

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

CASTLEWOOD COUNTRY CLUB
Employer

and

Case 32-RD-1590

STEPHEN R. FREITAS¹
Petitioner

and

UNITE-HERE, LOCAL 2850, AFL-CIO,
Union

James L. Ferree and Bernard Florian Burdzinski II,
Burdzinski & Partners, of Dayton, Ohio, for
the Employer

Stephen R. Freitas of Tracy, California for Petitioner
Kristin L. Martin, Davis, Cowell & Bowe, of San
Francisco, California, for the Union

REPORT AND RECOMMENDATIONS

Mary Miller Cracraft, Administrative Law Judge: This hearing, conducted on May 6, 2010,² in Oakland, California involves the objections of Employer Castlewood Country Club (the Employer) to conduct of the Union, Unite-Here, Local 2850, AFL-CIO (the Union), which the Employer claims affected the laboratory conditions of an election held on April 2. The election was based upon a Petition for Representation filed by Petitioner Stephen R. Freitas (Freitas).

The parties stipulated that the Union has represented the bargaining unit involved in these proceedings for 30 years or more. The parties' most recent collective-bargaining agreement expired by its terms on September 1, 2009. Bargaining for a successor contract began shortly before the expiration of the most recent contract. Bargaining was ongoing at the time of the hearing. During the course of the bargaining, employees were locked out on February 25, 2010. The lockout was ongoing at the time of the hearing.

¹ The caption was corrected at the hearing to reflect the correct spelling of Petitioner's first name. Thus, it was changed from Steven to Stephen.

² All dates are in 2010 unless otherwise referenced.

Freitas filed the Petition on March 5. Pursuant to a Stipulated Election Agreement approved on March 16, a secret ballot election was conducted on April 2 in the following appropriate unit of employees:

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All full-time and regular part-time employees engaged in or in connection with the preparation, handling and serving of food and/or beverages, including all food and cocktail waiters and waitresses, banquet waiters and waitresses, banquet captains, bar person (bartenders), service bartenders, busboys (bussers), dishwashers, all cooks including dinner cooks, sous chefs, cook(s) in charge, night cooks, griddle cooks, fry cooks, and cook’s helpers, pantry employees, cashiers, housemen, all maintenance (general repair) employees and housekeepers/housekeeping employees, employed by the Employer at its Pleasanton, California facility; *excluding* all managerial and administrative employees, salespersons, office clerical employees, grounds maintenance employees (including mechanics), mechanical engineers, utilities employees, pro-shop employees, including merchandisers, cart staff and mechanics, and other golf and tennis personnel, guards, and supervisors as defined in the Act.

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Following two sessions of secret ballot voting on April 2, the votes were counted. The Tally of Ballots served on all parties at the conclusion of the ballot count reflected the following results:

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Approximate number of eligible voters.....	61
Number of void ballots.....	0
Number of votes cast for Petitioner.....	41
Number of votes cast against participating labor organization.....	17
Number of valid votes counted.....	58
Number of challenged ballots.....	0
Valid votes counted plus challenged ballots.....	58

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Thereafter, the Employer timely filed three objections to the election. After consideration of these objections, the Regional Director determined that they could best be resolved by a hearing.

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All parties were afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue the merits of their respective positions. On the entire record, including my observation of the demeanor of the witnesses,³ and after considering the closing arguments of the Employer, the Petitioner, and the Union, I make the follow findings of fact and recommendations.

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Objection No. 1

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In the period between the filing of the Petition and the conduct of the Election, the Union, by its officers and agents, threatened certain employees that if they voted the

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³ Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

Union out, they would be discharged, arrested, deported; and, alternatively, if they continued to be employed they would lose all of their benefits. These threats destroyed the laboratory conditions in which the Board conducts its elections, citing *General Shoe Corp.*, 77 NLRB 124 (1948); *Smithers Tire*, 308 NLRB 72 (1992).

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No evidence was produced of any threats during the critical period. Accordingly, I recommend that this objection be dismissed.

Objection No. 2

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On the day of the election, April 2, 2010, the Union paid employees \$200 to gather at a meeting place and travel together to the polling place. Gifts to encourage employees to vote have been found by the Board to be objectionable conduct, citing *Sunrise Rehabilitation Hospital*, 320 NLRB 212 (1995); *Rite Aid Corp.*, 326 NLRB 924 (1998); *Lutheran Welfare Services*, 321 NLRB 915 (1996); *Action Carting Environmental Service*, 354 NLRB No. 84 (2009).

