Avis Rent-A-Car System, Inc. *and* Local Lodge 724, International Association of Machinists and Aerospace Workers, AFL–CIO, Petitioner. Case 4–RC–14839

24 June 1986

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN DOTSON AND MEMBERS DENNIS AND BABSON

The National Labor Relations Board, by a three-member panel, has considered objections to an election held 22 October 1981 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 40 for and 13 against the Petitioner, with 15 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs,[1] and has decided to adopt the hearing officer's findings[2] and recommendations only to the extent consistent with this Decision and Certification of Representative.

The Employer rents motor vehicles at various locations throughout the United States, including several locations in Philadelphia, Pennsylvania. On 26 August 1981 the Petitioner filed a representation petition seeking certification as the exclusive bargaining representative of the Employer's shuttlers in Philadelphia. The shuttlers drive cars from the Employer's main facility in Philadelphia, located at Norwitch Drive, to the Employer's other Philadelphia locations, and return cars from those locations to the Norwitch Drive facility. On an average day, the shuttlers drive through the main gate at the Norwitch Drive facility from 15 to 30 times.

The Petitioner also represents the Employer's mechanics. Because the parties reached an impasse during negotiations for a new bargaining agreement covering the mechanics, the Petitioner struck the Employer on 18 September 1981, 1 day after the Employer and the Petitioner signed the Stipulated Election Agreement setting 22 October 1981 as the date an election would be held in the shuttler unit. The strike lasted until 2 November 1981, and only the mechanics, not the shuttlers, picketed the Employer's Philadelphia locations. The Employer's election objections generally allege that, because of strike misconduct attributable to the Petitioner principally at the Norwitch Drive facility, a general atmosphere of fear and reprisal was created that interfered with employee free choice in the election.

When the strike commenced, the Petitioner immediately set up a picket line at the Employer's Norwitch Drive facility. The pickets at the Norwitch Drive facility engaged in the following acts of picket line misconduct that we attribute to the Petitioner.[3] On 22 September and again on 24 Sep-

[1] The Employer has requested oral argument The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] 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

[3] We disagree with the hearing officer's conclusions that the Petitioner was not responsible for the misconduct of the unidentified picket, for the damage done to the cars of two employees who worked as shuttlers during the strike, and for the scattering of roofing nails on several days during the strike When a union authorizes a picket line, "it is required to retain control over the picketing. If a union is unwilling or unable to take the necessary steps to control its pickets, it must bear the responsibility for their misconduct" *Iron Workers Local 455 (Stokvis Multi-Ton)*, 243 NLRB 340, 343 (1979) Accord: *Hospital Employees District 1199 (Frances Schervier Home)*, 245 NLRB 800, 804 (1979), *Broadway Hospital*, 244 NLRB 341, 349 (1979) The hearing officer erred in finding that the Petitioner was not responsible for the misconduct of the unidentified picket because the Employer failed to identify the picket or show that he acted as the Petitioner's agent or with the Petitioner's approval A union is responsible for the acts of its authorized pickets even if not specifically authorized or indeed specifically forbidden. Nor is it necessary to establish the identity of the picket engaging in the misconduct *Hospital Employees District 1199*, supra, 245 NLRB at 804–805; *Meat Cutters Local 248 (Milwaukee Meat Packers)*, 222 NLRB 1023, 1034 (1976), enfd mem 571 F 2d 587 (7th Cir 1978) We find the Union had an affirmative obligation to control the actions of the unidentified picket, and cannot escape responsibility by simply contending that neither Business Agent Greg McAnally nor picket captain John Martin was present when the misconduct occurred

