

Bonanza Aluminum Corporation and Teamsters, Chauffeurs, Warehousemen, Industrial and Allied Workers of America, Local 166, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO. Cases 31-CA-17638 and 31-RC-6536

October 31, 1990

DECISION, ORDER, AND CERTIFICATION
OF REPRESENTATIVE

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

On December 13, 1989, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Respondent Employer filed exceptions and a supporting brief.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief,² and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

Although we adopt the judge's recommendation to overrule Objection 1 alleging that threats made by union supporters interfered with the election, we reach this conclusion for the reasons that follow.

We note initially that the judge treated employee Jose Romero's discussion with fellow employee Crispin Martinez about an employee named Arias as occurring during the same conversation held a few days before the April 6, 1989 election, when Romero chastised Martinez about his failure to support the organizing campaign. The record shows, however, that there were actually two separate conversations between Romero and Martinez. Thus, Martinez testified that it was in January 1989 that Romero made the remarks about Arias which the Employer alleged as a threat interfering with the election. We find it unnecessary to consider whether those remarks were objectionable because the Employer has not shown that they were made during the critical period. Even viewing the January remarks as background, we find that Romero's remarks a few days before the election, in which he told Martinez "not to ask questions [at campaign meetings the Employer conducted], to shut up . . . or else to accept the consequences," were too vague and ambiguous to warrant setting aside the election.

¹There were no exceptions to the judge's recommended dismissal of the alleged unfair labor practice in this case. The issues before us concern the judge's recommended disposition of the Employer's Objections 1 through 6 in the representation case.

²The Respondent Employer has requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

We further conclude that employee Javier Mascareno's preelection threat to discharge employees who failed to support the Union also did not taint the election because the employees could not reasonably have concluded that Mascareno, as a nonsupervisory employee, had the means to carry out that threat.

Finally, although we find that Mascareno's conduct in telling employee Jeffrey Bourgoine that if Bourgoine or anyone else tried to stop the Union from getting in Mascareno would kill them; in then tearing a procompany button from Bourgoine's shirt; and in later simulating the pulling of a trigger while pointing his index finger toward Bourgoine as though the finger were the barrel of a gun was serious and not to be condoned, we nevertheless find in the circumstances here that the brief incidents involving Mascareno and Bourgoine were isolated and do not warrant setting aside the election held in a unit of about 120 eligible voters. We note Bourgoine's testimony that he only reported Mascareno's threats to six eligible voters.

For all these reasons, we adopt the judge's recommendation that Objection 1 be overruled.

We further adopt the judge's recommendation to overrule Objection 5 which alleged, inter alia, that a conversation between union observer Jose Bonales and employee Juan Ambriz at the polling place violated the rule of *Milchem, Inc.*, 170 NLRB 362 (1968). The judge found that the testimony of employer observer Maria Fuentes indicated that the conversation, the substance of which is unknown, "lasted about 2 minutes or so." However, without indicating how he so concluded, the judge found that "[the conversation] was much shorter" and did not violate *Milchem*. The Employer argues in its exceptions that Fuentes at one point testified that the conversation was "more than two, less than five" minutes. Nevertheless, we find that, even accepting the latter version offered by Fuentes, the conversation between Bonales and Ambriz was not shown by the Employer, the objecting party, to be prolonged or sustained within the meaning of the *Milchem* rule. See *Clothing & Textile Workers v. NLRB*, 815 F.2d 225 (2d Cir. 1987), enfg. sub nom. *Angelica Healthcare Services*, 280 NLRB 864 (1986), and *NLRB v. U.S.M. Corp.*, 517 F.2d 971 (6th Cir. 1975), enfg. 209 NLRB 956 (1974); cf. *Milchem, Inc.*, supra. Accordingly, we also adopt the judge's recommendation that the Employer's Objection 5 be overruled.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Teamsters, Chauffeurs, Warehouse-

men, Industrial and Allied Workers of America, Local 166, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All production and maintenance employees, shipping and receiving employees, warehouse employees and truckdrivers employed by the Employer at 11711 Pacific Avenue, Fontana, California and 1420 South Bon View Avenue, Ontario, California.

Ami Silverman, Esq., for the General Counsel.
Raymond R. Kepner, Esq. and *Kenneth D. Sulzer, Esq.*, of Los Angeles, California, for the Respondent.
Michael J. Shelley, Esq., of Encino, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Los Angeles on August 29 and 30, 1989,¹ pursuant to a complaint issued by the Regional Director for the National Labor Relations Board for Region 31 on May 31. In addition, on June 16 the Regional Director ordered consolidated certain issues arising from a representation election in Case 31-RC-6536. The complaint, based upon charges filed on April 18 (original) and on May 25 (first amended) by Teamsters, Chauffeurs, Warehousemen, Industrial and Allied Workers of America, Local 166, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO (the Union or Charging Party), alleges that Bonanza Aluminum Corporation (the Respondent), has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act.

The Union's representation petition was filed on February 22 and sought a representation election among certain of Respondent's production and maintenance employees. On April 6 an election was held pursuant to a Stipulated Election Agreement. On April 13 objections to conduct affecting the outcome of the election were filed by the Employer. In addition, it appears from the tally of ballots that one vote was challenged, and it is not sufficient in number to affect the outcome of the election.

