

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE**

**TULLY ENVIRONMENTAL, INC., d/b/a  
EVERGREEN RECYCLING OF CORONA  
Employer**

**and**

**Case No. 29-RC-11915**

**UNITED PLANT AND PRODUCTION WORKERS,  
LOCAL 175**

**Petitioner**

**and**

**BUILDING, CONCRETE, EXCAVATING,  
AND COMMON LABORERS, LOCAL UNION 731,  
LABORERS' INTERNATIONAL UNION OF  
NORTH AMERICA, AFL-CIO**

**Intervenor**

*Rachel Zweighaft, Esq.*, Regional Office Representative.  
*Eric Chaikin, Esq., Chaikin & Chaikin*, Counsel for the Petitioner.  
*Melvin Feder, Esq.*, Counsel for the Intervenor.  
*Richard Wynn, Esq.*, Counsel for the Employer.

**DECISION ON OBJECTIONS**

**Joel P. Biblowitz, Administrative Law Judge:** This case was heard by me on September 14 and September 24, 2010<sup>1</sup> in New York, New York. Pursuant to a Stipulated Election Agreement signed by the parties and approved by the Regional Director for Region 29 of the Board, an election by secret ballot was conducted on July 14 among the Employer's employees in the following unit:

All full-time and regular part-time welders, repair and maintenance men, grease men, fork lift operators, platform operators, hi-lo operators, back hoe operators, pay load operators, bull dozer operators, crusher operators, yuk operators, motors, generators, power equipment and all other yard equipment men, tool room men and all other employees that handle any material by loading and unloading of all trucks, freight cars, barges, boats and ships to docks or to any other of the Employer's property; also the testing of all materials, the cubing stock piling either by hand or by equipment, and other miscellaneous skilled and unskilled duties in and around the plants owned and/or operated by the Employer, but excluding all guards and supervisors as defined in Section 2(11) of the Act.

The tally of ballots showed the following:

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<sup>1</sup> Unless indicated otherwise, all dates referred to herein relate to the year 2010.

Approximate number of eligible voters.....35  
 Number of ballots cast for the Petitioner (Local 175).....6  
 Number of ballots cast for the Intervenor (Local 731).....20  
 Number of votes cast against  
 5 participating labor organizations.....2  
 Number of valid votes counted.....28  
 Number of challenged ballots.....4  
 Number of valid votes counted plus challenged ballots.....32  
 10 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  
 Intervenor.

15 The Petitioner filed timely objections to conduct affecting the results of the election. On  
 August 24, the Regional Director issued a Report on Objections and Notice of Hearing in which  
 he ordered that a hearing be held concerning the Petitioner’s fourth, fifth and seventh objections  
 and recommended that the remaining objections filed by the Petitioner be overruled. Objection  
 20 No. 4 alleges that supervisors, one of whom was also the shop steward, remained on an  
 elevated platform above the area where the voters voted, observing the voters on line and as  
 they voted, throughout the voting period. Objection No. 5 alleges that voters standing on line to  
 vote could observe how a voter marked his ballot “by virtue of the persons hand on the ballot.”  
 Objection No. 7 alleges that the “improvised voting arrangements established by the Board  
 Agent were entirely too open and subject to observation to secure the secrecy of the ballot.” The  
 Employer and the Intervenor assert that these objections lack merit and should be overruled.

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**The Facts**

30 The election was conducted in the Employer’s Corona Meadows Yard, a large area  
 containing two trailers relevant to this matter. The ballots were marked in the rear portion of a  
 station wagon that was parked with the back portion of the wagon facing, and about five to eight  
 feet from, a stairway leading to a raised platform. On the opposite end of that platform, facing  
 the direction of the wagon, is a trailer that serves as a changing room for the employees.  
 Employees enter and exit this trailer from the platform. To the left of this trailer (as you look from  
 35 the wagon) and perpendicular to the changing trailer is another trailer that is used by Ruben  
 Jakab and Anthony Polito, alleged by the Petitioner to be supervisors within the meaning of  
 Section 2(11) of the Act, and to have engaged in the surveillance alleged in Objection No. 4. A  
 window on this trailer is adjacent to, and faces, the platform, but this trailer has no ingress or  
 egress from the platform.

