

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

ARAMARK SPORTS, LLC
Employer

and

Case 4-RC-21685

PENNSYLVANIA CONVENTION CENTER
SERVICE EMPLOYEES UNION
Petitioner

and

PHILADELPHIA JOINT BOARD,
WORKERS UNITED, A/W SEIU
Union Involved

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RECOMMENDED DECISION AND ORDER ON OBJECTIONS

MICHAEL A. ROSAS, Administrative Law Judge. Pursuant to a notice of hearing on objections to election ballots issued by the Regional Director for Region 4, dated January 20, 2011,¹ I conducted a hearing on this matter on February 14-15 in Philadelphia, Pennsylvania. Based on the evidence submitted in that hearing, including the testimony of witnesses and my assessment of their demeanor, as well as the post-hearing brief submitted by counsel, I make the following findings and conclusions.

I. The Procedural History

In accordance with a stipulated election agreement signed by the Pennsylvania Convention Center Service Employees Union (the CCSEU), the Philadelphia Joint Board, Workers United, A/W SEIU (the Joint Board), and Aramark Sports, LLC (the Employer), and approved by the Regional Director for Region 4 on December 4, 2010, an election was conducted on January 14, 2011, in the following unit:

Included: All cooks, stewards, pantry employees, head pantry employees, pastry employees, kitchen utility/dishwashers and porters, banquet servers, runners, Java City attendant, stand manager/cashiers, concession workers, warehouse employees, cash

¹ Unless otherwise stated, all dates refer to 2011.

bartenders, cash cocktails, set up employees, coffee/attendants, buffet attendants, wait staff, including head waiters, captains, and wait staff working at breakfast, lunch, dinner, cash bar, hosted bar and cocktail reception (servers) employed by the Employer at the Pennsylvania Convention Center in Philadelphia, Pennsylvania. The only employees eligible to vote in this election are those employees who have worked sixty (60) or more hours for the Employer at the Pennsylvania Convention Center during the period from January 1, 2010 through November 24, 2010.

Excluded: All other employees, including office employees, clerical employees, professional employees, maintenance employees, and guards and supervisors as defined in the National Labor Relations Act.

At the election, 66 votes were cast for the CCSEU, 60 were cast for the Joint Board, and 1 ballot was voided. There were no challenged ballots. However, the Joint Board filed 16 objections asserting improper conduct by the CCSEU and/or Employer which destroyed the laboratory conditions necessary for a fair election.² The following seven objections, all pertaining to the Employer's alleged conduct during the election, were withdrawn at or subsequent to the hearing: 3, 7, 8, 10, 11, 12, and 13.

II. The Election

A. The Voting Environment

The election was conducted at the Pennsylvania Convention Center on January 14, 2011, from 7:30 a.m. to 9:30 a.m. (morning session) and 2:30 p.m. to 4:30 p.m. (afternoon session). The Notice of Election designated the polling place at "[t]he Employee Time Office (formally known as the Command Center)." (RD Exh. 1.) The voting actually took place in the former Command Center, while the Time Office is the room next door where employees clock in and walk through in order to reach the employee locker room. Prior to the election, the Employer moved the Command Center to a new location in the same area; the Time Office remained situated immediately next door. (Empl. Exh. 1; Tr. 177-189.)

B. The Preelection Conference

Shortly before the election began, Barbara Mann, the Board Agent, met with Hope Sykes and Cynthia Hernandez, the designated observers for the CCSEU and Joint Board, respectively. (Tr. 59, 74, 212.) During the preelection conference, Mann designated the entire hallway outside the former Command Center as a no-electioneering area. The credible testimony of Joint Board witnesses Hernandez, Ernest Chester, Richard Minter, and Ronald Forrest, as corroborated by Mann, explained that the no-electioneering area consisted of a straight hallway running from a set of double doors at one end to another set of double doors at the other end of the hallway. Mann instructed the election representatives to remain outside of the no-electioneering area during the voting and positioned a chair in the hallway immediately outside the polling site to indicate when voting was in session. She did not specifically include the Time Office in her description of the no-electioneering zone. (Tr. 36, 59, 74-76, 106, 166, 263, 311-313.) Mann did, however, instruct the Employer to block the windows to the Time

² The Joint Board's Objections 1 through 15 referred to specific acts on the part of the CCSEU and/or the Employer. Objection 16 is a catch-all provision, which alluded to other unspecified acts that would be revealed during the investigation. It was not substantiated with further evidence at trial and, as such, is overruled without further discussion.

