JD(NY)–35-07
Windsor, CT

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

FEDEX HOME DELIVERY, AN OPERATING DIVISION OF FEDEX GROUND PACKAGE SYSTEMS, INC.
Employer

and **Case No. 34-RC-2205**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 671
Petitioner

Doreen Davis, Esq. and *Amanda Sonneborn, Esq., Morgan, Lewis & Bockius, LLP,* for the Employer.
Gabriel Dumont, Esq., Dumont, Morris & Burk, PC, for the Petitioner.
Terri Craig, Esq., Counsel for the Regional Director.

DECISION ON OBJECTIONS

Joel P. Biblowitz, Administrative Law Judge: This case was heard by me on July 2 and 3, 2007 in Hartford, Connecticut. International Brotherhood of Teamsters, Local 671, herein called the Petitioner or the Union, filed a petition to represent the contract drivers at the Windsor, Connecticut terminal (also referred to as the Hartford terminal) of FEDEX Home Delivery, An Operating Division of FEDEX Ground Package Systems, Inc., herein called the Employer. By Decision and Direction of Election dated April 11, 2007, the Regional Director for Region 34 found that the Employer was an employer within the Act and that it would effectuate the purposes of the Act to assert jurisdiction. Substantively, the Decision rejected the Employer's argument that the petitioned for contract drivers were independent contractors within the meaning of Section 2(3) of the Act and found that they were employees within the meaning of the Act. The Decision further found that the Employer had failed to satisfy its burden that contract driver Paul Chiappa was a supervisor within the meaning of Section 2(11) of the Act, and was therefore an eligible voter, and that Robert Dizinno shared a community of interest with the other contract drivers to warrant his inclusion in the petitioned-for unit. The Decision set forth the following as the appropriate unit herein:

> All contract drivers employed by the Employer at its Hartford terminal; but excluding drivers and helpers hired by contract drivers, temporary drivers, supplemental drivers, multiple-route contract drivers, package handlers, office clerical employees, and guards, professional employees and supervisors as defined in the Act.

A secret ballot election was conducted on May 11, 2007, but because the Employer had filed a Request for Review of the April 11, 2007 Decision and Direction of Election, the ballots were impounded. By Order dated May 22, 2007, the Board denied the Employer's Request for Review of the Decision and Direction of Election, and the Tally of Ballots took place at the regional office on June 1, 2007. The Tally of Ballots states that 12 votes were cast for the Petitioner, 9 votes were cast against the Petitioner, there were 2 challenged ballots, and, therefore, challenges were not determinative. On June 8, 2007, the Employer filed Objections to Election consisting of two objections, set forth below, *verbatim*:

1. During the critical period before the representation election on May 11, 2007, Teamster Union Local 671, Affiliated with IBT ("Union"), by and through its agents and others with whom it acted in concert, improperly conferred valuable benefits, including legal services, to eligible voters and caused two civil actions on their behalf to commence in the U.S. District Court for the District of Connecticut. The civil actions identify six (6) voters as named plaintiffs. The Union's conduct constitutes, among other things, an impermissible benefit that interfered with laboratory conditions necessary to conduct a free and fair election.

2. At the election, the Company challenged the ballots cast by Paul Chiappa and Robert Dizinno, including for the reason that certain circumstances had changed since the time when the petition was filed. Before the Region counted the ballots, the Company notified the Board Agent that it maintained its challenge to the ballots of Chiappa and Dizinno for the reasons stated previously, and it objected to the Region opening and commingling their ballots without first (1) counting the unchallenged ballots to determine whether all challenged ballots were outcome determinative and (2) if so, giving the Company an opportunity to present evidence in support of its challenges, conducting an investigation, and then making a determination as to Chiappa's and Dizinno's eligibility. Over the Company's objection, the Board Agent opened and counted the challenged ballots of Chiappa and Dizinno; however, he did not open and count the other two challenged ballots (one by the Union and one by the Company). The count yielded 12 votes for the Union and 9 votes for no union. The Board Agent's conduct in prematurely opening and counting challenged ballots was improper.

The Union and Board Agent's conduct was improper and affected the outcome of the election, which turned on three votes (two of which should not have been counted without an investigation). For these reasons and the additional reasons that the Region and the Company might discover, the Company requests that the results of the election in the above-captioned matter be set aside.

