

**Lily Transportation Corp. and International Brotherhood of Teamsters, Local 863, Petitioner.** Case 4–RC–21314

July 31, 2008

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN SCHAMBER AND MEMBER LIEBMAN

The National Labor Relations Board<sup>1</sup> has considered objections to an election held December 7, 2007, and the administrative law judge's report concerning disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows 17 votes for and 14 votes against the Petitioner, with 2 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the judge's findings<sup>2</sup> and recommendations,<sup>3</sup> and finds that a certification of representative should be issued.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for the International Brotherhood of Teamsters, Local 863, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time tractor-trailer drivers ("truck drivers") employed by the Employer at its Gouldsboro, Pennsylvania location excluding all part-time tractor-trailer

drivers, office and clerical employees, guards and supervisors as defined by the Act.

*Devin S. Grosh, Esq.*, for the Regional Director.  
*John M. Simon, Esq. (Stoneman, Chandler & Miller, LLP)*, of Boston, Massachusetts, for the Employer.  
*Paul L. Kleinbaum, Esq. (Zazzali, Fagella, Nowak, Kleinbaum & Friedman)*, of Newark, New Jersey, for the Petitioner.

RECOMMENDED DECISION AND ORDER ON OBJECTIONS

MICHAEL A. ROSAS, Administrative Law Judge. I conducted a hearing in this case involving objections to a representation election on January 22, 2008, in Scranton, Pennsylvania. Based on the evidence submitted in that hearing, including the testimony of the witnesses and my assessment of their demeanor, as well as the posthearing briefs submitted by counsel, I make the following findings and conclusions.

Lily Transportation Corp. (the Employer) contracts with Verascold, a cold storage facility, to transport food in tractor-trailers to several large supermarket chains in the Northeast. The Employer's operations in this matter are based out of a Verascold facility in Gouldsboro, Pennsylvania. The Employer's staff consists of a manager, dispatchers, and truckdrivers.

I. THE PROCEDURAL HISTORY

On June 21, 2007, the International Brotherhood of Teamsters, Local 863 (the Union), a labor organization, filed a petition with the Board for a representation election pursuant to Section 9 of the National Labor Relations Act (the Act). The applicable unit was stated to include: all full time tractor-trailer drivers employed by the Employer at its Gouldsboro location. Excluded were all part time tractor-trailer drivers, office and clerical employees, guards and supervisors as defined by the Act.

In accordance with a stipulated election agreement signed by the International Brotherhood of Teamsters, Local 863 (the Union), and the Employer, and approved by the Regional Director for Region 4 on July 3, 2007,<sup>1</sup> the first election was conducted on September 21.<sup>2</sup> Thirty-six eligible truckdrivers voted. Fifteen votes were cast in favor of the Union, 18 votes were cast against the Union, and 3 ballots were challenged. After the Union filed objections, the parties stipulated to set aside the September 21 election and conduct a second election.

The second election, hereinafter referred to as the election, was held on December 7. The tally of ballots indicated that 17 votes were cast in favor of the Union, 14 votes were cast against, and 4 ballots were challenged. On December 12, the Employer filed timely objections to the election. Objection 1 charges the Union's representatives engaged in active campaigning at and near the polling area before and during the election. Objection 2 charges the Union's representatives engaged in prolonged conversations with voters at and near the

<sup>1</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

<sup>2</sup> Applying *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118 (1982), enf. sub nom. *Boston Insulated Wire & Cable Systems, Inc. v. NLRB*, 703 F.2d 876 (5th Cir. 1983), we find that the election-day display of a union banner on a recreational vehicle parked in the hotel parking lot did not constitute objectionable conduct.

<sup>3</sup> The Employer's reliance on *Nathan Katz Realty LLC v. NLRB*, 251 F.3d 981 (D.C. Cir. 2001), is misplaced. The facts presented there are distinguishable from those presented here. In *Nathan Katz*, two union agents, sitting in a parked car within the area designated as a no-electioneering zone, motioned, honked, and gestured to employees arriving at the polling place to vote. This conduct was found to be contrary to the instructions of the Board agent overseeing the election. Here, there is no contention that union representatives were stationed within the no-electioneering zone during the election period, nor is there evidence that they engaged in conduct contrary to the instructions of the Board agent overseeing the election.

<sup>1</sup> Unless otherwise stated, all dates refer to 2007.

<sup>2</sup> All Board documents relating to the stipulations, objections, and tallies in the first and second elections were received in evidence collectively as Board Exh. 1.

polling area before and during the election. The Employer also stated a third objection, that the Union offered voters benefits in exchange for union support. That objection, however, has been withdrawn.<sup>3</sup>

On December 28, the Board sustained the challenges to the ballots of two of the four challenged voters. A revised tally of ballots was issued indicating that the two unchallenged ballots were insufficient to affect the outcome of the election. Accordingly, on December 31, Region 4's Regional Director directed that a notice of hearing be held concerning the Employer's objections to the election.

