

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15

Durham School Services, LP..
Employer

And

Case No. 15-RC-096096

International Brotherhood of Teamsters,
Local 991
Union

REPORT AND RECOMMENDATION ON OBJECTIONS

Procedural History:

A petition was filed by International Brotherhood of Teamsters, Local 991 (herein called Petitioner or Union), on January 10, 2013. The Stipulated Election Agreement was approved by the Regional Director of Region 15 of the National Labor Relations Board on January 24, 2013. On February 22, 2013, certain employees of the Employer voted to determine whether a majority wished to be represented by the Petitioner.¹ The tallies of ballots served on the parties immediately following the ballot count disclosed the following results:

Approximate number of eligible voters.....	208
Void ballots.....	0
Votes cast for the Union.....	112
Votes cast against participating labor organization.....	74
Valid votes counted.....	186
Challenged ballots.....	4
Valid votes counted plus challenged ballots.....	190

The challenged ballots are not sufficient in number to affect the results of the election.

¹ The appropriate collective bargaining unit as set forth in item 13 of the Stipulated Election Agreement is as follows:

Included: All full-time and regular part-time school bus drivers and monitors employed by the Employer at its Milton, Pace and Navarre facilities.

Excluded: All office clerical employees, maintenance employees, mechanics, dispatchers, routers, the safety coordinator, managerial employees, professional employees, guards, and supervisors as defined by the Act.

On March 1, 2013, the Employer timely filed "Objections to Election" a copy of which was served on the Union. Attachment A is a copy of the objections.

Acting pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the undersigned has caused an investigation of the Employer's objections to be conducted and recommends that Objections 1, 2 and 3 be dismissed and a Certification of Representative be issued.

THE OBJECTIONS

Objection 1.

The Objection

In Objection 1, the Employer alleges that "shortly before the election" the Petitioner distributed a flyer that "contained pictures of eligible voters and language misrepresenting that the pictured employees, including the Company's Observer at the Navarre Customer Service Center, intended to vote for the Union." The Employer contends "the creation and attribution of quotes to employees that do not fairly represent the quoted employees' views – especially in such close proximity to the election – interfered with the absolute right of eligible voters to make a free and untrammelled choice on the issue of unionization, violates the statutory rights of quoted employees to cast a secret ballot, and negated the employee's right not to publicize how they intended to vote in the election."

Evidence

In support of Objection 1, the Employer provided a copy of the flyer and affidavits from employees April Perez and Heidi Gourley². According to Perez, the Employer's Observer, about a month prior to the election, she attended a breakfast meeting hosted

² Gourley's affidavit simply confirms that she saw the flyer, which had Perez's picture on it and indicated that Perez and the other pictured employees were voting yes, and that she heard employees discussing that Perez was on the flyer on the day of the election.

by the Union, where she asked union representatives questions about the Union and stated that she felt she did not need a Union. Perez stated that during this meeting, the union asked her to “fill out a card.” According to Perez, the Union told her that the card “simply indicated that [she] was ready to vote in the election.” The evidence does not reflect whether Perez read the card or signed the card. Then, about a week prior to the election, Perez was leaving the parking lot in her car when she was stopped by a Union representative, who asked if they could take her picture. Initially she said no, but the Union persisted, so “in an attempt to stop them from continuing to ask, [she] agreed to have her picture taken. At that time the Union handed [her] a clipboard and asked [her] to sign the document on it. [She] signed the piece of paper but did not read it.” In her affidavit, Perez states “at no time did I tell any representative of the Teamsters Union that I was going to vote yes.”

The Union denies that it engaged in the objectionable conduct. Specifically, the Union contends that they did have permission to use Perez’s likeness and name in Teamster publications, and that Perez had indicated that she was voting for the Union. In support of this contention, the Union provided a release signed by Perez on February 6, 2013 which states: “I hereby give permission to the International Brotherhood of Teamsters to use my likeness and name in Teamster publications”. In addition to signing the release, in response to a preprinted statement on the release “I support forming a union with the Teamsters because:” Perez had written: “I want fairness.” The Union also provided three documents signed by April Perez that were each entitled “YES, I’m voting to have a voice in our working standards by voting for Teamster representation on February 22,” three of which were signed by April Perez.

