

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

**NEWARK EXTENDED CARE FACILITY
(Employer)**

and

Case No. 22-RC-12869

**LOCAL 707, H.E.A.R.T
(Petitioner)**

and

**SEIU, 1199 NEW JERSEY HEALTH CARE
UNION
(Intervenor)**

Thomas Rubertone Jr., Esq., Counsel
for the Petitioner
William S. Massey, Esq., Counsel
for the Intervenor

DECISION ON OBJECTIONS

Statement of the Case

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in Newark, New Jersey on March 10 and 11, 2008. The Petition was filed on December 3, 2007 by Local 707, H.E.A.R.T. and SEIU, Local 1199, intervened based on its status as the incumbent union. Pursuant to a Stipulated Election Agreement executed on January 9, 2008, an election was held on January 30, 2008. The election involved two groups of employees, one a professional unit consisting of about 12 individuals and a much larger group of non-professional employees. The professional employees were given the choice of voting to be included in an overall unit and a majority of those who cast valid ballots, voted for inclusion. The final tally of ballots that was amended on March 11, 2008 was as follows:

Approximate number of eligible voters	278
Number of void ballots	7
Number of votes cast for Local 707 H.E.A.R.T	98
Number of votes cast for SEIU, Local 1199	70
Number of votes cast against the Unions	1
Number of valid votes counted	169
Number of challenged ballots	26
Number of valid votes counted plus challenges	195

Based on the fact that the number of challenges was not sufficient in number to affect the results of the election, a majority of the valid votes counted plus challenged ballots have been cast for Local 707, H.E.A.R.T.

On February 6, 2008, SEIU, Local 1199, (the intervener), filed objections to the election and these were referred to me for hearing. By March 10, 2008, SEIU had withdrawn Objections Nos. 3, 4, 5 and 7. Therefore, the remaining objections alleged as follows:

Objections 1 and 2 alleged that on the day of the election, supervisors or agents of the Employer were present during voting times in the no-electioneering area and spoke to employees waiting to vote.

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Objection 6 alleged, in substance that on the day before the election, the President of Local 707 was allowed to enter the premises and that she photographed employees as they spoke to representatives of SEIU.

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Objection 8 alleged that agents of Local 707 and “outspoken supporters” of Local 707 made inflammatory and derogatory racial and ethnic remarks about agents of SEIU.

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

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Findings and Conclusions

To balance the interests of insuring that employees have a fair chance to express their choice with the requirement that elections have at least a reasonable degree of finality, the Board has explicated a set of standards by which to judge whether conduct, (by either party), will be sufficient to set aside an election. In *Taylor Wharton Harsco Corp.*, 336 NLRB 157, 158 (2001), the Board stated:

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[T]he proper test for evaluating conduct of a party is an objective one- whether it has “tendency to interfere with the employees’ freedom of choice.” *Cambridge Tool Mfg.*, 316 NLRB 716 (1995). In determining whether a party’s misconduct has the tendency to interfere with employees’ freedom of choice, the Board considers: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. See e.g., *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

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Objection Nos. 1 and 2

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In support of these objections, the Intervener produced Brenda Enriquez who was its observer at the afternoon polling session.¹

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The election was held in the employee cafeteria and the employees lined up outside a set of double doors that led from a hallway into the cafeteria. In that area there are some vending machines and two service elevators that are used to transport food from the kitchen to patients and to transport linens to and from the laundry. These elevators are also used, particularly in the afternoon, to transport day care patients, some of whom have wheelchairs, from the upper floors to the first floor. The testimony indicated that the Board agent in charge of

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¹ The election was held from 5:30 a.m. to 8:30 a.m. and from 2:00 p.m. to 4:30 p.m.

the election instructed the parties that there should be no electioneering in the area outside the double doors.

Ms. Enriquez testified that on four occasions; once during the morning session and thrice during the afternoon election session, she saw supervisors talking to employees while they waited on line outside the cafeteria to enter and vote. Enriquez testified that while she was on line to vote during the morning session, she saw that housekeeping supervisor Gus Koiquah was talking to employees outside the polling place. She testified that at one point, the Board agent came out of the cafeteria and asked Koiquah to leave that area. Enriquez further testified that during the afternoon session, she witnessed three other occasions where supervisors, including Koiquah and Amy Moses, (the Director of Housekeeping), were either walking in the area outside the cafeteria or placed themselves in that area. She testified that on each occasion, she spoke to the Board agent about this and that the Board agent went outside and asked these supervisors to leave.

Enriquez could not testify as to what these individuals might have said to any prospective voters or that engaged in any electioneering.

