

Embassy Suites Hotel, Inc. and Local 69, Hotel Employees and Restaurant Employees Union, Petitioner. Case 22-RC-10645

November 23, 1993

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

Questions presented in this postelection proceeding include whether the Regional Director correctly recommended overruling the Employer's objection alleging that the Petitioner improperly used a former employee as an election observer.¹ The Board has reviewed the record in light of the exceptions and the briefs and has adopted the hearing officer's findings and recommendations, as further explained below.²

The Employer's Objection 2 challenges the Petitioner's use of Miguel Fernandez as an election observer. Fernandez had been an employee of the Employer. His name appeared on the *Excelsior* list submitted to the Region, but the Employer discharged him prior to the date of the election. The Regional Director found that a union's designation and use of a nonemployee as its observer at an election did not, by itself, amount to objectionable conduct. He further found that the Employer failed to produce evidence that Fernandez' presence at the election had a coercive effect on any employee. We agree.

The Employer relies, in part, on a provision in section 11310 in the Board's Casehandling Manual for representation proceedings, which states that "[o]bservers must be nonsupervisory employees of the employer, unless a written agreement of the parties provides otherwise" and "the use of an ineligible observer may result in an election being set aside." It is well established, however, that the provisions of the Board's Casehandling Manual are guidelines and are not binding rules.³

In deciding whether to apply these Manual provisions to a given case, it is well to keep in mind the concern that underlies the rule. The rule is "aimed primarily at preventing intimidation that might take place should the employer choose to have supervisory em-

ployees present."⁴ (Emphasis in original.) Thus, the concern is that supervisors (or other persons whose interests are closely aligned with management) may have an intimidating impact on voters. However, it is not reasonable to assume that the use of a former employee as an observer for any party to an election would intimidate voters. Accordingly, the Board will not find the use of a nonemployee as an observer to be objectionable, absent evidence of misconduct by that observer or of prejudice to another party by the choice of that observer. See generally *San Francisco Bakery Employers Assn.*, 121 NLRB 1204, 1206 (1958).⁵

The Employer cites Board precedent holding that

"[d]ischarged employees are entitled to be considered employees of the employer for the purpose of serving as observers at an election pending the resolution of [unfair labor practice charges] against the employer." [*Kellwood Co.*, 299 NLRB 1026, 1029 (1990).]

The Employer argues that the obverse proposition is also true, i.e., if there are no charges concerning the discharged employee, that person may not serve as an observer.⁶ We disagree. The quoted precedent affirms that a former employee retains per se eligibility to serve as an observer as long as his/her employment status remains a matter of dispute at the time of the election. See *Correctional Health Care Solutions*, supra at 835 fn. 1. However, it does not necessarily follow that a former employee is ineligible to serve as an observer simply because the discharge is undisputed at the time of the election. Rather, the rule set forth above will apply. Applying that rule here, the Employer has produced no evidence of misconduct by Fernandez as an observer; nor has the Employer shown any prejudice to it from his presence at the election. We, therefore, overrule the Employer's Objection 2.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Local 69, Hotel Employees and Restaurant Employees Union, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

¹ The National Labor Relations Board has considered the objections to an election held on April 6, 1993, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 50 for and 46 against the Petitioner, with no challenged ballots.

² In the absence of exceptions, we adopt, pro forma, the Regional Director's recommendation to overrule the Employer's Objection 1. In adopting the Regional Director's recommendation to overrule the Employer's Objection 6, we rely solely on his finding that the objection was untimely.

³ *Correctional Health Care Solutions*, 303 NLRB 835 (1991).

⁴ *Diamond International Corp. v. NLRB*, 646 F.2d 1, 3 (1st Cir. 1981); and see *Mid-Continent Spring Co.*, 273 NLRB 884 (1985). The rule would appear equally applicable should a union choose to have a statutory supervisor as an observer.

⁵ Accord: *Standby One Associates*, 274 NLRB 952, 953 (1985); *E-Z Davies Chevrolet*, 161 NLRB 1380, 1383 (1966), enf. 395 F.2d 191, 193 (9th Cir. 1968). Member Raudabaugh notes that there are certain circumstances in which he would bar nonemployees who are union officials from serving as observers, but there is no evidence here that Fernandez was an official of the Petitioner.

⁶ The Board is administratively advised that no unfair labor practice was ever filed regarding Fernandez' discharge.

All full-time and regular part-time employees of the Employer at its Secaucus Meadowlands, New Jersey hotel, but excluding all confidential employees, office clerical employees, sales employ-

ees, reservation employees, professional employees, night auditors, guards and supervisors as defined in the Act.