Objection No. 1

This objection alleges that the Union improperly conferred valuable benefits, including legal services to the eligible employees herein, and caused two civil actions to be commenced on their behalf. It is alleged that these "benefits" constituted impermissible benefits that interfered with the laboratory conditions necessary for a free and fair elections. Without even discussing the legal issues herein, it is clear that there is no record evidence supporting this objection and it must therefore be overruled. The uncontradicted testimony establishes that the Union did not initiate or pay any part of the legal fees or any incidental expenses of the lawsuits against the Employer, either directly or indirectly, or confer any valuable benefit upon the unit employees as alleged in the objection. Rather, the Retainer Agreement reluctantly turned over by counsel for the plaintiffs in the cases, states unequivocally, that the law firm is handling the matter "on a complete contingent fee basis" and the testimony of the employee/plaintiffs is in complete accord. In other words, neither the Petitioner nor the unit employees paid anything toward this lawsuit.

The only "support" provided by the Union relating to the lawsuits involves the maintenance of two websites that provide information relating to the Employer, its attempts to classify contract drivers as independent contractors, and the resulting lawsuits. One, is fedexdriverslawsuit.com, which is maintained by the law firm representing the plaintiffs in the lawsuit. David Welker, who is employed by the Union as senior project coordinator for the IBT

parcel and small package division, testified that he provided this website information to the Employer's unit employees at a meeting in December 2006. The other website, which is maintained by the Union, is called FEDEX WATCH. As a union is entitled to notify employees of their rights, I find nothing objectionable about the maintenance of, or publicity about, either of these websites. Further, Objection No. 2 alleges that the Union "conferred valuable benefits" to the employees. These websites simply kept the employees informed about the numerous lawsuits that were pending against the Employer on the independent contractor issue. As there is no evidence that the Union conferred valuable benefits or, in fact, any benefits to the employees herein, as alleged in Objection No. 1, I recommend that this objection be overruled.

Objection No. 2

This objection is substantially more complicated than Objection 1. At the pre-election conference on May 11, 2007, the Employer was represented by Robert Hodavance, Esq., an attorney employed by the law firm of Morgan, Lewis & Bockius, the Union by Anthony Lepore, the Union president, and the Board's regional office by Board Agent and Compliance Officer Nestor Diaz. Hodovance testified that at this conference, Diaz asked him and Lepore if there were going to be any challenge ballots. Hodovance responded that the Employer was going to challenge three voters, Garrett Anderson (who Diaz, apparently, knew would be challenged) and Chiappa and Dizinno. Lepore asked him why he was challenging Dizinno and Chiappa and Hodovance said that, in addition to the fact that the Board had not yet ruled upon their Request for Review, "the circumstances for these two individuals had changed from the time of the end of the hearing to the time of the election, and they were now in positions that would be ineligible to vote." Diaz said that he would accept all of the challenges, which he did. Lepore testified that at this pre-election conference, Hodovance said that the Employer was going to challenge the ballots of Dizinno and Chiappa, as well as Garrett Anderson. Lepore responded that the region had already determined that Chiappa and Dizinno were eligible voters and that their votes should be counted. Diaz said that the Employer had the right to challenge them if it wished to do so. Lepore said that the Union was going to challenge the ballot of Sandra Lott as not eligible because she was a multi-vehicle contractor. Diaz testified that he began the conference by asking the parties if there would be any challenges. Hodovance said that the Employer was going to challenge the ballots of Dizinno, Chiappa and Anderson, and the Union was going to challenge the ballot of Lott. Diaz could not recall whether Hodovance stated any reason for challenging the ballots of Dizinno and Chiappa. The parties were not able to resolve any of the four proposed challenges, they left the area, and Diaz and the observers conducted the election, at which the four individuals were challenged as stated in the conference. The Employer's observer challenged the ballots of Dizinno and Chiappa, stating: "Not a single route driver" and that is what Diaz wrote on the challenge ballot envelopes. Because the Board had not yet ruled on the Employer's Request for Review the ballots were impounded. By Order dated May 22, 2007, the Board denied the Employer's Request for Review of the Decision and Direction of Election, and the ballot count was scheduled for June 1, 2007 at the regional office.

