UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
Division of Judges

DHSC, LLC, d/b/a AFFINITY MEDICAL CENTER,	)	
	)	Case Nos. 08-CA-090083
and,	)	08-CA-090193, 08-CA-093035,
	)	08-CA-095833
NATIONAL NURSES ORGANIZING COMMITTEE,	)	

Pursuant to § 102.26 of the NLRB's Rules and Regulations, Susan Kelley and Cinda Keener ("Movants") request special permission to appeal the denial of their motion to intervene by Administrative Law Judge ("ALJ") Arthur Amchan and request that this decision be reversed and that their intervention be granted.

In short, in this action the General Counsel seeks to compel DHSC, LLC, d/b/a Affinity Medical Center ("Affinity") to recognize and bargain with the Nurses Organizing Committee ("NNOC") as the exclusive representative of the Movants and their co-workers based on an election conducted on 29 August 2012. Movants seek to intervene to argue against a bargaining order is improper because the election was tainted by misconduct jointly committed by Affinity and NNOC. In an Order dated 9 April 2013, ALJ Arthur Amchan denied the Movants' motion to intervene. Given that a hearing is scheduled in this case on 29 April 2013, Movants' request special permission to appeal the denial of their motion and further request that the ALJ's ruling be reversed so that they can participate as parties in that hearing to protect their § 7 right to refrain from unionization.

FACTS

Movants are registered nurses employed by Affinity in Massillon, Ohio. On 20 August 2012, NNOC petitioned for an election at their place of employment in Case 08-RC-87639. A consent election was scheduled and conducted only nine (9) days later, on 29 August 2012. The Movants and a number of their co-workers campaigned vigorously against the NNOC. The unofficial tally of votes showed that 100 employees voted for the union, 96 against it, and 7 ballots were challenged. *See* Report on Challenged Ballots & Objections, Case 08-RC-87639 (21 Sept. 2012).

On 5 September 2012, Affinity filed six objections to the results of the election, alleging that NNOC engaged in numerous acts of misconduct. *Id*. However, the merits of these objections were never ascertained because Affinity did not submit any evidence in support of its challenges or objections. *Id*. at 4-5. Affinity later asserted that it was precluded from supporting its objections because it was bound to an agreement with NNOC that required that it submit the merits of its objections to arbitration. *See* Affinity Amended Answer in Case 08-CA-093035, 2nd Affirmative Defense (15 Jan. 2013).

On 5 September 2012, the Movants 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 in the election. *See* Movants' Mot. to Intervene in Case 08-RC-87639. First, Affinity and NNOC jointly engaged in unlawful surveillance, and conduct that created an impression of surveillance, of employees exercising their right to campaign against the Union. *See* Employee

Intevenors' Evidence in Support of Objections to Results of the Election in Case 08-RC-87639. This includes an egregious incident in which Affinity, at the behest of NNOC, made Cinda Keener document the activities of employees who were campaigning against the union and then provided this information to the union. *Id.* at 7-8. Second, Affinity and NNOC refused to provide employees with a copy of the secret agreement that existed between them, which the Employee Intervenor feared included concessions pre-negotiated by the NNOC at employee expense. *Id.* at 2-6.

The next day, on 6 September 2012, NLRB Region 8 summarily denied the motion to intervene, and ignored the Movants' objections, on the grounds that "Motions to Intervene made by employees or employee committees not purporting to be a labor organization will be denied." Region 8 Letter of 6 Sept. 2012. On 11 January 2013, an ersatz Board denied the Movants' Request for Special Permission to Appeal the denial of their motion to intervene on the grounds that "employees lack standing to file objections."

On 5 October 2012, the Board certified the NNOC as the exclusive representative of Affinity nurses based upon the election results. The merits of both the Movants and Affinity's objections to this certification were never adjudicated for the reasons previously discussed.

On or around 17 November 2012, the NNOC's proposal for a collective bargaining agreement was leaked to members of the bargaining unit. *See* Email of 17 Nov. 2012, with attached NNOC Bargaining Proposal (Ex. D). NNOC's proposal states that the "Health Plan and Dental Plan" is "pre-negotiated, language to

follow," *id*. at Art. 17, that "Life Insurance" is "pre-negotiated, language to follow," *id*. at Art. 18, that the "Retirement Plan" is "pre-negotiated language to follow," *id*. at Art. 19, and that "Substance Abuse" is pre-negotiated [with] language to follow," *id*. at Art. 34. This new evidence confirms the validity of the Movants' second election objection—that prior to the election Affinity and NNOC concealed from employees bargaining concessions pre-negotiated at their expense.

