Grapetree Shores, Inc. d/b/a Divi Carina Bay Resort *and* Virgin Islands Workers Union. Case 24–CA–10700

December 29, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND HAYES

On February 8, 2008, Administrative Law Judge Paul Bogas issued the attached decision.[1] The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

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 briefs[2] and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order as modified.[4]

The judge found that the Respondent violated Section 8(a)(1) of the Act by announcing an improved 401(k) plan 2 days before a representation election among its production and maintenance employees. In its exceptions, the Respondent argues, among other things, that its announcement was lawful under the Board's decision in *Weather Shield of Connecticut*, 300 NLRB 93 (1990). We disagree.

In *Weather Shield*, the employer announced a new pension plan 1 day before a representation election. The Board found no violation because the details of the pension plan were already known and the plan was to become effective on a date certain, shortly after the election. In those circumstances, the Board concluded that the employer's announcement was more akin to the permissible publicizing of an existing benefit than to the announcement of a new or future benefit. Id. at 96–97.

Here, by contrast, the Respondent had neither established the details of the improved 401(k) plan nor settled on a date for implementation before announcing it. Even by the date of the hearing, 4 months later, the Respondent had yet to finalize or implement the improved plan. Given these facts, the Respondent's reliance on *Weather Shield* is misplaced. See *Audubon Regional Medical Center*, 331 NLRB 374, 374 fn. 5 (2000) (distinguishing *Weather Shield* and finding the employer's election-eve announcement of new benefits unlawful, where those benefits were conditioned on future action by the employer and critical details, including their effective date, were not set until months later); *KOFY TV-20*, 332 NLRB 771, 792–793 (2000) (distinguishing *Weather Shield* and finding the employer's preelection announcement of a new 401(k) benefit unlawful because the employer was still negotiating with providers at the time and did not select a provider until 2 months later).[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Grapetree Shores, Inc. d/b/a Divi Carina Bay Resort, Christiansted, St. Croix, U.S. Virgin Islands, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order as modified.

Substitute the following for paragraph 2(a).

[1] This case was originally consolidated with a related representation case, Case 24–RC–8566. In an unpublished Decision, Order, and Direction, dated July 30, 2008, the Board severed and remanded that case to the Regional Director for Region 24 for further processing, which resulted in the Union's certification as the exclusive collective-bargaining representative of the unit employees. See 355 NLRB No. 194 (2010). The Respondent sought to test that certification by refusing to bargain. On December 7, 2010, the Board granted the General Counsel's Motion for Summary Judgment in Case 24–CA–11101. 356 NLRB No. 47. Accordingly, only Case 24–CA–10700 is now before us.

[2] We deny the Respondent's request for oral argument, as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] We shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring,* 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring,* Member Hayes would not require electronic distribution of the notice.

[5] In affirming the judge's finding of a violation, we rely, for the reasons explained above and in the judge's decision, on the fact that the improved 401(k) plan was not an existing benefit on the date of the Respondent's announcement. We therefore find it unnecessary to rely on the additional reasons cited by the judge, including his finding that the Respondent never informed employees about the new benefits before the critical period when it had reached earlier "milestones" in the process of negotiating them, and the lack of evidence showing that the Respondent had made such announcements immediately after governmental approval of earlier agreements providing for new benefits.

Member Hayes would find that the Respondent's announcement of a pending improved benefit, made possible by recently obtained Government approval, was protected speech within the meaning of Sec. 8(c), notwithstanding that all details of the 401(k) plan were not finalized at the time of the announcement. He acknowledges that the majority's finding of a violation is supported by Board precedent, which he would either overrule, if necessary, or decline to extend to the facts presented here.

"(a) Within 14 days after service by the Region, post at its Christiansted, St. Croix, U.S. Virgin Islands facility, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 11, 2007."

Dated, Washington, D.C. December 29, 2010

Wilma B. Liebman, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Jose L. Ortiz, Esq., for the General Counsel.

Charles E. Engeman, Esq. (Ogletree, Deakins, Nash, Smoak & Steward, LLC), of St. Thomas, U.S. Virgin Islands, for the Respondent.

Charlesworth Nicholas, of Christiansted, St. Croix, U.S. Virgin Islands, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. I heard these consolidated unfair labor practice and representation cases in Christiansted, St. Croix, U.S. Virgin Islands, on November 6, 2007. The Virgin Island Workers Union (the Union) filed the charge on July 12, 2007,[1] regarding alleged unfair labor practices by Grapetree Shores, Inc. d/b/a Divi Carina Bay Resort (the Respondent) in advance of a July 13 representation election. Seven of the ballots submitted in that election were challenged, and that number was sufficient to affect the results of the election.[2] Both the Union and the Respondent filed timely objections to preelection conduct. On September 19, the Regional Director for Region 24 issued a report and recommendation on challenged ballots and objections which directed that a hearing be conducted regarding two of the challenged ballots, two of the Union's objections, and four of the Respondent's objections. On September 26, the Regional Director issued a complaint order consolidating the unfair labor practice and representation cases, and notice of hearing. The Regional Director issued a supplemental report on October 11, which directed that another one of the Respondent's objections be consolidated for hearing with the other outstanding issues. The Respondent filed a timely answer in which it denied committing any of the unfair labor practices alleged in the complaint.

The unfair labor practices complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) on or about July 11 by: impliedly threatening its employees with reprisals if the Union was voted in, and announcing the implementation of a 401(k) plan just prior to the representation election. The two union objections being adjudicated in this proceeding are based on the same conduct alleged in the complaint. As for the Respondent's objections, two are based on the allegation that, in the days before the election, an employee who acted as the Union's election observer told banquet department employees that they were the reason the Union lost a previous election and that if the Union did not win the upcoming election "you will see what happens." Two other objections made by the Respondent are based on the allegation that, on the day before the election, the same employee, while in the employee dining room, stated, "I does thank God I don't come to work with a gun because I will kill a lot of people and they will be sorry." The Respondent withdrew its fifth objection after completion of the trial. (R. Br. at 11–12.) One of the two challenged ballots is that of Matthew Moore. The Union challenged that ballot and contends that it should not be counted because Moore did not begin working until after the May 27 eligibility date. The other challenged ballot was submitted by Felicia Dixon. The NLRB agent challenged that ballot and the Respondent contends that Dixon is ineligible to vote because she is unable to work due to an injury and has no reasonable expectation of returning to work.[3]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

[1] All dates are in 2007, unless otherwise indicated.

[2] Of the 87 unchallenged ballots, 45 were cast in favor of representation by the Union, and 42 were cast against representation by the Union.