Furthermore, the Union contends that it is unlikely that the use of Perez's likeness persisted in the minds of voters in that 84 other identified individuals had their images and sentiments on the same union literature with their consent.

Analysis and Recommendation

The facts in *Somerset Valley Rehabilitation & Nursing Center*, 357 NLRB No. 71 (2011) are substantially the same as in the instant case. Specifically, in *Somerset* "the Employer contended that the Union distributed a flyer during the critical period containing statements purportedly made by employees that they did not, in fact, either make or authorize." As in the instant case, the evidence reflects that the Union obtained releases from the employees, authorizing them to use their photograph and comments on a flyer, which similarly stated "We're Voting Yes" for the Union and contained individual photos of 49 of 73 bargaining unit employees. Citing *Midland National Life Insurance Co.*, 263 NLRB 127, 133 (1982), the Board noted, "Under the well-established standard for evaluating misrepresentation in campaign propaganda , an election can be set aside on the basis of misleading campaign statements only if a party has used "forged documents which render the voters unable to recognize propaganda for what it is." Here, there has been no evidence of forgery presented. Instead, Perez testified that after agreeing to have her picture taken by the "Union, she signed a document that she did not read. As it turns out, the document was a release to use her likeness. Further, the evidence reflects that she signed at least two other documents which reflected her support for the Union. In that the evidence fails to establish that the Union misrepresented Perez's views or that her likeness was used

without permission, or that the statutory rights of employees to cast a secret ballot were compromised, the Region recommends that Objection 1 be dismissed.

Objection 2.

The Objection

In Objection 2, the Employer alleges that during the election at the Pace Customer Service Center, the Board Agent handling the election “destroyed confidence in the Board’s election processes and impugned the Board’s election standards: (1) allowed the Company’s observer to assist her in carrying the election booth and ballot box out of the voting area to a parking lot so that one of the Company’s former monitors, who was not on the Voter Eligibility List, could vote; (2) failed to seal the ballot box when transporting it outside; (3) left the voting area designated and described in the Board’s Election Notice unattended, and did not post any notice informing voters as to why the voting area was vacant; (4) failed to follow the Board’s challenge procedure with respect to the vote cast by a former monitor whose name was not on the Voter Eligibility List; (5) spent a considerable amount of time on the telephone while the polls were open and eligible voters were casting ballots, and (6) engaged in other conduct inconsistent with the Board’s election procedures.” The Employer contends “This conduct, including the undisputed irregularity in the handling of at least one ballot tends to raise a reasonable doubt as to the fairness and validity of the election.”

Evidence

In support of Objection 2, the Employer provided affidavits from Company Manager of Labor and Employee Relations Cal Schmidt, and employee Barbara Nelson who served as Employer Observer at the Pace location.

In his affidavit, Schmidt states that he was present at the Milton location during the ballot count, and that before the ballot boxes were opened, the Board Agent who worked at the Pace location made the following announcement, "I need to advise the union and the company that I had intended to place a challenged ballot into a challenge envelope but I got busy and forgot and it seems the ballot was placed directly into the ballot box. I apologize to the parties but I thought it important to advise you."

In her affidavit, Barbara Nelson states, "At the pre-election conference, there was a discussion about the Union's request that the NLRB make special accommodations to secure votes from two people who would not physically get to the voting area." Nelson does not state what the discussion was, nor whether there was agreement by the parties as to how to handle these two voters. According to Nelson, between 11am and 11:30am, employee Gary Beam came in to vote, and "advised that his wife Gerri Beam, who works for the Company as a monitor but is inactive, wanted to vote but that she could not physically get into the voting area." Both Nelson and the Union's observer Russell Troupe checked the voter eligibility list and Gerri Beam was not on it, a fact that they relayed to the Board Agent, who began to fill out the challenged ballot envelope. According to Nelson, once she completed the envelope, the Board Agent "placed the ballot box and her papers inside the voting booth." Nelson went on to state that she then helped the Board Agent carry the voting booth, including

