

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

SOUTHLAND TRANSIT, INC.

Employer,

and

UNITED TRANSPORTATION UNION

Petitioner.

Case No.: 21-RC-21256

**UNITED TRANSPORTATION UNION'S
STATEMENT IN OPPOSITION TO
SOUTHLAND TRANSIT'S REQUEST FOR REVIEW**

Pursuant to Section 102.67 of the Board's Rules and Regulations, United Transportation Union ("UTU" or "the Petitioner" or "the Union") hereby opposes the Request for Review¹ ("Request") filed by Southland Transit, Inc. ("Southland" or "the Employer"). As indicated in the foregoing, Southland Transit has not shown "compelling reasons" supporting its Request.² Accordingly, the Petitioner respectfully requests that the Board dismiss the Employer's Request for Review in its entirety and that the Regional Director schedule and conduct the rerun election.³

¹ While Southland has labeled its filing "Employer's Exceptions to the Hearing Officer's Report and Recommendations" and "Brief in Support of Employer's Exceptions to the Hearing Officer's Report and Recommendations," these documents are essentially a Request for Review of the Hearing Officer's decision to direct an election.

² NLRB Rules and Regulations and Statements of Procedure, § 102.67(c), U.S. GPO, Washington, D.C. (2002).

³ NLRB Rules and Regulations, § 102.67(b).

STANDARD OF REVIEW

In order for the Board to grant a Request for Review of a Region's decision, the Employer must set forth compelling reasons for such review. NLRB Rules and Regulations, § 102.67(c). Section 102.67(c) provides that such request will only be granted if:

- (1) a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent;
- (2) the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party;
- (3) the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error; and/or
- (4) there are compelling reasons for reconsideration of an important Board rule or policy.

Based on the Employer's submitted Request, it appears that the Employer relies upon the first and second ground for its request for review. NLRB Rules and Regulations, § 102.67 (c)(1), (2). Contrary to the Employer's assertions, the Region has neither departed from officially reported Board precedent nor made any clearly erroneous decisions on substantial factual issues.

FACTS

On November 2, 2010, UTU filed a representation petition at the National Labor Relations Board ("Board") Region 21 Office for a unit consisting of all ADA transportation service drivers, mechanics, and utility workers employed by Southland Transit at its facility located at 110 South G Street, Perris, California. The parties entered into a stipulated election agreement on November 9, 2010, which set the election to be conducted between the hours of 5:00 a.m. to 7:00 a.m., 2:00 p.m. to 4:30 p.m., and 5:00 p.m. to 7:00 p.m. on December 10, 2010, in the Training Room at the Employer's facility. (*See Stipulated Election Agreement*). There are no cameras in the Training Room. (Transcript ["Tr."] at 65.)

Upon UTU Alternate Vice President of Bus West Bonnie L. Morr's approximate 4:30 a.m. arrival on December 10, 2011 at the polling site, she was informed that the vote would be

moved to another, separate extension of the training room. (Tr. at 10:16-21.) This new voting location (hereinafter “vault room”) appeared to be a storage area. (Tr. at 28-29.) Mr. Len Engel, Vice President at Southland, made the decision to move the vote into the vault room. (Tr. at 49, 65.) At no time prior to the start of the vote did Ms. Morr look for or see cameras in the vault room. (Tr. at 19.) Despite Mr. Engel’s knowledge regarding the cameras, at no time did Engel inform Ms. Morr, the union observer, and/or Board Agent John Hatem of the presence of cameras in the vault room. (Tr. at 14, 51, 66, 110.) As Agent Hatem was already setting up his voting tables, Ms. Morr acquiesced to the move. (Tr. at 11-12.) The first session of voting commenced at 5 a.m., as scheduled.

Thereafter, but before the second voting session, Ms. Morr received a phone call from Gary Miller, a Southland driver who voted in the election and was the union’s election observer. (Tr. at 13, 27, 33-34.) Miller indicated that another driver, who also voted, informed him that the vault room was “under camera surveillance.” (Tr. at 13:16, 27, 33-34.) After several unsuccessful attempts, Ms. Morr was finally able to get in touch with Board Agent John Hatem regarding the shared concerns over the video surveillance. (Tr. at 13.)

