

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ECOLOGY SERVICES, INC., ECOLOGY SERVICES
CURBSIDE COLLECTION SERVICES, LLC,
ECOLOGY SERVICES ANNE ARUNDEL COUNTY
CARTAGE, LLC, A SINGLE EMPLOYER

Employer

and

Case 5-RC-16235

TEAMSTERS LOCAL UNION NO. 311,
A/W INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

Petitioner

Paula S. Sawyer, Esq., and Sean R. Marshall, Esq.,
for the Regional Director.

James R. Rosenberg, Esq., for the Petitioner.

Frank L. Kollman, Esq., for the Employer.

ADMINISTRATIVE LAW JUDGE'S REPORT AND
RECOMMENDATIONS ON OBJECTIONS

BRUCE D. ROSENSTEIN, Administrative Law Judge. Pursuant to a petition filed on June 18, 2008¹ and a Stipulated Election Agreement entered into by the parties and approved on June 30, an election by secret ballot was conducted under the direction and supervision of the Regional Director, Region 5 of the National Labor Relations Board (the Board or NLRB) on July 30, in the following unit of employees.

INCLUDED: All full time and regular part-time drivers and helpers employed by the Employer at its Pasadena, Maryland facility.

EXCLUDED: dispatchers, mechanics, office clerical employees, managerial employees, professional employees, and supervisors as defined in the Act.

The tally of ballots, which was made available to the parties at the conclusion of the election showed the following results:

¹ All dates are in 2008 unless otherwise indicated.

	Approximate number of eligible voters	192
	Void ballots	3
	Votes cast for Petitioner	71
	Votes cast against participating labor organization	77
5	Valid votes counted	148
	Challenged Ballots	0
	Valid votes counted plus challenged ballots	148

A majority of the valid votes counted have not been cast for the Petitioner.

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On August 5, the Petitioner filed timely objections to conduct affecting the results of the election. On August 29, the Regional Director issued a Report on Objections recommending that the election be set aside and a second election be directed. On September 12, the Employer filed with the Board timely objections and a brief in support thereof. On October 30, the Board issued a Decision finding that the exceptions raise substantial and material issues warranting a hearing. On November 3, the Regional Director for Region 5 issued a Notice of Representation Hearing designating an administrative law judge to conduct the hearing (BD Exh. 1).

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I conducted a hearing on the below noted objections in Baltimore, Maryland, on November 18.² On the entire record, I make the following recommendations.

BACKGROUND

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The parties agreed to hold two-scheduled voting sessions on July 30, a one-hour period from 5 to 6 a.m. and a two-hour period from 1 to 3 p.m. It was anticipated in reaching this arrangement that the majority of the employees would vote in the afternoon session with fewer participants for the earlier period. Contrary to these expectations, almost all of the voters appeared at the morning session. Accordingly, too many employees attempted to vote in the morning session with an insufficient number of Board personnel to control and monitor all of the activity that occurred surrounding the polling area.

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The election was held in a trailer on the Employer's premises that housed its administrative offices including the time clock, microwave, and a water cooler. In addition to the high volume of voters, the Board agent was confronted with a large contingent of the electorate that found it difficult to understand and speak English. Accordingly, the voting process became bogged down and caused a long backup of employees waiting in line that extended outside the trailer. Throughout the morning polling period, employees entered the trailer to punch in at the time clock, get water, and use the microwave. Employees congregated around the outside of the trailer and commingled with those waiting in line often talking in a loud manner despite the requests of the Board agent to move away from the trailer and to stop talking. Campaign leaflets were deposited all over the polling area, and the Board agent's efforts to remove all of them proved unsuccessful.

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In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is the Board's duty to establish those conditions and to determine whether they have been fulfilled. *General Shoe Corp.*, 77 NLRB 124, 127 (1948). It is also the responsibility of the Board to ensure that its elections are properly conducted; the

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² Post hearing briefs filed by the Petitioner and the Respondent were duly considered.

Board's role in the conduct of elections must not be open to question. *New York Telephone Co.*, 109 NLRB 788, 790 (1954).

OBJECTION 1

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The Petitioner requested the withdrawal of Objection 1 and it was approved by the Regional Director.

OBJECTION 2

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During the critical period, on the date of the election, the Employer by its supervisors and agents engaged in surveillance of lawful Union handbilling activity. By this conduct, the Employer improperly affected the free choice of the employees in voting for or against representation by the Petitioner.