Issues

(1) Whether Respondent, through its plant manager, Michael Hall, disciplined employee, Jose Bonales, because Bonales served as the Union's election observer, and because Respondent intended to discourage employees from engaging in similar activities or other protected concerted activities.

(2) Whether, because of certain neglect of his duties allegedly committed by the Board agent conducting the election, and because of certain other preelection actions allegedly taken by supporters of the Union, employee free choice in

the election was not possible and therefore a fair election did not occur.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of General Counsel, Charging Party, and Respondent.²

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is a California corporation engaged in the manufacture of extruded aluminum products with an office and principal place of business located in Fontana, California. It further admits that in the course and conduct of its business, it annually sells and ships goods or services valued in excess of \$50,000 directly to customers located outside the State of California. Accordingly it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that Teamsters, Chauffeurs, Warehousemen, Industrial and Allied Workers of America, Local 166, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE AND THE OBJECTIONS TO ELECTION

A. *The Facts*

1. Background

On April 7, Respondent employee, Jose Bonales, was suspended for 5 days without pay. The "Corrective/Disciplinary Notice" issued to Bonales recites that the suspension was imposed

for making a sexually disparaging remark to a female employee on the morning of 4/6/89. This conduct will not be tolerated. Any further incidents of this nature will result in your immediate termination. Effective 4/10/89 and return Tuesday 4/18/89. [G.C. Exh. 2]

The incident for which Bonales was disciplined arose out of the election on the prior day. Bonales had been assigned there as an observer for the Union. Employees voted between the hours of 6 a.m. and 7 a.m. in an area of Respondent's plant near the shipping and receiving department.³ This area was delineated by stacks of aluminum products approximately 8 feet high, which formed three walls of the voting

²General Counsel's unopposed motion to correct the transcript in the particulars recited at pp. 2-3, fn. 1 of her brief, is granted. In addition, the transcript is corrected to include new pages 31, 31A, 31B, 31C and 31D, submitted with a September 28 letter of explanation from the court reporter.

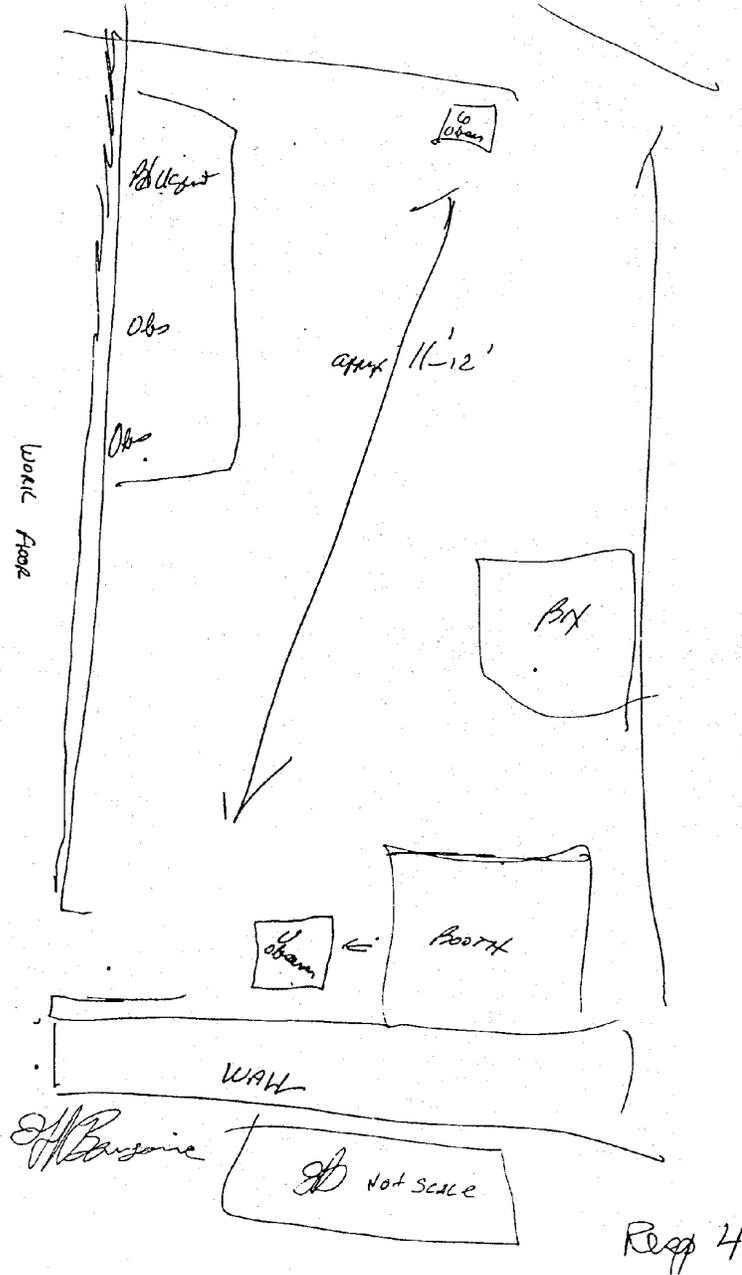
³Employees also voted in the same place in an afternoon session and in a second plant during the morning hours of April 6. Nothing of relevance to the present case occurred during the voting at these other times and places.

