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C & G Heating and Air Conditioning, Inc. and United Association of Plumbers and Pipefitters, Local 777. Case 34-RC-2408

April 6, 2011

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND HAYES

The National Labor Relations Board, by a three-member panel, has considered an objection to an election held on November 24, 2010, and the Regional Director's report recommending disposition of it. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows six for and one against the Petitioner, with two challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions, and has adopted the Regional Director's findings and recommendations, and finds that a certification of representative should be issued.

In this case, the Employer filed an objection to the outcome of a secret-ballot election, in which employees voted 6 to 1 to be represented, on the ground that a union representative sat in his parked truck on a public street behind the Employer's facility while voting was going on inside the facility. Drawing all reasonable inferences in favor of the Employer from both the two affidavits it submitted in support of the objection and the factual representations in its objection, the evidence demonstrates that the Union's representative at the election parked his truck on a public street 77 feet from the entrance to a garage behind the Employer's facility through which employees entered in order to vote inside the garage. The representative was in that location between 8:05 and 8:30 a.m. while the polls were open between 7:30 and 8:30.¹ There is no evidence that the union representative talked to any voter as he or she entered or exited the garage. There is no evidence that the union representative kept any form of list of employees entering or exiting the garage or that any employee witnessed the keeping of any such list. In fact, there is no evidence that any employee entering the garage to vote saw the union repre-

¹ The union representative had attended the preelection conference inside the facility, left to have breakfast, and was then waiting outside before reentering the facility for the tally of ballots.

sentative and recognized him as a union representative.² There is no allegation that the secrecy of the balloting was compromised in any manner.³ The Regional Director concluded that, even accepting all the Employer's factual assertions as true, the alleged conduct was not objectionable and dismissed the objections without a hearing. The Employer then filed exceptions.

In its exceptions, the Employer's legal argument, in its entirety, reads as follows:

It is the Employer's position that the Union by the above and other acts, engaged in objectionable conduct, in the instant case.

See:

Piggly Wiggly, #011, 168 [NLRB] 792 (1967);
Pepsi-Cola Bottling, 291 [NLRB] 578 (1988);
Hollingsworth Management Service, 342 [NLRB] 556 (2004);
Tyson Fresh Meats, Inc., 343 [NLRB] 1335 (2004).

The Employer made the identical legal argument to the Regional Director. The Regional Director rejected the argument in a well-reasoned report supported with citations to applicable Board precedent. The Employer's exceptions do not cite and thus do not distinguish the applicable precedent cited in the report. Rather, the exceptions merely cite the same four cases cited in the objection.

Each of the cited cases is clearly distinguishable from the facts here, and the Employer makes no argument for the extension of their holdings or for any other change in Board law. In *Piggly Wiggly*, the union representative

² Both of the affidavits submitted by the Employer state that the affiant employees saw the individual in the truck before they voted but did not know he was the union representative until after the polls closed when he entered the facility for the tally.

³ The Employer alleges that while the windows of the overhead garage door closest to the entrance to the polling area were covered by cardboard, "the second overhead garage door windows were not covered in cardboard and would have provided [the union representative] a direct line of sight to the actual balloting area." While one of the Employer's affiants speculates that the union representative "would have been able to look through the window of the garage door and possibly observe the balloting process," neither affiant states affirmatively that any of the windows were uncovered and neither states affirmatively that it was possible from a distance of 77 feet to look through a window in a garage door and discern anything going on inside the garage. The Regional Director's report states that the Board agent conducting the election stated that the windows were covered throughout the election. Even crediting the Employer's assertion, employees cast their ballots in Board elections in voting booths in order to insure the secrecy of the ballot. Casehandling Manual, Part Two, Representation Proceedings, Sec. 11304.3, 11322.2. The Employer does not allege that a voting booth was not used in the election or that even people inside the polling area could see into the booth much less someone in a truck 77 feet outside the garage looking through a window.

kept a list of employees as they entered the polls to vote in violation of Board policy “prohibiting anyone from keeping any list of persons who have voted, aside from the official eligibility list” and at least some eligible voters were aware of the maintenance of the list. 168 NLRB at 793.⁴ In this case, the Employer does not allege that the union representative kept any form of list or that eligible voters knew of any such list. In *Pepsi-Cola*, a large group of union supporters wearing union hats and shirts stood on both sides of employees waiting in line to vote, within the area that had been designated by the Board agent as the no-electioneering area around the polls, clapping and cheering and engaging in active campaigning. In this case, the Employer does not allege that the union representative entered any no-electioneering area at any time, that a line of voters extended to the representative’s truck parked on the public street or even outside at all, or that the representative engaged in any form of campaigning. In *Hollingsworth*, the Board found “physical manhandling of voters, . . . extended conversations with voters about the Union and about how they intended to vote, and [a] large number of voters subjected to the conduct while waiting in the voting line.” 342 NLRB at 558. In this case, the Employer alleges not one of those three types of conduct. Finally, in *Tyson*, the Board found that the conduct of union stewards engaging in conversations with employees standing in line to vote violated the per se rule established in *Milchem*, 170 NLRB 362 (1968), barring any party to the proceedings from engaging in “prolonged conversations with prospective voters waiting in line to cast their ballots.” 343 NLRB at 1335. In this case, the Employer does not allege that the union representative engaged in any conversations with employees waiting in line to vote much less prolonged conversations.

Moreover, existing Board precedent, endorsed by the Sixth Circuit, but not cited by the Employer, clearly

⁴ Since *Piggly Wiggly*, the Board has several times distinguished that case on the ground that even if a party’s representative keeps a list of employees who have voted, the conduct is not objectionable unless more than a de minimis number of voters have knowledge of the maintenance of the list. See, e.g., *Indeck Energy Services of Turner Falls, Inc.*, 316 NLRB 300, 301 (1995); *Tom Brown Drilling Co.*, 172 NLRB 1267, 1267 (1968).

holds that “[p]resence [of a union representative in the vicinity of the polls] alone, in the absence of evidence of coercion or other objectionable conduct, is insufficient to warrant setting aside an election.” *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 121 (6th Cir. 1974), cert. denied 416 U.S. 986 (1974).

We find that the Employer’s exceptions are wholly baseless.⁵

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for United Association of Plumbers and Pipefitters, Local 777, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time installation and service technicians and apprentices employed by the Employer at its Torrington, Connecticut facility; but excluding all professional employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C. April 6, 2011

Wilma B. Liebman, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

⁵ Member Hayes would adopt the Regional Director’s report and overrule the Employer’s objection as without merit. He finds no need at this stage of Board proceedings to further characterize the relative strength, or lack thereof, in argument made and evidence adduced in support of the objection.