

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

DURHAM SCHOOL SERVICES, LLP,
Employer

and

Case 32-RC-66466

FREIGHT, CONSTRUCTION, GENERAL
DRIVERS, WAREHOUSEMEN AND HELPERS
LOCAL NO. 287, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS,
Petitioner

Stephen M. Astor,, Esq. (Falk & Sharp),
of Pasadena, California, for the Employer.

David Rosenfeld, Esq., of Alameda, California,
for the Petitioner.

Administrative Law Judge’s Report on Objections

Jay R Pollack, Administrative Law Judge: Pursuant to Section 102.69 of the National Labor Relations Board’s Rules and Regulations, Series 8, as amended, the Regional Director for Region 32 entered an amended report on objections, and ordered a hearing before an Administrative Law Judge. The matter was heard by me on January 3, 2012 at Oakland, California.

The first election among employees in the Unit found appropriate for collective-bargaining was held on November 18, 2011. The Tally of Ballots served on all the parties at the conclusion of the balloting showed the following:

Approximate number of eligible voters.....	117
Number of void ballots.....	3
Number of votes cast for Petitioner.....	63
Number of votes cast against participating labor organization.....	49
Number of valid votes counted.....	112
Number of undetermined challenged ballots.....	5
Number of valid votes counted plus challenged ballots.....	117

The Employer filed timely objections to conduct affecting the results of the election.

The Employer's objections

Objections 1 and 2 and 7

- 5 1. A mere two days prior to the certification election concerning the above-captioned parties , a male Union agent-whose photograph appeared on a Union produced poster – forcefully shoved the Employer's designated female employee observer against a brick wall, causing the employee observer to suffer a shoulder contusion and spasms, as diagnosed by a medical doctor. This act of unprovoked violence was witnessed by at least one other employee and was immediately communicated by the assailant himself to at least 65 other employees at a captive audience meeting. The assailant stated that others had encouraged him to be disruptive. The employer's observer has reported this act of violence to the Santa Clara police department.
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- 15 2. At a captive audience meeting on November 16, 2011, which took place at a middle school while 7th and 8th grade students were in class, Union organizers and supporters in the quad of the school complex were so loud, disruptive and aggressive toward the other employees, that on two occasions school administrators were forced to leave their offices and reprimand the Union representatives for their unruly behavior.
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- 25 7. During the period prior to the election, Union representatives and employees attempted to intimidate eligible voters and disrupt meetings by enlisting local politicians and other outsiders to "crash" the meetings and scare employees by implying that the meetings were improper unless they were monitored by local officials.

30 Employee Karen Bryan testified that she attended an employer held meeting on November 16, 2011, at the campus of a preschool. According to Bryan she went outside to ask that the individuals outside keep the noise down. According to Bryan, Glenn Shore, a union supporter, pushed her right arm and shoulder against a wall and "got in her face." Bryan returned to the meeting room to retrieve her purse and then went to the school office. According to Bryan, Shore followed her.

35 Bryan went to a medical facility and was examined by a medical doctor. The doctor's report included a diagnosis of a contusion to Bryan's left arm and shoulder.

40 Employee Deborah Parrish testified that she was at the November 16 meeting. Parrish testified that Bryan asked the people outside to keep their voices down. According to Parish, Shore said that the two women should not be there. Shore then grabbed Bryan and pushed her against the wall. Parrish further testified that Shore chided Bryan for "being so childish."

45 According to several witnesses, Shore entered the meeting room and apologized before at least sixty employees that he had laid hands on Bryan.

50 Shore testified that he simply gently nudged Bryan at the doorway to the meeting. According to Shore, he was simply telling Bryan that he could not control what Cal Schmidt, a corporate representative, was saying. Shore's account was corroborated by employee Vanessa Pena.

I resolve this credibility dispute in favor of Bryan. First, it is undisputed that Shore apologized at the meeting. Second, Bryan did visit a medical facility and a report was issued. Accordingly I find that Shore did push Bryan and then followed her.