the ballot box and the Board Agent's papers to the car where Gerri Beam was sitting. Nelson stated, "Before we carried the voting booth outside, I do not believe that we put tape over the top of the ballot box. When we went outside, we did not place any type of sign on the door to the voting area indicating that we were leaving the voting area or that the observers and the NLRB election official would return. Eligible voters could enter the voting area during the time period that we were out obtaining the vote of Mrs. Beam." Nelson further stated that they were outside for 2 to 3 minutes, and that she thought that if the Board Agent "had seen a person trying to enter the voting area while we were outside she would have asked them to wait." In that it was raining, Nelson went to her car to get her umbrella, which she said took "approximately 30 seconds." She further stated, "While I was getting my umbrella I was unable to see the voting booth or the ballot box" which according to Nelson was "on the gravel parking lot right outside of the car where Mrs. Beam was sitting." Nelson did not see the Board Agent give Mrs. Beam a ballot. According to Nelson, just she, the Beams, Russell, and the Board Agent were present when Mrs. Beam voted. Nelson went on to state, "After Mrs. Beam voted, we carried the voting booth, including the ballot box and [the Board Agent's] papers back into the voting area." As they were walking back, the Board Agent stated, "Oh my God—I forgot to put the ballot into the envelope." Once inside, the Board Agent "called her supervisor and explained what happened." The Board Agent also called the Board Agent who was at another facility and "explained to him what had happened." According to Nelson, the Board Agent was on the phone "for about 20 minutes" between 11:30 and 12, and "during this time, eligible voters cast their ballots."

According to the Union, at the pre-election conference, there was a discussion as to how 2 disabled employees would vote, with an agreement that the Board Agent would take the ballot box and voting booth down the stairs to their car. The Union contends that when Mr. Beam advised that his disabled wife wanted to vote but was unable to climb the stairs, the Board Agent and the two observers came out of the doors of the polling area with the voting booth and ballot box and went down the steps to the car, which was pulled up in front of the steps. According to the Union, they were approximately 5 to 8 feet from the door and 1 to 5 feet from the steps. The Union agrees that after Mrs. Beam voted, the ballot was put in the ballot box before it could be placed in the challenged ballot envelope. The Board Agent and two observers immediately returned to the polling area. According to the Union, during the period that the Board Agent and two observers were outside, the entrance to the polling place was always in view of the Board Agent and the observers, and no other employees came to the polling place to vote. Further, the Union contends that the ballot box was in the presence of the Board Agent and the observers at all times, and therefore the security of the ballot box was never in question. The Union contends that the Board Agent telephoned the Region after the ballot was erroneously placed in the ballot box without challenge. However, according to the Union, this was an isolated phone call which lasted for a very short time. The Region has taken administrative notice of the Board Agent's phone record, which reflects one 3 minute call and one 4 minute call to the same Board Agent. However, contrary to Nelson's contention there were no calls to or from another Board Agent.

Analysis and Recommendation

With regard to Objection 2, the evidence fails to establish that the conduct alleged to be objectionable had any effect on the results of the election. See *An Outline of Law and Procedure in Representation Cases*, CHM 24-311, citing *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995), for the standard utilized by the Board: whether the misconduct, taken as a whole, warrants a new election because it has “the tendency to interfere with the employees’ freedom of choice” and “could well have affected the outcome of the election.” As more fully discussed below, the Region recommends that all portions of Objection 2 be dismissed.

Specifically, with regard to Objection 2, part (1) that pertains to Nelson helping the Board Agent carry the voting booth and “papers,” part (2) alleging that the ballot box was not sealed, and part (3) alleging that the Board Agent left the voting area unattended, and did not post any notice informing voters as to why the voting area was vacant, the evidence does not establish any failure by the Board Agent to maintain the security of either the ballots, the ballot box, or the polling place, nor that anyone was prohibited from voting. Instead, based on the Employer observer’s testimony, the ballot box was in the possession of the Board Agent when it was taken outside the polling place to give Gerri Beam an opportunity to vote. Further, there is no contention that any unauthorized ballots were cast. See *Sawyer Lumber Co., L.L.C.*, 326 NLRB No. 137 (1998) wherein the Board declined to set aside an election when it found that the objection did not raise reasonable doubt as to the fairness and validity of the election, since there was no evidence of any security breach involving the ballot box or ballots, nor evidence the Board Agent’s conduct compromised the election’s integrity where no