[3] Five other ballots were challenged by the Union. The parties agreed, and the Regional Director found, that two of those ballots were submitted by ineligible voters—Valmy Thomas and Rosa Aponte—and should not be counted. The Regional Director found that three of the challenged ballots were submitted by eligible voters—Ellen Henry, Karen Nystrom, and Linda Obermann—and should be counted.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Christiansted, St. Croix, U.S. Virgin Islands, operates a hotel and casino where it annually derives gross revenues in excess of $500,000 and purchases and receives goods valued in excess of $50,000 directly from points outside the U.S. Virgin Islands. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

The Respondent operates a resort facility that has 140 to 150 employees. On June 1, 2007, the Union filed a representation petition and on July 13, Region 24 of the National Labor Relations Board (the Board) conducted a secret-ballot election to determine if a unit of approximately 110 employees of the resort[4] wished to designate the Union as the unit's collective-bargaining representative. The question of whether the final tally of votes will be for, or against, representation by the Union is unresolved at this juncture due to challenges to the voting eligibility of a number of the individuals who cast ballots.

Henry Meets with Martin: Richard Patrick Henry is the general manager of the resort. The Respondent admits that he is its agent and a supervisor. In the days before the election, Henry talked to employees, both in groups and individually, about the upcoming election. On July 12, Henry met individually with Vitalis Martin, a housekeeper who had been working for the Respondent since February 2000. Henry and Martin had a good working relationship and had talked on other occasions. Martin testified that she considered Henry "a very good person." The July 12 meeting between the two took place while Martin was at work and no one else was present. Henry asked Martin whether "everything" was "all right." Martin answered, "No." She told Henry that "[t]he people that are around here, they treat people too bad, so this time is different with me; I'll be going with the Union." Henry responded, "Vote for the hotel, everything would be all right."[5] Martin testified that she had been having problems with Henry over her failure to arrive at work promptly, and that she believed Henry's statement that "everything would be all right" related to those problems. On the day after the election, the Respondent terminated Martin's employment, citing her tardiness as the reason.[6]

Announcement Regarding 401(k) Plan: On July 11, Henry gathered employees together during working hours for two group meetings about the election. One meeting was held at about 10 a.m. and the other at about 2 p.m. Each lasted approximately 1 hour and was attended by 25 to 30 employees. Henry understood these to be the last general meetings regarding the upcoming vote that he would legally be permitted to conduct prior to the July 13 election.[7] At these meetings, Henry urged the employees to vote in the upcoming election. He also announced that employees would be receiving enhanced benefits, including a new 401(k) retirement plan, a $10,000 life insurance policy, a new education reimbursement plan, and improved health insurance. Henry indicated that the new benefits were connected to an economic development agreement that the governor of the U.S. Virgin Islands had signed. In addition to discussing the new benefits at the July 11 group meetings, Henry did so during individual meetings with employees, including during a July 12 meeting with Bernicedeen Bryan, one of the Respondent's room attendants.

The record shows that the Respondent had, since 1996 and 1999, been party to economic development agreements with the Government of the U.S. Virgin Islands, under which the Respondent received favorable tax treatment in exchange for meeting certain requirements. The 1996 and 1999 agreements were set to expire in 2006 and 2009 respectively. In order to obtain an extension of the tax benefits, the Respondent was required to negotiate a new agreement with the Economic Development Commission (EDC) of the U.S. Virgin Islands. Any agreement that was reached between the Respondent and the EDC was subject to final approval by the governor of the U.S. Virgin Islands.[8] In 2005, the Respondent began the process of applying for an extension of the tax benefits. A public hearing regarding the Respondent's application was held by the EDC board in February 2006. The Respondent and the EDC board subsequently reached an agreement, which was then referred to the EDC executive committee. On August 11, 2006, the EDC executive committee met regarding the agreement and voted to grant continued benefits to the Respondent. It is not clear what happened with the agreement for the next period of approximately 9 months, but the record shows that, on May 14, 2007, the EDC forwarded the agreement to the Respondent, asking that the Respondent sign and return it to the EDC by May 18. The Respondent signed the agreement, and on June 1, the EDC chairman transmitted the agreement to the governor with a

[4] The unit is defined as "including all full-time and regular part-time production and maintenance employees, including food and beverage, kitchen, housekeeping, maintenance, front desk, communications, bell and guest services, gift shop, activities and grounds; employed by the Employer at its facility located in St. Croix, U.S. Virgin Islands; excluding all other employees, office, clerical employees, guards, and supervisors as defined in the Act."

[5] This is based on the account of Martin. Henry did not have a specific recollection of meeting with Martin, however, he did state that if she was at work he would have talked to her about the election. Henry did not recall telling Martin "vote for the hotel, everything would be all right," but did not claim to recall that he had not made the statement. In the absence of a denial or contrary account from Henry, I accept Martin's credible testimony about their exchange.

[6] There is no allegation in this case that the Respondent's termination of Martin was discriminatory in violation of Sec. 8(a)(3) and (1).

[7] The Board prohibits employers and unions from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election. *Peerless Plywood Co.,* 107 NLRB 427 (1953); see also *Pearson Education, Inc.*, 336 NLRB 979 (2001), enfd. 373 F.3d 127 (D.C. Cir. 2004), cert. denied 543 U.S. 1131 (2005).

[8] According to Henry, it was his understanding that the governor had sometimes rejected such agreements even after the EDC approved them.

recommendation that he approve it.[9] On July 10, the governor approved/signed the agreement. Henry was informed about the governor's action on either July 10 or 11, and first obtained a copy of the document signed by the governor on the morning of July 11.

The EDC agreement states that the tax benefits "are to commence at the option of the Applicant"—in this case the Respondent—and continue for a "10-year period." There are multiple conditions that the Respondent will be required to meet in exchange for the tax benefits. For example, the Respondent must have at least 75 full-time employees, and residents of the U.S. Virgin Islands must comprise at least 80 percent of its employees. The agreement also states that, in order to qualify for the tax benefits, the Respondent is required to provide employees with a retirement plan, health insurance benefits, life insurance, and certain vacation and personal day benefits. The paragraph regarding the retirement plan reads:

> 4. After one year of employment the Applicant will provide its full time employees with a 401(k) or similar retirement plan whereby the employer will contribute up to 2 percent of the employees' base salary to the plan whether or not the employees contributes [sic].

Since this language only states that the Respondent will be required to contribute "*up to* 2 percent," and does not set forth a minimum contribution, it is doubtful that the language of the agreement actually requires the Respondent to make a contribution of 2 percent or any other amount. However, Henry testified to his understanding that the Respondent will be required to contribute 2 percent. That understanding is lent some credence by an earlier, January 26, 2007 letter from the Respondent's attorney to the EDC, which states that the Respondent is confirming that "[a]fter 1 year of employment, [the Respondent] will make a 2 percent contribution across the board to each employee's 401(k) plan . . . whether or not the employee contributes." On the other hand, that letter predated the agreement signed by the parties by over 4 months and the record does not reveal whether the relevant language was modified during that time.

