UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LIFESOURCE	)	
	)	
and	)	**Cases 13-RC-074795**
	)	
LOCAL 881, UNITED FOOD AND COMMERCIAL WORKERS	)	
	)	

RESPONDENT'S EXCEPTIONS TO
REPORT ON OBJECTIONS OF REGIONAL DIRECTOR FOR REGION 13

Pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board ("Board"), Respondent, LifeSource ("LifeSource" or "Company"), by and through its counsel, John E. Lyncheski, Ronald J. Andrykovitch, Ryan W. Colombo, and Cohen & Grigsby, P.C., submits the following Exceptions to the Report on Objections ("Report") of the Regional Director for Region 13 ("Regional Director") in the above-captioned case.

1. LifeSource excepts to the Regional Director's findings and conclusion as to LifeSource's first objection wherein he concludes, "there is no evidence presented to suggest that there were any irregularities or the election was otherwise comprised as a result of the unsealed ballot box that was left with the Board Agent (while the observers were permitted to leave the polling station twice for ten (10) minutes each time). (Rep. 2)[1] This conclusion is not only mistaken, but logically cannot be reached without a hearing involving testimony from the Board Agent, Observers for both parties and eligible voters. Indeed, *Sawyer Lumber, LLC,* 326 NLRB 1331 (1998), the sole case cited by the Regional Director in support of his conclusion, occurred **after** the parties had the benefit of a hearing. Therefore, it is premature for the Regional Director in the instant case to conclude, without LifeSource having the benefit of

[1] References to the Regional Director's Report are indicated as "(Rep. __)."

subpoena or a hearing, that "no evidence" exists to suggest that the irregularities compromised the result of the election and deprived employees of their freedom of choice without interference. Further, because the Board Agent, in contravention of form NLRB-722, permitted both of the observers to leave the room for approximately ten (10) minutes twice during the election, while leaving the ballot box unsecured, it is unknown whether any voters came to vote during either of the periods where both observers were absent, and, if so, whether they were turned away or permitted to vote. It is undisputed that at least one eligible voter did not cast a ballot. Further, it is unknown if either party engaged in impermissible electioneering at the polling both while the observers were absent. The entire purpose of having observers was contravened. Notably, the Regional Director's Report on Objections makes no reference to form NLRB-722, which requires that observers, *inter alia*, (1) "see that each voter deposits the ballot in the ballot box," and (2) "see that each voter leaves the voting area immediately after depositing the ballot." Contrary to the Report on Objections issued by the Regional Director, the required laboratory conditions for an election to proceed under were, at the very least, jeopardized by the Board Agent permitting the observers to leave the polling area twice for a period of ten (10) minutes each time without securing the ballot box. As such, and as further explained below, the Report on Objections of the Regional Director should be overturned and a new election be ordered, or, at the very least, a hearing must be held to determine the veracity of the Regional Director's aforementioned findings and conclusion regarding the effects of the Board Agent's actions on the outcome of this extremely close election. *See e.x. Harry Lunstead Designs, Inc.,* 270 NLRB 1163 (1984) (holding that Board Agent's commission of several deviations from Board rules for conducting an election interfered with the conduct of the election and as such a new election was ordered.).

2. LifeSource excepts to the Regional Director's findings and conclusion regarding LifeSource's third objection wherein he concludes that "there could not have been any

effect on the election" despite the Board Agent leaving the room while failing to secure the ballots, simply because: (1) "neither observer handled the ballots," (2) "no one came into the polling area during the Board Agent's short absence," and (3) the "tally of ballots…did not reflect any discrepancy between the number of ballots cast and the number of employees marked off on the voter eligibility list." (Rep. 4). None of these explanations support the conclusion that "there could not have been any effect on the election." (Rep. 5). To the contrary, as the Regional Director's Report on Objections points out, "it is better procedure for the Board Agent to retain custody of the unmarked ballots at all times." The reason for this, which was not noted at all in the Regional Director's Report on Objections, is that, in cases such as this, where **no one** has any idea where the ballots are, there is a high likelihood of tampering or perceived tampering with the ballots and interference with the employees' free choice and Section 7 rights. For example, the issue of "chain voting," wherein an individual could have pre-marked a ballot and coerced someone to turn it in, would not be picked up by the fact that the, "tally of ballots…did not reflect any discrepancy between the number of ballots cast and the number of employees marked off on the voter eligibility list." (Rep. 4). Conversely, such a finding supports a theory that chain voting possibly occurred, as no one can account for the whereabouts of the ballots during the time the Board Agent left the voting room without taking and securing the ballots. Thus, the Regional Director's statement that, "[r]egardless of the location of the unmarked ballots, neither observer handled any ballots, both observers remained at the polling area table, and no one came in to the polling area during the Board Agent's short absence" (Rep. 4) only serves to confirm that if the ballots left with the Board Agent, and the Agent inadvertently set one down somewhere, the possibility of real or perceived chain voting exists.[2] Therefore,