Once Ms. Morr returned to the property, Mr. Engel assured her that all the cameras had been covered and had not been taping during the election. (Tr. at 14.) Ms. Morr then accompanied Mr. Engel to view the surveillance screens at Southland Project Manager Ms. Wynne’s desk. (Tr. at 15.) While looking at these surveillance feeds between the first and second voting sessions, Ms. Morr noticed that the live video was still taking place. (Tr. at 15.) While Ms. Wynne was unable to pull up the video from the morning vote in Morr’s presence (Tr. 22, 77, 93), from the live view, Ms. Morr was able to see people walking into the vault room and towards the right of the voting area. (Tr. at 22.) Morr saw footage from two different cameras

from the live feed: one camera coming into the entrance of the vault room and one on the inside of the vault room. (Tr. at 23-24.) Before the 2 p.m. vote, Ms. Morr witnessed a Southland employee covering up the camera on the outside of the building [“camera 2”]. (Tr. at 16:13-14, 25-27, 57, 60, 66; Employer’s Exhibit [“Ex.”] 1.) Morr then returned to Ms. Wynne’s office to view the monitors and observed one camera continuing to videotape the entrance. (Tr. at 16-17.)

Southland employees are generally prohibited from entering the vault room. (Tr. 42, 67.) In fact, there are signs posted noting this prohibition. (Tr. at 111, 112.) The only employees allowed in the vault room are the “vaulters.”⁴ (Tr. at 40-41.) There are always two vaulters on duty at one time, one of whom is a part-time driver. (*Id.*) On election day, the vaulting was moved to the lobby. (Tr. at 43-44.) Hearing testimony revealed that there are two visible cameras inside the vault room where the vote was conducted: one marked “camera 3” and the other labeled “don’t work” in Employer’s Ex. 1. (Tr. at 101, 102; Employer’s Ex. 1.) Camera 2, which focuses on the doorway coming into the vault room, is also visible. (Tr. at 102; Employer’s Ex. 1.)

Though she never saw the previously taped footage, Ms. Morr was told before the 5 p.m. voting session that all video taken that day had been erased. (Tr. at 25, 95.) Southland contends they were later able to pull the morning footage and stopped watching before 5 a.m. (Tr. at 58.) At the close of the polls, the ballots were counted. UTU’s petition was defeated by a count of 47 to 50, a difference of only three (3) votes.

STATEMENT OF THE CASE

The Union timely filed the following objections: the Employer engaged in unlawful surveillance during the election and the created the impression of surveillance during the

⁴ “Vaulters’ are the people who actually do the exchange of the vaults.” (Tr. at 40-41.)

election, both of which had a reasonable tendency to interfere with, restrain, and coerce individuals affected in the exercise of their Section 7 rights.⁵ Pursuant to the Regional Director's January 12, 2011 Order, a hearing was conducted on January 26, 2011. After considering all evidence, the Hearing Officer sustained the Union's objections and ordered "a rerun election be held to insure employees a free and reasoned selection of alternatives." (Hearing Officer's Report and Recommendations[hereinafter "HORR"] at 11). On March 17, 2011, the Employer filed its Request for Review.⁶

ARGUMENT

A. The Hearing Officer Applied Existing Board Precedent in Sustaining the Petitioner's Objections and Ordering a Rerun Election

The Hearing Officer clearly applied existing Board precedent in determining that the Employer interfered with the conduct of the election by engaging in unlawful surveillance and by creating the impression of surveillance. As noted by the Hearing Officer, it has long been established that "absent a legitimate reason, photographing or videotaping employees as they engage in protected-concerted activity violates Section 8(a)(1) of the Act, and also constitutes objectionable conduct, which warrants a second election unless the impact on the election results is negligible." *Snap-On Tools, Inc.*, 342 NLRB 5, 11-12 (2004). (HORR at 8).

Here, the Hearing Officer found that the Employer decided to change the previously agreed-upon voting location with no cameras to a room that contained two working cameras, that

⁵ Although the Union initially submitted a third objection, the Union requested its withdrawal in its post-hearing brief.