On 18 December 2012, the General Counsel issued a Complaint against Affinity in Case No. 08-CA-93035 that has the objective of compelling the employer to recognize and bargain with NNOC as the exclusive representative of its registered nurses. On 7 February 2013, the Movants filed a motion with NLRB Region 8 to intervene in the action to present their case that a bargaining order is inappropriate because the election was tainted by unlawful conduct jointly committed by the Affinity and NNOC. In a letter dated 14 February 2013, the Region denied the motion to intervene.

On 8 March 2013, Region 8 issued an Order Consolidating Cases and Notice of Hearing that provides that a hearing will be conducted in the case before an ALJ on 29 April 2013. On 2 April 2013, Movants moved the ALJ to permit them to intervene in this action to present their case for why a bargaining order that imposes the NNOC as their exclusive representative is inappropriate. In support of their motion, movants proffered the attached Offer of Proof (Ex. C) that details the facts and legal authorities that that they will proffer on the merits if permitted to intervene in the case.

On 9 April 2013, the ALJ denied the Movants' motion to intervene on the grounds that: (1) the Board's denied their motion to intervene in the representation case; (2) Respondent's is identical to that of the Movants; and (3) that Movants' intervention would not be useful in resolving the case. (Ex. E). On 10 April 2013, the ALJ supplemented his order and averred that employees lack standing to raise objection to elections. (Ex. F).

ARGUMENT

I. Movants Must be Permitted to Intervene Because Their § 7 Rights To Refrain from Associating with a Union That Lacks Majority Employee Support is Imperiled in These Proceedings

Board rules permit intervention based on a movant's interest in the proceeding. *See* NLRB Rules and Regulations, § 102.65(b). This "interested party" standard is not a high one, as it is based on § 554 of the Administrative Procedures Act, 5 U.S.C. § 554. *Cf. Camay Drilling Co.*, 239 N.L.R.B. 997, 998-99 (1978). Under this standard, any person "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).

Employees have been often been permitted to intervene in unfair labor practice proceedings that affect their rights. *See New England Confectionary Co. & Bakery*, 356 NLRB No. 68, * 1-2 (2010) (employee who initiated decertification petition allowed to intervene in case that regarded validity of the petition); *Washington Gas Light Co*., 302 NLRB 425, 425 n.1 (1991) (employee permitted to intervene in case that regarded validity of a dues deduction cards); *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 a bargaining representative); *J.P. Stevens & Co.*, 179 NLRB 254, 255 (1969) (employees allowed to intervene in case that concerned validity of authorization cards that they had signed). Indeed, unions that enjoy the support of only one employee are allowed to intervene in election proceedings. *Union Carbide & Carbon Corp.*, 89 N.L.R.B. 460 (1950).

Movants should be permitted to intervene in this case because they have an overriding statutory interest in whether they and their co-workers are exclusively represented by the NNOC. The § 7 right of "employees," such as Cinda Keener and Susan Kelley, to freely choose or reject unionization 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 NLRA is "voluntary unionism"); *Rollins Transp. Sys.*, 296 N.L.R.B. 793, 794 (1989) (NLRA's overriding interest is "employees § 7 rights to decide whether and by whom to be represented"). Indeed, the employees' statutory interest in this case exceeds any interest possessed by Affinity or 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 General Counsel's desire for a bargaining order that imposes NNOC representation on the Movants and their co-workers poses a significant threat their § 7 rights because the union lacks the uncoerced support of a majority of employees. *See* Movants' Offer of Proof (Ex. A). Given that "[t]here could be no clearer abridgment of § 7 of the Act" than to impose union representation on employees in the absence of majority support for it, *Ladies Garment Workers (Bernhard-Altmann Corp.) v. NLRB*, 366 U.S. 731, 737 (1961), it imperative that the Movants be permitted to intervene to defend their right to refrain from unionization.

Instructive on this matter is *Trbovich v. United Mine Workers*, 400 U.S. 528 (1972), where 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. Movants have a similar interest in this case.

In addition to their statutory interests, the Movants and their co-workers also have substantial pecuniary interests at stake in this action. An order that compels Affinity to negotiate with NNOC will likely result in a collective bargaining agreement that affects the employees' wages, benefits, and working conditions.