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The election was not held at the Employer's premises. Rather, it was held at Heritage House in the Alameda County Fairgrounds. There were two polling periods. The first was from 10 a.m. to noon. The second was from 5 p.m. to 7 p.m. Prior to the morning session, Petitioner Freitas drove to a Starbucks near the fairgrounds at around 8:30 a.m. He observed unit employees and at least one Union official in and around the Starbucks. After making this observation, he decided not to stay and drove away.

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Union Organizer Sarah Norr was present at a Starbucks near the fairgrounds on April 2. She arrived around 9 a.m. Norr testified that there was no organized meeting. She made no speeches and did not pass out any leaflets. The reason for the gathering was to assist voters in finding Heritage House. Some of the voters had expressed concern to the Union about finding the polling place. Because Norr had been to Heritage House on other business, she offered to help the employees find the polling place. Norr testified that no money was given out at Starbucks on April 2.

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Union president Wei-Ling Huber agreed that there was no organized meeting at Starbucks. When she arrived, some unit employees were inside drinking coffee and others were inside in line for coffee. Other unit employees were outside in the sidewalk area where two tables had been pulled together. Huber testified that no money was given out to workers at Starbucks that morning. No money was given to workers at any time for the purpose of having them gather at Starbucks or to encourage them to go to the polling place together. Huber left Starbucks shortly before 9:30 a.m. and went to Heritage House to attend the pre-election meeting conducted by Paloma Loya, an agent of the NLRB.

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Although the evidence reveals that some unit employees and Union representatives gathered at a Starbucks near the polling place, the undisputed evidence reveals that these individuals gathered in order to proceed to the polling place together because they were unfamiliar with the fair grounds where the voting took place. Because employees were locked out on the date of the election, the polling place was located in an unfamiliar area. One of the Union representatives was familiar with the polling place and showed unit employees where to go to vote. There is no evidence that employees were paid any money to gather and travel together. There is no evidence that any organized speeches were made at the Starbucks. Accordingly, because there is no evidence that the Union paid employees \$200 to gather at a meeting place and travel together to the polling place, I recommend that the objection be dismissed.

Objection No. 3

During the election, the Union stationed its officers and agents in the parking lot outside the polling place, where they campaigned among employees proceeding to vote, and they appeared to be making a list of employees who went in to vote. Union agents in the parking lot could see employees in the polling place, and vice versa, citing *Piggly-Wiggly #011*, 168 NLRB 792 (1967); *Pepsi-Cola Bottling Co.*, 291 NLRB 578 (1988); *Hollingsworth Management Service*, 342 NLRB 556 (2004); *Tyson Fresh Meats, Inc.*, 343 NLRB 1335 (2004).

The election was held at Heritage House in the Alameda County Fairgrounds. The room in which the election was held was at the front of Heritage House and had large windows facing a parking area. During polling, the observers, including Freitas, were seated with their backs to these front windows. Voters approached the observers and identified themselves before receiving a ballot. The voters would have been able to look out the window towards the parking area. Freitas testified that he did not see any Union officials near Heritage House during the polling periods. He explained that although his back was to the window when he was acting as an observer, he was able to get up from time to time and look out the windows.

During the pre-election meeting, Union president Huber asked the Board Agent how close the Union agents could be to Heritage House while polling was taking place. According to Huber, the Board Agent told her that Union agents could not come into the parking area at Heritage House. Huber testified that the NLRB agent admonished generally, "If I can see you then you're too close."

Unit employee Paul Keck, utility man, was driven to the polls on April 2 by his sister Candace Keck, event coordinator, a non-unit position. When they drove through the Yellow Gate into the fairgrounds, both of them observed Union Organizer Sarah Norr, an admitted agent of the Union, standing at the front gate with another woman they could not identify. The other woman turned and began walking into the fairgrounds as the Kecks drove through the gate. Candace Keck noticed that Norr was waving cars through the gate.

According to Paul Keck, when he entered the polling area, he could see the parking area through the windows of the voting room. When he cast his vote, he entered a three-sided voting booth which came up to about his chest area. He did not look outside when he was in the voting booth. From her car in the parking area outside Heritage House, Candace Keck was able to see the backs of the observers, her brother identifying himself to the observers, and her brother entering the voting booth.