Office windows with cardboard. (Tr. 69, 105, 182–184.) Coupled with the confusing notice referring to Time Office as the polling location, the covered windows made it appear as if the election were taking place in that room as well. (Tr. 97, 121, 245–246.)

5 Slaughter did not dispute that Mann established the entire hallway as a no-electioneering area. She asserted, however, that she spoke with Mann in the former Command Center at some point during the morning session and the latter acceded to her request to be in the hallway—as long as she remained on the far side of the water fountain. (Tr. 262–265, 287–288, 292–294.) Given credibility issues that I found with much of Slaughter’s testimony, I credit
10 Mann’s testimony denying any conversation with anyone about the no-electioneering area after the preelection conference. (Tr. 311–314.) See *In re Pratt Towers, Inc.*, 338 NLRB 61, 82–83, 94 (2002) (testimony of Board Agent especially credible because neutral and unbiased).

15 In addition to Mann’s instructions, Sykes and Hernandez, as the observers, were given a copy of the Board’s “Instructions to Election Observers.” The instructions stated, in pertinent part, that observers were not to keep a list of individuals who have or have not voted, talk to any voter waiting to vote, discuss the election, or use an electronic device. (HO Exh. 1.)

20 III. The Objections

The remaining objections allege that the CCSEU’s agents and supporters destroyed the laboratory conditions necessary for a fair election by engaging in electioneering and other improper conduct during the election.

25 ***A. CCSEU agents and supporters engaged in electioneering and distributed literature in the hallway outside the polling booth (i.e., the Command Center) and in the Time Office next door, all areas designated by the Board agent as the area within the no-electioneering zone (Objections 1–2)***

30 The Joint Board contends that Shirley Slaughter, CCSEU’s president and representative, in contravention of Mann’s instructions designating the entire hallway as a no-electioneering zone, stood in the hallway and spoke with employees on several occasions during the election.³ Slaughter positioned herself in the Time Office for much of the election. Given Slaughter’s lack of credibility regarding the scope of the no-electioneering zone, I did not credit her assertion that
35 she only spoke with six employees about nonvoting matters in the hallway only during the afternoon session (Tr. 257–259, 272, 272–278.) The credible testimony of Joint Board witnesses Doris Gary, Ernest Chester, and Ronald Forrest revealed that Slaughter solicited support and distributed literature in the hallway to over 20 employees during the morning and
40 afternoon sessions; some of those discussions lasted 15 minutes or more. (Tr. 42–49, 108–113, 146–147.) One witness, Chester, went to the former Command Center and complained to Mann about Slaughter’s electioneering in the hallway. (Tr. 47–48, 62, 217–218, 248–249.) Another Joint Board witness, Ron Lawrence, credibly recounted how *he*, Slaughter, and others engaged in discussions with voters in the hallway. (Tr. 121–126.)

45 It is not disputed that Slaughter spoke to numerous employees while in the Time Office during the election. Moreover, the credible evidence reveals that she also solicited many of those employees. (Tr. 93–94, 98–99, 108, 124, 151, 257–258.) Notwithstanding the confusion

50 ³ There is no dispute that Slaughter’s actions are attributable to the CCSEU as its representative.

as to whether the polling room was in the Time Office or the former Command Center next door, Mann did not designate the Time Office as part of the no-electioneering zone. (Tr. 311–313.)