There is also sufficient evidence to infer that the pickets scattered the roofing nails and damaged the cars of the two persons working as shuttlers during the strike. Leonard Bagby, a guard, testified that he saw a man, who in the past had worn picket signs, scatter nails on the facility's driveway on one occasion This testimony, coupled with evidence demonstrating that roofing nails were scattered at the facility near the picket line on 3 consecutive days—20, 21, and 22 October 1981—and the increase in the number of flat tires fixed during the strike—75 repairs as compared to 9 in the previous 2-month period—makes it reasonable to infer that the Petitioner knew the pickets were scattering nails but failed to take more effective steps to prevent this misconduct As to the damage to the cars, Robert Quilles, a shuttler during the strike, testified that on one occasion when he parked his car outside the facility during the strike, two of the tires were slashed and one had a puncture hole in it. Beverly Lightfoot, a shuttler during the strike, also testified that there was a "small dent, scratch" on her car's left door, and the air was let out of the left rear tire on the one occasion she parked outside the facility during the strike. (The hearing officer erroneously stated Lightfoot's car was parked inside on this occasion.) We infer that the Petitioner's pickets were responsible for this misconduct because neither Quilles' nor Lightfoot's car was damaged on other occasions when each parked their car inside the facility during the strike See *Broadway Hospital*, supra, 244 NLRB at 346 (Howle incident), *Dover Corp*, 211 NLRB 955, 958 (1974), enfd as modified 535 F 2d 1205 (10th Cir 1976), cert. denied 429 U.S. 978 (1976) (Jones incident).

Contrary to his colleagues, Member Babson agrees with the hearing officer that the Union can only be held responsible for the two September incidents pertaining to the alleged blocking of ingress to and egress from to the Company's facility An individual can be held to be a union agent if the union instigated, authorized, solicited, ratified, condoned, or adopted the individual's actions or statements or clothed the individual with apparent authority to act on behalf of the union *Kitchen Fresh, Inc v. NLRB*, 716 F 2d 351, 355 (6th Cir 1983) Member Babson notes that in authorized strikes unions *may be* held responsible for the acts of author-

Continued

tember 1981 pickets blocked a gasoline truck from entering the facility to make a delivery. During the first week of the strike, an unidentified picket delayed cars entering the facility for up to 5 minutes, slapped the rear fender of those cars with his hand, and put picket signs on the windows of a rental car that stalled on the main driveway. All of these actions by the unidentified picket took place within the space of 3 hours. On several other occasions, pickets either slapped or spit next to cars that crossed the picket line and entered the facility. In two instances, employees who worked as shuttlers during the strike had some damage done to their cars while parked outside that facility. Finally, about 4 days during the strike, including the election day, employer officials found roofing nails on the driveway or in other areas of the facility.[4]

We agree with the hearing officer that, because the Petitioner was responsible for the misconduct, the test to be applied is whether the conduct "reasonably tends to interfere with the employees' free and uncoerced choice in the election." *Baja's Place*, 268 NLRB 868 (1984). Accord: *Zeiglers Refuse Collectors v. NLRB*, 639 F.2d 1000, 1005 (3d Cir. 1981). In deciding whether the employees could freely and fairly exercise their choice in the election, we evaluate the following factors: (1) the number of the incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party in canceling out the effect of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the union. *Chicago Metallic Corp.*, 273 NLRB 1677 (1985); *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); *YKK (U.S.A.) Inc.*, 269 NLRB 82, 83–84 (1984). Accord: *NLRB v. L & J Equipment Co.*, 745 F.2d 224, 236 fn. 17 (3d Cir. 1984) supplemental decision 278 NLRB 385 (1986); *Zeiglers Refuse Collectors v. NLRB*, supra, 639 F.2d at 1005.

After evaluating all these factors, we find that the Petitioner's misconduct, when considered cumulatively, did not reasonably tend to interfere with the shuttlers' free and uncoerced choice in the election for the following reasons.

Although the strike lasted about 6 weeks, there were very few incidents of misconduct and those that did occur were relatively mild, were not directed at the shuttlers, and were limited for the most part to the first week of the strike. Much of the misconduct of the first week—the blocking of the two gasoline delivery trucks and the misconduct of the unidentified picket—involved impeded ingress to the Norwitch Drive facility and occurred because picket captain John Martin erroneously believed the pickets had a legal right to block ingress unless enjoined by an appropriate court. When the Employer obtained a temporary restraining order against this conduct on 24 September 1981 and Martin learned his view of the law was wrong, the blocking of ingress and egress ceased.[5] Employees, including shuttlers not honoring the picket line, crossed the picket line daily with no problem, other than that the pickets occasionally "took their time" crossing the main driveway causing delays in ingress or egress of "a couple of minutes."