¹All dates refer to 1989 unless otherwise indicated.

area. The fourth wall was the natural wall of the building. Two openings in the enclosure were designated "entrance" and "exit."

area on the day in question. (R. Exhs. 4, 6). Bourgoine's sketch with descriptions in English is reproduced below and is marked R. Exh. 4.

Two witnesses, Jeffrey Bourgoine and Maria Fuentes, both called by Respondent, prepared rough sketches of the voting



Seated at the table were a second union observer named Javier Mascareno, an employer observer named Angel Garcia, and a Board agent. Bonales was seated near the voting booth; about 11 to 12 feet away from him was seated the second employer observer, Fuentes. The disputed events involved Bonales, Bourgoine, and Fuentes.

Bonales, an employee for Respondent for 7 years with no prior disciplinary record, testified for the General Counsel that shortly after 6:30 a.m., after Bourgoine had obtained his ballot, he rolled it up, placed it near his groin and with his other hand manipulated the ballot in a sexually provocative manner. Since this act was allegedly performed while Bourgoine was facing Bonales, the latter took offense, but did nothing. Then another employee named Julio told Bourgoine to leave which he did. Neither Julio nor Garcia testified. Mascareno was called by the Union in rebuttal, but did not address this subject.

Bourgoine and Fuentes testified in direct contradiction to Bonales. First, Bourgoine flatly denied performing the act described by Bonales. The former had worked for Respondent for 2-1/2 years as a dye repairman. In the 2-month election campaign, Bourgoine had been a member of the faction opposed to the Union. After completing his ballot, Bourgoine emerged from the booth, where, Bonales allegedly asked him if he wanted “panochas.” (Translated as “pussy.”) Bourgoine first asked Fuentes what Bonales had said, then repeated his question to Bonales, who asked, “Do you like pussy—her pussy?” Bonales then made a gesture pointing toward Fuentes with the two index fingers together and the two thumbs together which apparently was intended to represent the vagina and was understood by Bourgoine and Fuentes in that way. Then according to Bourgoine, he deposited his ballot and walked out of the voting area shaking his head.

Generally speaking, Fuentes supported Bourgoine’s account of the incident. Employed as a packer for 3 years before the incident, Fuentes testified that Bonales was looking directly at her when he said to Bourgoine in a voice loud enough for her to hear, “Jeff, like panochas.” She described the gesture that Bonales made, again while looking directly at her.

Fuentes was the only female in the voting area at the time.⁴ She made no complaint to the Board agent because she assumed he had heard the remark and was disturbed at his lack of action. She supported Bourgoine in his denial of having performed the gesture described by Bonales. In the course of her testimony, Fuentes was uncomfortable with and embarrassed by that part of her testimony dealing with a description of what Bonales had said and done. Although she was generally acquainted with the slang term, “panochas,” she felt it had been directed toward her and this had never happened before. I found her to be a credible witness.

I also find that Bonales made the remark and gesture as described by Bourgoine and Fuentes. I am much less certain that they were directed towards Fuentes, although her interpretation of them as personal insults was not unreasonable. In making this credibility determination, I am guided by the fact that General Counsel produced no witnesses to corroborate Bonales’ account of the incident, even though other vot-

ers as well as observers were present. I also draw inferences from Bonales’ statements to the investigating plant manager, as described below. And I note that Fuentes made a prompt complaint of the incident to plant manager, Mike Hall, who testified for Respondent. Finally, I can’t believe that Bourgoine made the gesture described by Bonales, when Fuentes was seated about 12 feet away and would have been just as offended by it, if it had occurred, as she was by what Bonales had said and done.⁵

2. Michael Hall’s investigation of the incident

Shortly after the 7 a.m. voting had ended, Fuentes reported the incident described above to Michael Hall, plant manager. After receiving Fuentes’ account with the use of an interpreter, Hall interviewed Bourgoine, who corroborated Fuentes. In lieu of written statements made out on company forms, both Fuentes and Bourgoine gave formal declarations to Respondent’s attorneys who were present at the time due to the election. Hall also questioned Mascareno, who said he didn’t see or hear anything. Finally, Hall conferred with the former factory manager to see if any precedent existed for this type of complaint, but there was none.

By the time Hall had finished his investigation, it was midafternoon and Bonales had left for the day. The following morning, Hall sent for Bonales. At first Bonales, who speaks some English, said he didn’t need an interpreter. After Hall advised him that a complaint of sexual harassment had been lodged against him, Bonales requested an interpreter and one was immediately provided. When the charge was repeated in Spanish, Bonales said he didn’t hear anything, say anything, or do anything. Bonales never requested the name of the complaining witness and when asked for a written statement, he refused to provide one. Before he left the office, Bonales was told by Hall that Fuentes had made the complaint.

After completing his interview of Bonales, Hall called the company president in Florida to seek advice on how to handle the matter. Thereafter, Hall decided that he believed Fuentes and Bourgoine and disbelieved Bonales. In deciding how next to proceed, Hall consulted Respondent’s supervisors’ manual, which reads in pertinent part (G.C. Exh. 3):

1.7 EMPLOYEE STANDARDS OF CONDUCT

The Company seeks to provide for each of its employees a safe and orderly workplace where the acceptable performance of Company business can be conducted. The Employee Standards of Conduct that follow are intended to assure this working environment and are not presented here with the intent to form any contractual basis between the Company and its employees for the procedures to be followed concerning standards violations; nor is this list intended here to be all inclusive. If and as infractions occur, employees will be given the opportunity to discuss questionable conduct with Com-

⁴ Respondent’s nonsupervisory work force consists of approximately 120 males and 8 females.

