

**Westwood Horizons Hotel and Culinary Workers
and Bartenders Union, Local No. 814, AFL-
CIO, Petitioner. Case 31-RC-5351**

18 May 1984

**DECISION AND DIRECTION OF
SECOND ELECTION**

**BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS**

The National Labor Relations Board, by a three-member panel, has considered objections to an election held 13 August 1982 and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 46 for and 24 against the Petitioner, with 2 challenged ballots, an insufficient number to affect the results, and 4 void ballots.

The Board has reviewed the record in light of the exceptions and brief, and has decided to adopt the hearing officer's findings¹ and recommendations only to the extent consistent with this decision.

The Employer operates a hotel in Los Angeles, California. In the summer of 1982, the Petitioner commenced an organizing campaign among the hotel's kitchen, dining room, housekeeping, and laundry employees. About 2 weeks before the Board election, Francisco Marcial,² a prounion employee, told employee Jesus Luna, in the presence of three prounion employees and two or three other employees, that he would beat Luna up if he did not vote for the Union. Marcial then said that he would beat up employees Ignacio Garcia and Fernando Fuentes, who were not present, and also any other employee who did not vote for the Union. Arturo Naharo,³ another prounion employee present, also threatened to beat up Garcia, Fuentes, and Luna, and anyone else who did not vote for the Union. Luna replied that he was with "them," that he would vote for the Union "so that they would not . . . comply with their threats and beat [him] up."

On election day, Garcia was working in the hotel's kitchen when Marcial approached him and said "let's go vote." When Garcia said that he would vote later, Marcial said that Garcia had to

go with him immediately. Marcial then grabbed Garcia's upper right arm and held it during the 5-minute walk to the voting area.

Marcial still held Garcia's arm as they entered the voting area in the hotel's garage.⁴ Naharo then told employee Ronnie Torres, one of the 15 employees waiting to vote, that Marcial had used force to bring Garcia to the voting area. When several of the employees waiting to vote began saying that Marcial had used force to bring Garcia to vote, Marcial just laughed. Marcial then put Garcia at the front of the line of employees waiting to enter the voting room to vote.⁵ Marcial was ahead of Garcia as they entered the voting room together. When the Board agent handed a ballot to Marcial, he, in turn, handed it to Garcia. The Board agent told Marcial to keep his ballot and then gave one to Garcia. Marcial and Garcia then voted.⁶

After he voted, Marcial, with three other prounion employees, went to the hotel's front desk where Fuentes was using the public address system to release employees from work by department to vote in the election. Fuentes was another of the employees Marcial and Naharo threatened 2 weeks earlier. Marcial told Fuentes, who had planned not to vote: "Friend, Fernando, you have to go vote now." When Fuentes explained that he could not because he was still announcing, Marcial told Fuentes that "if you don't go now, you'll go by force with us." Wilfredo Sanchez, one of the

⁴ The hearing officer stated that "[t]here was no testimony that Marci[al] continued to hold Garcia's arm while they were in the garage area." Garcia, however, testified that Marcial still held his arm when both entered the voting area. We rely on Garcia's testimony because we believe that the hearing officer, in stating that there was "no testimony" on this point, simply overlooked Garcia's testimony rather than discredited it.

⁵ The voting took place in a small room in the hotel's garage. Employees lined up outside the room, and not more than four employees entered the room to vote at any one time.

⁶ The hearing officer stated in the "Credibility Resolutions" portion of her report that she did not credit Garcia "except as expressly noted." It is clear from the report as a whole, however, that the hearing officer, while totally discrediting Garcia's testimony about threats, generally credited his testimony about his being forced to vote. In setting forth a "summary" of the credited forcible voting incident involving Garcia, the hearing officer failed to mention Garcia's testimony that Naharo commented to Torres that Marcial had used force to bring Garcia to the voting area and that several of the employees waiting to vote repeated Naharo's comment to one another. While the hearing officer noted that Garcia's testimony was "often vague, conclusionary and subjective, making it extremely difficult to determine whether Garcia testified what he felt or concluded versus what was in reality stated to or done to him," we do not believe that she discredited his testimony on these points. Garcia's testimony on these points, unlike his specifically discredited testimony on whether Marcial attempted to mark his ballot and vote for him, was not "vague, conclusionary [or] subjective," and the Petitioner did not call Marcial, Naharo, or Torres to contradict Garcia. Accordingly, we rely on all of Garcia's testimony about events occurring in the voting area, even though not specifically detailed in the hearing officer's report, except for Garcia's testimony that Marcial attempted to vote for him.

¹ The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

² The hearing officer's report misspells Francisco Marcial's last name as "Marciel."

³ Arturo Naharo's last name is also spelled "Najarro" in parts of the transcript.

prounion employees, told Fuentes: "Don't be stupid. You have to go with us."

While taking him to vote, Marcial told Fuentes that he had to vote yes. Hector Hurtado, another of the prounion employees, told Fuentes: "You have to vote yes. Don't be stupid." Then, as Fuentes stood in line to vote with Luna (the third employee threatened 2 weeks earlier) and 10 other employees, Marcial and 6 other prounion employees who had already voted stood on both sides of the voting line and kept repeating, "Vote for the Union," "Vote Yes, Vote Yes." This activity continued for about 3 minutes until the Board agent came to the doorway of the voting room and told the prounion employees to leave. They left the area for a few seconds, but returned and continued to repeat, "Vote Yes." The prounion employees continued this activity right outside the voting room for about 10 minutes.

We agree with the hearing officer that, because there is no evidence of union involvement in the misconduct, the test to be applied is whether the misconduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.⁷ We disagree, however, with her conclusion that the misconduct, even when considered cumulatively, was not so aggravated that it denied the employees a free expression of choice.