After voting, the Kecks left Heritage House. When they drove back through the gate, Sarah Norr was still present at the gate. Candace Keck also saw Union president Wei-Ling Huber, an admitted agent of the Union, inside the fairgrounds on a sidewalk along the road leading from the Yellow Gate to Heritage House. Huber was talking with a woman that Candace
5 Keck could not identify. Candace Keck recalled that Huber was holding something that could have been a notepad or some paper or a binder.

Norr left Starbucks just before 10 a.m. She rode with a unit employee into the fairgrounds. Norr had attended a meeting at Heritage House about a month prior to the election and agreed to assist voters in finding it. Norr rode with several unit employees. They entered the
10 fairgrounds through the Yellow Gate off Pleasanton Avenue. After driving into the fairgrounds and driving along Fairgrounds Road until Heritage House was visible, Norr pointed to Heritage House and then got out of the car. Norr walked back to the Yellow Gate.

Heritage House is of craftsman-style construction. On the front there are large windows looking out onto an 8 to 10 foot deep porch. A roof overhang of an additional 4 feet extends beyond the porch. There is a short ivy-covered railing and columns along the front of the porch. A pathway leads from a parking area to the front of Heritage House. The record reflects that
15 Heritage House was accessed by voters by entry through the Yellow Gate off of Pleasanton Avenue and onto Fairgrounds Road. The record reflects that Fairgrounds Road is heavily wooded. Further, at many points along Fairgrounds Road, Heritage House is not visible because another building blocks the view of Heritage House.
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Although pictures taken by Norr on the day before this hearing show the windows of
25 Heritage House as darkened, I credit Candace Keck's testimony that an individual could see into the polling place from the parking lot at the time of the election.

Pictures taken of the fairgrounds and admitted in evidence in this proceeding indicate that it would be possible for a person standing on the porch of Heritage House to see an
30 individual standing on Fairgrounds Road at the point where Norr exited the voter's car. However, the distance appears to be great and there are many trees and buildings obstructing such a view. More importantly, no witness testified that any Union agent was visible to voters from the polling area. Norr testified that when she exited the voter's car, she did not attempt to look through the front window of Heritage House. In fact, she walked the other way – back to the
35 Yellow Gate. Norr recalled that she was told by Huber not to go into the Heritage House parking lot while the election was in progress.

On the day before the hearing, Norr returned to the spot on Fairgrounds Road where she had disembarked from the voter's car. At that time she attempted to view the interior of
40 Heritage House. She testified that she was unable to do so.

Norr testified that she was not carrying a clipboard, notebook, notepad, or any other item. She testified she was wearing a backpack on her back. When Norr was at the Yellow Gate, Norr observed two other Union agents, president Wei-Ling Huber and Carmen Rodriguez,
45 also at the Yellow Gate. As far as Norr recalled, neither of them was carrying a clipboard, notepad or any other thing.

After leaving the pre-election conference, Huber remained on the fairgrounds from about 10 a.m. until about 11:15 a.m. Initially, she stood along Fairgrounds Road and spoke to Carmen
50 Rodriguez. Huber identified Carmen Rodriguez as a housekeeping supervisor at a Marriott hotel represented by the Union. They spoke for a few minutes and then Rodriguez left. When Rodriguez left, Huber walked back to the gate house at the Yellow Gate. Huber testified that at

no time while she was on fairgrounds property was she holding a clipboard, notepad, or notebook. Further, Huber testified that at no time was she able to see into the windows of Heritage House because there was another building in her line of vision. In addition to speaking to Rodriguez, Huber recalled speaking to about 4 unit employees while she was on the fairgrounds property. She told all of them how to get to Heritage House.

Mr. Freitas asked Huber whether, in fact, the instructions at the pre-election conference were that Union agents should stay entirely away from the fairgrounds. Huber replied that she did not remember being told that.

There are two issues raised by these facts. The first is whether the presence of Union agents on the fairground premises constitutes objectionable conduct. I find that it does not under the circumstances of this case. Initially, I note that the record is devoid of any evidence that Union agents were seen from the polling area. Regardless of whether the instruction given in the pre-election conference was that Union agents should keep out of the fairgrounds entirely or whether they were told to stay away from the parking area only, the record reflects that no conversation was initiated by Union agents with voters in the polling area. Thus, the *Milchem*⁴ rule prohibiting sustained conversation with voters waiting to cast their ballots, regardless of the content of remarks exchanged, does not apply in this case. See, e.g., *Connecticut Foundry Co.*, 254 NLRB 758 (1981), *enf. denied on other grounds*, 668 F.2d 871 (2d Cir. 1982)(union representatives who briefly entered area within agreed-upon election zone but initiated no conversation did not interfere with election).