[2] The Regional Director also errors as a factual matter when he describes the Board Agent's ten (10) minute absence, during which the whereabouts of the Ballots are unaccounted for, as a "short absence." (Rep. 4). Suffice to say that a lot can happen to ballots in ten (10) minutes as it would only take someone seconds to swap ballots, mark a vote on a ballot, or engage in any number of illicit actions that have the effect of depriving the employees' of their free choice.

contrary to the findings of the Regional Director, the Board Agent's failure to retain custody of the unmarked ballots at all times destroyed the required laboratory conditions by failing to maintain the required integrity of such ballots. Therefore, and as explained more fully below, the Report on Objections of the Regional Director should be overturned and a new election should be ordered, or at the very least, a hearing must be held to determine the whereabouts of the ballots during the Board Agent's absence, and whether or not any "chain voting" or other improprieties actually or could have occurred in order to fully preserve the employees' Section 7 rights. *See e.x. Fresenius USA Manufacturing, Inc.,* 352 NLRB 679 (2008), discussed *infra,* wherein the Board ruled that the Board Agent's mishandling of ballots necessitated a new election, particularly because the results of the election were close.

3. LifeSource excepts to the Regional Director's findings and conclusion to LifeSource's second objection wherein he states that: (1) "the actions engaged (in) by the Board Agent as described by the employer were consistent with the procedure outlined in the (NLRB) Casehandling Manual, Part Two, Representation Proceedings (for excelsior lists)"; and (2) that "[e]ven assuming an employee did see the list of employees as the Employer asserts, there is no evidence suggesting that this did, or could have, compromised or interfered with the election or free expression of the employees' choice." (Rep. 3-4). Neither of the Regional Director's conclusions is supported by the facts of the case. First, the Regional Director quoted from the NLRB's Casehandling Manual, Part Two, Representation Proceedings, Section 1132.12 Procedure ("NLRB manual") at Checking Table to support his conclusion that the Board Agent followed the proper procedure for handling the excelsior list. This section, as quoted by the Regional Director, states that, "At the checking table are a set of observers, who sit behind the table, and a Board agent, who sits at one end. Before them is part of the voting list applicable to that table. The approaching voters should be asked to call out their names, last names first, as they reach the table. They may also be asked for other identifying information, as necessary.

Once a voter's name has been located on the eligibility list, all observers are satisfied as to the voter's identity and no one questions his/her voting status, each observer at the checking table should make a mark beside the name. Once a voter has been identified and checked off, the observers -- or one of them designated by the others -- should indicate this to the Board agent, who will then hand a ballot to the voter." However, nothing in the above-quoted passage from the NLRB manual supports the Regional Director's conclusion that the Board Agent's actions "were consistent with the procedure outlined" in the NLRB manual. To the contrary, the NLRB manual, with good reason, does not contemplate voters either easily viewing, or studying the excelsior list, nor interacting with it, both of which happened in this case as the voters approached the list, looked at it, and pointed out their names on the list. Second, the Regional Director's unfounded conclusion that such knowledge on the part of the voters as to who had voted "could not have" compromised or interfered with the election or free expression of the employees' choice is not supported by the undisputed facts. The "could not have" finding is based on pure surmise. For example, if employee A noticed that employee B, C, and D had not yet voted because he had studied the excelsior list when he voted, he could easily go to employee B, C, and D and convince them, or coerce them, into voting in the manner he preferred, or simply voting when they otherwise would have abstained. In such a close election, where the final tally was 11-9 and the change of one "Yes" vote to a "No" vote could swing the election in the other direction, employees being allowed to openly view the list of those who have and have not yet voted is not a matter that can be dismissed by a simple unfounded statement that such knowledge "had no effect" on the election. Without further evidence and a hearing that amounts to pure speculation. To the contrary, the knowledge the voters were given access to by the way the excelsior list was openly displayed by the Board Agent is analogous to allowing a voter or party representative to keep a list of who has voted -- an action explicitly prohibited by Board precedent. *See* NLRB Casehandling Manual, § 11322.1 (prohibiting observers from making lists