## II. THE ELECTION

### A. *The Voting Environment*

The polling site was located on the third floor of the Dunmore Holiday Inn (the hotel). The hotel's main entrance leads to a lobby and is the only means by which nonguests are able to enter the hotel. The registration desk is on the right side of the lobby; there is seating on the left side. The elevators leading to the third floor are located approximately 75 feet from the main entrance.<sup>4</sup>

There is a parking area outside the hotel's main entrance and another on the other side of the hotel driveway. A large recreational vehicle, driven by Charles O'Mara, the Union's business agent, was parked in the lot adjacent to the hotel prior to and during the election. The vehicle, which was situated approximately 150 to 175 feet from the side of the hotel, had a large banner on its side indicating that it was the Union's organizing unit. The banner was visible to voters as they arrived in the parking area and proceeded to the hotel's main entrance.<sup>5</sup>

### B. *The Preelection Conference*

At around 1 p.m., the Board agent overseeing the election conducted a preelection conference. The attendees included: John Bunevith, the Employer's human resources director; Union Business Agents Charles O'Mara and George Grimshaw; Union Vice President Val Fiorello; and Patrick Martin, a truck driver who served as the Union's designated election observer. At that time, in pertinent part, the Board agent instructed the parties that electioneering was prohibited in designated areas. Signs stating "no electioneering" were placed immediately outside of the third floor polling site and next to the lobby elevators. Those were the only elevators that could be taken by voters to the third floor voting location. As such, the Board agent established a no-electioneering zone from the lobby elevators to the third floor polling site. There were no signs prohibiting conversations in the hotel's lobby or parking area. After the Board agent instructed the parties, Bunevith left the polling site and took the elevator to the lobby. As he walked through the lobby to leave the hotel, Bunevith announced to employees present that the polling site was open for voting.

<sup>3</sup> Emp. Br. at p. 3.

<sup>4</sup> Descriptions of the distance from the hotel entrances to elevators varied, but witnesses' estimates ranged from 50 to 100 feet. (Tr. 12–14, 54–55, 68–70, 92.)

<sup>5</sup> It was not disputed that the union van and its signs were clearly visible to anyone who parked in the lot and entered the hotel to vote. (Tr. 11–13, 19, 38–39, 54, 63, 68, 92–93, 125–126, 130.)

O'Mara left shortly after Bunevith, but Grimshaw and Fiorello lingered in the lobby for a while before also leaving the hotel.<sup>6</sup>

### C. *Activity in the Hotel Lobby During the Election*

Fred DePew was among the voters who were present in the hotel lobby waiting to vote before the 1 p.m. start time. At that time, three truckdrivers who supported the Union—Jamie Loss, Kevin Taylor, and Troy Cole—were also present in the lobby. In addition, an unidentified union official—a person wearing a jacket bearing a union insignia—was also present. As DePew waited in the hotel for an announcement that the voting poll was open, he was approached by the union official. The union official introduced himself to DePew and asked for his name. Rather than identify himself, DePew responded by asking the union official if he was one of the people in the Union's recreational vehicle that had been seen in the Gouldsboro area during the week. The union official acknowledged that he had been one of the occupants in the recreational vehicle and they continued with general conversation for about 5 to 10 minutes. They did not otherwise speak about the election.<sup>7</sup>

Jamie Loss, a truckdriver and member of the Union's organizing committee, also spoke with DePew in the lobby. At or around 1 p.m., Bunevith walked through the lobby to leave the hotel and announced that the poll was open. At that point, DePew, Loss, and an unidentified driver took the lobby elevator to the third floor. While in the elevator, Loss told DePew that he that he could not wait until the Union got in.<sup>8</sup>

After voting upstairs, DePew returned to the lobby. As he walked through lobby to leave, Depew observed the union official and Loss in the lobby approach another truckdriver who arrived to vote.<sup>9</sup> After Depew left, Loss, Taylor, and Cole remained in or around the lobby area until the polls closed at 7 p.m.<sup>10</sup>

Truckdrivers Frank Gilroy, Frank Rowe, and Art Thomas arrived at the hotel to vote at approximately 2 p.m. As they en-

<sup>6</sup> I based my findings regarding the preelection conference on Bunevith's credible testimony. (Tr. 23–27.) O'Mara testified that he left with Grimshaw and Fiorello after the preelection conference. However, he was evasive when asked whether he saw Grimshaw or Fiorello speak with other employees in the lobby before they left the building. It is also noted that neither Grimshaw nor Fiorello testified. (Tr. 122–125, 128–129.)