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Facts

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On the morning of the election, Petitioner's Business Agent Kenneth Kelm along with two other non-employee Union representatives arrived at the Employer's facility around 4:15 a.m. and parked their vehicles on the street adjacent to the entrance. Kelm and the organizers intended to engage in handbilling while standing in front of the gated entrance when eligible voters drove into the yard (Pet Exh. 2 and 3). Around 4:25 a.m., Kelm while standing in the vicinity of the gate area heard Attorney Kollman inform an individual that he did not want any managers in the area near the gate. The individual left the area prior to the commencement of the 4:30 a.m. pre-election conference. Upon completion of the conference, Kelm and another Union organizer stationed themselves in front of the gate entrance to distribute handbills to the occupants of the vehicles as they entered the facility. Kelm observed two individuals stationed further down the road who were talking to individuals in their cars as they slowed down to make the turn into the facility. Kelm approached them and after introducing himself learned that they were supervisors of the Employer, namely President Ruth Rilee and Operations Manager Howard Lane. Both of the supervisors informed Kelm that they had a right to be in the vicinity of the gate area just as he was entitled to engage in handbilling. Kelm observed that both supervisors remained stationed in their positions for approximately one hour and spoke with eligible voters in their vehicles as they prepared to enter the facility. Kelm testified that he did not hear what Rilee or Lane said to the employees nor did he observe either of them taking notes or pictures of the vehicle occupants. Likewise, Kelm acknowledged that neither supervisor impeded the election process or prevented eligible voters from entering the facility.

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Rilee testified that the Employer made a decision to station Lane and herself on the road leading into the facility on the morning of the election to inform employees to vote first before punching in at the time clock and receiving their work assignments for the day. Rilee stated that she along with Lane were standing approximately 20-30 yards from the gated entrance and while she observed Kelm and the other Union organizer talking to employees in their vehicles and handing them literature, it was impossible to identify who they were talking to or what type of literature was being given to them due to early morning darkness.

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Lane testified that while he and Rilee attempted to talk to each of the passengers in the vehicles, it was impossible to reach all of them as they drove toward the gate entrance. Lane asserts that he did not observe the Union organizers handing out literature to employees as they approached the gate leading into the facility.

Discussion

5 In *Sands Hotel & Casino*, 306 NLRB 172 (1992), the Board held that the respondent engaged in unlawful surveillance by posting one or two security guards near the employee entrance and another security guard with binoculars in an upstairs hotel room in order to observe employees and union agents soliciting union authorization cards across the street from the hotel. On the other hand, the Board has held that where employees are conducting their activities openly on or near company premises, open observation of such activities by an employer is not unlawful. *Roadway Package System, Inc.*, 302 NLRB 961 (1991) (no violation where manager stood for 30 minutes by guardhouse, visible to all, observing handbillers' efforts to distribute pronoun literature).

15 Applying these principles, I find that the Employer did not engage in unlawful surveillance of the Petitioner's handbilling activities for the following reasons. First, while Rilee and Lane spoke with eligible voters while they entered the facility on the morning of the election, they merely encouraged them to vote first before punching in and receiving their work assignments for the day. Second, the evidence establishes that neither Rilee nor Lane took notes or photographs of the employees entering the facility nor did they block or impede access to the voting site. Third, because of the distance between the Employer and Petitioner representatives, and particularly noting that it was dark in the early morning hours prior to the commencement of the election, neither party was able to hear what the other communicated to employees nor identify the type of literature that was being distributed. *Days Inn Management Co.*, 306 NLRB 92, fn. 3 (1992).

25 For all of the above reasons, I recommend that Objection 2 be overruled.

OBJECTION 3

30 The Employer did not comply with the requirement to post the Notice of Election in conspicuous places at least three full working days prior to 12:01 a.m. of the day of the election. This contributed to the fact that only approximately 75% of eligible employees voted.

Facts

35 The Petitioner did not call any witnesses to substantiate the underpinnings of this objection.

40 The Employer, however, conclusively established that two Notices of Election, one in English and the other in Spanish, were posted in the trailer in conspicuous places continuously since July 18, and remained posted through the day of the election. Indeed, Rilee credibly testified that she personally posted the Notices and checked daily to make sure they were visibly displayed. In fact, in one situation when she observed one of the notices being defaced, it was replaced immediately.

45 Discussion

Based on the forgoing, I recommend that Objection 3 be overruled.

OBJECTION 4

50 The Employer instructed certain employees that they did not have to work on the day of the election in order to dissuade the employees from exercising their right to vote. This

contributed to the fact that only approximately 75% of eligible employees voted.