⁶ In the HORR, the Hearing Officer stated that exceptions must be received by March 17, 2011 at 5p.m. unless filed electronically. In email dated March 18, 2011, Erick Becker, the Employer's counsel, served the Union with a copy of its filing and asserted that its Request for Review had been electronically filed on March 17, 2011. The Regulations provide that "[u]nless otherwise specified elsewhere in these rules, service on all parties shall be made in the same manner as that utilized in filing the paper with the Board, or in a more expeditious manner." 29 C.F.R. § 102.114. Because service was not made in the same manner as that utilized in filing the paper with the Board or in a more expeditious manner, the Board should dismiss this request for Review.

the Employer did not take appropriate action to ensure that the cameras were not in operation, that “the entire first two-hour polling session (at the very least) was subject to active video surveillance,” that every employee who voted walked through the door with the camera focused on the entrance, and that, at least four employees knew of the cameras in the vaulting room. (HORR at 8-9). In addition, the Hearing Officer determined that on the day of the election, no collection or counting of money took place in the vaulting room or cash room (HORR at 5), and instead took place in another area. (HORR at 8).

Consistent with Board precedent, *Randell II* (citing *F. W. Woolworth*, 310 NLRB 1197 (1993)), the Hearing Officer correctly found that the Employer offered no business justification for videotaping the vaulting room area on the day of the election. The record reveals that even the Employer’s own witnesses testified that all vaulting functions were performed elsewhere. (HORR at 8; Tr. at 43-44, 104). As such, the Hearing Officer properly discounted the Employer’s hindsight excuses that the room was moved to “avoid employees walking past supervisory offices.” (Request at 9).

While correctly noting that “[r]epresentation elections are not lightly set aside, *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991), , the Hearing Officer determined based on the record that the Employer’s conduct did tend to interfere with the employees’ freedom of choice in selecting a representative. *See Kux Mfg. Co.*, 890 F.2d 804, 808 (6th Cir. 1989) (quoting *NLRB v. White Knight Mfg. Co.*, 474 F.2d 1064, 1067 (5th Cir.1973) (noting “heavy” burden of proof satisfied where showing that unlawful acts interfered with “employees’ exercise of free choice to such an extent that they materially affected the results of the election”).

In making this determination, the Hearing Officer applied the Board's objective test.⁷ (HORR at 7). *Cambridge Tool and Mfg. Co.*, 316 NLRB 716 (1995) (citing *Hopkins Nursing Care Center*, 309 NLRB 958 (1992)); *Avis Rent-A-Car Systems*, 280 NLRB 580 (1986). When considering the factors laid out in *Avis Rent-A-Car*, the Hearing Officer determined that "given the nature and timing of the Employer's misconduct, and its sole responsibility for such misconduct, a second election is warranted." (HORR at 11). The Hearing Officer properly reasoned that the Board has "regularly overturned elections with narrow margins of victory, where there is conduct that has the tendency to interfere with employees' free and untrammelled choice." *Cambridge Tool and Mfg. Co.*, 316 NLRB 716 (1995); *Hopkins Nursing Center*, 309 NLRB 958 (1992); *Rosehill Cemetery Assn.*, 275 NLRB 180 (1985); *Hamilton Nursing Home*, 270 NLRB 1357 (1984).

To the extent the Employer relies upon *Antioch Rock and Ready Mix*, 327 NLRB 1091 (1999), such reliance is misplaced. In *Antioch Rock*, the Board conducted two separate elections for two separate units: mechanics and drivers. *Id.* at 1092. While the Hearing Officer found that objectionable conduct in the form of threats had occurred in the drivers unit, the Board determined this conduct did not warrant setting aside the separate, mechanics' unit's election. *Id.* Likewise, the Employer misstates *Delta Brands*, 344 NLRB 252 (2005). The issue in *Delta Brands* was whether the Employer's unlawful no-solicitation rule contained in its 36-page handbook was enough to set aside an election. In declining to set aside the election, the Board concluded that the rule prohibiting vending, solicitation or collecting contributions for any purpose without management approval, was contained in a 36-page policy manual and was not

⁷ The Board considers the following factors in making this determination: the size of the unit, the number of employees exposed to the misconduct, the proximity of the misconduct to the election, the timing of the misconduct to the election, and the degree to which the misconduct is attributable to the party. *Avis Rent-A-Car Systems*, 280 NLRB 580 (1986).

adopted in reaction to the union campaign.⁸ *Id.* Here, the Hearing Officer determined that the Employer not only engaged in the impression of surveillance while employees were casting their representation votes (HORR at 10), but that the Employer actually engaged in surveillance by video camera during the election (HORR at 9).