Indeed, Affinity and NNOC have already pre-negotiated the employees' health, dental, life insurance, and retirement benefits. *See* NNOC Bargaining Proposal, Arts. 17-19 (Ex. D). If bargaining is compelled, the Movants will also be forced to pay dues and fees to the NNOC to keep their jobs as a result. Accordingly, Movants' have significant interests in this case that justify their intervention.

II. That the Movants Were Not Permitted to Raise Their Objections in the Election Proceedings Supports their Intervention

The ALJ erred in concluding that the denial of the Movants' motion to intervene in the election proceedings in Case 08-RC-87639 precludes their intervention here. (ALJ Order of 9 Apr. 2013) (Ex. E). In reality, their exclusion from that case only makes their case for intervention in these unfair labor practice proceedings *stronger* because this case is now the employees' only avenue to raise their objections to the imposition of NNOC's exclusive representation upon them.

In other words, given that the employees were not permitted to intervene in the election proceedings, it becomes incumbent that they be permitted to intervene here. In fact, the Board only permits the litigation of issues in unfair labor practice proceedings that were not or could not be raised in the election proceeding. *See, e.g.*, *Pittsburgh Plate Glass Co.*, 313 U.S. 146, 162 (1941). Given that the Movants were precluded from litigating their allegations of illegal surveillance and wrongful concealment in Case 08-RC-87639, this doctrine supports permitting the employees to litigate their allegations here.[1]

[1] In the alternative, the Board's Order in Case 08-RC-87639 was erroneous. First, it was *ultra vires* for the reasons set forth in *Noel Canning v. NLRB*, No. 12-

III. Affinity Does Not Adequately Movants' Interests

The ALJ also erred in concluding that Affinity will represent the Movants' interests in this case. (ALJ Order of 9 Apr. 2013) (Ex. E). Movants' complain of misconduct *jointly* committed by Affinity and NNOC in support of the union that interfered with employee free choice in the election. This includes the employer and union's joint refusal to disclose to employees the terms of their secret pact and their joint surveillance of employees campaigning against the NNOC. Certainly, Affinity cannot be counted on to argue that its own misconduct tainted the election.

Even if Affinity were willing to argue that its own misconduct tainted the election, Affinity may be precluded from raising these contentions by its election procedures agreement with the NNOC that requires that it submit its objections to an arbitrator. *See* Affinity Amended Answer, Second Affirmative Defense. The General Counsel may also argue that the Board's doctrine precluding re-litigation of issues that could be raised in election proceedings prevents Affinity from raising

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1153, slip op. (D.C. Cir. Jan. 25, 2013). Second, the notion that employees cannot intervene to becomes parties with standing to file objections because they do not already have standing is absurd and was rejected in *Belmont Radio Corp.*, 83 N.L.R.B. 45, 46 n.3 (1949). Third, the Board's statement that it would not review the Movants' objections because a showing of "fraud, misconduct, or such gross mistakes as to imply bad faith or that the regional director's rulings were arbitrary or capricious" is required for review in a consent election, Bd. Order in Case 08-RC-87639 (11 Jan. 2013), is clearly erroneous because the Movants were not parties to the consent election agreement. The Board should correct its wrongful denial of Movants' motion to intervene in the representational case by permitting their intervention in this case.

any arguments against the election results.[2] By contrast, Movants face no such restriction because they were excluded from the election proceedings.

Moreover, it is institutionally improper for the Board to entrust employee representational rights to an employer that has colluded with a union. "There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom." *Auciello Iron Workers v. NLRB*, 517 U.S. 781, 790 (1996). Indeed, the Supreme Court warned decades ago that it is improper to defer to even "good faith" employer or 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*, 366 U.S. at 738-39. The D.C. Circuit reiterated this warning in *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003), when overruling a Board decision to blindly defer to a pre-existing recognition agreement between an employer and union without independently verifying whether employees actually supported the union. "By focusing exclusively on employer and union intent, the Board has neglected its fundamental duty to protect employee § 7 rights, opening

[2] Movants submit that any such argument by the General Counsel would be untenable because the election procedures agreement apparently did prevent Affinity from litigating its objections in the election proceeding. But, in the event that the General Counsel's argument is accepted, it would only strengthen the Movants' case for intervention.

the door to even more egregious violations than the good faith mistakes at issue in *International Ladies Garment Workers*." *Id*. at 537.

