

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX

GORBETT ENTERPRISES OF SOLON, INC.

Employer

and

Case 6-RC-12747

TEAMSTERS LOCAL UNION NO. 538,
AFFILIATED WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

Petitioner

REGIONAL DIRECTOR'S REPORT ON OBJECTION

Following the election in this matter, the Employer filed an Objection to the election on June 15, 2010. I have considered the evidence and the positions of the parties on this issue. As discussed below, I conclude that the Objection should be overruled. Accordingly, I recommend that the Board certify the Petitioner as the exclusive collective-bargaining representative of the employees in the unit involved herein.

I. PROCEDURAL HISTORY

Pursuant to a Stipulated Election Agreement approved by the undersigned on May 17, 2010, an election by secret ballot was conducted on June 10, 2010, among employees in the unit heretofore found appropriate.¹ The results of the election are set forth below:

1. Approximate number of eligible voters	19
2. Void ballots.....	0
3. Votes cast for Petitioner	9
4. Votes cast against participating labor organization	8
5. Valid votes counted.....	9

¹ The appropriate unit is: All full-time and regular part-time warehouse employees, maintenance employees, dispatch employees and shipping and receiving employees employed by Gorbett Enterprises of Solon, Inc. at its Cranberry Township, Pennsylvania, facility; excluding all office clerical employees and guards, professional employees and supervisors as defined in the Act, and all other employees.

- 6. Challenged ballots..... 0
- 7. Valid votes counted plus challenged ballots 17
- 8. Challenges are not sufficient in number to affect the results of the election.

A majority of the valid votes counted plus challenged ballots has been cast for the Petitioner.

On June 15, 2010, the Employer filed a timely Objection to conduct affecting the results of the election, a copy of which was duly served upon the Petitioner. In accordance with Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, an investigation of the Objection was conducted during which the parties were afforded an opportunity to submit evidence bearing on the issues. Having duly considered the results thereof, I hereby make the following report.

II. FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

The Objection alleges as follows:

On Monday, June 7th at 2:55 p.m., a Gorbett employee entitled to vote defaced the Notice of Election by placing an “X” in the square under the word, “YES”. This activity was recorded by one of Gorbett’s closed circuit cameras which are placed throughout the facility for safety and security purposes. (The cameras were installed in August 2006 and are in full view.) Gorbett’s Vice President, Joseph Smith contacted the Board on June 7th and again on June 9th to advise of the defacement. On June 10th, a replacement Notice was received and posted by Gorbett. Gorbett believes that the defacement of the Notice affected the results of the election.

On May 28, 2010 two copies of the official Notice of Election in connection with the election were mailed to the Employer’s facility in Cranberry Twp., with instructions that “One Notice of Election be posted in a conspicuous place immediately upon receipt.” Gorbett Executive Vice President and General Manager for the Great Lakes facility Joseph Smith provided testimony on behalf of the Employer.² Smith testified that despite the above instructions he posted both of the Notices in the lunch room, one on a door and the second beneath the time clock. On Monday, June 7, at about 4 p.m. he entered the lunch room and

² Smith submitted an affidavit prepared by a Board Agent. As the facts in this matter are not in dispute, there is no need for an evidentiary proceeding.

saw that an "X" had been placed in the "Yes" box of each Notice. It appeared to him that a black marker had been used in each instance. Smith immediately reviewed company surveillance tapes and identified an employee, Jeremy Gatewood, as having marked each of the Notices at 2:55 p.m. that day.

Smith attempted to contact NLRB Region Six offices at 4:30 p.m. and his call was sent to the operator's voice mail. Smith did not leave a message. Smith left both marked Notices where they were posted in the lunch room. On Tuesday morning, June 8, Smith called the NLRB office and left a message in the operator's voice mail but did not give any details as to the reason for his call.³

Smith testified that on the afternoon of June 8 he marked the "No" box on each of the Notices. He then decided that it would be better to remove the Notice to Elections rather than leave the copies defaced by both the employee and himself. He removed both Notices at about 4 p.m. that afternoon. Smith was not in the facility on June 9, but called the Regional Office and left a voice message for the Board Agent assigned to the case. Although informed that the Agent was out of the office, Smith did not ask to speak to anyone else about the situation.