<sup>7</sup> I based this finding, first, on DePew's credible and unrefuted testimony, including his concession on cross-examination that he and the union representative engaged in "small talk." Secondly, DePew's testimony in this regard was corroborated by Bunevith, who observed him with a person wearing a union jacket. (Tr. 17–19, 27–28, 53–59, 63–64.)

<sup>8</sup> Bunevith also corroborated DePew's credible testimony that Loss was in the lobby and not functioning as an observer at the polling station, at least at the outset of the election. (Tr. 14–16, 58–61.)

<sup>9</sup> There is no indication whether Loss and the union official succeeded in speaking with the unidentified truckdriver. (Tr. 61–62.)

<sup>10</sup> Neither Loss nor Cole was called as a witness, but Taylor conceded that he was either in the lobby or in the adjacent hotel restaurant during the voting period. More significantly, he was not asked to refute any of the testimony provided by the Employer's witnesses—Bunevith, DePew, Gilroy, or Storms—regarding their presence and activities in the lobby during the election. (Tr. 14–15, 18–20, 25, 55–56, 60–62, 71–72, 92, 110.)

tered the lobby, Loss, Taylor, and Cole were sitting. Taylor was the first to speak to them, urging them to vote for the Union and insisting that everything would be great if the Union won. Loss managed to engage Thomas in conversation for several minutes. Gilroy, Rowe, and Thomas then proceeded to the elevators and went upstairs to vote. Gilroy's vote, however, was challenged because he was a part-time truckdriver. After returning to the lobby, Gilroy expressed his dismay to Taylor about the fact that his vote had been challenged.<sup>11</sup>

Truckdriver Mark Storms voted in the election between 3 and 5 p.m. When he arrived, he saw Loss, Taylor, Cole, and another truckdriver, Alfredo Rivera, in the lobby. He was greeted by Taylor, who advised him about the location of the polling station. Although the group was engaged in conversation, Storms did not hear what they were speaking about. Storms proceeded to the third floor and voted. After voting he walked through the lobby, saw the same group talking, and left.<sup>12</sup>

O'Mara, Fiorello, and Grimshaw returned to the hotel at around 5 p.m. and remained in the lobby until the polls closed at 7 p.m. During that time, "a couple" of persons passed through the lobby to vote.<sup>13</sup>

#### D. After the Election

Bunevith returned to the hotel at approximately 7 p.m. to observe the tally of ballots. There were numerous employees in the hotel lobby. He proceeded to the polling site and, together with O'Mara, counted the ballots. He then left, but O'Mara stayed and bought a round of drinks for voters who were still there. Anmbrustea, the Respondent's dispatcher and an employee excluded from voting, also stayed and bought a round of drinks as well.<sup>14</sup>

### III. LEGAL ANALYSIS

The Employer asserts that the Union engaged in impermissible conduct that destroyed the laboratory conditions necessary for a fair election and interfered with employees' free choice regarding representation. Specifically, the Employer contends that union officials and/or supporters campaigned in the hotel lobby where voters passed through to get to the polling station. In addition, a union supporter is alleged to have engaged in improper conduct within the no-electioneering zone. The Union

<sup>11</sup> I had some problems with Gilroy's credibility in light of contradictory statements in an affidavit he submitted to the Board. His affidavit omitted any reference to comments made to him as he left the polling location. Nor did he include any statements in his affidavit about conversations he had with Anmbrustea, Martin, or anyone else. His affidavit also did not include any statements about confronting Kevin Taylor in the lobby about his vote being challenged (Tr. 70-76, 87-88). Nevertheless, I found it significant that neither Loss nor Cole testified and Taylor, who did, failed to refute Gilroy's testimony.

<sup>12</sup> Storm's testimony added nothing new to the record except to confirm the continued presence in the lobby of the aforementioned union supporters. (Tr. 92-93.)

<sup>13</sup> This finding is based on O'Mara's testimony, but there is no testimony indicating that he, Fiorello, or Grimshaw spoke with voters during the period of time. (Tr. 125-131.)

<sup>14</sup> The testimony of Bunevith, O'Mara, and Anmbrustea was consistent as to the postelection events. (Tr. 19-20, 37-40, 42-43, 123-124.)

does deny that its officials and supporters were present and campaigned on behalf of the Union during polling hours, but contends that such conduct occurred in the lobby, which was located outside of the no-electioneering zone established by the Board agent. In the case of the employee blurring out pronoun comments on the elevator, the Union denies he was acting as its agent when he expressed support for the Union.

