranted setting aside election based on evidence of dissemination to other unit members).

1. Solicitation of union card and petition signatures

The majority attempts to magnify the potential effect of Supervisor Thomas' conduct by citing a dozen employees whom Thomas asked to sign union cards and three to four employees whom Thomas asked to sign a union petition. But this conduct was not objectionable, under well-established Board law, endorsed by the courts. See footnote 8, supra (collecting cases).[25] As the Board has held:

> [T]he solicitation of authorization cards by supervisors is not objectionable where "nothing in the words, deeds, or atmosphere of a supervisor's request for authorization cards contains the seeds of potential reprisal, punishment or intimidation."

Millsboro Nursing, supra, 327 NLRB at 880, quoting *NLRB v. San Antonio Portland Cement Co.*, 611 F.2d 1148, 1151 (5th Cir. 1980), cert. denied 449 U.S. 844 (1980). There is no evidence in the record of special circumstances surrounding Thomas' solicitations or of accompanying statements that might make the solicitations reasonably likely to coerce employees into voting for the Union in a secret-ballot election.[26]

Reaching out to decide an issue not raised by the Sixth Circuit's remand, the majority now reverses the established rule that supervisory card solicitation is presumptively permissible.[27] It holds that supervisory solicitation of an authorization card is objectionable, even where the employer publicly opposes unionization, "absent mitigating circumstances," which are not identified. Our colleagues assert that "[b]y definition, a supervisor has the power to affect—for good or for ill—the working life of the employee." But as the Board's decisions long have recognized, where an employer is opposed to unionization, a prounion supervisor acting on his own has sharply limited power.

The majority's ruling puts unions in an extraordinarily difficult position. To avoid creating a basis for setting aside an election, unions must now avoid using any person who might later be found to be a statutory supervisor to solicit authorization cards. Making such supervisory determinations is, to say the least, difficult even for the Board.[28] As we have pointed out, many prounion supervisors are unaware of their own supervisory status. If unions err on the side of caution, the number of potential card solicitors will be reduced significantly, excluding many people who might be natural leaders. The union will thereby be deprived of the talents of effective advocates. If, on the other hand, unions guess wrong, the results of many elections will be subject to challenge. Either way, employees who want union representation lose.

There are no good reasons to reverse the Board's current approach. According to the majority, card solicitation by a supervisor should be treated no differently than a supervisor's solicitation of signatures on an *antiunion* petition. But for reasons already explained, the situations are not comparable in their tendency to coerce employees, at least where the employer opposes unionization. In such a case, employees reasonably have little to fear or hope from a prounion supervisor, who is acting against employer policy, at his peril. Treating different situations as if they were the same is not even-handed, as the majority claims; it is arbitrary.

The majority fails to excuse another flaw in its new rule: it contradicts the long-established principle of *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961), that to be considered objectionable, conduct must occur during the "critical period," i.e., the period between the filing of the union's representation petition and the date of the election. Supervisory solicitation of authorization cards, which are used to support the filing of a petition, typically occurs *outside* the critical period. Our colleagues assert that the "impact of the supervisor's solicitation would ordinarily continue to be felt during the critical period" "because of the power of the supervisor over an employee." This principle would seem to apply to *any* type of coercive conduct by a supervisor before the critical period, because the supervisor's power persists. But unless it is limited to a prounion supervisor's card solicitation, it guts the *Ideal Electric* rule.

The majority attempts to justify such a limitation by citing *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973),

[25] Although supervisory solicitation may invalidate a showing of interest in support of a representation petition, the Board made clear in *Millsboro Nursing, Sutter Roseville,* and *Cal-Western Transport*, supra, that such conduct is not a basis for setting aside an election. Id. Cf. *Dejana Industries*, 336 NLRB 1202 (2001) (representation petition dismissed based on supervisor's direct solicitation of cards). Here, as in *Cal-Western Transport*, the Respondent is objecting to the allegedly coercive effect of Thomas' prounion conduct on the election. Thus, the question is not whether the Union's showing of interest was tainted by Thomas' card solicitation, but rather whether the employees solicited by Thomas were reasonably likely to have been coerced to vote for the Union.