On June 10 between 8:30 and 9:00 a.m., Smith received a call from the Board Agent assigned to the case. Smith informed her that an employee had put an "X" in both the "Yes" and "No" boxes on both of the Notices the company had been sent. At no time did Smith inform the Regional Office that the notices had been removed, or that it was he who had also defaced the notice by marking the "No" box. The Board Agent informed him that another agent would bring new Notices to be posted. Smith then re-posted the defaced Notices so that they could be seen by the Board Agent. That agent arrived prior to 10 a.m., removed the defaced Notices and

³ Since the Employer was represented by Counsel, the Board Agent assigned to the case first contacted Employer Counsel Clifford Ingber on June 8 to determine the nature of Smith's call. Ingber returned this call and left a message after the Board Agent left for the day advising that he believed Smith was calling about a defaced notice and giving the Agent permission to contact Smith directly.

replaced them with new unmarked Notices. The election was conducted without incident that afternoon.

The Notice of Election contains the following two paragraphs, the second in large, bold, capitalized letters:

The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.

WARNING: THIS IS THE ONLY OFFICIAL NOTICE OF THIS ELECTION AND MUST NOT BE DEFACED BY ANYONE. ANY MARKINGS THAT YOU MAY SEE ON ANY SAMPLE BALLOT OR ANYWHERE ON THIS NOTICE HAVE BEEN MADE BY SOMONE OTHER THAN THE NATIONAL LABOR RELATIONS BOARD, AND HAVE NOT BEEN PUT THERE BY THE NATIONAL LABOR RELATIONS BOARD. THE NATIONAL LABOR RELATIONS BOARD IS AN AGENCY OF THE UNITED STATES GOVERNMENT, AND DOES NOT ENDORSE ANY CHOICE IN THE ELECTION.

The central issue when examining an altered Notice of Election is “whether the altered document is likely to have given voters the misleading impression that the Board favored one of the parties to the election.” Brookville Healthcare Center, 312 NLRB 594 (1993). The Board in Brookville announced that due to the language now contained in each Notice of Election it would no longer apply the test previously announced in SDC Investment, 274 NLRB 556 (1985) inquiring into the source of the defacement.

Rather, we deem the new language itself as sufficient to preclude a reasonable impression that the Board favors or endorses any choice in the election, whether or not an “X” appears on the sample ballot. Given the prominence of the bold, large-print “warning,” we think it extremely unlikely that an employee would overlook the disclaimer of board involvement in any markings; in fact, we think an employee would be at least as likely to see the “warning” as any marking such as that involved in the instant case.”

Thus where disclaimer language, such as what was included on the Notice of Election herein, is included in the Notice, such language on its face counteracts any potential that the markings added to the Notice misled potential voters. Moreover, further disclaimer language is now contained on the ballot itself. In 2007 the Board announced a policy to revise “the Board’s official election ballot so that it will now include language that asserts the Board’s neutrality in

the election process and disclaims the Board's participation in the alteration of any sample ballot." Ryder Memorial Hospital, 351 NLRB 214 (2007). The language announced in Ryder, was contained on all ballots in this election.

III. RECOMMENDATIONS

I recommend that the Employer's sole objection should be overruled because the Notice of Election at issue contained the disclaiming language announced in Brookville. The inclusion of this language "precludes a reasonable impression that the "X" marking in the box indicating a choice for the Petitioner emanated from the Board." Brookville, supra. I further recommend that the Board certify the Petitioner as the exclusive collective-bargaining representative of the employees in the unit involved herein.

IV. EXCEPTIONS

Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8 as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570-0001. Under the provisions of Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Report, is not part of the record before the Board unless appended to the exceptions or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Report shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

Procedures for Filing Exceptions: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on July 7, 2010, at 5 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically.** If

exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.⁴ A copy of the exceptions must be served on each of the other parties to the proceeding, as well as to the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select the E-Gov tab, and then click on the E-filing link on the pull down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated at Pittsburgh, Pennsylvania, this 23rd day of June, 2010.

Robert W. Chester
Regional Director, Region Six
NATIONAL LABOR RELATIONS BOARD
William S. Moorhead Federal Building
1000 Liberty Avenue, Room 904
Pittsburgh, Pennsylvania 15222

⁴ A Request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.