The proponent of an election objection has the burden of proving that the conduct complained of had the tendency to interfere with the employees' freedom of choice. *Double J. Services*, 347 NLRB No. 58, slip op. at 1-2 (2006) (not included in bound volumes). That burden is a heavy one because there is a strong presumption that ballots cast under Board Rules and supervision reflect the true desires of the electorate. See *Safeway, Inc.*, 338 NLRB 525 (2002), and cases cited there. In assessing whether to set aside an election, the Board looks to all of the facts and circumstances to determine whether the atmosphere was so tainted as to warrant such action. Such a determination has typically involved consideration of several factors: (1) whether the conduct occurred within or near the polling place and, specifically, within a no-electioneering area; (2) the nature and extent of the electioneering; (3) whether it was conducted by a party or employees; and (4) whether the conduct contravened the instructions of a Board agent. *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118, 1119 (1982), enf'd. 703 F.2d 876 (5th Cir. 1983).

In *Boston Insulated*, union officials engaged in electioneering just outside glass doors that opened from the parking lot into a corridor that led to the polling site. The Board did not find the union's conduct objectionable because it did not occur in the polling place or a designated no-electioneering zone, was not directed at employees waiting in line to vote, and did not violate any of the Board agent's instructions.

In this case, pronoun employees and union officials engaged in conversation with, or directed pronoun comments to, voters in the lobby as they waited for voting to begin at 1 p.m. When voting began, Loss, one of those employees, directed pronoun comments to DePew and another voter while they were in the elevator going to vote. After voting, Loss returned to the lobby and remained there with the other two pronoun employees until the poll closed at 7 p.m. At that point, at least one union official was still in the lobby engaging arriving voters in conversation. At some point before 2 p.m., however, that official had left. Finally, at 5 p.m., O'Mara, Grimshaw, and Fiorello returned to the lobby and remained there until the poll closed.

The lobby and parking lot areas were outside the perimeter established by the Board agent for no-electioneering. Furthermore, those areas were not "at or near" the voting station. A voter had to take an elevator to the third floor and then walk down a hall to the rear of that floor before entering the voting station. Being separated from the electioneering activity by at least two building floors clearly established a separation from the voting station. See *J. P. Mascaro & Sons*, 345 NLRB 637, 639-640 (2005) (voting location separated from area of electioneering by a 10-foot wide hallway). The elevator, however, fell within the designated no-electioneering area and, as such, Loss' comments in that location ran afoul of the Board agent's instructions.

With respect to the nature and extent of the electioneering, some of it was general conversation. During DePew's conversation with the union official, he had no problem avoiding a discussion of the election. In the case of Loss' pronion comments to DePew and an unspecified driver on the elevator, the comments were gratuitous, presumptuous, and relatively innocuous—Loss expressed his excitement at the prospect that the Union would prevail. Several employees, including Gilroy, Rowe, and Thomas, were urged to vote for the Union, while others, like Storms, were merely greeted by the pronion employees and advised as to the location of the polling station. Finally, O'Mara, Grimshaw, and Fiorello were present in the lobby between 5 and 7 p.m. However, there is no evidence that they engaged voters in conversation during that period of time.

The union officials were clearly parties. However, the pronion employees were not. Even though Loss was a member of the organizing committee, he lacked any formal role with the Union that would enable him to be treated as its agent. As such, his conduct, as well as that of the other pronion employees, must be evaluated on the basis of the Board's standard for third-party conduct. *Cornell Forge Co.*, 339 NLRB 733 (2003).

Based on the foregoing, the election was conducted while there was electioneering to varying degrees in the hotel lobby and elevator. The conversations and outbursts in the hotel lobby did not contravene the instructions of the Board agent, were not harassing in nature, and did not occur at or near the voting station. The comments of a pronion employee on the elevator violated the Board agent's instructions, but were relatively innocuous under the circumstances. They were no worse than

the typical instance of employees talking among themselves as they wait to vote—realities that do not justify setting aside elections. See, e.g., *Masoneilan International*, 223 NLRB 965, 971 (1976) (there is no prohibition on such conversations). As such, the conduct of pronion employees in the lobby, as well as Loss' remarks on the elevator, was not so disruptive as to require setting aside the election. *Boston Insulated Wire & Cable Co.*, supra at 1118 fn. 11.

Based upon the evidence and testimony presented at the hearing, the Employer has failed to meet its heavy burden to demonstrate that Local 863 committed any objectionable conduct.

#### IV. CONCLUSIONS AND RECOMMENDED ORDER

In accordance with the above findings, I conclude that the objections of Employer Lily Transportation, Corp. to the representation election held on December 7, 2007, have no merit, are hereby overruled, and the election ruled valid. The case is remanded to the Regional Director for Region 4 to process the matter in accordance with this recommended decision and to issue an appropriate certification.<sup>15</sup>

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<sup>15</sup> Under the provisions of Sec. 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 14, 2008.