⁵ In making this credibility finding, I place some weight on R. Exhs. 1 and 2. The first is a form submitted by Bonales to the State of California on April 16, as a claim for unemployment benefits. There Bonales wrote as a reason for leaving his last job “Lack of Work.” Bonales blames this inconsistency on a clerk who, he said, told him to write down that reason. The second document is a form submitted to the California Department of Fair Employment and Housing on May 23. There Bonales claimed that he was unfairly suspended from work due to his national origin. Both claims were denied by the state examiners when the true facts were uncovered (R. Exh. 3).

pany management, though the Company reserves the right to terminate any employment without prior issuance of either verbal or written warnings or dialogue when employee misconduct is of such a nature that termination is in the best interest of the Company.

1.7.1 MAJOR INFRACTIONS

J. Harassment toward any employee or employee candidate for reasons of race, color, religion, national origin, sex, sexual preference, age, handicap, veteran status, citizenship, marital status, pregnancy or medical condition, or any other protected status.

1.5 HARASSMENT

Harassment of any form directed toward race, color, religion, national origin, sex, sexual orientation, age, citizenship, or handicap will not be tolerated in the workplace. Similarly, unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, where there is an attempt to make submission to such conduct a term or condition of an individual's employment; or where the submission of or rejection of such conduct is used as a basis for employment-related decisions; or where such conduct has the purpose or effect of substantially interfering with an individual's working environment, will not be tolerated. The supervisor or manager will promptly investigate all claims of harassment and will insure that appropriate action is taken. The disposition of this investigation will then be communicated to the reporting employee.

Although this manual had not been distributed to employees, Respondent did have posted various official notices in English and Spanish stating that "Equal Employment Opportunity is the Law," with a text explaining the policy (R. Exhs. 9, 10).

Finally, Hall decided that Bonales deserved appropriate punishment for his transgression. About 2:30 p.m. on April 7, Hall called Bonales and an interpreter into an office and told Bonales that he would be suspended for 5 days. To this Bonales responded that Hall should do what he had to do.

3. Other alleged instances of sexual harassment in Respondent's plant

As her second witness, General Counsel called Anita Reyes, employed by Respondent for 4 years as a packer. On May 5, she provided to Hall a written complaint which reads as follows (G.C. Exh. 4):

Employee or Location of Occurrence: Packing Department

Date of Occurrence: 5-5-89

Time: 11:45 to 12:00

Description: I was putting the plastic wrap on the bundle and I felt someones [sic] hand touched me on my bottom and I turned around and it was Jeff Bourgoine and he said I'm sorry to me but there was enough room for him not to touch me at all. Also when I was

filling out my report he came to me and started to say bad words at me so I started to tell him too.

Completed by:

/s/Anita Reyes

/s/M. Hall

Department Manager

Reyes testified to this incident consistent with her written complaint. After it occurred, she promptly reported it to Hall, who began an investigation.

Before Hall talked to Bourgoine about the matter, Bourgoine learned of Reyes' complaint from another supervisor. Bourgoine then left his work station to confront Reyes and to ask her why she was lying. Reyes told Bourgoine to "shut up" and "get the fuck" out of there.

Later Bourgoine told Hall and testified at hearing that he had touched Reyes on the way to the men's room, but that it was an accident which occurred in a narrow passage as Reyes was backing up. His written account of the incident reads as follows (R. Exh. 5):

Employee or Location of Occurrence: Shipping

Date of Occurrence: 5-5-89 Time: 1:00

Witness(es): None

Description: I was walking to the restroom. Anita was stepping back. My arm bumped her butt. I said I was sorry. I used the restroom and left.

Completed by:

/s/ Jeffrey Bourgoine

/s/ M. L. Hall

Department Manager

Hall visited the passage where the incident occurred and found that its width varied at different times from about 3 feet to 10 feet, depending on material being worked on and stored there. Both Reyes and Bourgoine had clean records with no prior discipline nor conflict with each other or with other employees. Hall concluded the incident was accidental and since Bourgoine had already apologized, also concluded that no further action was warranted. Hall offered to relocate Reyes to another area in the plant, but she declined to be moved. On rebuttal, Reyes was called back to testify that while she didn't observe Bourgoine at the time in question, she felt his palm on her buttocks leading her to believe his actions were intentional.

On August 12, Reyes was involved in a second incident with another employee named Jose Chadez, a leadman on the paint line, who did not testify in this case. Again Reyes submitted to Hall a written incident report which reads as follows (G.C. Exh. 5):

Employee or Location of Occurrence: Anita Reyes Packing

Date of Occurrence: 8-12-89 Time: 10:25

Witness(es): Jorge Yanez & Margarito Escalante

Description: Jose Chadez made a bodlied [sic] advancement towards me. And I turned around and told him never to do this to me and all he said to me was to shut up shut up and I told him that he could lose his

job and he said to me that he did not care to go and tell any body. So I told Jose Perez that I needed to talk to him and he said after lunch so we talked after lunch and I told him what Jose Chadez did to me and he said that he was going to talk to Jose Chadez so when he called Jose Chadez to come over were Jose Perez and I were Chadez said no you come over here and finally he came over. And Jose Perez ask him if he did anything to me and Chadez said no and that he could get better asses excuse me but that was what Chadez said. He also said that I was only looking for problems. And I told Jose Perez that I whated [sic] for Mike to know about this and it seem to me that Jose Perz [sic] did not what [sic] Mike to know about this incident so I told Jose Perez that I was going to talk to Mike Hall and he said go ahead so I did.