The record shows that the Respondent's previous EDC agreements already provided for the maintenance of a 401(k) plan benefit, but the Respondent was not required to make any contributions and did not do so. Despite the Respondent's July 11 announcement regarding the improved 401(k) benefit, the Respondent had still not made any contributions at all to employees' 401(k) plans as of the time of the trial, 4 months after the election.[10] Henry testified that the Respondent would make the 2-percent contribution based on employees' yearend earnings for 2007, but he did not provide a date when this would occur, other than to say it would be some time before April 15, 2008. The Respondent, he said, was still working with a plan provider to develop a 401(k) plan that would meet Federal requirements.

At the trial, Henry testified that he had not discussed the new benefits with employees prior to July 11. He had not, in other words, discussed those benefits with employees when the EDC board approved the agreement, when the EDC executive committee approved it, when the Respondent signed the final agreement, or when the EDC chairman referred the agreement to the governor with a recommendation that he sign it. Henry offered the following explanation for his decision to announce the yet-to-be-finalized benefits to employees during the July 11 meetings:

> I felt it was important for them to understand all—it was a new benefit. We were excited to get it, I mean, not only from the ownership of the property. The ownership was glad because this extension goes to 2019, which guarantees that we have these benefits from the government until 2019, so it's a great benefit for the ownership of the property. I think it's also a great benefit for the employees and it's important for the employees to be informed and know what's going on. I could not announce it before I got the governor's signature. Or I felt very uncomfortable. I mean, it was not a done deal until we actually had the governor of the Virgin Islands sign it.

Henry did not explain why he thought that it was "important" that, during the July 11 meeting regarding the upcoming election, employees "be informed" about the new benefits. As of July 11, the Respondent had not set an implementation date for the new 401(k) benefit and some elements were yet to be finalized. As of the trial date, almost 4 months later, most of the new benefits, including the improved 401(k) plan, had still not been implemented. Henry did not specifically deny that the reason he thought it was important that employees be informed about the benefits on July 11, rather than on a later date close in time to implementation, was that he hoped hearing about the new benefits before the July 13 election would influence how employees voted.

B. Analysis

The General Counsel alleges that the statements Henry made to Martin during their July 12 meeting constituted an implied threat of reprisals, and violated Section 8(a)(1). The Respondent counters that Henry's conversation with Martin was innocuous and that his comment "vote for the hotel, everything will be all right" was an acceptable statement of opinion. In deciding whether a remark is threatening in violation of Section 8(a)(1), the Board applies the objective standard of whether the remark would reasonably tend to interfere with the free exercise of employee rights, and does not look at the motivation behind the remark, or rely on the success or failure of such coercion. *Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998); *Miami Systems Corp.*, 320 NLRB 71, 71 fn. 4 (1995), affd. in relevant part 111 F.3d 1284 (6th Cir. 1997). When applying this standard, the Board considers the totality of the relevant circumstances. *Mediplex of Danbury*, 314 NLRB 470, 471 (1994).

[9] June 1 was also the date on which the Union filed its representation petition.

[10] At the time of the trial, the Respondent had also failed to implement the new life insurance benefits and improved sick days benefit, but had implemented the educational reimbursement plan.

I conclude, based on the totality of the relevant circumstances, that Henry did not violate Section 8(a)(1) during the July 12 conversation with Martin. On its face, Henry's comment that "everything w[ould] be all right" if Martin voted "for the hotel," was a simple statement of Henry's opinion regarding the advisability of rejecting union representation. The General Counsel's argument that the statement was coercive and threatening is based on a supposed connection between the statement and Martin's pending discipline problems over tardiness. However, during the conversation Henry made no mention of tardiness, performance problems, or the possibility of discipline. Nothing in the record leads me to conclude that, during the preelection period, Martin had a reasonable basis for believing that such matters were a subtext of Henry's facially benign comment. See *Miami Systems Corp.*, 320 NLRB 71 fn. 4 ("The test to determine interference, restraint, or coercion under Sec. 8(a)(1) is an objective one, and thus it is not dependent on an employee's subjective interpretation of a statement.").

In reaching my conclusion that Henry's statements were not threatening, I considered the fact that Henry and Martin had a good working relationship, had talked on other occasions, and that Martin considered Henry a "very good man." Although, Martin told Henry that she intended to vote for the Union, Martin disgorged that information of her own accord, not in response to questioning by Henry about her union sentiments or intentions. Under these circumstances, I conclude that the General Counsel has failed to show that anything Henry said to Martin on July 12 was objectively coercive.

For the reasons discussed above, I conclude that the complaint allegation that the Respondent violated Section 8(a)(1) by threatening employees with reprisals should be dismissed.

The General Counsel alleges that the Respondent interfered with employees' Section 7 rights in violation of Section 8(a)(1) when it announced benefits, including an improved 401(k) plan, on July 11 and 12—during the final 2 days before the representation election. As stated in *Mercy Hospital Mercy Southwest Hospital*, the Board will infer that an employer's announcement or grant of benefits during the critical period before a representation election is coercive, but the employer may rebut that inference by establishing an explanation other than the pending election for the timing of the announcement or bestowal of the benefit. 338 NLRB 545 (2002), citing *STAR, Inc.*, 337 NLRB 962 (2002); accord: *American Red Cross*, 324 NLRB 166 fn. 2 (1997), and *Southgate Village, Inc.*, 319 NLRB 916 (1995). Even when the new benefit has been in the works and its approval shortly before an election is not itself unlawful, a violation has been found where the respondent failed to establish a legitimate reason for timing the announcement before the election, rather than waiting to make the announcement afterwards. *American Red Cross*, supra at 166 fn. 2, 170–171.

In the instant case, Henry made the announcement regarding the new 401(k) benefits and other improved benefits during the critical period preceding the representation election, thus giving rise to an inference that the timing of the announcement was coercive. That inference is particularly strong in this case given that the initial announcement was made only 2 days prior to the election, at group meetings that the Respondent convened about the election, and on the last day that such meetings were permitted. On July 12, the day before the election, Henry discussed the new benefits with one or more employees during individual meetings. The U.S. Supreme Court has explained why such "well-timed" announcements of benefits are coercive, stating:

> The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

NLRB v. Exchange Parts Co., 375 U.S. 405, 409 (1964).