[26] Cf. *Gibson's Discount Center*, 214 NLRB 221, 221–222 (1974) (solicitation of cards accompanied by promise that initiation fee would be waived objectionable); *Lyons Restaurants*, 234 NLRB 178 (1978) (solicitation of authorization cards accompanied by threats of job loss objectionable).

[27] The majority states that it is overruling *Millsboro Nursing*, but, of course, the Board's current rule long predates that case.

[28] This is acutely so in the nursing context. See *Kentucky River*, supra; *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571 (1994).

which involved a union's offer to waive initiation fees for employees who signed authorization cards before the election. But, as the Supreme Court's decision made clear, the offer was objectionable because it amounted to the promise of a benefit. The union could "buy endorsements." Id. at 277. It was in that context that the Court observed that employees who signed cards, in exchange for the fee waiver, might "feel obliged" to vote for the union. Id. at 277–278. Nothing in *Savair* suggests that absent even an implicit promise or threat by the supervisor, supervisory card solicitation is objectionable.

In limited instances in the past, when the Board has treated a union's solicitation of authorization cards as objectionable where accompanied by a threat of job loss or a waiver of initiation fees, it has expressly recognized that it was carving out an exception to the *Ideal Electric* rule and has carefully limited that exception to the precise factual circumstances presented. Contrary to our colleagues' assertions, those cases provide no support for the decision here.[29]

Finally, only by creating what seems to be a broad prohibition against card solicitation by any supervisor, from any employee, can the majority achieve the desired result. As we will explain, while Thomas is a supervisor, there is no evidence that she had meaningful control over any of the dozen or so unidentified employees from whom she solicited cards or the three or four employees from whom she solicited petition signatures. The majority insists that Thomas' solicitation must be viewed in light of her allegedly objectionable statements made to *different* employees (namely Pavelchak, Thyme, Jackson and a housekeeper). However, in the absence of evidence that the statements were directed at the same employees from whom she solicited cards, or that these employees learned of the statements and were likely to be influenced, the statements are plainly irrelevant.[30]

2. Inference of threats to other employees

As we will explain, the majority finds that Thomas made objectionable threats to four employees; we disagree, on the basis of controlling Board precedent. But even assuming that Thomas did threaten the four, the majority errs its finding that Thomas' conversations with other employees are objectionable, based on an "inference" that when Thomas spoke with these employees she "did not limit her remarks to permissible expressions of opinion about the Union, but rather threatened them as well with the prospect of losing their jobs in the event the Union lost the election."

The asserted basis for this "inference" is the "nature of Thomas' discussions with Pavelchak, Thyme, and Jackson," which occurred on entirely separate occasions. That is no basis at all. We doubt that the Board would make a comparable inference about a supervisor's conduct in the context of an employer's antiunion campaign. (If we are wrong, of course, the Board will have to regularly set aside elections where the record establishes that one or more employees were threatened by the supervisor and that the supervisor made undetermined campaign-related statements to other employees.) Here, there is simply no evidence about the actual content or circumstances of Thomas' conversations to suggest that she went beyond unobjectionable statements of her opinion about the benefits of unionization.[31]

3. Explanation of benefits of unionization

The majority's assertion, in turn, that Thomas's conversations with numerous employees explaining the benefits of unionization are objectionable is at odds with well-established law.[32] The Board repeatedly has found that such statements by a prounion supervisor working for an antiunion employer—and even analogous state-

[29] See *Lyon's Restaurants*, supra, 234 NLRB at 179; *Gibson's Discount Center*, supra, 214 NLRB at 222 fn. 3. In *Lyon's Restaurant*, cited by the majority, the union threatened to enforce a nonexistent union-security clause against employees who did not pay dues and solicited authorization cards on that basis. The employer, in turn, deducted union dues well into the critical period. On those facts, the Board concluded that the prepetition threat could have interfered with the election. This case is not analogous. *Gibson's Discount Center*, also cited by the majority, involved a *Savair* violation, i.e., the promise of a benefit as an inducement to sign a card. The Board observed that "it would severely circumscribe the doctrine of *Savair* to limit application to postpetition waiver of initiation fees." 214 NLRB at 22. The *Savair* doctrine, as we have shown, has no application here.