Also Margarito was hearing everything I was telling Chadez when it happen he also heard when Chadez said I didn't care go ahead and tell anybody.

/s/ M. L. Hall

Department Manager

In her testimony, Reyes was again generally consistent with her written report and provided additional details of how Chadez had approached her from the back and made a thrusting motion forward.

In the statement, Reyes stated that two witnesses knew what happened, and both were interviewed by Hall. Escalante denied knowledge of the incident, but Yanez corroborated Reyes' account. Then Hall talked to Chadez who denied any contact with Reyes, but did not deny the gesture. After reviewing the evidence, Hall decided to and did in fact suspend Chadez for 5 days. During the 2-month campaign preceding the election of April 6, Chadez had been a supporter of the employer.

During his investigations of both incidents involving Reyes, Hall told Bourgoine and Chadez in separate conversations that Respondent was opposed to sexual harassment of any type and that such conduct would not be tolerated.

B. Analysis and Conclusions

1. Preliminary statement of applicable law

In *Star Tribune*, 295 NLRB 543, 548 (1989), the Board clearly stated its position with respect to discrimination in the workplace:

The elimination of actual or suspected sexual discrimination is a mandatory subject of bargaining

In *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 66 (1975), the Supreme Court stated that "national labor policy embodies the principles of nondiscrimination as a matter of highest priority [citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974), and it is a commonplace that we must construe the [National Labor Relations Act] in light of the broad national labor policy of which it is a part." . . . In *Westinghouse Electric Corp.*, 239 NLRB 106 (1978), enfd. as modified sub nom. *Electrical Workers IUE*, 648 F.2d 18 (D.C. Cir. 1980), the Board observed that the Court's statement in *Emporium* that "[the] elimination of discrimination and its

vestiges is an appropriate subject of bargaining" was a reaffirmation of the Board's holding that "the elimination of race or sex discrimination practices is a proper subject of bargaining." [Footnote omitted.]

Although the above statement of law occurred in the context of a refusal-to-bargain case, it nevertheless constitutes a fitting and proper introduction to my analysis in the instant case.

I turn next to the *Wright Line*⁶ analysis: The test for causation for cases alleging violations of Section 8(a)(3) of the Act is as follows: First, General Counsel must make a prima facie showing, sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct. *Jamar Coal Co.*, 293 NLRB 1009 (1989).

I fully agree with the General Counsel's brief, page 5, that Bonales was engaged in protected concerted activity while serving as an election observer for the Union, *Pierre's Vending Co.*, 274 NLRB 1219, 1221 (1985), and that Respondent was aware of his activities. However, because I find no evidence of animus by Respondent or its agent Hall, and for other reasons as well, I find that General Counsel has failed to prove a prima facie case. In the alternative, if General Counsel did prove a prima facie case, Respondent proved by a preponderance that it would have taken the disciplinary action against Bonales even in the absence of the protected activity.

2. Did the misconduct occur?

In the facts section of this Decision, I credited Fuentes and Bourgoine and discredited Bonales. Bonales' motivation and intent in making the statements are not in issue. However that he made the remarks at the time and place in question, in the presence of a female coworker whom he knew or should have known was likely to take offense and reasonably interpret the remarks as directed to her, all indicate to me that Bonales could properly be subject to discipline without violating the Act.

As part of her theory, the General Counsel contends that Hall conducted an inadequate investigation. In *Hickory Creek Nursing Home*, 295 NLRB 1144, 1159 (1989), the administrative law judge, quoting from *Firestone Textile Co.*, 203 NLRB 89, 95 (1973) noted:

The Board has consistently held that an employer's failure to conduct a full and fair investigation of an employee's alleged misconduct is evidence of discriminatory intent, especially when viewed in light of the employer's union hostility. [Citations omitted.]

In the instant case, there is no evidence showing union hostility or an inadequate investigation. Hall gave Bonales an opportunity to give his side of the dispute, but other than denying that he did anything wrong, Bonales declined to provide additional details. Hall also interviewed Mascareno who denied knowledge of the incident.

⁶*Wright Line*, 251 NLRB 1083 (1984), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

The General Counsel makes much of certain alleged discrepancies elicited in testimony. These are recounted in her brief with lawyer-like thoroughness. That Hall did not attempt to interview all possible witnesses to the incident does not raise an inference of unlawful conduct. Under the circumstances, I find Hall's investigation was entirely adequate. Compare *Hickory Creek Nursing Home*, supra, 295 NLRB at 1159, 1160. I also find that Hall had a good-faith belief that Bonales committed the infraction.