of those who have voted); *Sound Refining, Inc.,* 267 NLRB 1301 (1983) ("Contrary to the Regional Director, we find that Barber's listkeeping violated the Board's prohibition against the keeping of any list…of employees who have or have not voted.") Further, the open presentment of the marked up excelsior list to all voters means that employees knew that lists of those who had and had not voted was likely kept. Employee knowledge that a list of voters may be kept by an individual is likewise prohibited by NLRB precedent. *See Sound Refining, supra* ("if 'it was either affirmatively shown or could be inferred from the circumstances, that the employees knew their names were being recorded'" the election should be set aside."). Clearly then, and as explained further below, the Report on Objections of the Regional Director should be overturned and a new election be ordered, or, at the very least, a hearing must be held to determine whether or not permitting voters to maintain lists by way of the agent's open display of the marked up excelsior list had, or could have had, an effect on the outcome of this extremely close election and/or in any way may have interfered with the employees' Section 7 rights.

4. LifeSource excepts to the Regional Director's refusal to order a new election. Due to the multitude of irregularities that occurred during the election, and the closeness of the election, the Regional Director should have ordered a new election.

First, the Regional Director considered LifeSource's objections in a vacuum and did not consider the cumulative effect that the multitude of irregularities which occurred during this election had on the voters. Rather, the Regional Director only considered each of LifeSource's objections one by one. Particularly glaring is the fact that the Regional Director did not make a determination on the cumulative effect of the multitude of the irregularities, given that the election result would change by the swing of only **one vote.** While the Regional Director casts off each of LifeSource's objections one by one as somehow being *de minimus,* more is required. Indeed, the Board has held that, "As such, the fact that there is no showing of actual interference

with the free choice of any voter, or that no objection was raised at the time of the election, is of no moment. As this Board said "…confidence in, and respect for, established Board election procedures cannot be promoted by permitting the kind of conduct involved herein to stand. Election rules which are designed to guarantee free choice must be strictly enforced against material breaches in every case, or they may as well be abandoned." *International Stamping Co.,* 97 NLRB 921 (1951) (internal quotations/citations omitted). In particular, the Board and courts have held that closer scrutiny applies and new elections should be ordered when a multitude of irregularities are found, particularly in a close election. In *Fresenius USA Manufacturing, Inc.,* 352 NLRB 679 (2008) the Board was confronted with an issue, similar to that raised in LifeSource's third objection, wherein the Board considered the issue of a board agent who failed to secure "the ballots in a way to assure against any tampering, mishandling, or damage." Following a hearing (which hearing was not even conducted in the instant case) the hearing officer, similar to the Regional Director in the instant matter, "acknowledged that the Board Agent's handling of the ballot count did not comport with Board guidelines. He nonetheless found that these irregularities were not objectionable absent evidence that they actually affected the election results," and called the objections "speculative." *Id.* The Board, however, disagreed. The Board began its analysis by noting that it "goes to great lengths to ensure that the manner in which an election was conducted raises no reasonable doubt as to the fairness and validity of the election." *Id.* (internal quotations/citations omitted). While noting that there is not a "per se rule that…elections must be set aside following any procedural irregularity," and that more than "mere speculative harm" must be shown to overturn an election, the Board "will set aside an election, however, if the irregularity is sufficient to raise a reasonable doubt as to the fairness and validity of the election." *Id.* (internal quotations/citations omitted). The Board then held that the employer's objections relating to the fact that the "Board agent did not secure the ballots against tampering or mishandling" were sufficient to put into

question the outcome of the election. The Board noted that its "election procedures are designed to ensure both parties an opportunity to monitor the conduct of the election, ballot count, and determinative challenge procedure. *Id.* (internal quotations/citations omitted). The Board then held that, "[w]e find it unnecessary to pass on whether the irregularities in this election, considered separately or in various combinations, would warrant setting aside the election. Rather, reviewing all the facts in this case, we find that the cumulative effect of these irregularities … raises a reasonable doubt as to the fairness and validity of the election. This is especially so considering the closeness of the election, where even one mistake in the distribution or counting of the ballots could have altered the election outcome.") (internal quotations/citations omitted). The Board therefore set aside the election, as it should in the case of LifeSource, and ordered a second election. This precedent should be viewed as controlling in the instant proceeding.