extra ballots were cast, the ballot box was never left unattended, and there was no evidence that anyone tampered with the ballot box. To the extent that the Employer contends that its observer was absent “for 30 seconds” and did not see the Board Agent give Ms. Beam a ballot, the Board has long held that a party is stopped from relying on the conduct of an individual who is its own representative. See *Thiele Industries, Inc.*, 325 NLRB 1122 (1998) wherein the Board stated, “A party should not be able to assert its own failure to meet its obligations as a basis for setting aside an election.” See also *Benavent & Fournier, Inc.*, 208 NLRB 638 (1974), wherein although the Board Agent left the polling area for 5 minutes, leaving the ballots and an unsealed ballot box unattended, the Board did not set aside the election because the evidence failed to establish that anyone touched the ballots in his absence. Regarding leaving the polling place unattended, the Employer has not provided evidence to establish that if the conduct occurred as alleged, that there was any reasonable doubt as to the integrity of the election. Rather, the Region notes that part (3) of Objection 2 amounts to “little more than speculation about the possibility of irregularity.” *Sawyer Lumber*, *ibid.* “The Board will not set aside an election unless it finds a reasonable possibility of a breach in security.” *An Outline of Law and Procedure in Representation Cases*, CHM 24-410. Evidence provided by the Employer in support of part (3) does not contemplate whether anyone entered or even approached the designated voting area during the 3 minutes that everyone was outside, not does it even attempt to describe where the outside voting took place in relation to the location of the designated voting area. The Employer has not presented evidence warranting setting aside the election based upon

the alleged conduct contained in these portions of Objection 2. Therefore, the Region recommends that Objection 2 parts (1), (2), and (3) be dismissed.

¹⁸ With regard to part (4) of Objection 2, which alleges that the Board Agent failed to put Gerri Beam's ballot into a challenged ballot envelope, although there is agreement that this one ballot was not properly placed in the challenged ballot envelope and therefore was commingled and counted, inasmuch as the Union won the election by 38 votes, this one vote would not materially affect the results of the election. See *Thomas Lanier*, 124 NLRB 202 (1959) where as in the instant case the ballot of one person who was not on the Excelsior list did not get placed into a challenged ballot envelope and instead was put into the ballot box and comingled with the other ballots. In *Lanier*, the tally of ballots showed 95 votes for the petitioner, 92 against the petitioner, and 4 challenged, and the Employer contended "the Board agent's failure to segregate the ballot...was conduct which improperly influenced other voters, and which *per se*, warrants setting aside the election." Noting that "intermingling of challenged ballots with unchallenged ballots should be diligently guarded against" the Board nonetheless found "the intermingling of one challenged ballot with the unchallenged ballots did not improperly influence other voters and does not *per se* warrant setting aside the election." Based on the above, the Region recommends that Objection 2 part (4) be dismissed.

Objection 2 part (5) alleges that the Board Agent 'spent a considerable amount of time on the telephone while the polls were open and eligible voters were casting ballots. According to Employer witness Nelson, upon their arrival back inside the designated voting area, the Board Agent "immediately called her supervisor and

explained what happened.” Nelson further contends that the Board Agent also called a Board Agent who was at a different polling place while she waited for her supervisor to call her back. According to Nelson, “between 11:30 and Noon, [the Board Agent] was on the phone for about 20 minutes. During this time, eligible voters cast their ballots.” Nelson’s affidavit makes no mention of what the Board Agent said during these conversations, how many voters were in the voting area at the time of these conversations, or how she knows how long the conversations lasted. Additionally, there was no evidence provided that established how these alleged conversations affected the integrity of the election. *Sawyer*, *ibid*. See also *St. Vincents Hospital, LLC.*, 344 NLRB 586 (2005) wherein the Board citing *Rochester Joint Board v. NLRB*³ noted, “..there is not a “per se rule that representation elections must be set aside following any procedural irregularity.” Based on the above, the Region recommends that Objection 2 part (5) be dismissed.