Nor do we consider the other acts of misconduct occurring after the first week—occasional spitting next to or slapping cars crossing the picket line; two instances of property damage done to the personal cars of employees crossing the picket line;

ized pickets who act within their scope of employment as pickets, *Longshoremen ILWU Local 6 (Sunset Line)*, 79 NLRB 1487, 1509 (1948), *Teamsters Local 327 (Coca-Cola Bottling)*, 184 NLRB 84, 94 (1970), and that the identity of authorized picketers need not be established, *Hospital Employees District 1199 (Frances Schervier Home)*, 254 NLRB at 805 He also notes that conduct by unknown perpetrators will not be attributed to a union simply because it occurred in the vicinity of the union's picket line *Sunset Line*, supra Applying these principles, Member Babson finds that the conduct engaged in by the unidentified picket and by unknown perpetrators has not been shown to be attributable to the Union In his view, those cases relied on by his colleagues, for finding the additional conduct attributable to the union involved facts, not present here, showing that the union was aware of and did not disavow the conduct, or which otherwise supported the conclusion that the conduct was attributable to the union. Assuming arguendo, however, that all of the conduct here is attributable to the Union, as found by his colleagues, Member Babson agrees with Member Dennis that the conduct does not rise to the level of objectionable conduct which would warrant setting aside the election

[4] Absent exceptions, we adopt pro forma the hearing officer's findings that the Petitioner's pickets (1) did not block the entrance to the Employer's 19th & Market Street location on 24 and 25 September 1981, (2) did not prevent a tow truck from towing a disabled rental car into the Norwitch Drive facility on 18 September 1981, (3) did not threaten employee Ernest Merriweather or any other employee with bodily harm or prevent employees from working during the strike, (4) did not threaten service agent Tyson Drummond with bodily harm at the 19th & Market Street location during the second week of the strike, and (5) did not threaten the Employer's customers with bodily harm or property damage during the strike.

[5] The hearing officer found that a picket raised a fiery piece of wood about the time the gasoline truck attempted to enter the Norwitch Drive facility Security Operations Manager Judy Hopson, believing that he might hurl it at the gasoline truck, told him to put the piece of wood down and the picket complied We cannot, however, from Hopson's testimony, infer the picket intended to hurl the fiery piece of wood at the truck Strike Coordinator Paul Vitrano, who was in the cab of the gasoline truck, saw no such thing Consequently, we reject the dissent's inference that the picket "wav[ed] a fiery torch in the direction of a loaded gasoline delivery truck"

and some nail scattering—as creating an atmosphere of fear and coercion that interfered with the shuttlers' free choice in the election. The spitting next to and slapping of cars caused no property damage, and those instances of actual property damage that occurred during the strike—a small scratch on one employee's car and damaged tires on another employee's car—were isolated. The nails that were scattered at the facility were swept up immediately when discovered, and even the Employer did not view this misconduct as serious. On the one occasion when a guard saw a person scatter nails, the Employer took no action against that person other than to photograph him with other pickets and the guard, who posed with the broom he used to sweep up the nails.

Moreover, we agree with the hearing officer that the Employer failed to demonstrate that the shuttlers were present when these incidents occurred or that knowledge of these incidents was disseminated among the shuttlers. The Employer did not demonstrate that any shuttler witnessed any of the picket line misconduct that occurred in this case.[6] Only two shuttlers testified that they had heard of any of the incidents of picket line misconduct—Lee Goldwire and Warren Turpin had heard of the blocking of the gasoline delivery trucks and Goldwire had heard that an employee had driven his car over nails scattered at the facility, causing a flat tire. Because the election was not close and because there is no evidence from which we can infer that a substantial number of shuttlers knew of or were affected by the relatively minor picket line misconduct,[7] we agree with the hearing officer that the Employer's election objections should be overruled[8] and that the Petitioner should be certified as the collective-bargaining representative of the Employer's shuttlers. See *Bauer Welding*, 268 NLRB 1416, 1421 (1984), enfd. 758 F.2d 308 (8th Cir. 1985); *NLRB v. Southern Paper Box Co.*, 506 F.2d 581, 585 (8th Cir. 1974).