The Employer's argument that the Hearing Officer's decision was "clearly erroneous under Board precedent" because she "substituted speculation for actual evidence that employees believed the Employer was trying to spy on them and that such belief affected them in some way" (Request at 9) is unsupported by the record. In essence, the Employer complains that the Hearing Officer did not apply existing Board precedent in a manner favorable to the Employer. Rather than offer any support for an argument that the Region has departed from officially reported Board precedent, the Employer attempts to distinguish its version of the events from the findings of the Hearing Officer and proffers reasons why the present matter is distinguishable *Snap on Tools* and *CBS Records*. (Request at 9). Such claims do not satisfy the "compelling reason" standard sufficient to grant the Employer's Request for Review.

The Employer also contends that the "Hearing Officer found that changing the voting location was a deliberate act to allow for surveillance." (Request at 9). Such assertion is unfounded and completely lacking in the Hearing Officer's decision. *See* HORR at 8 (citing *Fieldcrest Cannon, Inc.*, 327 NLRB 109 n. 2 (1998) (finding improper motivation not necessary element of objectionable conduct)).

⁸ The Board reasoned that the mere existence of the Employer's rule did not affect the results of the election where

the mere presence of an overbroad rule [contained] in a much larger document, with no showing that any employee was affected by the rules existence, no showing of enforcement, and indeed no showing of any mention of the rule. *Id.*

Because the Employer has not set forth compelling reasons raising a substantial question of law or policy is raised due to the absence of, or a departure from, officially reported Board precedent, the Board should deny the Employer's Request for Review.

B. The Hearing Officer Did Not Make Erroneous Findings of Substantial Factual Issues

The Employer additionally contends that the Hearing Officer made clearly erroneous decisions on substantial factual issues. However, the "errors" complained of are more of a complaint that the Hearing Officer did not view the evidence presented at the hearing in the same manner as the Employer. As indicated in the following, not only are these decisions not erroneous, but the facts are not critical to the Hearing Officer's ultimate decision.

1, 3. The Employer argues that the Hearing Officer erred in finding both that "[t]he record establishes that the entire first two-hour polling session (at the very least) was subject to active video surveillance" and that "during the first voting session, a second camera may have been recording inside the vaulting room proper while the election was preceding there." In support of the Employer's contention that the Hearing Officer "relied on speculation rather than proof," the Employer proffers that its "General Manager, Len Engel, credibly testified to the reasons for the voting room move. It is the Hearing Officer who holds the responsibility to decide such credibility determinations. Contrary to the Employer's accusations, the Employer's own testimony revealed that "during the first voting session ... the cameras were operable." (Hearing Transcript "Tr." at 36 (emphasis added); *see also* Tr. at 22, Tr. at 43-44). The Hearing Officer carefully considered the evidence presented at the hearing and Board precedent in determining that the election results be set aside and a new election be conducted. (HRR at 9) (citing *CBS Records Div. of CBA, Inc.*, 223 NLRB 709 (1976)).

2. The Employer argues that the Hearing Officer's finding that "[a]s each employee walked through the door to vote, his or her conduct was being recorded" "misstates the undisputed evidence." (Request at 4). However, the record clearly establishes, and the Hearing Officer notes, that at a minimum, Camera 2 was taping throughout the first polling session. (HORR at 6; Tr. at 22-24, 57, 102; Employer's Exhibit 1). Furthermore, the Hearing Officer did not merely find that the employer "view[ed] employees on their way to the polls" (Request at 5), but determined that at least one video camera was in operation while employees entered the polling area.

5-7. Contrary to the Employer's assertions, the Hearing Officer's finding that the cameras were still operative as late as 1:30 p.m. was supported by the record. At approximately 1:30 p.m., Ms. Wynne was still able to access the live feed from camera 2. (Tr. at 91-92.) In addition, UTU's Ms. Morr testified that from the live view at approximately 1:30 p.m., she was able to see people in the vault room where the vote was being conducted. (Tr. at 22). Furthermore, it is well within the Hearing Officer's discretion to discredit the Employer's witnesses denials of viewing any footage of the voting.⁹ Similarly, it is well within the Hearing Officer's discretion to discredit the Employer's witnesses' testimony in light of their actions. For example, the testimony revealed that while Ms. Wynne did not initially recall viewing any footage after 5 a.m. (Tr. at 94), she later testified that she viewed the recording from camera 3 (the camera *inside* the vault room) for at least five minutes after 5 a.m. (Tr. at 95.)