[30] It is true that Thomas' subsequent statements to employee Pavelchak about the risk to her job security in failing to support the Union did, in one instance, refer back to Pavelchak having signed a card. But we assume for the sake of argument that Pavelchak herself was coerced. It is other employees who are at issue.

[31] The majority relies particularly on Thyme's testimony that she saw Thomas having conversations with these other employees that were "similar" to her own conversations with Thomas in which Thomas stated "there is no job security [at Harborside]." In fact, the record shows that Thyme simply stated, in reply to Counsel for the Respondent's question on direct examination "Did you *see* [Thomas] have *similar* discussions with other employees?" (emphasis added), that she had. There is no evidence that Thyme actually *heard* these conversation, and, in any event, to the extent she may have overheard Thomas mention job security that fact would not render Thomas' statements objectionable.

[32] The only evidence that Thomas made statements to other employees in support of the Union is Pavelchak's general testimony that she observed Thomas "explaining to other people that were working on the floor with her what the Union was going to do for them, how great it was going to be, and telling them that they needed to vote for the union," and Thyme's testimony that she observed Thomas telling employee Lolisa Starr and a "numerous amount" of other employees that it would benefit them to vote for the Union. The record tells nothing about the precise content or circumstances of these conversations.

ments by an antiunion supervisor of an antiunion employer—are not "inherently coercive."[33] The Supreme Court has made clear that "[a]n employer is free to communicate to his employees any of his general views about unionism or any specific views about a particular union." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618–619 (1969). An employer and his supervisors are surely as free to communicate prounion views as they are antiunion views. See, e.g., *Admiral Petroleum Corp.*, supra, 240 NLRB at 896 (citing *Gissel*). Statements that stress the benefits of unionization in terms of job security constitute permissible campaigning.[34] Contrary to the majority's view, the law does not apply more harshly to prounion supervisors expressing personal views about the benefits of unionization, in conflict with the views of their employer, than to antiunion supervisors, who may bring to bear not only their own day-to-day authority over employees, but also the absolute authority of an openly antiunion employer.[35]

B. Conduct Involving the Four Employees

Aside from its contention that the vote of virtually every employee with whom Supervisor Thomas had contact was potentially tainted, the majority relies on Thomas' statements concerning job security and the importance of supporting the Union to employees Pavelchak, Thyme, Jackson, and an unidentified housekeeping employee.[36] None of these statements could have reasonably tended to coerce even these four employees. They were not objectionable threats under Board law.[37] Even if, considered in isolation, the statements had a tendency to coerce employees, it was undercut, given the employer's open opposition to the Union and Thomas' minimal authority over the employees.

Remarkably, the majority asserts that Thomas' repeatedly urging Pavelchak to attend union meetings is objectionable. This finding is utterly inconsistent with the well-established principle that management may hold repeated captive audience meetings to express its opposition to unionization. *S & S Corrugated Paper Machinery Co.*, 89 NLRB 1363, 1364 (1950); see also *Livingston Shirt Corp.*, supra, 107 NLRB at 405–407. If compelled attendance at multiple meetings demanded by the employer is not objectionable, then surely the lobbying of a single supervisor is proper.