We disagree with the dissent's conclusion that the Petitioner's picket line misconduct "had a reasonable tendency—indeed, in this case, almost a self-evident tendency—to interfere with the [shuttlers'] free choice in the election" for the following reasons.

First, we find no reason or even an explanation why the dissent reverses one of the hearing officer's credibility resolutions. In describing the 22 September gasoline delivery truck blocking incident, the dissent states that "the Petitioner's picket line captain, John Martin, threatened the Employer's pipeline manager, Ray Groses, that 'they would blow the truck up first before it got through the gate.'" Two employer witnesses—strike coordinator Paul Vitrano and Pipeline Manager Ray Groses—and one Petitioner witness—strike captain John Martin—testified about this incident. Although Groses testified, contrary to Martin, that Martin made the alleged threat, the hearing officer only credited the testimony of Vitrano. Because Vitrano did not testify that Martin had threatened the driver of the gasoline truck, there is no credible record evidence the threat was made.

Second, the dissent errs by suggesting that we are willing to tolerate the picket line misconduct that occurred in this case. The issue before us is not whether the Petitioner violated the Act engaging in the picket line misconduct, but whether the misconduct interfered with the shuttlers' free choice in the election. The problem in this case is that of the 68 shuttlers voting in the election, there is no evidence any shuttler witnessed any instance

[6] Although nails were scattered at the Norwitch Drive facility on election day, the only shuttlers testifying at the hearing—Joseph Laughinghouse, Lee Goldwire, and Warren Turpin—denied seeing any nails when they voted at the facility that day.

[7] We disagree with the Employer that we can infer that the misconduct was disseminated and had an effect on the election because (1) damage appraiser John Bankhead testified that shuttlers were "standing around" the picket line 50 percent of the time; and (2) less than 50 percent of the shuttlers actually voted in the election. Bankhead testified he "never saw a shuttler on the picket line" and that, while he thought shuttlers were present about 50 percent of the time, he qualified his testimony by stating "[t]here were shuttlers standing . on the outside of the gate around their own personal automobiles. Quite a few times." If it were true that shuttlers were present 50 percent of the time, the Employer should have been able to produce at least one shuttler who personally observed some of the picket line misconduct. The Employer failed to do so We find Bankhead's testimony too speculative to be entitled to any weight

Nor can we infer dissemination from the alleged fact that only 50 percent of the shuttlers actually voted in the election. While correctly noting that 110 names were included on the Employer's voter eligibility list and that only 68 shuttlers voted, the Employer failed to demonstrate that those shuttlers who did not vote knew of the picket line misconduct and that the reasonable tendency of this misconduct was to deter employees from voting in the election. In any event, Daniel Isaac, the immediate supervisor of the shuttlers, testified, "I can't agree with that 100 number because we don't have . 100 shuttlers." The Employer actually employs "I'd say somewhere in the neighborhood of 75 to 80 [shuttlers]." Assuming the Employer has 80 shuttlers, 85 percent (68/80) of them voted in the election.

[8] The Employer filed four objections to the election We have discussed Objection 1, alleging that the Petitioner's picket line misconduct interfered with the election.

Member Dennis agrees with the hearing officer in overruling that part of Objection 1 alleging that the Petitioner threatened the shuttlers when picket Bob Fitzpatrick wrote down the license tag numbers of cars crossing the picket line. Although dispatcher Valerie Giddings, strike coordinator Paul Vitrano, and Pipeline Manager Raymond Groses testified seeing Fitzpatrick writing something on a pad when cars crossed the picket line, none of them knew what he wrote She cannot infer that Fitzpatrick was attempting to gather information about those employees crossing the picket line for possible later retaliation because Vitrano testified that Fitzpatrick was interested only in "[o]ur vehicles" driven by "managers from out of town."