5 The burden of setting aside a Board-supervised, secret-ballot election is a heavy one and there is a strong presumption that ballots cast under Board rules and supervision reflect the true desires of the electorate. *Safeway, Inc.*, 338 NLRB 525 (2002). The Joint Board met its burden. Slaughter, as CCSEU’s representative, engaged in electioneering for prolonged periods of time within the no-electioneering zone established in the hallway during the election. See *Milchem, Inc.*, 170 NLRB 362 (1968). Moreover, although the Time Office was not specifically
10 designated within the no-electioneering zone, it was next door and, as such, certainly “near the polls.” See *Claussen Baking Co.*, 134 NLRB 111, 112 (1961); *Star Expansion Industries Corp.*, 170 NLRB 364, 365 (1968). Accordingly, such discussions and distribution contravened the instructions of the Board Agent and are sufficient to sustain the Joint Board Objections 1 and 2. See *Bio-Medical of Puerto Rico*, 269 NLRB 827 (1984).

15 ***B. CCSEU agents and supporters engaged in electioneering in the polling area during the voting while other employees waited to vote (Objection 4)***

20 During the morning session, employee Tasha Grey came to the former Command Center to vote. While there, Grey engaged in a conversation with Sykes for several minutes while three or four other employees waited to vote. Based on the detailed testimony of Hernandez, whom I found more credible than Sykes on this issue, I find that the conversation related to the Joint Board and the election, and that it resulted in Mann instructing Sykes and Grey to stop talking. (Tr. 60–61, 232–234.)

25 Pursuant to the Board’s longstanding rule in *Milchem*, supra at 362–363, it is objectionable for parties to engage in prolonged conversations with voters while the voters are in the polling place waiting to vote. The nature of the conversation is inconsequential. *Perdue Farms*, 323 NLRB 345, 354 (1997). Under the circumstances, Joint Board Objection 4 is
30 sustained.

35 ***C. CCSEU agents and supporters engaged in electioneering in the polling area during the voting by using an electronic device while other employees waited to vote (Objections 5)***

40 While it was undisputed that Sykes accessed her cellular telephone during the morning session, the parties disagreed as to whether she did more than just check the telephone for the time. According to Hernandez, Sykes appeared to be transmitting text messages. Sykes disputed that assertion (Tr. 61, 64, 231–232). Pursuant to the Joint Board’s subpoena duces tecum, served one business day before trial, Sykes was to provide copies of her cellular telephone records as relevant to this issue. She did not, however, receive the subpoena prior to or during the trial and I directed that she submit a request to T-Mobile, her cellular telephone company, for the records and provide them to the Joint Board. (Tr. 319–322.) Rather than
45 submit an appropriate request to T-Mobile, Sykes sent a subpoena lacking sufficient information to track her account information. (UI Exh. 7.) Although it appears that Sykes was less than diligent in her efforts to retrieve her records, I will not draw an adverse inference from her failure to obtain her account information. While I agreed that the Joint Board was entitled to such information, it simply waited until the eve of trial to subpoena documents *by mail* and caused this dilemma to continue beyond the close of testimony. In any event, the episode does
50 convince me that Hernandez was more credible than Sykes on the issue, and I find that Sykes used her telephone to transmit text messages during the election.

The use of a cellular telephone by an observer to transmit text messages reasonably conveyed to a voter that the observer was communicating information to her union, thus creating an impression that voters' activities were being reported to others. As such, Sykes' repeated use of her cellular telephone violated the Board Agent's rules for the election and constituted improper conduct under *Milchem. Cf. Topside Construction, Inc.*, 329 NLRB 886, 890-891 (1999) (union representatives brief use of cellular telephones and other activity within 5-10 feet of entrance to polling place after voting began but not while voters were present insufficient to support a finding of improper conduct warranting that election be set aside.) Accordingly, Joint Board Objection 5 is sustained.

D. CCSEU agents and supporters created an impression of surveillance of employees who voted in the election through the possession and visible use in the polling place of a list (other than the Excelsior list) while employees were voting (Objection 6)

During the preelection conference, Mann explained to Sykes and Hernandez that they, as observers, could not have any other lists with them while observing the election. (Tr. 58, 75, 230.) Having other lists of potential voters was also prohibited by the Board's rules. (HO Exh. 1.)