The General Counsel also contends that the 5-day suspension was unduly harsh and therefore suggestive of an unlawful motive. In support of her contention, the General Counsel cites the case of *Consumers Power Co.*, 282 NLRB 130, 132 (1986). There, an employee was terminated for a relatively minor offense. The instant case was not a minor offense and was not a termination. Rather, the use of the language here and the gesture directed to or in the presence of Fuentes constituted a direct verbal assault based on Fuentes' gender. It is important to note that no evidence was presented to show that the use of said language or gestures was common in the plant or that Fuentes herself had used such language or gestures. In fact, before Bonales, the factory had never experienced this type of conduct and Hall felt that a 5-day suspension was appropriate. I cannot find it was inappropriate or unduly harsh. Cf. *Texberry Container Corp.*, 217 NLRB 58 (1975); compare *Postal Service*, 250 NLRB 4 (1980).

Finally, I reject the General Counsel's argument that Bonales was treated disparately. As noted in the Facts section, Reyes reported two other instances of sexual harassment. Hall found the complaint against Bourgoine to be unfounded, and the complaint against Chadez, a company supporter in the election campaign, to be valid. Chadez was given a 5-day suspension just like Bonales. I find no evidence of disparate treatment. Compare *Fern Terrace Lodge*, 297 NLRB 8, 9 (1989).

In summary, I find that when Fuentes complained to Hall about Bonales' conduct, Hall was required by law to investigate the charge, and where the allegation was found to be valid to take reasonable measures to punish the offender to deter others from similar conduct. See *Arnold v. City of Seminole*, 614 F. Supp. 853, 869 (D.C.Okla. 1985). In the exercise of a business judgment which was not tainted by Bonales' activities as an election observer, Hall decided that Bonales should be suspended for 5 days. I find no violation of the Act, *Florsheim Shoe Store Co.*, 279 NLRB 950 (1986) and I will recommend to the Board that this case be dismissed.⁷

2. The objections

Before turning to the specific objections, I note the standard by which the objections are to be judged.

"[B]allots cast under the safeguards provided by Board procedure [presumptively] reflect the true desires of the participating employees." *NLRB v. Zelrich Co.*, 344 F.2d 1011, 1015 (5th Cir. 1965). Thus, the burden of proof on parties

⁷In deciding on a proper disposition of this case, I note that Hall relied in part on the "Employee Policy Manual" (G.C. Exh. 3), which had never been distributed to employees. See *Herman Bros., Inc. v. NLRB*, 658 F.2d 201, 209-210 (3d Cir. 1981). However, in the absence of credible evidence tending to show Respondent's unlawful motive, and with a serious infraction committed by Bonales, I conclude that Bonales and other employees knew that conduct like that in issue here would be subject to disciplinary action.

seeking to have a Board-supervised election set aside is a "heavy one." *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 120 (6th Cir. 1974), cert. denied, 416 U.S. 986 (1974); see also *NLRB v. First Union Management*, 777 F.2d 330, 336 (6th Cir. 1985) (per curiam). This burden is not met by proof of misconduct, but "[r]ather, specific evidence is required, showing not only that unlawful 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." *NLRB v. Bostik Div., USM Corp.*, 517 F.2d 971, 975 (6th Cir. 1975) (quoting *NLRB v. White Knight Mfg. Co.*, 474 F.2d 1064, 1067 (5th Cir. 1973)).

With the above standard in mind I turn to the six objections filed by the Employer.

a. *Objection 1*

"Union supporters made death threats, threats of physical harm, and threats of job loss, such that employee free choice in the election was not possible."

According to Bourgoine, on April 4, about 10 a.m., he and Mascareno were discussing the approaching union election in the dye shop, when Mascareno stated in a loud voice that if Bourgoine or anyone else tried to stop the Union from getting in, he would kill the "motherfucker." Bourgoine described the demeanor of Mascareno as "serious." To this statement, Bourgoine responded that if anything happened to him or his family he'd deal with it. Then Mascareno allegedly tore a procompany button from Bourgoine's shirt. Later that same day while both men were working, Mascareno allegedly made a gesture of pointing his index finger toward Bourgoine as though it were a barrel of a gun. With another finger Mascareno simulated the pulling of a trigger. Then Mascareno placed his index finger toward his mouth and exhaled air as though he were blowing gunsmoke away.

In rebuttal, Mascareno denied making the statements and gestures to Bourgoine. I don't believe him and find the incident happened just as Bourgoine testified. Later that day, Bourgoine reported the incident to a supervisor named Gilbert who has since left the company and to Plant Manager Hall. Neither considered the matter serious enough to take any action or even to request a written incident report from Bourgoine, although Hall advised Bourgoine to stay away from Mascareno.

In addition to reporting the incident to supervisors, Bourgoine also reported it to six coworkers. Crispin Martinez, the only one of the six to testify, responded to the report by stating, apparently in a joking way, "don't worry, they also wanted to kill me, and that would make two." (Tr. 299).

Martinez also testified to a conversation with Jose Romero, who like Mascareno, was a leader of the pronoun faction. A few days before the election and a day or so after a preelection meeting held by the employer, Romero asked Martinez why he was no longer supporting the union. Martinez had asked certain questions at the meeting and Romero told him not to ask future questions and just shut up, or accept the consequences. Romero also referred to another company supporter named Arias and stated he knew where Arias lived. Like Bourgoine, Martinez told four other coworkers about Romero's remarks. A coworker named Garcia responded to this information by telling Martinez "Don't pay attention to him. He's crazy." (Tr. 298).