Member Babson finds that Fitzpatrick's conduct was not objectionable under all the circumstances

We also agree with the hearing officer that Objections 2, 3, and 4 should be overruled for the reasons stated in her report

of picket line misconduct; testimony revealed only 2 shuttlers had heard of the blocking of the gasoline delivery trucks, and only 1 had heard that one employee had driven his car over nails scattered at the facility.[9] Despite the virtual absence of evidence of dissemination of the picket line misconduct among the shuttlers, the dissent would set aside the election because the nail scattering was "peculiarly calculated to come to the attention of shuttlers whose duties consisted of ferrying the Employer's vehicles" and because it is "safe" to assume that the two employees whose cars were damaged informed other employees of the damage done to their cars. The dissent's assumptions are erroneous.

The dissent assumes that all or almost all the shuttlers worked during the strike and would have observed or learned of the picket line misconduct. In fact, only 14 shuttlers crossed the picket line at the Norwitch Drive facility sometime during the strike, and only 3 to 6 of them worked at that facility on a daily basis during the strike. Those shuttlers, substitute shuttlers, and employees, who worked at the facility during the strike and testified at the hearing, admitted that they crossed the picket line daily without incident, except that occasionally the pickets "took their time" moving away from the entrance and they had to watch out for nails on the driveway. Among those testifying were Robert Quilles and Moses Ferguson, whose cars were damaged during the strike. Quilles testified that he worked 5 days a week during the strike as a shuttler, that he had no trouble crossing the picket line except for watching out for nails, and that security personnel immediately swept up any nails seen at the facility. The cars he shuttled were never blocked and he was never threatened. Ferguson testified that he crossed the picket line daily, that he was never threatened, that he was never asked not to cross the picket line, and that the only problem he had was watching out for nails in the driveway.[10] In fact, Fleet Distribution Manager Laura Fels had two meetings with the shuttlers during the strike—18 September and 29 September—and those shuttlers attending testified that they had no difficulty crossing the picket line.

Moreover, while the temporary restraining order issued against the Petitioner at the time of the 24 September gasoline delivery truck blocking incident allowed only six pickets at the Norwitch Drive facility, this restriction was lifted after a hearing on the preliminary injunction. There is no evidence of any picket being arrested, or of any violation of the temporary restraining order or preliminary injunction and, in the one instance when a picket was seen dropping nails, the Employer simply took the picket's picture with a Wells Fargo guard standing next to him holding a broom.[11] In these circumstances, we cannot agree with the dissent that we can assume dissemination among the shuttlers of the picket line misconduct and then infer that the misconduct interfered with the shuttlers' free choice in the election.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Local Lodge 724, International Association of Machinists and Aerospace Workers, AFL–CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time shuttlers employed by the Employer at its facility at 6615 Norwitch Drive Philadelphia, Pennsylvania; excluding all other employees, rental agents, service agents, mechanics, office clerical and professional employees, guards, watchmen, and supervisors as defined in the Act.

CHAIRMAN DOTSON, dissenting in part.

Contrary to Member Babson, I agree with Member Dennis, for the reasons set forth in footnote 2 of the majority opinion, that the Petitioner was responsible for the misconduct of the unidentified picket, for the damage done to the cars of two employees who worked as shuttlers during the strike, and for the scattering of roofing nails on several days during the strike. However, contrary to Members Dennis and Babson, I find that the Petitioner's picket line misconduct undermined the conditions necessary for a free and fair election. I find merit in the Employer's Objection 1 and I would set aside the election on that basis.[1]

[9] To support its conclusion that the picket line misconduct was "directed at the shuttlers," the dissent states that pickets slashed the tires on two shuttlers' cars and scratched or dented the car of another shuttler The only employee who had his tires slashed was Robert Quilles, a security man Moses Ferguson, a lead agent, picked up some nails in the rear tires of his car while leaving the facility around 1 October, and Beverly Lightfoot, a body shop clerk, noticed a small dent or scratch on her left car door and that the air was let out of the left rear tire around 11 October None of these employees was a shuttler eligible to vote in the election, although Quilles and Lightfoot worked as shuttlers during the strike