Hodovance testified that two days prior to the date set for the counting of the ballots, he received a call from Diaz, who told him that he would be in charge of the vote count and that "he had been instructed by the Board to count the ballots of Dizinno and Chiappa." Hodovance responded: "Is this even with the fact that there were changed circumstances from the time of the hearing to the time of the election?" Diaz answered, "Well, I guess if either one were no longer employed as of the time of the election, or either one had been promoted into a pre-existing supervisory position, that might make a difference." Hodovance responded that the challenged ballot procedure was the way to determine whether changed circumstances rose to that level, and Diaz responded, "Well, I have my instructions. I just hope that these are not going to be determinative of the outcome of the election." Diaz testified that on the morning prior to the

count he called Lepore and Hodovance to tell them that he would be conducting the ballot count; however he does not recall having any conversation with Hodovance about the count or the challenges at that time, or a day or two prior to the day of the count. Hodovance testified further that at the count on June 1, Diaz began by saying that he had received instructions from the Board to count the two ballots, and Hodovance replied that the Employer objected to that. Diaz told him that the region was going to do it anyway. Diaz then asked if there was any chance of resolving the other two challenges, and Hodovance and Lepore indicated that there wasn't. Diaz then opened the challenged ballot envelopes of Dizinno and Chiappa and mixed them with the other open ballots, and counted the ballots. Hodovance testified that in none of these three conversations with Diaz about the changed circumstances for Dizinno and Chiappa did he specify what the changed circumstances were.

Lepore testified that on the morning of June 1, 2007, Diaz told the parties that he was going to count the ballots of Dizinno and Chiappa and Hodovance said that the Employer did not agree with that. Diaz then asked if the parties could resolve the remaining two challenges, and when they said that they couldn't, he opened the ballot box, after mixing in the ballots of Dizinno and Chiappa, and counted the ballots. Diaz testified that when he arrived for the ballot count, he told the parties that the Board had decided that Dizinno and Chiappa were eligible employees and that their ballots should be opened and counted, "and that's what I intend to do." He testified that Hodovance did not respond to this statement. He then asked the parties if they wished to withdraw their challenges to Anderson and Lott, and they said that they did not. He then opened the ballot box, separated the ballots of Anderson and Lott, and opened the challenged ballot envelopes of Dizinno and Chiappa and dropped them in the ballot box, mixing them with the other ballots. He counted the ballots and prepared the Tally of Ballots stating that 12 votes were cast for the Petitioner, 9 votes were cast against the Petitioner, there were two remaining challenged ballots, and that these challenges were not determinative.

Initially, I credit the testimony of Hodovance regarding his conversations with Board Agent Diaz. I do this not because I found Diaz to be less than a credible witness. Rather, his testimony clearly reveals that his memory of the events was lacking. In addition, the testimony of Hodovance that he informed Diaz at the election and prior to the ballot count that there had been a change in circumstances is a reasonable, and expected, position for an attorney to take. The credited evidence therefore establishes that two days prior to the ballot count Diaz called Hodovance and told him that the ballots of Chiappa and Dizinno were going to be opened and counted at the ballot count. Hodovance questioned the propriety of this procedure as "…there were changed circumstances from the time of the hearing to the time of the election." On the morning of the count when Diaz again informed the parties that he was going to open, mix, and count the challenged ballots of Chiappa and Dizinno, Hodovance again objected to this procedure but, apparently, did not repeat the allegation of changed circumstances from the close of the hearing.

The law is clear that the party challenging a voter bears the burden of establishing that he/she should not be allowed to vote. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001); *Nurses United for Improved Patient Healthcare*, 338 NLRB 837 (2003). In the instant matter it is undisputed that the Employer's sole objection to opening and counting Chiappa and Dizinno's ballots was that there was a change of circumstances from the time of the hearing to the date of the election. I find that this challenge/objection was insufficient for two reasons. As the Employer bears the burden of establishing the ineligible status of Chiappa and Dizinno, it must do more than simply repeat that there was a change of circumstances. Did their jobs change to make them supervisors within the meaning of the Act, or were they to be excluded from the unit for some other reason? In addition, the Employer has a difficult burden herein because the hearing that was the basis for the Decision and Direction of Election

concluded on March 2, 2007, approximately ten weeks prior to the election. Further, I note that Dizinno, who testified in this matter on July 3, 2007, testified that he was currently driving a route for the Employer in Manchester, Connecticut, which would be a unit position. I therefore find that the Employer did not satisfy its burden by adequately establishing that there was a change of circumstances since the close of the hearing in the job responsibilities of Chiappa and Dizinno, and that the region properly opened and counted their ballots. I therefore recommend that Objection No. 2 be overruled.

Conclusion

Based upon the above, I recommend that the Employer's objections be overruled and that the Regional Director issue an appropriate certification.[1]

Dated, Washington, D.C. August 2, 2007

Joel P. Biblowitz
Administrative Law Judge

[1] Under the provisions of Section 102.69 of the Board's Rules and Regulations, Exceptions to this Report may be filed with the Board in Washington, DC within 14 days from the date of issuance of this Report and recommendations. Exceptions must be received by the Board in Washington by August 16, 2007.