Joint Board witness Hernandez credibly testified that Sykes had a binder on the table and generally kept it closed. She also recalled that Sykes opened it once when a question arose about an employee's schedule. (Tr. 61, 63-64.) Sykes conceded that the binder contained her schedule and the names of other employees, and that such information was in addition to the official list provided to the observers at the preelection conference. On cross-examination, Sykes further conceded that she opened the binder "at times" while the election was going on. (Tr. 230-231.) Moreover, Joint Board witness Vaughan, specifically recalled that Sykes opened the binder while he was there to vote. (151-153.)

Sykes violated Mann's directive by having a binder with her containing a list of employees and opening it at least once in the presence of a voter. The parties' observers were permitted to have only the official voter eligibility list. By keeping a separate list of employees on the table that was visible to at least one voter waiting to vote, Sykes reasonably conveyed to that employee that his name was being recorded, a practice long condemned by the Board. See *Snap-On Tools, Inc.*, 342 NLRB 5, 24 (2004), citing *Days Inn Management Co.*, 299 NLRB 735, 736 (1990). Under the circumstances, Joint Board Objection 6 is sustained.

E. CCSEU agents or supporters distributed election-related literature, throughout the campaign period and on the day of the election falsely stating or implying that the CCSEU is affiliated with the "Teamsters" organization (Objection 9)

Sykes generated and distributed several pieces of campaign literature promoting the CCSEU over the Joint Board. One leaflet recounts an August 31, 2010 meeting between 30 Pennsylvania Convention Center employees and the Teamsters in which the latter advised employees to vote for the CCSEU as "the best and most lawful way to quickly and smoothly break away from the . . . Joint Board." (UI Exh. 2.) On a handwritten flyer, dated January 13, 2010, the CCSEU asserted, in pertinent part, that "[w]e can do better with the Teamsters backing us." (UI Exh. 4.)⁴ Sykes conceded that the CCSEU was not affiliated with the

⁴ The Joint Board also referred to UI Exh. 3 as evidence that the CCSEU misrepresented its affiliation. However, there is no reference to the Teamsters on that document.

Teamsters organization, and denied that she made such a representation when she generated and distributed such campaign literature. (Tr. 244-247).

5 None of the documents relied on by the Joint Board state that the CCSEU is affiliated with the Teamsters. They simply suggest that the CCSEU met with Teamsters officials and had the support of the Teamsters, all facts that may or may not be true. However, the extent of the CCSEU's support by the Teamsters was not the issue here.

10 The Board will set aside elections conducted under circumstances that created serious doubt over whether the employees knew which labor organization their vote addressed. *Pacific Southwest Container*, 283 NLRB 79 (1987). There is no evidence demonstrating such confusion in this case. At worst, any misrepresentations in the CCSEU's propaganda are typical of those frequently found in campaign propaganda. The Board has long held that such
15 misrepresentations do not constitute grounds for setting aside an election. See *Midland National Life Insurance Co.*, 263 NLRB 127, 130 (1982); see also *TEG/LVI Environmental Services*, 326 NLRB 1469 (1998). Cf. *The Humane Society for Seattle/King County*, 356 NLRB No. 13, slip op at 5-6 (2010) (election set aside where employees were confused over the identity of the organization). Under the circumstances, Joint Board Objection 9 is overruled.

20 ***F. The Board Agent denied employee Greg Martucci's request to vote a challenged ballot because he was not listed on the Excelsior list (Objection 14)***

25 The Joint Board, as the objecting party, contends that employee Greg Martucci was improperly prevented by Mann from casting at least a challenged ballot. Sykes merely recalled that he was prevented from casting a challenged ballot because his name was not on the Excelsior list. (Tr. 237-238.) Hernandez, however, more credibly recalled that, since Martucci's name was not on the list, Mann asked him if he had worked the number of hours in 2010 required for voting eligibility. Martucci conceded he did not meet that threshold and Mann informed him that he was not eligible to vote. (Tr. 63.)