[10] Beverly Lightfoot, whose car was also damaged during the strike, was not asked about her experiences in crossing the picket line

[11] Leonard Bagby, a Wells Fargo guard assigned to the Norwitch Drive facility during the strike, testified that only once did he see a picket dropping nails Bagby reported the incident to Security Operations Manager Judy Hopson and they decided to take his picture When company personnel asked, "Anybody want to take pictures?" all the pickets said yes Bagby, holding a broom used to sweep up nails, posed in the picture with the pickets

[1] I agree with my colleagues to overrule Objections 2, 3, and 4

The Petitioner seeks to represent a unit of the Employer's shuttlers (employees who deliver and return the Employer's rental cars to and from the Employer's fleet storage premises and various customer rental locations). During the time material herein, the Petitioner already represented a unit of the Employer's mechanics. The collective-bargaining agreement covering the mechanics expired 16 September 1981 (all dates are 1981). The instant Stipulation for Certification Upon Consent Election in the shuttlers' unit was approved by the Regional Director 17 September. The mechanics went on strike starting 18 September. They picketed at the entrance to the Employer's premises around the clock through the day of the election, 22 October. There was no picketing during the voting hours on 22 October, but picketing resumed thereafter, finally ending on 2 November. This picketing was accompanied by egregious misconduct which, in my view, most assuredly had a tendency to intimidate the shuttlers and interfere with their ability to make a free and uncoerced choice of whether to be represented by the Petitioner.

About a month before the election, the Petitioner's pickets blocked a gasoline truck from making delivery to the Employer. At that time, the Petitioner's picket line captain, John Martin, threatened the Employer's pipeline manager, Ray Groses, that "they would blow the truck up first before it got through the gate."[2] Two days later, the Petitioner's pickets again blocked a gasoline truck (loaded with 8000 gallons of fuel) from making a delivery to the Employer. The Petitioner's strike captain told the Employer's security operations manager Judy Hopson that the only way the Employer would be able to get the truck through the pickets would be if the Employer obtained an injunction. Later that day, the Employer obtained a temporary restraining order. Hopson, accompanied by two police officers, was present while a process server read the temporary restraining order to the pickets, and served each picket with a copy of the order. Although the pickets reacted with obvious dissatisfaction to this latest turn of events, the gasoline truck eventually gained entry to the Employer's premises under the protection of two police officers. However, one of the pickets raised a fiery piece of wood and appeared ready to hurl it at the truck until dissuaded from doing so by Hopson.

On another day, as Hopson was entering the Employer's premises, one of the Petitioner's pickets yelled at her through her car window "scab manager's here" and then slammed her rear fender as she went through the picket line. Also, this picket stopped other cars from entering the Employer's premises, making them wait almost 5 minutes before allowing them in. Even then this picket struck the cars as they came through the gate, spat on them, and made lewd remarks to female management personnel who were shuttling cars. When one car stalled in front of the gate, this picket placed picket signs on the car and removed the keys from the ignition; a duplicate set of keys had to be obtained.

On 24 September, shortly after the start of the Petitioner's strike, and again on the day of the election (22 October) and on the 2 days preceding the election, the Petitioner's pickets scattered roofing nails on the driveway entrance to the Employer's premises, on the Employer's rear lot, and along the gate inside the fence. Some of the nails were inserted into squares of roofing paper to ensure that they remained upright. During the 6-week preelection period there was an 833-percent increase in flat tires on cars on the Employer's lot compared to the immediately preceding 2-month period: an increase from 9 to 75 flat tires.

Also, the Petitioner's pickets slashed the tires of one employee who worked as a shuttler during the strike, and deflated a tire and dented the car of another such employee.

