

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

DHSC, LLC, d/b/a AFFINITY)	
MEDICAL CENTER,)	
(Employer),)	
)	Case No. 08-RC-87639
and,)	
)	Employee Movant-Intervenors’
NATIONAL NURSES ORGANIZING)	Request for Special Permission
COMMITTEE,)	to Appeal Denial of Motion to
(Union))	Intervene
)	
SUSAN KELLEY and CINDA)	
KEENER)	
(Employee Movant-Intervenors).)	

Pursuant to § 102.65 of the NLRB’s Rules and Regulations, Susan Kelley and Cinda Keener (“Employee Intervenors”) request special permission to appeal NLRB Region 8’s denial of their Motion to Intervene in this case. This request presents an important issue: should individual employees be permitted to intervene in certification proceedings to object to collusive conduct by the employer and union that interfered with employee free choice in the election? As discussed below, the answer to this question must be “yes” because only individual employees will file objections in this circumstance. The employer and union, the only current parties to the proceedings, will obviously not object to their own electoral misconduct. Given that Board cannot allow only foxes to guard the henhouse, it must permit employees to file objections when they allege that their employer and union jointly engaged in conduct that interfered with the results of the election.

FACTS

On 20 August 2012, the National Nurses Organizing Committee (“NNOC” or “Union”) petitioned for a certification election at DHSC, LLC, d/b/a Affinity Medical Center (“Affinity” or “Employer”). A consent election was scheduled and conducted only nine (9) days later, on 29 August 2012. The unofficial tally indicates that the Union won the election by a small margin.

The Employee Intervenors are employed by Affinity as registered nurses within the petitioned-for bargaining unit. On 5 September 2012, they moved to intervene in the post-election proceedings to file two objections to conduct jointly committed by Affinity and NNOC that interfered with employee free choice.

First, the Employer and Union jointly engaged in surveillance, and conduct that created an impression of surveillance, of employees exercising their right to campaign against the Union. Among other things, non-employee Union organizers who were operating within the workplace with Affinity’s consent trailed employees who were campaigning against the Union, reported their activities to management, and attempted to cause management to retaliate against them. Additionally, the Employer, at the behest of the Union, made and attempted to make one of the Employee Intervenors create timelines of her activities and those of other employees opposed to unionization.

Second, Affinity and NNOC refused to disclose to employees the terms of a secret agreement between the parties. Affinity and NNOC announced to employees that they are parties to an organizing agreement. However, both rebuffed employee

requests for copies of their secret agreement(s), which could include pre-negotiated bargaining concessions and other arrangements detrimental to employees.

The Employee Intervenors stated that they would submit evidence to the Region to support their objections within seven days, as required by § 102.69(a) of the NLRB's Rules and Regulations. The evidence they would have submitted to the Region is attached, and substantiates their objections.

However, the Region did not wait to see the evidence. On 6 September 2012, only one day after the Motion to Intervene was filed, the Region summarily denied it with the terse assertion that "Motions to Intervene made by employees or employee committees not purporting to be a labor organization will be denied." *Id.* (citing NLRB Case Handling Manual § 11194.4). That is not what the manual actually states,¹ and it is not a binding regulation in any event. The question presented is whether employees are categorically precluded from intervening in certification elections even when it is alleged that the employer and union—the only existing parties to the proceedings—jointly engaged in electoral misconduct.

ARGUMENT

I. Employees Have Been Allowed to Intervene in Election Proceedings

Foremost, the Region's assertion that employees are flatly prohibited from intervening in certification proceedings is false. The Board has permitted employees to intervene in post-election proceedings on a number of occasions. *See Shoreline Enter. of America*, 114 N.L.R.B. 716, 717 n.1 (1955) ("we shall permit these

¹ Section 11194.4 does not announce a categorical rule, but states that employee motions to intervene "should be denied."

employees to intervene for the limited purpose of entering exceptions to that part of the Regional Director’s report on objections which relates to their nonparticipation in the election”); *Belmont Radio Corp.*, 83 N.L.R.B. 45, 46 n.3 (1949) (permitting employees to intervene and file exceptions related to challenged ballots); *Western Electric Co.*, 98 N.L.R.B. 1018, 1018 n.1 (1952) (permitting “a group of employees affected by this proceeding” to intervene in a certification election and file motions regarding the appropriateness of the bargaining unit); *see also Taylor Bros.*, 230 N.L.R.B. 861, 861 n.1 & 862 (1977) (employees permitted to intervene in unfair labor practice proceedings against their employer to protect their interest in voting on their bargaining representative).²

Indeed, by its terms, the Board’s rules provide for a case-by-case approach to intervention motions based on the movant’s interest in the proceedings.