As for Thomas' statements to Pavelchak, Thyme, and Jackson about the need for a union to insure employees' job security, they cannot be viewed as threats of job loss that would reasonably tend to coerce employees into supporting the Union. Under the circumstances, no reasonable employee could believe that Thomas was conveying a threat from the Employer or that she was in a position, given the Employer's opposition to the Union, to retaliate against prounion employees. At most, Thomas stated her in own conviction that there was no job security for the employees at Harborside. She clearly did not indicate that she herself would use her own authority to get them fired. Treating such statements by a prounion supervisor as having the power to coerce employees into supporting the union is contrary to *B. J. Titan Service Co.*, 296 NLRB 668 (1989), which the majority adds to the list of decisions overruled today, on dubious grounds.[38]

But in any case**,** none of these statements, with the possible exception of that to Pavelchak, could be regarded as objectionable threats. Only to Pavelchak did Thomas specifically state that, because Pavelchak had made her initial support for the Union known to the Respondent by signing a union card, the Respondent was sure to retaliate against her if the Union was not elected.

[33] *Sutter Roseville Medical Center*, supra, 324 NLRB at 219. Compare *NVF Co.*, supra, 210 NLRB at 663 (employer's preelection meetings with unit employees in small five-to-six person groups to explain the employer's reasons for opposing unionism and solicit employees to vote against the union were not per se coercive).

[34] *NLRB v. Superior Coatings*, 839 F.2d 1178, 1181 (6th Cir. 1988); *Sutter Roseville Medical Center*, supra, 324 NLRB at 219; *Smith Co.,* 192 NLRB 1098, 1101 (1971).

[35] See supra at fn. 13.

[36] Specifically, Thomas told Pavelchak that, because she had signed a union authorization card and "her name was on the list, that [Harborside] would fire [her] anyway, so [she] had better vote for the Union and pray they got in," and also repeatedly urged Pavelchak to attend union meetings. Thomas also told Jackson that he could lose his job if he did not vote for the Union. Similarly, she stated to Thyme that she had "no job security here" and that Harborside could fire her "at will." Finally, according to Pavelchak's testimony, Thomas stated to a housekeeping employee "I can count on your vote, right? I really need to have your vote." Although the housekeeping employee was not identified and did not testify, Pavelchak testified that she overheard Thomas pressuring the employee to vote for the Union.

[37] Member Walsh finds it unnecessary to reach this conclusion because even assuming that Thomas' statements were objectionable threats, they were made to only four employees, and there is no evidence that they were disseminated to other voters. Therefore, Thomas' conduct could not have materially affected the outcome of the election. (As stated earlier, the Union's margin of victory in this case was 11 votes. Thus, a shift in six votes would be necessary to change the election result.)

[38] The majority's discussion of *B. J. Titan* effectively rejects the well-established principle that a prounion supervisor's statements stressing the need for a union to ensure job security constitute permissible campaigning. See, e.g., *NLRB v. Superior Coatings*, supra, 830 F.2d at 1181; *Sutter Roseville Medical Center*, supra, 324 NLRB at 219; *Smith Co.,* supra, 192 NLRB at 1101. Our colleagues say that such statements are permissible "provided they cannot reasonably be construed as a threat of loss of continued employment if the employee does not vote for the union." But the majority implies that employees could *always* reasonably construe such statements as a threat, even when the employer demonstrably opposes unionization, so long as the supervisor has firing authority.

Arguably, such a statement could cause an employee, who has reason to believe that her support for the union is known, to feel pressured to vote for the Union as the only means to protect herself. Here, however, there is no indication that Thyme or Jackson had ever taken a prounion position or done anything to openly show support for the union. Nor does the record show that they or anyone else overheard or otherwise learned of Thomas' statement to Pavelchak regarding her open union support and the certainty of retaliation. Clearly, then, Thomas' comments could not reasonably have tended to coerce these employees to vote for the Union.[39]

Even after the overruling of *B.J. Titan*, the Board still must consider the circumstances in which the comments were made, including the Employer's opposition to the Union and Thomas' minimal authority over the employees potentially affected by her statements. These circumstances further weaken our colleagues' already dubious position.