I believe that the Petitioner's misconduct—its threat to blow up a gasoline truck in order to keep it from delivering fuel to the Employer; its (perhaps symbolic) waving of a fiery torch in the direction of a loaded gasoline delivery truck; its infliction of verbal abuse on entrants to the Employer's premises, and physical abuse to their automobiles; its wanton scattering of roofing nails in front of and within the Employer's property (with entirely foreseeable and intended resulting property damage); and its intentional infliction of property damage to the cars of two employees who worked as shuttlers during the strike—effectively poisoned the election atmosphere. The message to the shuttlers was loud and clear: do not oppose the Petitioner. I simply cannot agree with—indeed, I cannot understand—my colleagues' willingness to accept this sort of violent and destructive conduct on the part of the Petitioner during the critical period leading up to the election, and their willingness to find that it did not interfere with the conditions necessary for a fair election.

[2] Contrary to the view of my colleagues, Groses' testimony in this regard is not controverted by the general testimony of Manager Paul Vitrano about this blockage of ingress incident, or by the specific testimony of Vitrano about what he told the gasoline truckdriver. Vitrano himself never spoke to Martin on this occasion, and Vitrano was in no position to overhear Martin's threat to Groses because, according to Vitrano, "I was, you know, too far away and plus in the beginning I was inside." Although Martin denied threatening to blow up the truck, the hearing officer did not credit (or even mention) Martin's denial, but instead expressly *discredited* Martin's testimony that the gasoline truck struck one of the pickets

In overruling the Employer's objections in this regard, my colleagues find that the Petitioner's misconduct did not interfere with employees' free choice in the election because there were "very few incidents of misconduct . . . [which were] *relatively mild,* were not directed at the shuttlers, and were limited for the most part to the first week of the strike." (Emphasis added.) I do not agree that the Petitioner's blocking gasoline delivery trucks, threatening to blow one of them up, and waving a fiery torch at another are "relatively mild." I also do not agree that the Petitioner's slashing, puncturing, and deflating the tires on two shuttlers' cars and scratching or denting one of them was "not directed at the shuttlers." Nor, finally, do I agree that the Petitioner's scattering and placing roofing nails on the Employer's driveway and rear lot on the day of the election and the 2 days beforehand was "limited for the most part to the first week of the strike" (i.e., a month before the election).[3]

My colleagues also rely on the absence of direct evidence that any of the shuttlers had actually witnessed any of these incidents of Petitioner misconduct. Also, my colleagues apparently rely on the hearing officer's findings that "no shuttler testified that the incidents that transpired during the strike affected his willingness to vote" and that "there was no record evidence that the employees considered [these incidents] or cared."[4] Thus, my colleagues rely on an absence of a showing of *actual* coercion or intimidation of unit employees. However, it is well established that the subjective reactions of employees are irrelevant to the question of whether there was objectionable conduct;[5] the correct standard is an objective test: whether the alleged objectionable conduct has a *reasonable tendency* to interfere with the employees' freedom of choice in the election.[6]

Finally, my colleagues find no basis for inferring that the Petitioner's picket line misconduct became known to "a substantial number" of shuttlers. Not surprisingly, I disagree in this respect also.

First, as the hearing officer herself notes, the shuttlers who testified stated that they had heard about the gasoline truck incident. Second, as seen in footnote 4 above, the scattered roofing nails were a matter of common knowledge and liable to be of concern to shuttlers during the course of their driving duties. Third, it is safe to assume that at the very least the two employees whose cars were damaged by the Petitioner's pickets had knowledge of those incidents. Moreover, it is equally safe to infer that they informed other employees of the damage done to their cars. Thus, direct evidence from the record itself establishes that numerous employees had actual knowledge of the Petitioner's picket line misconduct—some of which was aimed specifically at the shuttlers themselves, and some of which was targeted more generally at anyone perceived by the Petitioner to be working with or for the Employer during the Petitioner's strike. Beyond this evidence of actual knowledge of the Petitioner's picket line misconduct, I believe it is reasonable to infer that union misconduct of this type during the critical preelection period would become known to unit employees,[7] particularly because much of it occurred in broad daylight at the Employer's premises. The majority's strenuous effort to explain away the effect of this "broad daylight" violence on the ground that only 14 shuttlers ever crossed the picket line will not wash.