Any person desiring to intervene in any proceeding shall make a motion for intervention, stating the grounds upon which such person *claims to have an interest in the proceeding*. The Regional Director or the hearing officer, as the case may be, may by order permit intervention in person or by counsel or other representative to such extent and upon such terms *as he may deem proper*, and such intervenor shall thereupon become a party to the proceeding.

² The Board has held that employees who do *not* move to intervene cannot file objections because they are not yet a party to the case. *See Clarence E. Clapp*, 279 N.L.R.B. 330, 331 (1986); *Westinghouse Electric Corp.*, 78 N.L.R.B. 315, 316 n.2 (1948). Here, the Employee Intervenors are moving to intervene precisely to become parties to this case. *See* NLRB Rules & Regs. § 102.65(b) (an “intervenor shall thereupon become a party to the proceeding”); *see also Belmont Radio*, 83 N.L.R.B. at 46 n.3 (rejecting argument that “Intervenors had no standing to file exceptions in this case because they are not parties to the proceeding,” because “[t]he Intervenors acquired the status of parties when the Board in its discretion permitted them to intervene”).

NLRB Rules and Regulations, § 102.65(b) (emphasis added). This “interested party” standard is not a high one.³ The Board permits unions that enjoy the support of *only one* employee to intervene in elections. *Union Carbide & Carbon Corp.*, 89 N.L.R.B. 460 (1950). Here, almost one-half of the employees at Affinity voted to remain nonunion, which is the position advocated by the Employee Intervenors.

II. The Motion to Intervene Should Be Granted Because the Employee Intervenors Have a Substantial Interest in This Election

The Employee Intervenors certainly “have an interest in th[is] proceeding” under § 102.65(b) of the NLRB’s Rules and Regulations. This proceeding will determine whether or not they are exclusively represented by the NNOC under § 9(a) of the NLRA, 29 U.S.C. § 159(a). Indeed, this election, like all Board-conducted elections, was conducted precisely to “determine the uninhibited desires of the employees.” *General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948).

The right of “employees,” such as Susan Kelley and Cinda Keener, to choose or reject union representation is the paramount interest protected by the Act. *See* 29 U.S.C. § 157; *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985) (policy of the NLRA is “voluntary unionism”); *Rollins Transp. Sys.*, 296 N.L.R.B. 793, 794 (1989) (overriding interest under Act is “employees Section 7 rights to decide whether and by whom to be represented”). Their interest in the election exceeds that of Affinity

³ The Board’s intervention standard is analogous to § 554 of the Administrative Procedures Act, 5 U.S.C. § 554. *Cf. Camay Drilling Co.*, 239 N.L.R.B. 997, 998-99 (1978) (permitting party to intervene based on APA standard). Under that analogous standard, persons “with a concrete interest however small in the proceeding have a right to intervene.” *American Trucking Ass’n, v. United States*, 627 F.2d 1313, 1320 (D.C. Cir. 1980).

or the NNOC. See *Levitz Furniture Co.*, 333 N.L.R.B. 717, 728 (2001) (employer’s only statutory interest in representational matters is in not violating employee rights); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992) (“By its plain terms . . . the NLRA confers rights only on employees, not on unions or their nonemployee organizers.”). As the Board stated in *Levitz Furniture*, “[i]t is well to bear in mind, after all, that it is employees’ § 7 rights to choose their bargaining representatives that is at issue here.” 333 N.L.R.B. at 728.

The Supreme Court’s decision in *Trbovich v. United Mine Workers*, 400 U.S. 528 (1972) is instructive. There, the Court permitted an individual to intervene in a lawsuit brought by the Secretary of Labor to invalidate an election of union officers. *Id.* at 537-39. Construing Federal Rule of Civil Procedure 24(a)—which permits intervention by persons with an interest in a proceeding that is not adequately represented by existing parties—the Court allowed the individual to intervene based on “the interest of all union members in democratic elections.” *Id.* at 538. Employee Intervenors have a similar interest in this certification election.