40 The election was conducted by Board Agent James Kearns. He testified that he used his  
 car, a station wagon that did not have a third row of seats, but did have a rear door that opened  
 up and down, oftentimes referred to as a hatchback. He backed the car to near the raised  
 platform leading to the trailer/changing room, and placed the Board’s three sided election booth  
 45 in the rear of the wagon for use of the voters to mark their ballots. He estimated that each side  
 of the voting booth was about eighteen inches high. In addition, he left the hatchback up during  
 the election period and taped Board election notices in English and Spanish, as well as the  
 Board’s three paneled Notice of Election, to the windows in the rear of the wagon. During the  
 voting period, Kearns and the Board’s interpreter stood by the driver’s side door of the wagon  
 where he met the voters and gave them ballots. He instructed the voters to lean in to the rear of  
 50 the car where the three sided voting booth was located, and to mark their ballot on the floor of  
 the cargo area and return it to him to be placed in the ballot box. On a few occasions, two or  
 three voters appeared at one time. On those occasions, he asked them to stand on the driver’s

side of the wagon and line up toward the front of the wagon and away from the platform. He was asked if it were possible for employees on line to see how voters were marking their ballot; he testified: "I can't imagine." He also testified that on a couple of occasions during the voting period, he saw people standing on the platform behind the wagon. On each of these occasions  
5 he asked the individuals to leave, and they complied with his request. Nobody remained on the platform for more than thirty seconds to a minute, and nobody was there while a voter was marking his ballot in the rear of the wagon. On one occasion, he walked up on the platform, looked down at the car, and could not see into the rear of the wagon.

10 In addition to Kearns, testifying herein were employees Roberto Pena, Francisco Ortiz, Roby Pena and Jose A. Pichardo, as well as Polito and Jakab, and Fred Clemenza, field representative for the Petitioner. Roberto Pena, a maintenance employee employed by the Employer, testified that when he voted he leaned into the rear of the station wagon and marked  
15 his ballot on the floor of the wagon. While he was voting there were no other voters present and, during that period, he did not see either Polito or Jakab in the area. Ortiz testified that when he went to vote, only the Board Agent and the interpreter were present. He told the Board Agent his name, the Board Agent put a line through his name and gave him a ballot. The back door of the wagon was lifted up, and he leaned into the wagon, marked his ballot and placed it in the ballot box. Both before and after voting, no other employee was in the voting area. In addition,  
20 during this time, he did not see either Polito or Jakab in the area.

Roby Pena has been employed by the Employer for twelve years, presently as an operator. He voted between 1:50 and 2:00. He testified that prior to voting he was in the trailer with some other employees. He walked out of the trailer, walked across the platform, down the  
25 steps, and walked to the driver's side of the wagon, adjacent to the driver's door. He was given a ballot, leaned into the rear of the wagon and marked his ballot. He didn't remember whether anybody else was voting at the time and did not see anybody on the platform while he was waiting to vote. Pichardo has been employed by the Employer for five years as an operator. He testified that he voted at about 2:15. He parked his car after arriving for work, went into the  
30 employees' trailer to punch the time clock and then voted. Although his testimony is not very clear, it appears from his testimony that there were four people on line when he was waiting to vote. They waited by the driver's side of the wagon toward the front. There were signs about the election posted on the windows of the wagon. He leaned into the back of the wagon, and marked his ballot while it was on the floor of the wagon. He was asked if he stopped on the  
35 platform on the way to voting. He testified: "When they voted they said we couldn't be there."

Jakab testified that he is employed by the Employer as a working foreman. He voted in the election subject to challenge. He left the trailer that he shares with Polito between 1:45 and  
40 2:00; the polls were open from 1:15 to 3:15. He walked across the front of the two cars (the station wagon being used for the voting and a car parked next to it) and walked to the driver's side of the wagon where the Board Agent was standing. No other employee was present at the time. The Board Agent told him that he was being challenged, gave him a ballot and told him to mark the ballot with his choice. He went to the rear of the wagon, where he marked his ballot. There were voting signs on the windows of the wagon and a box in the rear of the wagon. After  
45 he marked his ballot, the Board Agent placed it in an envelope and inside the ballot box. He testified that at no time during the election did he remain on the platform near the wagon observing voters. He also testified that the window facing the platform is located behind his desk and that it has horizontal blinds that are "always closed."