Since the Respondent's announcement of new benefits raises an inference of unlawful coercion, the Respondent must establish that it announced the benefits when it did for some reason other than the upcoming representation election. The Respondent's burden is "to show that its announcement was reasonably timed as a sequential step in, and a byproduct of, a chronology of conception, refinement, preparation, and adoption, so as to lead one reasonably to conclude that the announcement would have been forthcoming at the time made even if there were no union campaign." *Snap-On Tools, Inc.*, 342 NLRB 5, 14 (2004), quoting *Arrow Elastic Corp.*, 230 NLRB 110, 113 (1977), enfd. 573 F.2d 702 (1st Cir. 1978). The Respondent attempts to meet its burden by arguing that the reason it announced the new benefits on July 11 and 12, was that the governor had approved the Respondent's agreement with the EDC on July 10. Although this contention has some facial appeal, for the reasons discussed below, I conclude that the Respondent has failed to show that the governor's July 10 action would have caused it to announce the yet-to-be-finalized benefits to employees on July 11 and 12, if not for the fact that a representation election was scheduled to take place on July 13.

First, the governor's approval of the EDC plan was only one of multiple milestones along the way to implementation of the new benefits. The Respondent had not notified employees when, prior to the filing of the representation petition, the previous milestones were reached. More specifically, the Respondent did not notify employees when the Respondent and the EDC reached an agreement regarding new employee benefits, or when the EDC executive committee voted to accept that agreement on August 11, 2006, or when the Respondent signed the agreement in May 2007, or when the EDC forwarded the agreement to the governor in June 2007, with a recommendation for approval. The fact that the Respondent failed to tell employees about the new benefits it was developing prior to the critical preelection period undermines its contention that the timing of the grant of benefits was governed by factors other than the election. See *Dlubak Corp.*, 307 NLRB 1138, 1161 (1992), enfd. mem. 5 F.3d 1488 (3d Cir. 1993).

The governor's approval of the EDC agreement was also not the final milestone along the way to implementation of the benefits. The Respondent failed to show any reason, other than the upcoming election, why yet-to-be-finalized benefits had to be announced immediately after the governor signed the EDC agreement. Indeed 4 months after the election, the Respondent had still not implemented the new 401(k) plan, the new life

insurance benefit, or the improved sick leave that Henry chose to announce on July 11 and 12. At the trial, Henry was unable to say with specificity when the new 401(k) plan would be implemented and he conceded that the Respondent was still working with a plan provider to develop a 401(k) plan that would meet Federal requirements. Under similar circumstances the Board, in *Audubon Regional Medical Center*, found an employer's preelection announcement of benefits was coercive because, inter alia, there was no date certain for the implementation of the benefit and critical details were still being worked out. 331 NLRB 374, 374 fn. 5 (2000). Indeed, according to Henry's testimony, the first 401(k) contributions by the employer might not be made until sometime before April 15, 2008—9 months after the preelection announcement. In *Snap-On Tools, Inc.*, the Board found a violation of Section 8(a)(1) after the administrative law judge concluded that the employer "presented no evidence whatsoever justifying the timing of its announcement 2 days before the election of a change that was not going to occur until some 9 months in the future." 342 NLRB at 14. Similarly, the Respondent's failure to explain why it decided to announce the yet-to-be-finalized 401(k) benefit on July 11, rather than waiting until a time close to the implementation, undercuts its defense here. The Respondent has failed "to show that its announcement was reasonably timed as a sequential step in, and a byproduct of, a chronology of conception, refinement, preparation, and adoption, so as to lead one reasonably to conclude that the announcement would have been forthcoming at the time made even if there were no union campaign." *Snap-On Tools, Inc.,* supra. Rather the record evidence leads me to conclude that the Respondent rushed to announce the yet-to-be-finalized benefits on July 11 and 12 in the hopes that such knowledge would influence how employees voted on July 13.

The Respondent's effort to tie the July 11 announcement to the governor's approval of the EDC agreement is further undermined by the fact that the language of the agreement did not actually trigger an obligation on the part of the Respondent to implement the new benefits. Although the agreement states that in exchange for tax benefits the Respondent will provide certain benefits to employees, it also states that the benefits are "to commence at the option of the" Respondent. Thus, the agreement signed by the governor, on its face, did not require the Respondent to do anything unless and until the Respondent exercised its option to commence tax benefits under the new agreement. See *Arrow Elastic Corp.*, 230 NLRB at 113 ("It is not enough that the employer had previously decided on the grant of such benefits, if in fact it had not become lawfully committed to provide such benefits prior to the union campaign."). The record does not show that the Respondent had exercised that option as of July 11, or even as of the time of the trial. Assuming that the Respondent had taken action to commence the benefits as of July 11, it is still not clear that the newly finalized EDC agreement would mandate any significant change in the 401(k) benefit since the agreement's language only requires employer contributions of "*up to* 2 percent," and does not set forth any minimum contribution level. For this reason I believe that implementation of the 2-percent contribution to employees' 401(k) plans is, at best, rather loosely tethered to the EDC agreement.

The Respondent's contention that it would have made the announcement of benefits on July 11 based on the governor's action regarding the EDC agreement, even absent the upcoming election, would be more persuasive if the Respondent had shown that it made such announcements immediately after the governor approved the EDC agreements that took effect in 1996 and 1999. However, the Respondent presented no such evidence. Moreover, I consider it telling that Henry never specifically denied that he accelerated the announcement of the yet-to-be-finalized benefits in an effort to influence the election or that the reason he thought it was important that employees be informed about those benefits on July 11 and 12, was that such information might encourage employees to vote against union representation. Given this, and the other evidence discussed above, I conclude that the Respondent has failed to rebut the inference that its preelection announcement of the new benefits was coercive. Indeed, the evidence persuades me that, to the contrary, the Respondent rushed to announce the improved 401(k) plan benefit, and other new benefits, on July 11 and 12 in the hopes that doing so would influence how employees voted in the July 13 election.

For the reasons discussed above, I find that the Respondent interfered with, restrained, and coerced employees in violation of Section 8(a)(1) of the Act when it announced the new 401(k) plan benefit during the final 2 days before the scheduled July 13 representation election.

III. CHALLENGED BALLOTS

Two ballot challenges are before me in this consolidated proceeding. One challenge was made by the Board agent, and concerns the ballot that was cast by Felicia Dixon. The other challenge was made by the Union and concerns the ballot cast by Matthew Moore. For the reasons stated below, I overrule the objection made to the ballot of Dixon and sustain the objection made to the ballot of Moore.

A. Felicia Dixon

1. Facts

Dixon began working for the Respondent as a housekeeping employee on May 9, 2002. She served as an observer for the Union during a representation election conducted in 2006. During her tenure with the Respondent, Dixon experienced at least two work-related injuries that caused her to miss work. The first was in 2004. Subsequent to that injury, Dixon returned to work, and she worked on and off until June 27, 2006, when she experienced another work-related injury. She returned to work from that injury in November 2006, and worked until December 2006.