The majority asserts that the Respondent's open opposition to unionization is not a mitigating factor, because there is no evidence that the Respondent informed its employees that it had instructed Thomas to cease her prounion activities[40] and because Thomas had day-to-day control over employees. However, it is clear that the Employer made its antiunion views generally known, and the evidence is clear that employees who felt threatened by a prounion supervisor could—and did—turn to their employer. Pavelchak filed a grievance with the Employer regarding Thomas' prounion conduct, strongly suggesting not only that she was aware of the employer's antiunion views, but also that she expected that the Employer would be sympathetic to her complaint against Thomas.

Moreover, Thomas essentially never had direct authority over the employees to whom she made the allegedly objectionable statements. Although Pavelchak's and Thyme's testimony indicates that they recognized Thomas' supervisory authority in her position as a charge nurse, their testimony also establishes that Thomas was not the charge nurse under whom they usually worked. As the majority recognizes, Thomas never acted as Thyme's immediate supervisor. Thomas was assigned as Pavelchak's charge nurse for only 1 day and was assigned as Jackson's charge nurse for all of 45 minutes before Jackson himself was reassigned. It is clear that these employees viewed their regular charge nurse as the person having authority to evaluate *their* performance, write *them* up, or send *them* home. Contrary to the majority, Pavelchak, Thyme, and Jackson could not reasonably have viewed Thomas as having substantial authority to reward or punish them.[41]

For all of these reasons, even if the votes of the four employees were enough to affect the outcome, there is no proper basis to conclude that they might have been tainted by Thomas' prounion conduct.

V. CONCLUSION

Supervisor Thomas was an energetic advocate for the Union. But she never made promises or threats, explicit or implicit, to employees. Even if she had, employees had no good reason to believe, given the Employer's opposition to the Union and Thomas' limited authority, that Thomas could have acted effectively to punish or reward them. And even assuming, against the evidence and the law, that Thomas strayed into objectionable conduct with respect to a handful of employees, their votes did not make the difference here. Following well-established Board law leads inescapably to the conclusion that the Employer's objections should be dismissed and that the Union should be certified as the bargaining representative of the employees. Only by applying a flawed test in a flawed manner does the majority reach a different result. Accordingly, we dissent.

[39] There is no basis for the view that when a prounion supervisor tells an employee, who has *not* expressed a position regarding unionization, that the employer will retaliate against him if he *does* support the union, such a statement could reasonably coerce the employee into supporting the union. Just the opposite is true. Such an employee would likely be discouraged from supporting the union.

[40] The majority's argument here raises more questions than it answers, for it is doubtful whether the Respondent is now free to rely on Thomas' conduct as a basis for setting aside the election, having failed to specifically repudiate the conduct to its employees. See *Hadley Mfg. Corp.*, 106 NLRB 620, 621 (1953) (employer estopped from relying on supervisor's conduct in challenging election, because employer "did not communicate to the employees any disavowal of [the particular supervisor's] activities," notwithstanding employer's instruction to supervisor to cease prounion activities and employer's circulation of antiunion letters). See also *Decatur Transfer & Storage, Inc.*, 178 NLRB 63 (1969); *Talladega Cotton Factory, Inc.*, 91 NLRB 470, 472 (1950). Here, although the Respondent spoke with Thomas and circulated a letter to its employees urging them in general terms to disregard harassment by prounion employees, it at no point specifically disavowed Thomas' particular statements or conduct.

[41] Thus, when Jackson was asked on direct examination whether Thomas threatened or otherwise intimidated him when urging him to support the Union in order to protect his job security, he stated "[i]f I'd have worked up under her, I'm pretty sure she would have." Given that none of the employees to whom Thomas made these statements "worked up under" Thomas, they would not reasonably have perceived Thomas as being in a position to punish or reward them.