Tyson Fresh Meats, Inc., relied upon by the Employer, is distinguishable. In *Tyson*, union stewards were found to be agents of the union authorized to speak to employees regarding the merits of unionization. Thus, conversations between the stewards and other employees, all of whom were waiting in the voting line, about the benefits of unionization constituted unlawful electioneering under the *Milchem* rule.⁵ Huber's gate house comments to voters about the location of the polling place were not in the election area and constitute only isolated or innocuous comment. See *Milchem, supra*, 170 NLRB at 363: "The rule contemplates that conversations between a party and voters while the latter are in a polling area waiting to vote will normally, upon the filing of proper objections, be deemed prejudicial without investigation into the content of the remarks. But this does not mean that any chance, isolated, innocuous comment or inquiry by an employer or union official to a voter will necessarily void the election."

The second issue raised by the facts is whether employees might have feared that their names were being recorded as they went to vote. Candace Keck testified that she observed Union president Huber at an unspecified point on Fairgrounds Road carrying something that

⁴ *Milchem, Inc.*, 170 NLRB 362 (1968). The transcript is corrected sua sponte at page 17, line 20, to change the phrase "milk count" to "*Milchem*."

⁵ Two other cases cited by the Employer in support of its objection regarding Union agents on the fairgrounds property are inapposite. These cases deal with third-party electioneering conduct. In *Pepsi-Cola Bottling Co.*, 291 NLRB 578, 579 (1988), boisterous prounion conduct of employees in an area through which all voters were forced to walk in a case where the election results were very close warranted a new election. In *Hollingsworth Management Service*, 342 NLRB 556, 557 (2004), the Board held that persistent campaigning in the election area, manhandling of voters, extended conversations with voters about the union, and the large number of voters subjected to this treatment while waiting in line to vote substantially impaired employee free choice.

could have been a notepad, paper, or a binder. Huber denied having such an item and Norr testified that she did not remember Huber having such an item. The record is, however, devoid of any evidence that any Union agent was keeping a record of voters.

5 Even crediting Candace Keck’s testimony that Huber had a notepad, paper, or binder, there is nothing objectionable about this alone. There is no evidence that Huber was making any annotations let alone any evidence that she was in a position to see any voters or that voters were in a position to see her.⁶ See, e.g., *Indeck Energy Services*, 316 NLRB 330 (1995)(where there was no evidence that any voter suspected his name was being recorded, no
10 new election was warranted). *Piggly-Wiggly #011*, 168 NLRB 792 (1967), relied upon by the Employer, is inapposite. In *Piggly-Wiggly*, union agents stood in full view of all employees coming to vote with a sheet of paper in hand, making notations as employees passed. The Board found this conduct objectionable and in violation of the general ban on any person keeping a list of voters aside from the official eligibility list. Accordingly, I recommend that
15 objection 3 be overruled.

Recommendation

20 Based on the evidence recited above and the record as a whole,⁷ I recommend that objections 1, 2, and 3 be overruled and the appropriate certification issue.⁸

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Mary Miller Cracraft
Administrative Law Judge

30 Dated: Washington, D.C. May 21, 2010

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⁶ Were it necessary to resolve the creditability conflict between Keck and Huber, I would find that Huber was not carrying anything. Keck admitted that her recollection was “foggy.”

40 ⁷ Union Exhibit 6 is a Google map depicting the fairgrounds. It was admitted in evidence as a single-page document. Nevertheless, another unidentified document was beneath Exhibit 6 in the official record of Union Exhibits. This document, on the letterhead of Burdzinski & Partners Incorporated and containing affidavits from Paul Keck and Candace Keck, was not identified or admitted in evidence. Accordingly, this document has been placed in an envelope at the back of the official record of Union Exhibits and marked “Unidentified Extraneous Matter.”

45 ⁸ Pursuant to 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 Recommendation. Exceptions must be received by the Board in Washington, D.C. by June 4, 2010. 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
50 Regional Director. If not exceptions are filed thereto, the Board may adopt this Recommended Report.