

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

In the Matter of:)
)
EASTERN BUS COMPANY, INC.)
)
Employer,)
)
)
UNITED STEEL, PAPER AND)
FORESTRY, RUBBER,)
MANUFACTURING, ENERGY, ALLIED)
INDUSTRIAL AND SERVICE WORKERS))
INTERNATIONAL UNION,)
AFL-CIO, CLC)
)
Petitioner.)
)

Case No. 1-RC-082285

**UNION'S OPPOSITION TO EMPLOYER'S EXCEPTIONS TO HEARING OFFICER'S
REPORT AND RECOMMENDATIONS ON OBJECTIONS**

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INTRODUCTION

The Petitioner, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (“Union”), hereby opposes the Employer, Eastern Bus Company, Inc.’s (“Employer” or “Eastern”) Exceptions to the Hearing Officer’s August 23, 2012 Report and Recommendations on Objections (“Hearing Officer’s Report”), in which she overruled Employer’s Objections One, Three and Four following a hearing on July 16, 2012.¹

The Employer raises four² exceptions to the Hearing Officer’s Report, stemming from Objections One and Four.

For the reasons set forth by the Hearing Officer in her Report, and for the reasons advanced by the Petitioner in its Post-Hearing Brief on Employer’s Objections, incorporated herein by reference, the Petitioner respectfully requests that the Board overrule the Employer’s Exceptions, adopt the Hearing Officer’s Report, deny the Employer’s Exceptions in their entirety, and certify the Union as the exclusive bargaining representative of the Employer’s bus drivers.

STATEMENT OF FACTS

The Petitioner incorporates by reference the full statement of facts set forth in its Post-Hearing Brief on Employer’s Objections.

On the morning of the election, Carlos Fernandez and Tony Chiquillo, arrived at the Somerville voting location at approximately 3:30 a.m. to set a Union support table on the street

¹ The Employer withdrew Objection Two prior to the start of the July 16, 2012 hearing.

² The Employer’s Exceptions are set forth in Roman numerals I-III. However, the Employer appears to raise a fourth exception in subsection D of Section I, on page 19 of its brief.

outside of the corner of the Employer's property. [H.O.R.³ 9.] The table was "placed about 60-70 feet from the entrance gate to the property." From the entrance gate "[i]t is at least 70 feet ... to the back of the bus yard." [H.O.R. 4.] The lot is surrounded by a concrete retaining wall and fence, and the Company's office sits at the far northwest area of the lot (back and to the right from the entrance). [H.O.R. 4.] The retaining wall is about 3.5 feet tall, and the fence stands about 8 feet tall. When employees arrive for their shift in the morning, they park on Chestnut Street outside the gates to the Somerville property. The testimony established that employees can park on either side of the gate and thus not all employees would have had to walk past the Union table, which was 60-70 feet from the gate, prior to entering the property. [H.O.R. 4.]

Kirschbaum arrived at the Somerville facility at about 4:00 a.m. with pro-Union literature and placards. He also brought two employee lists, dated June 7 and June 8, and identified as Er. #1(a) and #1(b). The typewritten lists contained several hand-written marks, indicating corrections to presumably incorrect contact information. He placed these lists on the Union table so that supporters could check the names, addresses and phone numbers of employees who stopped by the table. [H.O.R. 7.] Throughout the day, there were between 8 and 12 Union supporter standing around the table at any given time. [H.O.R. 9.] Kirschbaum told supporters that "I have the list here and we need to get correct addresses and phone numbers. If anybody wants to check and see if there are correct, they can do that." [H.O.R. 7.] Other recalled Kirschbaum saying this. [H.O.R. 9.] Only about one-third of employees entering the property stopped by the Union table. [H.O.R. 8; Tr.⁴ 215.]

³ Citations to Hearing Officer's Report hereinafter referred to as "H.O.R." followed by the relevant page number.

⁴ Citations to the Transcript of the July 16, 2012 Hearing on Objections hereinafter referred to as "Tr." followed by the relevant page number.

Of the 81 employees eligible to vote in the Board election, 52 were scheduled to vote at the Employer's Somerville location, and 29 were scheduled to vote at its Waltham location. [H.O.R. 4.] Of the 36 employees who cast a vote against the Union, only two of them, Pierre Jacques and Karen Sauer, testified for the Employer at the Objections hearing. Both admitted to having special responsibilities with the Employer.