In a note dated December 6, 2006, a chiropractor stated that Dixon was not fully recovered and should avoid "heavy lifting, excessive bending, pushing and pulling until her condition improves further." Dixon gave the chiropractor's note to Henry before beginning a vacation. In January 2007, Dixon returned from her vacation, but after she had worked for about 3 hours she was placed on a leave of absence by the Respondent's housekeeping director. The housekeeping director gave Dixon

a letter, dated December 30, 2006, which stated that the Respondent had received the chiropractor's note, but that the Respondent did not have "light-duty" assignments in the housekeeping department, and that there were no other openings that Dixon was qualified to fill. The letter stated that the Respondent was placing Dixon on leave of absence until it received a physician's assurance that Dixon was fully recovered and could return to work without restriction. Dixon has not worked for the Respondent since that time. However, after the Respondent placed Dixon on leave of absence, it continued to include Dixon's name on the weekly work schedule that it posted and distributed to employees. Rather than listing work hours next to Dixon's name, the schedule stated, "OUT." In May 2007, Dixon renewed the Virgin Islands Casino Control Commission card that she was required to have in order to be eligible for work with the Respondent.

Dixon had an orthopedic evaluation on April 25, 2007, that was part of the process regarding her workers' compensation claim. The physician who completed that evaluation reported that Dixon could return to work, but that she should not lift more than 40 pounds. He further stated that he believed Dixon had "reached maximal medical improvement." Workers' compensation authorities subsequently referred Dixon for another medical evaluation. The physician who completed the second evaluation reported, on August 14, 2007, that Dixon was presently able to perform only light-to-medium duty work, but that she had not reached "a permanent stationary level of improvement," and that her level of recovery could be improved through further treatment. As of the time of trial, Dixon was receiving workers' compensation payments for her work-related injuries.

It is undisputed that Dixon had been on leave of absence for more than 6 months at the time of the July 13 election. Henry testified: "Basically, we have a 6-month policy that allows for anyone that is in excess [of] six months is without employment any longer." According to Henry, this policy was part of "the collective-bargaining agreement." However, Henry conceded that the collective-bargaining agreement he was referring to was a contract *proposa*l that the Respondent itself had never agreed to. He stated that the Respondent nevertheless followed some terms of the proposed agreement. The provision in that proposed agreement that Henry says set the 6-month time limit on leaves of absence states in relevant part: "Seniority rights shall terminate for any of the following reasons: . . . c. Failure to work for the Employer for a period of six (6) consecutive months." (R. Exh. 4, at sec. 8.5.) Although Henry testified that this meant that Dixon's employment had been terminated by the date of the election, the evidence showed that the Respondent neither notified Dixon that her employment was being terminated nor placed anything in its records stating that her employment had ended. Indeed, a work schedule that the Respondent posted and distributed for the week of the July 13 election included Dixon's name, although it did not list any work hours for her.[11]

2. Analysis

Under the well-established Board standard, an employee on sick or disability leave is presumed to be eligible to vote absent an affirmative showing that the employee has resigned or been discharged. *Home Care Network, Inc.*, 347 NLRB 859, 859 (2006), citing *Red Arrow Freight Lines*, 278 NLRB 965 (1986), and *Pepsi-Cola Co.*, 315 NLRB 1322 (1995); see also *Hospital del Maestro*, 323 NLRB 93, 95 (1997) ("The party seeking to exclude an individual from voting has the burden of establishing that the individual is ineligible to vote."). In this case, Dixon was on a leave of absence due to her disability and the Respondent has failed to make the necessary affirmative showing that she had resigned or been discharged. The Respondent's assertion that it terminated Dixon before the election is frivolous. The Respondent's own witness, Henry, admitted that the Respondent never informed Dixon that she was being terminated and did not record Dixon's supposed termination in its own files. During the week of the election, the Respondent still listed Dixon as an employee on a work schedule that it posted and distributed to employees.

Notwithstanding the above, Henry testified that pursuant to a provision in a proposed labor contract, Dixon's employment would have ended on either June 14 or July 4, 2007, since she had not worked in 6 months. I find that testimony to be unworthy of credence in light of the facts, discussed above, that the Respondent never told Dixon she was terminated, never documented the supposed termination, and continued to list Dixon as an employee on work schedules. The provision Henry says triggered Dixon's discharge was part of a proposed labor contract that the Respondent never ratified, and which even Henry did not claim the Respondent followed in its entirety. Moreover, the provision cited by the Respondent does not say anything about the termination of employment after 6 months, but rather concerns the termination of *seniority rights*. An individual without seniority rights may still be an employee. Indeed, the proposed labor contract relied upon by the Respondent states that an employee has no seniority rights during the 90-day probationary period. Respondent's Exhibit 4, sections 8.6 and 9.1; see also *Westlake Plastics Co.*, 119 NLRB 1434, 1436 (1958) (persons who are probationary employees on the eligibility date and on the date of the election are entitled to vote in representation election). Seniority rights under the provision relied upon by the Respondent affect an employee's treatment during layoff and recall, see Respondent's Exhibit 4, section 8.1, but neither layoff nor recall is at issue here. Thus, even assuming that the Respondent adheres to the provision regarding termination of seniority rights after a 6-month absence from work, that would not mean that Dixon's employment had terminated.

In addition, I note that while Henry was generally a confident witness, he appeared uncertain on the subject of Dixon's supposed termination. For example, he did not state that the Respondent had a clear policy of automatically terminating anyone who did not work for 6 months, but rather testified, "*Basically*, we have a 6-month policy that *allows* for anyone

[11] The copy of this schedule that was introduced at trial had a line through Dixon's name, but there was credible testimony that the line did not appear when the schedule was posted. Tr. 106. The Respondent subsequently took down the schedule that bore Dixon's name, and posted a new version with Dixon's name excised.

that is in excess [of] 6 months is without employment any longer." Even assuming the existence of such a policy, that would only mean that the Respondent was *allowed* to terminate Dixon, not that the Respondent actually did so. Indeed, the lack of documentation for Dixon's supposed termination, and Dixon's inclusion on the employee work schedules indicates that any policy on the subject was not applied to terminate Dixon's employment prior to the election. Moreover, if the Respondent had actually terminated Dixon's employment prior to the election, one would expect that Henry, its general manager, would be able to say when precisely that termination occurred. However, Henry could do no better than to provide two dates—June 14 and July 4—on which he said the termination would have occurred given his understanding of the Respondent's policy. Based on Henry's demeanor and testimony regarding Dixon, and the record as a whole, I do not credit Henry's claim that Dixon's employment was terminated prior to the election. Any weight that testimony deserves is outbalanced by the evidence showing that the Respondent had not actually terminated Dixon's employment.[12]

For the reasons discussed above, the challenge to Dixon's ballot is overruled and her ballot must be opened and counted.