30 The Joint Board relies on NLRB Case Handling Manual Sections 11338.3 and 11338.7, which require that challenged ballots be placed in a sealed challenged ballot envelope, unless the employee falls under an excluded job classification. There was no dispute here as to whether Martucci fell within an included or excluded voting classification. He fell within an
35 included voting classification, but conceded that he had not worked the minimum number of hours in 2010 necessary to vote.

40 The Board Agent's refusal to permit Martucci to cast a challenged ballot did not contravene standard Board election procedure as set forth in the Case Handling Manual. Unlike situations in which there was a dispute as to whether a voter was eligible, Hernandez's credible testimony indicates that Mann carried out her mandate by excluding a potential voter who, by *his* own words, did not meet the qualifications to vote. In any event, her action affected one challenged ballot, which would not have been determinative under the circumstances. In cases
45 involving a substantial deviation from its election procedures, the Board has set aside the election only where the deviation created a reasonable doubt about its validity. See *Madera Enterprises*, 309 NLRB 774 (1992). Cf. *Paprikas Fono*, 273 NLRB 1326, 1328 (1984) (Board set aside election where there was extensive handling of impounded determinative challenge ballots outside the presence of the parties). Under the circumstances, Joint Board Objection 14 is overruled.

G. The Board Agent failed to stop the conduct described in Objections 1–3, 5–6 and 9, despite having knowledge of said conduct and complaints by the Joint Board (Objection 15)

5 The Joint Board contends that the Board Agent failed to take appropriate action, as required by Case Handling Manual Section 11326.3, after being informed that CCSEU representatives and supporters were campaigning within the no-electioneering zone. Chester credibly testified that he informed the Board Agent about the CCSEU's actions within the no-electioneering zone, but she declined to take action because she could not leave the polling site. (Tr. 47–48.) Mann was unable to refute the allegation, as the subject matter fell outside her scope of testimony as permitted by the Regional Director.

15 Mann's refusal to abandon her post within the polling location to address alleged electioneering in the hallway was consistent with her duty to oversee voting activities in the former Command Center. However, Chester's credible testimony revealed that she came to the doorway of the polling site to speak with him. From that juncture, she would have been able to observe electioneering within the hallway and could have directed Slaughter to cease her activities within that designated area. Without Mann's explanation to prove otherwise, I must rely on Chester's testimony and find that the Board Agent was informed that electioneering was occurring within the no-electioneering zone in the hallway, but she failed to take action to stop it. Under the circumstances, Joint Board Objection 15 is sustained.

IV. Conclusions and Recommended Order

25 The election results were very close, as the CCSEU prevailed by a mere 6 votes out of 137 votes cast. As described above, a myriad of inappropriate acts destroyed the laboratory conditions necessary for a fair election: electioneering at or near the polls by the CCSEU's representative and designated voting observer, coupled with the Board Agent's failure to prevent such acts; prolonged conversations between the CCSEU observer and voters at the polling site as other voters waited to vote; use of a cellular telephone by the CCSEU's observer while other employees waited to vote; and the CCSEU observer's possession and use of a prohibited employee list visible to employees as they waited to vote.

35 In accordance with the aforementioned findings, I conclude that Joint Board Objections 1, 2, 4, 5, 6 and 15 are sustained, while remaining Objections 9 and 14 are overruled. As the cumulative effect of the sustained objections is sufficient to question the fairness and validity of the election, I recommend that the election be set aside and the case remanded to the Regional Director to schedule a new election.⁵

40 Dated: Washington, D.C. March 22, 2011

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Michael A. Rosas
Administrative Law Judge

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⁵ Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this Recommended Decision may be filed with the Board in Washington, DC within 14 days from the date of the issuance. Exceptions must be received by the Board in Washington, D.C. by April 5, 2011.