In deciding that the election should not be set aside, the hearing officer erroneously concluded that the threats employees Marcial and Naharo made 2 weeks before the election were not very serious because they were directed at only three employees. We have held, however, that whether a threat is serious and likely to intimidate prospective voters to cast their ballots in a particular manner depends on the threat's character and circumstances and not merely on the number of employees threatened.⁸ In determining the seriousness of a threat, the Board evaluates not only the nature of the threat itself, but also whether the threat encompassed the entire bargaining unit;⁹ whether reports of the threat were disseminated widely within the unit;¹⁰ whether the person making the threat was

capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat;¹¹ and whether the threat was "rejuvenated" at or near the time of the election.¹²

Applying this test, we find that the threats, when considered with other misconduct occurring on the day of the election, did create a general atmosphere of fear and reprisal that interfered with the election. Marcial and Naharo threatened to beat up not only employees Garcia, Fuentes, and Luna, but also any other employee within the bargaining unit who decided not to vote for the Union. These threats were disseminated to some extent within the unit, because two or three employees, not shown to be union adherents, were present when the threats were made.¹³

On election day, Marcial and other prounion employees rejuvenated the threats by physically taking Garcia to the voting area and by forcing Fuentes to vote and telling him to vote for the Union, even though, as Fuentes later testified, he did not want to vote at all. Not only were Garcia and Fuentes likely to be intimidated by such conduct, but so also were the 15 other employees waiting in line to vote who saw Marcial bring Garcia to the voting area and heard prounion employee Naharo tell one of the employees waiting in line to vote that Marcial had used force to bring Garcia to the voting area. Marcial and six union adherents further intimidated Fuentes, Luna, who was standing in line behind Fuentes, and the 10 other employees waiting in line to vote by continually repeating for about 10 minutes that the employees should vote for the Union.¹⁴

¹¹ *Anchor Inn Hotel of St. Croix*, supra at 1139; *Zeiglers Refuse Collectors v. NLRB*, supra at 1005.

¹² *Hamilton Label Service*, 243 NLRB 598, 599 (1979); *Cross Baking Co.*, 191 NLRB 27, 28 (1971), affd. on this point 453 F.2d 1346, 1348-1349 (1st Cir. 1971).

¹³ Marcial and Naharo made their threats in the presence of about five employees. Because two of them—Hector Hurtado and Benjamin Rodriguez—were union adherents, it is not likely that the threats had any effect on them. It is likely, however, that the threats had a tendency to intimidate or coerce the other employees.

¹⁴ The hearing officer concluded that the union adherents did not engage in impermissible electioneering in the voting area because "the 'voting area' is limited to the room in which the balloting actually took place and does not include any area outside the voting room." The hearing officer, however, overlooked Board precedent that defines a "voting area" as including the place where the votes are actually cast—in this case, the room inside the garage—and the area where the employees line up waiting to vote. *Boston Insulated Wire Co.*, 259 NLRB 1118, 1119 (1982); *Pastoor Bros. Co.*, 223 NLRB 451 (1976); *Marvil International Security Service*, 173 NLRB 1260 (1968); *Harold W. Moore & Son*, 173 NLRB 1258 (1968).

The Board's normal policy on electioneering is inapplicable here, because it bars any prolonged conversations between parties to the election and employees waiting in line to vote. *Milchem, Inc.*, 170 NLRB 362 (1968); *Boston Insulated Wire Co.*, supra at 1119 fn. 11; *Robert's Tours*, 244 NLRB 818 fn. 6 (1979), affd. mem. 633 F.2d 223 (9th Cir. 1980). Rather,

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⁷ *Diamond State Poultry Co.*, 107 NLRB 3, 6 (1953); *P. D. Gwaltney, Jr. & Co.*, 74 NLRB 371, 379-380 (1947). See also *NLRB v. Griffith Oldsmobile*, 455 F.2d 867, 870 (8th Cir. 1972).

⁸ *Steak House Meat Co.*, 206 NLRB 28, 29 (1973) ("the fact that the threats were directed at only one employee does not necessarily lead to the conclusion that no general atmosphere of fear and coercion existed").

⁹ *Anchor Inn Hotel of St. Croix*, 262 NLRB 1137, 1139 (1982); *Zeiglers Refuse Collectors v. NLRB*, 639 F.3d 1000, 1005 (3d Cir. 1981).

¹⁰ *Westside Hospital*, 218 NLRB 96 (1975); *Zeiglers Refuse Collectors v. NLRB*, supra at 1005.

Member Hunter presumes that threats are disseminated in the absence of evidence to the contrary.

Because an election cannot stand whenever conduct disruptive or destructive of the exercise of free choice by the voters occurs, regardless of

the test to be applied is whether the conduct of the prounion employees, who were not shown to be agents of the Union, was so disruptive as to require setting aside the election. *Boston Insulated Wire Co.*, supra at 1119 fn. 11; *Robert's Tours*, supra at 818 fn. 6. We need not decide whether the conduct of the prounion employees in the voting area was sufficient by itself to set aside the election, however, because we conclude that it was part of an impermissible pattern of conduct by prounion employees that precluded holding a free election.

whether the person responsible for the misconduct is an agent of a party to the election or simply an employee, we find merit in Employer's Objections 1, 2, 3, 4, 8, and 9 to the election.¹⁵ Accordingly, we conclude that this election must be set aside and a new election held.

[Direction of Second Election omitted from publication.]

¹⁵ We agree with the hearing officer that Employer's Objections 5, 6, and 7 should be overruled.