Facts

5 The Petitioner did not present any evidence in support of this objection.

Discussion

10 Under these circumstances, I recommend that this Objection be overruled.

OBJECTION 5

15 The Employer did not notify employees that the day of the election was a work day until after employees completed their work day on the day before the day of the election in order to dissuade the employees from exercising their right to vote.

Facts

20 The Petitioner did not introduce any evidence to sustain this Objection.

Discussion

Accordingly, I recommend that this Objection be overruled.

25 OBJECTION 6

30 The Employer provided an inaccurate Excelsior list that contained approximately 24 wrong addresses. This was an effort to prevent the Petitioner from communicating with these employees which constituted approximately 12% of the eligible employees.

Facts

35 Neil Dixon, President of the Petitioner, testified that he received the Excelsior list from the Employer in early July 2008. The Petitioner then sent mailings to eligible employees utilizing the addresses provided by the Employer. Over the next several weeks, the Petitioner received approximately 28 of the envelopes back from the Post Office based on inaccurate addresses (Pet Exh. 4). On cross examination, Dixon admitted that some of the envelopes came back to the Petitioner 7-10 days before the election but the Union did not ask the Employer for updated addresses. Dixon also acknowledged that multiple mailings were sent to employees some of which were returned but the Union did not request updated addresses nor did it request the Employer to verify the accuracy of the addresses.

45 Judith Sharp, vice president for the Employer, testified that she prepared a voter eligibility list relying on the names and addresses of current employees from their most recent data base. Likewise, she is responsible for processing change of address forms that are received from employees. These forms are located in the trailer but the notice identifying the form and the form itself are only printed in English and Sharp acknowledged that a large contingent of the employees do not read or speak English. Sharp also testified that the Employer sent out campaign literature using the same data base of names and addresses provided to the Petitioner and no envelopes were returned to their offices.

Discussion

5 In *Washington Fruit & Produce Co.*, 343 NLRB 1215 (2004), the Board declined to set aside the election where the union was given a list that had inaccurate addresses for 28 percent of the unit. Because the union was able to obtain correct addresses from other sources for 90 percent of the unit, the Board found substantial compliance with the Excelsior rule. Likewise, the Board found in *Women in Crisis Counseling*, 312 NLRB 589 (1993), that a 30 percent inaccuracy rate for addresses in the Excelsior list did not warrant setting aside the election noting that the inaccuracies were not the result of gross negligence or bad faith.

10 Applying these principles, I find that the Petitioner did not present sufficient evidence to sustain this Objection. I find that the Employer provided the most current address list that it possessed and used the same data base to send campaign literature to its employees. Thus, any inaccuracies in the Excelsior list that caused 28 or approximately 14% of eligible voters' envelopes to be returned to the Petitioner cannot be attributed to Employer gross negligence or bad faith. Moreover, the Petitioner did not make any effort to contact the Employer for more accurate addresses when a number of its mailings were returned 7-10 days prior to the election, a time period sufficiently in advance of the election that would have permitted new mailings to be sent.

20 For all of the above reasons, I recommend that Objection 6 be overruled.

OBJECTION 7

25 The NLRB refused to allow employees that were in line at 6:00 a.m. to vote during the 5:00 a.m. to 6:00 a.m. session of the election on July 30, thereby disenfranchising voters.

Facts

30 Rhonda Barker, the observer for the Petitioner in the morning and afternoon election sessions, credibly testified that due to the majority of eligible voters appearing for the morning session the line of voters backed-up as employees waited both inside and outside the trailer. Additional complications occurred because approximately 50% of the workers did not speak or understand English. Both of the election observers and the Board agent only spoke English and found it exceptionally difficult to communicate or give instructions to the Spanish speaking employees. Indeed, on a number of occasions time was lost in attempting to verify that a voter had proper identification and if employees did not appear on the voting list it necessitated the voter being challenged as the polling time approached the end of the agreed upon 6 a.m. closing.³ Because there were still a large number of the electorate waiting in line to vote, the Board agent extended the polling time one-half hour. As the additional 30 minutes got closer to 6:30 a.m., Barker testified that she observed through the trailer window and heard the Board agent state that there were approximately 20-40 employees remaining in line who had not cast their ballots. Despite this fact, the Board agent determined to end the voting at 6:30 a.m. and did not permit the remaining employees waiting in line to cast their ballots.⁴ Barker, who also

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³ All of the challenged ballots were resolved by the parties after the close of the afternoon election session. The Board agent, who informed the parties he would not return for the afternoon session, was replaced with a different Board agent who supervised the afternoon voting session.