B. Matthew Moore

1. Facts

The election eligibility date is May 27, 2007. Moore, an activities attendant, was hired by the Respondent on May 25, 2007, and underwent an unpaid orientation on that date. However, the uncontradicted evidence showed that Moore's first day actually performing his job was May 30, 2007. That was also the first day for which he was paid by the Respondent.

2. Analysis

To be eligible to vote in a Board-conducted election, the employee must be employed and working on the eligibility date, unless the employee is absent for one of the reasons set out in the direction of election. *CWM, Inc.*, 306 NLRB 495 (1992). The Board defines "working" under this "requirement as meaning 'actual performance of bargaining unit work,' excluding 'participation in training, orientation or other preliminaries.'" Id., citing *Emro Marketing Co.*, 269 NLRB 926 fn. 1 (1984), and *Roy Lotspeich Publishing Co.*, 204 NLRB 517 (1973). In this case, Moore had undergone an unpaid orientation, but had not started the actual performance of bargaining unit work as of the May 27 eligibility date. Therefore, he was ineligible to vote. In its posthearing brief, the Respondent conceded the legitimacy of the Union's challenge to Moore's ballot. (R. Br. at p. 2 fn. 1.) Accordingly, I sustain the challenge to Moore's ballot.

IV. OBJECTIONS TO THE ELECTION

A. Union's Objections 1 and 4

The conduct that the Union relies on to support Union Objections 1 and 4 is the same conduct that was at issue in the unfair labor practice case.[13] As found above, the allegation that Henry unlawfully threatened Martin during their conversation on July 12 was not substantiated. Based on the totality of the relevant circumstances, I concluded that Henry's statements to Martin were innocuous statements of opinion and were not threatening or coercive. For the same reasons, I conclude that Henry's statements to Martin were not objectionable election conduct. Therefore, the Union's objection based on that conduct (U. Objection 1) is overruled.

As discussed above, I found that the Respondent violated Section 8(a)(1) when, during the final 2 days before the representation election, it announced that it would provide an improved 401(k) plan. "It is well established that '[c]onduct violative of Section 8(a)(1) is, *a fortiori*, conduct that interferes with the exercise of a free and untrammeled choice in an election.'" *Sea Breeze Health Care Center*, 331 NLRB 1131, 1133 (2000), quoting *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786–1787 (1962). "Thus, the Board's policy is to direct new elections in cases where unfair labor practices have occurred during the critical preelection period, unless the conduct is so de minimis as to warrant a finding that it did not impact on the election results." Id. In this case, Henry announced a significant new benefit during the final 2 days before the election. Henry made this announcement at two group meetings that the Respondent convened on July 11 to discuss the election. Each of those meetings was attended by 25 to 30 employees, out of the approximately 110 who were eligible to vote. In addition to discussing this benefit at the July 11 group meetings, Henry did so during individual meetings with one or more employees on July 12. The announcement of a significant new benefit to so many of the eligible voters during the final 2 days before the election clearly could have an effect on that election, especially since the election will be decided by only a few votes. *NLRB v. V & S Schuler Engineering, Inc.*, 309 F.3d 362, 372 (6th Cir. 2002) (when election is close a party's misconduct is more likely to taint the election result). Thus, the Respondent's conduct was not de minimis in the context of this election. The Union's objection based on the Respondent's announcement of a new 401(k) plan benefit (U. Objection 4) is sustained. In the event that the Respondent prevails after all valid votes are counted, the election should be set aside, and a second election directed.

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[12] The Respondent contends that the "correct legal analysis" is whether Dixon had a "reasonable expectancy of recall." R. Br. at p. 6–7. However, as even the Respondent recognizes, the Board recently reaffirmed its rejection of that legal standard in *Home Care Network, Inc.*, supra. If the Respondent's argument in favor of a change to the Board's well-established legal standard has merits, those merits are for the Board to consider, not me. I am bound to follow Board precedent on the subject. See *Hebert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993); *Lumber & Mill Employers Assn.*, 265 NLRB 199 fn. 2 (1982), enfd. 736 F.2d 507 (9th Cir. 1984), cert. denied 469 U.S. 934 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981).

[13] U. Objections 1 and 4 state:

(1) The Union is objecting that the management of the hotel interfered with Section 7 rights of the employees to become members of the Virgin Islands Workers Union.

(4) During the same week of July 9, 2007 management proposed a 401 K Retirement Plan.

B. Employer's Objections 1 and 2

1. Facts

The Respondent is forwarding four objections, all based on alleged preelection statements by Lucy Edward—an employee who served as the Union's election observer. Respondent Objections 1 and 2 are based on statements allegedly made by Edward to a group of employees who worked in the Respondent's banquet department.[14] The only witness who testified about these statements was Phyllis Blackman, an assistant captain in the banquet department. Blackman testified that, during the final 2 weeks before the election, when the banquet department employees went to lunch, a number of other employees made statements to them regarding the upcoming election. According to Blackman, "They would tell us the Union is coming back and we—should we with the Union didn't get in the first time and if we don't let them in this time, we will see." Blackman also testified that these employees stated: "The Union is coming back and they know the last—we's the one that get the Union not to be there and if we get them there this time, we will see. They kept telling us that." Blackman testified that she considered these statements threatening.

Blackman consistently attributed the comments to a group of other employees—none of whom she identified by name. She never testified that Edward made the comments that the Respondent argues were objectionable. In fact, Blackman testified that she never had a conversation with Edward regarding the Union and never found out Edward's position regarding the Union. She said that Edward was present at the polling place during the election, distributed "paper" to the banquet employees, and gave the banquet employees a "strange look," but she did not say that Edward said anything to the banquet workers at that time. Blackman did not claim that she knew that the reason Edward was present at the polling place was to serve as a union observer.

Based on the above, I conclude that the evidence does not show that Edward, or anyone else the Respondent claims was the Union's agent, made the statements that Blackman says she considered threatening. At any rate, I found Blackman's recollection about the specifics of the supposed threats to be a bit of a muddle. For example, first she testified that the other employees had said that if the Union *did not* get in this time "we will see." Then she testified that what the other employees said was that if the Union *did* get in this time "we will see." Blackman's recollection of the specifics of the allegedly threatening statements was not, in my view, reliable. To the extent employees other than Edward made comments to the banquet department workers as they went to lunch, the record does not establish with any certainty the specific language that was used.