ARGUMENT

I. The Hearing Officer Properly Concluded that the Union Did Not Engage In Any Objectionable Conduct Concerning the Maintenance of Two Employee Lists at the Union Table.

The Board has ruled that a union or an employer may not keep a list of employees who enter the official voting area “when it can be shown or inferred from the circumstances that the employees knew that their names were being recorded.” *Days Inn Management Co.*, 299 NLRB 736, 737 (1992). This principle has been applied to set aside election results only where the person keeping or appearing to keep a list of voters is either one of the observers or is at the entrance to the voting area. *Piggly Wiggly #011*, 168 NLRB 792 (1967); *Cross Pointe Paper Corporation*, 330 NLRB 658 (2000). But these principles have no application where union officials are located on the public street or sidewalk some distance from the general entrance to the employer' business that is used by employees and supervisors who are coming to or leaving work, or other persons who are not in the “line of march” to the voting area. Here, the evidence established that employees did not have to stop at or even pass by the union table on the sidewalk on their way to the polling place. Although 36 employees voted against union representation, the employer only called two (2) of them to testify at the hearing. Indeed, the evidence

established that only about one-third of the employees who entered the yard that day actually stopped by the union table that was set up 60-70 feet from entrance. The employees who entered the main gate may or may not have been on the way to vote, as the buses they drove were also located in the yard where voting was taking place.

Moreover, there was no evidence that the Union supporters at the table were attempting to keep a list of employees who were going to vote. No such list was introduced as evidence. The Hearing Officer properly found that the *Excelsior* lists that had been provided by the Employer were incomplete, and in many cases inaccurate. She further found that to the extent that Union supporters had a list of those eligible to vote, they were merely attempting to assemble an accurate list of employees in the unit they hoped to represent. This was, as the Hearing Officer properly concluded, a legitimate objective.

Accordingly, applying the relevant Board precedent to the facts, the Hearing Officer rightly found no basis to set aside the election. The Board has never set aside an election where a union sets up a table 60-70 feet from the entrance to the property (which is 70 feet from the voting area), and keeps a list for the sole purpose of ensuring the accuracy of the contact information for the employees it hopes to represent.

II. The Hearing Officer Properly Concluded that Kirschbaum's Actions During the Critical Period Did Not Impact the Election.

The Employer lastly excepts to the Hearing Officer's Report with regard to her finding that Kirschbaum's actions from June 4-11 did not impact the results of the election. In reaching this conclusion, the Hearing Officer engaged in an well-reasoned analysis of the nine factors set forth in *Avis Rent-A-Car Systems, Inc.*, 280 NLRB 580 (1986). [H.O.R. 33-35.]

In finding that Kirschbaum's actions "did not tend to interfere with the employees' free and uncoerced choice in the election," the Hearing Officer reasoned that his conduct, which occurred during the first-half of the critical period, one week or more before the election, was neither threatening nor coercive, and occurred outside the presence of employees. The Hearing Officer also relied the fact that Kirschbaum did not re-enter the property after receiving the No Trespass Order from Winitzer on June 11 to highlight the fact that the Employer was not powerless to defend its own property rights.⁵

Accordingly, the Hearing Officer's finding that Kirschbaum's actions during the critical period did not affect the election results is supported by the factual record and based on her careful application of those facts to the nine *Baja* factors.

CONCLUSION

Based on the foregoing, the Board should overrule the Employer's Exceptions, adopt the Hearing Officer's Report in its entirety, and certify the Union as the exclusive bargaining representative of the Employer's bus drivers.

⁵ In its Exceptions, the Employer wrongly asserts that it had to call the Somerville Police Department to enforce its No Trespass Order against Kirschbaum. There is simply no record of this in evidence. Kirschbaum testified credibly that he voluntarily complied with the order and never attempted to re-enter the property after receiving the letter on June 12.

Respectfully submitted,

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION, AFL-
CIO, CLC,
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Dated: September 13, 2012

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been filed electronically with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570, and a copy has been served via electronic mail upon the National Labor Relations Board – Region 1, 10 Causeway Street, 6th Floor, Boston, MA 02222, and to the Employer's counsel, Joseph P. McConnell, Esq., Morgan, Brown & Joy LLP, 200 State Street, Boston, MA 02109 on this 13th day of September 2012.

/s/ Timothy D. Zessin
Timothy D. Zessin