50 ⁴ Barker's testimony is fully consistent with her pre-hearing written statement that was given on the day after the election (Emp Exh. 1).

served as the observer for the Petitioner in the afternoon session, credibly testified that none of the voters who were denied the right to vote in the morning session returned to cast ballots in the afternoon session.⁵

5 Claude Poole served as the Employer's observer for the morning voting session and testified that the election process was bogged down due to the large number of employees that attempted to vote and the process of challenging a large number of voters either because they could not understand instructions or their names did not appear on the eligibility list. Poole noted that when the polls were ultimately closed at 6:30 a.m., he did not notice that any
10 employees were waiting in line to vote but did acknowledge that the Board agent went to the door of the trailer at that time and looked outside. Poole admitted that he did not walk over to the trailer door to look outside, and therefore, could not determine if any employees were waiting outside the trailer to vote when the polls were closed by the Board agent.

15 Discussion

It is apparent to me that due to the circumstances discussed above there was an insufficient number of Board personnel to control all of the activity that took place in and around the polling area. Thus, these irregularities call into question the closeness of the election
20 especially based on my findings that a large number of eligible voters did not have an opportunity to cast their ballots. Both of the election observers credibly testified that due to these unforeseen conditions, the Board agent appeared to be overwhelmed and lost control of the election process. Indeed, the observers and Dixon testified that the Board agent stated in their presence that "he could not take it any longer, this is too much and he would not return for the afternoon election session". Such conduct, in my opinion, tends to destroy confidence in the
25 Board's election process or could be interpreted as undermining the high standards that the Board attempts to maintain.

Accordingly, and particularly noting the closeness of the election that could have been impacted by voters that were not permitted to cast ballots coupled with my assessment of the
30 conduct surrounding the election, I find that it fell far short of the Board's standard's for laboratory conditions. Therefore, I recommend that Objection 7 be sustained.

OBJECTION 8

35 The NLRB agent and an eligible voter got into a verbal confrontation in front of other eligible voters which spoiled the laboratory conditions under which NLRB elections must be run.

Facts

40 Both Barker and Poole credibly testified that a verbal face to face confrontation occurred between the Board agent and an eligible voter who took offense to some of the comments the Board agent made while attempting to control the voting process in the face of long employee lines waiting to vote in the morning session. Barker and Poole noted that the employee and the
45 Board agent engaged in a loud three minute exchange that got very tense and created a hostile atmosphere. The discussion was witnessed by approximately 15-20 employees who were standing in line waiting to vote inside the trailer.

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⁵ According to Barker, only three employees cast ballots in the afternoon session.

Discussion

I find that the Board agent's loss of control of the election process, due in large part to matters beyond his control, was compounded by the conduct raised in this objection. The Board cannot condone loud and threatening confrontations that take place in the midst of an election especially when the conduct involves a Board agent that is witnessed by eligible voters. Such conduct, in my opinion, is intimidating to those employees that are waiting in line to cast a ballot and must be considered for its potential affect on employees' free choice and confidence in the Board's election process. *Glacier Packing Co., Inc.* 210 NLRB 571, 573 (1974).

Based on the totality of circumstances, I find that the conduct raised in this objection falls far short of the Board's standard for laboratory conditions and its cumulative effect had great potential for impacting this close election. In Board conducted elections the confidence and integrity of the process must be upheld.

Accordingly, I recommend that Objection 8 be sustained.

Conclusions and Recommendations to the Board

Based on my findings and conclusions above, I recommend that the Board overrule Petitioner objections 2 through 6 and sustain objections 7 and 8. Further, I recommend that the election be set aside and a second election be directed.⁶

Dated, Washington, D.C. December 12, 2008

Bruce D. Rosenstein⁷
Administrative Law Judge

⁶ Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, within 14 days from the date of issuance of this Recommended Decision, either party may file with the Board in Washington D.C. an original and eight copies of exceptions thereto. Exceptions must be received by the Board in Washington by December 26, 2008. Immediately upon the filing of such exceptions, the party filing same shall serve a copy 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.

⁷ If my recommendation to set aside and rerun the election is sustained, I make the following suggestions. Based on the totality of circumstances discussed above, I firmly believe that any second election should be held at a location off the Employer's premises unless the trailer in which the election was held is kept off-limits to all personnel during the agreed-upon polling hours. Additionally, I recommend that two or more Board agents be assigned to work the election and one of them, if possible, be able to speak Spanish. If this is not possible, the Board should provide a Spanish speaking interpreter for the election.