2. Analysis

It is well settled that when an employer objects on the basis of conduct engaged in by employees who are supporters, but not agents, of the Union, the objecting party must establish that the conduct "was so aggravated as to create a general atmosphere of fear and reprisal rendering a fair election impossible." *Cal-West Periodicals*, 330 NLRB 599, 600 (2000). As the Board has noted, courts are hesitant to overturn elections based on statements that cannot be attributed to the parties because there generally is less likelihood that statements by nonparties affected the outcome. Id., quoting *NLRB v. Eskimo Radiator Mfg. Co.*, 688 F.2d 1315, 1319 (9th Cir. 1982), and *NLRB v. Mike Yurosek & Sons*, 597 F.2d 661, 663 (9th Cir.), cert. denied 444 U.S. 839 (1979).

As stated above, I do not consider Blackman's testimony reliable regarding the specifics of what other employees said to the banquet workers. Assuming for purposes of discussion that employees told the banquet workers something along the lines of what Blackman recounted—i.e., that banquet department workers were responsible for the Union's defeat in the previous election and that if the Union did not win this time (or if the Union did win this time) "we will see" what happens—I conclude that such statements were not threatening, much less so aggravated as to create a general atmosphere of fear and reprisal rendering a fair election impossible. On its face, "we will see" is a benign statement and Blackman did not report any actions or comments linking the statement to violence or other forms of retaliation. It was not shown that any employee who has made such statements had evidenced a propensity for violence or had the ability to negatively affect the employment of the banquet department employees. The record does not, in my view, provide a reasonable basis for believing that the statement "we will see" what happens after the election, meant anything more than that employees would see how working conditions were affected by the election outcome. Such a statement, especially when made by a nonagent, is even more innocuous than Henry's comment that "everything would be all right" if employees voted against the Union.

I conclude that the evidence does not substantiate Respondent Objections 1 and 2, and those objections are overruled.

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[14] R. Objections 1 and 2 state:

(1) Petitioner, through its agents and supporters, interfered with the laboratory conditions necessary for conduct of a secret ballot election by threatening Banquet Department employee(s) (which consists of thirteen (13) employees on the Excelsior list), stating, on repeated occasions during the two (2) week period before the election, words to the effect of that the Banquet Department was the reason that the Petitioner lost the election in 2006 and that, if these employees caused the Petitioner to lose again, the Banquet Department employee(s) would see what happens. The Banquet Department employee(s) took this as a threat to their physical and/or financial well-being.

(2) Petitioner, through its agents and supporters, interfered with the laboratory conditions necessary for conduct of a secret ballot election by telling Banquet Department employee(s), on repeated occasions, words to the effect of that the Banquet Department was the reason that the Petitioner lost the election in 2006 and that, if these employees caused the Petitioner to lose again, the Banquet Department employee(s) would see what happens. The Banquet Department employee(s) took this as an indication that the Union had a way of knowing how individual employees voted and that their votes would not be secret further interfering with the conduct of a free and fair election.

C. Respondent's Objections 3 and 4

1. Facts

Respondent Objections 3 and 4 concern a threatening statement allegedly made by Edward in the employee dining hall on July 12—the day before the election.[15] The Respondent did not present any live testimony at the trial to show that Edward made the statement. Instead it relies on the written declarations, made pursuant to 28 U.S.C. § 1746, by Melissa Pereira and Brandy Pereira—both of whom were employees of the Respondent at the time they signed the declarations.[16] The two declarations use identical language to describe Edward's alleged conduct. Both read in relevant part:

> The day before the Union election, Thursday July 12, 2007 at approximately 4:28 or 4:29 p.m., Ms. Lucy Edwards, a strong union supporter, came into the Employee Dining Room ("EDR") and stood in the middle of the EDR and raised her hands in the air and said "I does thank God I don't come to work with a gun because I will kill a lot of people and they will be sorry."
>
> I firmly believe that she meant that she wanted to shoot openly anti-Union employee(s) and/or those she assumed did not support the Union.

The declarations are both dated July 25, 2007.

Edward testified that she comes to the employee dining room at about 4:29 or 4:30 p.m. to use the timeclock and that the employees there "joked around." However, Edward emphatically denied that she ever made any comments about bringing a gun or killing people. She also testified that she did not speak to Melissa Pereira or Brandy Pereira on July 12, and denied that she raised her hands over her head and made a statement in the employee dining room.

I considered Edward to be a somewhat, but not highly credible witness. She testified confidently and with certainty about the matters at issue. On the other hand, she had an affected, even theatrical, demeanor that made her testimony seem at times a bit rehearsed. In addition, in at least one instance she gave testimony that could be seen as evasive. She was asked on direct examination whether she recalled meeting Melissa and Brandy Pereira in the employee dining room on July 12, and she responded, "I doesn't go to the [employee dining room] for lunch." However, on cross-examination she conceded that she went to the employee dining room at about 4:30 p.m. every day to use the timeclock. Nevertheless, nothing that occurred during Edward's cross-examination shook her certainty regarding the matters at issue or impeached her denial of the alleged threat in a significant way.

Turning to the written declarations of Melissa and Brandy Pereira—I did not have the opportunity to observe the demeanor of the declarants and do not have the benefit of knowing how they would have responded to questioning. However, the fact that the two declarations use exactly the same language, word-for-word, detracts somewhat from their weight. It gives the impression that the declarations are not in the declarants' own voices, but rather were prepared for them without meticulous attention to the details of how each declarant described what she had seen and heard. In addition, although both declarants state that they believed Edward "meant that she wanted to shoot openly anti-Union employee(s)," neither was shown to have taken any action consistent with such a belief. For example it was not shown that either individual reported Edward to the employer or law enforcement authorities, or took steps to avoid her or protect themselves. Finally, since neither witness took the stand, there was no opportunity to address the possibility that, as employees of the Respondent, they felt pressured to sign declarations that were favorable to the Respondent.

In short, I am presented with two conflicting accounts, neither of which in my view is highly credible. Having considered this evidence, I cannot find a basis for crediting the account in the declarations over the one Edward provided during her live testimony. Therefore, it has not been shown, by a preponderance of the evidence, that Edward engaged in the conduct alleged to be objectionable, and Respondent's Objections 3 and 4 are overruled.