5 Elections, are not only invalidated because of the conduct of the parties and their
agents, but also because of third-party conduct which interferes with the rights of employees to
a free and uninhibited choice in the selection of a bargaining representative to such an extent it
renders “ a free election impossible.” Here, Shore was not an agent of the Union. His conduct
must be analyzed as third-party conduct. The Board accords less weight to conduct by a
10 nonparty than to conduct by a party because “neither unions nor employers can prevent
misdeeds . . . by persons over whom they have no control. Thus, the Board will generally
overturn an election based on third-party conduct only when it is so aggravated that it creates a
general atmosphere of fear and reprisal rendering a free election impossible. *Phoenix
Mechanical, Inc.*, 303 NLRB 888 (1991).

15 In *PPG Industries*, 350 NLRB 225 (2007), the Board set out the standards for assessing
the nature of third-party conduct:

20 In assessing the seriousness of such threats, the Board considers (1) the nature of the
threat itself; (2) whether the threat encompassed the entire bargaining unit; (3) whether
reports of the threat were widely disseminated within the unit; whether the person
making the threat was capable of carrying it out, and whether it is likely that the
employees acted in fear of his capability of carrying out the threat; and (5) whether the
threat was “rejuvenated” at or near the time of the election.

25 Here, Shore physically assaulted an employee just two days prior to the election. That
assault was made public to 60 employees at an employee meeting. Thus, more than half of the
bargaining unit was aware of the assault. It is impossible to know what effect the assault had on
the bargaining unit.

30 I find that the threat created by Shore announced to over half of the bargaining unit
created a general atmosphere of fear and reprisal that rendered free choice in the election
impossible. I, therefore, shall recommend that a rerun election be held. See *PPG Industries*,
supra.

35 As I have found that the election should be set aside based on objection 1, I find it
unnecessary to pass on the Employer’s other objections.

Objection 3

40 3. During the period prior to the election, a Union organizer attempted to physically
place a pro-union sticker on the young child of an employee, in a manner that was
unwelcomed, aggressive and entirely unacceptable.

45 Employee Tracy Powell testified that on November 2, she took her son with her when
she went to attend the captive audience meeting. A union supporter placed a Union sticker on
her son. Powell took the sticker off her son and returned it.

Objection 4

50 4 Throughout the period following the filing of the petition, Union representatives and
organizers continually and repeatedly engaged in intimidating and coercive conduct by

shouting down employer representatives and employees at captive audience meetings and other locations, not permitting employer representatives and employees from speaking and answering questions, calling the Employer's vice president a liar, and walking out en masse at employee meetings.

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Cal Schmidt, labor relations specialist for the Employer, testified that at a meeting on November 2, 2011, attended by approximately 80 employees, union supporters lined the hallway. Employees entering the meeting had to pass through Union supporters who were stationed on both sides of the hallway. During the meeting an employee called the Employer's vice president a liar. Towards the end of the meeting fifteen employees walked out en masse.

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Objection 5

5. During the period prior to the election Union representatives and organizers formed human columns in the pathways leading to captive audience meetings, thereby attempting to provoke confrontation and seeking to harass and intimidate eligible voters.

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B. Conclusions and Recommendations

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I recommend that Employer objection 1 be sustained and a second election be conducted.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:

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ORDER¹

The Employer's objection¹ to conduct affecting the results of the election in the above matter is sustained. The matter should be remanded to the Regional Director for Region 32 to hold a rerun election.

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Dated, Washington, D.C. February 7, 2012

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Jay R. Pollack
Administrative Law Judge

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¹ Any party may, under the provisions of Section 102.67 and 102.69 of the Board's Rules and Regulations, file exceptions to this report with the Board in Washington, D.C., within fourteen (14) days from the issuance of this report. Immediately upon filing of such exceptions, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director. Exceptions must be received by the Board in Washington, D.C. by February 21, 2012.

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