About 3 weeks before the election, after a preelection company meeting, Fuentes was part of a group of about 10 persons seated in the lunchroom. Mascareno said “if the Union loses, they will all fuck their mothers and lose their jobs.” Another time Mascareno told Fuentes and others that when the Union won, he would have the power to fire employees opposed to the Union. Again Mascareno denied making these statements and again, I don’t believe him.

In evaluating this evidence, I note that “generally, a union is not responsible for the acts of an employee, unless the employee is an agent of the Union.” *Kitchen Fresh, Inc. v. NLRB*, 716 F.2d 351, 355 (6th Cir. 1983). The conduct of prounion employees will only be attributed to a union where the union has “instigated, authorized, solicited, ratified, condoned or adopted” the conduct. *Id.* Under the standards described above, there is no evidence to show the Union was responsible for Mascareno or Romero’s conduct.

This finding does not end the inquiry. The alleged objectionable conduct must be considered next under the standard for third party conduct. In *Picoma Industries*, 296 NLRB 498 (1989), the Board described this standard as set forth in *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984), “whether the misconduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.”

Applying this standard to the instant case, I note that both Bourgoine and Martinez testified they were fearful and concerned after the threats from Mascareno. Martinez was primarily concerned that his former friends, the in-house union leaders were not talking to him any more. (Tr. 321). In any event, the “subjective reactions of employees to threats are irrelevant to the question of whether there was, in fact, objectionable conduct.” *Picoma Industries*, supra at 499, citing *Emerson Electric Co.*, 247 NLRB 1365, 1370 (1980), enfd. 649 F.2d 589 (8th Cir. 1981). Rather, the Board in *Picoma Industries* states, “the test is based on an objective standard.” *Ibid.*

On an objective basis, I find that the statements of Mascareno and Romero did not combine to make a free election impossible. See *NLRB v. Griffith Oldsmobile*, 455 F.2d 867, 870 (8th Cir. 1972), quoting *Manning, Maxwell & Moore v. NLRB*, 324 F.2d 857, 858 (5th Cir. 1963). See also *S. Lichtenberg & Co.*, 296 NLRB 1302 fn. 3 (1989). The threats such as they were, were directed solely to specific individuals who opposed the Union. See *Duralam, Inc.*, 284 NLRB 1419 (1987). Moreover neither Mascareno nor Romero was known to be violent. Rather, Mascareno was known to be an excitable individual given to exaggerations.

I also note the breadth of dissemination involved between 8–12 individuals. This should be considered in the context of relevant election figures: of approximately 120 eligible voters, 110 cast ballots, of which 63 were cast for the Union, 46 were cast against the Union, and 1 was challenged (G.C. Exh. 1h). Accordingly, the breadth of dissemination is not significant,⁸ the threats did not make a free election impossible and the vote was not close. Compare *Picoma Industries*, supra, 296 NLRB at 500.

As to Mascareno’s threats of job loss after the Union won the election, I find that threats of job loss for not supporting

the Union, made by one rank-and-file employee to another, are not objectionable and that such statements can be readily evaluated by employees as being beyond the control of the Union. *Duralam, Inc.*, supra 284 NLRB 1419 fn. 2 (citations omitted).

For all the reasons stated above, I will recommend that Objection 1 be overruled.

b. Objection 2

“The Board Agent stationed the Union’s observer within 18 inches of the voting booth such that the Union’s observer could see into the voting booth while the employees were voting.”

The voting booth had a curtain which apparently did not fully cover the booth; on both sides, uncovered space of approximately 1 inch existed. The employee voting had his or her back to the observers, as did Bonales as he sat close to the booth. While there is evidence that Bonales lifted the curtain to show employees where to vote, there is no credible evidence that he lifted the curtain while an employee was still in the booth. Accordingly, I find no evidence that either Bonales or Fuentes, or anyone else could see into the voting booth to observe an employee voting. Compare *Imperial Reed & Rattan Furniture Co.*, 118 NLRB 911 (1957). I find this objection completely unsupported by the evidence and will recommend that it be overruled.

c. Objection 3

“During the morning voting session one of the Union’s observers made a sexually derogatory remark and gesture to a female company observer and a voter in the presence of other voters—the Board agent did not admonish the Union’s observer, indicating to the voters present, among other things, the Board would not prevent the Union observers from intimidating voters.”

Because the facts surrounding this objection have been extensively recited above, lengthy additional discussion is not warranted. I have found that Bonales committed the acts of which he was accused. I also found he was duly punished by the Employer for his conduct. To conclude that Bonales’ isolated behavior somehow rendered the entire election void simply does not follow. The number of persons waiting to vote at the time in question was never established with precision. Outside of the principals who actually testified, those who witnessed Bonales’ conduct if any, were never established at all. For example, Mascareno was present at the time but said he saw nothing. Moreover, many voters cast their ballots at other times or places. Finally if other voters did see and hear Bonales, they would have to be influenced in their voting, as measured by an objective standard. But even company supporter Bourgoine didn’t know why Bonales was present at the time and place in question (Tr. 165). Further, the incident occurred after Bourgoine cast his ballot. It is not likely that any other employee who may have witnessed Bonales’ behavior knew more than Bourgoine about why Bonales was there. Accordingly, I cannot conclude that any such voters would have been influenced by Bonales’ acts. As to the Board agent failing to admonish Bonales, I note the Board agent did not testify. There is no credible evidence to establish that he was aware of Bonales’ conduct. Fuentes did not complain to him at the time. Even if the Board agent was

⁸The language difficulties between the mostly Spanish-speaking employees and Bourgoine render widespread dissemination by the latter even less likely.

aware, but did nothing, his conduct and judgment could be questioned, but there would be no reason to void the election.