Objection 2 part (6) alleges that the Board Agent “engaged in other conduct inconsistent with the Board’s election procedures.” The Employer has provided no evidence in support of part (6). Further, part (6) is non-specific. Therefore, in accordance with CHM Sec. 102.69(a)⁴, Objection 2 part (6) is dismissed.

Objection 3.

The Objection

Objection 3 alleges “in light of the decision of the United States Court of Appeals for the District of Columbia Circuit in *Canning v. National Labor Relations Board, et al.*,

³ 896 F.2d 24, 27 (2d Cir. 1990)

No 12-1115 (January 25, 201[3]) that President Obama's recent appointments to the National Labor Relations Board are unconstitutional, it is Employer's position that Region 15 currently lacks authority under 29 U.S.C. § 159 to investigate or conduct a hearing on the pending petition in this matter because, absent a quorum, the Board has no authority to investigate or conduct hearings which may be delegated to Region 15 under 29 U.S.C. § 153(b). Employer provides this notice and objection in order to preserve such argument for subsequent review, and its continued participation and cooperation in these proceedings does neither waive the foregoing nor acknowledges this Regional Office's authority to investigate or conduct a hearing on the current petition."

Analysis and Recommendation

Although the Employer correctly points out that on January 25, 2013, the D.C. Circuit Court, held that the President's appointments to the Board were not valid, the Board disagrees with that decision. In this regard, Chairman Mark Gaston Pearce issued the following statement:

The Board respectfully disagrees with today's decision and believes that the President's position in the matter will ultimately be upheld. It should be noted that this order applies to only one specific case, *Noel Canning*, and that similar questions have been raised in more than a dozen cases pending in other courts of appeals.

In the meantime, the Board has important work to do. The parties who come to us seek and expect careful consideration and resolution of their

⁴ Objections which are nonspecific, for example, which allege "by these and other acts, etc.," are insufficient, should not be treated and should be dismissed on their face.

cases, and for that reason, we will continue to perform our statutory duties and issue decisions.

News Release, Statement by Chairman Pearce on Recess Appointment Ruling, <http://www.nlr.gov/news/statement-chairman-pearce-recess-appointment-ruling> (Jan. 25, 2013).

In addition, I note that in *Noel Canning*, the D.C. Circuit Court itself noted that its conclusions concerning the Presidential appointments had been rejected by the other circuit courts to address the issues. Compare *Noel Canning v. NLRB*, Nos. 12-1115, 12-1153, 2013 WL 276024, at *14-15, 19 (D.C. Cir. Jan. 25, 2013) with *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). Even in the absence of a circuit conflict, it has been the Board's longstanding practice not to acquiesce in adverse decisions by individual courts of appeals in subsequent proceedings involving different parties. See Letter of Acting Solicitor, National Labor Relations Board, *Industrial Turnaround Corp. v. NLRB*, 118 F.3d 248 (4th Cir. 1997) (Nos. 96-1783 & 96-1926) (explaining that "the Board, for more than 50 years, has taken the position that it is not obliged to follow decisions of a particular court of appeals in subsequent proceedings not involving the same parties," and discussing the grounds for that position).

In light of the above, and given the strong public interest in promptly addressing representation disputes that are of concern to employees and employers alike, I must reject the Employer's assertions that none of the agency's employees have legal authority to continue processing cases on behalf of the Board and that the election

must be set aside. Most representation disputes have long been resolved administratively without the necessity of court litigation. And even where, as here, there is a challenge to the authority of the Board to act, our experience in continuing to process cases during the analogous dispute leading to *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2638 (2010), was that most of the cases decided during that time helped finally resolve labor disputes because the parties either accepted the Board's decision or settled the dispute.

Accordingly, the Region recommends that Objection 3 be dismissed.

CONCLUSIONS

The Region recommends that Objections 1, 2 and 3 be dismissed in their entirety and a Certification of Representative be issued.

Dated in New Orleans, Louisiana, this 25th day of March, 2013.


M. Kathleen McKinney
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