In *RJR Archer, Inc.,* 274 NLRB 335 (1985), the Board held that "[d]uring a representation election the Board must provide a laboratory in which an experiment can be conducted, under conditions as nearly ideal as possible." *Id.* (internal quotations/citations omitted). The Board then considered the fact that numerous irregularities had arisen during the election, and held that, "… when viewed cumulatively (the irregularities) created an atmosphere … in which a fair election could not be conducted." *Id.* (internal citations omitted). The Board further found that a new election should be held because not only were there multiple/cumulative irregularities, but also because the election was close. The Board held that the multitude of irregularities coupled with the close outcome warranted a new election and held that, "In these circumstances, especially where the election results were so close, we do not view the election as reflecting the free choice of the employees." *Id. See also, Cedars-Sinai Medical Center,* 342 NLRB 596 (2004) n. 21; *NLRB v. Service American Corporation,* 841 F.2d 191 (7th Cir. 1988);

Trimm Associates, Inc. v. NLRB., 351 F.3d 99 (3d Cir. 2003); wherein the Board and Circuit courts have held that additional scrutiny must be applied to objections when the vote is close.

5. LifeSource excepts to the Regional Director's failure to order an evidentiary hearing. Not only should the multitude of serious, material election improprieties that occurred warrant a new election on the record as it currently exists, but also it was an error for the Regional Director to not, at the very least, hold an evidentiary hearing to determine the veracity of his largely uncorroborated conclusions. This is particularly true here, where the Regional Director admitted that best practices were not followed in regards to how the election was conducted, no testimony was taken from any voters, the Board Agent, or the Union Observer -- despite a request from LifeSource to interview her, and the election result could be changed decided by a change of **one vote.**[3] As such, LifeSource has clearly raised substantial and material issues of fact to support a prima facie showing of objectionable conduct and as such is entitled under both Board and Circuit Court law to a hearing. Indeed, a "Regional Director is **required** under the Board's rules to direct a hearing if the objecting party raises substantial and material issues of fact to support a prima facie showing of objectionable conduct." *NLRB v. Service American Corporation,* 841 F.2d 191, 197 (7th Cir. 1988) (emphasis added). The Board has similarly held that, "the Board's Rules and Regulations make clear that ex parte investigations are not to be used to resolve substantial and material factual issues particularly where the factual issues turn on credibility. Rather, the rules specifically provide that a hearing **shall** be conducted with respect to those objections or challenges which the Regional Director

[3] The fact that LifeSource was unable to obtain a statement from the Union Observer, Board Agent, or voters also weighs heavily in favor of ordering a hearing. *See Trimm Associates, Inc. v. NLRB,* 351 F.3d 99, 106 (3d Cir. 2003) (holding that the "inherent constraints on discovery" prior to a hearing weight heavily in favor of conducting a hearing when a party raises substantial issues that, if resolved favorably, would warrant setting aside the election.) LifeSource requested of the Union observer that she submit to an interview concerning the election day events, but she declined.

concludes raise substantial and material factual issues." *Erie Coke & Chemical Company,* 261 NLRB 25 (1982). *Id.* (emphasis added, internal quotations/citations omitted). As such, the Board in *Erie, supra,* required that,"the resolution of these conflicts by the Regional Director was improper and requires that we remand this proceeding for a further hearing." *Id.* (internal quotations/citations omitted).

Indeed, the Regional Director's conclusions in this case were drawn nearly entirely by way of a very few ex parte interviews and without providing LifeSource the opportunity for a hearing or a compulsory process to obtain evidence. This is impermissible not only under the Board law cited above, but also under the law of the Seventh Circuit. *See NLRB v. Lovejoy Industries, Inc.,* 904 F.2d 397 (7th Cir. 1990) ("If the regional director thought he could resolve disputes and draw inferences on the basis of ex parte interviews with a few of Lovejoy's employees, without offering the employer either a hearing or compulsory process to obtain evidence, he was mistaken … the regional director **must hold a hearing** when the employer presents facts sufficient to support a prima facie showing of objectionable conduct, that is, of misconduct sufficient to set aside the election under the substantive law of representational elections." *Id.* at 399-400 (emphasis added, internal quotations/citations omitted). Moreover, a party is not required to establish that its objections must be sustained before obtaining an evidentiary hearing. *Id.* Indeed, "[t]he whole purpose for the hearing is to inquire into the allegations to determine whether they are meritorious; it makes little sense to expect the employer to prove its case, especially without power of subpoena, to the Regional Director before a hearing will be granted." *NLRB v. Service American Corporation,* 841 F.2d 191, 197 (7th Cir. 1988) (quoting *J-Wood/A Tapan Div.,* 720 F.2d 309, 315 (3d Cir. 1983)). *See also Saint Gobain Abrasives, Inc.,* 342 NLRB 434 (2004) ("The Regional Director's finding … was made without a hearing. The result is that the employees are deprived, at least for now, of their Section 7 rights on the question of union representation…we have no lack of trust in our