I find this objection lacking in merit and will recommend that it be overruled.

d. *Objection 4*

“The Board Agent stationed the Union’s observer at the entrance to the voting area such that the Union observer was the only person visible to voters waiting in line to vote. This conveyed the impression that the Union was in charge of the election.”

On election day, Bonales was permitted by the Board agent over the Employer’s objection to wear a union T-shirt and hat. No specific postelection objections were ever filed over this matter.⁹ Notwithstanding how Bonales was dressed as Bourgoine entered the voting area to cast his ballot, the latter was asked if he knew “that Bonales was the union observer?”; Answer, No. Did Bourgoine have any impression that Bonales “was somehow in charge of the [election] process because of where he [Bonales] was seated?” Answer, No. Bourgoine knew only that Bonales was performing the neutral role of traffic cop—that “he was directing people in and pointing towards the ballots.” In sum, Bourgoine did not know why Bonales was there (Tr. 164–165).

Employer witness Martinez testified that when he entered the voting area, he knew the Union was in charge of the election. His conclusion is not only unsupported by the facts of this case, and reasonable inferences flowing therefrom, but his conclusion is unsupported by his own testimony (Tr. 305–306):

Q. How do you know that? [Union was in charge of election.]

A. Because the Company had told us.

Q. What did the Company tell you?

A. That the vote had to be secret.

Q. And how did that indicate to you that the Union was in charge of the election.

A. Because—I don’t remember.

In sum, the Employer’s own witness, Bourgoine, denies the gist of the objection. Another witness, Martinez, is unable to explain his conclusion in any meaningful way. More importantly, no other credible evidence tends to show that in the 1-hour morning voting session, any employee could reasonably have concluded the Union was in charge of the election. Accordingly, I will recommend to the Board that the objection be overruled.

e. *Objection 5*

“The Board agent allowed the Union’s observer who was sitting at the entrance to the polling site to converse improperly with voters and to intimidate voters who were waiting to vote.”

Bonales had a conversation with an employee named Juan Ambriz as the latter was waiting to vote. According to Fuentes, the conversation lasted about 2 minutes or so, but I find that it was much shorter. Ambriz did not testify and

⁹In any event, wearing of such apparel does not constitute interference with an election. *Colfor, Inc.*, 242 NLRB 465 (1979).

the subject of the conversation is not known. The Employer contends (Br. 29), that the conversation in question violates the rule of *Michem, Inc.*, 170 NLRB 362 (1968), where the Board held that “the final minutes before an employee casts his vote should be his own, as free from interference as possible.” I find that the conversation was not prolonged or sustained within the meaning of the Board’s *Michem* rule. I also find in the absence of evidence to the contrary, that the conversation was innocuous and did not involve electioneering. *Resins, Solvents & Varnishes Corp.*, 227 NLRB 959 (1977); see also *Princeton Refinery*, 244 NLRB 1 (1979). In addition, I find that to the extent that Bonales may have violated the Board’s election rule by this brief single conversation, said conduct was harmless error and could not be said to have affected the outcome of the election.

The *Michem* rule was designed to prevent last-minute electioneering in the immediate vicinity of the polls. *Princeton Refinery*, supra, 244 NLRB 1, 2. Therefore it is questionable whether Bonales’ conversation with Ambriz should be considered together with his sexually derogatory comment discussed above, which clearly was not electioneering. In any event, even when all are considered together, I arrive at the same conclusion. The Employer has simply not provided sufficient evidence to prove that a new election is warranted. Therefore, I will recommend that Objection 5 be overruled.

f. *Objection 6*

“The Board Agent allowed the Union’s observer to call out to employees in the plant and to summon them into the voting area.”

I find that from time to time, Bonales did call to employees to come into the voting area to vote. In addition, on one occasion he and Fuentes together went to a department in the factory to summon voters. While the Board agent was remiss in permitting Bonales to behave as alleged, the Board has held that such conduct is not grounds for a new election. See *Amalgamated Industrial Union Local 76B*, 246 NLRB 727 fn. 2 (1979); *San Francisco Sausage Co.*, 291 NLRB 384 fn. 1 (1988). Accordingly, I will recommend that this last objection also be overruled.

CONCLUSIONS OF LAW

1. Respondent Bonanza Aluminum Corporation is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, Teamsters, Chauffeurs, Warehousemen, Industrial and Allied Workers of America, Local 166, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

4. Since April 6, the Union has been the exclusive representative of Respondent’s employees by virtue of Section 9(a) of the Act. (R. Exh. 7).

5. The appropriate unit is:

All production and maintenance employees, shipping and receiving employees, warehouse employees and truckdrivers employed by the Employer at its facilities in Fontana and Ontario, California, excluding all office

clerical employees, professional employees, guards and supervisors as defined in the Act.

On the basis of these findings of fact and conclusions of law and on the entire record in this proceeding, I issue the following recommended¹⁰

¹⁰If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as

ORDER

IT IS ORDERED that the complaint be dismissed in its entirety, and that each and every objection be overruled and that Case 31-RC-6536 be severed and remanded to the Regional Director for Region 31 for certification of representative.

provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.