2. Analysis

Even had I concluded, contrary to the above, that Edward made the statement alleged, that statement would not warrant overturning the election results. The first question is whether Edward's conduct was that of an agent of the Union, or of a third party. If Edward was not acting as an agent of the Union when she made the alleged statement, the Respondent's objection can be sustained only if the statement "was so aggravated as to create a general atmosphere of fear and reprisal rendering a fair election impossible." *Cal-West Periodicals*, 330 NLRB at 600. Under applicable Board precedent, I conclude that Edward was not shown to be an agent of the Union. There was no evidence that she was a union officer or had been asked by the Union to serve as its organizer, or spokesperson. Although Edward was a union election observer on July 13, her alleged conduct on July 12 did not occur while she was serving in that capacity and was outside her responsibilities as an observer. Under such circumstances, the Board has found a prounion employee's service as a union election observer insufficient to

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[15] R. Objections 3 and 4 state:

> (3) Petitioner, through its agent and supporter, interfered with the laboratory conditions necessary for conduct of a secret ballot election by making a statement in the Employee Dining Room in front of a number of potential voters, the night before the election, to the effect of that it was a good thing that Petitioner's agent and supporter did not walk with her gun because if she had walked with her gun a lot of people would be in trouble. The employees who heard this statement interpreted it to mean that she wanted to shoot openly anti-representation employee(s) and/or those she assumed did not support the Petitioner.
>
> (4) Petitioner interfered with the laboratory conditions necessary for conduct of a secret ballot election by making the individual who had made the threatening comments about the gun (and other threatening statements) the Petitioner's observer at the election the following day causing intimidation and fear of harm for those voters who had heard the threatening comments or about those comments, which had spread to numerous employees, particularly in light of the statements that inferred that the Petitioner and/or its agents knew how employees had voted.

[16] The Respondent and the Union reached a stipulation that Melissa Pereira and Brandy Pereira would have testified consistently with their written declarations had they appeared as witnesses in the proceeding.

render that employee an agent of the union. For example, in *Windsor House C & D*, 309 NLRB 693 (1992), an individual who served as a union election observer was found not to be an agent of the union and the third-party standard was applied to evaluate conduct that was outside the individual's responsibilities as an observer. See also *Dunham's Athleisure Corp*., 315 NLRB 689, 690 (1994) (although individual was union's election observer, "no evidence in the record that he was a general agent for [the union]"); *Advance Products Corp.*, 304 NLRB 436 (1991) (same). Therefore, Edward's alleged statement must be evaluated under the standard applicable to conduct by third parties.

I find that the conduct described in the declarations does not approach the standard of being "so aggravated as to create a general atmosphere of fear and reprisal rendering a fair election impossible." To start with, the declarations do not show that Edward's alleged statement had anything to do with the election or the Union. Even according to the accounts in the declarations, Edward never mentioned, or alluded to, the upcoming election or the Union. Neither declarant claimed that Edward was talking to persons who were known to oppose the Union or that she appeared to intend for the statement to be heard by such persons. Therefore, even assuming that Edward made the statement described in the declarations, there is insufficient record evidence to link that statement to the representation election. The proximity of the election, and Edward's support for the Union, are not enough to show that Edward's alleged expression of anger would reasonably be understood by other employees to relate to the election, rather to any one of the many other subjects about which individuals become angry at work. A single statement, even one threatening violence, that did not mention or allude to the Union or the upcoming election, and which was not shown to be made to persons because of their views regarding the upcoming election, cannot reasonably be seen as conduct that "create[d] a general atmosphere of fear and reprisal rendering a fair election impossible."

In addition, there was nothing in the record to suggest that employees would have a reasonable basis for believing that Edward meant that she was actually prepared to engage in gun violence against other employees. She was not shown to have taken part in violence of any kind in the past, nor was it shown that she carried or owned a gun. Although both declarants, in identical language, stated a belief that Edward meant that she wanted to shoot openly antiunion employees such a subjective interpretation by employees is irrelevant to the question of whether the statement was objectionable conduct. "The test is not a subjective one, but an objective" one, and "the subjective reactions of employees are irrelevant to the question of whether there was in fact objectionable conduct." *Lake Mary Health & Rehabilitation*, 345 NLRB 544, 545 (2005). At any rate, the record here undercuts the declarants' claim that they felt subjectively threatened or coerced by Edward. There was no evidence, for example, that either declarant reported Edward to company officials or law enforcement authorities, sought to protect themselves, or took steps to avoid Edward. Moreover, neither of the declarants stated that they had any reason to believe that Edward would know how employees voted on July 13.

The accounts of the declarants were also lacking in details that would be necessary, under the circumstances present here, to find that Edward's alleged statements were coercive. Edward testified that she and other employees "joked around" in the employee dining room. The declarants do not state whether Edward was laughing or otherwise "joking around" when she made the alleged statement. Although the declarants report that they overheard Edward's statements, they do not reveal who Edward was actually talking to. There is no way of knowing whether Edward was addressing a friend, a group of friends, a person or persons known to oppose the Union, or everyone in the employee dining room.

For the reasons discussed above I conclude that, even assuming the record showed that Edward engaged in the conduct described in the declarations submitted by the Respondent, the conduct would not be a sufficient basis upon which to sustain Respondent Objections 3 and 4.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent interfered with, restrained, and coerced employees in violation of Section 8(a)(1) of the Act when it announced a new 401(k) plan benefit during the final 2 days before the scheduled July 13, 2007 representation election.
4. The above-described unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.
5. The Respondent was not shown to have violated Section 8(a)(1) of the Act on or about July 11, 2007, by threatening employees with reprisals if the Union was voted in.
6. Felicia Dixon was eligible to vote in the July 13, 2007 representation election and the Board agent's objection to her ballot is overruled.
7. Matthew Moore was ineligible to vote in the July 13, 2007 representation election and the Union's objection to his ballot is sustained.
8. Union Objection 1 is overruled.
9. Union Objection 4 is sustained.
10. Respondent's Objections 1, 2, 3, and 4 are overruled.
11. The objectionable conduct engaged in by the Respondent during the critical preelection period had an impact on the election, and that impact was more than de minimis.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order and Direction[17]

[17] If 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 provided in Sec. 102.48 of the Rules, be

ORDER

The Respondent, Grapetree Shores, Inc. d/b/a Divi Carina Bay Resort, Christiansted, St. Croix, U.S. Virgin Islands, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Announcing any new employee benefit in a manner intended to influence the outcome of a representation election.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Christiansted, St. Croix, U.S. Virgin Islands, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 11, 2007.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

DIRECTION

It is directed that, within 14 days from the date of this Decision, Order and Direction, the challenged ballot of Felicia Dixon in Case 24–RC–8566 be opened and counted by the Regional Director, along with the other valid ballots cast, and that a revised tally of ballots be issued.

IT IS FURTHER ORDERED that if the revised tally of ballots reveals that the Virgin Islands Workers Union (the Petitioner) has received a majority of the valid ballots cast, the Regional Director shall issue a certification of representative. If, however, the revised tally shows that the Petitioner has not received a majority of the ballots cast, the Regional Director shall set aside the election and conduct a new election when he or she deems the circumstances permit a free choice.

Dated, Washington, D.C. February 8, 2008

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT announce any new employee benefit(s) in a manner intended to influence the outcome of a representation election.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

GRAPETREE SHORES, INC. D/B/A DIVI CARINA BAY RESORT

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adopted by the Board and all objections to them shall be deemed waived for all purposes.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."