Regional Director. Rather, we simply rely on the traditional rule that genuine factual issues require a hearing."); *and Testing Service Corporation,* 193 NLRB 332 (1971) (directing Region 13 to hold a hearing and holding that, "since a factual question has been raised, we shall order that a hearing be held …") Because LifeSource has set forth numerous instances of objectionable conduct, which, if true, are more than sufficient to set aside the election, it has clearly established that not only should a new election be conducted, but, at the very least, a hearing must be held before a valid Certification of Representative can issue. Such irregularities as set forth above include, *inter alia,* (i) the high possibility of employees making lists of those who have voted with employees having knowledge of the same, (ii) the mystery regarding what the Board Agent did with the ballots when she left the polling location for approximately ten (10) minutes and (iii) what occurred in the polling location when both observers were absent two (2) times during the election for a total of twenty (20) minutes.

Further, the fact that the change of **one vote** would change the outcome of the election**,** coupled with the numerous irregularities and lack of evidence supporting the Regional Director's Report on Objections, mandates that LifeSource **at least** have the benefit of a hearing. Numerous courts have held that when an election is "close", and it does not get any closer than **this** election, that a hearing **must be** held even if only minor misconduct is alleged to have occured. "The necessity for a hearing is particularly great when an election is close, for under such circumstances, **even minor misconduct cannot be summarily excused on the ground that it could not have influenced the election."** *See Trimm Associates, Inc. v. NLRB,* 351 F.3d 99, 103-104 (3d Cir. 2003) (quoting and citing, *NLRB v. Bristol Spring Mfg. Co.,* 579 F.2d 704, 707 (2d Cir. 1978) (emphasis added); *NLRB v. Gooch Packing Co.,* 457 F.2d 361, 362 (5th Cir. 1972); and *NLRB v. Valley Bakery, Inc.,* 1 F.3d 769, 773 (9th Cir. 1993)) (emphasis added). Therefore, because the Regional Director noted that irregularities occurred during the election, but "summarily excused" them, without the benefit of testimony from material witnesses, on the

ground that it "could not have influenced the election" the Report on Objections of the Regional Director must be overturned and a new election must be ordered, or, at the very least, a hearing must be held before a valid Certification of Representative can issue.

6. LifeSource excepts to the appropriateness of the Regional Director's Order. Because of the numerous improprieties that occurred in an election where a change of **one** vote changes the outcome, and because LifeSource has presented **at least** a prima facie showing that objectionable conduct occurred, the election should be set aside and a new election should be ordered or, at the very least, a hearing must be conducted to permit LifeSource to prove its case and determine the veracity of the Regional Director's questionable findings and conclusions.

Respectfully submitted,

s/ John E. Lyncheski

John E. Lyncheski
Ronald J. Andrykovitch
Ryan W. Colombo
COHEN & GRIGSBY, P.C.
625 Liberty Avenue
Pittsburgh, Pennsylvania 15222-3152
(412) 297-4900

Counsel for LifeSource

Dated: May 21, 2012

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of RESPONDENT'S EXCEPTIONS TO REPORT ON OBJECTIONS OF REGIONAL DIRECTOR FOR REGION 13 has been served upon the following via Federal Express this 21st day of May, 2012, upon:

Local 881, United Food and Commercial Workers
10400 W. Higgins Rd., Suite 500
Rosemont, IL 60018-3712

Local 881, United Food and Commercial Workers
c/0 Jonathan D. Karmel, Esq.
The Karmel Law Firm
221 N. LaSalle St., Suite 1307
Chicago, IL 60601-1206

s/ John E. Lyncheski
John E. Lyncheski