The Petitioner called its own observer, Darnae Williams, who testified that she did not notice any supervisors outside in the hallway during the afternoon voting session. She also testified that the glass panels in the cafeteria's double doors were largely covered by paper, therefore suggesting that it was unlikely that Ms. Enriquez could have seen the people she claims that she saw. Additionally, the Petitioner offered evidence suggesting that the supervisors in question may have had legitimate reasons to be briefly in the area because their jobs may have required their presence, especially in bringing day care patients from the service elevators to the front entrance.

There is no evidence that any electioneering was engaged in by supervisors or by anyone else in the area where the employees were lined up to vote. Even assuming that some supervisors may have been in the area, their occasional presence would have affected each union equally and could not have been prejudicial to one union in relation to the other. (There is no evidence that the Employer engaged in a campaign favoring either Local 770 or SEIU, Local 1199). Further there is no evidence showing that any employees failed to vote because these supervisors may have been outside the voting area.² As such, it is my opinion that even assuming that Ms. Enriquez's testimony is completely accurate, I cannot conclude that the events described by her would be sufficient to set aside this election under the Board's decision in *Milchem, Inc.*, 170 NLRB 363 (1968).³ See *Nathan's Famous of Yonkers*, 186 NLRB 131 (1970) where the Board in a two union election, held that an employer's conduct that equally affected both unions would not be the basis for setting aside the election. Cf. *President Container, Inc.*, 328 NLRB 1277 (1999) and cases cited therein.

In light of the above, it is my conclusion that Objections 1 and 2 should be overruled.

² See *Lemco Construction*, 283 NLRB 459 (1987) and *Glass Depot*, 318 NLRB 766 (1995), for the proposition that unless caused by an extraordinary event, the Board will not set aside an election where it is contended that a representative complement has not voted.

³ It is noted that I thought that Ms. Enriquez was a credible witness.

Objections No. 6

In support of this objection, SEIU agent Roy Garcia testified that on the day before the election he was talking to an employee in the employee cafeteria when Local 770's President, Odette Machado, entered and took pictures of him talking to the employee. This is alleged to have occurred at around 2:00 p.m. and there was no one else present at the time.

Machado explained that the Board's official Election Notice states that an example of conduct that could be grounds for setting aside an election, would be campaigning to groups of employees on company time within 24 hours before an election. Machado testified that when she was notified by an employee that Local 1199's agent was talking to employees on the employer's premises within 24 hours of the election, she thought that this was a breach of the election rules and after consulting with counsel, she entered the cafeteria and attempted to take the pictures with her cell phone camera in order to be able to prove what she believed to be an infraction.⁴

On these facts, I don't think that Ms. Machado's singular action was irresponsible, ill intended or could reasonably be construed as intimidation. I therefore conclude that this Objection should be overruled.

Objection No. 8

In Objection 8, the Intervener contends that agents of Local 707 and "outspoken supporters" of Local 707 made inflammatory and derogatory racial and ethnic remarks about agents of Local 1199.

The Board has held that campaign propaganda calculated to inflame racial prejudice of employees, deliberately seeking to overemphasize and exacerbate racial feeling by irrelevant, inflammatory appeals, is a basis for setting aside an election. *Sewell Mfg. Co., 138 NLRB 66 (1962); and YKK (USA) Inc., 269 NLRB 82 (1984)*.

However, the evidence presented by the SEIU does not, in my opinion, rise to the level described above. In one incident described by Roy Garcia, he was in the cafeteria talking to some employees when another employee who was a supporter of Local 770, came in and said that the employees should not listen to that Puerto Rican. (Garcia is Columbian). The other incident was related by union agent Clairice Saint Hilaire, who testified that on an occasion before the election, this same Local 770 supporter, (who is also Haitian), called him a "monkey" in front of other employees. According to Hilaire, this is a grave insult among Haitians. But whether or not this is the case, neither of the alleged remarks constitute campaign propaganda calculated to inflame "racial" prejudice.

Perhaps these are examples of rudeness. Nevertheless, the two comments described above are in the nature of name calling and do not, in my opinion, constitute objectionable conduct by agents of Local 770. Accordingly, I recommend that Objection be overruled.

⁴ I note that during the election campaign, representatives of Local 770 were not allowed access to the employer's facilities whereas SEIU Local 1199, as the incumbent union, did have the right to visit the premises and talk to employees about such matters as grievances and contract negotiations.

Conclusions of Law

Neither the Petitioner nor the Employer has engaged in objectionable conduct that would warrant setting aside the election.

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ORDER

The representation case should be remanded to the Regional Director of Region 22 for the purpose of issuing the appropriate Certification.⁵

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Dated, Washington, D.C., April 1, 2008.

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Raymond P. Green
Administrative Law Judge

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⁵ 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, D.C. within 14 days from the date of issuance of this Report and Recommendations. Exceptions must be received by the Board in Washington by April 15, 2008 . Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof upon the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may adopt this Recommended Decision.

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