III. The Motion to Intervene Must Be Granted Because the Employee Intervenors’ Interests Are Not Represented by Existing Parties

The Employee Intervenors must be permitted to intervene because the existing parties to this case—Affinity and NNOC—will not represent their interests. The employees object to misconduct *jointly* committed by Affinity and NNOC *in support* of the Union. This includes both parties refusal to disclose to employees the terms of their secret pact and their joint surveillance of employees who were campaigning against NNOC. It is self-evident that neither Affinity nor

NNOC will object to their own misconduct. Given that no party to this proceeding will protect the interests of the Employee Intervenors and like-minded coworkers, due process dictates that they be permitted to intervene to protect their rights.⁴

Granting intervention in this circumstance is also necessary to protect the integrity of the Board's election process. A Board election is supposed to be "a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." *General Shoe*, 77 N.L.R.B. at 127 (1948). "It is [the Board's] duty to establish those conditions; it is also [the Board's] duty to determine whether they have been fulfilled." *Id.* Here, the Board can only determine if the election was conducted under laboratory conditions if it investigates the Employee Intervenors' objections. To turn a blind eye to their objections, as the Region did, would constitute an abdication of the Board's responsibility to ensure that the results of the election actually reflects employee free choice.

Indeed, the Region's decision constitutes a mockery of justice—to ignore employee objections on the grounds that only the two perpetrators of the wrongful conduct may file objections. It is akin to holding that only foxes can guard the henhouse, and not the hens themselves.

⁴ Any concern that permitting intervention here will lead to widespread employee intervention in elections is unfounded. In most instances, the interests of pro-union employees will be adequately represented by the union and those of anti-union employees by their employer. But in situations, such as here, where the employer and union collusively engaged in misconduct in support of the union, employees must be allowed to intervene because no other party represents their interests.

Entrusting employee representational rights to colluding employers and unions is not only illogical, but runs contrary to a core purpose of the Act—to protect employee rights *from* employers and unions. *See* 29 U.S.C. §§ 158(a) & (b). As the Supreme Court warned decades ago, it is improper to defer to even “good faith” employer and union beliefs regarding employee representational preferences because doing so “place[s] in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives.” *Ladies Garment Workers (Bernhard-Altmann Texas Corp.) v. NLRB*, 366 U.S. 731, 738-39 (1961). The Region ignored this wise counsel by blindly entrusting the § 7 of rights of employees, and the sanctity of the election, to Affinity and NNOC. The Region must be reversed.

IV. The Region Denied the Employee Intervenors Their Constitutional Right to Due Process of Law

The Due Process clause to the Fifth Amendment to the United States Constitution requires that the federal government provide citizens with a hearing before depriving them of their liberty or property. *See, e.g., Zinermon v. Burch*, 494 U.S. 113, 127-32 (1990). The Board will deprive the Employee Intervenors of their liberty, namely their freedom to associate, if it certifies NNOC as their exclusive representative. *See Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1287-86 (11th Cir. 2010). If the Board refuses to consider the employees’ objections, it will have failed to provide them with due process of law prior to this deprivation.

Accordingly, to avoid violating the Employee Intervenors' rights to due process of law under the Fifth Amendment, the Region must be reversed.⁵

CONCLUSION

For the foregoing reasons, the Board should grant the Employee Intervenors' special permission to appeal, reverse the Region, grant the Employee Intervenors' Motion to Intervene, and order that the Region conduct a hearing and adjudicate their objections to the election.

Respectfully submitted this 19th day of September 2012.

/s/ William L. Messenger

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⁵ The Board will also violate the Employee Intervenors' right to due process, and exceed its authority under §§ 3(a) and (b) of the NLRA, 29 U.S.C. §§ 153(a) & (b), if it denies this request for permission to appeal because Sharon Block and Richard Griffin are not lawfully-appointed members of the Board. Both were appointed to the Board without the Senatorial consent required under article II, section 2, clause 2 of the Constitution, and at a time during which the Senate was not in recess under article II, section 2, clause 3 of the Constitution. A denial of this appeal by the Board, as currently constituted, would be *ultra vires* and unconstitutional.

CERTIFICATE OF SERVICE

Pursuant to Section 102.114(i) of the NLRB's Regulations, I hereby certify that on 19 September 2012 the foregoing Request for Special Permission to Appeal, but not its attachment, was served on the following parties via electronic mail:

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