

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

THE ORIGINAL MOWBRAY'S TREE SERVICE, INC  
Employer

and

Case 31-RC-8758

LOCAL 47, INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, AFL-CIO, CLC  
Petitioner

*Roberto Velazquez*, Business Administrator,  
for the Employer.

*Hank Colt*, Assistant Business Manager,  
for the Petitioner.

REPORT ON OBJECTION

Statement of the Case

**WILLIAM G. KOCOL**, Administrative Law Judge. This case was heard in Los Angeles, California, on September 9, 2009. Local 47, International Brotherhood of Electrical Workers, AFL-CIO, CLC, (herein the Petitioner) filed a petition on June 15, 2009<sup>1</sup> to represent certain employees of The Original Mowbray's Tree Service, Inc. (herein the Employer). Pursuant to a stipulated election agreement an election was held on July 27 in the following appropriate unit:

Included: All full-time and regular part-time Tree Trimmers, Foremen, Climbers, Groundworkers, Groundsmen/Grapple Drivers, and Stump Grinders/Groundsmen employed by the Employer at or from its facilities located at 171 South Waterman Avenue, San Bernardino, California and 17332 Millwood Drive, Visalia, California.

Excluded: Office clerical employees, Maintenance Mechanics, Listers, Traffic Control employees, Safety Officers, all other employees, guards and supervisors as defined in the Act.

The tally of ballots showed that of approximately 111 eligible voters, 106 cast ballots of which, 51 were cast for the Petitioner and 54 were cast against the Petitioner. There were no voided ballots and 1 ballot was challenged, a number insufficient to affect the results on the election.

The Petitioner filed timely two objections to the election. At the hearing the Petitioner withdrew objection 2, so the sole remaining objection to be resolved is:

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<sup>1</sup> All dates are in 2009 unless otherwise indicated.

After the NLRB field agent declared the voting polls opened, an agent of the company walked in. The company agent ignored several requests from the NLRB agent to leave. Company agent proceeded to tell the workers not to vote – that the election was over and they should leave.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the brief filed by the Employer, I make the following.

#### Findings of Fact

Leonel Corona is a general foreman for the Employer; he is in charge of its operations in the areas of Valencia, Thousands Oaks, and Ventura. The election at the San Bernardino location was held during two time periods on July 27; first from 7:00 a.m.- 9:30 a.m. and then from 10:00 a.m.-11a.m. The election was held in an office at the back of the Employer’s facility in San Bernardino. Corona has a box in that office that he uses to store paperwork. During the first voting session Corona came into the voting area and remained there about 1½ minutes as he examined and gathered the paperwork on his shelf. The Board agent discovered that Corona was a supervisor and asked Corona what he was doing there; Corona said he was picking up his paperwork. The Board agent told Corona to leave the area several times but Corona refused until he finished gathering his paperwork. As Corona left the voting area about eight or nine employees were waiting outside to vote; Corona told them, in Spanish, “Don’t come to vote because the lady is mad.” These employees are all directly supervised by Corona. The Board agent told the employees waiting outside that they could come in and vote if they wanted, and they entered the voting area and voted.

Raymundo Meraz has worked for the Employer for about two years as a groundsman/driver; he works out the Employer’s San Bernardino location. Meraz both voted during the election and was the observer for the Petitioner. The facts in the preceding paragraph are primarily based on the Meraz’s credible testimony. His demeanor suggested that he was attempting to relate the facts as he understood them. His testimony remained consistent and logically plausible especially as I questioned him for more detail. Daniel Rosas Sanchez also works as a driver/groundsman for the Employer. Sanchez served as the Employer’s observer at the election. He confirmed that Corona entered the voting area and that the Board agent asked him to leave. According to Sanchez, as Corona was leaving he told the waiting employees “Don’t come to vote because the lady is mad.” Corona admitted that he entered the polling area during the election. He also admitted that he told the employees he supervised, who were waiting outside, that they should not vote because the woman is angry.

The voting list showed that two employees from the San Bernardino location did not vote; one was apparently on vacation in Mexico and the other was apparently was not working due to an injury.

#### Analysis

The Board attempts to conduct elections in a manner that ensures, as much as possible, that the results of the election flow from a free and fair choice of the voters. *Kerona Plastics Extrusion Co.*, 196 NLRB 1120 (1972). Not every conceivable irregularity requires that an election be set aside. *Trico Products Corp.*, 238 NLRB 380, 381 (1978). The Board, however, is “especially zealous in preventing intrusions upon the actual conduct of its elections.” *Claussen Baking Co.*, 134 NLRB 111, 112 (1961). Supervisory presence in the voting area may provide a basis for overturning an election. *Smithfield Packing Co.*, 344 NLRB 1,12 (2004).

Indeed, supervisory presence *outside* the actual voting area but along the route that voters must take to the voting area may be a basis for setting aside an election. *ITT Auto. v. NLRB*, 188 F.3d 375 (6<sup>th</sup> Cir. 1999). Moreover, [t]he final minutes before an employee casts his vote should be his own, as free from interference as possible.” *Milchem, Inc.*, 170 NLRB 362 (1968).

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Section 11326 of the NLRB’s Casehandling Manual Representation Proceedings sets forth the following long-standing policy:

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*Electioneering:* No electioneering will be permitted at or near the polling place during the hours of voting, nor should any conversation be allowed between an agent of the parties and the voters in the polling area, or in the line of employees waiting to vote. Indeed, agents of the parties other than observers) should not be allowed in the polling area during the election hours.

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While the Casehandling Manual does not carry the force of law, it provides support for the Board agent’s direction to Corona to leave the voting area and is part of the network of Board procedure designed to produce a free and fair election.

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Corona’s conduct breached established election procedure in several respects. First, he came into the actual voting area itself during the polling times. Next, he remained there even after he was instructed by the Board agent to leave. Third, he spoke to voters in line waiting to vote in the final moments before they cast their ballots. Moreover, he belittled the election process and the Board agent’s ability to control the rules of the election by encouraging the voters not to vote because the Board agent was angry. This conduct in its entirety made it appear that Corona, and by implication the Employer, did not have to abide by the rules designed by the Board to assure a fair election. I note that the voters waiting in line were “his” (Corona’s) employees. I also note that this was an extremely close election and there were about eight employees plus two observers that directly witnessed Corona’s misconduct. And the “unfairness” of Corona’s conduct is palpable in that the Petitioner, by following the rules, did not have this last minute chance to show its presence in the voting area or view and speak to voters as they were waiting to cast their votes.

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In its brief the Employer points out that despite Corona’s comments, all the employees waiting in line did vote. But this fact misses the point. Rather, the point is the negative impact that Corona’s conduct had on their ability to cast their votes in accordance with procedures designed to provide them with a free and fair election.

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Under these circumstances I conclude that the election must be set aside and another election be held.<sup>2</sup>

#### DIRECTION OF SECOND ELECTION

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A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board’s Rules and Regulations. Voter eligibility

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<sup>2</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, DC within 14 days from the date of issuance of this Report and recommendations. Exceptions must be received by the Board in Washington by November 27, 2009. If no timely exceptions are filed the Board may adopt the recommendation set forth herein.

shall be determined consistent with the eligibility requirements set forth in the earlier stipulated election agreement. Those eligible shall vote whether they desire to be represented for collective bargaining by the Petitioner. To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C., November 13, 2009.

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William G. Kocol  
Administrative Law Judge