50 Polito has been employed by the Employer for thirteen years, presently as a working foreman. He testified that he believes that he was the first person to vote when he went to vote between 1:15 and 1:25. Prior to voting, he was in the back of the yard. He obtained a ballot from

the Board Agent located on the driver's side of the wagon and was told that his vote was being challenged. He leaned into the rear of the wagon where there was a three sided enclosure, marked his ballot on the floor of the wagon, folded it and returned it to the Board Agent. After he voted, he walked past the driver's side of the car, and walked to the right about one hundred feet to the welding area. After checking on some work that was performed there, he walked directly to the trailer that he shares with Jakab. He stayed in the trailer for a few minutes and from there, he went to the employees' trailer to check to see whether the employees on the second shift had arrived. When he left the trailer he walked across the platform, down the stairs and walked past the driver's side of the car toward the front of the car, when two employees were walking toward him. Polito walked past them without saying anything to them, and went to his trailer. He testified further that he never stood, or remained, on the platform during the voting period observing voters on line as they voted. Like Jakab, he testified that the blinds on the window behind Jakab's desk are always closed. Pichardo was questioned about this window and was asked if he ever looked in that window. He testified: "There's something that you can't see through."

### Analysis

The three objections to be scrutinized are Objections 4, 5 and 7. Objection 4 alleges that alleged supervisors Jakab and Polito remained on the platform adjacent to, and above, the voting area where they observed the voters while they were on line and as they voted. Polito testified that he was on the platform briefly during the voting period. He had gone into the employees' trailer to see if the second shift employees had reported for work and, upon leaving that trailer, he had to cross the platform in order to get to his trailer. While he was crossing there were no employees voting, or waiting on line to vote. Jakab and Polito each testified that they never stood or remained on the platform during the voting period observing voters. In addition, Ortiz, Pichardo, Roberto Pena and Roby Pena each testified that during the voting period they did not see Jakab or Polito, and Kearns testified that on a couple of occasions during the voting period he saw people standing on the platform, and he asked them to leave. On all of these occasions, the employees complied with his request and nobody remained on the platform for more than thirty seconds and nobody was on the platform at the same time that an employee was voting. As there is no evidence supporting Objection 4, I recommend that it be overruled.<sup>2</sup>

Objection 5 alleges that voters standing on line to vote could observe how voters were marking their ballot. This objection is purely speculative and totally without any substantive support. Rather, the uncontradicted evidence establishes that while the employees voted in the rear of the wagon, when there was a line to vote, the line began by the driver's side door and went to the front of the car. Further, there was a three sided voting booth in the rear of the wagon and there were signs posted on the windows of the wagon, as well. Considering the location and direction of the line, as well as the obstructions on the windows of the wagon, there was no way that voters on line could have observed how the voters were marking their ballot. Because there is no evidence supporting this objection, I recommend that it too be overruled.

Objection 7 alleges, generally, that the "improvised voting arrangements" at the election compromised the secrecy of the ballots. This objection is also totally lacking in support. Rather, the evidence establishes that the voters had to lean into the rear of the wagon to vote within the three sided voting booth. In addition, there were election signs posted on the windows of the wagon, and the hatchback of the wagon was raised making it additionally difficult, if not

<sup>2</sup> Because of the total lack of support for this objection, I find that it is unnecessary to decide whether Jakab and Polito are supervisors within the meaning of Section 2(11) of the Act.

impossible, for anybody to observe how the voters marked their ballots. I therefore recommend that this objection be overruled.

**Conclusions**

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Based upon the above I recommend that the Petitioners Objections 4, 5 and 7 be overruled and that the Board’s Regional Office issue an appropriate certification certifying the Intervenor as the collective bargaining representative of the Employer’s employees in the appropriate unit herein.<sup>3</sup>

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**Dated, Washington, D.C., October 12, 2010.**

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**Joel P. Biblowitz**  
**Administrative Law Judge**

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<sup>3</sup> Under the provisions of Section 102.69 of the Board’s Rules and Regulations, exceptions to this Decision may be filed with the Board in Washington, D.C. within 14 days from the date of this Decision and recommendation. Exceptions must be received by the Board in Washington by October 25, 2010.