The Board will commit the same reversible error here if it turns a blind eye to Movants' objections to the bargaining order sought here. Indeed, to not permit employees to intervene to protect *their* statutory rights on the grounds that only the union and employer that violated their rights can participate in the case is akin to holding that only foxes can guard the henhouse, but not the hens themselves.

IV. The Movants' Objections Are Directly Relevant to These Proceedings

The ALJ also erred when concluded that Movants' intervention would not be helpful in resolving the issues in this case. (ALJ Order of 9 Apr. 2013) (Ex. E). It is well-established that the bargaining order sought by the General Counsel requires actual proof of majority employee support for NNOC. *See, e.g., Conair Corp. v. NLRB*, 721 F.2d 1355, 1383-84 (D.C. Cir. 1983). Accordingly, whether the election of 5 October 2012 reflected employee free choice is a core issue presented in this case. It is with respect to this critical issue that Movants' seek to intervene.

Moreover, the ALJ's findings that the misconduct alleged by Movants would not justify setting aside the election results are impossible to accept for the reasons detailed in Movants' Offer of Proof (Ex. B). It is not speculative, but obvious that wrongfully concealing a secret-deal from employees that governs their health and pension benefits will affect the outcome of the close election. *Id*. at 3-5. Contrary to the ALJ, surveillance of protected activities does not somehow become permissible if "conducted in open and public areas." (ALJ Order of 9 Apr. 2013) (Ex. E). In any

event, Movant Cinda Keener was not interrogated at behest of NNOC to report on employee protected activities in public. *See* Offer of Proof, 12-13 (Ex. B).

V. Movants Seek to Intervene to Gain Standing to Object the Certification of the NNOC as Their Exclusive Representative

In his supplemental ruling, the ALJ reiterated the Board's counter-intuitive rationale that Movants' should not be permitted to intervene because employees don't have standing to file election objections. (Ex. F). But the entire point of intervention is to allow a person who is *not* already an existing party to a case to *become* a party to that case. *Cf.* NLRB Rules & Regs. § 102.65(b) (an "intervenor shall thereupon become a party to the proceeding"). The notion that the Movants cannot intervene to become parties to this case (or Case 08-RC-87639) because they are not already parties to the cases is absurd on its face.

Over sixty years ago in *Belmont Radio Corp.*, 83 N.L.R.B. 45, 46 n.3 (1949), the Board allowed employees to intervene in an election case to file exceptions. The Board rejected the proposition that the "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." *Id*. The ALJ's supplemental order of 10 April 2012 is in direct conflict with *Belmont Radio* and must be reversed.

VI. Movants' Constitutional Rights will be Violated if Their Motion to Intervene is Denied

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). Movants will be deprived of their liberty, namely their freedom to not associate with the NNOC, if the Board deems NNOC to be their exclusive representative. *See Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1287-86 (11th Cir. 2010). If the merits of the Movants' objections are ignored prior this imposition on their liberty—as they have been so far—the Board will have failed to provide the Movants with the pre-deprivation due process of law to which they are entitled. Accordingly, the motion to intervene must be granted to avoid violating the employees' Fifth Amendment rights.

The Board will also violate Movants' rights to due process if it rejects this appeal because the Board currently lacks a lawful quorum § 3 of the NLRA, 29 U.S.C. §§ 153(a) & (b). Sharon Block and Richard Griffin are not lawfully-appointed members of the Board because they were appointed without Senatorial consent and their unilateral appointments was not permitted under the Recess Appointments Clause, art II, § 2, cl. 3, because neither the vacancies to which they appointed, nor their appointments to the Board, happened during a Senatorial recess. *See Noel Canning v. NLRB*, No. 12-1153, slip op. (D.C. Cir. Jan. 25, 2013).

CONCLUSION

For the foregoing reasons, the Movants should be granted special permission to appeal, the ALJ's denial of their motion to intervene should be reversed, and Movants should be permitted to intervene as parties in this case.

Respectfully submitted this 17th day of April 2013.

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CERTIFICATE OF SERVICE

Pursuant to the NLRB's Regulations, I hereby certify that on 17 April 2013 the foregoing Special Permission to Appeal was filed with the NLRB through its electronic filing system and served on the following parties as follows:

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