⁹ In resolving credibility determinations, the Hearing Officer properly relied upon existing Board precedent, noting that she "has considered the entire record," that such determinations were "based on [her] observations of the testimony and demeanor of witnesses at hearing," and "[t]o the extent that any testimony or other evidence is not discussed herein, ... [she] found it either irrelevant, incredible or of little probative value" (HORR at 2, FN 2) (citing *NLRB v. Brooks Camera Inc.*, 691 F.2d 912, 915 (9th Cir. 1982); *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970); *Bishop and Malco, Inc., d/b/a Walkers*, 159 NLRB 1159, 1161 (1966); *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 810-11 (6th Cir. 1989); *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2nd Cir. 1950, *rev'd on other grounds*, 340 U.S. 474 (1951)).

4. It appears that the Employer is claiming that the Hearing Officer's finding that "four identifiable votes were aware of the video cameras" is clearly erroneous on the record. However, the Hearing Officer relied upon Engel's testimony that all employees knew of the presence of cameras in the vaulting room and that, at a minimum, there were four employees eligible to vote in the representation election who had knowledge of the presence of the video cameras.¹⁰ In addition, Engel himself testified that "everybody on the property, all 118 people, would know there is video there," including the drivers, mechanics, and utility workers. (Tr. at 68.) Even Southland's own observer, a maintenance employee eligible to vote (Tr. at 107-08), testified that he knew camera 2 was located on the outside of the building. (Tr. at 112, 113.)

8. Based on the above-mentioned Board precedent, the Hearing Officer's determination that "the Employer's videotaping of the election constitutes objectionable conduct" was correct.

9-10. In support of its "Ninth and Tenth Exceptions," the Employer again claims that the Hearing Officer substituted speculation for actual evidence. However, instead of arguing or offering any support for an argument that the Region has departed from officially reported Board precedent, the Employer attempts to distinguish its version of the events from the findings of the Hearing Officer and proffers reasons why the present matter is distinguishable from the cases relied upon by the Hearing Officer. (Request at 9). Such claims do not satisfy the "compelling reason" standard sufficient to grant the Employer's Request for Review. In addition, based on the above-mentioned Board precedent, the Hearing Officer's determination that "the Employer's videotaping of the election constitutes objectionable conduct" was correct.

¹⁰ The four employees were: Gary Miller (union observer), the driver that phoned Miller regarding the video cameras, the part-time driver/vaulter, and the Employer's observer. (Tr. at 13:16, 27, 33-34, 40-41, 112-13.)

11–14. Based on the above-mentioned Board precedent and record, the Hearing Officer’s determination that the impact of the Employer’s misconduct was not minimal and thus warranted a second election is correct. Accordingly, the order of a rerun election should be affirmed.

Because the Employer has not set forth compelling reasons that a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party, the Board should deny the Employer’s Request for Review.

C. The Regional Director Must Proceed in Scheduling and Conducting a Rerun Election

Section 102.67(b) provides that:

“The Regional Director shall schedule and conduct any election directed by the decision notwithstanding that a request for review has been filed with or granted by the Board. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of the election.” Here, the Employer has not set forth compelling reasons for review, let alone reasons justifying a stay. In fact, the Employer did not even request a stay of the election. As such, the Regional Director should schedule and conduct the rerun election as directed by the Region’s decision.

CONCLUSION

Based on the foregoing, because the Employer is unable to establish that compelling reasons as enumerated in § 102.67(c) exist, the Board should deny the Employer's Request for Review. Accordingly, Regional Director should schedule and conduct the rerun election as directed by the Region's decision.

Dated this 24th day of March, 2011.

Respectfully submitted,

s/ Erika A. Diehl

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing United Transportation Union's Post-Hearing Brief has been electronically filed with the NLRB and served this 24th day of March, 2011, via email upon the following:

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