My colleagues' use of the term "relatively mild" to describe the violent behavior exhibited in this record raises serious legal and policy considerations. Presumably, violence does not become socially or legally permissible simply because it occurs in a labor context. I had thought this Board had made this proposition clear in *Clear Pine Mouldings*, 268 NLRB 1044 (1984).

There is no doubt that the courts have conveyed this message, not only about violence, but about coercive language. See *Associated Groceries of New England v. NLRB*, 562 F.2d 1333 (1st Cir. 1977); *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519 (3d Cir. 1977); and *Operating Engineers Local 542 v. NLRB*, 328 F.2d 850 (3d Cir. 1964), cert. denied 379 U.S. 826 (1964). This Agency is charged by Congress with policy-making functions both in unfair labor practice and representation areas, functions explicitly recognized by the United States Supreme Court. See *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), and *NLRB v. Action Automotive*, 105 S.Ct. 984 (1985). If violence is to be prevented and discouraged, this policy-making

[3] I especially disagree with my colleagues' characterization of this latter conduct, which caused a more than eightfold increase in tire damage, as merely "some nail scattering." I note further that flat tires—75 of them as the majority states—were an item peculiarly calculated to come to the attention of shuttlers whose duties consisted of ferrying the Employer's vehicles

[4] Specifically with regard to the roofing nails, the hearing officer found that "a number of people observed the nails but there was no evidence presented that the presence of the nails frightened the potential voters."

[5] See *Emerson Electric Co.*, 247 NLRB 1365, 1370 (1980), enfd 649 F.2d 589 (8th Cir. 1981), *Wayne Metal Co.*, 246 NLRB 392 (1979). See also *Monark Boat Co.*, 276 NLRB 1143 fn. 2 (1985).

[6] See *Weyerhaeuser Co.*, 247 NLRB 978 (1980), *Baja's Place*, 268 NLRB 868 (1984) (objective test).

[7] See, e.g., *Broadway Hospital*, 244 NLRB 341, 346 (1979) ("Nor was it necessary in every instance that employees witnessed these acts of violence or intimidation, because they took place during the Union's strike against the hospital and under circumstances wherein the employees might reasonably be expected to become aware of the incidents.")

Agency must set norms. These norms must encompass a policy that creates costs for violators. While I do not believe that this Agency acting alone can eliminate violence in labor affairs, "Such conduct, however, does not go unregulated by society . . . it is not for the Board to set less stringent standards but to observe those already in existence." *NLRB v. A. Duie Pyle, Inc.*, 730 F.2d 119, 124 (3d Cir. 1984). My colleagues, by their decision in this case, establish no norms. Indeed, as indicated, they retreat from ones previously established.

There can be no doubt that had this Employer, in another procedural context, engaged in similar misconduct, my colleagues would undoubtedly have stood ready to impose a bargaining order rather than permitting an election won by the Employer to stand. Violence is not even necessary. Verbal conduct and nonviolent behavior will sustain a bargaining remedy. *Quality Aluminum Products*, 278 NLRB 338 (1986). This double standard, which imposes a remedy for verbal or nonviolent behavior of one side, while tolerating explicit violence by the other, has more than anything else contributed to the view that the Board is simply unfair. I subscribed to the decision in *Quality Aluminum*. I cannot subscribe to a contrary holding in this case. This case and *Quality Aluminum* are mirror images of one another save only in the critical facts that the Petitioner here engaged in violence while the respondent in *Quality Aluminum* employed verbal or nonviolent methods.

An employer's economic power to affect employees' livelihood lends weight to its words in dealing with those employees. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). This Board has frequently taken account of that fact. It ought also to take account of the correlative fact that violence, employed even by a party who lacks immediate power to affect employees' livelihood, lends weight to the known wishes of that party.

In light of the above considerations, I find that the Petitioner's picket line misconduct had a reasonable tendency—indeed, in this case, almost a self-evident tendency—to interfere with the employees' free choice in the election. Accordingly, I would set the election aside.